

HONG KONG / JUDGMENT

DCB v. AB

[2018] HKCFI 717

COURT

Court of First Instance

DECIDED

9 April 2018

CASE / FILE NUMBER

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HCMP 2173/2014

[2018] HKCFI 717

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2173 OF 2014

IN THE MATTER OF an application to make IMB-B also known as IMB, a girl born on 15th day of May 2013, a ward of court

and

IN THE MATTER OF Section 26 of the High Court Ordinance (Cap. 4)

and

IN THE MATTER OF Order 90 of the Rules of the High Court (Cap. 4A)

and

IN THE MATTER OF Guardianship of Minors Ordinance (Cap. 13)

BETWEEN

DCB

Plaintiff

and

AB

Defendant

Before: Hon B Chu J in Chambers (not open to public)

Date of Hearing: 28 March 2018

Date of Decision: 9 April 2018

DECISION

(Variation + Undertaking)

The background and history of these wardship proceedings have been set out in several previous judgments/decisions and will not be repeated here.

At present, there are two applications before this Court, namely (i) a summons filed by the Father on 1 December 2017, essentially seeking an immediate variation downwards of the interim maintenance order which this Court made on 22 July 2016 (“Interim Maintenance Order”), and (ii) a summons issued by the Mother on 6 February 2018 for the Father to pay the outstanding school fees and expenses for the ward L pursuant to his undertaking set out in the Interim Maintenance Order.

Both parents are now acting in person. Although the Official Solicitor acts for L in the Mother’s relocation application, the Official Solicitor has obtained leave from this Court to be absent at the hearing of the present two summonses.

The Father’s summons

The ground for the Father’s immediate variation downward is that, as alleged by him, the Mother’s updated Form E shows that she has a “materially higher” personal income than previously stated, and that her Form E also shows spousal income of \$60,000, resulting a total household income of \$116,000.

It turns out what the Father did was adding up all the credits in the Mother’s bank account for 12 months, as seen in the bank statements produced by the Mother in her Form E, and claimed that the Mother’s average gross income was SG\$9,757 per month, or approximately HK\$54,641.

Further, the Father alleged that the Mother’s husband B owns a company and that the Mother has failed to disclose the assets of B’s company, and the Mother has also failed to disclose the value of her own business of a psychologist practice.

Since issuing his summons, the Father had served a questionnaire on the Mother, in which the Mother had explained:

The amount of average monthly income of approximately HK\$36,000 disclosed by her in her Form E of 26 June 2017 was calculated based on adding up the amounts paid by her clients, or credits into her bank account between June 2016-May 2017 and deducting her clinic expenses and then divided by 12;

Her psychologist practice is that of a sole proprietorship with no assets and therefore the value is the income the Mother produces;

The Mother has disclosed a copy of her husband B's payslip which was SG\$11,000 and disclosed a copy of his bank statement.

First of all, I do not see how the Mother's husband's/B's income or assets is relevant at this stage. B is not the father of L and is under no legal liability to contribute towards L's expenses. The most that can be said is that B may be contributing towards the Mother's rental and/or household expenses in Singapore, thereby reducing her own expenses. Since L is not residing in Singapore, whatever B's contribution towards the Mother's general expenses in Singapore, if any, does not affect L or the Father's liability towards L. Further, there is no issue in the present application in relation to the Mother's ability to contribute towards her share of L's expenses.

There was no sufficient evidence to show that the Mother's average income net of her clinic expenses was not what was disclosed by her in the Form E.

Further, as seen in this Court's judgment on the Interim Maintenance Order, the approach this Court took on a broad brush basis was that the parties should contribute towards the interim maintenance of L in the proportion of their respective income, net of tax and that in addition the Father should pay for L's medical and school expenses. The value of the Mother's psychologist practice is of no relevance at this stage. She is the sole practitioner and she is not selling her practice.

Anyway, in my view, the Father's grounds for his variation application are totally misconceived.

At the time of the Interim Maintenance Order, I found L's interim financial needs to be HK\$28,000 per month, less school fees and medical expenses. I found the Father's income, net of tax, to be HK\$133,000 per month, and the Mother's income, net of tax, to be HK\$28,000 and on this basis, the Father's and the Mother's contribution should be 83% being the Father's and 17% being the Mother's. This was in addition to the Father's undertaking to pay for L's medical expenses and nursery school expenses in Hong Kong, if and when applicable. Thus under the Interim Maintenance Order, the Father has been ordered to pay HK\$17,740 per month as interim maintenance plus his undertakings.

The Father has disclosed a monthly income of HK\$192,800 in his Form E of 26 June 2017 and tax of HK\$24,353, which means his net income in June 2017 was at least HK\$168,447, which is HK\$35,447 per month higher than his net of tax income at the time of the Interim Maintenance Order.

On the other hand, as mentioned earlier, the Mother's income as at June 2017 was on average HK\$36,000, and net of tax of HK\$1,000, was about HK\$35,000.

The Father's general and personal expenses were about HK\$142,232 at the time of the Interim Maintenance Order, at the old rent. In June 2017, with his rent at HK\$ 26,000, and a young baby son, his expenses, excluding the Interim Maintenance of HK\$17,740 per month and the tax, was only HK\$112,510 per month.

There is no issue about the Father not being able to pay the amounts ordered under the Interim Maintenance Order, in addition to his undertakings, nor can the Court see any evidence that he is not able to pay.

Having considered the Father's present income and expenses, I am of the view that the Father has not made out any ground for any immediate variation downward of the Interim Maintenance Order.

So far as the final maintenance for L is, in light of the Mother's application for relocation, the matter of L's final maintenance can only be decided when the Mother's relocation application has been determined.

The Mother's summons

The Interim Maintenance Order contains an undertaking by the Father that he will be responsible for payment of L's nurse school expenses if and when applicable.

L is now almost 5 years old. The parties have joint custody of L. On 16 May 2017, this Court ordered that the Mother is to have L's sole care and control and the access arrangements have been set out by this Court.

Since then, the Mother has continued her practice in Singapore and has been commuting between Hong Kong and Singapore. When she has to be in Singapore, her husband B will come up to Hong Kong to take care of L. So far, according to the Social Welfare Report, the access arrangements have been working out smoothly.

In August 2017, the Mother enrolled L in a kindergarten in Mui Wo on Lantau. Since then, despite numerous letters and correspondence, the Father has failed to comply with his undertaking to this Court and has failed to pay any of L's nurse fees and school expenses.

Finally, the Mother issued her summons seeking a sum of HK\$52,450, for school fees and expenses for the period from August 2017 until February 2018.

At the 1st hearing on 27 February 2018, the Father sought leave to apply for the transcript of the hearing on 15 July 2016, saying that he did not realise what an undertaking was.

The Father has received tertiary education, and there is no sufficient evidence as to why he would not understand what an “undertaking” mean or the effect of an undertaking. The undertakings are clearly stated in the order of the Interim Maintenance Order, and this was in July 2016. If the Father had not understood the meaning or effect of the undertakings, he had had ample time to consult a lawyer, which he had done in the past, and if it was not his intention to undertake or agree to pay L’s medical expenses (by claiming reimbursement from his medical policy) or to pay the nursery fees, he should have immediately made an application to this Court. Nothing was done by him.

The Father had quoted two sentences from the transcript of the hearing on 15 July 2016. However, they were not complete. What he said was set out below:

“Mr Bryant: So my understanding of ... and again, the costs, we don’t have any school costs in Hong Kong. It would be minimal. I think K1 runs at about HK\$1,500 a month on Peng Chau, which is quite good. In Discovery Bay, if you went to the top Montessori pre-school, it’s 7,000 a month and so the maximum we would have schooling would be – would be 7,000; the minimum would be 1,500 which again, I would be – happily to pick up, as I already pick up the medical and other expenses.”

“Mr Bryant: Yes, Yes, so – and those are fairly accurate numbers and again I’ve put in school fees as if she went to school on Peng Chau. Obviously that would increase if she went to Discovery Bay.”

It is clear from the above, whether, undertaking or not, the Father has agreed to pay for L’s nursery school fees. What he said was the amount he put in his then Form E was as if L went to school on Peng Chau, but his agreement was not limited to that he would pay only if L were to go to school on Peng Chau. In any event, he never filed any application to vary or clarify his undertaking/agreement.

In his affirmation of 16 March 2018 filed in opposition to the Mother’s summons, he complained that he did not consent or agree to D’s action to unilaterally relocate L to a new school, and alleged that the Mother was in breach of the joint custody order. He said “without this breach there would be no change of schools and no additional costs”.

The Father is fully aware throughout that the Mother does not live on Peng Chau and has no intention of so doing. The Mother and L have been living in Leyburn Villas in Cheung Sha on Lantau and that is where they are now living. At the trial in December 2016, the Mother indicated that for the schooling arrangements for L, her primary preference at that time if L were to remain in Hong Kong was Lantau International School, but she is open to consider schools in Central if the Father has other preferences.

The Father was also aware at the trial in December 2016 that since the Mother and L would not be living on Peng Chau, it was the Mother’s plan to enrol L into a new school if the Mother were to be granted sole care and control.

More importantly, L has been enrolled at her present school in August 2017 for the 2017/2018 term. The Father has been fully aware of the arrangement since August 2017. Any alleged “breach” has been accepted by the Father. In fact, according to the Mother, the Father has attended many school events. There was never any application by the Father to vary L’s schooling arrangement nor has he come up with any proposal for another school for L elsewhere, other than Peng Chau which is not realistic nor practical for L.

Having considered all the above, the Father has not made out any grounds in opposing the Mother’s application.

The amount outstanding as at the hearing was HK\$60,630. In view of the fact that the Father has been away, I will give him 14 days to pay. Normally, a judgment debt will carry judgment interest (currently at 8% per annum) and I see no reason as to why the amount should not carry such interest after 14 days.

Order

My order is therefore:

The Father’s summons issued on 1 December 2017 for immediate variation downward of the Interim Maintenance Order is dismissed;

As for the Mother’s summons issued on 6 February 2018, the Father shall pay the Mother the sum of HK\$60,630 being L’s school expenses up to and including March 2018, within 14 days from today. Thereafter, the sum, or any unpaid balance, will carry interest at judgment rate, which is currently 8% per annum until full payment.

As for costs, as the Mother is the successful party, the Father has to pay the Mother’s costs of and incidental to the two summonses.

Further Observations

The hearing date on 28 March 2018 for the two summonses was fixed in the presence of the Father on 27 February 2018. On 9 March 2018, he sent a letter to inform the Court that he needed to leave Hong Kong on 27 March 2018 for 5 days travel to the United States, and sought an adjournment or the matter be dealt with on paper. There was no reason provided by him as to why he needed to leave Hong Kong on 27 March 2018, whether it was for business/work, or for his own pleasure or for any other reason. There was also no evidence as to when the trip was booked.

This Court directed on 12 March 2018 that the Father should provide evidence of having to leave Hong Kong on 27 March 2018. There was no response from the Father. Thereafter, this Court further directed on 15 March 2018, amongst other things, that unless he was to produce to the Court sufficient evidence on or before 26 March 2018 that he received notice to travel from his employer after 8 January 2018, the hearing on 28 March 2018 would stand. There was again no response to this direction. The Father simply did not turn up at the hearing on 28 March 2018.

The above in fact would have justified this Court in dismissing his summons outright at the hearing. Unless there is a reasonable explanation from the Father, this Court will regard his attitude as one of disrespect to the Court.

The Father is also reminded to seek legal advice as soon as possible on the consequences of failing to comply with this order, namely the steps the Mother may take to enforce payment, in the event if he fails to comply with this order within the time stipulated.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

The plaintiff was not represented and did not appear

The defendant appeared in person

Attendance of the Official Solicitor was excused

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