

HONG KONG / JUDGMENT

WMB v. EIYL

[2024] HKCFI 1773**COURT**

Court of First Instance

DECIDED

5 July 2024

CASE / FILE NUMBER

HCMP797/2024

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**[2024] HKCFI 1773 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 797 OF 2024**

IN THE MATTER OF RJL also known as RJLB, a girl, born on xxxx 2021 (the Minor) AND IN THE MATTER OF Section 26 of the High Court Ordinance (CAP. 4) and Order 90 of the Rules of the High Court (CAP. 4A) AND IN THE MATTER OF the Guardianship of Minors Ordinance (CAP. 13) AND IN THE MATTER OF the Child Abduction and Custody Ordinance (CAP. 512) BETWEEN WMB Plaintiff and EIYL Defendant

Before: Hon H. Au-Yeung J in Chambers (Not Open to Public) Date of Hearing: 26 June 2024 Date of Judgment: 26 June 2024 Date of Reasons of Judgment: 5 July 2024

REASONS FOR JUDGMENT**INTRODUCTION**

By Originating Summons filed on 14 May 2024 (the Originating Summons), the plaintiff (Father) applied for, among others, the following orders: The Minor be made ward of the court during her minority or until further order; The plaintiff be granted an order pursuant to section 3(1)(d) of the Guardianship of Minors Ordinance (Cap.13, Laws of Hong Kong) () and shall consequently have all the rights and authority that the law will allow him as a father as if the Minor were legitimate; Joint custody and shared care and control of the Minor be granted to Father and the defendant (Mother); Mother forthwith returns the Minor to the jurisdiction of Hong Kong from

Taiwan; Upon the Minor's return to the jurisdiction of Hong Kong, Mother is required to surrender to Father's solicitors the passport(s) which have been issued to the Minor forthwith; Until further order, Mother whether by herself, her servants or agents or otherwise be restrained from taking the Minor out of the jurisdiction of the Court or causing or permitting the Minor to leave the jurisdiction of Hong Kong. MOTHER'S ABSENCE FROM THE HEARING When the Originating Summons was issued, Father did not know where exactly Mother and the Minor were except that they were in Taiwan. Therefore the Originating Summons and the supporting affirmation could not be served on Mother at any known address. However, these documents (together with a Notice of Appointment to Hear Originating Summons dated 27 May 2024) had been sent to Mother via her email address (Mother's Email Address) on 8 June 2024. It is also evident that Mother did use Mother's Email Address to send an email to Father on 17 June 2024. I am therefore satisfied that Mother must have had notice of these proceedings and the hearing to be held on 26 June 2024. As a result, I have made the following orders at the hearing on 26 June 2024: Leave be granted to the plaintiff to effect substituted service upon the defendant at her last known email address namely xxxx as set out in paragraph 1(a) of the plaintiff's 3rd Affidavit dated 11 June 2024; and Retrospective leave be granted that the service of the documents by way of email from the plaintiff to the defendant on 8 June 2024 at her last known email address namely xxxx be deemed proper and effective service in lieu. Given the above circumstances, the hearing on 26 June 2024 was proceeded with despite Mother's absence. THE SUBSTANTIVE ORDERS MADE At the end of the hearing on 26 June 2024, I have made the following orders: That the Minor be made a ward of the Court during her minority or until further order; The plaintiff be granted an order pursuant to section 3(1)(d) of GMO and shall consequently have all the rights and authority that the law will allow him as a father as if the Minor were legitimate; Interim joint custody and shared care and control of the Minor be granted to Father and Mother; Mother forthwith returns the Minor to the jurisdiction of Hong Kong from Taiwan; Upon the Minor's return to the jurisdiction of Hong Kong, Mother is required to surrender to Father's solicitors the passport(s) which have been issued to the Minor forthwith; Until further order, Mother whether by herself, her servants or agents or otherwise be restrained from taking the Minor out of the jurisdiction of the Court or causing or permitting the Minor to leave the jurisdiction of Hong Kong; Upon the Minor's return to Hong Kong, Father (once he is informed of the matter) and Mother (within 3 days) shall inform the Court in writing, and propose further directions for disposal of the application made under paragraph 3 of the Originating Summons (i.e. joint custody and shared care and control be granted to Father and Mother). The followings are my reasons.

BACKGROUND

Father came from USA whereas Mother was born in Taiwan. They started dating in about December 2017. They started cohabiting in October 2018 in a flat located on the Hong Kong Island (the Home) and got engaged in the summer of 2020. They never married due to the wedding complications created by the pandemic. The Minor was subsequently born in 2021. On the Minor's birth certificate, the plaintiff was named as her father. Before the Minor was taken

out of Hong Kong, she was attending a Nursery on the Hong Kong Island. The relationship between Father and Mother became more tensed since the birth of the Minor. In around late 2022 to early 2023, the Mother had even reported to the Police several times and made allegations against Father for domestic abuse. However, no charge had ever been laid against Father by the Police. Be that as it may, Father decided to move away from the Home in February 2023. On 13 April 2024 (which was a Saturday), Mother informed Father by WhatsApp message that she would take the Minor to Taiwan that weekend, and would be back on the following day. However, she did not do so at the end of the day. On 18 April 2024, Mother sent another message to Father, and stated that she needed to recover from the trauma of living under constant fear and abuse over the years and that they (Mother and the Minor) needed time and space for a healing process. Since then, Father had been blocked by Mother on WhatsApp. He could only contact her by email and FaceTime, though Mother never picked up Father's FaceTime calls, other than a call which was made on 23 April 2024, which lasted for 5 minutes. As aforesaid, Father then took out the Originating Summons on 14 May 2024. SECTION 3(1) OF GMO FATHER'S RIGHTS AND AUTHORITY Section 3 of GMO provides that:

- (1) In relation to the custody or upbringing of a minor, [
 - (a) in any proceedings before any court (whether or not a court as defined in section 2) the court
 - (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to (A) the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; and (ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father;
 - (b) except where paragraph (c) applies, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other;
 - (c) where the minor is illegitimate
 - (i) a mother shall have the same rights and authority as she would have by virtue of paragraph (b) if the minor were legitimate; (ii) a father shall only have such rights and authority, if any, as may have been ordered by a court on an application brought by the father under paragraph (d);
 - (d) the Court of First Instance or a judge of the District Court may, on application, where it is satisfied that the applicant is the father of an illegitimate child, order that the applicant shall have some or all of the rights and authority that the law would allow him as father if the minor were legitimate.

- (2) Subsection (1)(a) shall have effect as regards any application under subsection (1)(d). In *BGPB v KSW*, [2021] 2 HKLRD 458, [2021] HKCFI 899, Au-Yeung J explained that:
61. In approaching s.3(1), subject to the position under illegitimacy, the Court will always put the competing parents on an equal footing. This equality principle reflects the universal recognition that the long-term best interests of a child are best protected if both parents are, despite the breakdown of their relationship, involved equally. See *H v N* [2012] 5 HKLRD 498, Poon J (as he then was), at 18.
62. In the case of illegitimacy, it remains the case that the unmarried father has no legal parental rights over his illegitimate child but he will have such rights and authority, if any, as may be ordered by the court upon his application under s.3(1) GMO: *H v N*, 19.
63. The Court will consider, in particular,
- (1) The degree of commitment which the father has shown towards the child;
 - (2) The degree of attachment which exists between the father and the child; and
 - (3) The reasons of the father applying for the order. See *C v S*, HCMP 929/2017, 12 October 2017, B Chu J, 12, 77-90.
64. The terms best interests is to be given its widest meaning. It is well established that the courts will have regard to a welfare checklist which include a list of non-exhaustive factors like:
- (a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
 - (b) His physical, emotional and education needs;
 - (c) The likely effect on him of any change in his circumstances;
 - (d) His age, sex, background and any characteristics of his which the court considers relevant;
 - (e) Any harm he has suffered or is at risk of suffering;
 - (f) How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and
 - (g) The range of powers available to the court in the proceedings in question. See *H v N*, at 27-28.
65. The Court however, is not obliged to follow this list and set out the findings on each factor one by one. The checklist is but an aide memoire and is not exhaustive: *H v N*, 28-32. Having considered Father's evidence, I am satisfied that: He has shown a high degree of commitment towards the Minor According to him (which is not contradicted by any evidence), before the Minor was taken to Taiwan (especially the time when he was still residing at the Home), he has all along been loving and caring towards the Minor, and has

been actively involved in the Minor's daily life. He has been supporting the Minor financially, including the payment of nursery school fees; Strong attachment exists between him and the Minor. It is evident (especially by a number of photographs capturing their activities) that the Minor has been very close to Father. As stated, the plaintiff has been registered as the father of the Minor's birth certificate. There were also occasions when Mother described the plaintiff as a father in their WhatsApp communications. In all the circumstances, I have no doubt that the plaintiff is the biological father of the Minor. Mother has taken the Minor to Taiwan for a period which has not been consented to by Father. She has also cut the connection between Father and the Minor, such that Father has not been able to communicate with the Minor directly since 23 April 2024. Given the close relationship between Father and the Minor all along, such prevention of communication cannot be in the best interest of the Minor, not to mention Mother's unilateral decision to take the Minor to Taiwan and stay for an unknown period of time. It was under such situation that Father considered necessary to make the present application so as to legalize his rights. Taking all the above circumstances into account, I am of the view that it is in the best interest of the Minor for Father to be granted all the rights under section 3(1)(d) of the GMO, so that Father can also be involved in matters concerning the Minor.

WARDSHIP AND ORDER TO RETURN THE MINOR

It is trite that wardship is a discrete and ancient aspect of the inherent jurisdiction of the High Court. In the exercise of this jurisdiction, the court acts in a parental, administrative and inquisitorial manner. Its purpose is to protect the property and/or the person of the ward. The Court's duty is to act in a way that is best suited to serve the true interests of the ward and, if it is necessary, the Court will exercise this supervisory jurisdiction over an extended period of time. It will only be exercised when there is a real need for the court to protect the interests of a child. There is no stated limit to the jurisdiction because each and every case is unique. But there is an underlying common denominator, that is, the imminent or immediate need to afford protection for a child when that protection may not readily be derived from any other source: *M v Y & Another* [2009] 5 HKLRD 597 at [3] [4]. In *BGPB v KSW* (supra), [2021] 2 HKLRD 458, [2021] HKCFI 899, Au-Yeung J also explained at [59] that: Wardship proceedings are not adversarial in nature. The Court acts in a parental, administrative and inquisitorial manner. Its purpose is to protect the property and/or the person of the ward. Its duty is to act in a way that is best suited to serve the true interests of the ward where there is an imminent or immediate need to afford protection for a child when that protection may not be readily derived from any other source. If it is necessary, the court will exercise this supervisory jurisdiction over an extended period of time. In the present case, as aforesaid, Mother has taken the Minor to Taiwan. Initially it was said that the Minor would only stay there for a weekend. However, Mother changed her mind subsequently and has not brought the Minor back to Hong Kong, the place where she was born or raised, ever since. Father has never consented to such a new plan. According to Father's communication with the nursery school in Hong Kong which the Minor was attending, while Mother has informed the school that the Minor would not attend school for a period, she has not applied for the Minor to withdraw from the school. Therefore it is not apparent that Mother has already made up her mind that the

Minor would never be brought back to Hong Kong. Having said that, it is still undesirable for Mother to retain the Minor in Taiwan for an indefinite period of time without the consent of Father. It is even more undesirable for Mother to deny access of the Minor to Father. In such circumstances, in my view, it is in the best interest for the Minor to be made a ward of the Court. Mother should also be ordered to bring the Minor back to Hong Kong and surrender the Minor's travel documents thereafter. She should also be restrained from taking the Minor out of Hong Kong again without leave of the Court.

CUSTODY, CARE AND CONTROL

Father asked for joint custody and shared care and control in the Originating Summons. Having taken into account the evidence and the relationship between Father and the Minor, I am of the view that it is appropriate to make an interim order in that regard. However, whether that should be an order for the long term is a question which should be considered with more objective assessment of the situation. A social investigation report is necessary to be done for that purpose. I have therefore ordered that the Court should be informed once the Minor has been brought back to Hong Kong, so that further directions can be given in this regard.

COSTS Costs be reserved. (H. Au-Yeung) Judge of the Court of First Instance High Court Mr Azan Marwah, instructed by Withers, for the plaintiff The defendant was not represented and did not appear Paragraphs 8, 11 14 & 27 of Father's affidavit filed on 14 May 2024

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