

HONG KONG / JUDGMENT

NI v. TCHK

[2023] HKFC 253

COURT

Family Court

DECIDED

22 December 2023

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FCMC 549 / 2020

[2023] HKFC 253

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NO. 549 OF 2020

BETWEEN

NI

Petitioner

and

TCHK

Respondent

Coram: Her Honour Judge Elaine Liu in Chambers (by paper disposal)

Date of Submissions: 20 September 2023

Date of Reply Submissions: 27 September 2023

Date of Decision: 22 December 2023

DECISION

(Costs)

Introduction

On 31 August 2023, I heard the Petitioner Mother's ex parte (on notice) application for return of the Child. The Respondent Father was represented by leading counsel. Mother's ex parte (on notice) Summons was adjourned for argument inter partes. Costs of the ex parte hearing was reserved ("August Order").

At the end of the inter partes hearing on 13 September 2023, I delivered an ex tempore decision ("Decision") allowing Mother's application for return of the Child to Shenzhen. The background facts and reasons for my decision are set out in the Decision. The question of costs was adjourned for paper disposal after further submissions by the parties. This is the decision on costs.

Costs in children related applications

The question of costs are in the discretion of the court. Order 62 of the Rules of the High Court and similarly Order 62 of the Rules of the District Court set out the provisions governing the award of costs.

The general practice is that the court would usually make no order as to costs on applications relating to children matters. This general practice is not a principle, nor a rigid rule. The court may give other costs order if there are exceptional circumstances such as where the conduct of one party has been reprehensible or the party's stance has been beyond the band of what is reasonable.

As explained by the Court of Appeal in *TPL v WYY* formerly known as *WYY*, the rationale for the general practice is that the court's role to consider the custody, care and control of children is inquisitorial, not adversarial. The court is to find the best arrangements for the children. The parents should not be considered as a "winner" or "loser" in the search for the best option for the welfare of the children. The court does not wish to discourage those with a proper interest in the child from participating in the debate, nor does it wish to reduce the chance of their co-operation around the future life of the child.

At the same time, the court should guard against abuse. The general practice should not be turned into an opportunity for one parent to wear the other down financially by means of multiple interlocutory skirmishes.

Where the court finds that a parent's conduct in the proceedings was reprehensible or unreasonable, the court orders one party should pay the other's costs to the extent no more than is necessary to reflect the exceptional circumstances. The court should not be too swift to find a

parent's conduct unreasonable. There is a distinction between unreasonableness in relation to the child and unreasonableness in the attitude to the litigation. Even if a judge considers one parent's proposal hopeless, it does not mean that an adverse costs order should be made against that parent because hopelessness is not necessarily the same as unreasonableness. The policy consideration in the underlying rationale is that it is in the best interests of the children that there should be no order as to costs.

Issues

The board issues in the present case are (1) whether any of the parents' conduct in these proceedings was reprehensible or unreasonable to the extent that justify a departure from the general practice on costs; and (2) whether the costs of the ex parte hearing shall be different from the costs of the hearing inter partes.

Costs of the inter partes hearing

In support of Mother's claims for costs, Mr Surman (with Ms Leung) representing Mother argued that Father's conduct in the litigation is reprehensible and unreasonable. It was contended that he attempted to mislead the court on the time of his decision to keep the Child; failed to honestly disclose his address despite court order and requirements under the rules; against the guidance by case law, produced as evidence video recording of the Child answering leading questions and placing the Child in the centre of the dispute; and attempted to short-circuit an effectively relocation application.

They cited *LEYY v UKWK and C*, *MT v M*, *P* where the court ordered a parent to pay 50% of the other's costs on account of poor litigation conduct, as well as authorities on return of child or abduction application, including Article 26 of the Hague Convention, *EC-L v DM* (Child Abduction: costs), and *T v L*.

The costs order made in these cases are fact specific.

In *LEYY*, cost order was imposed against the father who was found to have falsely alleged the mother of child abuse, took the child to a therapist on the premises that the alleged abuse took place, he also obstructed mother's access.

In *C, MT*, the father failed to return the passport to the mother despite told by the judge to do so, and he deliberately withheld from the mother's solicitors outside court of the fact that he had recently "found" the passport of the child.

In *E, C-L v DM*, cost order was made against the mother who commenced the claim for return of the child. The judge found that the mother had made very serious uncorroborated and false allegations against the father including kidnapping of his child and forgery of documents.

T v L is a claim under the Child Abduction and Custody Ordinance and the Hague Convention for return of child. The cost order was made on a nisi basis.

In the present case, I expressed my concern on the reliability of Father's evidence and found that Father had actively planned to keep the Child with him during summer behind the back of Mother. The evidence before the court, however, is not sufficient to support Mother's arguments that Father attempted to mislead the court as he must have plans before the summer holiday to keep the Child away from Mother.

Counsel for Mother argued that information in the Child's school handbook is questionable. There is, however, no evidence of falsity nor evidence to support the allegation that the way Father handled the Child's school handbook is reprehensible.

Although Counsel for Mother mentioned at the hearing that Father should produce the school application documents, there was no discovery application. The case is in a relatively early stage. I do not consider the non-production of these documents in the context of the present hearing is reprehensible.

I have some concerns on Father's conduct in relation to the disclosure of his address in Hong Kong. The parties had given an undertaking to the court embodied in the August Order that they shall provide with each other their addresses and contact details of the Child. Pursuant to this undertaking, by a letter from Father's solicitors dated 11 September 2023, Father provided the address of the Braemar Hill property.

At the September inter partes hearing, I raised concerns on Father's unexplained omission of his residential address in his affirmation which was required by Order 41 rule 1(4) of the Rules of High Court.

To support the lease of the Braemar Hill property, Father disclosed an offer to lease at the hearing. This offer does not bear the signature of the landlord. It was stated in the offer that the lease would commence on 20 September 2023. Counsel for Mother argued that Father "fabricated" his address in the letter of his solicitors dated 11 September 2023 in breach of the undertaking embodied in the August Order, and further that Father's statement in his affirmation that he has "rented a child-friendly place" is not true.

I was critical of Father's conduct in connection with the disclosure of his address in Hong Kong, which is an important piece of evidence in opposition to Mother's application. The omission of his residential address in the affirmation might create a doubt on whether Father had secured an address in Hong Kong. However, fabrication is a serious allegation that requires cogent supporting evidence. I have not made a finding of fabrication. To be fair, the offer to lease was produced in a haste at the hearing. Father did not have an opportunity to give evidence about this offer to lease.

Counsel for Mother complained that Father had video recorded the Child, used leading questions, prepped, coached and discussed the custody and care issues with the Child, thus placing him in the centre of his parents' dispute. I strongly disapprove any attempt to place a child in the centre of the parents' dispute. I have not placed any weight on the video recording because there is no evidence on the circumstances under which the video was taken. By reason

of the lack of evidence on the circumstances in which the video was taken, this court could not reach a conclusion that the taking and the production of the video was reprehensible that justifies a departure from the general practice on costs.

As to the complaint that Father attempted to “short-circuit” the procedural safeguards on relocation, I bear in mind that the order on custody, care and control is not yet granted. I hesitate to characterise at this stage Father’s claim for the Child’s interim care and control as an attempt to relocate the Child without proper consideration of the procedural safeguards.

Ultimately, the question is whether Father’s conduct in the litigation crossed the line and became unreasonable and reprehensible that justify the award of costs against him. I have carefully reflected on the evidence as well as the parties’ behaviours in context. My answer to this question is no. There should be no order as to costs of Mother’s Summons.

Costs of the ex parte hearing

Mother first took out her application ex parte on notice. The court received Mother’s Summons and supporting documents at about 3:30 pm on 31 August 2023. The papers were served on Father’s solicitors at about 3:40 pm on the same day. Having noted the background leading to the Summons and the issues involved, the court informed solicitors for Mother at about 5 pm that the Summons would be heard at 7 pm on the same day.

Ms Vivien Leung appeared for the Mother, Ms Anita Yip S.C. (together with Mr Ken Chan) appeared for the Father at the ex parte on notice hearing.

At the end of the hearing, I directed Father to file evidence in opposition and Mother to file her evidence in reply. Mother’s Summons was adjourned for substantive argument inter partes and costs of the ex parte hearing be reserved.

Counsel for Father argued that Father should be entitled to costs of the ex parte hearing by reasons of (1) Mother’s material non-disclosure; and (2) Mother’s failure to give adequate notice of her ex parte application.

It is trite that a party has the duty to give full and frank disclosure in an ex parte application. An order obtained with material non-disclosure at the ex parte application is liable to be discharged with costs. Materiality is to be decided by the court objectively and not by assessment of applicants or their advisers.

Father cited the case *Thinking Group v Dialectric PR* in support of the contention that a party found responsible for material non-disclosure will generally be ordered to bear costs on an indemnity basis if the non-disclosure was deliberate.

It is of note that different from *Thinking Group* where the court has made an injunction order at the ex parte stage, this court has not made any order on substantive relief, but have adjourned it for argument inter partes.

Moreover, for the reasons stated below, I am not satisfied that Mother had material non-disclosure at the ex parte stage.

Firstly, Counsel for Father referred to the statement in [3] of Mother's 1st Affirmation that before the summer trip, Father "had not seen or spent much time with his father over the past 4 years". It was pointed out that Mother did not disclose the fact that Father visited the Child multiple times in the last 4 years including visits in January, August, September and October 2020, weekly access since the start of 2023 and overnight access since April 2023 as well as video access. Father contended that Mother calculated to convey a false impression that Father was an absentee father with little knowledge of the Child.

To put Mother's evidence in context, [3] of her 1st Affirmation reads as follows:

"3. In July 2023, the Respondent wanted to take [the Child] away to Thailand on holidays and as [the Child] was on his summer holidays, I allowed [the Child] to travel with his father. It was agreed that [the Child] would be returned to me after one month. However, after the one month was up, [the Child] was still with the Respondent who explained that [the Child] was attending summer camp or school or this or that. ... In the beginning, I thought nothing of it as [the Child] was on holiday, had not seen or spent much time with his father over the past 4 years and it is quite reasonable and understandable for father and son to spend a bit more time together." (emphasis added)

Mother was expressing why she allowed the Child to stay with Father initially even after the agreed period of one month. In [2] of her 1st Affirmation, Mother deposed that since the borders reopened, Father was able to see the Child a few times. On Father's own evidence, he had not visited the Child for 6 consecutive months in 2020 and then from November 2020 to 2022.

I do not find any material non-disclosure by Mother in this respect.

Secondly, Father argued that Mother had misrepresented in [4] and [6] of her 1st Affirmation by saying that the Child needed to start his new school term on 18 August 2023 and had missed school by two weeks. As Mother had subsequently revealed, 18 August 2023 was just the school's registration day and the Child had not missed school by two weeks.

Counsel for Mother has already clarified at the ex parte hearing that the school term commenced on 23 August 2023 (not 18th) and the Child had missed school for just over a week (not two weeks).

Thirdly, Father argued that Mother was trying to exaggerate the Child's connection with Shenzhen by not disclosing the fact that the Child had attended a kindergarten in Sha Tau Kok for 1.5 years since late 2017 and had subsequently applied to and was accepted by other kindergarten in Hong Kong.

There is a factual dispute on the duration of the Child's attendance in Sha Tau Kok kindergarten. Mother said it was only a few months, the kindergarten located near the border and was a stop gap arrangements while they waited for the kindergarten in Shenzhen.

It is not in dispute that the Child has attended school in the Mainland in the past 4 or 5 years. Considering the evidence in context, I do not find there is a material non-disclosure on the Child's schooling or the Child's connection with Hong Kong.

There is no merits in the second ground advanced by Father. Mother has served the papers on Father's solicitors around 10 minutes after the same was filed with the court. The evidence lodged by Mother showed that Father was not forthcoming with the whereabouts of the Child, the Wechat messages in June to August 2023 suggested Father was hiding something. There was an urgency in dealing with the case. There is no delay or withholding of the application.

The appropriate order on costs of the ex parte hearing should be in the cause of the Summons inter partes.

Conclusion

By reasons of the above, I made no order as to the costs of Mother's Summons, including the costs of the ex parte hearing on 31 August 2023 and inter partes hearing on 13 September 2023.

(Elaine Liu)

District Judge

Mr. Giles Surman and Ms. Vivien Leung instructed by Foo & Li for the Petitioner.

Ms. Anita Yip S.C. and Mr. Harry Chan instructed by Grandall Zimmern Law Firm for the Respondent.

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