

HONG KONG / JUDGMENT

W v. M

COURT

Family Court

DECIDED

17 January 2007

CASE / FILE NUMBER

FCMC7104/2004

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bjbj FCMC 7104 / 2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 7104 OF 2004

BETWEEN W Petitioner and M Respondent

Coram : Deputy District Judge Tracy Chan in Chambers Date of Hearing : 19th December 2006
Date of Judgment : 17th January 2007

J U D G M E N T

Introduction

AUTONUM The Petitioner in this application seeks to vary a maintenance order made by consent on 9th November 2005 (the Order). By the Order, the Petitioner shall pay to the Respondent for and on behalf of each of the two children of the family the sum of HK\$6,250 per month and such payment shall continue until the respective child shall attain the age of 18 years or complete their full time education whichever is the sooner. The Petitioner now asks that the payment for one of the child be reduced to the extent that he would not be required to make any payment for this child. His application is made on the basis that there is another person liable for the maintenance of this child and that there is change of circumstances. For convenience, I shall refer to the Petitioner as the husband and the Respondent as the wife AUTONUM The parties got married on 29th June 2001. When they got married, the wife had already had a boy, B (), from her previous marriage. The boy was born in October 1996 and was about 4 years old at the time of parties getting married. In fact before parties got married, they had already had their own son out of their cohabitation, A (), who was born in May 1999. The maintenance for B is the subject matter for this application. AUTONUM Parties commenced separation in 20th December 2002.

The husband commenced the divorce proceedings in July 2004 on the fact that parties had separated for one year and the wife gave her consent for a divorce. In the petition, the two children were treated as children of the family and the husband had at one time asked for joint custody of both children. The wife resisted the husband's application on custody and the matter was tried. At the trial, husband did not insist on having joint custody of B but insisted that it should be the order sought for A, his natural son. On 3rd day of July 2006 Deputy Judge Jenkins having heard parties ordered that joint custody of A be to both parties with care and control to the wife and defined staying access to the husband, and that the wife shall have custody on B with reasonable access to the husband. AUTONUM Before the issue on custody was heard, there was an order made for interim maintenance by His Honour Judge Geiser on 17th June 2005. By such order, the husband was to pay maintenance until further order at the rate of HK\$6,250 for each of the child. On 9th November 2005, the interim maintenance order was eventually adopted by parties as maintenance order by consent (the Order mentioned in paragraph 1 herein).

5. The summons now taken out by husband before me is to vary part of the Order relevant to maintenance he has been paying for the benefit of B. The application is made on the ground of section 7 (3) (c) Cap 192 that it is the liability of another person namely the natural father of B, Mr. M, to maintain the child. On the day of hearing, the wife was absent. The Notice of Hearing dated 28th September 2006 had been served on the wife at the address given by her in her Notice to Act in person filed on 30th August 2006. That was her last known address at the time of service. I ordered the hearing to proceed in the absence of the wife. The Law
6. Matrimonial Proceedings and Property Ordinance, Cap 192 Section 7 (3) : It shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case)
 - (a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
 - (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
 - (c) to the liability of any other person to maintain the child.
7. According to s.7 set out in the above, I may therefore, in my discretion, order the husband to make financial provision for B but may only do so having had regard to the criteria detailed in s.7 (3) (c). The husband is not relying on s 7 (3) (a) and (b). It is the husband's case that he has assumed responsibility to contribute to B's maintenance during the marriage which lasted for about one and half a year. It is not disputed that the husband knew that B was not his natural son.

8. The husband is of the view that that the natural father of B is the person liable to maintain B. There was a Child Support Agency Order in place for some time around 1999 for Mr. M to pay GBP 200 per month to the wife for the maintenance of B and the same had been reduced to GBP 160 per month. Although the wife seems to have made no effort to recover the maintenance payments from Mr. M, there is no evidence to show that the maintenance order has been discharged.
9. Prior to the Order, the husband has always thought that Mr. M had chosen to cut off contact and the wife did not have his address for contacting him (paragraph 4 of the husband s 3rd Affidavit). This was what he had learned from the wife. But since the Order he had successfully contacted Mr. M and had asked him to file an affirmation on 2nd May 2006 on matters relating to the husband s application for custody.
10. In the said affirmation Mr. M said that it was the wife who did not want him to see B, but he managed to contact her and get her to court for access on B. He paid for maintenance of B and had access to him for some time and about September 1999 he lost his job and was unable to pay. Shortly after that, the wife told him that she would be moving to Hong Kong with B. He agreed to such arrangement but for a period of two years only.
11. According to Mr. M, after the wife moved to Hong Kong with B in July / August 2000, he managed to keep regular contact with B for about a year and saw him once during this period. But sometime around August 2001 he received an email from the wife saying that she and B would not return to UK but would move to the States. In September 2001 when he sent an email asking about their move to the States, the wife s reply was that B did not want to know him anymore. At that time he realized that the wife did not want him in the life of B.
12. The content of Mr. M s unsworn affidavit is disputed by the wife. But in her 5th Affirmation, she said she had also been contacting Mr. M since April 2006 on the matter of B s maintenance albeit there was no response. Change of circumstances
13. The husband also relies on change of circumstance in his application. He filed an affirmation in this regard and gave evidence in court. He said first there was decrease of income on his side because there was a pay cut policy adopted by his employer institution. There had been a pay-cut of HK\$3,254 per month since 1st September 2006. He is now earning \$54,000, and there would still be pay-cut until 2009. Further, he said that he had a girlfriend at present. They had decided to stay in Hong Kong on a long-term basis and both had taken out loans to purchase a flat. For the time being, he would spend about HK\$20,000 on paying back two mortgages. He said he was suffering a shortfall of \$8,700 per month.
14. He also pointed out that there is change of circumstances on the part of the wife. The wife had moved to South Africa and settled there with her boyfriend who is a professional. The cost of living is apparently lower than that in Hong Kong and that was one of the reasons they said why they would move over there. He said although the wife claimed that she would be a full-time student again in January 2007 with no income, it only meant that her boyfriend could afford not to have her working. Not only that, their residence is situated in a

very well off area with comfortable layout in the house which includes a swimming pool. There is also a house help. It seems that the family also enjoy club facilities there.

Conclusion

15. To determine on the first ground relied on by the husband, there is one issue to decide, the liability of any other person to maintain the child. I could understand the feelings of the husband when he learned from the social investigation report that B had ranked him below everybody for his wish of keeping the family healthy, he came after the boy friend of the wife. But in my judgment B's attitude towards him has little weight. In fact Mr. Erving did not try hard to elaborate on this point at the hearing.
16. I have the benefit of reading the e-mail exchanges between parties and Mr. M. I am satisfied that Mr. M can be located. I note that there has been an order for Mr. M to pay maintenance for B although the wife ceased to enforce the order upon Mr. M's unemployment in 2001. I accept Mr. Erving's submission made on behalf of the husband that there was no evidence that this order has been discharged. In any event, there has been 5 years time since Mr. M last said he was unemployed. Situation must have since been changed as he said in his email that he was happily married for some 2 - 3 years. Further through some investigation, it is found that Mr. M has in 2005 purchased a franchise for the retailing of optical products. I accept that such evidence tends to show that Mr. M is no longer unemployed.
17. Apart from considering the liability of another person for the maintenance of B, I am required by s.7 (3) to consider the circumstances of the whole case as well. Circumstances include but not limited to those being set out under s.7 (2). I find the wife's new union with Mr. A material to this application. Mr. A, although not yet married with the wife, has a steady relationship with her and they already have a son F. According to the social investigation report, Mr. A has relayed to the social welfare officer that they have plan to get married and he assured the wife of his commitment to the boys. I also take into account the fact that the wife is not working and it should have been a concerted decision made by the wife and Mr. A. Against this background, I am satisfied that even if the husband were relieved of his responsibility over the maintenance of B, the wife would not face immediate financial hardship that would affect the interest of B.
18. I accept that there has been change of financial situation on the part of the husband as there was a pay cut and that would continue. I accept that the wife is at the moment unemployed to pursue her study plan, but that has little weight in my judgment because it is her own decision to start her study instead of being employed.
19. After considering all relevant matters including the liability of Mr. M on the maintenance of B and the change of circumstances of parties, it is my decision that the order of Deputy Judge Jenkins dated 9th November 2005 in respect of the maintenance of B be varied to the extent that the husband is not required to make any contribution as from first payment following the date of this Summons. Order

20. The effect of my order is as follows: As from 1st September 2006, the maintenance payment to the wife for the benefit of B to be reduced to HK\$0 per month until further order.
21. On the issue of costs, I find it appropriate that costs follow the event. The wife shall bear costs of the husband's application including all costs reserved. This is an order nisi which would become absolute 14 days from date hereof. (Tracy Chan) Deputy District Judge Mr Erving of Messrs Erving Brettell for the Applicant The Respondent in person absent PAGE - PAGE - &`#\$~!P] j% Td #-p 6<z% ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ vRs&r 1 #' : 'L- E{k' XW(\$ s `()H/0 -3*\$ 43*\$ c7*+ :p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p M|;\$ wzO?p= H#@\$ 3i@\$ nSDH lEFE 5)GTd HHzbr kxL\$ /eNH S\$O\$ y<0O vuWOTd c;R\$ Y CR G%9UT Zk_UR z`Uf RW!W C:~W x% X\$ x8Y\$ L}YH (Yq[*n\T #b2^\$ Q^f Y6xc\$ e>tD ?Dep= LiWfpt ZJg\$ hx;r N)/h vCip= T{sk %i? l U]m.rZ TCn\ ZorB "hsTd gsTu\$ r7Fv, 4xv\$ 2wx^ x4ah xDs\ *'y\$ Yay~_ __z4w {6=P# | >\$> C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . s `(vuWO c7*+ Y CR T{sk 1 #' RW!W %i?l r7Fv Zk_U vRs& y<0O #-p LiWf @\ \Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \ \Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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