

HONG KONG / JUDGMENT

# LSFB v. LWO

## COURT

Family Court

## DECIDED

11 September 2009

## CASE / FILE NUMBER

FCMC6499/2004

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bjbj u>eQ FCMC 6499 / 2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 6499 OF 2004

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BETWEEN LSFB Petitioner and LWO Respondent

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Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Date of Hearing: 7  
September 2009 Date of Judgment: 11 September 2009

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## J U D G M E N T

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### Introduction

AUTONUMOUT This is an application by a petitioner wife for ancillary relief for herself and the two children of the family. She seeks the transfer of a property currently held in the husband s sole name, into her own name.

### Background

AUTONUMOUT The parties married on the 11 August 1988 and had two children, a girl who is now aged 19 years and a boy who is now aged 16 years. Unfortunately the elder daughter suffers from epilepsy and although she attended a course last year at the VTC School of Business and Information Systems, she is presently unemployed. The son is studying Form 4. Both children reside with the wife. The wife issued divorce proceedings on the 18 June 2004 based on the husband s unreasonable behaviour. The decree nisi was pronounced on the 20 May 2005 and the decree absolute on the 11 March 2006. Although directions were given to set this matter down for trial on the 16 February 2006, the wife did not choose to proceed with the application until now. Background to the marriage AUTONUMOUT It is the wife s case that the husband began to spend

less and less time with the family from about 1999 2000 onwards. On the 28 January 2004 he left the matrimonial home and she has not seen him since. She confirmed that the children have had no contact with him. The husband's father also came to court to give evidence. He also confirmed that he had not seen his son for a very long time and that he did not know where he was.

AUTONUMOUT The wife all along worked as a sales girl, whereas the husband worked as a general decoration worker. Prior to their marriage the couple applied for a public housing unit. However because of the long waiting lists they had to look for alternative accommodation. It was then that they decided to purchase a small unit. As they only had limited savings, the husband's father (old Mr L) contributed the sum of HK\$200,000 towards the purchase of Flat X, X/F, Block XX, (T House), Tsuen Wan Centre, No. 98 Tsuen King Circuit, Tsuen Wan, New Territories for them. The purchase price was HK\$425,000. The wife said in her affirmation that initially the couple thought that the property should be held solely old Mr L given that he was contributing almost half of its purchase price. However old Mr L refused to sign the provisional sale and purchase agreement saying that the HK\$200,000 was an unconditional marriage gift for the couple. Consequently the property was purchased in the husband's sole name. AUTONUMOUT At the beginning of their marriage the parties lived in this property. The wife gave evidence that they both contributed financially towards the mortgage and the other household expenses and that they pooled their income for that purpose. The mortgage was repaid early as the parties took advantage of early redemption repayment terms. AUTONUMOUT In or about the end of 1993 the parties moved in to live with the wife's parents, who assisted them with childcare. Old Mr L lived in the property from time to time and the wife also attempted to lease it out. Unfortunately this was not very successful and on one occasion she had to take steps to repossession the property.

AUTONUMOUT The property is presently vacant, but in a very poor state of repair.

AUTONUMOUT From about 1995 1996 the also husband began to contribute less and to the family expenses, as he spent less and less time at home. It is the wife's case that he made no contribution at all from about 2000.

## Issues

AUTONUMOUT It seems to me that the following issues need to be determined by this court:

Capital What is the computation of available assets? How should those assets be divided bearing in mind the principles of need, compensation, sharing and the s.7 factors? To what extent should the court depart from the yardstick of equality when dividing the said assets, bearing in mind the circumstances of this particular case? The law Ancillary relief AUTONUMOUT The applicable principles, which govern applications of this nature can be found in DD v DKW (CACV no. 91 of 2007). Reference was made in that case to the principles of needs (generously interpreted), compensation and sharing. Overall the court is charged with dividing the assets fairly. Any division of assets should be considered against the yardstick of equality. Where the principle of need means that one party may receive more than 50% of the available assets, then need may in some circumstances over ride the concept of sharing. AUTONUMOUT In DD v DKW, the Hon Mr Justice Cheung JA identifies the section 7 factors, which the court must take into account when considering an application for ancillary relief, under the headings of need, compensation and

sharing. For ease of reference I repeat section 7 again as follows: (7)(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. AUTONUMOUT Reference will be made specifically to these sections under the headings identified by Mr Justice Cheung below. The Wife s Capital and Income AUTONUMOUT The wife has little capital herself. According to her Form E she had limited savings (HK\$53,000), 500 MTR shares (HK\$7,500), some life assurance policies and an mpf fund of just under HK\$200,000. This was at 26 October 2005. The wife is now 45 years of age and therefore she is not eligible to claim against the mpf fund for quite some considerable time. In September 2006 the Mitsubishi store, in which she had worked for 19 years, closed down. She received a severance payment of HK\$270,000. It is her case that she has used this in order to support her living and that of her family from September 2006 to January 2008. She presently works in her elder sister s caf /tea house earning HK\$7,300 per month. She says that she has also relied on the good offices of her family who help her financially. Her elder sister gives her children pocket money and takes them out for supper etc. The wife said that she had not kept a record but that she estimated that she had borrowed between HK\$50,000 HK\$60,000 from her elder sister. Discussion AUTONUMOUT I must now turn to consider the issues, the law, and the wife s evidence as set out in her Form E and narrative affirmation. The husband has not taken part in the proceedings and no evidence has been filed. What is the computation of available assets? AUTONUMOUT Apart from Flat X there are very few assets. It is the wife s case that she has used up all her savings to support herself and children. The wife estimates that the property is presently worth in the region of HK\$900,000 HK\$1 million. There are a number of encumbrances charged against the property for non-payment of management fees, government rates and rents etc. The wife also estimates that it will cost in the region of HK\$80,000 to renovate the property. It is estimated that

somewhere in the region of HK\$250,000 will be needed to repay outstanding encumbrances and to undertake the renovation. AUTONUMOUT On that basis there is approximately HK\$650,000 HK\$750,000 available for distribution. This does not take into account the wife's potential liability for legal costs. How should those assets be divided bearing in mind the principles of need, compensation, sharing and the s.7 factors? To what extent should the court depart from the yardstick of equality when dividing the said assets, bearing in mind the circumstances of this particular case? AUTONUMOUT The wife asks that I transfer the whole of Flat X into her sole name. She asks for that on the basis of need. Given the lack of support from the husband in the past and the fact that she cannot rely on him for any form of financial support going forward, she argues that she needs the whole of the property to be transferred to her. I agree, especially given the fact that the elder daughter is suffering from epilepsy and may need to be financially supported, in part at least, for some years to come. The wife also points to the fact that the son has at least another three years of schooling to go. Although the wife is working she is not able to fully support all three of them and is relying on her family for assistance. AUTONUMOUT Old Mr L has filed an affirmation and came to court to give evidence. He confirmed that the original HK\$200,000 that he contributed towards the purchase of Flat X, was indeed a gift. He asked that the property be transferred to the wife. The section 7 factors AUTONUMOUT I am also charged with considering the section 7 factors. I have done so in the body of the judgment but for the avoidance of doubt I will add as follows:

- 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; AUTONUMOUT The wife has a limited earning capacity. She is presently earning just over HK\$7,000 per month. Although in theory I accept that she has a greater earning capacity (in the past she has earned up to HK\$10,050 per month as a sales assistant), I also accept that given her daughter's illness and her other domestic responsibilities it is difficult for her to work other than in her current capacity. I also accept that her age may count against her in the very competitive environment of retail. She has no other property other than as set out above and her claim against Flat X. I accept that her other financial resources, i.e. her severance pay and other savings have been used to support the family since being made redundant. Need
- (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; AUTONUMOUT I accept that the wife needs to be able to support not only herself but also the children of the family going forward. Under the new educational system the son has another three years to go at school. The wife said in evidence that he may then undertake some form of vocational training. She estimates the fees for this at HK\$29,000 per annum. His living expenses will also need to be provided for. She puts her current general expenses at HK\$7,696 per month, plus an additional HK\$3,483 for herself and an additional HK\$3,894 for the son i.e. c HK\$15,000 in total. I accept the wife's estimates, which do not strike me as being inflated or in any way unusual. Thus each month she has a shortfall of nearly HK\$8,000 per month.

- (c) the standard of living enjoyed by the family before the breakdown of the marriage; AUTONUMOUT The parties had a normal working class standard of living.
- (d) the age of each party to the marriage; AUTONUMOUT The wife is 45 and the husband 47 years of age.
- (e) any physical or mental disability of either of the parties to the marriage; AUTONUMOUT This is not in issue. Compensation The prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for the benefit of the family during marriage. In short marriages the financial disadvantage a party suffered, if any, on entering the marriage. AUTONUMOUT This is not particularly pertinent here. Sharing
- (e) 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; AUTONUMOUT I accept that the wife contributed fully to both the upbringing of the children and to the family finances. The duration of the marriage; AUTONUMOUT This is a long marriage of some 18 years duration, although the parties were separated for some of that time. The conduct of the parties such as it would be inequitable to disregard AUTONUMOUT This is not of relevance here.

## Conclusion

AUTONUMOUT Consequently in the circumstances of this case it seems only fair and reasonable for the property to be transferred to the wife subject to the current encumbrances on that property. I will make an order as follows: The Respondent do within 21 days transfer to the Petitioner subject to the current encumbrances on the property all legal and beneficial interest in the property known as Flat X, X/F, Block XX, (T House), Tsuen Wan Centre, No. 98 Tsuen King Circuit, Tsuen Wan, New Territories, failing which the Registrar of the High Court be authorized and requested to execute the transfer in question on his behalf. Costs be to the Petitioner in any event. ( Sharon D. MELLOY ) District Judge Ms B Chan of Messrs Ho & Wong for the Petitioner Th 1udk 1udk U V &`#\$ &`#\$ 9#\*BB #W&d Bs>L #W&d & 6" English.dot Administrator Microsoft Word 9.0 Title ~>eQ ~>eQ ~>eQ Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 27 October 2026 · Esheria