

HONG KONG / JUDGMENT

TRH v. KCS

[2024] HKFC 82

COURT

Family Court

DECIDED

17 April 2024

CASE / FILE NUMBER

FCMC8704/2023

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bjbj FCMC 8704/2023

[2024] HKFC 82 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 8704 OF 2023

BETWEEN TRH Petitioner and KCS Respondent

Coram: H.H. Judge C.K. Chan in Chambers (Not Open to Public) Date of Hearing: 17 April 2024
Date of Handing Down Decision: 17 April 2024 (4:30pm)

D E C I S I O N (Ex-parte Summons (On Notice) for Variation of Interim Access)

This is an ex-parte application taken out by the Petitioner Father (the father) on the issue of interim access. On 20 October 2023, this court has granted the father an interim defined access order in respect of the 2 children of family on broadly the following terms:

- (1) Access by way of weekday morning drop-off for elder son () on Monday, Wednesday and alternate Friday; and for younger son () on Tuesday, Thursday and alternate Friday with some other related directions (1 (a), (b) and (c)).
- (2) Weekday afternoon access on Tuesdays and Thursdays after school from 4:15pm to 9:00pm (1 (d)).
- (3) Sunday access from 9:00am to 9:00pm (1 (e)).
- (4) All access initially take place at the former matrimonial home () and the father be at liberty to take the children for access outside the premises (1 (f)).

- (5) The Respondent Mother (the mother) and maternal grandmother to leave FMH 15 minutes before access (1 (g)).
 - (6) CCTV at FMH to be turned off during access (1 (h)).
 - (7) The children to attend a private clinical psychologist, preferably the same one as the parties 2).
 - (8) The parties to attend co-parenting course and to receive counselling (3).
 - (9) A parenting coordinator to be appointed (4).
 - (10) Costs of the parenting co-ordinator and clinical psychologist to be shared equally (5).
2. On 15 April 2024, the father issued the present Ex-parte Summons (On Notice) for variation of the above interim defined access order, returnable today for a 2-hour hearing.
 3. As submitted by the father s leading counsel Mr. Cheng SC, ever since the granting of the interim defined access order, the mother continued to obstruct the father s already limited access to the children. The situation has now come to a stage that the father is currently having zero access.
 4. In support of his application, the father has filed a lengthy 6th Affirmation basically saying that the mother has now denied the children of all access to the father; the mother being a dishonest person and not being fit as a temporary or sole guardian. He also put in 2 affirmations, one from the family driver saying how the father was being a hands-on and loving father and also on an incident happened on 9 April 2024, during which the younger son did go to the Century Tower voluntarily. The other affirmation was from a mutual friend saying that the mother has placed the children s passports with her but at the same time alleged those travel documents were being kept by the father. I think the father was trying to show that the mother was a dishonest person.
 5. The father now asks for urgent orders from the court to vary the interim defined access order in that:
 - (1) the week-day afternoon access on Tuesday and Thursday from 4:15pm to 9:00pm be changed to Monday, Tuesday and Wednesday for the children to be picked up at school until 9:00pm.
 - (2) On non-school days, access to start from 3:30pm to 9:00pm to take place at the Ladies Recreation Club and returning the children to the FMH at the end of access.
 - (3) Sunday access from 9:00am to 9:00pm with handover at Ladies Recreation Club.
 - (4) There be urgent regular therapy sessions with Dr. Chan, clinical psychologist, with a regular frequency established before the children are allowed to leave Hong Kong.
 - (5) A report from the parties single joint expert, Dr. Poon on the children.
 - (6) The parties do attend co-parenting course.

- (7) The costs of clinical psychologist to be shared equally. One would realise that sub-paragraphs (1) to (3) concern with the actual access time by the father, whilst sub-paragraphs (4) to (7) deal with psychological therapy, expert report and co-parenting course to be attended by the parties themselves.
6. In sub-paragraphs (1) to (3), the father is actually asking for an increase in access (from 2 week-day afternoon access to 3 week-day afternoon access) and the place of pick-up to be changed from FMH to school pick-up or the Ladies Recreation Club. As to the other sub-paragraphs (4) to (7) on psychological therapy, expert psychologist report and co-parenting course, they are more or less the same as the previous order.
7. As the mother was put on notice, she was represented by Ms. Yip SC this morning. Due to the short notice, the mother was only able to submit a draft 8th Affirmation in response. There was no denial that the father's access to the children has deteriorated but according to the mother, there were 2 incidents which have caused such an undesirable state of affairs. First, during the M-CDR hearing, it was agreed that the children would be allowed to go for holidays in Korea during the Easter Holidays, but the father now reneged on it. Second, during a morning trip to school, the younger son was forced to go to the father's residence at Century Tower and the above 2 matters have caused much distress to both children.
8. Before one goes into the merits of the father's application, this court has to address a more fundamental point and that is whether this court should entertain the father's ex-parte application, whether on notice or not, at all. It is well established that ex-parte applications should be regarded as exceptional and the court should not entertain the same unless there are cogent justifications usually in terms of extreme urgency or secrecy: *Slik Hong Kong Co Ltd v Gerald Merlyn Rhoslyn E & Ns and Others* [2005] HKEC 2368, per Lam J (as Lam PJ then was) at 2.
9. The issue here is whether the requirement of extreme urgency is satisfied. I stress here that the requirement is not simply urgency, but extreme urgency. I fully appreciate that from the angle of a loving father, anything that may affect the welfare of his children would somehow be urgent, but I am afraid that the test is much higher than that.
10. As far as the present case is concerned, there is undoubtedly no justification whatsoever for the reliefs under Paragraph 5 (4) to (7) above to be sought by way of an ex-parte application. There are already similar orders in place, including psychological therapy to the children and the parties attendance of co-parenting course. For the appointment of an expert report on the children, that is nothing so urgent that it cannot be done by way of an inter-parte application, if such order has not yet been made.
11. The same can also be said of Paragraph 5 (1) to (3). Again, there is already an existing interim access order. I accept that for one reason or another, the terms of the order could not be carried out as anticipated. The father is now asking for such interim access to be substantially increased (from 2 afternoon access to 3 afternoon access) and the place of pick-up to be varied. I do not see why such application can not be done by the usual way of an

inter-parte application, so that the mother could be put on proper notice (not just 1 or 2 days notice) and be allowed to put forward her side of the story in a more comprehensive manner. If there is really some urgency in the matter, the father could ask for an early return date or even for the time for service to be abridged.

12. At the hearing, I was reminded by Mr. Cheng SC that the mother once did file an ex-parte summons on access which was heard by this court on 28 September 2023, accepting that the requirement of extreme urgency may be more readily relaxed on children matters. But as rightly pointed out by Ms. Yip SC, the mother's then ex-parte application was within a much narrower ambit in that she only asked for access to take place at FMH, hoping that it would make the father's access easier to be achieved. That was very different for the father's present ex-parte application in which he asks for quite a substantial increase in access time, apart from the changing of pick-up venue. Despite the very skilful submissions put forward by Mr. Cheng SC, I am afraid that the father simply fails on the threshold of extreme urgency.
13. Another criticism by Ms. Yip SC is material non-disclosure of relevant and important facts on the part of the father. I was referred to Hong Kong Civil Procedure 2024, Vol.1, 29/1/47: Paragraphs 19-22 set out general matters relating to ex-parte applications for interim relief and paragraphs 23-26 of the Practice Direction the requirements for the supporting affidavit in some detail including likely defences or weaknesses in the plaintiff's case. On an ex-parte application in particular, the affidavit must be full and frank and failure to disclose a material matter will often lead to the discharge on an injunction even if it would otherwise remain justified (see notes on Mareva injunctions).
14. Reference was also made to Practice Direction 11.1, 32 that:
 32. The affidavit in support should contain a clear and concise statement of the following:
 - (4) any answer either asserted or likely to be asserted by the defendant in response to the applicant's claims for interim relief and substantive relief;
 - (5) any facts known to the applicant which might lead the Court not to grant the relief sought or not to grant relief ex-parte; and
15. It was Ms. Yip's submission that one of the main reasons for the rapid deterioration of the already fragile father-and-sons relationship was the father's reneging on his previous agreement to the children's trip to Korea during the Easter Holidays. This important fact was missing from the father's affidavit which was a material non-disclosure and therefore, the father's ex-parte application should be refused.
16. Mr. Cheng for the father counter-argued that the father had no intention to hide the children's failure to have the Korean trip during Easter. He did disclose this at 81 of his 6th Affirmation and a letter from the mother solicitors dated 5 April 2024 recording such fact was also enclosed as exhibit.

17. As far as I could recall, the parties did reach an agreement or at least a clear understanding at M-CDR that the children would be allowed to go to Korea for holidays during Easter. The father's subsequent refusal to allow such a trip must have pushed the already strained relationship between father and sons to a higher level. In my view, the father does have a duty to expressly draw the court's attention to this aspect of the case in order to fulfil his full and frank disclosure, instead of just putting in one sentence mentioning about his disagreement to the holidays and enclose the mother's solicitors letter as one of the many exhibits of the affirmation. The father must appreciate that the court has just very little time to read the parties affirmations and submissions during the ex-parte hearing and this look-it-up yourself attitude cannot be accepted.
18. Lastly, I must point out that the father is not asking for an ex-parte prohibitory order just to maintain a status quo. Instead, he is asking for a mandatory order for a substantial increase in access time. In view of the parties serious dispute on the facts leading to the total breakdown of access, this court is simply not in a position to adjudicate on their dispute on facts and rule on the father's ex-parte application by just relying on his one-sided affirmation evidence.
19. Based on the above discussion and despite Mr. Cheng's very able submissions, the father's ex-parte summons has to be dismissed.
20. Costs will follow event. The mother shall have the costs of this ex-parte application with certificate for 2 counsel. This will be in the form of order nisi to be made absolute upon the expiry of 14 days from the handing down of this Decision. After costs order being made absolute, I direct the mother to lodge and serve a statement of costs restricted to 1-page A4 paper for the court's summary assessment within 7 days and the father be allowed to lodge and serve his objections also restricted to 1-page A4 paper for the court's consideration.
21. Lastly, I thank counsel for their assistance. C. K. Chan District Judge Representation: Mr. Cheng Huan SC, leading Ms. Elizabeth Lee, Barristers-at-law, instructed by Messrs Hugill & Ip, solicitors for the Petitioner Ms. Anita Yip SC, leading Ms. Lily Yu, Barristers-at-law instructed by Messrs. Withers, solicitors for the Respondent
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