

HONG KONG / JUDGMENT

WHW v. CWK

COURT

Family Court

DECIDED

31 March 2016

CASE / FILE NUMBER

FCMC16044/2009

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bjbj FCMC 16044/2009 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES SUIT NO. 16044 OF 2009

BETWEEN WHW Petitioner and CWK Respondent

Before : HH Judge Bruno Chan in Chambers Date of Hearing : 21 May, 9-10 September, 8-9
December 2015, 21 January and 26 February 2016. Date of Decision : 31 March 2016.

JUDGMENT

(Variation of Maintenance Order)

This is the Petitioner Wife's application for variation of an order for periodical payments made on 29th March 2010 as part of her divorce settlement with the Respondent Husband, for upward adjustment of the monthly maintenance for both herself and the child of the family, a daughter now almost 12 whose custody care and control has been granted to her, from the original total monthly sum of HK\$65,000 to HK\$85,000 or such sum as the court deems reasonable, due to a variety of reasons but essentially their increased needs and costs of living over the years, continuing inflations as well as the advancements being made in the Husband's professional career and income. The Husband who is a psychiatrist in the employment of the Hospital Authority does not dispute that the quantum of both of their maintenance is due for a proper adjustment since the divorce, which he has done by voluntarily raising to its current level at HK\$70,000 per month being HK\$33,000 for the Wife and HK\$37,000 for the Daughter, nor does he dispute his financial ability to meet the amount claimed by the Wife, but disputes her claimed increase to HK\$85,000 per month as excessive, unnecessary and unreasonable in view of her own substantial savings and ability to return to at least part-time employment as a school teacher, which are essentially the issues between the parties for the court's determination.

Background

The parties were married in 1997 when the Husband had just commenced his medical career working as a psychiatrist at Castle Peak Hospital while the Wife was as noted a secondary school teacher. It was however not until April 2004 when their daughter was born, and shortly thereafter in about 2005 the Wife quitted her job to become a full-time mother and homemaker. Sadly by the end of 2008 the parties started to drift apart, and in December 2009 the Wife filed for divorce in these proceedings against the Husband based on his unreasonable behaviour. Eventually they were able to reach overall settlement through their lawyers and signed a Minutes of Agreed Order on 26th March 2010 on all matters including custody care and control of the Daughter to the Wife and certain defined access to the Husband, and various terms on financial relief, which were subsequently made an order of this court on 17th June 2010 upon the granting of the decree nisi dissolving their marriage based on 1-year separation between them on the following relevant terms: AND UPON the parties agreeing and acknowledging that the terms and conditions as set out hereinafter are in full and final settlement of any claim which the parties may have against each other or his/her estate for lump sum or sums, transfer and/or settlement of property order and order for sale whether under the matrimonial Causes Ordinance, Matrimonial Proceedings and Property Ordinance, Married Persons Status Ordinance, Inheritance (Provisions of Family and Dependents) Ordinance or any other relevant Ordinance; AND UPON the parties acknowledging and agreeing that each has been independently advised and they are fully aware of their respective legal rights as to disclosure or discovery in relation to the other party's financial means and assets (including in particular the matters recited in Section 7 of the Matrimonial Proceedings and Property Ordinance, Cap.192), their respective financial positions and their rights under this suit and that they have both received independent legal advice in respect of the settlement herein and that they have entered into the settlement herein voluntarily. AND UPON the Respondent agreeing to transfer to the Petitioner his trust fund with Zurich International Life Limited Plan No.9852494 with a value not less than \$661,000.00 and undertaking to sign the necessary transfer form to effect the said transfer within 3 days from the date of the signing of the Minutes of Agreed Order. AND UPON the Respondent's agreement to change the beneficiary of his fund policy under No.B070082485 with American International Assurance Co. (Bermuda) Limited to the child of the family namely as her education fund for attending university within 7 days from the date of signing of the Minutes of Agreed Order and upon the Respondent undertaking not to create any charge, withdraw, cancel. Void and/or transfer the said fund without the consent of the petitioner for the next 12 years from the signing of the Minutes of Agreed Order BY CONSENT IT IS ORDERED THAT:- 1

4. The Petitioner be granted custody of the child of the family namely with access in the following manner be granted to the Respondent

5. The Respondent shall pay to the Petitioner maintenance pending suit in the sum of HK\$33,000.00 per month commencing on the 1st day of April 2010 and payable thereafter on the 1st day of each month during the joint lives of the parties or until the petitioner s remarriage whichever is the shorter or until further order. Such maintenance pending suit shall become final upon pronouncement of the Decree Absolute.
6. The Respondent shall pay maintenance pending suit for the child of the family HK\$32,000.00 per month commencing on the 1st day of April 2010 and payable thereafter on the 1st day of each month until she attains the age of 18 years old or shall complete full time education whichever is the alter or until further order. Such maintenance pending suit shall become final upon pronouncement of the Decree Absolute. It is as noted above the last 2 terms of the order, i.e. the periodical payments of HK\$33,000 and HK\$32,000 respectively for herself and the Daughter that the Wife now asks for an increase to a total amount of HK\$85,000 per month, something which she had in fact been seeking from the Husband since early 2014 albeit at a lower amount then and not formally raised until the Husband had applied for joint custody of the Daughter. By then the parties were no longer represented by lawyers and have in fact appeared in person throughout these proceedings. The joint custody application of the Husband was taken out on 14th March 2014 and in his supportive affirmation of the same date he explained that he wanted joint custody of the Daughter so that he could make joint decisions over her after the Wife had allegedly threatened to unilaterally change her school without his consent, as she claimed to be unable to afford its expensive school fees if the Husband refused to meet her request for the amount of increment to be made to their monthly maintenance. The Husband s application was opposed by the Wife who in her affirmation in reply argued that giving the Husband joint custody would not serve the Daughter s best interests, and formally requested that their monthly maintenance be increased to HK\$70,000 being HK\$34,000 for herself and HK\$36,000 for the Daughter, and that the Husband should also take out certain medical insurance policy for the Daughter. While the Wife had never issued any formal application for increase of maintenance, it was accepted by the Husband that to save time and costs the court should dispense with such formality to deal with this dispute between the parties together with his joint custody application, and as a result both subsequently filed their Form E in September 2014 setting out their financial situations. In his Form E the Husband disclosed a total monthly income of just over HK\$186,000 including various allowances and benefits, and monthly expenses of almost HK\$170,000 including his monthly maintenance for the Wife and Daughter which by then had already been increased to HK\$70,000 commencing from 1st September 2014. While this was confirmed by the Wife in her Form E, by then she had also raised her total monthly expenses to HK\$72,600, with further increases to be anticipated in the near future such as new rental for her apartment towards the end of 2014, or the Daughter s school fees which would be increased to HK\$8,000 per month when she entered secondary school in September 2015, hence she concluded that her earlier requested increment to HK\$70,000 was no longer sufficient. That was however not the only issue between the parties, as the Husband then retorted in his 2nd affirmation of 4th

October 2014 accusing the Wife of failing to disclose possible income from a part-time teaching job and her substantial savings of more than HK\$3 million at the time when she was pleading financial difficulty and misleading him into making those voluntary increments for her and the Daughter. He therefore suggested that his monthly maintenance for them should be reduced accordingly to HK\$68,000 instead. This was of course not acceptable to the Wife who denied having any gainful employment, part-time or otherwise save for some voluntary work helping out at the school's library, and insisted that the bulk of her savings came from her MPF funds received when she resigned from her teaching job which was meant to safeguard her livelihood when the Husband retires and ceases his maintenance for her, and hence they should not be utilised at this stage for any other use, and certainly not for the purpose of reducing his financial obligations toward her or the Daughter. Meanwhile the parties were also unable to resolve their dispute over the Husband's request for joint custody of the Daughter, and as a result the Social Welfare Department was requested to intervene and to look into the matter. Eventually after 2 Social Investigation Reports had been submitted the Husband agreed not to pursue his request and withdrew his such application on 21st May 2015, leaving only still in issue the Wife's request for increase to the monthly maintenance for her and the Daughter, which by then had gone up to more than HK\$85,000, a jump by more than 20% since her Form E filed barely one year ago. Not surprisingly, it was strongly opposed by the Husband and the matter therefore proceeded to trial. Again in order to save time and costs, I acceded to the parties request to dispense with any trial bundle or another round of Form E other than just a short affirmation by each to update their respective financial means. By now the Husband's monthly income has been increased to just over HK\$200,000 due to the annual adjustment to civil service pay, and so has as noted above the Wife's claim. At the trial both parties gave evidence and were properly cross-examined, but when they submitted their closing submission, the Wife's turned out to include various matters not previously disclosed either in any of her affirmations or evidence during the trial as correctly identified by the Husband in his reply, and of which I agreed that they be excluded from the Wife's evidence and disregarded by the court in the consideration of her application. Before proceeding to conduct the assessment of such increase to the periodical payments, however, it would be necessary to first set out the relevant law and principles applicable for such purpose.

Applicable Principles

The powers to vary a periodical payment order are expressly provided for by section 11 of Matrimonial Proceedings and Property Ordinance, Cap. 192 (MPPO):

- (1) Where the court has made an order to which this section applies, the, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended. How those powers are to be exercised is stated in section 11(7):

- (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death. The proper approach to such an application has been succinctly summarized in *Raydan and Jackson on Divorce and Family Matters*, 18th Edition, Chap.18.21: The court considers the application to vary on the basis of the means of the parties as they stand at the time when the case is before it, and approaches the matter as if it were assessing the payments *de novo*. It follows that the principles governing the assessment of periodical payments will in broad measure apply to applications to vary: the overriding objective is fairness. Discrimination between the sexes must be avoided. The court should consider not only the descending income of one party but also any ascending income of the other, and take into account of any increase or decrease in responsibilities or liabilities on the part of each party, including obligations to a new family. Whilst the court deprecated the notion that a husband and father could evade his financial responsibilities it would have regard to reality; there was life after divorce and a payer was entitled to order his affairs in such a way as to balance his responsibilities to his existing family with his proper aspirations for a new future, in particular, that he should have accommodation suitable for proper staying contact. In considering the application the court might have regard to the availability of social security benefits to the wife and children if there was no practical alternative. Financial mismanagement by the payer or the payee may be one of the relevant circumstances to which the court is required to have regard under s 31(7), and conduct on the part of a wife post the substantive ancillary relief order can be weighed in the balance in an application for a variation of periodical payments. This approach was examined and endorsed by the Court of Appeal in *AFM v VFM (Variation of Maintenance)* [2008] HKFLR 106 at 111:
3. The traditional approach to variation was not to re-fix afresh the amount of maintenance but to consider the amount of change in the actual means of the parties so that the new order should merely be increased or decreased roughly in proportion to the change in the means: *Foster v Foster* [1964] 3 All ER 541, *Jackson s Matrimonial Finance and Taxation* 7th Ed. Ch.3.131.
4. The modern approach, as required by section 11(7), is for the Court to consider all the circumstances of the cases. The Court is not required to proceed from the starting point of the original order but look at the matter afresh: *Flavell v Flavell* [1997] 1 FLR 353 at 357B following *Lewis v Lewis* [1977] 1 WLR 409 and *Garner v Garner* [1992] 1 FLR 573.
5. Any change in any of the matters to which the Court was required to consider when making the original order was one of the circumstances to be considered.

6. Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some changes in the circumstances since the original order was made, for example, continuing inflation; the increased costs in supporting a growing child and that one party may be more adversely affected than another by the increase in the costs of living: *Garner v Garner*.
7. An increase in the wealth of the husband was a relevant factor to be taken into account: *Premavera v Premavera* [1991] 1 FLR 16 and *Cornick v Cornick* (No.2) [1995] 2 FLR 490.
8. At the same time the basis and intended effect of the original order are relevant factors to which the Court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order: *Boylan v Boylan* [1988] FLR 282. It is therefore with these principles in mind that I now come to consider the matters relevant to the Wife's application, starting first with the Husband's financial situations which are in the main non-controversial. The Husband's Financial Situation The Husband, who will be 45 by 20th May 2016, still works at Castle Peak Hospital as a psychiatrist, but as a result of annual revision to his salary over the past 2 years, his present total income including various allowances stands at about HK\$207,000 per month, some HK\$20,000 more than what he had disclosed in his Form E in 2014. That document also revealed some savings of about HK\$86,000, certain stocks/shares investment valued then at just over HK\$216,000, and MPF worth about HK\$4.3 million. As noted above he put his then monthly expenditure at just under HK\$170,000, but updated it at the trial to more than HK\$190,000 including the current maintenance of HK\$70,000 for the Wife and Daughter due mainly to increase in his rental expenses and repayment of a tax loan obtained last year. The Husband however also revealed in his evidence in court of an intention to marry his present girlfriend in the immediate future either this year or next, and when that happens he claims to need to rent a bigger flat for his new family as he plans to have children too. Whilst the Husband is of course entitled to proper aspirations for a new family, his evidence also confirms that his girlfriend is also gainfully employed earning about HK\$30,000 per month, and hence would be expected to share some of the living expenses of their new family thereby enabling him to better balance his income between his existing family as well as his new one. In any event as noted above he does not dispute his current ability to meet the Wife's stated needs and expenses even at the highest at HK\$85,000 per month, the main issue is whether they are indeed as much as she claims, and if so whether they are reasonable or necessary in the circumstances, in which case it would be useful to first set out here a list of the Husband's alleged expenses, based on his Form E and his subsequent evidence in court, for comparison purpose: 4.1 General Household: HK\$ Rent \$20,000+ Utilities + Management \$34,000 Food \$31 grooming \$500 Entertainment/presents \$2,000 Holiday \$2,000 Tax loan (+ personal loan) \$45,000 Insurance premium \$17,000 Maintenance for Wife and Daughter \$70,000 Contribution to parents \$8,500 Others (professional registration fees, MPF) \$1,800 Sub-total: \$151,300 4.3 Daughter: Extra Curricular Activities \$1,600 Entertainment/presents \$1,500 Lunches and pocket money \$300 Sub-total: \$3,400 Total Monthly Expenses:

\$194,700+ With his total monthly expenditure kept under HK\$195,000 and at his current income close to HK\$210,000, it is clear why the Husband does not dispute his ability to increase his monthly maintenance to the extent of HK\$85,000 which the Wife now claims to be her needs and of the Daughter, but instead takes issue with either the necessity or reasonableness of such increment in the circumstances of the Wife's own financial situation, of which I shall next consider. The Wife's Financial Situation The Wife, now also aged 45, is said to have remained unemployed since the divorce as a full-time mother residing with the Daughter currently in a 500 sq ft 2-bedrooms apartment at Lai Chi Kok, Kowloon. She does not dispute that she used to have more than HK\$3 million in cash made up primarily of her capitalized MPF and various payments received from the Husband under their divorce settlement, but has since invested some of them in 3 insurance policies which cannot be liquidated until their maturity dates past 2020 and beyond. In her Form E of 2014 she put her cash at about HK\$2.15 million in bank savings and the current value of her insurance policies at HK\$1.49 million. It is not disputed that she has no other assets of significant value. As noted above, she put in the same Form E her total monthly expenses at HK\$70,000, but has since updated them to just over HK\$85,000 according to her affirmation of 14th August 2015 as follows:

4.1 General Household: HK\$ Rent \$18,250 Utilities \$ 2,400 Food \$ 6,500 Household \$ 2,100 Furniture and electrical appliances \$ 500 Domestic helper (Part-time) \$ 1,000 Removal expenses \$ 2,500 Sub-total : \$33,250

4.2 Personal: Meals out of home \$ 3,000 Transport \$ 2,000 Clothing/Shoes \$ 4,000 Personal grooming \$ 4,000 Entertainment/presents \$ 1,000 Holiday (Weekends and major holidays) \$ 2,000 Holiday (Overseas trips) \$ 3,800 Medical/Dental \$ 1,500 Insurance premium \$1,200 Health food and supplements \$ 2,970 Sub-total: \$25,470

4.3 Daughter: School fees \$ 8,500 Private tuitions \$ 2,000 School trips, examination fees \$ 1,100 Books and stationary \$ 1,800 Transport \$ 4,000 Extra-Curricular activities \$ 1,000 Entertainment/presents \$ 500 Holidays (Weekends and school holidays) \$ 1,500 Holidays (Overseas) \$ 3,800 Clothing/shoes \$ 1,800 Pocket money \$ 300 Personal grooming \$ 800 School uniform \$900 Sub-total: \$27,000

Total Monthly Expenses: \$85,720 Of this total sum of HK\$85,720, the Wife however has not specified the respective share for herself and the Daughter in terms of periodical payments which she now seeks from the Husband, which is necessary as the time or date of their cessation will no doubt be different, and which in the circumstances will have to be properly apportioned in this judgment, but on the basis of these figures it means that not only is the Wife now having a monthly deficit of some HK\$15,000, but as she set out in her same affirmation she will also have further expenses which she anticipates in the near future, such as for her new rental upon the expiration of her present lease by 2017, and for additional education expenses now that the Daughter has entered secondary school. Firstly, the Husband is right to question such substantial jump of more than 20% in expenses over just one year since his last increment, even accepting it is inevitable for the Daughter's expenses to go up somewhat upon entering secondary school, and he suspects, rightly in my view, that the Wife has exaggerated many of her expenses. Of course not all of such expenses are challenged by the Husband, and of those that are, it is essentially their quantum that are at issue, except for the items of moving costs and taking the Daughter to school by taxi and

back which the Husband also takes issue with their necessity or reasonableness, and which I propose to deal with first, starting with the moving expenses which as I understand are related to her rental increase. Rental Increase & Moving Expenses The Wife's evidence is that since divorce she has been subjected to substantial rental increases to her accommodation expenses every 2 years or so, and if she could not afford the increment asked for by her landlord, she would then have to move to a new one that she could afford, in which case there would be moving costs which she claims would require between HK\$20,000 \$30,000 including other relevant expenses such as estate agency fees, rental and utilities deposits, installation expenses for new telephone line and internet services, replacing new furniture and electrical appliances, all of which would average out to HK\$2,500 per month in total. It is however also her evidence under cross-examination that the lease of her current apartment had been renewed since 5th March 2015 for 2 years from 15th April 2015 to 14th April 2017 at the new rental of HK\$17,500 per month, an increase of HK\$1,000 from previous rental, plus a further monthly sum of HK\$750 for replacing certain electrical appliances provided by the landlord, bringing her new total rental expenses to HK\$18,250 per month under the new lease, as evidenced by the Memorandum of New Rent signed by her and her landlord on the same date [P-1]. As a result there had been no moving costs over the past 2 years and not until next year when the current lease expires in April 2017, and as pointed out by the Husband, even then those expenses may not arise if she is again able to agree with her landlord on a new lease. Furthermore, the Husband argues, given the amount of rental increment may be less than the moving costs, as is the Wife's case with her new lease when the increment was clearly less than her projected moving costs, it would make more economic sense for the Wife to try to agree with her landlord on the amount of the increment every 2 years rather than moving to another apartment which may well be more expensive taking into account of the moving and other consequential expenses as noted above, not to mention the possible disruptions to the daily routine of the Daughter. Hence the Husband submits that it would not be appropriate for the Wife to include any possible moving costs as part of her monthly expenditure. I agree with the Husband on this point, but if the Wife is to continue to rent her accommodation, and that has been her practice all these years since their divorce, it is inevitable that there will be rental increment every 2 years or so, and that if and when her lease is not renewed, it is only normal that there would be all sorts of related costs and expenses. These are however one-off capital expenses rather than regular monthly expenses, for which I agree that the Wife is entitled to raise with the Husband if when they become necessary, and if he is expected to meet those expenses, it is only reasonable that he should first be consulted. On this basis and since the removal costs have not actually been incurred in this application, I agree that they should not be considered as part of the Wife's regular or monthly household expenses, of which the Husband does not take issue with the remaining items, thus bringing the Wife's total household expenses down to about HK\$30,000 per month which I find to be normal and reasonable. Daughter's Taxi Transport to School It is the Wife's case that every weekday she would accompany the Daughter to school in the morning by taxi, take another taxi back home herself, and in the afternoon she would again take a taxi to school to collect the

Daughter from school, and then return home together by taxi, which at some HK\$40 to \$50 per trip the taxi fares add up to about HK\$200 per weekday, and hence her claim of HK\$4,000 for the whole month of the Daughter's transport costs to school. The Wife explains that although the school does provide a busing service for its students, it means that the Daughter would have to get up much earlier in the morning to catch it, and as the school bus has to pick up other school children at various pick-up points and with heavy traffic jams along the route, she considers it preferable for the Daughter to take the taxi to school to save time, but as she feels unsafe for her to do so by herself at her age, she therefore accompanies her on the taxi, but as she needs to carry out her daily household chores afterwards, she therefore has to take a taxi home and later to return to the school in the afternoon to pick up the Daughter and to return home together again by taxi. It is no surprise that the Husband objects to this practice of the Wife by arguing that with the Daughter now aged almost 12 and already in secondary school, he believes that she is mature enough to be able to go to school by herself either by taxi or better still by school bus during which she can play and interact with her fellow schoolmates, which is also cheaper either way, and that it simply does not make any sense in terms of time and costs for the Wife to tag along in a taxi for a round trip twice everyday. For whatever reasons in the past that the Wife found it necessary to accompany the Daughter to school by taxi, and while I note that she is, quite understandably, very protective of her daughter, I agree with the Husband that with the Daughter now in the secondary school and at her age, it is time for her to become more independent and for the Wife to allow her more room to do so, which would also enable herself to better manage her own time whether for her daily household chores or to re-establish a career, as there is evidence to suggest that that may indeed be her goal, of which I will have more to say later in this judgment when I come to consider her earning capacity. In the premises I agree that the Daughter's travelling expenses to school should come down to about HK\$2,500 per month either by changing to school bus or by taxi based on one daily round trip.

Daughter's Other Expenses The Husband generally does not take much serious issue with most of the Daughter's other expenses, save for her overseas holidays expenses of HK\$3,800 or just over HK\$45,000 for the year which he argues as exaggerated for normally just 2 short trips during Christmas and summer and mainly to neighborhood destinations, but to which the Wife has pointed out a few longer trips in the past to Europe which she justifies as much. I agree that the Wife's figure for this item, which is essentially for airfares and hotel expenses, does appear to me on the high side for mainly short trips but even with the occasional longer trip, and I propose to round it down to a more appropriate sum of HK\$30,000 for the year, or HK\$2,500 per month on average. In addition, the Husband has also pointed out a miscalculation of the Daughter's school fees which at HK\$8,000 per month but for 11 months per year should average out to a monthly sum of HK\$7,791 instead, a small point not disputed by the Wife. Thus the Daughter's total personal expenses would come down to about HK\$24,000 per month.

Wife's Personal Expenses Of the Wife's personal monthly expenses set out under item 4.2 which she has updated from HK\$23,500 in her Form E of September 2014 to the present amount at HK\$25,470, a seemingly insignificant increase of less than HK\$2,000, but which the Husband

takes issue with almost every item on the basis that if she does not work as alleged, there is no reason why she needs to spend HK\$8,000 on personal grooming and clothing/shoes which he argues as unreasonable and excessive; or HK\$3,800 on overseas holiday which amounts to more than HK\$45,000 for the year for what he believes to be similar to the Daughter's case, just 1-2 short trips in South East Asia and hence is grossly exaggerated; or a monthly sum of HK\$1,500 for medical/dental expenses and almost HK\$3,000 for what he believes to be simply vitamins and supplements which he also argues as unnecessary or excessive given the Wife's general good health. For that last item, the Wife insists that the supplements also include Chinese health food which are more expensive than vitamins, but from her disclosed receipts for these items, as pointed out by the Husband, they amounted to only about half of her claimed amount. I agree that in the absence of any specific medical needs of the Wife, this claim appears to me somewhat on the high side and a lower sum of say HK\$2,000 appear more reasonable. Similarly her claim of HK\$1,500 per month for medical and dental expenses appears high for a healthy adult and in the absence of medical evidence, I propose to reduce it by half to a more reasonable level. As for her overseas holidays expenses, since the Wife's evidence is that all her such trips were the same as the Daughter's as they would always go together, for the same reasons already articulated above, I agree with the Husband that HK\$45,000 for the year appear to be on the high side, and possibly overlapping on the hotel expenses as they would no doubt share the same room, I propose to round this item down to HK\$3,000 per month as more reasonable. For her clothing and grooming expenses totaling at HK\$8,000, if the Wife is indeed not under any gainful employment, I would agree with the Husband that they do appear on the high side, but as noted above, whether she has in fact been working, or for that matter if she is not, whether she should is an issue raised by the Husband which will no doubt impact not just on such items of her expenses but also on the question of whether she is really in financial needs, of which it would be relevant for me to deal with first before returning to the issues over her such and other personal expenses.

Wife's Earning and Earning Capacity There is no dispute that the Wife used to earn some HK\$33,000 per month as a secondary school teacher before she resigned to become a full-time mother after giving birth to the Daughter, but that was more than 10 years ago, and it is her claim that she has not resumed working after the divorce and has remained a full-time homemaker and carer of the Daughter. The Husband however doubts that that is still the case and suspects that she has in fact already returned to work at least on part-time basis if not full-time, and suggests that in any event that should be her future plan. On the evidence before the court, that suspicion of the Husband is not without basis. Firstly, in the Wife's said affirmation of 14th August 2015 where she updated her personal expenses where she included an item for attending 2 courses which would cost HK\$6,600 per month in total, indicating a possible intention to equip or prepare herself for some sort of future career. Secondly, the Social Investigation Report submitted to court in June 2014 in respect of the Husband's initial application for variation of custody revealed that the Wife was then working part-time when it reported in Paragraph 7:

7. (Wife) and (Daughter) have been living on the monthly maintenance paid by (Husband) all along, which has increased from \$65,000 to \$^9,500 in March 2014 and will reach \$70,000 in September 2014. (Wife) also earns some income from her part-time tutorial work. She joins the Parent-teacher Association of (Daughter) s school and actively participates into volunteer services in school. Having no special hobby of her own, (Wife) spends most of her leisure hours on accompanying (Daughter). She claims to be healthy without special medical treatment need. She is still single and has no marriage plan. While that report does not reveal what sort of income the Wife may be earning from her part-time tutorial work, the statements of her Standard Chartered Bank Savings Account exhibited to her Form E may shed some light with the following deposits which very much indicate certain regular income from such part-time job: 7th November 2013 HK\$8,000 7th December 2013 HK\$7,000 10th January 2014 HK\$12,000 6th March 2014 HK\$5,500 10th March 2014 HK\$8,750 4th April 2014 HK\$14,000 3rd June 2014 HK\$9,500 17th July 2014 HK\$13,000 7th August 2014 HK\$15,500 It is true that the Wife never disclosed any such income in her Form E, nor did she make any such admission at the hearing that they were income from her part-time tutorial work, while vaguely explaining away those deposits appeared in her Standard Chartered Bank account as interests earned from certain high-interests yielding investments that she had in the past before she switched them into those insurance policies referred to in her Form E, but given the then prevailing interests rate and the amount of the principal sum involved, these deposits simply do not appear interests earned, and as pointed out by the Husband that in the absence of any supporting documentary evidence, I have great difficulty accepting her evidence that she has not been earning from any employment, and if they were indeed her income, which average out to more than HK\$10,000 per month, they certainly cannot be said to be insignificant, whether from a part-time job or otherwise. As discussed above of the legal principles applicable to this application, the court is required to have regard to the earning capacity of both parties which it would in its opinion be reasonable to expect to take or acquire. On this Rayden and Jackson on Divorce and Family Matters, 18th Edition, has this to say at Chap. 16.42: In deciding whether and, if so, to what extent the court should take into account the earning capacity of a wife, the court will have regard to the facts of the particular case, including the wife s age, qualifications and role in the marriage, whether or not she is caring for children, any recent work experience and the availability of suitable jobs. It is often said that the cost of child care makes employment uneconomical for some mothers. Where a wife has not been gainfully employed during the marriage and has no particular skill, the court has generally regarded it as unjust to expect her to go out to work in order to reduce the former husband s liability to maintain her. If there is evidence that a husband could find employment or increase his earnings but he has unreasonably declined to take advantage of such opportunities the court can make an order based on what was reasonable for him to be earning, or reflect his conduct in the award. That last sentence, I am sure, equally applies to a wife who has unreasonably make use of such opportunities to find employment or to increase her earnings. The question must therefore be: even if the Wife in the present case is not indeed working, and of which I have serious doubt, should she in the circumstances do so? To answer this question, it would be

relevant to go back to the original divorce settlement of the parties to see what were their intentions when they agreed on the periodical payment for the Wife which was stated for their joint lives or her remarriage whichever is the shorter, or until further order. While there was never any direct evidence adduced at the trial, one can safely assume that the periodical payment for the support of the Wife was necessary as she was then unemployed and without any income or financial resources to enable her to become financially independent upon her divorce with the Husband, and that as the Daughter was then aged only 5, it was not possible or practical for the Wife to return to work at that time. Now that the Daughter is in the secondary school and no longer requires full-time parental care or attention and that must mean that she can travel to school and back, whether by school bus or otherwise, all by herself without being accompanied by her mother, which should in turn free up the Wife's daily schedule to increase her part-time teaching work or to even seriously consider resuming full-time employment. As discussed in the above legal principles, while a wife who has not been gainfully employed during the marriage in order to look after the children, as was the case of this Wife, the court would generally regard it as unjust for her to do so in order to reduce her former husband's liability to maintain her, but in the present case the evidence before me that she is no longer burdened with full-time childcare, that she quite likely may have been working part-time for sometimes already with income averaging as much as HK\$10,000 per month, and that she has undertaken certain courses or studies presumably to improve her already established earning capacity as a school teacher, all of which should in the circumstances be taken into account in considering whether her present application is necessary or reasonable. I am of course not suggesting that the Wife should be able to return to earn anything close to her previous earnings before the marriage, at least not right away and certainly not without complications given her present age and having been out of regular employment for more than 10 years, but there is no question that she does have both the capacity and desire to work and to earn an income which cannot be considered as insignificant, and while it may not allow her to become entirely financially independent of her former husband, she herself has readily conceded as much that there will come a day when he retires and is unable to support her at all or as much as she may require, hence it would only be in her interests to re-equip herself with earning capacity and to actually start earning in preparation for that day, and on the basis of the evidence before me, I believe she has in fact been doing just that, albeit perhaps on irregular and part-time basis, and for which reason I am prepared to round that said average sum down to say HK\$8,000 per month, but would expect she to make better use of her time and experience to improve on that income in the foreseeable future. Which brings me to the remaining issue raised by the Husband over the relevancy of the Wife's other financial resources of more than HK\$3 million in savings and insurance policies to her present application. I accept her evidence that those policies cannot be liquidated anytime soon, while there is no evidence to suggest that she is able to derive any meaningful income from her bank savings other than some meagre earned interests, and that above all they are meant to secure her future maintenance upon the retirement of both herself and the Husband when his maintenance payment ceases. I therefore do not propose

to take them into account as part of her financial resources for the present application.

Conclusion

In the premises and for the reasons articulated above, I have found and would allow as reasonable and/or necessary the following monthly expenses of the Wife: 4.1 General Household: HK\$30,000 4.2 Personal: HK\$23,000 4.3 Daughter: HK\$24,000 Total: HK\$77,000 This total sum must of course first be properly apportioned by allotting about half of the household expenses to the Daughter thus bringing her total expenses to HK\$39,000, while the Wife s would become HK\$38,000, against which however must be set her part-time income which I would round down to a more conservative average sum of HK\$8,000 due to its irregularity. Given the fact that the Husband has earlier already voluntarily increased her share to HK\$33,000, I do not propose to reduce it now and instead maintain that amount for the Wife in the hope that she can better manage her own spending and budget with the rest of this income of hers, and only adjust the Daughter s monthly maintenance accordingly to HK\$39,000, hence an increase of HK\$2,000 per month, to commence from 1st April 2016. In conclusion, my order is therefore as follows: The Wife s periodical payment shall remain as HK\$33,000 per month until further order; The Daughter s periodical payment shall be increased from HK\$37,000 to HK\$39,000 per month commencing from 1st April 2016 until she reaches 18 or completes full-time education whichever is later, or until further order; No order as to costs as both parties were unrepresented, which is an order nisi to be made absolute at the expiration of 14 days. (Bruno Chan 1udk hE{U ~t~p~ hRW6 hRW6 hS:x h#]4 hRW6 gdUd gd@Y gd@Y gd4:M wnwnw h.D\$ h.D\$ h.D\$ h.D\$ hyiw h.D\$ h4:M h4:M hyiw hyiw hCl- h%([h`Qe h4:M h|,5 hnmy h|,5 h+=@ h+=@ gd@Y hS:x hyiw tftfX ulcZ hn-P hn-P h5,[ h~D, h~D, gd@Y gdvO {i`iWi` hWt5 hWt5 hJ?h gdDG( hDG( hDG( hV#I h!3/ hV#I h! 3/ hDG( hDG( h!3/ gdDG( gdDG( gd@Y hDG( hDG( hDG( hDG( gdDG( gdDG( gdDG( hDG( hDG( gdHz gd@Y gdDG( gdDG( h:Rm h:Rm h:Rm h:Rm hog( hog( hATJ hz+i hog( h oJ h[(Z hn02 hn02 hW2T hW2T hATJ |s|k|s| s|bs hn02 hbB= hbB= h`gP h`gP h[(Z hn02 h+(I h+(I hn02 h+(I hn02 hn02 hbB= h+(I h`gP gd@Y gdHz hbB= hbB= hbB= h.& h.& h`gP |t|kbYPY haL2 haL2 h[YY haL2 zqhQ\_V\_V\_NJE haL2 h[YY h[YY haL2 gd@Y h>A h &T h &T h3y} h3y} gd@Y }umcUcHC> hW,c &`#\$ 1udk N O P Q R S T U V [Content_Types].xml Iw}, \$yi} _rels/rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al-4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/relsPK theme/theme/themeManager.xmlPK theme/theme/ theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/ drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 'b- & 6" CACV Judiciary English.dot Judiciary Microsoft Office Word Judiciary CACV Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http:// schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml

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