

HONG KONG / JUDGMENT

WKWV v. HDG

COURT

Family Court

DECIDED

26 November 2015

CASE / FILE NUMBER

FCMC15178/2014

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bjbj FCMC 15178 / 2014 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 15178 OF 2014

BETWEEN WKWV Petitioner and HDG Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Date of Hearing: 9
November 2015 Date of Ruling: 26 November 2015

R U L I N G (Leave to file answer out of time)

Introduction

AUTONUMOUT This is an application by a respondent husband dated the 25 August 2015 for leave to file an answer out of time. He maintains that the marriage has not broken down irretrievably and that he has not behaved in such a way that the petitioner cannot be reasonably expected to live with him. He also asked that the decree nisi hearing fixed for the 2 September 2015 be adjourned until after the determination of this application. Infact, by order of the court dated the 2 September 2015 the decree nisi was vacated and adjourned sine die with liberty to restore. Thus there is only one outstanding issue to be determined namely whether or not the husband s application for leave should be granted.

Background

AUTONUMOUT The parties married on the XX September 2007 in the United Kingdom. There is one child of the marriage, a little girl, S, who is now 6 years of age. The husband is an accountant with one of the big accountancy firms and the wife was originally a housewife, although as I understand it she has now returned to the workforce. She is also well educated. The husband is

52 and the wife 46 years of age. AUTONUMOUT On the 13 November 2014 the wife issued a petition based on mild unreasonable behaviour particulars. On the 14 January 2015 the petition was served personally on the husband. He did not file an Acknowledgement of Service form. The wife instructed lawyers and filed the requisite court documents including a Form E (Financial Statement) and a Form J (Children's Form). The parties entered into negotiations and on the 12 May 2015 a comprehensive order was made by consent, which included inter alia the husband's undertaking to pay for the mortgage and S's school fees, an undertaking by him to move out of the matrimonial home on or before the 31 July 2015 plus an order for joint custody of S with care and control to the wife and reasonable access to him to include scheduled access over the weekends, public holidays etc. He also agreed to provide interim financial support for the wife and S in the total sum of HK\$80,000 per month. This was expressed as a court order. The only outstanding issue related to final ancillary relief. AUTONUMOUT Unfortunately at some point in the process the husband changed his mind. He did not move out of the matrimonial home as agreed and he issued the summons referred to above. He says inter alia that the marriage is not at an end, that a divorce would have a detrimental effect on S, that the petitioner is at fault (although he does not cross petition) and that he was unaware that he did not have to move out of the matrimonial home when he gave his undertaking to do so. AUTONUMOUT The wife in turn has now signed a provisional tenancy agreement and is planning on moving out of the matrimonial home in mid December with the daughter, two domestic helpers and the parties dogs. She has pointed out that this can only have an adverse effect on the parties finances, but that she has been left with little alternative given the husband's stance. AUTONUMOUT In the event that the husband's application is successful the wife may file additional and more robust particulars of behaviour, with a view to the matter then proceeding to a trial of a defended suit. In the alternative she may simply wait until the parties have been separated for two years. It is of note that on the wife's account marital relations ceased in February 2014. The law AUTONUMOUT Both parties referred me to a number of cases on this issue including the Court of Appeal decision - YSP and HFF, HA, CACV 235 of 2003 (unreported) and a decision from this court which cited that authority namely KEWS v NCHC FCMC 13087/2008. In YSP and HFF, HA the relevant principles were identified as follows:

13. The following are the relevant principles gleaned from the authorities on how the court should deal with the delay and extension of time by a party in filing an answer to the petition. The starting point is that under the special procedure the registrar has certified that the petitioner has proved the contents of the petition and is entitled to a decree: Day v Day [1979] 2 WLR 681. This being the position an application for extension of time to file the answer should be dealt with by analogy to the principle governing the former procedure of an application for re-hearing after decree nisi: Day v Day. This principle is that the application should have been refused unless there were substantial grounds for the belief that the decree would have been obtained contrary to the justice of the case: Owen v. Owen [1964] P.277. Each case has to be dealt with on its own facts: Rogers v Rogers [1974] 1 WLR 709. Broadly speaking, the cases may be divided into two types. This division is not exhaustive: Where the applicant was not served at all and the proceedings took place

without his knowledge. He would get a re-hearing almost immediately. The applicant knew of the proceedings but chose not to defend. He then changed his mind again and asked for time. He had to satisfy the court that it was more probable that the decree was obtained contrary to the justice of the case. AUTONUMOUT As can be seen in this instance the case falls squarely into subsection (2) i.e. the husband clearly knew of the proceedings, but chose not to defend. Consequently he has to satisfy the court there are substantial grounds for the belief that the granting of a decree nisi would be contrary to the justice of the case. He also has to give a valid explanation for the delay of nearly 8 months from the date of the service of the petition to the date of his summons. AUTONUMOUT Counsel for the wife in her submission also added as follows:

14. In *BCA v IOF HCMP 1901/2005*, the Court considered on the facts of that case and based on the draft submissions of the H applicant, that he has no realistic prospect of succeeding in a defended suit; and that there were no injustice in granting the decree (Para 19 and 20 referred). 15.
16. In the case of *JAH v VH [2011] HKEC 350*, the above authorities were cited but more importantly the court looked at the approach stated in *Grenfell v Grenfell [1978] Fam 128*, with regard to parties seeking to answer allegations cited in the petition, in that the court should not engage in an examination or conduct an enquiry on the behavior of the parties merely to satisfy feelings of the parties. (Para 26) I agree. Discussion Are there substantial grounds for the belief that a decree nisi would be contrary to the interests of justice? AUTONUMOUT With respect it seems to me that the answer to that question must be no. The husband relies on the fact that the particulars in the wife s petition as originally drafted are mild . He says that there are no allegations that he took drugs, engaged in illicit sexual activities or was abusive in any way. However that is not the test. In this case the wife relies on the ground of unreasonable behaviour. In line with modern thinking the particulars have been deliberately drafted in such a way as not to cause unnecessary offence to the other party. This is to be encouraged. Section 11A(2)(b) of the Matrimonial Causes Ordinance, Cap 179 states as follows: 11A. Proof of ground for petition
 - (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts ..
 - (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. AUTONUMOUT The appropriate test for this was originally formulated in the case of *Livingstone-Stallard v Livingstone-Stallard [1974] 2 All ER 766*. In that case, the judge posed the following question: Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him? Taking into account the whole of the circumstances and the character and the personalities of the parties. AUTONUMOUT It is then both a subjective and an objective test. The issue is not so much whether one spouse s actions are unreasonable per se although that may be the case, but rather, whether this particular spouse found the other spouse s actions unreasonable. The court will consider

this and will then go on to determine whether or not the wife can be reasonably expected to live with the husband in the circumstances of this particular case. This test has been approved in a number of cases since Livingstone-Stallard, including a number of judgments in the Family Court in Hong Kong. AUTONUMOUT In this instance it seems to me that there are no grounds for believing that a decree nisi would be contrary to the justice of this particular case. From the wife's perspective the marriage is clearly at an end. The husband feels very aggrieved about this. However the husband should not be allowed to defend simply because he wishes to. Certainly I have not been taken to anything, which has led me to believe that the husband has a reasonable chance of lodging a successful defence, especially if the wife files the supplemental particulars. Mr Firmin says that more weight should be given to a meritorious defence. I accept that. However it does not seem to me that the husband's draft Answer necessarily falls within that category. I am also cognizant of the fact that the husband makes many allegations against the wife in his draft Answer without cross petitioning. It is hard to see in such circumstances how the parties can begin to effect a meaningful reconciliation. I am also very concerned that S is being drawn into her parent's dispute in an inappropriate way. As Ms Kwan says at no point does the husband say I love my wife and cannot live without her. Instead he says that he is prepared to forgive her for the sake of his daughter. The wife of course does not believe that she has done anything that requires forgiveness. AUTONUMOUT In addition the delay of nearly 8 months was unacceptable. The husband is a professional man. He is intelligent. He must have been aware of the need to take proper legal advice. Infact the court suggested that he do so on several occasions. There is a sense that he simply put his head in the sand in the hope that the matter would go away. He led the wife to believe that he would resolve matters in a conciliatory way. I accept that his change of heart has put incredible pressure on her and has cost both sides a great deal of money and for no useful purpose. AUTONUMOUT Consequently the husband's application shall be dismissed. The decree nisi hearing shall be restored forthwith. Given the circumstances I can see no reason why the wife shouldn't have her costs. Costs will therefore follow the event in the normal way. There shall be certificate for counsel.

16. The First Appointment shall be adjourned to the 21 January 2016 at 9:30 am. Both parties do personally attend that hearing. (Sharon D. MELLODY) District Judge Ms T Kwan instructed by Howse Williams Bowers for the Petitioner Mr Paul Firmin of Oldham Li & Nie for the 1udk h8j3 gd!t sosos h9 1 xnhn &`#\$ h8j3 1udk [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"/>

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