

HONG KONG / JUDGMENT

M S, EFS also known as S, EF v. M,UN

COURT

Family Court

DECIDED

16 November 2015

CASE / FILE NUMBER

FCMC2038/2011

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bjbj FCMC 2038 / 2011 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 2038 OF 2011 BETWEEN M-S, EFS also known as S, EF Petitioner and M,UN Respondent Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Date of Hearing: 3 November 2015 Date of Ruling: 16 November 2015

RULING

(Re opening maintenance orders for children)

Introduction

AUTONUMOUT This hearing centres on one discreet point namely whether or not it is possible, as a matter of principle, for the Petitioner wife to reopen the issue of maintenance for the two adult children of the family, when provision has been made for them in an original consent order, entered into by the parties following a successful mediation. Both the mediated agreement and the consent order dealt with all the outstanding financial issues between the parties at that time on a clean break basis. The summonses AUTONUMOUT The wife originally filed a summons dated the 16 March 2015 which she subsequently amended on the 22 September 2015. The amended summons reads as follows: The Respondent do pay periodical payment to the Petitioner as maintenance for the children, namely M, JS and M, TN (the Children), as the Court should deem fit. In the alternative, there be variation of the Order dated 11th June 2012 (the Order) to include a provision to provide that the Respondent do pay periodical payments to the Petitioner as maintenance for the Children. The Respondent do reimburse the Petitioner on behalf of the Children or to the Children direct all the reasonable expenses the Petitioner incurred for the Children, which was not covered by the education fund as stated in Recital A of the Order since the date of the Order. Costs of this application be to the Petitioner.

AUTONUMOUT The husband for his part filed a summons dated the 15 June 2015 which sets out his position in relation to this matter. This states as follows: The Petitioner is bound by the Mediated Agreement and same Order; The Respondent has complied with the Mediated Agreement and same Order; In the circumstances, the Petitioner s summons of 16 March 2015 be

dismissed; Costs be to the Respondent. AUTONUMOUT The issue to be determined then is whether or not it is possible for the wife to seek a variation of the original order dated the 11 June 2012 in so far as it relates to the financial provision for the children. The wife argues that it is. She also maintains that:

41. The Court adopted the Mediation Agreement effectively in toto. However, it did not address the claims for the children which were included in Form 25 and properly considered. So that it might be said the Courts is not functus despite the fact that the Order has been sealed insofar as the claims for the childrens periodical payments have not been properly considered. Of course different considerations may apply to the Orders made in my favour which are described as a lump sum payable by instalments which I used to pay for the monthly maintenance for the Children. Without these monthly payments, I am unable to provide for the Children financially to sustain their living. Therefore, I need periodical payments to be paid by the Respondent to cover the Children s expenses. AUTONUMOUT It is common ground that the only reference to the financial provision for the children in the order dated the 11 June 2012, is as follows: AND UPON the parties acknowledgement that the education fund for the children of the family, namely M, JS and M, TN (the Children) shall be retained by the Children and used for the Children s education and living expenses until they finish full time undergraduate education AUTONUMOUT The children, both girls, were 20 and 19 years old at the time of the original order. It is also agreed that the original intention was to put CHF200,000 aside for each child although there is some disagreement about how that sum should have been made up. In addition the parties do not agree about the parties intention at the time with respect to the girls tertiary education, although it seems fairly clear that the sum of CHF200,000 was arrived at on the premise that the girls would undertake their undergraduate studies in Switzerland. Infact the girls remained in Hong Kong and they both attended Chinese University as overseas students. The girls are now aged 22 and 23 years old respectively. J, the eldest child has now graduated from Chinese University, but wishes to take a Masters degree. T has a language component of her course to complete in Beijing before she will similarly be able to graduate. She is seeking an exemption from that aspect of the course in any event. She also wishes to progress to a Masters. AUTONUMOUT Although there is some dispute about a short fall of CHF 39,316 for T s education fund it is generally accepted that the husband has complied with his obligations under the terms of the court order. He has paid all outstanding sums due and owing to the wife including two lump sums payable by instalments. The education fund was put aside for the girls and was meant to be used by them for their tertiary education. The parties acknowledged that the terms were in full and final settlement of their respective claims for ancillary relief. It is accepted that this only relates to the parties claims and not to any claims that the wife might have on behalf of the girls as it is not possible to dismiss a child s claim for ancillary relief. AUTONUMOUT The husband for his part has moved on. He has remarried and he has two young children. He is 56 years old. He appears to be completely estranged from his elder children and contact is virtually nonexistent. The wife says that he has abandoned them. She is now seeking additional financial support for the

girls to the tune of some HK\$3 million. She says that this is the shortfall between the education fund and the actual cost of the children completing their studies in Hong Kong, as opposed to Switzerland. She also seeks maintenance for them on an ongoing basis presumably on the premise that they will still be in full time education. The law AUTONUMOUT The law is not in dispute. Counsel for the wife makes reference to it in his written submission as follows: The Law Financial provision for children under the Matrimonial Proceedings and Property Ordinance, Cap 192 The Court s power to make financial provision orders in favour of a child of the family following divorce under section 5 of the Matrimonial Proceedings and Property Ordinance, Cap 192, is subject to section 10 of the ordinance. Although in general, no order may be made in favour of a child who has attained the age of 18 years, under section 10(3), so far as is relevant - the court may make such an order . in favour of a child who has attained the age of 18 if it appears to the court that - that child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment ..; or there are special circumstances which justify the making of the order or provisions. Under section 5(5) of the MPPO, While the court has the power in any proceedings by virtue of subsection 1(a), it may exercise that power from time to time; and where the court makes an order by virtue of subsection 1(b) in relation to a child it may from time to time make a further order under this section in relation to him. As far as a child is concerned, there can be no financial clean break and the fact that an existing order may make no provision for periodical payments or lump sum payment does not preclude a later application for such provision. AUTONUMOUT This is accepted by counsel for the husband. Discussion AUTONUMOUT Counsel further argues on his behalf that the court should exercise its discretion in this particular case and not allow the wife to proceed with her application, given that the change of circumstance, namely the fact that the children did not go to university in Switzerland as contemplated by the husband, took place three years ago. He says that it ill becomes the wife now, three years after the event and only after her instalment payments have come to an end, to make this application to the court. He points to the fact that the husband has placed much reliance on the court order. He has moved on. He has arranged his finances accordingly. By analogy counsel points to section 12 of the Matrimonial Proceedings and Property Ordinance, Cap 192, where a creditor is not allowed to enforce arrears of maintenance that are over 12 months old without first seeking the leave of the court. The rationale for that statutory provision is much the same namely that a litigant should not be able to enforce arrears that are over a year old without first seeking leave, because in such circumstances the paying party may have come to the conclusion that the other side did not intend to enforce payment. He may therefore have rearranged his affairs accordingly and taken on other financial commitments. AUTONUMOUT However, although I can see some force in the husband s argument it seems to me that it is not possible to bar the wife from making her application given the fact that it is never possible to dismiss a child s claim for financial support. It does not follow that she will be successful when the matter comes to be heard substantively either in whole or in part. It also follows that she may be at risk as to costs. But it does not seem to me that it is possible for me to deny her her day in court. It is also of note

that unlike cases concerning arrears of maintenance there is infact no statutory bar to the wife seeking to be heard on this issue. AUTONUMOUT Consequently I will make an order as follows: The Respondent s summons dated the 15 June 2015 shall be dismissed; The Petitioner s summons dated the 22 September 2015 shall be adjourned for argument. In the first instance the summons shall be adjourned for a call over on the 29 January 2016 at 9:30 a.m.; Each party do file and exchange updated financial statement Form E s within the next 28 days; Costs be reserved. (Sharon D. MELLOY) District Judge Mr. Ian Wingfield instructed by Boase Cohen & Collins for the Petitioner Mr. R Egerton instructed by T K Tsui & Co for the Respondent 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 uguYuYK hc(> hc(> hc(> hc(> hc(> h26p hNT1 hc(> qmdm[m hc(> hc(> h26p hc(> hc(> hc(> |tk[N[A hc(> hc(> hc(> hc(> hc(> zodYLAL4L htF* hc(> hc(> hc(> }ncnWJ= htF* htF* nenen hZVU htF* gdZVU ujaajajajVjVM hRl4 htF* htF* hZVU gdZVU riririr htF* hRl4 hRl4 htF* htF* vhbXND h4'C hdRS gdfy gdfy h{ l h{ l hD5k hD5k h{ l h{ l gdOC _[_[_ hcs\$ &`#\$ hc(> hc(> 1udk gdOC [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/ themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v )I`n 3Vq%`#q x}r :T'ZaG I u3 L+M2 e(O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/ themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/ theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/ themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> urn:schemas-microsoft-com:office:smarttags place DCCJ643/2003 setup Normal.dotm Judiciary Microsoft Office Word Judiciary Hong Kong SAR DCCJ643/2003 Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{7386C17A-59CC-4BE0-8ED4- DE9B16E0DA88}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/ customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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