

HONG KONG / JUDGMENT

I, M aka K, M v. I, SM

[2023] HKFC 136**COURT**

Family Court

DECIDED

12 July 2023

CASE / FILE NUMBER

FCMC10984/2020

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bjbj FCMC 10984/2020

**[2023] HKFC 136 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 10984 OF 2020**

BETWEEN I, M Petitioner also known as K, M and I, SM Respondent

Coram: Her Honour Judge Thelma Kwan in Chambers (not open to public) Date of Hearing: 12
July 2023 Date of Judgment: 12 July 2023

J U D G M E N T (Costs variation) (Ex tempore)

This is an application for variation of the Cost Order Nisi made in my Judgment on Relocation handed down on 31 March 2023 (the

Judgment

). First to start with some legal principles which are not in dispute. The usual order would be no costs , as explained by our Court of Appeal in TPL v WYY (Costs: Children) [2015] HKFLR 75 in paragraphs 14.1-4. However, a no costs order is only the starting point. The court s discretion on costs in family cases is very wide (See: HK v BD, CACV 252 of 2009, date of judgment 15/10/2010, per Hartmann JA; Gojkovic v Gojkovic [1992] Fam 40). Its discretion would never be fettered in awarding costs against a party if he/she has been unreasonable or reprehensible in the conduct of the litigation. This was explained by the Court of Appeal in TPL v WYY (supra) as follows: 14.5. Having said that, this general practice is not a rigid rule. In particular, the court must be careful that this approach to costs should not be abused eg in cases where one parent has more means at

his disposal than the other who does not qualify for, or prefers not to use, legal aid. The practice should not provide the opportunity for one parent to wear the other down financially by means of multiple interlocutory skirmishes. .. Exceptional circumstances 15.1. Accordingly the courts have said that this approach to costs does not apply in exceptional circumstances, such as where the conduct of one party has been reprehensible, or the party's stance has been beyond the band of what is reasonable (LB of Sutton v Davis (No.2) at p571B-C, following Haverling LBC v S [1986] 1 FLR 489 and Gojkovic v Gojkovic (No. 2) [1992] Fam 40). Coming to this case. It is correct and as stated in my Judgment, I did not accept the stance taken by H with regard to factoring his income for two households, those numbers were never feasible, and his position was exacerbated by the fact that he expected W to contribute, and the shortfall to come from her savings (my Judgment paragraph 106 refers). Today in court, H changed that stance; and says that he had intended the shortfall to be borne by him, and says that with his capital this could have lasted 4 years. He says that this was not properly put forward by his evidence in court. He was reminded that he is not to re-argue his case, and that he had legal representation at trial, and a chance to put forward his case in closing. Mr Clough rightly states that H should not be going behind finding of facts in my Judgment. Referring to paragraphs 95-118 of my Judgment, it was my view that he has taken an unreasonable stance in the proposal of his plan to support both families in HK, which was not sustainable. More importantly, when asked to put forward a viable plan after the hearing, none was forthcoming. On this, Mr Clough submits that the divorce, the need to move to Tung Chung, W's eventual plan to relocate, the need to defend H's opposition and suffer H's ongoing accusations regarding obstruction of access; all arising out of H's conduct in the first place, are all litigation conduct that should be taken into account. Mr Clough also reminds me that H changed his stance after trial. This is correct. H did start with opposing the W's application, and then in his closing, says that his position is not now, so he could have time to repair relationship with his daughters. He says he relied on the SJE report and the SWO to support his opposition. Today, he is reminded that the SJE and SWO did not oppose the relocation, both only stated that the relocation is not to take place immediately. This change of stance must be taken into my consideration. While the usual practice is to make no order as to costs, the exceptional categories were not closed and possible exceptions were not confined to reprehensible behaviour or unreasonable stance. In re S (A Child) [2015] UKSC 20, Lady Hale made reference to the usual exception categories of reprehensible and unreasonable behaviour in the case of In re T (Children) (Care Proceedings: Cost) [2012] 1 WLR 2881, and stated that there might be other reasons why an award of costs might be justified, financial hardship being one of the other reasons. She said this at paragraph 33: The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there maybe cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, if otherwise the child's welfare would be put at risk. H has incurred around HK\$3 Million for these proceedings. W has incurred at least HK\$3.5 Million, this was paid for out of her share of the proceeds of the capital assets which by agreement had been distributed, and from

her own savings. I recall that at the time of writing the Judgment, she had \$16,500 in her account. W has been practically brought down to minimal savings for her move to Japan. At the time of the relocation decision, ancillary relief proceeding is nowhere in sight, and there is no clear indication as to how much of the matrimonial pot there is to be considered. This could not possibly be in the best interest of the children, and it is plain that the children must not be principal sufferers as they are moving with W to another country, but she has almost no financial resources to settle them into their new life. On these bases, I made the Cost Order I did. Today, I have heard submissions from the H, the one point that I will consider is that his finances will also affect the children as he is the main breadwinner. Albeit that the costs will be taxed, and it is not to be paid immediately or maybe not all at once, there will need to be payment plan for the costs order I made. On the basis of his submission, I will vary the Cost Order I made in that he is to pay 75% of all costs arising from the relocation proceedings, to be taxed if not agreed. For the costs of today s variation application, I make an Order for H to pay 50% of the costs of this variation proceeding to the W, to be taxed if not agreed, with certificate for counsel. (Thelma Kwan)

District Judge For Petitioner: Mr Neal Clough instructed by Messrs Oldham, Li & Nie Respondent: Acting in person PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 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 {q{dZq h3`q gd77 gd\*~ ~zszokz~zszokzdZ \_[W[ ha-e h3`q hjfz hFR? gdH. gd&> gd&> gd~[gd&> gd&> gd&> gd&> hch[RhR ha-e gd&> gdJ\ gd&> gd&> ha-e &`#\$ gd`` gd`` wqwq h}R` h}R` h#Sw h)o> &`#\$ h}R` h}R` :pd= mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH

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Prepared on 27 October 2026 · Esheria