

HONG KONG / JUDGMENT

K v. C

COURT

Family Court

DECIDED

29 August 2007

CASE / FILE NUMBER

FCMC2421/2005

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bjbj FCMC 2421 / 2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 2421 OF 2005

BETWEEN K Petitioner and C Respondent

Coram : Deputy District Judge Tracy Chan in Chambers (Not Open to Public) Date of Hearing : 30
& 31 July 2007 Date of Final Submissions by Parties : 14 August 2007 Date of Handing Down of
Judgment : 29 August 2007

J U D G M E N T

Introduction

1. The Petitioner wife () applies for ancillary relief for herself and for the child of the family (the Child). For herself she mainly asks for a lump sum from the proceeds of the sale of the former matrimonial home (the Property) and nominal maintenance. W asks that the proceeds of the sale of the former matrimonial home be split between the parties with 70% to be awarded to her as her lump sum payment.
 2. For the Child, W asks for \$4,200 from the Respondent husband () as periodical payments per month until he attains the age of 18 or finishes full-time education. She asks that H s salary be attached with such a sum reflecting his monthly contribution to the Child s maintenance. H has been paying HK\$1,500 a month before trial since September 2005. She asks for reimbursement of shortage and default interim maintenance prior to trial from H.
- ### Background and History of the Marriage

3. H and W got married in November 2000. H is now 37 while W is 33. The Child was born in May 2001 and is now 6 years old. Parties separated in 2004. W issued a Petition for Divorce on 15th March 2005. A decree nisi was issued on 16th December 2005. Custody of the Child was agreed by the parties on the first day of hearing. It was agreed that joint custody of the Child be granted to the parties, care and control be to W with reasonable access to H.
4. The family assets are simple. The Property was sold under auction in a mortgagee action on 7th October 2005. The net proceeds (the Net Proceeds) now being stakeheld by W s solicitors is about \$393,562.52. Both parties have all along been and are still employed receiving similar income. The Law
5. In considering the applications for ancillary relief, I will need to have regard to the matters set out in s. 7 (1) and 7 (2) of the Matrimonial Proceedings and Property Ordinance (MPPO), which I set out as follows :
7. Matters to which court is to have regard in deciding what orders to make under sections 4, 5 and 6
 - (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say -
 - (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 for the family;
 - (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.
 - (2) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say -
 - (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;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated; and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him .

Main Issues for Trial

6. The major issues in this hearing on ancillary relief are : -
 - (a) the resources of the parties;
 - (b) the apportionment of the Net Proceeds between the parties;
 - (c) the reasonable requirements of the Child and H s share in such expenses; and
 - (d) whether H should reimburse W the interim maintenance paid by her for the Child pending suit.
7. All of the above issues are within the ambit of s.7 and I shall deal with them together with other factors. Conduct
8. W alleges that the marriage broke down due to H's unreasonable behaviour and in particular his bad temper and lack of love and concern for the Child. There is allegation that there was violent behaviour and the incident was reported to police same day on 6th December 2004. It is trite law that unless the conduct is gross and obvious, otherwise it would not be taken into account when considering ancillary relief matters. I am not satisfied that there is sufficient evidence to prove that H s conduct is gross and obvious. I would not give weight to those allegations. Other s. 7 Matters
9. I now turn to consider the other s. 7 (1) and (2) matters set out in the Matrimonial Proceedings and Property Ordinance (MPPO). Income, Earning Capacity, Property and other financial resources which each party has or is likely to have in the foreseeable future
H s Income / Earning capacity
10. As said above, H is now 37. He is a merchandiser now making HK\$15,000 per month plus one month year-end bonus making an average income of \$16,250 per month. He has been working for the same company for 3 years and he has no plan to change his job at this stage. He has to travel to China to work. H s Property and Financial Resources
11. Apart from his interest in the Net Proceeds H claims he has the following assets :

- (i) Cash at the 4 sole name accounts with Hang Seng Bank and Hong Kong Bank accounts (April / 2007) HK\$11,811.12 (ii) A car parking space No. 102 unknown (iii) Insurance HK\$33,625.8
12. In regard to the assets of H, W submitted a valuation report saying that the market price of the said car parking is about \$200,000. H said that it would not be worth that amount because there was a sewage drainage running alongside the car parking space and there was dripping problem because of the presence of another pipe at the ceiling right on top of it. I note however from the final submissions made for and on behalf of H that the content of valuation report was accepted and it was said that the net worth of the said car park is about \$40,000. I take that that is H's position. W's Income / Earning capacity
13. W, now 33, has worked throughout the marriage and remains employed after the marriage broke down. She is earning \$15,937.83 on average per month inclusive of bonus and allowance. She is working as an executive. W Property / Financial Resources
14. Apart from her interest in the Net Proceeds, W's assets were, at the date of her Affirmation dated 17th January 2007, mainly cash at bank under her sole name at the amount of \$50,770.62. Financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future
15. W said that she had to live in the public housing unit of her mother. She set out the monthly expenses for herself and the Child at a total of \$36,547 with breakdowns in her Form E and an affirmation of means updating her financial position : - General Expenses for W and Child Form E Aff of Means
1. Rent 2100 2010
 2. Utilities 1500 1305
 3. Food 3500 4500
 4. Household 1500
 5. Entertainment 0 1000
 6. Miscellaneous expenses(transportation) 0 1200
 7. Medical expenses for mother 600 10,615.00 10,015 Personal for W Form E Aff of Means
1. Meals out of home 1000 400
 2. Transportation 500 0
 3. Clothing 1000 1000
 4. Personal grooming 2000 0
 5. Holidays 2500 0

-
6. Dental/medical 500 0
 7. Tax 1000 0
 8. Contribution to parent 3000 0
 9. telephone 214 120
 10. Insurance 624 624
 11. Entertainment 0 0 11,714 2,144.00 Total : 22,329 12,159 The Child Form E Aff of Means
 1. School fees 2452 2,452
 2. Extra tuition 935 340+167
 3. School books 400 150
 4. Transport to school 200 0
 5. Medical 1000 800
 6. Entertainment 1500 1000
 7. Holiday 0 0
 8. Cloth/Shoes 500 300 (toys)
 9. Insurance 108 292
 10. Lunches and pocket money 0
 11. Other transportation 0
 12. Nanny 0 2550
 13. Uniform 85 35 7180 7093 Total: 29,509 19,252
 16. H challenged W s expenses especially the expenses for the Child. But the item which I think would affect their budget most is the expenditure on the nanny. It is W s case that a part-time nanny is necessary. The cost for that would be around HK\$2,500 per month. The nanny used to work for her helped to take the Child to and from school and looked after him until the Petitioner picked him up in the evening after work. However this nanny would not work for her any more. She said it would be difficult to get another and she said the only way possible might be to hire a full time maid and the expenses for this would be around \$5,000 per month. H said that in that case his stepmother in her 30s would be able to assist.
 17. On the other hand, H had and will have the following monthly expenses : General Expenses Form E Aff Mean
 1. Rent 2000 2000
 2. Mortgage 2714.20 2849.84
-

-
3. Utilities 665 665
 4. Management 171.00 171
 5. Food 2000 2500
 6. Household 200 200 Sub total: 8,250.20 8,385.84 Personal Form E Aff Mean
 1. Meals out of home 600 600
 2. Transport 1200 1200
 3. Clothing 200 200
 4. Personal grooming 200 200
 5. Holidays 200 200
 6. Dental/medical 200 200 200
 7. Tax 730 200
 8. Contribution to parent 1500 1500
 9. MPF 650 750 5,780 5,050 Total 14,030.2 13,435.84
 18. W pointed out the expenses of H on meals had been exaggerated. H said that although he could have meals in the factory in Mainland China, he had to have meals outside because he had to meet customers outside of the factory. He sometimes would have to pay for the meals of his colleagues or subordinates.
 19. After hearing evidence and submissions, my finding on parties expenditure is this. On the issue of hiring an assistant to take care of the Child, I say parties should hire a part-time maid to assist instead of a full-time one due to the tight budget of the parties. I do not think the stepmother could be a long-term help because she does not have the right of abode in Hong Kong and her visits here are subject to conditions. On the expenditure of H, I do not take into account the mortgage payment to the said car park made by H every month when considering his financial needs in such a tight budget. The need of the Child should come first. I find \$1,500 reasonable for H s meals outside. For W, I do not allow entertainment with the Child as household expenses because H would also have such expenses. I allow \$1,000 as payment for tax as I accept that she would have to pay tax in future. I do not agree that \$1,200 for transportation for the Child be put under General Expenses for W, I however allow \$600 as expenses for such nature under expenses for the Child. Further as both said they had needs to support their parents, I make no such allowance in this judgment. See below tables showing my findings on reasonable expenses for parties on relevant items.
Table 1 General Expenses for W Form E Aff of Means Court
 1. Rent 2100 2010 2010
-

-
2. Utilities 1500 1305 900
 3. Food 3500 4500 3000
 4. Household 1500 800
 5. Entertainment 0 1000 0 (see table
 6. Miscellaneous expenses(transportation) 0 1200 0 below)
 7. Medical expenses for mother 600 0 10,615.00 10,015 6,710 Personal for W
 1. Meals out of home 1000 400 400
 2. Transportation 500 0 500
 3. Clothing 1000 1000 500
 4. Personal grooming 2000 0 500
 5. Holidays 2500 0 300
 6. Dental/medical 500 0 300
 7. Tax 1000 0 1000
 8. Contribution to parent 3000 0 0
 9. telephone 214 120 120
 10. Insurance 624 624
 11. Entertainment 0 0 500 11,714 2,144.00 4,744 Total : 22,329 12,159 11,454 The Child Form E Aff
of Means Court
 1. School fees 2452 2,452 0
 2. Extra tuition 935 340+167 507
 3. School books 400 150 200
 4. Transport to school 200 0 0
 5. Medical 1000 800 800
 6. Entertainment 1500 1000 0
 7. Holiday 0 0 0
 8. Cloth/Shoes 500 300 (toys) 300
 9. Insurance 108 292 108
 10. Lunches and pocket 0 0

11. Other transportation 0 600
12. Nanny 0 2550 2500
13. Uniform 85 35 42 Total: 7,180 7,093 5,057 Table 2 General Expenses for H Form E Aff Mean Court
1. Rent 2000 2000 2000
2. Mortgage 2714.20 2849.84 0
3. Utilities 665 665 300
4. Management 171.00 171 171
5. Food 2000 2500 600
6. Household 200 200 200 Sub- total: 8,250.20 8,385.84 3,271 Personal for H
1. Meals out of home 600 600 1500
2. Transport 1200 1200 1200
3. Clothing 200 200 200
4. Personal grooming 200 200 200
5. Holidays 200 200 200
6. Dental/medical 200 200 200
7. Tax 730 200 200
8. Contribution to parent 1500 1500 0
9. MPF 650 750 750
10. Insurance premia 730.56 Sub-total 5,780 5,050 5,180.56 Total 14,030.2 13,435.84 8,451.56
20. Summary of my findings on parties income and reasonable expenditure is as follows : W H Income \$15,937.83 \$16,250 Expenditure \$16,511 \$8,451.56 Liabilities of W
21. W stated in her Affirmation that she had liabilities amounted to \$4,494.00 owing to credit card accounts. This was not mentioned in the final submission and I do not find that this is a real debt but only her spending on credit for the current month.
22. H said that he owed some debt to his family for the purchase of the Property and legal fees for this suit. I do not find that such debt be debt of family and be shouldered by W. I would however find that this is the financial situation of H.

23. Summary of my findings on parties assets and liabilities. Assets W H Bank Accounts \$50,770.62 \$11,811.12 Car parking space No.102 0 \$40,000 Sub-total: \$50,770.62 \$51,811.12 Liabilities 0 \$120,000 Net assets (excluding \$50,770.62 (-)\$68,188.88 Proceeds of the Property) Standard of living enjoyed by the family before the breakdown of the marriage
24. Both H and W were working throughout the marriage. Upon their joint effort, they had enjoyed a comfortable standard of living. The Property was a flat of the size about 462 sq ft built by private developers. I however do not believe that this could continue as the resources of the parties would have to be stretched between two separate households after the marriage broke down. Age of the parties and duration of the marriage
25. H is now 37, and W is 33. Their marital relationship lasted for about 4 years at the time of separation. This is a short marriage. Any physical or mental disability of either of the parties
26. Neither party asks the court to consider their health condition. Contributions made by each party to the welfare of the family, including any contribution made by looking after the home or caring for the family
27. As mentioned earlier, both H and W had worked throughout their marriage. It is common ground that both contributed equally to all expenses. I find that they made similar contribution to the family. Conclusion on Maintenance for the Child
28. After considering all relevant factors, I find it fair for H to bear one-fourth of the General Expenses found to be reasonably incurred by W for keeping the household to raise the Child. The basis for such finding is that the General Expenses is for both the Child and W basically. Half the expenses is therefore generated by the Child and H should bear half of this portion; i.e. one-fourth of the total. Further, H should pay half the direct expenses of the Child making a total of \$4,206 ($\$6,710 \times 1 / 4 + \$5,057 \times 1/2 = \$1,677.5 + \$2,528.5 = \$4,206$), I round it off to \$4,200. Attachment of earnings
29. I find W s application for the attachment of earnings without basis. There is no evidence suggesting that H would be sloth in complying with a court order. The application is therefore refused. Reimbursement of defaulted and shortage of Interim Maintenance
30. W asks also for reimbursement of defaulted and shortage of interim maintenance.
 - a. Defaulted interim maintenance : January to August 2005 $8 \times \$4200 = \$33,600$
 - b. Shortage of \$2700 (4200-1500) : September 2005 to July 2007 $23 \times \$2,700 = \$62,100$ Total: \$ 95,700

31. H's reply to this application is that the income of W should be sufficient to handle these outgoings in the past. This may be the case, but the Respondent also had the means to support the Child. I do not see why the burden should be shifted to W. I find the application reasonable and do make such an award. I take a broad brush approach by taking \$4,200 as the monthly contribution of H during the material time. H should pay W \$95,700 as reimbursement. Distribution of the Sale Proceeds
32. W says she should get \$275,493.76 out of \$393,562.52 (equivalent to 70%). On the other hand, H says that allowance be made for his debt be paid off by the Net Proceeds. The debt incurred was for paying off his share of the down payment of the Property and that made half his share in it, the other debt was for legal cost. These are not debt which should be shouldered by the family but by himself. I think the fair distribution should be equal distribution between the two after taking into consideration factors listed above and the fact that the parties held the Property as joint tenants. Nominal Maintenance for W
33. I find that clean break is in the interest of both parties, given the fact that both are educated with a steady job, both are relatively young, W is only expected to have a longer period to stay in employment due to her younger age, I therefore make no award for nominal maintenance. Her claim for ancillary relief is therefore dismissed save and except for the lump sum payment made upon the distribution of the Net Proceeds. Summary
34. As mentioned above, I find it fair that H pays \$4,200 to W as the monthly maintenance for the Child until he attains the age of 18 or finishes full time education. There should be reimbursement of interim maintenance in the sum of \$95,700 from H to W.
35. For W, she should take 50% (\$196,781.26) of the Net Proceeds and her claim is otherwise dismissed. Order
35. The effect of my order is as follows : -
- (i) Out of the Net Proceeds, a lump sum of \$196,781.26 representing 50% of the Net Proceeds and a sum of \$95,700 as reimbursement of interim maintenance for the Child shall be paid to W within 7 days from the pronouncement of Decree Absolute. (ii) W's claim for ancillary relief against H shall stand dismissed except for that stated in paragraph (i) hereinabove. (iii) H do pay to W \$4,200 per month for the benefit of the Child until he attains the age of 18 or ceases full-time education, whichever is later. First payment be made on or before 1st September 2007 and on or before the 1st day of each and every succeeding month thereafter; such payment shall be paid into W's bank account as assigned by her. (iv) There be liberty to apply in relation to the implementation of the terms of the above order.
- (v) The interim maintenance order on the Child shall continue until first payment mentioned in (iii) hereinabove is made. (vi) Joint custody of the Child be granted to parties, care and control be to W with reasonable access to H. Costs

36. As both parties are legally aided, I make an order nisi that each is to be responsible for his / her own costs. Parties own costs in relation to the application be taxed in accordance with Legal Aid Regulations. This order shall be made absolute and final within 21 days. Other Matters
37. I hereby make the declaration under s.18 Cap 192 that I am satisfied that the arrangements made in respect of the Child of the family are satisfactory. (Tracy Chan) Deputy District Judge Mr Ho of Messrs Au-Yeung, Cheng, Ho, & Tin for Petitioner Mr Tang of Messrs Ma Tang & Co for Respondent PAGE - PAGE - &`#\$ ~!P] j% Td #-p 6<z% ,f@- sy \$ he~"Td c(#\$ 0kJ\$ \$ @P\$\$ vRs&r 1 #' :!L- E{k' XW(\$ s `()H/0 -3*\$ 43*\$ c7*+ :p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p M;`6 M|;\$ wzO?p= H#@\$ 3i@\$ nSDH lEFE 5)GTd HHzbr kxL\$ /eNH S\$O\$ y<0O vuWOTd c;R\$ Y CR G%9UT Zk\_UR z`Uf RW!W C:~W x% X\$ x8Y\$ L}YH YR9r (Yq[*n\T #b2^\$ Q^f ``T_ Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/h vCip= j&]8 T{sk %i?l TCn\ ZorB "hsTd gsTu\$ LN3vj r7Fv, 4xv\$ 2wx^ x4ah xDs\ *y\$ Yay~_ __z4w {6=P# | >\$> C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . s `( vuWO c7\*+ Y CR T{sk 1 #' RW!W %i?l r7Fv Zk\_U vRs& y<0O #-p M;`6 LN3v ``T_ 6]H @HP LaserJet 1200 Series PCL 6 LPT1: winspool HP LaserJet 1200 Series PCL 6 HP LaserJet 1200 Series PCL 6 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) HP LaserJet 1200 Series PCL 6 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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