

HONG KONG / JUDGMENT

KYK v. MSMSC**[2021] HKFC 76****COURT**

Family Court

DECIDED

21 April 2021

CASE / FILE NUMBER

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FCMC 8842 / 2009

**[2021] HKFC 76 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO 8842 OF 2009**

BETWEEN KYK Petitioner and MSMSC Respondent

Coram: Deputy District Judge Susan Wong in Chambers (Not Open to Public) Date of Hearing: 25
March 2021 Closing Submission filed by the Respondent: 9 April 2021 Date of Judgment: 21 April
2021**JUDGMENT**

(Ancillary Relief)

This is an application by the Respondent Mother (“M”) against the Petitioner Father (“F”) for:-
maintenance for the family’s elder child, who is now 16; and variation of maintenance order of
the family’s younger child, who is now 13. Brief background of the case The parties were married
in Hong Kong on 21 October 2003. Two children, both boys, were born during the marriage. F
issued divorce proceedings on 16 July 2009 and the Decree was made absolute on 19 March 2010.
By way of consent and by virtue of the Order made before Deputy District Judge Kot (as she then
was) dated 19 October 2009, custody of the elder son was granted to F whereas custody of the
younger son was granted to M. Also by way of consent and by virtue of the Order made before
Deputy District Judge Kot on 18 October 2009, F was ordered to pay to M HK\$8,000 per month
being the monthly maintenance of the younger son of the family (“Maintenance Order”). By
virtue of another Order made before Deputy Judge D To dated 29 August 2019, the custody of the

elder son was varied so that sole custody, care and control was granted to M with reasonable access to F. Because of the variation, M applied for maintenance for the elder son by way of a Summons dated 4 September 2019. On 20 December 2019, M also applied for variation of the Maintenance Order. M admitted that since the custody of the elder son had been varied to her, F had been paying to the elder son direct a monthly sum of HK\$8,000, whereby the elder son would pay M half of that amount and he would keep the remaining for his own use, though there had been no Court Order for the said arrangement. M also admitted that despite the Maintenance Order and upon her request, F now pays her a monthly sum of HK\$10,000 for the maintenance of the younger son. In the opening proposal submitted by Mr Chan representing M on 19 March 2021, M asked for HK\$13,000 being monthly maintenance for the elder son and the monthly maintenance of the younger son be varied upwards to HK\$17,000. In the Closing Submission, Mr Chan revised the proposal in respect of M's applications so that:- (i) F do pay a sum of around HK\$10,150 per month for the elder son and (ii) F do pay a sum of around HK\$15,250 per month for the younger son until the children reach the age of 18 or complete full-time education whichever is the later. F, on the other hand and despite my Directions given on 23 October 2019, 10 March 2020 and 1 September 2020, has failed to file any financial statements by way of a Form E, nor has he disclosed any of his financial status. As a matter of fact, F only appeared before me once on 23 October 2019 and failed to appear thereafter, despite the fact that service on him for my part has been carried out satisfactorily. Just to illustrate, for today's trial, from the Affirmation of Service filed by the clerk of the law firm representing M, I can see that the clerk served the sealed copy of the Order ("the said Order") made by me on 1 December 2020 together with other documents ("documents") personally on the address which F stated in his Notice to Act in Person filed on 26 August 2019 on 3 occasions, respectively on 10 December 2020, 15 March 2021 and 23 March 2021. The said Order sets out inter alia, (i) the date of today's trial, (ii) both parties must attend with penal notice endorsed and (iii) personal service of the said Order. For service on the first two occasions, the clerk affirmed that it was F's mother who opened the door but refused to accept the documents. So the clerk inserted the documents in between the metal gate and the door at the entrance of F's address. On the last occasion, it was a male who answered the door. When the clerk made enquiries as to whether he was F, he refused to answer and declined to accept any documents from the clerk. Again, the clerk inserted the documents in between the metal gate and the door at the entrance of F's address. This hearing was heard in his absence. The Law and the legal principle Variation of maintenance order Such variations are governed by section 11 of the Matrimonial Proceedings and Property Ordinance, Cap.192 ("MPPO"). Section 11(7) provides that in exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates. The modern approach in dealing with an application for variation of maintenance is summarised by Cheung JA in *AEM v VFM* [2008] 3 HKLRD 36 at §14, in particularly the following sub-paragraphs: "4. The modern approach, as required by section 11(7), is for the Court to consider all the circumstances of the cases. The Court is not required to proceed from the starting point of the original order but look at the matter afresh: *Flavell v. Flavell* [1997] 1 FLR 353 at 357B following *Lewis v. Lewis* [1977] 1 WLR 409 and *Garner v. Garner* [1992] 1 FLR 573.

5. Any change in any of the matters to which the Court was required to consider when making the original order was one of the circumstances to be considered.
 6. Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some changes in the circumstances since the original order was made, for example, continuing inflation; the increased costs in supporting a growing child and that one party may be more adversely affected than another by the increase in the costs of living: *Garner v. Garner*.
 7. An increase in the wealth of the husband was a relevant factor to be taken into account: *Primavera v. Primavera* [1991] 1 FLR and *Cornick v. Cornick* (No. 2) [1995] 2 FLR 490.
 8. At the same time the basis and intended effect of the original order are relevant factors to which the Court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order: *Boylan v. Boylan* [1988] FLR 282.” Maintenance for children The empowering provision is section 5 of MPPO, which provides for the maintenance of a child of the family. In considering whether to give maintenance for the benefit of a child, the relevant statutory factors that the court needs to consider are set out in section 7(2) of MPPO:- (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. M’s case M now lives together with the two sons in a public housing unit. Because she has to look after them, M said in her oral testimony that she could only take up a part-time job as a domestic helper working for her friend at an hourly rate of HK\$45 per hour. On average, she said she earned around HK\$2,000 - 2,500 per month. She therefore needed an increase of maintenance to support her two children. In order to support M’s calculation, Mr Chan drew my attention to the table under Part 4 in the updated Form E filed on 15 November 2019 (“the table”).
- | 4.1 General expenses | Item | Amount (HK\$) |
|---|--|--|
| Rent | 1,200 | Mortgage instalments - Utilities (electricity, gas, rates, telephone & water) |
| | 2,100 | Management fees - Food |
| | 7,000 | Household expenses |
| | 3,000 | Car expenses - Insurance premia - Domestic helper(s) - Other (specify) - Total monthly household expenses |
| HK\$13,300 | | 4.3 Children |
| Item | Amount (HK\$) | |
| Elder son | Younger Son | |
| | School fees - Extra tuition fees - - School books and stationery | 600 500 |
| Transport to school (including school bus) | *1,500 | 600 |
| | Medical / Dental | 350 350 |
| Extra Curricular Activities | *1,200 | 3,500 |
| | Entertainment / presents | *800 500 |
| Holidays | *1,000 | 1,000 |
| | Clothing / Shoes | *350 600 |
| Insurance premia - - Lunches and pocket money | *2,000 | 400 |
| | Other Transport | *800 6,400 |
| Child-minding fees - - Uniform | 250 250 | Others (specify) |
| | 150 150 | Total monthly expenses for children |
| HK\$9,000 HK\$14,250 | | Mr Chan submitted that the Order for maintenance for the younger son was made in October 2009 when he was 1-2 years old. Since then he has grown, and HK\$8,000 per month is not enough for him. Furthermore, the younger son was diagnosed of Attention Deficit Hyperactivity Disorder (ADHD) in 2011. To cope with his |

condition, M encouraged the younger son to play different types of sports. He joined Future Star Program conducted by Hong Kong Sports Institute and Hong Kong Triathlon Association in around 2015 when he was 8. In M's first Affidavit filed on 20 December 2019, she said, "12. He has a talent for sports, and in particular, a range of endurance sports including cycling, triathlon since his very young age of around 6. He has been awarded Championship of Hong Kong Future Cyclists Race for six consecutive years from 2014/2015 to 2019/2020.

13. He has participated in various competitions both locally and internationally and for instance, he represented Hong Kong to participate in various overseas competitions in Taiwan and Malaysia. Further, he has recently been selected to join the Searching for New Sport Stars Programme of Hong Kong Sports Institute.
14. In order to encourage him to engage in these sports, I need to pay for the training fee, the fees for uniforms and equipment as well as application/entrance fees of various local-level and international level sport games etc. If no sufficient maintenance is to be paid for the benefit of the younger son, he may be deprived of the opportunity to join the Association/ Programme mentioned above and thus his talents cannot be further developed." M said in her oral testimony that in view of the younger son's interest and his health issue, she decided to let him study Form 1 at Lam Tai Fai College, which was more sports-oriented but was under direct subsidy scheme, and because of the pandemic the college fee had recently been reduced from HK\$3,600 to HK\$3,300. M managed to apply for full subsidy of his school fees for this year and therefore this item of expenditure was not included in the table. If M had failed to apply for full subsidy, this item of expenditure would have been added to the table above. Upon query by this Court, M agreed that the extra-curriculum expenditure had been overstated and she agreed to cut it down to HK\$1,500. In her oral testimony, M also agreed that for the items of entertainment, holiday expenses and pocket money had been triple-counted. She is willing to withdraw the last two items. As to the expenditure on clothing, M is willing to cut it down to just HK\$500. In relation to other travelling expenses, as M said in her oral testimony that because of her financial situation, a lot of parents offered to help to take the younger son to training so as to save her some money, M is willing to cut this item down to HK\$3,200. The revised figure for the younger son's outgoing expenses is therefore HK\$7,550, excluding college fees. M then divides the general household expenditure (HK\$13,300) into 3 portions, namely hers and those for the two children, making HK\$4,433 (round-up figure) each. In Court, M confirmed that she was prepared to adjust her request for the younger son's maintenance downward. As to the elder son's expenditure, M admitted that for those items the figures to which I have marked with an asterisk, they were in fact paid by the elder son out of the HK\$4,000 he obtained from F. M is prepared to withdraw those items of expenditure. As to the expenditure on extra-curricular activities, she said that although the elder son paid for most of them himself, M needed to incur around HK\$400 per month towards this item. The revised figure of the elder son's expenditure is therefore HK\$1,750. Again, adding the 1/3 of the general household expenditure, the maintenance for the elder son should be HK\$6,183. As to the means of F, M

said in her supplemental affidavit filed on 29 September 2020 (“M’s affidavit”), “11. I am given to understand that F owns a landed property in mainland China, however, the address of which is unknown to me. 12. F previously owned a landed property.....in Sceneway Garden....I have instructed my solicitors....to conduct a land search in respect of such property.....as from the land search result...:- (a) On 3 January 2011, F and....entered into the Agreement for Sale and Purchase....for purchase at the consideration of HK\$4,838,000. (b) On 28 February 2011, an Assignment was executed....and on the same date,...a Mortgage Deed....in favour of the Hong Kong and Shanghai Banking Corporation Limited. (c) On 19 January 2018, F (as seller)....entered into Agreement....for sale of the property at the consideration of HK\$9,168,000. (d) On 3 April 2018, an Assignment....was executed...the mortgage has been fully redeemed...” M has exhibited all relevant land searches in her affidavit. M also said in her affidavit that F has other sources of income, “14. According to the latest Social Investigation Report dated 12 August 2019, F together with his family are operating a takeaway restaurant business in Tsimshatsui, Hong Kong and I verily believe that such restaurant is still on-going. I know that the trade name of such restaurant business is TY. F has already been operating TY since 1999 onwards. As far as I know, although F was operating TY together with his family members, he was at all material times the person-in charge of TY and has been allotted more than half of the profits earned thereby. I know that the monthly turnover of TY is around HK\$600,000.

15. With the prior approval of the Director of Legal Aid, I have further instructed my solicitors... to conduct a business registration search and company search on TY; however, I have been advised by my solicitors and verily believe that no relevant results in respect of TY could be located. During the marriage, F held another (unlimited) company called “EA” to conduct other businesses. It is therefore not surprising that F may not use TY as the company name of his restaurant business. However, despite various attempts made by my solicitors, the name of the company holding the restaurant business could not be revealed so far.... 16. I have instructed my solicitors,...to conduct various searches in respect of TY through other means. I have been told by my solicitors and verily believe that they have conducted searches at the mobile phone applications called “OpenRice” and are able to locate a restaurant “XX” therein. I could recognize and confirm that such “XX” is the same as F’s TY....
18. As far as I know, while running TY, F has all along been working as an insurance agent in Hong Kong. I have instructed my solicitors to conduct a search at the online Register of Licensed Insurance Intermediaries of the Insurance Authority. I have been told by my solicitors and verily believe that such a search result reveals that F is still a registered individual insurance agent and his appointing principal is China Taiping Life Insurance (Hong Kong) Company Limited...
19. As such, I verily believe that F would have no difficulty and in fact more than sufficient means to satisfy latest maintenance orders to be made for the benefit of the children.” Discussion Having heard M’s evidence in Court and in particular, and after she expressed

willingness to revise the figures of both children's expenditure, I am satisfied that the amounts incurred are reasonable. I will allow the elder son's maintenance at HK\$6,183, plus the HK\$4,000 he receives from F direct. As for the younger son, I will allow HK\$7,550 + HK\$4,433 = HK\$11,983 rounding up to HK\$12,000 as his maintenance. As this amount is exclusive of college fees, if M fails to obtain full subsidy, she will need to make an application for variation again. As to M's income and earning capacity, I accept that because she has to look after the children, she cannot find a full-time job. Although I find that an hourly rate of HK\$45 per hour is on the very low side for a part-time domestic helper, I accept her evidence that she has no qualifications and/or training for a domestic helper and therefore she cannot work for any company but can only help her friend with the household chores at such a discounted rate. I also accept that even if she manages to find time to look for more work to double the amount of her present pay, looking at the general household expenditure in her Form E, she can only manage to support herself. It is almost impossible for her to make any contribution towards the children's maintenance. As to F's income and earning capacity, I accept what M said in her affidavit. In Court, M explained that most of the information she learnt about F, including his property in China, came from the elder son. With regard to the restaurant's profits, M explained that the restaurant suffered no adverse effect in the Covid-19 situation because it mainly operates takeaway business. As the elder son goes to the restaurant every weekend to work as a part-time cashier, it is the elder son who told M that the business is having a turnover of HK\$20,000 – HK\$30,000 during weekdays and HK\$10,000 – HK\$20,000 during weekends. She therefore estimates the turnover to be around HK\$600,000. I accept her evidence. With that financial position, it is my finding that F is able to pay an additional few thousand dollars monthly towards the children's maintenance. Even if I am wrong about this, it is because F chose not to file any affidavit in reply to M's affidavit and to file any Form E to inform this Court of his difficulty (if any). Costs In the light of my findings, I fail to see why costs should not follow the event. Order The Petitioner do pay to the Respondent HK\$10,183 rounding down to HK\$10,150 for the elder son's maintenance, commencing from 21 April 2021 until the child reaches the age of 18 or finishes full-time education, whichever is the later; Paragraph 3 of the Order made before Deputy District Judge Kot on 18 October 2009 be varied so that the Petitioner do pay to the Respondent the sum of HK\$12,000 commencing from 21 April 2021 until the child reaches the age of 18 or finishes full-time education, whichever is the later; Costs of these proceedings including all costs reserved be to the Respondent and the Respondent's own costs to be taxed in accordance with Legal Aid Regulations. (Susan Wong) Deputy District Judge The Petitioner was not represented and did not appear Messrs Ernest Tang, Solicitors represented the Respondent

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