

HONG KONG / JUDGMENT

M D, MP v. M, MGA**[2022] HKFC 33****COURT**

Family Court

DECIDED

15 February 2022

CASE / FILE NUMBER

FCMC751/2018

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

FCMC 751/2018

**[2022] HKFC 33 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 751 OF 2018**

BETWEEN M-D, MP Petitioner and M, MGA Respondent

Coram: His Honour Judge G. Own in Chambers (By Paper Disposal) Date of Decision: 15 February
2022

D E C I S I O N (Section 18/Decree Absolute)

Introduction

The Petitioner was the Wife (“W”) and the Respondent was the Husband (“H”). 2. On 30/9/2021, H issued a Summons seeking, inter alia, for :- “(1) A declaration be granted pursuant to Section 18(1)(b)(i) or Section 18(1)(c) of the Matrimonial Proceedings and Property Ordinance, Cap.192; (2) Time for the Petitioner to apply for the Decree Absolute be abridged and the Respondent be at liberty to apply for Decree Absolute on an expedited basis in the event the Petitioner fails to do so within 1 week of the Section 18 declaration being granted.”

Background

3. Parties married each other in February 1999. There are 2 children of the family whom I will refer to them as “C” and “K” respectively, who are at the age of 18 and 13½ at the time of this Decision. 4. In January 2018, W issued Petition for divorce relying on the fact of

“Unreasonable Behaviour”. The divorce suit was uncontested by H. 5. In March 2019, Decree Nisi was granted. On the same day, H and W were granted joint custody of the 2 children. W was granted care and control of both children and H was granted reasonable access. 6. Ancillary reliefs were adjourned for further disposal. Parties have attempted several sessions of Private Financial Dispute (“FDR”) which turned out to be unfruitful. 7. It is common ground that this is a “big-money” case. The assets at stake, be it marital or non-marital, comprised of the former matrimonial home in Stanley, Hong Kong, worth around HK\$330 million, properties in Beijing, Canada, Dubai and also land in Australia. There are also local and overseas bank accounts and investment brokerage accounts where substantial sums were kept. 8. W was at the age of 54. H was at the age of 55. The Law 9. Section 18 of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (“MPPO”) reads :- “18. Restrictions on decrees for dissolution, annulment or separation affecting children The court shall not make absolute a decree of divorce or of nullity of marriage, or make a decree of judicial separation, unless the court, by order, has declared that it is satisfied :- that for the purposes of this section there are no children of the family to whom this section applies; or that the only children who are or may be children of the family to whom this section applies are the children named in the order and that – arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or It is impracticable for the party or parties appearing before the court to make any such arrangements; or That there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (b). The court shall not make an order declaring that it is satisfied as mentioned in subsection(1)(c) unless it has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the court within a specified time.” 10. For Decree Absolute, the following provisions under the Matrimonial Causes Ordinance, Cap.179 (“MCO”) are of relevance :- “15. Hearing of petition

- (5) Every decree of divorce shall in the first instance be a decree nisi and shall not be made absolute before the expiration of 3 months from its grant, unless the Chief Judge by general order, or the court in any particular case, fixes a shorter period.
- 17. Proceedings after decree nisi
- (2) (a) Where a decree nisi of divorce has been granted and no application for it to be made absolute is made, then, at any time after the expiration of 3 months from the earliest date on which such an application could have been made, an application for a decree absolute may be made by – in a case where the decree nisi was granted on a petition for divorce, the person against whom it was granted; or in a case where such a decree was granted on an application for divorce, either of the parties by whom the application was made.” 11. The Chief Judge (formerly Chief Justice) issued the Matrimonial Causes (Decree Absolute) General Order 1973 which reduced the period of 3 months after expiration of the Decree Nisi

to 6 weeks for decree nisi pronounced on or after 3 July 1973. 12. Further, Rule 65(4) of the Matrimonial Causes Rules, Cap.179A (“MCR”) provides :- “(4) An application by a spouse for a decree nisi pronounced against him to be made absolute may be made to a judge or the registrar, and the summons by which the application is made (or, where the cause is pending in the District Court, notice of the application) shall be served on the other spouse not less than 4 clear days before the day on which the application is heard.” Cases and Authorities 13. In the case of R, LH (also known as J, LH) v J, MS [2020] HKFC 209 where my learned sister Judge Melloy after referring to the statutory provisions of Section 18 of the MPPO, said : “8. It is perhaps trite, but worth repeating that when considering a section 18 declaration the court is concerned not only with the actual arrangements for a child’s practical care (and the accompanying orders inter alia for custody, care and control and access etc as here), but also with the accompanying financial orders for the child’s maintenance. In some circumstances, it is possible for the court to accept an undertaking from a parent to provide financial support for a child in the future and on that premise to grant a section 18 declaration, notwithstanding the fact that a final agreement or a final court order following a trial on ancillary relief has not yet been obtained.” 14. In the leading case of JAH v VH [2013] HKFLR 664 where the petitioner wife in the case did not wish a decree absolute to be granted. She was concerned that she might be severely prejudiced financially if the decree absolute was granted before the ancillary reliefs order was effected. Mr. Justice Cheung JA referred to the UK case of Dart v Dart [1997] 1 FCR 21 and set out the proper test to be applied, said as follows :- “VI. What is the test ? 7.2 The Judge held that the proper test is that ‘the opposing spouse must establish special or exceptional circumstances to satisfy the Court that it is just to refuse the grant of a decree absolute. He then held that ‘when the opposing spouse raise financial prejudice before determination of the ancillary relief as a special or exceptional circumstance, he/she must prove that the prejudice as alleged is real, failing which the mere fact that the ancillary relief is yet to be determined is not sufficient. 7.3 I have no doubt that when the respondent spouse against whom the decree nisi was made invoked the inherent jurisdiction of the Court, as in Dart, to delay or stay the making of a decree absolute, special or exceptional circumstances must be established. After all, the petitioner spouse for whom the decree nisi was made in his or her favour is entitled to have it made absolute as of right. 7.4 What then is the position when it is the petitioner spouse for whom the decree nisi is made in his or her favour wishes to delay the making of the decree absolute ? The reality is as Thorpe LJ observed in Manchanda v Manchanda [1995] 2 FLR 590 at page 596 that : ‘.....Many petitioners have applications for ancillary relief that are not finally determined until long after the decree nisi. For many reasons they are generally loath to lose that protection it should only be in the exercise of a judicial discretion after they have had a proper opportunity to present their opposition.’ 7.5 As against this, there is the public policy consideration discussed in Blunt v Blunt [1943] AC 517 which is relied upon by Mr Pilbrow SC, counsel for the husband, that the interest of the community at large, judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. 7.6 In my view the

public policy of ensuring a marriage that has been irretrievably broken down be put to an end without further ado must be subject to an equally important public policy of ensuring the spouse who opposes the making of a nisi absolute, must not be prejudiced in terms of financial provisions by way of ancillary relief. It is not necessary for me to come to a view whether the 'special or exceptional circumstances' test is to apply to a case like the present one where it is the petitioner spouse who opposes the making of a decree absolute. It is sufficient for me to say that, based on the authorities, the Court may refuse to make the decree absolute, if the opposing spouse can truly establish financial prejudice. This is the test that the Judge had actually applied in the present case." 15. That said, this is the test that I will apply to the present case. Case Management Directions 16. H's Summons was scheduled for a 15-minute call-over hearing on 8/10/2021. At the call-over hearing, the Summons was set down for substantive argument (with half day reserved) on the first available date to be fixed in consultation with Counsel's diaries. Directions were also granted for the parties to exchange affirmations. 17. On 26/11/2021, upon H's lawyers application (by letter) for the substantive hearing be conducted by way of VCF, this Court granted the following case management directions. The directions are :- "2. Substantive hearing on 20 December 2021 be vacated and Respondent's application be dealt with by paper disposal upon : Respondent's 5th Affirmation attached as Exhibit "KNM-5-1"; and Petitioner's 7th Affirmation marked as Exhibit "WCOC6-1" 18. On 30/11/2021, W's lawyers wrote to this Court confirming that W was not planning to attend the substantive hearing in person as she was also in the United States. In any event, it would not be feasible for W to attend the hearing via VCF given the extreme time differences between Hong Kong and the East Coast of the United States. 19. On 30/11/2021, this Court granted the following additional case management directions, namely :- "1. 2. In addition to (i) and (ii) of paragraph 2 of the Order, there be included Affirmation in Reply by Respondent to be filed by 3/12/2021 (as per Order on extension of time dated 30/11/2021); 3. Respondent do have leave to file and serve legal submissions (limited to 5 pages, font size 14, spacing 1.5 and single sided) on or before 16/12/2021; 4. Petitioner do have leave to file and serve legal submissions (limited to 5 pages, font size 14, spacing 1.5 and single sided) on or before 30/12/2021; 5. Respondent do have leave to file and serve legal submissions in reply (limited to 5 pages, font size 14, spacing 1.5 and single sided) on or before 6/1/2022; 6. No further legal submissions be filed by either party without leave of the Court; 7. Directions on Respondent's application be dealt with by paper disposal do stand." 20. H's Affirmation in Reply (unsworn) was then submitted as his 6th Affirmation under Exhibit "LTYN2-1" to his lawyer's Affirmation. The parties' positions 21. The reasons put forward by H for the need of an expedited Decree Absolute can be summarised as follows. 22. First, he had separated from W when he started his employment in Toronto, Canada, back in 2016. Since then, both of them had led two separate and different lives which, by the time of the trial on ancillary reliefs scheduled for July this year, would be around 6 years. 23. Secondly, he has been in serious relationship with one Madam G since November 2018 with whom he had lived for the last 1½ years since March 2020. He had now planned to marry Madam G and moved on his new life upon conclusion of these divorce proceedings which had lasted for around 3½ years by now. 24. Thirdly, Madam G is

now pregnant and the expected date of delivery was 28/2/2022. Given such fact, H wanted to be married to Madam G as soon as possible before their child was born in order to give Madam G and their child their proper status. 25. Fourthly, he has concerns about stigma and discrimination, and further that in some areas, the law can be seen to treat illegitimate child with disfavour. To his understanding, his rights as a parent are restricted over an illegitimate child. 26. W in her 21-page Affirmation in Opposition (unsworn) produced as her 7th Affirmation made reference to some other events which had taken place earlier and set out in her 1st, 4th and 6th Affirmations as well as H's 1st and 4th Affirmations already produced before the Court. 27. In gist, W's ground of opposition was that there would be real and tangible financial prejudice both to her and the children of the family if H's Summons was granted and a Decree Absolute was made. 28. First and foremost, there had not been any financial orders granted in respect of marital assets or maintenance. There are only 2 Orders granted, one on 26/3/2019 about custody, care and control of the 2 children; and another one on 14/7/2021 restricting H's access over the younger child K. Perhaps it is worth mentioning that there are serious psychological issues over the younger child K who had received intensive treatment in Hong Kong and lately in the United States. Anyway, W has accompanied K to the United States back in August 2021 and still there at the time of this Decision. H was also in the United States with Madam G expecting the birth of their baby. 29. According to W, the total marital assets are in the region of around HK\$1.2 billion and this is a "big money" case by any measure. However, the only meaningful assets which she has control are (i) the former matrimonial home in Stanley ("Stanley Home") where she was still residing whilst she was in Hong Kong; and (ii) the Land in Australia registered in her sole name which she had disclosed earlier in her 1st Affirmation. 30. On the other hand, H is the registered owner of all the brokerage accounts with Goldman Sachs, numerous bank accounts, numerous private investments, an apartment in Beijing, China ("Beijing House"), a new house purchased in Dubai. There was a house in Toronto, Canada ("Toronto House") which W said H had sold egregiously without accounting her 50% share of the net sale proceeds which was around C\$6.30 million. W had already issued a Summons for H to account for and pay her back the C\$6.3 million. Such application had already been directed to be dealt with by way of paper disposal and the decision of which is pending. 31. H resigned from his Executive position in a prominent Government Bureau in Canada around February 2021. He was entitled to an Exit package which was believed to be of substantial sums where details of which had yet to be explored by W unless H voluntarily disclosed them. 32. Upon scrutiny of H's belated disclosure of his updated bank statements on 22/10/2021 and with H's answers to questions raised, W was able to confirm that H had spent at least US\$7.2 million in the year 2021 which consists of the following : C\$1.5 million in April and May 2021 as partial payment for a US\$4 million property which H purchased in Dubai; US\$2 million was invested in Sxx Capital in March and June 2021; US\$500,000 was gifted to Madam G on 14 July 2021 (which was the same as the 2nd Children Appointment in these proceedings when H did not attend); US\$3.5 million was invested in Lxx Investment Technologies in September 2021. 33. It is also W's case that the financial support provided by H for the last couple of years had been sporadic and at H's whim. There was a joint account

with Standard Chartered Bank in Hong Kong (“SCB Joint Account”) where H, at his wish, transfer funds for the benefit of W and the children. Within the calendar year of 2021, H had made only 2 transfers totalling approx. HK\$27 million into the SCB Joint Account as follows :- C\$2 million (approx. HK\$12 million) on 15 January 2021; and C\$2.5 million (approx. HK\$15 million) on 10 September 2021. 34. Whilst the amount of approx. HK\$27 million might appear to be a significant sum, the monthly expenses payable therefrom were for H, for her and for the children which are substantial and ongoing. In summary, the expenses payable from the SCB Joint Account include :- Medical and other needs of the children who have serious, acute and chronic conditions; Children’s travel expenses; Children educational expenses; Mortgage instalments and running costs of the Stanley Home; H’s and her own legal fees; Rental and furnishing for 2 residences in the United States (one for C; the other one for W and K); Other expenses of the 2 children in the United States including car rental, clothing, food and other household expenses. 35. At this stage, it is unclear how long the younger child K would have to stay in the United States for her intensive and ongoing treatment. Thus, the exact amount of costs required for K’s treatment could not be ascertained save that it is fair to say those costs would certainly be significantly higher as compared to those in Hong Kong. 36. There are other complaints by W over H’s manipulation of assets that he held solely or otherwise, which are or might be marital assets of which she and the children should be entitled upon the trial of ancillary reliefs. Amongst these complaints, there are :- H instructing the CIBC bank in Canada not to execute her instructions on transfer of monies from their joint account with CIBC bank to her personal CIBC bank account; and H’s transferring the sum of C\$6,320,000, which was almost all of funds in the CIBC joint account seemingly by 53 separate transfers online on 1 October 2021. 37. Furthermore, W said H had once asked her to sign a document to remove her as one of the directors of the company Mxx Txx which holds the ownership of the Stanley Home. H also instructed the company secretary of Mxx Txx to stop sending correspondence to the Stanley Home. Still further, H had instructed the company secretary of another company Ixx not to contact W by claiming that H himself would be the authorized representative of both H and W. 38. Given all the above, W said no concrete Undertakings have been provided by H to safeguard hers and that of the children’s future financial position before the ancillary reliefs trial. The Section 18 declaration should not be granted. 39. To oppose granting the Decree Absolute at this stage, W submitted that there was a real risk of financial prejudice arising from 3 perspectives; namely, that (i) H would lose incentive to participate in the ancillary reliefs proceedings; (ii) in the unfortunate event that H dies before the ancillary relief was concluded, she would be left with no alternative but to apply for inheritance under the existing statutory provisions; and (iii) she would be barred from applying maintenance pending suit/litigation funding. 40. H in his 6th Affirmation in Reply (unsworn) brought forward certain safeguards for the interim period (pending the outcome of the ancillary reliefs trial) to cater for W’s concerns. They are as follows :- Monitoring and topping up the balance within the SCB Joint Account to ensure the bank balance would not fall below HK\$15 million; Providing medical insurance for the children until they reach the age of 18 or finishes full time education; Setting aside a sum of HK\$20 million (or such other sum as

the Court deems fit) into a trust for the benefit of the children until they reach the age of 18 or finishes full time education. 41. H in his Affirmation in Reply made the point that preserving family's financial status quo necessarily involves exercising discipline and instilling safeguards to ensure that needs are met and assets are prudently managed. Done incorrectly, it permits wanton spending and needless depletion of hard-earned resources on reckless legal exercises. 42. H denied there was any disposition or dissipation of the assets under his control and certainly he was not in the manner which W had done with the funds that she had direct access. On 5/11/2021, he instructed his lawyers to put forward to W a so-called "Charman option" which suggested a sum of approx. HK\$75 million be kept with W on her balance sheet as an advance payment and as part and parcel of her ancillary relief application. Such proposal was, after exchange of lawyers' correspondence, not accepted by W. 43. H also refuted W's allegations made against him in her 7th Affirmation. I do not intend to go through each and every one of the allegations and replies since no finding of facts could be made at this stage without the benefit of hearing parties' cross examination to determine veracities of the allegations and replies and also their credentials. Discussion Section 18 declaration 44. I noticed that there are solicitors' correspondence where the notion or idea of undertakings were canvassed by the parties, however, no formal Undertakings had actually been filed by H with the Court at the time of or before he issued the present Summons for the Section 18 declaration. Leaving aside any Undertaking to financially support the children, there was not even an Undertaking filed by H that he would bring the question of children arrangement before the court within any specified time as prescribed by Section 18(2) of the MPPO. 45. Going through H's financial portfolio and the actual children's arrangements at present, and in the absence of any maintenance orders upon H or undertakings from H, I am not satisfied that the children's welfare have been satisfactorily arranged or are the best that can be devised in the circumstances for a declaration to be granted under Section 18(1)(b)(i) of the MPPO. 46. The need for an imminent 2nd marriage of H and Madam G, and/or H's wishes to ensure their unborn child's legitimacy upon birth, in my decision, could hardly be accepted as circumstances desirable for granting the declaration under Section 18(1)(c) of the MPPO. 47. Although H's wishes and desire to lead a new life after the failed marriage and the legitimacy of the unborn child are of importance on public policy grounds, the interests of the children within the failed marriage, on the other hand, should not be curtailed or compromised. In my view, this is the rationale behind or legislative intent for the need of a Section 18 declaration preceding making the final Decree Absolute. This is especially so where the children, as in the present case like K and, to a lesser extent also C, requires additional care and special needs and attention for their upbringing. The best interests of the children have always been of paramount importance which, in my view, should not give way to their parents' personal wishes or aspirations. 48. For these reasons, I decided that no declaration should be granted under Section 18(1)(c) of the MPPO. Decree Absolute 49. Paragraph 2 of H's Summons sought abridgment of time for W to apply for the Decree Nisi to be made absolute. H also sought leave for him to do so on an expedited basis if W did not do so within 1 week of the Section 18 being granted. 50. As Section 18 should not be granted under whichever limb, be it under

(1)(b)(i) or (c) for the above reasons, such relief sought by H became nugatory. 51.

Admittedly, W had transferred from the SCB Joint Account a sum of US\$2.9 million (which is approx. HK\$22.6 million) on 1/10/2021 to her personal account. There was also refund of the excess withholding tax of US\$1,531,007.71 (approx. HK\$11.9 million) into the SCB Joint Account on 25/5/2021. 52. On the other hand, H had withdrawn a sum of around C\$6.32 million in early October 2021 which allegedly was W's 50% interests of the sale proceeds of the Toronto House from the CIBC joint account. According to the "Charman option", H admittedly had spent around HK\$75 million which, if added to the C\$6.32 million (approx. HK\$38 million) that he had withdrawn, was around HK\$113 million. 53. That said, I accept W's contention that, if the Decree Absolute was granted at this stage, she would be financially prejudiced given the fact that there was substantial disparity between her and H over the disclosed liquid cash, not even mentioning the value of any other assets, disclosed or undisclosed, or investment income or cash balances. 54. W's first concern of H's losing incentive to participate the ancillary reliefs is well-founded. H needed the Decree Absolute for him to be able to marry Madam G and; once that had happened, it is perfectly legitimate for H to arrange financial planning for his new family with Madam G in whatever way he chooses or wishes. The marriage would, as a matter of law, also avoid any prior wills or codicils from being effective or operative, had there been any in favour of W. 55. Given H's disclosure of his bank statements belatedly after W had issued a Summons on 1/9/2021 for specific discovery, I find that it is likely or probable that H would lose incentive to progress with W's ancillary relief after he had obtained the Decree Absolute that he wanted. 56. The ramification upon the unfortunate event of H's death, after obtaining the Decree Absolute and his marriage with Madam G but before conclusion of W's ancillary reliefs, is more far reaching than W so submitted. Apart from Madam G would be receiving H's estate as his spouse, the child whom F and Madam G are expecting would also have dependant interests in H's estate which W would also have to compete with. 57. W's third concern of losing right to seek maintenance pending suit/litigation funding after Decree Absolute is beyond any doubt as a matter of matrimonial rules and procedures. 58. In addition, W's Counsel Mr. Wood in his legal submissions raised a jurisdictional issue along two aspects. 59. First, since most of the substantial family wealth are located outside Hong Kong and that H himself also based outside Hong Kong, whether any ancillary relief orders could be enforced is unclear so long as H's domicile or place of residence remains unclear. 60. Secondly, there is the jurisdictional requirement under section 3(1) of the Inheritance (Provision for Family and Dependents) Ordinance, Cap.481 that H must have been domiciled in Hong Kong or having been ordinarily resident in Hong Kong for 3 years immediately preceding his death. Thus, any inheritance and succession issues regarding H's moveable property would likely be determined under the law of H's domicile wherever it was, be it Dubai or the United States. 61. I accept these two potential jurisdictional issues are properly raised which further support my decision for the Decree Absolute to be granted at this stage. 62. For all the above reasons, I find in W's favour that the Decree Absolute should not be granted at this stage. Having so decided, there is no question of abridgment of time for W to apply for Decree Absolute sought by H. The other reliefs for H to do so if W did not apply also falls apart.

Decision 63. In conclusion, I find H completely fails in his application. Costs 64. Since H completely failed in his application, I decided that the usual costs order should follow. H has to pay W's costs of his application, including all costs reserved (if any), to be taxed if not agreed. 65. I also grant Certificate for Counsel.

Orders

66. I now grant the following Orders :- H's Summons dated 30/9/2021 be dismissed; H do pay W the costs of this application, including all costs reserved (if any), to be taxed if not agreed; and There be Certificate for Counsel. 67. This is a costs order nisi which would become absolute if no application is made by any party to vary the same within 14 days from the date of this Decision. (George Own) District Judge Mr. James Wood instructed by Messrs. Gall, Solicitors for the Petitioner Mr. Jeremy S.K. Chan instructed by Messrs. Withers, Solicitors for the Respondent

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=144869

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/m-d-mp-v-m-mga-2022>

Prepared on 28 October 2026 · Esheria