

HONG KONG / JUDGMENT

RE HDF

[2025] HKFC 47**COURT**

Family Court

DECIDED

11 March 2025

CASE / FILE NUMBER

FCMP185/2024

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bjbj FCMP 185 / 2024

**[2025] HKFC 47 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FAMILY COURT MISCELLANEOUS PROCEEDINGS NO. 185 OF 2024**

IN THE MATTER OF the minor, LB and IN THE MATTER OF an Application under Sections 3(1) (d), 10(1), 21 and 26 of the Guardianship of Minors Ordinance, Cap 13, Laws of Hong Kong SAR and IN THE MATTER OF an Application under Order 90 of the Rules of the District Court, Cap 336H, Laws of Hong Kong SAR HDF Applicant

Coram : Her Honour Judge Grace Chan (paper disposal) Date of decision : 11 March 2025

DECISION (Application for custody by a father not registered as the father in the birth certificate)

Introduction

I have decided to write a short decision on this case, despite the fact that the applicant has filed a notice of discontinuance with the court on 3 February 2025. For reasons which appear below, had the applicant not filed a notice of discontinuance, I would have dismissed his application. Applications for custody under the Guardianship of Minors Ordinance, Cap 13 () come before the Family Court on a routine basis. However, the interplay between the GMO and the Parent and Child Ordinance, Cap 429 () is, regrettably, overlooked by some of the legal practitioners from time to time. The issue to consider is this: whether a father of an illegitimate child may be granted custody of that child, if he is not registered as the father in the relevant birth certificate.

The application & the background This case concerns an ex parte application by way of an originating summons filed by the applicant on 6 September 2024, pursuant to the GMO. The applicant is said to be the biological father (Father) of LB (). The Father asks the court to grant him (i) the custody, care and control, as well as (ii) the guardianship, of the Boy, relying on the legislation that is set out at the title heading of this case, which I shall not repeat. The Father and the biological mother of the Boy are both Chinese Mainlanders. They were never married to each other. The mother gave birth to the Boy in September 2011 in Hong Kong. Importantly, the Father is not registered as the father in the birth certificate of the Boy. He explained that it is because he and the mother were not married to each other at the time when the Boy was born. Since his birth, the Boy was living with the mother (assisted from time to time by her maiden family) in Hangzhou, China. The Father continued to provide financial support to them. In 2017, the mother allegedly passed away. To prove her death, the Father merely provides a letter of 8 August 2024 written by the village authority of the village to where the mother belonged. The letter is not notarised. A death certificate and/or medical report issued by the relevant PRC government authority or a qualified medical practitioner or a hospital showing the death of mother is not provided by the Father. This is plainly insufficient. Since then, the Father has taken up the care of the Boy who is now living and studying in Hangzhou, China. When the Boy reached 11 years old, he had to come to Hong Kong to renew his Hong Kong juvenile identity card and home return permit (ther takes out this application in the Family Court. For the purpose of his application, the Father has provided to the Family Court a DNA report dated 31 July 2024 showing that he is biologically related to the Boy. I have no reason to doubt the content of the DNA report. Hearings before the Master The Father s application first came before a Master of the Family Court on 24 September 2024. In that hearing, the Master was mindful, rightly so in my view, if there was/were other interested party/parties, such as the parents or siblings of the mother, whom should be joined into these proceedings. The Master also asked, again rightly so in my view, that the Father should clarify if he sought custody, or guardianship, of the Boy. The Father was directed to file a supplemental affirmation. Further, in the same hearing, the Master made an interim order that custody, care and control of the Boy be granted to the Father (Interim Order). The Father appeared before the Master again on 11 December 2024. His supplemental affirmation exhibited documents from the maiden family members of the mother that they do not wish to take up the caring of the Boy. Further, the Father filed a written submission dated 27 November 2024 for the purpose of the hearing (27/11/2024 Submission). More will be said about this written submission. Suffice it is for me to state at this stage that by this written submission, the Father confirmed that he would seek an order under section 3(1)(d) of the GMO, and an order for custody of the Boy. He submitted that he no longer sought an order to appoint him as the guardian of the Boy pursuant to section 8D(1) of the GMO. However, pausing here, it is pertinent to note that although the Father seeks, among other things, an order for guardianship of the Boy in his originating summons, the title heading of his originating summons fails to cite the said section 8D(1) of the GMO. At the end of the hearing, the Master adjourned the case and called for a social investigation report and an international social investigation report. On 21 January 2025, this case was transferred to this court for further handling. Requisitions from this court Upon cursory reading of the court files, I directed on 22 January 2025 that the preparation of social

investigation reports be withheld, and that a mention hearing be fixed for 18 March 2025 before me. I further directed that the Father shall file a concise submission 7 days before the mention hearing to address the court on various matters, one of which is this: whether the court has the power to grant interim custody, care and control to the Father, when he is not (or at least not yet) registered as the father in the birth certificate of the Boy. On 3 February 2025, the Father filed a notice of discontinuance. The written submission contemplated in the preceding paragraph was not prepared and filed. The court asked the Father to explain why he discontinued this case. By a letter dated 13 February 2025, the Father's solicitors wrote that with the Interim Order made by the Family Court, the Father was able to renew the juvenile identity card and home return permit of the Boy. The purpose of his originating summons was already served, and thus there is no further need to continue with this case. The court then invited the Father to make a written submission on whether the Interim Order should be formally discharged. By his written submission dated 7 March 2025, the Father said that he would not object that the Interim Order be formally discharged. Discussion As a starting point, the legal relationship of a child born out of wedlock and his parents is governed by the GMO, in particularly section 3(1)(b) to (d), section 10(1) and section 21, which I venture to summarize as follows: a mother of an illegitimate child shall have all the rights and authority in respect of the child : section 3(1)(c)(i); a father of an illegitimate child does not have such rights and authority, unless the court orders that he shall have some or all of such rights and authority on an application brought by him pursuant to section 3(1)(d): section 3(1)(c)(ii); the court may grant an order of custody and/or right of access to either of the parents of an illegitimate child: section 10(1);

- (d) however, in relation to an application regarding guardianship pursuant to sections 5 to 7, section 8D and section 11, the natural father of an illegitimate child shall not be regarded as the father unless he is entitled to the custody of the child pursuant to an order made under section 10(1), or he is granted the rights and authority with respect of the child pursuant to section 3(1)(d). The Father's application for custody is premised, inter alia, on section 3(1)(d) and section 10(1) of the GMO. He submits that the court may grant custody of the Boy to him pursuant to that section, since it is abundantly clear from the aforesaid DNA report that he is his natural father. However, in my view, apart from the GMO, the PCO is, and should also be, engaged in this case. My reasoning is as follows. First, section 10(1) of the GMO states that either parent may be granted custody of a child. The interpretation section (Section 2) of the GMO defines parent to mean father and mother of the child. The interpretation section does not go further to provide a definition of father or mother . Second, section 5(1) of the PCO sets out a rebuttable presumption as to who is presumed to be the father of a child, namely: a man who was married to the mother of the child at any time and if there arises by virtue of that marriage a presumption of law that the child is the legitimate child of that man;
- (b) where no man is presumed to be the father under section 5(1)(a), and subject to section 10(3), a man who has been registered as the father of the child in a birth certificate. Third, it is obvious to me that the Father does not fall within the presumption of section 5(1) of the PCO, since he was neither married to the mother, nor registered as the father of the Boy in the birth certificate. Fourth, I note that in 27/11/2024 Submission, the Father submitted that

the mother was not married at the time when the Boy was born. However, this cannot be regarded as evidence, because the affirmations of the Father do not contain such evidence. It is thus unclear from the Father's affirmations if the mother was married to another man at the time when the Boy was born, for if yes, the mother's husband would be presumed to be the father of the Boy until it is rebutted. If so, the Father's application should not be an ex parte one. The mother's husband should be named as the respondent of this application. Fifth, in such circumstances, the Father cannot be regarded as the father or a parent of the Boy for the purpose of an application under the GMO, and hence cannot be granted custody of the Boy, unless and until an application for parental declaration is also made under section 6(1) of the PCO. The section provides that, Any person may apply to the court for a declaration that

- (a) a person named in the application is or was in law his parent;
- (b) he is the legitimate child of his parents; or
- (c) he has become, or has not become, a legitimated person. As a matter of fact, the Father is aware of section 6(1) of the PCO. In the 27/11/2024 Submission, the Father said that he knew that the most appropriate action to make was to take out an application under section 6(1) of the PCO. However, he argued that such an application could not be made because the applicant (the Father is the applicant in the originating summons) has not met the jurisdictional hurdle imposed by section 6(2) of the PCO. Section 6(2) of the PCO imposes a jurisdiction requirement which provides that the court shall only have jurisdiction to entertain an application under this section if, at the date of the application, the applicant: is domiciled in Hong Kong; has been habitually resident in Hong Kong throughout the period of 1 year ending with that date; or
- (c) has a substantial connection with Hong Kong. Two points can be further taken and they are these: the facts of this case unequivocally suggest if an application for parentage declaration was made, the applicable sub-section should be section (6)(1)(a) of the PCO. Its wording shows that the applicant should be the Boy, but not the Father. It is thus an irrelevant submission that the Father cannot fulfil the jurisdiction hurdle of section 6(2) of the PCO. It has to be the Boy who has to satisfy the jurisdictional requirement under section 6(2) of the PCO. The supporting affidavit should explain, with documentary proof including but not limited to movement records of the Boy, if and if so how, the aforesaid jurisdictional hurdle is satisfied. Further, the documents required under Order 80 rule 3 of the Rules of the District Court, Cap 336H should be prepared and filed with the court; short of a declaration of parentage under section 6(1) of the PCO, the Father's application for an order under section 3(1)(d) and section 10(1) for custody of the Boy cannot even begin to take flight.

Conclusion

For all the matters set out aforesaid, I conclude that an order to grant custody of the Boy to the Father under the GMO cannot be made, whether on an interim basis or the otherwise, unless and until an application for declaration of parentage is also made pursuant to section 6(1) of the PCO. There is no such application under the PCO in this case, and thus the Father s application in his originating summons is doomed to fail. Had he not filed a notice of discontinuance, his application would have been dismissed by this court. The Interim Order should be formally discharged, with the hearing fixed before this court for 18 March 2025 be vacated, and I shall so order. The Father shall draw up this Order within 7 days, and serve it on the Director of Immigration and CTS Entry Permit Service Hong Kong Limited within 14 days thereafter. An affirmation of service shall be filed with the court within 42 days from the date of this Order.

Grace Chan District Judge The applicant represented by GT Lawyers 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 A B C D E F G H I J K L M N O P Q R S h?*, hay9 h?*, ha[N ha[N h?*, h?*, h?*, gday9 gday9 gda[N gday9 gday9 gd?*, oc^WS h?*, h?*, hay9 h?*, h?*, h?*, h?*, gd?*, gd?*, gdqs gday9 gd?*, gd?*, |ung^X^RL ha[N hLY~ h?*, h't gdi, gdi, gdi, gdi, gdi, mdZd h8r` gdi, gdi, gdi, gdi, ha[N hU+I gdi, gdi, gdi, hF4` ha[N gdi, gdi, gdi, gdi, gdi, gdi, gdi, hF@X gdi, gd`T gd`T gd`T gdi, gdi, gdi, gdno gdi, gdi, gdi, gdi, gdi, gdi, ha[N {u{u h8Fh &`#\$ gd C gdno gdno gdno h+X1 T U V gd C [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE} 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"/> /Q). }qNV ;yR4PT noj> ~d.2 @}, mvl\$ B1W) _Ui- ,Rc1 tFQ4 t:w9 GPx> ?x+@ T{)A *~OJ 2taO a}NP ;}R Ja~R VTTT gV4Y W%c[>>2_ et]e h0ng n97i Wy5{ /VM} & "CACV Judiciary English.dot Windows User Microsoft Office Word Judiciary CACV CACV Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><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="{E6C18962-B807-45B7-9A57-7F4690771746}" 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 Word 97-2003 Document MSWordDoc Word.Document.8

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