

HONG KONG / JUDGMENT

NLC v. YMF

[2022] HKCA 1310**COURT**

Court of Appeal

DECIDED

1 September 2022

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CAMP 22/2022

**[2022] HKCA 1310 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NO 22 OF 2022 (ON AN
INTENDED APPEAL FROM FCMC NO 8442 OF 2018)**

BETWEEN NLC Petitioner and YMF Respondent

Before: Hon Yuen JA and B Chu J in Court Dates of Written Submissions: 17 January 2022 and 31
January 2022 Date of Judgment: 1 September 2022

J U D G M E N T

Hon Yuen JA (giving the Judgment of the Court): 1.1. This is a renewed application by the Respondent (“the Father”) for leave to appeal the Decision of Grace Chan DJ (“the judge”) given on 11 October 2021 (“the Main Decision”). The judge had refused leave to appeal for reasons given on 3 January 2022 (“the Leave Decision”). 1.2. In the Main Decision, the judge dismissed the Father’s summons filed on 20 December 2019 for variation of a Consent Order made on 17 September 2018 (“the Consent Order”) under which sole custody of the child of the marriage (“the Child”) was given to the Petitioner (“the Mother”). The Father now seeks joint custody. (In the summons, the Father had also sought staying access, which was settled at a Child Dispute Resolution on 16 October 2020).

Background

2.1. Briefly, the Father and the Mother are both now in their 40's. They were married in 2005 and the Child, a boy, was born in 2008. Another child was born later who sadly died soon after birth.

2.2. In May 2018, the Father had a child by his then girlfriend¹. 2.3. In July 2018, the Mother petitioned for divorce, which was not opposed by the Father. 2.4. Both parties were legally represented. Their respective solicitors commenced negotiations for settlement of the Mother's claims for ancillary relief and sole custody of the Child. Events in August 2018

3.1. On 15 August 2018, the Mother took the Child to her mother's flat and did not return to the matrimonial home. Despite the Father's requests to see the Child, the Mother refused to let him do so for a week. The Father then went to the grandmother's flat uninvited and saw the Child briefly. 3.2. In the following few days, the Father's solicitors wrote to the Mother's solicitors agreeing to most of the terms she had proposed, and the Mother made arrangements for the Father to meet up with the Child at a movie that he had earlier promised to take him to. Consent Order 4. A few days later, on 7 September 2018 a Consent Summons was filed, and on 17 September 2018 the Consent Order was made which gave sole custody to the Mother and day access to the Father. 5. The Mother and the Child continued to live with the grandmother in the latter's flat. Events after the Consent Order 6. Another consent order was made on 29 January 2019 dealing with ancillary relief. 7. In March 2019, the decree absolute was made, and a month later, the Father re-married (he now has two sons by his present wife). 8. At around this time, about six months after the Consent Order, the Father proposed joint custody of the Child in place of sole custody. This was rejected by the Mother. However, the parties agreed on staying access between June and November 2019 in place of day access, and they also agreed on the Father taking the Child on a holiday overseas in August 2019. The Mother's summons regarding her transfer of a property 9.1. As part of the ancillary relief settlement, the Mother was to transfer her half-interest in a property ("the TW Property") to the Father but the consent order did not specify a date for the transfer. Upon disposal of her interest, she would be able to purchase a property of her own, with the lump sum from the Father paid under the ancillary relief consent order, without having to pay additional stamp duty. As the TW property was subject to mortgage and she was the mortgagor, it was necessary for the Father to pay off the mortgage before she could dispose of her interest. 9.2. In November 2019, the Mother filed a summons for an order to that effect². The Father's summons for variation of the custody order and staying access 10.1. In December 2019, the Father filed the summons³ for variation of the custody order from sole custody to joint custody. This variation was opposed by the Mother. 10.2. The Father's grounds for varying the custody order were as follows: (1) he had been pressurised to accept the Consent Order as the Mother had not allowed him to see the Child for a period of 7-9 days in mid-August 2018; (2) he was concerned that the Mother would make important decisions regarding the Child's further education without consulting him, as she had not kept him informed of the Child's medical condition or allowed him to attend the Child's medical consultations; (3) his second marriage is proceeding well and the Child gets along with his new family; (4) the Child wanted joint custody, and that was in his best interests. The Child 11. The Child, now nearly 14 years of age, started secondary school in September 2021. In 2016, he was found to be on the autism spectrum, but he is in the high average range of intellectual

functioning. He is regularly followed-up by a clinical psychologist. He had a squint in his eyes but had corrective surgery for it before the hearing, this being agreed among the Father, the Mother and the Child. Social Investigation Report 12.1. The judge called for a social investigation report (“SIR”) which we have read. The reporting officer (“the officer”) concluded that joint custody was a “plan which was worth trying”⁴ as the parents possessed the conditions for joint custody in that: - they have joint parenting responsibilities; - they have made substantial efforts in looking for common ground regarding access; and - they did not have any significant disputes regarding the Child’s medical condition, education or religion. 12.2. As far as the Child was concerned, the officer reported that he had a good, close relationship with both caring parents, he wished to vary the details of some arrangements regarding access, but otherwise he was content to leave the matter to the court. The judge’s Main Decision 13. The matter was heard over three days. Both parents, as well as the officer, gave oral evidence. 14. The judge handed down a decision which ran to 44 pages. The judge found, in summary: (1) regarding the circumstances before the Consent Order - - the Father had not been pressurised to agree to it as (a) he was informed that the Child was staying at the grandmother’s flat, so he would not have been as worried as he claimed; (b) he was legally represented, and there was no indication in the correspondence that he had been coerced into agreeing to the terms of the settlement; (c) he had not requested joint custody during the proceedings, and only brought it up for the first time about 6 months after the Consent Order; (d) the Mother had agreed to his taking the Child to the movie even though the settlement had not been agreed fully; - the Mother was in a confused state at the time; (2) regarding the Father’s fear that the Mother would make important decisions without consulting him - (a) he had not been very involved with the Child’s medical appointments previously; (b) in the SIR, the officer did not express any concern that the Mother would make any major decisions for the Child without consulting the Father; (c) the major decisions that he had been worried about (corrective surgery and choice of secondary school) had been agreed by the time of the hearing; (3) regarding the Child’s relationship with the Father’s new family - (a) this was a “non-pointer” on whether sole custody should be varied to joint custody; (b) the officer shared the same view that this was not a factor per se to vary the custody order; (c) this would have been relevant to a variation of the access arrangement, but that has been settled; (4) regarding the Child’s wish for joint custody and his best interests - (a) the Father had not mentioned the Child’s wish for joint custody in his affirmations; (b) the Child had told the officer that, apart from his wishes for some specific changes to access, he was satisfied with the current arrangement; (c) the Father knew that the Mother wanted him to redeem the TW mortgage so that she could purchase a property as a residence for herself and the Child, and his failure to do so was unreasonable and not in the Child’s best interests. Proposed grounds of appeal 15. The Father has advanced 5 proposed grounds of appeal, which will be discussed below. However, it should first be noted that s.63A District Court Cap. 336 stipulates that leave to appeal should not be granted unless there is a reasonable prospect of success, or there is some other reason in the interests of justice why leave should be given. 16. It is well-established that when a first instance judge has had the benefit of seeing and hearing witnesses give live evidence, an appellate court would not normally interfere with findings of fact. As for the evaluation of the facts as found, the assessment of the weight of various factors is essentially a matter for the judge. Different judges may legitimately differ in this

exercise, and an appellate court would not intervene unless it is satisfied that the judge's conclusion falls outside the bounds within which reasonable disagreement is possible. It is with those principles in mind that we have to approach the proposed grounds of appeal. Ground (1) Did the judge err in law in not applying the proper approach to an application for joint custody? 17. In his submissions, the Father relied on well-established authorities⁵ supporting joint custody, and submitted that since the judge accepted that the parents have been able to agree on various important questions, the Child had no views and the officer was in favour of joint custody, the judge should have varied the order accordingly. The Father submitted that the judge was wrong to speculate that his application was motivated by his desire to punish the Mother for her refusal to vacate her ancillary relief notices before she received the lump sum at the time of the divorce. 18.1. Indeed in the Main Decision, the judge referred to the fact that even though the Father had proposed a variation to joint custody in March 2019, he only filed the summons in December 2019. The judge considered that this was "far from a mere coincidence"⁶, and that it was "highly suspicious that the Father had a hidden agenda ... namely to punish the Mother for her refusal to vacate the ancillary relief notices"⁷. The judge also said it was "notable" that the Father took out the summons about 1 month after the Mother issued her summons⁸. 18.2. With respect to the judge, we have to agree it was unnecessary and imprudent to indulge in such speculation. The evidence that the Father had proposed joint custody as early as March 2019 showed that this proposal was not a recently-concocted reaction to "punish" the Mother. And his intemperate messages regarding the registration of the notices were sent in September 2018, 15 months before the summons for variation, since which time the parties have been able, in the words of the officer, to make substantial efforts in looking for common ground regarding access, and did not have significant disputes regarding the Child's medical condition, education or religion. In other words, the evidence did not show clearly that the Father was spoiling for a fight with what the judge called "a hidden agenda" in mind, and when the evidence is not clear, it would have been wiser to exercise restraint from suspicions and speculations. 18.3. Having said that, it does not follow that the judge had erred in her approach to the application. The fact remains that with the benefit of advice from lawyers (who must be taken to know the modern approach to joint custody), the Father had still agreed to the Mother having sole custody of the Child, which agreement was set out in a Consent Order, and the arrangements for the Child in the Consent Order were declared to be satisfactory prior to the decree nisi being made absolute. Finality is important in proceedings, especially family proceedings, so that the parties may get on with their lives without further emotional anxieties. This is especially so when one is dealing with children. The sole custody arrangement has been working for some 15 months before the summons and the Child expressed no objection to it. The benefit of finality was not taken into consideration by the officer, and with respect to her, her opinion that joint custody was a "plan worth trying" was hardly sufficient to move a court to vary a consent order. The court should not too easily vary consent orders dealing with children when there are no vitiating factors, no material change in circumstances and when they have not been shown to be not working, unless such consent orders are shown to be not in the best interests of the child/children. Ground (2) Did the evidence and the judge's factual findings (that the parties were able to agree on various important aspects of the Child's life) support, rather than undermine, a variation? 19. The

evidence and factual findings refer to the officer's report, and the parties' ability to agree on the Child's surgery and choice of secondary school. 20. This issue may be dealt with briefly. It is well-established that if parents are so antagonistic that they would not be able to agree with each other on most things, a court would not make a joint custody order as it would simply not be workable. However, it does not follow from the fact that the Mother as the sole custodian has discussed and agreed with the Father on important matters (such as the surgery and the choice of secondary school) that the court should vary the Consent Order. It is clear (from the decisions on those important matters) that the sole custody arrangement has, in the main, been working. The Father's concerns regarding medical appointments and school activities have been met by the undertakings given by the Mother⁹. The judge was therefore entitled to find that there was no need for a variation of the Consent Order. Ground (4) Was there still a need for a joint custody order after the decisions on surgery and choice of secondary school? 21. It would be convenient to deal with this proposed ground here. 22. It is of course correct that there may be other important matters concerning the Child in the future, such as whether to pursue further education overseas. But the continuance of the Consent Order does not jeopardize the Father's ability to input his views, or to challenge any final decision made by the Mother if he considers that it is not in the best interests of the Child. As was held in PD, "36. It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent. 38. A non-custodial parent ... has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. ... It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered. 39. While ... a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter. 40. ... In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent. 41. For this reason it is often said that there is a thin line between sole custody and joint custody". (Emphasis added). 23. Given that "thin line", and the fact that the Mother has not made any important decisions without having consulted the Father, she has offered further undertakings in response to the matters that he has raised, and that the sole custody order has been working, the judge was entitled to find that the Father has not discharged his burden of showing why it would be necessary to vary the Consent Order. In any event, the Child will soon be 14, and his own views will also have to be taken into account by the court on any important decisions concerning his welfare under section 3 of the Guardianship of Minors Ordinance, Cap. 13, in addition to the Mother's or the Father's views, and irrespective of whether the Mother or the Father has his sole custody, or they have joint custody. Ground (3) Did the judge consider that a variation would only be warranted by a material change in circumstances? And was there a material change in circumstances? 24. Dealing with the first issue above, it is clear from the number of diverse matters discussed in detail in the Main Decision that the judge did not think that a variation would only be warranted by a material change in circumstances. But

the topic had of course to be discussed as that was one of the grounds advanced by the Father for variation. 25. As to whether there was a material change in circumstances, the fact that the Child was getting along with the Father's new family (which has grown and settled since the Consent Order) might be regarded a change of circumstances, but it is a matter for the judge's evaluation whether that would be regarded as material to the issue of custody. As noted earlier, in the evaluation of facts, the assessment of the weight of various factors is essentially a matter for the judge. 26. In any event, the Child's relationship with the Father's new family would be more relevant to access (as the judge recognized), rather than to decisions concerning custody matters, such as his future education. The Father's ability to "understand" the Child (which the Father emphasized) is not hampered by the sole custody order. The time he spends with him is determined by the court's access order, not by the custody order. Ground (5) Were there clear errors in factual findings? 27. Finally, the Father submitted that there were a number of errors in the judge's factual findings. 28.1. We have mentioned earlier the well-established principle that an appellate court would not normally interfere with the findings of fact of a first instance judge who had seen and heard the witnesses giving live evidence. 28.2. We have considered the "clear errors" listed at §10 of the draft Notice of Appeal. We agree that the judge might have adopted a more charitable view of the Father's wish to see the Child when he was staying with the maternal grandmother, as the judge confined her consideration to concerns for the Child's physical safety only, instead of also taking into account his psychological well-being. However, it does not follow that the judge was wrong to find that the Father had not been coerced into agreeing to the Consent Order. He was legally represented throughout, he was financially in a stronger position than the Mother, and he could have set aside his agreement to the proposed terms instead of proceeding to the Consent Summons if the agreement had been obtained by duress. If he feared a repetition of the Mother's refusal to let him see the Child, he could have asked the court to order interim access. 28.3. As for the other "errors" submitted by the Father, some are immaterial in that they were not pertinent to the primary issues. Insofar as they related to the judge's speculation about the Father's "hidden agenda", this has already been discussed in §18 of this Judgment.

Conclusion

29. For the reasons given above, we do not consider that there is any reasonable prospect of success in any of the proposed grounds. Nor do we see any other reason in the interests of justice why leave to appeal should be given. Order 30. The renewed application for leave to appeal in the summons filed on 17 January 2022 is dismissed, with an order nisi that the Father should pay the Mother's costs which we would summarily assess at \$79,235. (Maria Yuen) Justice of Appeal (Bebe Pui Ying Chu) Judge of the Court of First Instance Ms Lily Yu, instructed by Hampton, Winter and Glynn, for the petitioner Ms Hiu H Wong, Athena, instructed by Chow Wong & Lawyers, for the respondent

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