

HONG KONG / JUDGMENT

TC formerly known as TSWC v. KCTC

COURT

Court of First Instance

DECIDED

21 October 2011

CASE / FILE NUMBER

HCMP813/2011

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bjbj HCMP813/2011 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 813 OF 2011

IN THE MATTER of LB known as T, Minor and IN THE MATTER of Section 26 of the High Court
Ordinance, Cap. 4 and IN THE MATTER of Order 90 of the Rules of the High Court, Cap. 4A and
IN THE MATTER of Guardianship of Minors Ordinance, Cap. 13

BETWEEN TC formerly known as TSWC Plaintiff and KCTC Defendant

Before : Hon Poon J in Chambers (Not Open to Public) Date of Hearing : 30 September 2011 Date
of Decision on Costs : 21 October 2011

DECISION ON COSTS

AUTONUMOUT This decision concerns how the court exercises its jurisdiction on costs in
wardship proceedings. Hitherto, local authorities on costs in children cases are scanty. I hope
this decision will provide some useful guidance in the future. AUTONUMOUT The present
proceedings arose in this way.

Background

AUTONUMOUT The Mother and the Father were married in January

1988. The Father was already a famous entertainer then. The Mother had just graduated from university. She gradually developed her own career in the entertainment and fashion field. She gave birth to a son in February 1990 (the Son) and a daughter (the Daughter), the ward in these proceedings, in March
1995. Marriage discord subsequently arose, which eventually led to their divorce in January 2000. AUTONUMOUT Because of their celebrity status, their marriage, the breakdown of their relationship and the divorce were widely reported in the media, especially by the tabloids and had been gossips of the town for years. AUTONUMOUT In the divorce proceedings, the Mother and the Father were, by consent, granted joint custody, care and control of the children. They further agreed that the children would stay with the Mother during weekdays and with the Husband over weekends and holidays. AUTONUMOUT In 2003, the Son furthered his studies in California, the USA. He was financed by the Mother. In 2005, the Mother also relocated to California. The Mother and Son have since been living together. The Son is now studying at a community college. The Mother has recently set up her own company specializing in film financing. With her new career established, she and her son are now leading a rather comfortable life style in the USA. AUTONUMOUT In 2004, the Daughter moved to live with the Father and his partner, Ms A. She is now studying at a local secondary school. Because of job commitments, the Father has to work outside Hong Kong quite often. Thus Ms A has all along been the Daughter s primary carer. Her relationship with the Daughter is said to be one of love and affections. Ms A regards her as her own daughter. The Daughter s feeling towards her is mutual. She calls her mommy . She also enjoys a loving relationship with her two step-sisters, who were born in 2004 and 2010. AUTONUMOUT Since 2004, the Mother and the Daughter had had no contact with each other. The Mother said she got to know about the Daughter s well being through the Son, who has maintained close contact with his younger sister. AUTONUMOUT In 2009, the Daughter was sent to a boarding school in Taiwan. Apparently, she did not adjust well and was having a rather difficult time there. On 25 May 2010, she wrote an email to the Mother. What followed was some 70 emails in which they, among other things, talked about the possibility of the Daughter joining the Mother and her elder brother in the USA and furthering her studies there. The Mother also made preliminary enquiries with various schools. On 2 June 2010, she wrote the Father an email, exploring with him the option of the Daughter studying in the USA. It is the Mother s case that the Father then called and threatened her not to take the Daughter away from him. AUTONUMOUT The Daughter then left returned to Hong Kong apparently without finishing the school term. Since the end of June 2010, the Mother had been unable to contact her, whose phone number and email address were disconnected. AUTONUMOUT In March 2011, the Mother was in Hong Kong. She began to receive information from her younger sister (the Sister), who lives in the same building where the Father does, a maid who was then working for the Father s household and two former maids that Ms A had been abusing the Daughter, physically, verbally and psychologically for some years. On 3 April 2011, the Sister bumped into the Father, Ms A, their two daughters and the Daughter at the lift lobby of their building.

According to the Sister, she was assaulted by Ms A. A report was made to the police who arrested Ms AUTONUMOUT On 18 April 2011, the Mother made a report to the police for having suspicions that the Daughter had been abused by Ms A while the Father travelled out of town. It is her case that on 22 April 2011, the Son mentioned to her that he and the Father had already discussed how Ms s bad volatile explosive temperament had been doing harm to the family. The Son agreed with her it was for the Daughter s best interest to be removed from the Father s household to pursue her studies in the USA. They could look after and take care of her. AUTONUMOUT In the meantime, the media s interest in the feud between the Mother and the Father revived. Reporters followed the Mother, the Father, Ms A and the Daughter around and elicited their responses about the recent events. Reportedly, the Father, Ms A, the Son and the Daughter all denied any abuse and were irritated by the Mother s conduct. The Father even wrote a blog attacking the Mother with some innuendos. Procedural steps AUTONUMOUT On 4 May 2011, the Mother commenced the present wardship proceedings. She sought an order that the care and control of the Daughter be committed to her and that leave be granted to remove the Daughter to the USA to further her education. AUTONUMOUT The matter first came before me on 6 May 2011 on an ex parte application by the Mother for an interim injunction against the Father not to remove the Daughter from jurisdiction, who had since the commencement of the present proceedings become a ward of the court, without leave, which I allowed. She also applied for an order to restrain the publication of the information in relation to the Daughter and the proceedings, which I also allowed. I further directed that the press be served with the order so that they would be bound by it as well. It was necessary to do so in order to stop the media from further prying into and exposing the Daughter s private life and to nip in its bud any attempt by any party to these proceedings to resort to a war in the media. I was firmly of the view that in the special circumstances of this case, protecting the Daughter s privacy and the integrity of these proceedings was of paramount importance and clearly outweighed the consideration of freedom of the press and information. I am glad to note that the gag order has achieved its objectives. AUTONUMOUT At the hearing on 20 May 2011, I appointed the Official Solicitor as the guardian ad litem of the Daughter. I did so because I thought it was necessary to enlist his assistance to protect and represent the Daughter s interest, especially when the Mother s case was based on the alleged abuse by Ms A, her primary carer, with whom the Daughter was residing. I gave directions for filing of evidence and a report by the Official Solicitor. I did not call for a social welfare report because the Daughter was to have her examination soon and I did not want to disturb her preparation. The matter was then adjourned to 7 July 2011. AUTONUMOUT In their evidence, both the Father and Ms A denied any abuse as alleged. They also opposed the application to remove the Daughter to the USA. In his first report dated 30 June 2011, the Official Solicitor stated that the Daughter also denied any abuse as alleged. She was quite adamant that she would not go to the USA. AUTONUMOUT At the hearing on 7 July 2011, I gave further directions for filing of evidence and called for a social welfare report. In the end, the Mother was unable to file any evidence from the maids, the alleged eye-witnesses of the abuse. In the social welfare report dated 18 August 2011, the Daughter again denied

the abuse and repeated quite sternly her wish of not going to the USA. She maintained the same stance in the second report of the Official Solicitor dated 6 September 2011.

AUTONUMOUT On 19 September 2011, the court was informed that the Mother had decided to withdraw the wardship proceedings and that what divided the parties was the question of costs. AUTONUMOUT On 30 September 2011, I gave the Mother leave to withdraw the proceedings. The Daughter was de-warded. The Mother asked that there should be no order as to costs. The Father and the Official Solicitor disagreed and asked for costs.

Applicable principles

AUTONUMOUT I first set out the general principles applicable to the costs between the Mother and the Father. AUTONUMOUT In wardship proceedings, as is the case for children cases generally, the court's usual practice is to make no order as to costs. AUTONUMOUT This practice emanates from the special nature of the proceedings. Wardship is a discrete and ancient aspect of the inherent jurisdiction of the High Court. In the exercise of this jurisdiction, the court acts in a parental, administrative and inquisitorial manner. Its purpose is to protect the property and/or the person of the ward. Its duty is to act in a way that is best suited to serve the true interests of the ward, always bearing in mind that welfare of the child is the first and paramount consideration. The court expects the parties to the proceedings to act bona fide and reasonably in the best interest of the child. They are entitled to put forward before the court their views, reasonably and honestly held, as to what is for the welfare of the child. They should not be penalized in costs for failing to persuade the court to accept their views. For the court does not wish the prospects of a costs order to discourage those with a proper interest from participating reasonably in the proceedings and the debate. Another reason in support of the practice is that an order for costs may exacerbate tensions between the parents and diminish the likelihood of future co-operation between them, to the disadvantage of the welfare of the child.

AUTONUMOUT Exceptionally, the court may depart from the general practice and make a costs order. In so doing, the court will take into all the relevant circumstances of the case, including : Whether a party has a proper interest in participating in the proceedings. This is self-explanatory. Whether a party has acted bona fide in the best interest of the child. This is similarly self-evident. Whether a party has been motivated by any ulterior motive in participating in the proceedings. As noted, the court's primary concern is the welfare and best interest of the child. The court will not allow the parties to manipulate the wardship proceedings for their own agenda, say, to gratify one's wounded pride, to spite the other party or to take revenge on him or her. If a party is so motivated in participating in the proceedings, the court will punish him or her with costs relentlessly. Whether it is necessary to invoke the court's wardship jurisdiction. The jurisdiction will only be exercised when there is a real, imminent or immediate need to afford protection for a child when that protection may not be readily derived from any other source. If the child requires no such protection, the applicant may be held liable for the costs of the proceedings wrongly invoked. Whether a party has been guilty of unreasonable conduct in relation to the conduct of the proceedings. AUTONUMOUT I next turn to the costs of the Official

Solicitor. AUTONUMOUT The Official Solicitor is an officer of the court. He may at any time be called upon to carry out investigation or to assist the court to see that justice is done between the parties. He is appointed to act where, if this were not done, there would be a denial or miscarriage of justice. When the Official Solicitor is appointed as guardian ad litem in children cases, he is much more than a mere guardian ad litem in typical civil actions. He is at once an amicus curiae, an independent solicitor acting for the children, an investigator, an adviser and sometimes a supervisor. AUTONUMOUT The court retains an unfettered discretion over the payment of the Official Solicitor's costs. There is no hard and fast rule as to how the discretion should be exercised and the court will bear in mind all the circumstances of the case.

AUTONUMOUT The first and most important of the considerations which the court will have regard to is that a judge, whenever he thinks it would be right to invoke the assistance of the Official Solicitor, should feel free to do so without being constrained by anxiety about the possible effect in relation to costs on one or other, or both of the other parties to the proceedings. It is one of the many valuable functions of the Official Solicitor to provide such assistance, and he is funded by central funds for this and other purposes. This consideration applies particularly where the Official Solicitor is appointed guardian ad litem on the judge's own motion. It may well persuade the court to make no order as to the Official Solicitor's costs. AUTONUMOUT However, there are plainly cases where it is not unjust to order one or other of the parties to bear the Official Solicitor's costs rather than the central revenue. For example, if a party has acted unreasonably in the conduct of the proceedings, which necessitated the appointment of the Official Solicitor or prolonged his engagement in the case, he may be held liable for the Official Solicitor's costs in full or partially. AUTONUMOUT In other cases where the Official Solicitor is appointed on the application of one, or sometimes both, parties either to assist generally in the interests of the child or for a particular purpose, it may be just to order his costs, or a proportion of them, to be borne by the party asking for his assistance. Indeed, the Official Solicitor, like all guardians ad litem, can only be appointed if he has consent to act. This enables him, where he thinks fit, to ask the party seeking to appoint him for a full or partial indemnity for his costs.

AUTONUMOUT All in all, much will depend on the actual circumstances of the individual case when the court determines the Official Solicitor's costs. Discussion AUTONUMOUT Here, I have no doubt whatsoever that when she commenced the present proceedings, the Mother was genuinely motivated by her love and concerns towards the Daughter. She had received information from various sources that Ms A might have abused the Daughter for some time. It is not necessary to recount in details the information that she had received. Suffice it to say that viewed objectively, the information did give rise to a reasonable suspicion about abuse, at least from the Mother's perspective. In the circumstances, I do not think the Mother could be criticized for invoking the court's wardship jurisdiction in order to protect her daughter from possible abuse by her primary carer. Such protection was plainly not otherwise readily available from other sources. AUTONUMOUT However, the circumstances changed materially when the Official Solicitor filed his first report on 30 June 2011. By then, the Father, Ms A and their witnesses had already filed their affidavit evidence refuting the allegations of abuse. The Official Solicitor had carried out independent investigations with other witnesses. The result of his investigations did not support any child abuse. Most significantly, the Daughter herself had

strongly denied any abuse and rejected the Mother's application for removing her to the USA. AUTONUMOUT When all the available evidence is considered in the round objectively, I think any suspicion about the Daughter being abused by Ms A must have been dispelled as at 30 June 2011. The basis of the application to remove her to the USA was already gone. In any event, the Mother should have accepted the reality that the attempt to remove her was doomed to failure. The Daughter had settled well in Hong Kong with the Father and Ms A. She would like to continue her secondary education at a local school. She would not consider furthering her studies until after she has finished Form

6. Plainly the Daughter, at 16, is mature enough to make a decision that best suits her own interest. There is no reason why the court should uproot her against her wish. The additional evidence presented to the court after 30 June 2011 did not tilt the overall position in favour of the Mother a bit. AUTONUMOUT The Mother should not have persisted with the proceedings after 30 June 2011. Unfortunately she did. Her conduct was in my view unreasonable. It had caused unwarranted distress to the Father and Ms A but more importantly to her beloved daughter. It had caused the Official Solicitor extra work as well. In the circumstances, it is just to hold her liable for the costs incurred by the Father and the Official Solicitor after 30 June 2011.

Orders

AUTONUMOUT For the above reasons, I order that : There will be no order as to costs from 4 May 2011 up to and inclusive of 30 June 2011. The Mother will pay the Father and the Official Solicitor costs incurred thereafter, including the costs of the hearing on 30 September 2011, to be taxed if not agreed. (J. Poon) Judge of the Court of First Instance High Court Ms Barbara Hung of Messrs Chaine Chow & Barbara Hung, for the Plaintiff Mr Robin Egerton, instructed by Messrs Withers, for the Defendant Mr Li Chi Keung of Official Solicitor as guardian ad litem of the Ward See section 26(2) of the High Court Ordinance, Cap.4. M v Y [2009] 5 HKLRD 597, per Hartmann JA at para.3 at p.598. Section 3(1)(a) of the Guardianship of Minors Ordinance, Cap.13 See generally Rayden and Jackson on Divorce and Family Matters, 18th Edn, Vol.1(2), para.52.21. Under Order 90, rule 3(3B) of the Rules of the High Court, Cap.4A, the name of each party to the proceedings shall be qualified by a brief description in the body of the summons of his interest in or relationship to the minor. M v Y, supra, per Hartmann JA at para.4 at p.598. FHY v S (Costs Children s Case) [2006] 3 HKFLR 453, per HH Judge Chu, at para.9; Rayden & Jackson, ibid. Re G (a minor) (Wardship: Costs) [1982] 2 All ER 32, per Ormrod LJ at pp.35j-36a. Re G, supra, per Ormrod LJ at p.35h. Re G, supra, per Ormrod LJ at p.36c-d. Re G, supra, per Ormrod LJ at p.36e.

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