

HONG KONG / JUDGMENT

TKY v. YSGA

[2024] HKCA 689

COURT

Court of Appeal

DECIDED

17 July 2024

CASE / FILE NUMBER

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CAMP 37/2024, [2024] HKCA 689 On Appeal From [2023] HKFC 215 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NO 37 OF 2024 (ON AN INTENDED APPEAL FROM FCMC NO 2208 OF 2023)

BETWEEN TKY Petitioner and YSGA Respondent

Before: Hon Cheung and G Lam JJA in Court Date of Decision: 17 July 2024

DECISION

Hon Cheung JA: I agree with the decision of G Lam JA. Hon G Lam JA: The Respondent (“father”) is the father of two children with the Petitioner (“mother”). Dissatisfied with the judgment of HH Judge C K Chan dated 20 October 2023 on the care and control of and access to the children (“Judgment”), the father sought leave to appeal. By his decision dated 9 February 2024, the judge refused to grant leave to appeal. The father now applies to this court for leave to appeal. The parties were married in 2018 but separated in 2021. They have two daughters born within wedlock, aged 4 and 3 at the time of the judgment below. On the mother’s petition for divorce, a decree nisi was granted on 15 June 2023. Pending the trial on custody, care and control, and access regarding the two children, they mainly stayed with the mother, with access granted to the father including staying access every Friday after school until Saturday 9 pm, and day access every Wednesday after school to 9 pm, and with telephone or video call access and equal sharing of school holidays. Following an unsuccessful CDR, the trial and submissions took place on a few days between March and May last year. The judge identified the 3 main issues that required the court’s determination to be: (1) whether a sole custody order in favour of the mother or a joint custody order is to be granted; (2) whether a shared care and control order should be granted as

sought by the father; and (3) if the court decides against equal shared care, what arrangement should be put in place for the father to exercise defined access to the daughters. On the question of custody, the judge found both parties are loving parents and that their differences are not so irreconcilable that a joint custody order would be detrimental to the daughters' welfare. A sole custody order might create a wrong impression of one party being the winner which will act against the goal of fostering future cooperation. He therefore agreed with the SIO's recommendation and granted joint custody to the parents. There is no appeal against this decision. On care and control, the judge noted that the main difference between the parties was the arrangement during term time. The father asked for care/access from Wednesday after school to Saturday 9 pm, whereas the mother advocated access for the father on Wednesday after school to 8 pm and staying access from Friday 4:40 pm to Saturday 8 pm. The judge accepted that both parties were primary carers during marriage, with each focusing on different aspects of the daughters' daily care. In the end he granted a care and control order in favour of the mother, instead of an order for equal shared care. The judge also made an order for the father's future defined access to the daughters. There is basically equal treatment as between the parents on holidays and special occasions, as to which there is no appeal. For term time, the judge ordered access for the father on Wednesday from after school to 8:30 pm and from Friday after school to Saturday 8:30 pm. On e-access, the judge granted the father telephone or video access on every Monday 6 to 8 pm for up to 30 minutes during term time. The father seeks leave to appeal, and seeks an order that there be a shared care regime during term time, with him having care from Wednesday after school to Saturday 8:30 pm and the rest of the week to the mother, or some other arrangement such that the father has staying access to the daughters 3 nights a week. He also seeks an order for telephone or video access for each parent on days that they do not have care, from 6 to 8 pm for up to 30 minutes. In support of the application for leave, 5 intended grounds of appeal have been put forward, which may be summarized as follows: The judge wrongly took a gender-biased and discriminatory view that the needs of the daughters would be more suitably met by a mother rather than a father. The judge placed disproportionate emphasis on avoiding disruption to the daughters' routine and difficulties caused by the mother's behaviour and failed to consider or give proper weight to the importance of the father's involvement, his shared care proposal, the mother's unilateral removal of the children from the matrimonial home on 26 April 2022, the children's adaptability and the father's ability to care for them. The judge failed to recognise the concerning implications of the mother's general lack of credibility. The judge gave disproportionate weight to the SIO's views whose recommendation was partial, irrational and illogical. The judge failed to identify any reason for the substantial reduction in the father's e-access, from each non-access day to only Monday. Under section 63A(2) of the District Court Ordinance (Cap 336), leave to appeal is not to be granted unless the appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the appeal should be heard. Having examined the papers, I consider it appropriate to deal with this application on the basis of the written materials without a hearing pursuant to Order 59 rule 2A(5) of the Rules of the High Court (Cap 4A). The judge's determination of the question of care of and access to the two daughters in this case was quite plainly an exercise of his discretion based on an overall evaluation of the circumstances having regard to what would be best for the children. It is well-

established that an appellate court would not interfere with the outcome of such an exercise unless there was an error of law involved in the decision, or the judge failed to take into account relevant matters or took into account irrelevant matters, or the order made was one that was “plainly wrong”. The fact that the appellate court itself might have made a different order is not sufficient: see *CCMJ v SSM* [2013] 3 HKLRD 497, §17; *PD v KWW* [2010] 4 HKLRD 191, §58. In my view, leave to appeal should be refused in this case as there are no grounds raised with a reasonable prospect of success. Ground 1 attacks the Judgment as discriminatory on gender. I am not impressed by the argument. The judge was very conscious that he should not exhibit any gender discrimination. He has instead relied on practical experience. As Ms Yu has pointed on behalf of the mother, the importance of the mother in the life of a young child has been stressed before which is based on practical experience and the realities of life and not a matter of prejudice or discrimination: *R v Y (Custody)* [2010] HKFLR 492, §10. The father may have felt that the judge’s order favours the mother as she is given care and control of the children, but it should be recalled that, as Hartmann JA emphasised in *PD v KWW* at §43: “when a court awards care and control to one parent but rights of access to the other, ... the court is effectively awarding a form of shared care and control. This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent’s physical custody.” In the present case the judge declined to give staying access to the father during the week in part because he considered a mid-week change of residence probably too disruptive for the children. There was also the SIO’s recommendation for maintaining the status quo. We do not think that the judge had proceeded on a discriminatory basis or made a decision contrary to principle. Grounds 2, 3 and 4 are essentially arguments that the judge has placed too much weight on one matter or too little weight on another. The question of what weight is to be placed on relevant considerations is generally a matter for the judge. As pointed out by Ms Yu for the mother with reference to various parts of the Judgment, the judge was aware of and did consider the matters in question. It seems to me that the father is in essence trying to say that the factors he has put forward should be accorded more weight and that those relied on by the judge should be given less. This is not a promising ground of appeal against an exercise of discretion such as involved in laying out care and access arrangements in relation to young children based on current conditions. Specifically, I do not think there is any ground for impugning the professionalism of the SIO or for saying that there is any lack of impartiality in the SIO’s reports. Ground 5 complains about e-access. The judge approached the matter as an overall “package”. He considered that by giving the father Monday e-access in addition to the physical access on Wednesday and Friday to Saturday, he will have time and contact with the daughters at least every other day. I do not think this can be said to be outside the generous ambit allowed to the judge in arriving at the access arrangements. For these reasons I would refuse to grant leave to appeal and would order, on a nisi basis, that the father do pay the mother’s costs of the present application in the gross sum of HK\$45,000. I would further make an order pursuant to Order 59 rule 2A(8) that the father may not request for this decision to be reconsidered at an oral inter partes hearing. (Peter Cheung) Justice of Appeal (Godfrey Lam) Justice of Appeal Ms Madeleine Booth, instructed by Messrs. Withers, for the Respondent Ms Teresa Yu, instructed by Messrs. Wellington Legal LLP, for the Petitioner

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