

HONG KONG / JUDGMENT

NAV v. JTMW

COURT

Family Court

DECIDED

30 June 2015

CASE / FILE NUMBER

FCMC4191/2012

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bjbj FCMC 4191 / 2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 4191 OF 2012

BETWEEN NAV Petitioner and JTMW Respondent

Coram: Deputy District Judge I. Wong in Chambers (Not Open to Public) Date of the Respondent s
Submissions: 3 December 2014 Date of the Petitioner s Submissions: 27 February 2015 Date of the
Respondent s Reply Submissions: 13 March 2015 Date of Handing Down Ruling: 30 June 2015

Ruling on Costs (By Paper Disposal)

AUTONUMOUT By a judgment dated 23 October 2014, I dismissed the petitioner wife s
application for single joint expert reports and I also gave an order nisi that there be no order as to
costs. The respondent father now challenges the order nisi in accordance with Order 42, rule
5B(6), RHC. By his summons dated 6 November 2014, he asks for the costs order be varied such
that the petitioner is to pay his costs of and incidental to the petitioner s application.

AUTONUMOUT As a matter of fact, this is already the 2nd application on the part of the
respondent for costs to be paid by the petitioner. The 1st application was in relation to the
respondent s application for the removal of certain parts of the petitioner s affidavit and for the
return of his personal documents. By a Ruling dated 10 February 2014, I ruled that the petitioner
should bear one-third of the respondent s costs, to be summarily assessed if not agreed.

AUTONUMOUT Turning back to the original application that sparked the present costs summons,
it was an application for leave to adduce the expert evidence of (1) a psychologist and (2) an
immigration expert. As said, I ruled against the petitioner on the reasons that I have set out in the
Ruling dated 23 October 2014 (the said Ruling). I would refer to the relevant parts of the said
Ruling where appropriate. The Relevant Legal Principles AUTONUMOUT Hon Yuen JA set out the

relevant principles in *L v C*, CACV No. 169/2006 (date of judgment: 19 March 2008):

[23] As a matter of law, it is clear that costs are in the court's discretion. Pointers as to how that discretion should be exercised include the following:

- (1) in family cases, as in others, costs should normally follow the event;
- (2) however because of the special dynamics of family litigation (e.g. where the case involved children, or where financial resources were inadequate to meet the needs of both parties, etc.), the discretion may be broader than in civil matters generally (*Gojkovic v. Gojkovic* [1991] 2 FLR 233, *F v F* (No. 2) [2003] 3 HKLRD 977); ;
- (3) the court also retains a discretion to deprive successful litigants of costs under the *Elgindata* principles (*In re Elgindata Ltd* (No. 2) [1992] 1 WLR 1207);
- (4) where a litigant succeeds on appeal but only on a new point, the court can deprive him of the costs below (*Farquharson v Morgan* [1894] 1 QB 552) or even order him to pay those costs (*Yip Lai Fong v. Sin Tung Hing* [2004] 3 HKLRD 230), and the court can deprive him of the costs of appeal (*Chard v Jarvis* (1882) 9 QBD 178). AUTONUMOUT Notwithstanding the starting point remains to be costs follow the event, it is important not to forget that the basic principle is that costs are in the court's discretion. AUTONUMOUT For children's cases, the general practice is that there should be no order as to costs save when one party has been unreasonable or reprehensible in the conduct of litigation, as parents should not be deterred from putting cases concerning children before the courts. AUTONUMOUT When assessing whether a party's conduct has been unreasonable, what should be considered is his or her unreasonableness in the attitude to the litigation. In *R v. R* (Costs and Child Case) [1997] 2 FLR 95, Hale J (as she then was) said at 98B as follows: The fair point is made that in children cases one must not confuse unreasonableness in relation to the child because one might say that we are all expected to be unreasonable in our attitudes to our children and unreasonableness in the attitude to the litigation. AUTONUMOUT In *Re G* (Costs: Child Case) [1999] 2 FLR 250, Butler-Sloss LJ had this to say at 252G: If this judge in this case had found that this father had behaved unreasonably in the litigation and had gone beyond what many fathers do, seeking orders which are hopeless, the point will come at which pursuing a hopeless application becomes unreasonable. But hopelessness and unreasonableness are not necessarily the same thing. Indeed, particularly where there is a litigant in person, a degree of generosity towards a litigant may be more appropriate than to a litigant which is on legal aid generally advised by counsel and solicitors as to the extent to which they should continue to litigate. AUTONUMOUT Her Ladyship then added at 253D: It seems to me that the case of *R v R* does not change the normal situation that it is unusual to order costs, although it will be appropriate to order costs when a parent, even a litigant in person, goes beyond the limit of what is reasonable to pursue the application before the court. AUTONUMOUT In *S v S* HCMP 5547/1999 (date of judgment: 22 June 2000) Deputy High Court Judge Gill went through the authorities then available and summarised how the court may determine a contest on costs in a case involving children: In general

circumstances there should be no order for costs. Parties who have a reasonable case to put forward going to a child's welfare should not be dissuaded from doing so by threat of an adverse costs order if they do not succeed. And in a child-related case there should be no perceived winner or loser, save that it is the child who is the winner. If a party has by virtue of improper conduct attracted the proceedings which but for that may have been avoided then that might well warrant an adverse costs order. If in the course of the proceedings one party behaves unreasonably in his or her conduct of the litigation then that might be recognised in an adverse costs order. The financial circumstances of the parties and how an order for costs will impact on the parties is a factor for consideration. The general rule of not ordering costs should not deter a court from exercising its discretion to do so in circumstances it finds to be exceptional not necessarily limited to a particular category of cases. AUTONUMOUT Having set out the relevant principles, I now turn to the issue. The Expert Psychologist Report AUTONUMOUT The respondent's main bone of contention is on the petitioner's conduct of the litigation. Her adamant and unreasonable pursuit of the expert summons at a very late stage was such that it must attract an order for costs. Her conduct of the litigation has gone well beyond unreasonableness in relation to the child and instead is a clear example of unreasonableness in the attitude of the litigation AUTONUMOUT As regards the psychologist expert, first, the petitioner has been represented by an experienced family law firm, she had ample opportunity to properly consider her relocation application, including whether expert evidence would be required. Yet she took no action and only intimated her wish to appoint a single joint psychologist at the CDR hearing on 17 September 2014. By that time, it was less than 2 months before the trial. AUTONUMOUT Secondly, her application for a psychologist expert was baseless and was out of her distaste towards the views of the social welfare officer. AUTONUMOUT Thirdly, the petitioner failed to demonstrate why a psychologist report would be necessary and/or relevant to her relocation application. It was clearly a smokescreen put up to deflect from the real issue and to attempt to fish for another report. AUTONUMOUT In response, the petitioner submits that she should not be deterred from putting legitimate application before the court. The fact that her application failed does not mean that it was not a legitimated and genuine application. AUTONUMOUT The petitioner emphasises that the social welfare report on her relocation dated 3 September 2014 was only received a few days before the CDR hearing, ie on 12 September 2014. She therefore cannot be criticised for not raising this issue any earlier. There was no opportunity for her to obtain any direction at any Children's Appointment prior to the CDR hearing. In fact, at the conclusion of the failed CDR hearing, Mr Marwah, the petitioner's counsel, had already informed the court that an expert psychologist report was needed. AUTONUMOUT The respondent says he received the report on 8 September 2014. It is unknown as to why the petitioner got the report a few days late. He argues that the relocation application was initiated entirely by the mother on 20 May 2014 without any supporting affidavit at the time of its issuance. Further, she was the one who asked for the trial dates to be set down in late 2014, before the academic year started. She was well aware that the CDR hearing was fixed on 17 September 2014. Hence, she knew well that it was totally unrealistic for a psychologist report to be appointed in time between

the CDR and the trial. AUTONUMOUT I do not think when the petitioner received the social welfare report is material. What is material is if the petitioner was genuinely of the view that a psychologist report was necessary to assist the court in the fair and just disposal of the relocation issue whether by way of the CDR hearing or the trial, what she could have done was to have her application made known to the court through her counsel before the CDR hearing so that the court may either give the necessary directions, for instance, to give her more time to consider her position or to proceed with the CDR hearing. As I said in Para 7 of the said Ruling, prior to the CDR hearing there was no suggestion on the part of the petitioner that any expert was required. It was at the end of the CDR hearing, after the parties had heard the views of the social welfare officer and the observations of the court, that Mr Marwah indicated that the petitioner would require the expert opinion of a psychologist. Thus, it appeared to me that the petitioner came to the CDR half-hearted, adopting a wait and see attitude. AUTONUMOUT As I have observed in Para 21 of the said Ruling, the petitioner was utterly unhappy with the investigations carried out by the social welfare officer and her recommendations. I have also found that the matters or concerns raised by the petitioner (and set out in Para 16 of the said Ruling) could not be addressed by a psychologist; what the petitioner asked for was effectively for another social investigation report (Para 23 of the said Ruling). This could be reflected from her asking for a psychologist report on the family without reference to any particular or specific purpose (see Para 22 of the said Ruling). I incline to agree with Ms Sum, who appeared for the respondent at the hearing, that it was a fishing expedition. AUTONUMOUT Surely, it is not her submission that she did not have sufficient time to consider or prepare her application. In any event, by the time when the petitioner took out her application on 23 September 2014, with the assistance of her solicitors, she should have sufficient time to consider whether or not her application was merited. AUTONUMOUT It is true that, as has been pointed out by the petitioner, in the interim between the hearing on her application regarding the expert reports on 10 October 2014 and the handing down of the said Ruling on 24 October 2014 there were new matters arising resulting in the respondent's ex-parte application for a non-molestation order and the granting of the relevant order by the court together with the calling for an up-dated social welfare report and a psychologist report on 29 October 2014. The petitioner seems to be saying that these new matters justified her application for a psychologist report. With respect, I do not agree. The new matters are in respect of the alleged abusive behaviour of the mother which is in stark difference from the matters relied upon by her in support of her application for a psychologist report. At the time of the petitioner's application and the hearing, there was no alarming circumstance which justified the involvement of a psychologist. I do not think the respondent's application automatically or retrospectively justify the petitioner's expert summons. AUTONUMOUT For the above reasons, I am of the view that the petitioner has behaved unreasonably in her conduct of the litigation by taking out the application for an expert psychologist report. She should be met with an adverse costs order. The Expert Immigration Report AUTONUMOUT On the immigration expert, the respondent raises the same point that the petitioner had never raised the issue before the application was taken out. Her application was clearly a waste of the parties time and a

hopeless pursuit. She even instructed a senior counsel to argue for her. There is no reason why the respondent should be asked to bear his own costs incurred as a result of the petitioner's unreasonableness in the litigation. AUTONUMOUT I said the following in Paras 27 and 28 of the said Ruling:

27. The Mother's case is that she does not wish to remain in Hong Kong even if she has the ability to do so. She wishes to return home with the children so that they may have long term stability, in terms of living and education there. However, if her application for relocation fails, she would try to remain in Hong Kong because she is not leaving without the children. Therefore, the court should know the likelihood of her ability to stay. For this reason, an expert opinion is needed.
28. I accept that the likelihood of her being able to stay is relevant to the extent that if the court is inclined to refuse the relocation application, then the court would need to consider the care and control arrangement of the children in Hong Kong. AUTONUMOUT Thus, I recognized the relevancy of the immigration issue. However, I conclude in Para 30 of the said Ruling that this is a matter on Hong Kong law and thus expert evidence is inadmissible. The parties are going to give their evidence in trial and their legal representatives may address the court on this issue by way of submissions. AUTONUMOUT It is certainly valid for the respondent to point out that it was a late application. Her immigration status as a dependant of the respondent at the time must have been at the back of her mind. However, for nearly 4 months since her application for relocation, the petitioner did not mention even a word about her intended application. That said, I do not consider that this factor per se is so grave that it would have warranted the petitioner bearing the costs. It is true that I have rejected her application but I do not think the manner in which the application was made was such that she had behaved unreasonably in the conduct of the proceedings. I agree with the petitioner that it was not wholly wrong for her to bring the application before the court to ensure that the court is properly assisted at the children's hearing. The Financial Position of the Petitioner AUTONUMOUT There are also some brief submissions by the parties on the overall financial impact the costs order will have on the petitioner when she is now without income or maintenance from the respondent. AUTONUMOUT On this, I must agree with the respondent that the petitioner's financial position is not transparent. In my judgment dated 8 July 2014 on the petitioner's application for maintenance pending suit, I concluded that the petitioner has other sources of income which are much more substantial than she has chosen to disclose and she has failed to give a full and frank disclosure of her financial situation. In this regard, it should be noted that the petitioner had the means to instruct a senior counsel to argue for her in the expert summons. Apparently, she is financially in a better shape than the respondent who has to support the 2 children. Conclusion and Order AUTONUMOUT For the above reasons, I am persuaded that the petitioner should bear the respondent's costs of and incidental to her application so far as they relate to the expert psychologist report. Doing the best I can, in terms of the coverage of the evidence and the hearing, I apportion 2/3 of the costs to the expert psychologist report and the remaining 1/3 to the expert immigration report. AUTONUMOUT The cost order nisi is therefore varied as

follows.

32. I order that the petitioner do bear 2/3 of the respondent s costs of and incidental to the summons dated 23 September 2014, including the variation of the costs order nisi, with counsel certificate, to be taxed if not agreed. (I. Wong) Deputy District Judge Withers, Solicitors, for the Petitioner Hampton, Winter & Glynn, Solicitors, 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 h>L4 hb{a hb{a hb{a hb{a hb{a gdek gdek hb{a hb{a hb{a hb{a hb{a hb{a hb{a hb{a hb{a wswswsws hb{a hb{a hb{a hb{a &`#\$ [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 :TZaG 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"/> <j?XO & 6" CACV Judiciary English setup Microsoft Office Word Judiciary CACV CACV Title L{)b L{)b <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="{6B4908E5-146E-431B-A7B9-6713802AFC46}" 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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