

HONG KONG / JUDGMENT

TKY v. YSGA

[2024] HKFC 28

COURT

Family Court

DECIDED

9 February 2024

CASE / FILE NUMBER

FCMC2208/2023

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bjbj FCMC 2208/2023 (formerly FCMC 903/2022)

[2024] HKFC 28 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL PROCEEDINGS NO. 2208 OF 2023

BETWEEN TKY Petitioner and YSGA

Respondent Before: HH Judge C.K. Chan in Chambers (Not Open to Public) Mode of Hearing: By
way of written submissions Respondent s Written Submissions: 17 November 2023 Petitioner s
Written Submissions: 1 December 2023 Date of Decision: 9 February 2024

D E C I S I O N (LEAVE TO APPEAL)

This is a hearing of the respondent father (the father s application for leave to appeal against my judgment dated 20 October 2023 in which I have granted a joint custody order, with care and control to the petitioner mother (the mother) and defined access to the father (the custody order). The order itself was very lengthy due to the fact that both parties had put forward very detailed and meticulous proposals on access (the father s proposals on access were 6 pages and the mother s proposals were 5 pages). Therefore, I do not propose to repeat the whole order in this decision.

- On 17 November 2023, the father issued the present summons asking for leave to appeal against 3 aspects of the custody order, namely: The order that the mother was given care and control of the 2 daughters (2 of the custody order); The order giving defined access to the father during term time (2 (a)(i) and (ii) of the custody order): Every Wednesday after school to 8:30pm; Staying access from Friday after school to Saturday 8:30pm; and The order

granting telephone or video access to the father on every Monday between 6:00pm to 8:00pm for not more than 30 minutes (2 (d)(i) of the custody order).

3. Despite these 3 aspects of appeal, I think what the father really wants is an equal sharing of care time of the 2 daughters during term time. The Law on Leave to Appeal
4. Leave to appeal is governed by s. 63A (2) of the District Court Ordinance, Cap 336 which reads:
 - (2) Leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that- 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.
5. As to what constitutes a reasonable prospect of success, it has been held that the prospects of succeeding in the intended appeal must be reasonable and therefore more than fanciful , but without having to be probable : SMSE v KL .
6. I do not think the above general principles are in dispute. The Father s Grounds of Appeal
7. Ms. Madeleine Booth representing the father put forward 5 grounds of appeals. Ground No.1: Gender Discrimination
8. Ms. Booth referred to 65 (1) of the judgment:
65. Despite the fact that both parties could be regarded as suitable carer by reference to past care and their ability to provide future physical care, there are other considerations that the court must take into account. They include:
 - (1) The age and gender of the daughters. They are aged 4 and 3 and as expected, it would be difficult for them to express any clear wish in their parents dispute. But the facts that they are girls and of very young age naturally mean that the mother will probably has an advantage in the comparison of the parties respective strength in the daughters future care. I hope that this will not be taken as a gender discrimination issue. But experience tells us that the needs of young children, especially girls may be more suitably met by a loving mother. As they grow up, both their physical and emotional needs may be better met by a parent of their same sex. The mother would be in a better position to explain the change in their physiology as they mature. It may also be easier for the daughters to share their feelings and emotions with their mother. According to SIO, A has indicated that she liked to talk about her inner feelings with and was more dependent on the mother (A/043).
9. Ms. Booth submits that the above ruling was discriminatory if the gender of a parent leads to the belief that they are somehow the more suitable parent to meet the needs of young children, especially girls. This was a fundamental error in both principle and discretion, warranting re-consideration of the appropriate care and control order for the girls.
10. Reference was also made to PD v KWW [2010] 4 HKLRD 199, per Hartmann JA at 45-46:

- [45] There was a time also, not so long gone, when the roles of the mother and the father in the raising of their child were viewed with almost equal rigidity. The mother was best left to care for the child, certainly when the child was young. The father was best left to provide financial support and to exercise rights of guardianship. As for his contact with the child, visitation was deemed sufficient. Today, such sexist views are obsolete.
- [46] Social imperatives change. When they are important and lasting, the common law can, and should, keep pace with that change. My Views
11. I entirely agree with Hartmann JA's observation that pure gender plays no part in the determination of the issue of custody (necessarily include the issues of care and control, and access) and that was why I said in the judgment that by reference to the parties' gender, I hoped that it would not be taken as a gender discrimination issue. I was fully aware of the potential argument on gender discrimination. This court then went on to explain why the mother had the advantage (as a parent of the same sex of the daughters) in explaining the change in the daughters' physiology when they matured. The daughters also found it easier to share their feelings and emotions with the mother, which was a fact as confirmed by the SIO. Therefore, it was not a decision based on pure gender.
 12. I am not satisfied that the father is having any reasonable prospect of success in this ground of appeal. Grounds 2 & 3: Disproportionate weight given to Status Quo and the 26 April 2022 incident
 13. Ms. Booth submits that this court has given disproportionate weight to the disruption to the daughters' routine, and failed to consider or give proper weight to: the importance of the father's involvement in the daughters' weekday and weekend care; the father's shared care plan which caused minimal disruption to the daughters' routine, involving less handovers, less travel than the current order; the original routine was disrupted by the mother's non-consensual removal of the daughters from the FMH on 26 April 2022; the consequences and implications of the 26 April, 2022 incident; and the daughters' adaptability and the father's ability to care for the children. My Views
 14. I do not accept the proposition that this court has failed to consider or give proper weight to the 5 matters as stated in the preceding paragraph. The importance of the father's participation in the daughters' care is indisputable but the real issue here is: whether he should be given an absolute half share of the total care time as demanded by him.
 15. As provided in the custody order, the parties will basically share the daughters' time equally outside school term and on special occasions. For term time, the father was given weekend staying access from Friday after school to Saturday 8:30pm, meaning that he will have equal sharing of all weekends as well. In other words, the father has already been given 50% of the daughters' care time during non-school attending period.

16. As to the daughters school attending period (i.e. from Monday morning to Friday morning during school term), I have already stated at 65 (2) of the judgment that in my view, a mid-week changeover is too disruptive when the daughters will enter primary education shortly. More importantly, there has already been on-going arguments on who should keep the school bags during the father's access indicating that the dispute might be further escalated if the supervision on the daughters studies and school works is to be changed mid-week. That was why this court only gives the father Wednesday after school to 8:30pm, i.e. 1 evening (Wednesday) instead of 2 out of a total of 4 evenings (Monday to Thursday). By this arrangement, the father has already been given very generous access, albeit one evening less than he had wished and thus not an exact 50% of the total care time.
17. As to the 26 April 2022 incident, the father seems to have placed much emphasis on it trying to convince this court that it was the mother who took away the daughters without his consent and thus creating the so called status quo in her favour. Ms. Booth also submitted that this court failed to consider the consequences and implications of that incident, including (i) the abduction of the daughters; (ii) serious disruption to their then routine at the FMH; (iii) not disclosing the daughters whereabouts to the father; (iv) forcing the father to move out of the FMH by using the daughters as leverage; and (v) restricting the father's access to the daughters.
18. In my view, it was quite obvious that before the 26 April 2022 incident, the relationship of the parties had already broken down. Both decided to stay at the FMH, presumably for the sake of the daughters. The subsequent tensions created by them staying under the same roof was quite understandable. This had eventually culminated into the 26 April 2022 incident, whereat the mother called the police and later left the FMH with the daughters.
19. At trial, both parties alleged the other being emotionally unstable during the incident. After hearing their evidence and viewing the footage recorded, I did not find the father being emotionally unstable. On the other hand, there was some footage showing the mother raising her voice causing a daughter to cover her ears. Under these circumstances, especially in view of the very tensed situation at the time, I do not find the behaviours of the mother being reprehensible that it must have any negative bearing on her ability to take good care of the 2 daughters in the future. The same could also be said of the subsequent events of the mother leaving the FMH with the daughters; and the parties having difficulties in communication and arrangement on access shortly thereafter. The allegation of the daughters being abducted by the mother was not accepted by this court.
20. I am not satisfied that the father is having any reasonable prospect of success in his intended appeal on Grounds 2 and 3. Ground 4: Disproportionate weight given to the Social Investigation Report ()
21. The court was criticised in relying on the SIR where the Social Investigation Officer's recommendations on care and control were not based on full and accurate facts or a balanced and open-minded approach.

- ## Conclusion

- (2009) 4 HKLRD at para 17 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
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