

HONG KONG / JUDGMENT

WJT v. YATM

[2021] HKCA 1267

COURT

Court of Appeal

DECIDED

3 September 2021

CASE / FILE NUMBER

CAMP226/2020

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CAMP 226/2020

[2021] HKCA 1267

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 226 OF 2020

(ON AN INTENDED APPEAL FROM FCMP NO 79 OF 2017)

IN THE MATTER OF an Application under Section 10 of the Guardianship of Minors Ordinance,
(Cap 13)

and

IN THE MATTER OF the Minor, V

BETWEEN

WJT

Petitioner

and

YATM

Respondent

Before: Hon Chu and Au JJA in Court

Date of Decision: 3 September 2021

D E C I S I O N

Hon Au JA (giving the Decision of the Court):

INTRODUCTION

In this application, the respondent (“the Father”) seeks leave from this Court to appeal against the judgment of Deputy District Judge M Lam (“the Judge”) dated 28 September 2020 (“the Judgment”).

The trial before the Judge concerned the application by the petitioner (“the Mother”) for financial provisions for the child, V who was born on 16 January 2013 out of her relationship with the Father. The Mother and the Father are not married. Hence, the application was made pursuant to section 10(2) of the Guardianship of Minor’s Ordinance (Cap 13) (“the GMO”).

After a 7day trial, by way of the Judgment, the Judge ordered the Father to pay, inter alia, a monthly maintenance of US\$8,000 for V until V reaches the age of 18 or ceases full time education (whichever is later), and a monthly sum of US\$2,500 to the Mother as carer’s allowance for eight years. Both payments are dated back to commence from 1 August 2018.

The Father first sought leave to appeal from the Judge, who refused leave by way of her decision dated 20 November 2020 (“the Leave Decision”). He now renews his leave application before us.

Having considered the papers and the parties’ written submissions, we consider it is appropriate to determine the application on paper without an oral hearing, pursuant to Order 59, rule 2A(5) (a) of the Rules of the High Court (Cap 4A) (“the RHC”).

BACKGROUND

The background facts leading to this appeal were summarized by the Judge at [11] [21] of the Judgment. We shall only highlight those relevant to this appeal.

The parties started their relationship in Hong Kong in November 2010. The Mother is now 51 years old. She has an associate degree in Accounting and worked as an accounting coordinator in a fashion company between 2001 and 2003. She had two previous marriages in the United States (“the US”). She has the custody of her two daughters aged 19 and 17 respectively, after her first divorce in 2006. In 2007, she married her second husband. From 2008 to 2011, she set up and operated a spa business at her second husband’s clinic providing dermatological laser treatments in Wisconsin. She divorced her second husband in February 2013 after she gave birth to V. The

Father is now 71 years old. He practices chiropractic, naturopathy, homeopathy and traditional Chinese medicine. He runs a number of businesses in Hong Kong including a clinic. Through his businesses and inheritance, he has accumulated substantial wealth. He confirmed before the Judge that his ability to pay was not in issue.

After the birth of V, the Father arranged an employment visa through his clinic for the Mother to come to Hong Kong, together with V and her two daughters (collectively, “the Family”), in August 2013. The Family lived in a property beneficially owned by the Father in Happy Valley and was financially dependent entirely on the Father. The Mother had never worked for the Father in the clinic. A few months after the Mother moved to Hong Kong, the relationship of the parties turned sour and they had been sleeping in different rooms since May 2014. Thereafter, the Mother commenced the present proceedings in April 2017.

Pursuant to an order dated 26 May 2017, which embodied the Father’s undertakings, the Father undertook to pay the Mother (a) a monthly maintenance of HK\$35,000, and (b) direct payments including expenses for the household capped at HK\$62,300, adding up to a total of not more than HK\$97,300. Such sum was exclusive of accommodation costs. From June 2017 to July 2018 when the Mother and V were relocated to the US, the Father paid roughly HK\$88,000 per month. However, from August 2018, the Father only paid the monthly maintenance of HK\$35,000 to the Mother but refused to pay any of the direct payments. Hence, the Mother made an application in the family court for financial provisions under the GMO.

THE JUDGMENT

Relevant for the present purpose, the financial provisions claimed by the Mother at the trial included, among others, (a) a monthly periodical payment of HK\$90,000 for the benefit of V until he reaches the age of 18 or completed full-time education, whichever is later, backdating to August 2018, and (b) a monthly carer’s allowance of HK\$50,000 for the Mother for a duration of eight years backdating to August 2018.

On the other hand, the Father only agreed to pay 50% of V’s reasonable expenses and 50% of V’s private school fee, which added up to US\$1,515 (HK\$11,817) per month. It was also the Father’s case that the Mother should be able to work in the US and should contribute financially to V’s maintenance.

The Judge set out the applicable legal principles at [27] [31] of the Judgment, which are not and cannot be in dispute: the court is to exercise its discretion under section 10(2) of the GMO, having regard to the means of the parents and the benefits of V, in assessing the parties’ positions. The Judge has further set out at [29] [31] of the Judgment with reference to well established authorities all the relevant factors that she was entitled to take into account in considering whether and how to exercise the said discretion.

The parties were represented at the trial, and the Judge heard the oral testimony of the Father and the Mother, and also had the benefit of the affirmation evidence filed by them.

In the detailed 248 paragraph Judgment, the Judge carefully assessed and weighed all the evidence, and took into account various factors before reaching the conclusion that V's monthly maintenance in the US should be at the sum of US\$8,000 (which included accommodation costs and the cost of a nanny), and that such sum should be paid wholly by the Father, instead of the 5050 share proposed by the Father. In particular, in arriving in these conclusions, the Judge had reference to and made findings on:

V's past living standard in Hong Kong, his financial needs and expenses in the US: [33] - [82] of the Judgment;

The parties' respective financial positions, in particular, the Mother's financial liabilities and obligations and the disparity between the parties' financial resources and earning capacity: [83] - [183] of the Judgment.

Insofar as the carer's allowance was concerned, again after taking into account the relevant evidence and factors, the Judge concluded that it was in the best interest of V to continue to have full time care from the Mother and adopted a broad brush approach in assessing that it was reasonable to allow a monthly sum of US\$2,500 for the Mother's allowance as a carer: [178] and [184] - [191] of the Judgment.

THIS APPLICATION FOR LEAVE TO APPEAL

D1.

Intended grounds of appeal

In the draft notice of appeal, the Father has advanced the following five intended grounds of appeal:

Ground 1: carer's allowance ordered for the Mother is too much and for too long;

Ground 2: the well-educated, professionally qualified, multi-lingual previously employed Mother can and should work outside the home;

Ground 3: the Judge erred in making no order that the Mother should contribute financially to V's maintenance;

Ground 4: challenge to provision of cost of a nanny for V; and challenge to the costs of a new nanny for V in addition to carer's allowance for the Mother to care for him; and

Ground 5: the simple truth.

He repeats the same grounds with some elaborations (which are essentially the same elaborations set out in the draft notice of appeal) in his written submissions.

It can thus be seen that Grounds 1 and 2 relate to the challenge against the Judge's order to grant the carer's allowance of US\$2,500 and for eight years; Ground 3 relates to the Judge's conclusion not to order the Mother to financially contribute to V's maintenance; and Grounds 4 and 5 relate to the Judge's finding on the sum of V's maintenance in the US, including the need and cost of also employing a nanny to help the Mother. They are all seeking to challenge the Judge's findings of fact after trial.

It is also noted that these are also the same grounds of appeal advanced by the Father before the Judge in seeking leave to appeal from the court below. They have all been rejected by the Judge as not reasonably arguable in her decision to refuse to grant leave.

D2.

Legal principles

It is necessary to first remind us of the following relevant principles in dealing with this leave application.

Section 63A(2) of the District Court Ordinance (Cap 336) provides that leave to appeal shall not be granted unless the court is satisfied that the appeal has a reasonable prospect of success or there are some other reasons in the interests of justice why the appeal should be heard.

Reasonable prospect of success involves the notion that the prospect of succeeding must be reasonable and therefore more than fanciful, without having to be probable: see *SMSE v KL* [2009] 4 HKLRD 125, per Le Pichon JA at [17].

Further, in respect of an appeal against the factual findings made by the trial judge, the appellant has to overcome a very high threshold in order to succeed. The Court of Appeal would not set aside the factual findings made by the trial judge unless the findings are plainly wrong or are tainted with errors of law: see *China Gold Finance Ltd v CIL Holdings Ltd & Others* [2015] HKCA 560, per Lam VP at [14] - [15]; and *BMC v BGC* [2020] HKCA 317, per Kwan VP, at [82] - [85].

Bearing these principles in mind, we now proceed to consider the merits of the Father's intended appeal.

D3.

Discussion

D3.1

Grounds 1 and 2

Under these grounds, the Father essentially seeks to argue that it is wrong for the Judge to (a) find that V needs a full-time carer, and (b) in any event order the excessive amount of the allowance (both in relation to the amount and the length of time of the allowance). The Father's main contentions in support are:

Normally a child at the age of five in the US does not need a full time carer, as he would receive full time education and thus spend most of the time at school. Since V is already seven years old, the Judge should not find that he needs a full time carer, or grant a duration of eight years for carer's allowance.

Further, given the Mother's qualification as an accountant and previous work experience and history in the US, (even when she was taking care of the daughters), the Judge ought also to have found that she could and should be able to take up gainful employment and thus contribute financially to the care of V.

These two grounds are without any merits.

First, all these arguments and submissions had been made before the Judge and rejected at the trial. The Judge has carefully considered and assessed the relevant evidence and reasons relating to these issues in (a) accepting the Mother's explanations for not working at this stage: see [11] - [30], [90] and [166] - [178] of the Judgment, and (b) concluding that it is in the best interest of V to continue to have full time care from the Mother: see [67] - [71], [166] - [171], [176] - [178] and [184] [191] of the Judgment.

The Father in this application is merely regurgitating his arguments already advanced before and rejected by the Judge at the trial, without pointing out with particularities any errors of the Judge's reasons. It is trite that these are therefore not valid grounds of appeal. See: *Symphony Partners Ltd v Fullerton Bay Investment Ltd* [2018] 4 HKLRD 264, per Lam VP at [33]. On this basis alone, these grounds are clearly not arguable.

In any event, these arguments are without any merits.

The Judge came to the conclusion on the award of a carer's allowance after examining and considering all the relevant evidence carefully:

In relation to all the matters raised by the Father under Ground 1, the Judge had carefully considered them against the Mother's evidence and all the relevant factors (as she was entitled to look at under the law), including the Mother's detailed evidence on her daily child-care plan, her own daily routine, her personal attention to V, the parties' respective personal situation and financial condition, V's interests and the fact that the Mother is a single mother without the assistance of the Father in the US. After weighing all the evidence, the Judge concluded that it would be in the best interest of V for him to continue to have fulltime care from his natural mother.

As to the amount of the carer's allowance, the Judge had again carefully set out her detailed assessment at [187] - [191] of the Judgment, after taking into account all the evidence adduced before her.

As to the duration of the carer's allowance, the Judge's order was that it would be confined to eight years commencing from 1 August 2018 (when V was aged 5.5 years old). See: [191] of the Judgment. Hence, the Father's assertion that the Judge should not have ordered the carer's allowance for eight years when the son is already seven years old is plainly misplaced.

It is pertinent to note that the Father in all his grounds of appeal has not suggested the Judge was wrong in law, have taken into irrelevant factors or failed to take into account relevant factors. All he is seeking to argue is his disagreement as to the weight the Judge had attached to the different factors or pieces of evidence and the conclusions so reached. This is not a proper challenge to the Judge's findings of fact, as it is trite that what weight to be put on the evidence is a matter for the trial judge and the Court of Appeal would not interfere unless it is shown that the findings are plainly wrong.

In this respect, under Ground 1, the Father has simply failed to show any basis to even begin to suggest the Judge's detailed assessment of the evidence which led to her conclusion is wrong, let alone plainly wrong. Quite to the contrary, we are of the view that the Judge's conclusion is reasonable and wholly justified on the basis of the evidence. Ground 1 is entirely without merit.

As to Ground 2, the Father's complaint is principally that, in light of the Mother's qualification and the fact that she had worked in the US previously when her two daughters were young, the Judge ought to have found that the Mother could and should work and thus neither the carer's allowance nor the nanny fees should be allowed. Further, the Mother should therefore indeed contribute financially to V's maintenance.

Again, when coming to the conclusion that "it would be unfair and unrealistic to expect the Mother to obtain any fruitful employment in the US while taking care of V as a single mother in the next few years", and it is for V's best interest to continue to receive full-time care from the Mother, the Judge had carefully considered all the relevant circumstances of the case, including the Mother's health, qualification, work history, reasons for not joining the work force, the child-care arrangement for V since his birth and the Father's arguments. The Judge then gave her cogent and justified explanations as to why, after weighing all the evidence against the Father's contentions, she had accepted the Mother's reasons for not planning to work at the moment at [169] - [178] of the Judgment.

Similarly, under this ground of appeal, the Father has failed to raise any arguable basis to point out with any particularities why the Judge's conclusion reached after her assessment of the evidence is plainly wrong. Instead, we find that the Judge's assessment is plainly justified on the basis of the evidence before her.

Ground 2 is therefore also hopeless.

D3.2

Ground 3

Under Ground 3, the Father challenges the Judge's decision not to order the Mother to contribute to V's expenses. He argues that the Judge should have found that the Mother should return to employment and, in any event, she has her own sufficient financial resources to pay V's expenses.

Again, these contentions had been advanced before the Judge at the trial and rejected by the Judge after careful consideration and with reference to the relevant evidence. As pointed out by the Judge in her Leave Decision:

The prospects of the Mother returning to gainful employment in the foreseeable future while taking care of V were examined by the Judge in [166] - [178] of the Judgment, her financial resources were investigated in [90] - [165] of the Judgment, and the Father's allegations that she had hidden assets were analyzed in [97] - [110] of the Judgment, her undisclosed business in [111] - [114] of the Judgment, and his gifts of more than US\$1 million to her in [115] [139] of the Judgment. The Mother's alleged liabilities and financial obligations were further scrutinized at [93] and [140] - [165] of the Judgment.

The Judge then tested and weighed the Mother's evidence against the Father's evidence, and explained why she accepted the Mother's arguments that she should not be ordered to contribute to V's maintenance but rejected the Father's arguments. See: [179] - [183] of the Judgment.

Other than repeating his arguments, the Father in this application again has not shown with any particularities the Judge's above conclusions reached after assessing all the evidence is plainly wrong. In our view, on the evidence before the Judge, she was fully entitled to accept the Mother's evidence and reached the conclusions as she did.

Ground 3 is without any merits.

D3.3

Grounds 4 and 5

Under Ground 4, the Father argues that after giving the Mother a carer's allowance on the basis that she is to take care of V on a full time basis, it is wholly unreasonable (and thus wrong) for the Judge to further order the provision of the cost for a nanny. This is particularly so as nanny is very expensive in the US, where domestic help is relatively rare and the son would be spending most of his time in school and extracurricular activities.

Under Ground 5, the Father submits that the Judge's various orders are wholly unjust as:

There is no evidence that V has ever lived a lifestyle costing US\$8,000 per month (especially when contrasted with the monthly allowance of US\$3,000 provided to her while living in Los Angeles before moving to Hong Kong, and that the Mother has her own wealth after selling her former condominium in the US);

The assessment of the allowance was done without due regard to the Father's old age, his deteriorating health and financial condition;

The Judge was plainly wrong in finding V's lifestyle should be significantly "more costly" than his two halfsisters and the average middle-class children in Los Angeles.

Again these arguments had all been advanced before and rejected by the Judge after trial, for all the detailed reasons provided in the Judgment. Instead of pointing out any specific errors in the Judgment, the Father simply regurgitates those arguments in support of these grounds. They are therefore not viable grounds of appeal and should be dismissed for this reason alone.

In any event, these arguments have no merits at all.

The need for V to be taken care of by a nanny was discussed at length at [67] [71] of the Judgment as follows:

"67.

Of the claim for child-minding fees for US\$3,000, the Father disputes such claim by referring to the Mother's 5th affirmation in that she stated that a full-time nanny for V was unnecessary as she could raise him the same way as she had raised the Two Daughters without the assistance of a nanny in the past. I accept Mr Yim's submission [counsel for the Mother] that her statements should not be taken out of context. They were referring to the period of time when she was living with the Father in Hong Kong and the Father's nanny, B, had been on vacation leave out of her control. By contrast, the mother is now aged 51, looking after V as a single mother in the US. It is for V's benefit to be fully taken care of by his natural mother with the assistance of a nanny as he enjoyed in the past.

68.

The argument that it is uncommon for families to have full-time nannies in the US is unconvincing, bearing in mind that V was used to enjoy the services of 2 domestic helpers while living with both of his parents in Hong Kong. I find no reason why he should be deprived of such service after being relocated to the US. The fact that the Father arranged B to take care of V during his access is a good indicator of the need. Sharp disparity between the Father and the Mother should be avoided.

69.

Probably the Mother may derive benefit from the nanny's contribution to household chores. I am however persuaded that she would not need to employ a nanny but for V and she could even more focus on taking care of V which will benefit V the most at the end. It is not fair to burden the Mother's extended family members or friends with V's daily care or household chores as suggested by the Father.

70.

It is logical that service fee of a nanny is fixed according to experience and expertise. I do not think a highly professional nanny is necessary for a child who is no longer an infant. I would allow US\$1,750 instead of US\$3,000.

71.

Provided with the service of the nanny, the meal out of home should be allowed at US\$250 (instead of US\$477 as claimed). I reject the claim for club membership fee of US\$50 which I would elaborate further below.”

In our view, the Judge’s decision to allow the sum for V’s nanny in the US is supported by the above careful and articulated analysis. In any event, this is not plainly wrong.

As to the Father’s criticism at the Judge’s conclusion of the US\$8,000 maintenance fee, we are equally not persuaded.

As mentioned earlier, it is trite that in exercising the court’s discretion for a child’s maintenance, the court has to adopt a holistic and broad brush approach with a range of parameters. The Judge started with V’s living standard in Hong Kong. She found that V had been living a rather comfortable life in light of the Father’s financial resources and social status. In this connection, in assessing V’s financial need in the US, she stated at [61] of the Judgment that it would be reasonable to apply the expenses on the higher end to maintain his life style. She then proceeded to consider V’s personal and general expenses at [62] [82] of the Judgment and found that a figure of US\$8,000 was appropriate. Such approach cannot be faulted.

The Father’s argument that V and the Mother previously only required US\$3,000 in Los Angeles and less than HK\$35,000 in Hong Kong is misplaced. After V’s birth in January 2013, he was brought to Hong Kong with the Family in August 2013. Thus, during his stay in Los Angeles, he was only an infant who required less expenses at that stage. Moreover, it is pertinent to note that while the Mother and V were in Hong Kong, the Mother, through the Father’s undertaking embodied in the 2017 court order, had been receiving approximately HK\$88,000 a month (ie, more than US\$10,000) from the Father as maintenance even though they continued to reside in the property provided by the Father. In the circumstances, the US\$8,000 now ordered by the Judge for the Mother and V’s maintenance in the US (including accommodation cost) certainly cannot be regarded as plainly wrong.

Further, as pointed out by Mr Yim for the Mother, despite the Father’s argument that he is old and about to retire and his business is not as profitable, it was admitted by himself before the Judge that his ability to pay for whatever amounts was not in issue. In any event, the Father’s health problems were never mentioned in his evidence before the Judge. This therefore cannot assist him to seek to challenge the Judge’s findings.

Thus, Grounds 4 and 5 are also clearly without any merits.

CONCLUSION

For the above reasons, we dismiss the Father's summons for leave to appeal as none of the proposed grounds of appeal have any merits, and the intended appeal has no reasonable prospect of success.

There are no reasons why costs should not follow the event. In the premises, we further order that the Mother is to have the costs of this application. We will assess the costs summarily on paper. The Mother has filed her statement of costs for summary assessment on 24 December 2020, claiming the amount of HK\$46,460. We direct the Father to file his statement of objection, if any, (the length of which should not exceed two pages) within seven days from the date of this decision.

As this application is wholly devoid of merits, we make an order pursuant to Order 59, rule 2A(8) of the RHC that no party may under rule 2A(7) request the determination of this Court to be reconsidered at an oral hearing *inter partes*.

(Carlye Chu)

(Thomas Au)

Justice of Appeal

Justice of Appeal

The respondent acting in person

Mr Eugene Yim, instructed by Chaine, Chow & Barbara Hung, for the petitioner

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Prepared on 28 October 2026 · Esheria