

HONG KONG / JUDGMENT

RE AN INFANT

COURT

Family Court

DECIDED

6 July 2007

CASE / FILE NUMBER

FCMP222/2006

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bjbj FCMP 222/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MISCELLANEOUS PROCEEDINGS NUMBER 222 OF 2006

IN THE MATTER of an infant and IN THE MATTER of an application under s. 10 of the
GUARDIANSHIP OF MINORS ORDINANCE, CAP. 13

Coram : H.H. Judge Bruno Chan in Chambers Date of Hearing : 17 May & 4 June 2007 Date of
Judgment : 6 July 2007

J U D G M E N T

1. This is the Applicant Mother's application against the Respondent Father for maintenance for their child, a son born out of wedlock on 3rd September 2003, who is now 3 1/2 year old and is residing with the Mother and under her care and control. The Mother is a divorcee in her early 40s who used to be employed as a manageress of a health and beauty company, but is now in transition from freelance work to a more permanent employment, while the Father is a 31 year old kickboxing champion hailed from Cameroon who is now married with a wife and a small child and works as an instructor in a martial arts and fitness centre.
2. Although the issue is fairly straightforward, mainly about the child's needs and the Father's ability to pay, it would be relevant to go into the background in more details.
3. The Mother came to work in Hong Kong in the late 80s and subsequently married a Mr D, and as I understand, it was her 2nd marriage after divorcing her first, and she has 2 other children, both of whom are now adults, presumably born out of her 1st marriage.

4. The Father, on the other hand, only came to Hong Kong in about September 2002 after spending sometime doing competition in Thailand. It was here when the parties first met through mutual friends. The Mother's case is that the parties started to cohabit together shortly thereafter during which she became pregnant with the child but when she discovered that the Father was seeing another woman, she therefore left him in March 2003 before giving birth to the child in September of the same year.
5. The Father however denies that there had been any cohabitation or relationship with the Mother, as he was then residing in accommodation provided by his sponsor, and that he already had a girlfriend at that time who subsequently became his present wife, but that it was the Mother who had been harassing and stalking him.
6. Whatever the truth of their case, and there were some serious squabbling between the parties which even involved the police intervention, it is not necessary for me to investigate the details as they are not in my view straightly relevant to the matter now before me, suffice it to say that the Father did make some payments of a few thousand dollars each from early 2004, and as from August 2004, he would regularly deposit a sum of \$5,000 per month into the Mother's Bank of East Asia account as his contribution for the child's monthly maintenance which was later regulated in August 2005 by auto-pay on the 11th of each month.
7. In August 2006 when the child started his kindergarten, the Mother approached the Father for increase of the maintenance in view of the child's additional school expenses, but after making some contribution towards the child's school uniform and other start-up school expenses, the Father indicated that he could not afford any substantial increase on regular basis in view of his own financial burden due to the arrival of a baby to his own family, which unfortunately led to further squabbling between the parties that again involved the police intervention, and eventually to the present application issued on 22nd November 2006, in which the Mother, in addition to periodical sum towards the maintenance of the child, also seeks a lump sum for the immediate and non-recurring needs of the child or for the purpose of enabling liabilities and expenses reasonably incurred in maintaining the child before making the order be met as set out in the originating summons issued under the Guardianship of Minors Ordinance, Cap. 192 (GMO), i.e. the various medical and hospital expenses incurred by her for the birth of the child, the initial and consequential expenses for setting up accommodation for the child, and as aforesaid his education expenses.
8. Initially the Father, perhaps unwisely, disputed the paternity of the child and demanded DNA test be carried out, which necessitated an adjustment of the hearing but not before the Mother was able to obtain an order for interim maintenance of \$7,000 per month dating back to 11th November 2006, the date which the Father used to pay in the past.

9. The paternity test, as expected, turned out to be positive, and the Father conceded his financial obligation towards the child, but as the parties were too far apart as to the quantum of the Mother's application, the matter was adjourned further for them to file their respective Financial Statements, upon which both gave oral evidence at the trial and were cross-examined.
10. The part of the Mother's originating summons for the lump sum is in fact taken, word for word, from s. 10 (2) of GMO which provides : -
 - (2) The court may as regards a minor, on the application of a person with whom, whether by virtue of an order under subsection (1) or otherwise, custody of the minor lies at law, make in respect of the minor any one or more of the following orders -
 - (a) an order requiring payment to the applicant by the parent or either of the parents of the minor of such lump sum (whether in one amount or by instalments) for the immediate and non-recurring needs of the minor or for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order to be met, or for both, as the court thinks reasonable having regard to the means of that parent;
 - (b) an order requiring payment to the applicant by such parent or either of such parents of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of that parent;
 - (c) an order requiring the securing to the applicant by such parent or either of such parents, to the satisfaction of the court, of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of that parent;
 - (d) an order requiring the transfer to the applicant for the benefit of the minor, or to the minor, by such parent or either of such parents, of such property, being property to which the parent is entitled (either in possession or reversion), as the court thinks reasonable having regard to the means of that parent;
 - (e) an order requiring the settlement for the benefit of the minor, to the satisfaction of the court, of such property, being property to which such parent or either of such parents is so entitled, as the court thinks reasonable having regard to the means of that parent .
11. There is no dispute between the parties that the Mother is the person under the section with whom custody of the child lies at law, and can therefore bring this application, but unlike s. 7 (2) of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (MPPO) which applies upon dissolution of a marriage where the court is required to consider all the circumstances of the case including those matters set out therein with the aim to place the child, so far as it is practicable, in the financial position in which the child would have been had the marriage of the child's parents not broken down, here the only guidance given by s. 10 (2) of the GMO is that the award shall be reasonable given the means of the paying parent. However, to arrive at what is reasonable, the court will nevertheless bear in mind all the matters drawn to its attention relating to the parties as well as the child. Perhaps the most

outstanding matters in every case are the reasonable needs of the child which must necessarily linked to the financial position of the custodial parent, and the ability of the other parent to pay. I shall start with the Mother s financial position.

12. In her Financial Statement the Mother put her occupation as a freelance therapist (spa manageress) earning an average income of about \$14,000 per month inclusive of commission. She also receives additional income from dance performance but there were only 2 such occasions in 2006 for a total sum of \$5,500 for the year. As aforesaid she was applying for another job at the time of the hearing but it is not known of the result. There is however no questions of her expertise and experience in her line of work which she has done for many years including running a business in the past. At any rate the Father does not take any real issue over her earnings, earning capacity or her financial resources in general as she has disclosed no other assets while her bank accounts show a balance of a few hundred dollars only, it is rather what she claims to be the reasonable needs of the child that is the main issue as far as the Father is concerned.
13. What should be the reasonable needs of the child must of course be considered in the context of the Mother s factual situation, and for that matter the Father s as well, and not just on what the Mother would like or hope her son s needs to be. In her Financial Statement, the Mother put her total expenditure including both herself and the child, at almost \$60,000 per month, being \$27,992.90 for the general household expenses, \$15,912.90 for her personal expenses, and \$15,790 for the child s, and may well be more than that amount comes September this year when the child starts his new school term. In all the Mother put the child s total expenses at more than \$25,000 per month after taking into account of his share of the accommodation expenses and the domestic helper s, and she asks that the Father should pay at least \$15,000 per month towards that expenses. Not surprisingly, the Father found the alleged amounts staggering, given in particularly the Mother s own limited income and resources.
14. One of the many items of expenses that came under the Father s criticism and scrutiny is the rent of the Mother s 2-bedroom apartment at \$10,500 per month which he argues as too big, too expensive and unnecessary for a household of 3 including a small child and a domestic helper. He also argues that the food and household expenses in the total sum of \$9,000 as grossly exaggerated or excessive, given the fact that the Mother is already claiming \$2,000 for meals out of home, and questions the necessity for her to spend \$4,000 for clothing / shoes and personal grooming, as well as a monthly provision of \$4,700 for her income tax which if true, would mean that her actual income should be several times more than what she has disclosed.

15. As regard the alleged expenses for the child, the Father also questions the desirability of sending him to a school that charges almost \$4,000 per month in school fees, which will go up even higher to \$5,000 in September, while his other monthly expenses such as \$1,500 for books and stationary, \$1,000 for medical and dental, \$1,200 for entertainment / presents, \$2,000 for holidays, \$1,200 clothing / shoes and \$2,000 for insurance and nappies, all of which point to a level of lifestyle well beyond the means of the Mother.
16. While I accept that many of such expenses must have been given as an average over a period of say 6 12 months and that it is generally accepted that it is expensive to raise a child in Hong Kong, in particularly a small child with various ailments and infections during his early years, but given the Mother s alleged limited income with virtually no savings or other assets, I must admit that I find it difficult to reconcile the seemingly great disparity between her limited resources and her alleged expenses, and that I too share the Father s suspicion that many of her alleged expenses for herself and the child may in fact be what she hopes to spend rather than what she actually spends.
17. The Mother has explained that she has been relying on borrowing including from her former husband of more than \$180,000 since January 2006 at about \$10,000 per month to meet her monthly deficits, but even if that is true, and taking into account of the Father s monthly payment of \$5,000 in the past, she would still come up way short of meeting her alleged expenditure of close to \$60,000 per month.
18. The state of her bank accounts does not help either, as the bank statements show many transactions which do not seem to correspond with what she claimed to be her income, perhaps partly because of the fact that she worked on a freelance basis with irregular commissions, and that she might have borrowed money here and there, but the total monthly deposits usually well exceeded her stated monthly income, which further confuse the issue and fuel the Father s suspicion that she has more income than she has disclosed.
19. As noted earlier above, the Mother also claims a lump sum from the Father for the various expenses incurred in respect of the child s birth including monthly medical examination and charges leading up to his birth at \$2,000 each, totalling \$20,000, plus setting up costs after his birth such as baby clothing, beddings, etc. of another sum of \$16,000. In all she put the total expenses of the child from 2004 to 2006 at more than \$600,000.
20. In June 2004 she instructed her former solicitors to write to the Father to demand him to contribute about \$6,000 per month towards the child s maintenance, \$986 per month towards his education fund, and a sum of \$50,000 towards the costs and expenses of his birth, which eventually led to the Father s agreement to pay the monthly maintenance of \$5,000 as aforesaid, but there seems to be no agreement regarding contribution towards the expenses relating to his birth.

21. The picture painted by the Mother clearly shows that she cannot afford to maintain the life style or standard of living what she claims, as it is clearly not an option for her to keep on relying from borrowing, which is probably why she is now looking for a better job with higher pay in spa management, and to take out the present application against the Father, whose means I shall consider next.
22. He has been employed by I Martial Arts and Fitness Centre (I Fitness Centre) as a coach and kickboxing instructor since January 2005, and his present salary is \$30,000 per month, which is evidenced by a letter dated 9th December 2006 from his employer. The letter also confirms that the Father is a shareholder of the company holding 15% of the issued shares which he put at a notional value of \$150,000, the same amount which he first subscribed for them, which sum he said he borrowed from the life savings of his present wife. He also claims that there has been no payment of any dividends as the company has not yet made any profits. The Father claims to have no other income or asset, of which the Mother however has serious reservation.
23. In her 1st Affirmation filed when she instituted these proceedings, the Mother believed that the Father s sharing holding in I Fitness Centre is 20% instead of 15%, and that he was able to earn as much as \$96,000 per month by teaching kickboxing on the basis that he charges \$500 per hour for 8 hours each day, and 6 days per week.
24. It is also her evidence that in addition the Father also receives other income from doing advertisements or commercials, as well as from participating in kick-boxing and other martial arts competitions or tournaments, as he has done in the past.
25. While it is true that according to the Company Registrar record of I Fitness Centre, his shareholding has been recorded at 20% instead of 15%, the Father insists that it was a clerical mistake on the part of his employer when compiling the paper work with the registry, a mistake which he says has since been rectified and properly reflected in his employer s said letter, I agree that the 5% discrepancy will not be relevant until the company do declare a dividend payment to its shareholders, but at this stage there is no evidence to suggest that is the case, or that such payment will be forthcoming.
26. What is of course of immediate relevancy is the Father s current income, and the Mother s belief that he is able to earn at least 3 to 4 times more than he has disclosed is partly based on what she claims to be what the Father had told her in the past, which he denies, and which is in my view questionable as he only joined I Fitness Centre in January 2005, long after their relationship, if any, had ended and in such acrimoniously manner that it is unlikely that he would have disclosed such details of the daily routine and schedule of his job at I Fitness Centre to her.
27. I believe that it is more likely a case of purely her assumption that if he charges \$500 per hour, and if he works for 8 hours per day and 6 days per week, then he would be able to earn as much as \$96,000 per month. However, not only is this a rather unrealistic assumption, but it must also be on the assumption that the Father is permitted by his employer, or rather his

other partners, to pocket all such income from using the time he is supposed to be working for I Fitness Centre, for which he is paid \$30,000 per month, to earn such income and at the same time not having to share them with his partners. This is simply in my view commercially impossible, and untenable as an argument.

28. It is also argued by the Mother that the Father's tax return for the previous year of 2005 / 2006 shows a total income of \$348,000 plus value of a residence provided for \$34,800, totalling \$383,800, which gives a monthly income of \$31,900, more than his stated income of \$30,000. While a slight discrepancy of \$1,900 per month appears immaterial, the Father insists that it was an arrangement made with his employer for tax purpose, and that his monthly income is indeed only \$30,000 as confirmed by the said letter from I Fitness Centre.
29. On the other hand, there seems to be some merits in the Mother's argument that the Father may have additional income from doing advertisements and prize money from competitions, the former of which he has readily admitted of having done a couple over the year for which he was paid about \$10,000. He however denies having received any prize money from kick-boxing competitions, even though he did travel abroad from time to time to participate in such international tournaments, and that he has in fact won 4 African Championships and a World Championship, his evidence is that other than having his room and board as well as travelling expenses paid for by his sponsor or the organisers, the only thing of value that he has won from such tournaments were his trophies instead of prize money.
30. I must admit that I was somewhat surprised to hear that the Father has not received any prize money from kick-boxing tournaments in this day and age of commercialization in everything in particular in professional sports with huge sums of money involved in sponsorship, TV deals and prize money to attract competitors from all over the world. On the other hand, it would not be too harsh to say that kick-boxing as a spectator sport is not, at least not yet, in the same league of say golf, tennis or football in terms of popularity that can attract the kind of attention and sponsorship that pay huge prize moneys.
31. The Mother's belief that the Father would have received prize money is based on a complaint that he might have made to her about his former manager failing to pay him his fair share of the prize money that he had won from a tournament in the past. The Father's case is that she had misunderstood his words. There is no other evidence to suggest that the Father has received prize money, which I believe could have been easily verified, one way or the other, by the Mother writing to the organizers of those tournaments that the Father had participated in the past, instead of just resting the issue on a matter of creditability.
32. Having seen and heard the Father in evidence in court, which I found in general firm and straightforward, I have no reason to doubt his evidence about his income, which is in the main also borne out by his bank statements. I am therefore satisfied that he has fully and frankly disclosed his income and asset.

33. The Father put his monthly expenditure at \$44,100 which is not just for himself but his family of 3 including his wife and his infant son born on 15th August 2006. Like the Mother, the biggest item of his expenses is the rent of his apartment at \$10,500 which turns out to be exactly the same of the Mother s, although his household in fact consists of 4 persons including a domestic helper which he says is necessary now that there is an infant in the family, and that his wife has to work, the same reason offered by the Mother in her case.
34. He alleges however that he also has to remit \$3,000 per month to support his mother in Africa, although it has been pointed out by the Mother that he has several siblings all of whom are working and could well be contributing and hence he may not have to remit as much. The same can be said about his monthly tax provision of \$7,200, given the tax allowances that he is entitled, while the medical / dental expenses of \$2,000 for his son appears to be on the high side in the absence of any particular medical reason or evidence, and that \$1,000 per month for the clothing / shoe expenses for an infant appears unjustified.
35. His wife does work and while her monthly income of \$16,000 cannot be treated as part of his income for the purpose of this application, it is nevertheless relevant in that his wife is expected to share his household expenses, thereby reducing his financial burden accordingly. Provision must of course first be made to meet her own personal expenses, but it would not be unfair to expect her to perhaps spend about \$10,000 of her income on the family. While the Mother suspects that she is in fact independently quite wealthy and has a much higher income, her case is based largely on hearsay and cannot be accepted.
36. My calculation of what I believe to be the reasonable expenditure for the Father s total monthly expenditure in the circumstances give a figure of about \$35,000, of which his wife would have contributed about \$10,000 as aforesaid, leaving a balance of \$25,000 to be met by the Father s regular income of \$30,000 from I Fitness Centre, plus some additional income from doing advertisements from time to time, and possibly some dividends from I Fitness Centre or even some prize money from tournaments in future, albeit unknown in amount and uncertain as to when. Realistically, however, what the Father can provide for the child on a regular basis for the time being is in my view \$6,000 per month, and this is the amount I so order to start from 1st August 2007 and thereafter on the 1st day of each month during the minority of the child.
37. As to the Mother s claim for a lump sum to reimburse the various expenses that she had incurred for the birth of the child and thereafter, which I accept as necessary and reasonable, even though the alleged amount again appears to be somewhat exaggerated, but apart from his income, I am unable to find any savings or capital which the Father may have to meet such claim and certainly his shareholding in I Fitness Centre cannot and should not be used for this purpose. However as he has been making a monthly payment of \$7,000 as interim maintenance since November 2006, which is \$1,000 higher than what I have now found to be the proper amount that he should pay, and which has been paid for some 9 months and hence \$9,000 in total, I suggest that that sum be treated as the Father s contribution, and I make no further order in respect of this claim by the Mother.

38. Lastly, on the question of costs, although the Mother is on legal aid, given the basis and result of my decision, I believe it would be appropriate to make no order as to costs including any costs reserved, and that there be legal aid taxation of the Mother's own costs. (Bruno Chan) District Judge Mr Charles Cook of Boase Cohen & Collins for the Applicant. The Respondent in person. PAGE - PAGE - &`#\$~!P] ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ : 'L- E{k' XW(\$ -3\*\$ 43\*\$ :p . (\$p2\$ 4g3\$ 4QQ4 0b50p Ok%: -0V: M|;\$ wzO?p= H#@ \$ 3i@\$ nSDH lEFE kxL\$ /eNH S\$O\$ @.xQ c;R\$ H`0U G%9UT C:~W x% X\$ x8Y\$ L}YH (Yq[*n\T #b2^\$ Q^f k{@b Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/h vCip= RF^o gsTu\$ 4xv\$ xDs\ *'y\$ __z4w C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . @.xQ k{@b H`0U RF^o -0V: Ok%: @\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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