

HONG KONG / JUDGMENT

DB v. DMA

[2023] HKFC 137

COURT

Family Court

DECIDED

21 July 2023

CASE / FILE NUMBER

FCMC1006/2021

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

FCMC 1006/2021

[2023] HKFC 137 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES No. 1006 OF 2021

BETWEEN DB Petitioner and DMA Respondent

Coram: Deputy District Judge S. Allison in Chambers (Not open to public) Dates of Hearing: 17
and 18 May 2023 Date of Closing Submissions: 29 May 2023 Date of Judgment: 21 July 2023

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

Introduction

This judgment deals with the Petitioner/ Wife's claim for ancillary relief upon divorce from the Respondent/ Husband. The Petition was filed in February 2021 on the grounds of unreasonable behaviour. The Decree Nisi was pronounced on 28 January 2022.

Background

The Husband is 47 years old, while the Wife is 36 years old. Both the Husband and Wife are from Guinea, in West Africa and married there in March 2005. At the time of the marriage, the Husband was operating a trading business in Guangzhou, China. Following the marriage, in 2006, the Wife moved from Guinea to Guangzhou to join the Husband. A year later, in 2007, the Wife gave birth to twin boys, A1 (the "Older Son") and A2 (the "Younger Son") in 2007 (collectively referred to as the "Twins"). The Twins are currently 16 years old. As a child, the Wife was

assessed to have significant global development delay, severe language impairment and autism spectrum disorder. She was educated to a secondary school level and was never in paid employment. Thus, following the birth of the Twins, the Wife's role in the family was that of a full time stay at home mother. Although the Wife and the Twins had been living in China for a couple of years, some difficulties arose in 2008 when the Husband tried to apply for an extension of a staying visa for them. When the Husband was unable to secure the extension of the staying visa for the Wife and the Twins, he consequently arranged for them to live in England for six months. During this time, the Husband remained living and working in China and later in Hong Kong. By late 2009, the Husband started a business in Hong Kong and the family was reunited in May 2010, when the Wife and the Twins joined the Husband in Hong Kong. The family has lived continuously in Hong Kong since then. Two years after moving to Hong Kong, the Wife gave birth to the family's third child, a daughter, H (the "Older Daughter") in 2012. This birth was followed by another daughter, M in 2017 (the "Younger Daughter"). At the time of trial, the two daughters were 11 years old and 6 years old respectively. Unfortunately, all four of the children have medical issues. All of them have been diagnosed to have sickle cell anemia at birth, which requires medical treatment depending on the severity of their condition. The Younger Son was diagnosed as autistic in 2011. More recently, he was assessed by an educational psychologist, to have "severe grade intellectual disability". As such, the Younger Son is enrolled at a weekday boarding school which caters to his particular needs and he returns home to the family on weekends. The parents are permitted and do visit the school on Wednesdays. The Younger Daughter was also diagnosed as autistic when she was three years old. Thankfully her condition is not as severe as the Younger Brother and she can remain living at home, although the Wife states that she requires constant supervision and care, which the Wife provides. The Younger Daughter is due to start primary school at special educational needs school this academic year. Given the needs of the children, the Wife has never worked outside the home during the marriage and has instead, devoted herself to raising the children and taking care of the household. During the course of the marriage, the Husband has been the sole breadwinner for this family. He completed his tertiary level education in Africa, and pursued further studies in Belgium and England. The Husband spent a few years working in England as an assistant accountant and then in office administration with a UK university. Following the Husband's move to Guangzhou, he operated a trading business involved in the trade of household items to be sold in Africa. The Husband's primary business in Hong Kong was initially the trade of household commodities, however, the outbreak of the Ebola virus in Africa in or around 2016/ 2017 caused the trading business to fail. Following the failure of the trading business, the Husband then opened up a money exchange company, GDL. The Husband was still a director and working at GDL at the time of trial. In his Form E, he disclosed that he only receives a salary of HK\$25,000 per month. Although the Petition was filed in February 2021, the parties remained living together with their children in a rental apartment in Kowloon. This was the family's living arrangement at the time of trial. The Wife issued a Summons dated 12 November 2021 for maintenance pending suit for herself and interim maintenance for the four children. The Judgment on MPS was handed down on 15 February 2021 ("MPS Order") ordering that the Husband pay the Wife HK\$6,400 per month, in addition to continuing to meet various expenses for the family and the

children. These additional expenses included utilities for the family home, tuition fees for the Younger Son and any additional expenses for the children as and when they arose. Credibility of witnesses Both the Wife and the Husband gave evidence. The Husband presented himself as a savvy businessman with many contacts and connections within the business community. I have no doubt that the Husband is financially shrewd. The Husband has however, failed to provide any financial evidence in support of his purported loans and liabilities. The Husband's credibility was considered in light of the evidence he gave and the supporting documents he provided. On the other hand, it is apparent that the Wife is not as perceptive as the Husband. When asked how she would be able to meet the significant shortfall between what she believed she would receive from the comprehensive social security assistance ("CSSA") and what she had estimated to be her expenses, she had not considered this as a real possibility nor was she able explain what she would do. The Wife's evidence regarding finances was unsophisticated which was an accurate reflection of the disparity between the parties in terms of their education. I have therefore, borne this in mind when considering the Wife's answers and her evidence regarding finances.

Legal Principles The court is required to have regard to the factors set out in section 7(1) of the Matrimonial Proceedings and Property Ordinance, Cap. 192 ("MPPO") when determining ancillary relief orders: - (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 of the family; and (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. In addition, the court is also to have regard to the factors set out in section 7(2) of MPPO, when there are children of the family whose financial needs have to be provided for: - (a) the financial needs of the child; (b) the income, earning capacity (if any), property and other financial resources of the child; (c) any physical or mental disability of the child; (d) the standard of living enjoyed by the family before the breakdown of the marriage; and (e) the manner in which he was being and in which the parties to the marriage expected him to be educated. In the case of *LKW v DD* [2010] 13 HKCFAR 537, the Court of Final Appeal laid out 4 principles as to how section 7 MPPO was to be approached. Firstly, there was to be a fair distribution of the assets between the parties. Secondly, the concept of fairness meant that discrimination against gender or roles within the family was to be rejected. Thirdly, to discourage discriminate and to promote fairness, the court should view distribution against a "yardstick of equal division" which should be departed from only for good, articulated reasons. Lastly, there was to be a rejection of minute retrospective investigation of the parties' finances. The Court of Final Appeal identified a five steps approach to be adopted in all ancillary relief trials, namely: - (a) Identification of the parties' assets; (b) Assessing the parties' financial needs; (c) Deciding to apply the sharing principle if there are surplus assets remaining after the parties' needs have

been catered for; (d) Considering whether there are good reasons to depart from the principle of equal division. (e) Deciding the outcome. Spousal maintenance In relation to circumstances of this case, as there are no assets to be shared, after consideration of the first two steps, the outcome of this case will be decided on a “needs basis”. There is no need to consider Step Three and Step Four of the five step approach in *LKW v DD*. In Hong Kong, section 4(1)(a) of the MPPO permits the court to make an order for spousal periodical payments for the joint lives of the parties to the marriage or until the receiving party remarries. There is no legislative duty on the court to consider a clean break or to fix a limited time for the payment of spousal maintenance. While the Court of Final Appeal in *Raymond Kin Sang Hung v Mimi Kar Kee Wong Hung* (2015) 18 HKCFAR 210, has espoused the need of finality in matrimonial proceedings, the principle of fairness remains a crucial concept for the court to take into account. “E FINALITY AND CLEAN BREAK 35. The desirability of finality in litigation has a somewhat special application in matrimonial matters in that while it is desirable to have a clean break between parties, the law recognises that this may not always be possible in the interests of fairness. Thus, for example, particularly where children are concerned, orders are frequently made for periodic payments which look to the future. Various orders which a court can make under ss 4, 6 or 6A of the Ordinance also look to the future.” The Wife relied on the case of *CKKA v WCLI* [2019] HKFC 287 (unreported, FCMC 14230/2016, 8 November 2019) in support of her proposal for nominal spousal maintenance. In that case, the financial circumstances of the parties is markedly different from this case; both spouses had the potential to secure financial assistance from their extended families living in Hong Kong. I do not accept that on the present facts, it is appropriate or fair for the Wife to only receive nominal spousal maintenance for reasons set out below. Material Non-disclosure In all matrimonial cases involving claims for ancillary/financial relief, both parties are under a duty to ensure that the court is provided with sufficient information as to their financial resources. This is a continuing duty on each of the parties and is not confined to completing information in and attached to the Form E and Answers to Questionnaires: *GW v RW* (Financial Provision: Departure from Equality) [2003] 2 FLR 108 at §17 (Mostyn J). Full and frank disclosure of each party’s financial circumstances is required, so as to enable the court to rule fairly. Thus, if any party has not made full and frank disclosure, the court is able to draw an adverse inference against that party. Mostyn J summarised the relevant principles in *NG v SG* (Non-Disclosure) on how adverse inferences are to be drawn: [16] Pulling the threads together it seems to me that where the court is satisfied that the disclosure given by one party has been materially deficient then: (i) The Court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden. (ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the Court is satisfied he has not got. (iii) If the Court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms. (iv) In making its judgment as to quantification the Court will first look to direct evidence such as documentation and observations made by the other party. (v) The Court will then look to the scale of business activities and at lifestyle. (vi) Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise. (vii) The *Al-Khatib v Masry* technique of concluding that the non-discloser must have assets of at least twice what the

Claimant is seeking should not be used as the sole metric of quantification. (viii) The Court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that than that the Court should be drawn into making an order that is unfair to the Claimant. The English Court of Appeal more recently held in *Moher v Moher* [2019] EWCA Civ 1482; [2020] 2 WLR 89; [2020] 1 FLR. 225; [2019] 3 FCR. 244, that in the event of non-disclosure of a party's financial resources in a financial remedies case, the court was not obliged to give a precise figure or bracket for the undisclosed resources before making an order. Instead, the court should: (i) seek to determine the extent of the undisclosed resources; (ii) draw such adverse inferences as were justified; and (iii) where appropriate, infer that resources were sufficient that the proposed award represented a fair outcome. Moylan LJ said, “86. My broad conclusions as to the approach the court should take when dealing with non-disclosure are as follows. They are broad because, as I have sought to emphasise, non-disclosure can take a variety of forms and arise in a variety of circumstances from the very general to the very specific. My remarks are focused on the former, namely a broad failure to comply with the disclosure obligations in respect of a party's financial resources, rather than the latter.

87. (i) It is clearly appropriate that generally, as required by section 25, the court should seek to determine the extent of the financial resources of the non-disclosing party.
88. (ii) When undertaking this task the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry. Nor, as Lord Sumption JSC said, should the court “engage in pure speculation”. As Otton LJ said in *Baker v Baker* [1995] 2 FLR 829, inferences must be “properly drawn and reasonable”. This was reiterated by Baroness Hale of Richmond JSC in *Prest v Prest* [2013] 2 AC 415, para 85: “the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are.”
89. (iii) This does not mean, contrary to Mr Molyneux's submission, that the court is required to make a specific determination either as to a figure or a bracket. There will be cases where this exercise will not be possible because the manner in which a party has failed to comply with their disclosure obligations means that the court is “unable to quantify the extent of his undisclosed resources”, to repeat what Wilson LJ said in *Behzadi v Behzadi* [2009] 2 FLR 649.
90. (iv) How does this fit within the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering what Baroness Hale and Lord Sumption JJSC called “the inherent probabilities” the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both *Al-Khatib v Masry* [2002] 1 FLR 1053 and *Ben Hashem v Al Shayif* [2009] 1 FLR 115 and, in my view, it is a legitimate approach. In that respect I would

not endorse what Mostyn J said in *NG v SG* [2012] 1 FLR 1211, para 16(vii).

91. This approach is both necessary and justified to limit the scope for, what Butler-Sloss LJ accepted could otherwise be, a “cheat's charter”. As Thorpe J said in *F v F* [1994] 1 FLR 359, although not the court's intention, better an order which may be unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in *NG v SG*, at para 7, that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at para 16(viii), that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations.” Due to the Husband’s failure to provide full financial disclosure the court is placed in a difficult position as to the family’s real financial situation. I am mindful that to ensure that the Husband’s failure does not give rise to what is termed a ‘cheat’s charter’. If the drawing of adverse inferences is too conservative, unfairness would be visited on the claimant giving rise to what might be termed a non-discloser’s dividend (see *NG v SG* (Appeal: Non-Disclosure) at [15]). The court must be astute to avoid this unfairness. A strong message must be sent out to the non-disclosing party that their non-disclosure will not procure them a better result than that which would be ordered, if full disclosure was given. I am mindful that the finding of any adverse inferences must be realistic and soundly based on admissible evidence, as to the broad extent of the true financial position. The finding can be as broad or precise as the facts of the case demand. It has been said where a party had been guilty of not making full disclosure, he cannot complain if uncertainties were determined against him (*L v C* [2007] 3 HKLRD 819, at [191(2)]). Despite the Husband’s alleged business difficulties over the years he has continued to provide for his family. The Husband also gave evidence that going forward he is prepared to ensure that the children’s financial needs are met, which leads me to draw adverse inferences against the Husband that he has not been truthful about his financial position, and his income is more than what he wishes the court to believe. On the analysis that I set out below, I consider the present case is one where such inferences could be properly and reasonably drawn. The Wife’s case / open proposal The Wife’s proposal at trial was: For the Wife and the children to remain living at the current rental apartment home for up to 6 months or another three-bedroom apartment, if the lease to the matrimonial home is terminated. During this time when the whole family remains living under the same roof, the Husband was to continue to meet the rental and utilities expenses; The Husband pay HK\$5,400 to the Wife for the benefit of the children. That was HK\$1,350 for each of the children; The Husband pay the Wife nominal maintenance of HK\$1 per annum; The Husband to pay the Wife the sum of HK\$16,100 which the Wife calculated as back payment or reimbursement due to her from the Husband. The sum of HK\$16,100 consists the Younger Son’s tuition fees from October 2022 to April 2023 (HK\$2,300 x 7 months) which the Wife paid for instead of the Husband; and no order as to costs and her own costs to be taxed in accordance with the Legal Aid Regulations. There was inexplicably no request by the Wife for the Husband to contribute towards her and the children’s rental or utilities after they moved out of the family home. With her proposed

maintenance of HK\$5,400 for the children, plus the CSSA of approximately HK\$8,303.58 the Wife calculated her income to be approximately HK\$13,703.58. The Wife's latest Form E had already calculated her total monthly expenses to be HK\$15,400. This sum did not include rent or utilities. There was clearly going to be an even larger deficit in the Wife's monthly budget once she and the children moved out of the family home. When the court asked how she was going to meet the shortfall, the Wife's reply was that she had not thought about it. The Husband's case/ open proposals The Husband's proposal at trial was for the children to remain living with him and he would continue to meet their financial needs. The Wife was to move out immediately and to find separate accommodation, and to meet her own financial needs through her own endeavours. The Husband did propose an alternative that if the children did move out to live with the Wife, that he would provide HK\$5,400 towards the maintenance for the children. The Husband did not make any proposal for spousal maintenance and he did not agree that the Wife was even entitled to nominal maintenance. There was also no consideration given by the Husband to contribute towards the cost of the Wife's and the children's housing when they moved out of the family home. The Husband further objected to the Wife's claim for back payment or reimbursement for the children's expense that he should have met under the MPS Order but did not. The Husband's view was that the Wife hid the school fee notices and therefore, he was not able to pay these amounts. He was also not prepared to reimburse the Wife for the payments on account of the fact that she was receiving CSSA and she could have paid for these items anyway. It was the Husband's case that he has had to resort to borrowing money from friends to meet the shortfall between his salary and the family's expenses. Step One - Family assets The family's assets are limited. The Wife has a bank balance of HK\$23,118.61 which is her sole asset. This was not challenged by the Husband. He did attempt to suggest that the Wife had undisclosed funds based on the fact that she could not account for her spending of the CSSA payments she received. The Husband could not provide the court with any evidence of this nor was he able to highlight any unexplained purchases or withdrawals from the Wife's bank account. I completely reject the Husband's suggestion that the Wife has undisclosed funds. The Husband claimed to have only one bank account, the SCB account. The latest bank statement provided by the Husband showed that this account had HK\$15,573.23. The Husband used this SCB bank account to receive his monthly salary from GDL and which he used to withdraw cash to pay the rental. However, from the bank statements disclosed it is impossible to see any other payments usually associated with a normal bank account such as payments for school fees, utilities or cash withdrawals for daily necessities. Apart from the bank deposit, the Husband has an MPF account valued at HK\$167,205, his shareholding in GDL nominally valued at HK\$585,000 based on the paid up share price, his shareholding in CNL nominally valued at HK\$10,000. These values were not challenged by the Wife. There was a contention between the parties as to whether the Husband still owned a Volkswagen Touareg with an estimated value at HK\$23,000. The Husband claimed that the vehicle had been scrapped, but the Wife did not accept this explanation. In her closing submissions, the Wife suggested that if the Husband's financial situation was dire that he would have sold the car or recouped some money rather than having the vehicle scrapped. However, neither

party have come up to proof with any evidence. On balance, I do not believe that the Husband has this asset and I, therefore, exclude it from the calculation of the family's assets. Husband's purported loans As set out above, according to the Husband the monthly deficient in the household budget was met through him having to borrow from friends to meet the shortfall. In the Husband's first Form E, he disclosed that his total monthly expenses were HK\$35,820 per month, which included the monthly rental amount of HK\$19,000 at the time. While in the Husband's second Form E, his total monthly expenses were reduced to HK\$30,348. This sum included rental of HK\$14,000. It is not in dispute that these expenses are more than the Husband's purported fixed income of HK\$25,000. In both Forms E, the Husband he did not declare having any liabilities or loans under Part 2.13 – Liabilities. If the family's spending did in fact exceed the Husband's income then it would be reasonable for there to be loans or borrowings to meet the shortfall. At Part 5 of his first Form E, the Husband claimed that his business had been suffering in the past two years, that is, since 2019, due to the Ebola outbreak in West Africa which was followed by the social unrest and COVID-19 restrictions around the world. He further explained that he had been taking personal loans from his friends to help meet the family expenses. The Husband's second Form E provided a similar explanation that how he meets the shortfall between his income and expenses. "I have always gone beyond my means and resorted to borrow money from friends to meet the needs of the family. I sacrificed everything to give the family a comfortable living which the Petitioner took for granted and kept abusing." At trial, when questioned why he did not set out the amount of these liabilities in Part 2.13 of the Forms E, the Husband tried to make the distinction that since these were not institutional debts but personal loans he, therefore, did not think he needed to fully disclose the loans. The Husband provide no figure as to how much was owing in either of the Husband's Forms E, nor did he provide any supporting documentation regarding these loans. In the same manner, in his narrative affirmation dated 10 May 2023, although the Husband refers to purported loans he provides no details on the amount outstanding or supporting documentation. The amount of the Husband's purported loans was first disclosed in his first Answer dated 8 March 2022, in which he stated that his outstanding loans totaled US\$38,650 (equivalent to HK\$301,470). By the time of the trial, the Husband claimed he owed approximately US\$40,000. The Wife had in all of her three Questionnaires reasonably requested details of the Husband's personal loans and supporting documentary evidence. All three Answers in reply from the Husband were evasive. No details were provided as to the quantum, timing or terms of the loans, and he refused to provide further information to the Wife when requested to do so. The Husband's explanation was that contracts were not drawn up or signed, there were no written repayment terms for the loan and it was sufficient for him to give his word and agree with the lender the manner of repayment. The Husband also claimed that he had no authorization from the lenders to disclose their identities. Hence, the Husband provided no supporting documentary evidence in respect of any of the outstanding loans despite being specifically requested to do so in the Wife's three Questionnaires. The Husband was cross examined on how he kept track of these loans. He said that the loans were given by friends, some of whom where in the money exchange

business. The Husband spoke with his friends regularly and they all knew each other. His explanation for not providing any supporting evidence was that firstly, the friends from whom he borrowed the money from refused to permit him to disclose their details. Secondly, these loans were made between friends and in cash based largely on trust, and thirdly, since these were not loans with financial institutions, the Husband did not think he needed to provide any financial disclosure. The Husband explained that it was common practice in the money exchange business community to provide loans to each other which were not always documented between the parties. He described it as a fluid arrangement of cash transfers. The Husband gave one example that if a customer came to his counter and he did not have enough of the particular currency the customer needed, he would borrow what he needed from his friend who had that currency. Another example provided, involved the Husband having previously borrowed money from a particular friend and when that friend was unable to remit money themselves to their overseas, the Husband would assist them making the foreign remittance and repay the loan to the friend in that manner. There was also a third example of the Husband repaying loans through payments on behalf of his friends for various reasons. Repayment terms for these purported loans were similarly fluid. When a lender needed repayment, he would ask for it. The Husband's evidence that he was able to negotiate extension of time for repayments and if the repayment was pressing and he did not have the funds, he would borrow from another friend to make the repayment. When I asked the Husband how he kept track of his obligations to the lender, the Husband admitted that he had his own personal records regarding the amount owed. The Husband was reminded of the nature and his duty for full and frank disclosure and to explain why he did not even provide his own records of the loans. The Husband reply was that he did not think it would be needed since these were non-institutional loans, despite the fact that he could have disclosed his own records of the borrowings. I am of the view that this is a not a satisfactory explanation. For obvious reasons, the Wife asks the court to reject the Husband's explanation that he has taken out loans from his friends to meet the family's expenses. The Husband had several opportunities to provide proper disclosure regarding these loans. I am satisfied that the Husband plainly and deliberately failed to give a full and frank disclosure of his financial situation. I, therefore, reject the Husband's case that he has outstanding liabilities or that he has used these loans to meet the family's expenses. I further accept the Wife's submission that even if the loans do exist as described by the Husband, the fluid and revolving nature of these purported loans makes it impossible to assess whether the loan amounts is as the Husband asserts. The burden is on the Husband to establish the existence and the amount of his liabilities and he has failed to do so. Step Two - The parties' respective needs. Husband's Income from GDL GDL is a money exchange business, and transactions are all cash based. In the audited report of the financial statements for the year ended 31 March 2022, the auditors noted that GDL kept HK\$1,056,273 in cash on hand with the caveat that the auditors did not observe the counting of the cash on hand, and "owing to the nature of the [GDL]'s records, we were unable to satisfy ourselves as to the existence an valuation of cash on hand by other audit procedures". The Husband maintained that he has only received a fixed salary from GDL of HK\$25,000 at the time of trial. This is paid to the Husband by way

of a monthly cash deposit of HK\$25,000 into his SCB account. It is the Wife's case that the Husband's declared monthly income of HK\$25,000 is not a true reflection of the Husband's actual income. In support of her proposition, the Wife puts forward the arguments that firstly, the family's expenses have been consistently in excess of HK\$25,000 per month and secondly, the cash nature of GDL business means that the Husband has access to cash available to him to support the family's true level of expenses which he has not disclosed. According to the Husband, GDL does not have its own bank account and at trial, he denied that he used his own personal bank account for GDL. The Husband explained at trial that he had on occasion, used his own personal bank account to receive funds on behalf of GDL such as the government subsidy and a repayment of a loan from the Husband's friend, Mr. KJ. In cross-examination, the Husband explained on those transactions was part of the remittance service provided by GDL, since the company did not have its own bank account. I note that the Husband's evidence at trial is at odds with his statement given at the MPS hearing and recorded at paragraph 43 of the MPS Judgment "43. This suggested that H's account with SCB was used for the business. At the hearing, H confirmed that GDL did not have its own bank account and all company transactions were run through his SCB account." The Husband was also questioned about the rental allowance given by GDL. On the Husband's evidence, previously, when he was the sole director of GDL and when the company was performing well, GDL was able to meet the family's rental accommodation. This changed in 2018 when the business was affected by Ebola virus in West Africa. In or around 2019, the Husband was joined by another director and the Husband became a minor shareholder. According to the Husband, from that time forward, he was not able to unilaterally decide for GDL to provide a rental allowance and therefore, since 2019 GDL stopped paying for the family's rental accommodation. On this issue of rental payment by GDL, I find that the inconsistencies in the Husband's answers lead me to conclude that he has been less than truthful. The tenancy of the previous family home was signed and stamped in July 2019. The tenant recorded on the stamped lease was GDL. The term of this lease ran until July 2022. However, in his Affirmation dated December 2021, the Husband stated that GDL was not paying for the rental and he was personally responsible for it. This was revised by the Husband's previous solicitors who wrote in a letter dated January 2022 that GDL was solely responsible for the family's rental accommodation. However, in March 2022, the Husband in his third Answer insisted that he had never received any housing allowance from the government or any company. Based on the documents filed by the Husband, it is conclusive that between July 2019 and until the new lease was signed in January 2023 for a new apartment, GDL was meeting the cost of the family's accommodation. It was also put to the Husband in cross-examination that he continued to receive a salary of HK\$25,000 regardless of the profitability of GDL. The 2018 Annual Return for GDL shows that the company was still making a profit, although it is not disputed that from 2019 onwards, GDL was making a loss each year. The Husband's answer was that on occasion the company could not pay him a salary and the other shareholder would have to inject funds into GDL so that the company would stay afloat. From the GDL audited financial statements, in the year ending 31 March 2020 the sum of HK\$713,451 was owed by GDL to

the majority shareholder. In the same financial statement, there is also a record of HK\$237,817 being owed to the Husband by GDL. A year later, in the audited annual financial statements provided by the Husband, GDL continued to owe the majority shareholder the amount of HK\$713,451. GDL's debt to the Husband however, was reduced from HK\$237,817 from the beginning of the accounting period to HK\$8,175 at the end of the accounting period. This repayment of HK\$229,642 to the Husband by GDL has not been accounted by the Husband. I have taken into account the Husband's own evidence regarding his ability to pay as another contradiction to his fixed income claim. The Husband calculated his total monthly expense in his latest Form E to be HK\$30,348. In addition to this, per the terms of the MPS Order he had to pay various children's expenses directly totalling HK\$8,450. These direct children's expenses were missing in his Form E calculations. At trial, the Husband gave evidence that was prepared to hire a helper in order for the Wife to move out and leave the children in his care. During the marriage, from the time the Twins were born the Wife had the benefit of a helper to assist her with childcare. The Husband claimed that in 2019, he could not afford to meet the family's expenses, and had to let go of the helper. The current minimum salary for a domestic helper in Hong Kong for all employment contracts signed after 1 October 2022 is HK\$4,730 plus HK\$1,196 for food allowance. This would represent an additional monthly cost of HK\$5,926 over and above the Husband's current expenses. The Husband answer in cross examination as to how he would meet the cost of the helper was that he would continue to borrow money. I am inclined to consider that the Husband's financial situation is not as dire as he makes it out. Given that he is a savvy business man who is numerically literate, the Husband would not have proposed hiring a domestic helper if he could not afford one. Thus, on the point of the Husband's income, I am satisfied that the inference has been properly drawn and reasonable to the extent that the Husband conducts his business entirely in cash, and he has undisclosed income or has the ability to manipulate his cash flow from his money exchange business to meet the family expenses. I take the view that on the balance of probabilities, it is likely that the Husband meets his other expenses with the cash he has access through his company. I am inclined to agree with the Wife that the Husband's true level of remuneration is more than the declared salary of HK\$25,000 although it is simply not possible to say exactly the Husband receives in remuneration since his expenses are primarily paid for in cash which he has access through GDL. However, based on the Husband's current expenses and projected expenses for a helper, I find that the Husband's income is not less than HK\$45,000 each month. This finding is consistent with the above finding that the Husband has not proven that he has any liabilities. Miscellaneous income In addition to his salary from GDL, the Husband disclosed in his first Form E that he had an interpreting job which earned him small amounts of money. This information was absent in his second Form E but he was not challenged on this. I therefore, accept that the Husband is no longer earning additional salary from being an interpreter. The Husband also previously received a disability allowance for the Younger Son in May 2021 and on his own evidence, he is no longer receiving this allowance. Wife's earning capacity As stated above, the Wife does not work outside the home. It is anticipated that the Wife will continue in her role as a stay at home mother, since the Younger Daughter

is currently only 6 years old, with a disability that requires care when she is not at school. The Husband tried to criticize the Wife's involvement in caring for the children when there was a domestic helper claiming that she was never at home but left the care to the helper. At the same time, the Husband admitted that he worked long hours and was rarely at home. It seems unlikely that the Husband would have been aware or involved in the daily care of the children when he was at the GDL office. Furthermore, with four children, two of whom have special needs, it is not at all unreasonable for the Wife to require the assistance of a helper. He Husband's expectation that the Wife be on call for the children is both unreasonable and unrealistic. The Husband was adamant that the Wife has an earning capacity, and hence she would be able to support herself financially. At the PTR hearing on 3 May 2023, the Husband was given the opportunity to file an updated narrative affirmation addressing the section 7 MPPO criteria. I had also asked him to provide in his affirmation, evidence and examples of the types of jobs he believed that the Wife could qualify for if he wanted the court to take into account her earning capacity. At trial, the Husband was reminded about the need to put his case to the Wife regarding her earning capacity. He ultimately chose not to do so. As such, on the evidence and bearing in mind the Wife's lack of language skills, her basic education, the need for her to be at home to care for the Youngest Daughter after school and during school holidays, and I, therefore, regard the Wife's earning capacity to be nil. Funds available to the Wife The Wife does receive CSSA. In her Form E, the Wife disclosed she received on average HK\$8,303.58 per month from CSSA. Based on the CSSA statements disclosed by the Wife, I accept her evidence that these payments fluctuate based on calculations made by CSSA although on an eight month average reveals she received HK\$9,785. The statements show the breakdown of the CSSA calculations although I accept the Wife's evidence that she does not understand the calculations or the reasons for the variation. I also accept that the maintenance or periodical payments paid by the Husband are taken into account by CSSA and deductions are made accordingly. I note that when maintenance receive exceeds HK\$18,400 per month, the Wife and the children will not be entitled to CSSA. The Wife was permitted to clarify with CSSA what rental allowance she would receive from CSSA when she moved out of the current accommodation with the children. The Wife submitted that the rental subsidy would be an additional sum of HK\$6,695 per month. There was no restriction as to the kind of accommodation the Wife could rent nor was there a cap on the rental amount imposed by CSSA. Furthermore, CSSA would take into account the amount of maintenance paid by the Husband and reduce that sum from the Wife's CSSA entitlement. The amount of CSSA is reviewed every six months. Given the Husband's level of income and earning ability, I do not think it is correct for the family to rely on CSSA as a primary source of income. Rather I believe that it is the Husband's responsibility to financially provide for the children and the Wife because he has the financial means to do so. In fact, it is the Husband stated "additionally, I do not have a goal to go around claiming money from the Government as long as I can afford the expenses of my family; it is an honour for me not to beg". Bearing in mind that two of the four children have been diagnosed with autism and have varying degrees of disability, appropriate housing arrangements for the four children need to be in place if the Wife and

the children are to move out of the current accommodation. There will, therefore, need to be a component for the costs of housing the children and the Wife in the maintenance payments for the benefit of the children notwithstanding the Wife's stance at trial. Parties' respective expenses I wish to preface this section by reminding the parties that although there is an MPS Order in place, it was the result of the court's assessment on a broad brush basis of the evidence placed before the court. The interim order for maintenance was made without hearing evidence from the parties and intended to be in place for a limited period of time, pending the determination of all the financial issues between the parties (See HJFG v KCY [2012] 1 HKLRD 95 at [38]). In this judgment, in calculating the final periodical payment orders for the Wife and the children, a more thorough analysis of the evidence has been undertaken. There is also a requirement for the court have regard to the factors under section 7(2) of MPPO, when determining the children's financial needs going forward.

Housing By consent, the parties' agreed arrangements on the children's care was encompassed in the Order dated 25 July 2022 ("Children's Order"). The Wife and Husband had joint custody while sole care and control of the children vested with the Wife. The Husband was to have reasonable access to the children while the family still lived together in the same house. This was the living situation at the time of trial. The Children's Order also provided for when the parties moved to living in separate accommodation; the Husband would have defined staying access to the children every week from Friday 5:00 pm to Saturdays 8:00 pm. If the children did not have school on Friday, staying access would commence at Friday, 3:00 pm and last until Saturday, 8:00 pm. Long school holidays, such as Chinese New Year, Easter and Christmas were to be shared equally, while there was alternate week staying access during the children's summer holidays. At the commencement of the ancillary relief trial the Husband initially sought to challenge Children's Order. This was despite there not being any application before the court. Thus, the Husband's initial stance at the ancillary relief trial was that he would continue to meet the children's financial needs so long as they lived with him and for the Wife had to move out without the children. This proposal meant that the children would be cared for by a domestic helper when the Husband was at work. The children's care arrangements had already been agreed and the Husband's proposal was on the face of it, not in the children's best interest. It was a mistake for the Husband to conflate the financial issues with the children's care arrangements. As such, any changes to their care was not was not accepted by the court to be a relevant issue to be dealt with at the ancillary relief hearing. It is, therefore, necessary to consider what was an appropriate rental amount to accommodate the Wife and the four children, as well as the Husband's rental amount for accommodation when the children stayed with him for one night a week every week. As stated above, during the trial there was an issue as to who paid for the family's accommodation. Although the family's previous accommodation was provided and paid for by GDL, in January 2023 the Husband arranged for the family to move to the current accommodation at short notice. He asserted without providing any documentary evidence, that he was the tenant of the current accommodation. Unsurprisingly, in the absence of a signed tenancy agreement the Wife did not accept that that the Husband was the tenant. During the course of the trial, the Husband finally

provided the signed tenancy agreement confirming that the term of the lease was for three years, and the Husband signed as the tenant in his personal capacity. The rental of the current apartment is HK\$14,000 per month. Since living in Hong Kong, the family's standard of accommodation has been a three-bedroom flat. Going forward, this seems appropriate and reasonable considering the number of family members, and it is fitting that the sons and daughters sleep in separate bedrooms. It was suggested to the Husband that instead of the Wife and the children moving out of the current apartment, that he be the one that does so. This was firmly rejected by the Husband. In light of the children's special needs it would be ideal for the children to remain living in the current apartment and for the lease to be transferred to the Wife's name. I strongly suggest to the Husband that he assist the Wife to negotiate with the landlord that the lease be transferred to the Wife's name, so as to enable the Wife and the children to have stability in their living arrangements, since the family had just moved into the current apartment in January. It is likely that the children will find having to move again unsettling, and if the Husband can use his best endeavours to secure the tenancy of the current apartment in the Wife's name, I am sure that this would be appreciated by the family. The Wife explained that if she moved out she would need six months to find suitable accommodation which took into account not only the rental amount, but also proximity and ease which the Older Son and Older Daughter could travel to school. The Younger Daughter would travel to school by school bus. The further away the children lived from their schools, the more time and money they would spend travelling to and from school. The Husband complained that it was not proper for the parties to continue living under the same roof after the divorce and he wanted the Wife to move out immediately. While I acknowledge the Husband's sentiments, the problem with his outlook was that he was only focused on the Wife moving out. He had failed to appreciate the inconvenience it would cause her or how unsettling it could be for the children. The family had just moved into the current apartment in January 2023. To have to move again so quickly, may cause distress to the Younger Son and Younger Daughter. There was also no consideration by the Husband that the Wife would need time to find suitable accommodation for herself and the children, as well as setting up a new apartment. These practical matters of setting up a new home for the Wife and the four children, is also another reason why it would be more sensible for the Husband to agree to permit the children and the Wife to remain living in the current apartment and for him to find new accommodation. I note that the children will have staying access with the Husband one night a week. When the Husband was cross-examined on what he viewed as adequate accommodation, the Husband insisted that he have a three-bedroom apartment because it was not befitting or practical for the children to all be sleeping together. I do not agree that the Husband requires three bedrooms all the time just for one-night access each week, and he can easily house himself comfortably in a two-bedroom apartment. Furthermore, given that the Husband's access with the children is over the weekend, less consideration needs to be given as to the location of his apartment in terms of proximity to the children's schools. The Husband can therefore, move to a more affordable neighbourhood to save money. I take the view that the Wife is entitled to house the children and herself in a three-bedroom apartment. Not only is this the standard which

the family enjoyed during the marriage, but it is also the standard which the Husband believes that he requires for only one-night access each week. Since the children will be living with the Wife for the bulk of the time, a three-bedroom apartment is reasonable for her. The Wife has asked for the sum of HK\$70,000 to be paid to her by the Husband for her moving costs. I do not doubt that if the Wife will incur the costs of a removalist and new furniture will have to be acquired however, no evidence or breakdown as to how the Wife has arrived at this figure of HK\$70,000. If the Husband was truly desirous of saving money, this is yet another reason for him to arrange for the Wife and the children remain living at the current apartment. If this is not possible, then it would be reasonable for the Husband to reimburse the Wife the cost of moving and to purchase new furniture capped at HK\$20,000. I take a broad brush calculation to find that the Wife will require HK\$10,000 for the removalist and an additional HK\$10,000 to purchase furniture for the new apartment. The Wife is to provide the official receipts of the move and her purchases to the Husband and he is to ensure she is reimbursed of these expenses within 7 days. Furthermore, if the Husband is not able to arrange with the landlord for the Wife and the children to remain living in the current apartment, then the Wife is permitted to remain there with the children until the beginning of September to find suitable accommodation. This should provide the Wife with enough time to locate, organize and set up the new apartment, hopefully before the start of the children's new academic year.

Husband's Expenses

The Husband's latest Form E expenses are :

Item	Total (HK\$)
General (rental of HK\$14,000)	25,800
Personal	3,000
Total Monthly Expenses for Husband	28,800

In light of my comments above that the Husband can and should find cheaper accommodation, I assess the Husband's rental amount to be HK\$10,000. He claims to be providing his elderly mother in Guinea the sum of HK\$1,000 each month. This is disproportionately high considering what he has proposed to pay for the children's maintenance and I only allow the sum of HK\$200 for provision for his mother. This brings the Husband's total general and personal expenses down to HK\$24,000. In addition to these expenses, pursuant to the MPS Order, the Husband makes the following payments on behalf of the children:

Children	Item	Total (HK\$)
Younger Son and Younger Daughter	School fees	3,250
	School fees – miscellaneous fees	400
	Tuition Fees (for Older Son)	2,300
	Uniform	400
	Lunches and pocket money	800
Older Daughter	Transport fee	500
	Medical/Dental	400
Younger Son	Diapers	400
Total	Monthly expenses for children	8,450

I will make an order that the Husband continue to make the above payments on behalf of the children directly to the various educational institutions and service providers. The Older Daughter will be moving into secondary school this upcoming academic year, which will necessitate more expenses for travel to and from school. In respect of the pocket money and transport fees for the Older Son and Older Daughter, the Husband is to ensure that their respective Octopus cards are topped up each week so that they are able to travel and purchase the necessary meals and snacks they need. As for the Younger Daughter, the Wife gave evidence that she has applied to three different special education needs schools which will cater for the needs for the Younger Daughter. The Wife was not clear as to how much the Younger Daughter's school fees and transport would increase because she was still waiting for replies to her applications. The Wife did estimate

that the special needs school expenses would be approximately HK\$1,000 plus HK\$900 for school bus. I order that these expenses for the Younger Daughter's special needs school are to be met directly by the Husband to the school. The Wife will ensure that the Husband is provided with all the invoices for all the children so that the Husband can settle the fees directly and promptly. Wife's expenses On the basis that the Wife will have to incur rental and the cost of running her own household, I assess the Wife's expenses to be as follows:

General Expenses Item Total (HK\$) Rent 14,000 Mortgage instalments Nil Utilities (electricity, gas, rates, telephone & water) 2,500 Management fees Nil Food 4,000 Household expenses 2,000 Car expenses Nil Insurance premia Nil Domestic helper Nil Other (specify) Nil Total monthly household expenses 22,500 (b) Personal Expenses Item Total (HK\$) Meals out of home 150 Transport 150 Clothing/shoes 300 Personal grooming 300 Entertainment/presents Nil Holiday Nil Medical/Dental Nil Tax Nil Insurance premia Nil Interim maintenance Nil Contribution to parents Nil Dependent family members Nil Other (specify) Nil Total monthly personal expenses 900 (c) Children Item Total (HK\$) School fees Nil Extra tuition fees Nil School books and stationery 200 Transport (not including school bus) 200 Medical/Dental 100 Extra-curricular activities 200 Entertainment/presents 200 Holidays 300 Clothing/shoes 800 Insurance premia Nil Lunches and pocket money 500 Other transport (Younger Son) 400 Child-minding fees Nil Uniform Nil Total monthly expenses for children 2,900 Total Monthly Expenses for Wife HK\$26,300 The Husband did not challenge the reasonableness of the Wife's Form E budget. As stated above, I do not accept that CSSA should be the primary source of income because of the Husband's financial resources. I have, therefore, not taken the CSSA allowances into account in calculating the Wife's and the children's monthly expenses. The Wife's share of general expenses is HK\$4,500. Adding HK\$900 for her personal expenses, the Wife's total expenses are HK\$5,400. In line with my conclusion that the Wife has no earning capacity, and her role as a stay at home mother will continue going forward, and as a matter of fairness, I order that the Husband pay spousal maintenance to the Wife in the sum of HK\$5,400 per month until her death or remarriage, whichever is the earlier. Of the general expenses, I have apportioned a sum of HK\$21,600 towards the children's share. This brings the children's total expenses to be HK\$22,500 or HK\$5,625 per child which needs to be met by the Husband. I round it down to HK\$5,600 per month per child. Back Payment In respect of the Wife's claim for back payment, it was her case that the Husband had failed pay for maths tutoring classes for the Older Son since October 2022. She had paid for these classes and she wanted the Husband to repay her the sum of HK\$18,400 because by the time of the trial, she had paid for 8 months of classes (October 2022 – May 2023). The Husband had historically been the parent who paid for these maths tuition fees directly, but since October 2022, he failed to do so despite being told by the Wife that they were due. The Husband did not provide a satisfactory reason for non-payment of the Older Son's tuition. His response was that the Wife had hidden the invoices for these classes and he therefore, did not know that he had to pay for the extra classes. I do not find the Husband's explanation credible. It makes no sense for the Wife to hide these invoices because she then had to pay it out of her own resources. Furthermore, if the Husband had been paying for these expenses continuously it is encumbered upon him to

ensure that the Older Son continues to receive a proper educational support, and to be proactive in keeping himself abreast on the son's education. I note that between March 2022 to February 2023, the Husband paid to the Wife HK\$7,400 each month as maintenance, instead of the MPS Ordered amount of HK\$6,400. The Husband provided no explanation for the extra HK\$1,000 per month. Since he has over paid the sum of HK\$12,000 over that period, I find that the Husband should be given credit for this overpayment. I also find that between the CSSA allowance previously received and the overpayment by the Husband the Wife would have had funds to meet the Older Son's tuition costs and accordingly, I will not permit the back payment on this occasion. Going forward however, I wish to remind the Husband that it is his responsibility to meet all of the children's expenses with the school and educational institutions directly. He bears the responsibility of ensuring that all payments for the children's benefit are up to date. It will not be acceptable for the Husband to claim that he has not been informed by the Wife as a reason for non-payment of any of the children related expenses. The Husband will be expected to be proactive in checking with the various schools and service providers that the children's accounts are settled promptly. Step Five – Deciding the Outcome As stated above, there are no assets to be shared and each of the parties are to retain the assets held in their respective names. I have considered this matter on a needs basis. The deficiency in the Husband's disclosure on his purported loans is glaring. I am, therefore, disinclined to accept the Husband's evidence on his liabilities. Taking all the matters into account, I am satisfied that the Husband has the ability to pay to the Wife the amounts I have assessed, including payments he is to make directly for the children's benefit. Furthermore, the financial provision which has been made for the Wife and the children are fair given all the circumstances of this case. I, therefore, make the following Order: (1) The Respondent do continue to pay the following expenses, for the benefit of the children directly: (i) each of the children's respective school fees and school related expenses including by not limited to uniforms, lunches, pocket money, and school bus; (ii) each of the children's respective extra-curricular activities and tutoring classes; (iii) all medical and dental expenses; (iv) diapers for the Younger Son; (v) lunch money, pocket money and transport to school costs for the Older Son and the Older Daughter is to be paid to them by the Respondent depositing such necessary sum directly into their respective Octopus cards. (2) The Respondent do pay to the Petitioner periodical payments for her benefit in the sum of HK\$5,400 per month, the first of such payment is to be made on 1st August 2023 and thereafter on the first day of each and every month, until her death or her remarriage, whichever is the earlier. (3) The Respondent do pay to the Petitioner periodical payments of maintenance for the benefit of the Children in the sum of HK\$22,400 per month or HK\$5,600 per child per month. The first of such payment is to be made on 1st August 2023 and thereafter, on the first day of each calendar month. (4) In respect of the child maintenance payable by the Respondent to the Petitioner as set out in Order (3) above for the Older Son and the Older Daughter, these payments are to continue to be paid by the Respondent until each of these Children turn 18 years old respectively or complete full time education or until further Order of the Court, whichever is earlier. (5) In respect of the child maintenance payable by the Respondent to the Petitioner as set out in

Order (3) above for the Younger Son and the Younger Daughter, these payments are to continue to be paid by the Respondent until further Order of the Court. (6) All payments to be made into the Petitioner's Hang Seng Bank Account. (7) There be a penal notice attached to this Order. (8) There be a Section 18 declaration. (9) There be liberty to apply in respect of the implementation of this Order. The Wife has been largely successful in her application for ancillary relief. There be a nisi order that the costs of the Wife's ancillary relief claim be paid by the Husband, including all costs previously reserved, to be taxed if not agreed. This nisi order will be made absolute within 14 days of this judgment. The Wife's own costs to be taxed in accordance with Legal Aid Regulations. (Sasha Allison) Deputy District Judge Ms Tina Li of Liu, Chan & Lam for the Petitioner The Respondent acts in person

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=155082

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/db-v-dma-2023-hkfc-137>

Prepared on 28 October 2026 · Esheria