

HONG KONG / JUDGMENT

Y, M v. S, J

[2022] HKFC 250

COURT

Family Court

DECIDED

16 November 2022

CASE / FILE NUMBER

FCMP10/2022

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FCMP 10 of 2022

[2022] HKFC 250 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MISCELLANEOUS PROCEEDINGS NO. 10 OF 2022

IN THE MATTER OF CY, a boy born on XX April 2021 and IN THE MATTER OF SECTION 6 OF THE
PARENT AND CHILD ORDINANCE (CAP. 429) and IN THE MATTER OF SECTION 3(1)(D) AND
SECTIONS 10(1) & 10(2) OF THE GUARDIANSHIP OF MINORS ORDINANCE (CAP. 13)

BETWEEN Y, M Applicant and S, J Respondent

Coram: Deputy District Judge Peter Barnes in Chambers (Not open to public) Date of Judgment:
16 November 2022 (Paper Disposal)

J U D G M E N T (G M O - I N T E R I M M A I N T E N A N C E)

On 14 January 2022 the Applicant (“Mother”) commenced these proceedings by filing an
Originating Summons (“OS”) seeking relief against the Respondent including a declaration under
the Parent and Child Ordinance (Cap. 429) (“PCO”) that the Respondent is in law the father of her
minor child, C, a boy born on 13 April 2021 (“the Minor”). Pursuant to leave, an Amended
Originating Summons has now been filed limiting the relief sought by the Applicant to matters of
custody and final financial relief, with the application for the declaration under the PCO dealt
with by a separate Inter-partes Summons. On 13 October 2022, the Court granted a declaration
that the Respondent (hereinafter “Father”) is the parent of the Minor. The Applicant now pursues

her Amended Inter-partes Summons filed 14 January 2022 and amended on 20 October 2022 (“the Summons”) for interim maintenance. Specifically, she seeks a lump sum to cover the costs of the Minor from his birth to the date of the summons in the sum of HK\$523,000, provision for past and future legal costs and interim periodical payments for non-legal expenses in the sum of HK\$48,550 per month rising to HK\$63,800 per month from 1 November 2022 to take into account anticipated increased rent.

Background

The Mother is aged 36 and is a Japanese national. She was educated in Japan and is a Certified Practicing Accountant, holding the post of Vice President of an investment fund accounting firm. She has lived and worked in Hong Kong since 2015 and with the firm since mid 2018. Her position provides her with a base salary of approximately HK\$67,000 per month plus annual bonus which works out to be about HK\$9,500 per month, total HK\$76,500 per month. Her assets comprise relatively modest bank savings and investments and her MPF. Her debts, principally legal fees, exceed her assets and according to her Form E her net position is approximately negative HK\$413,000. The Father, who is 39, is also a Japanese national. He was educated in Japan and then continued his studies in Switzerland. He has lived and worked in Hong Kong since 2014. According to the Mother, he comes from a family of very considerable wealth: his father is listed by 2020 Forbes as being worth in excess of US\$800 million. The Father is a director of a private company with offices in Central. The company a family owned and in the aircraft leasing business. It has very substantial share capital. Due to his non-participation in these proceedings and non-compliance with Court Orders, little is known as to the Father’s income or his overall financial position. What is known is that he lives in expensive rental accommodation. His employer’s annual return gives the Father’s residential address as an apartment block in Stubbs Road, Hong Kong. All of the apartments in this block are rented, with a median rental of HK\$142,000 per month. The parties met in Hong Kong in or around 2016 and became romantically involved in 2020. In August 2020 the Mother learned she was pregnant with the Father’s child and she informed the Father. He did not initially deny paternity. Over the course of the following weeks, he repeatedly told the Mother that he neither wanted the child nor had any intention to marry the Mother. The Mother asked him to reconsider, but he refused. Her last communication with him was in September 2020 and thereafter there was no contact until she gave birth on 13 April 2021. The Mother continued to work up to the day prior to her giving birth. In anticipation of needing assistance with child-care, she hired a domestic helper in February 2021. After she gave birth, the Mother instructed her present solicitors (OLN) and they wrote to the Father notifying him of the need to register the birth of the Minor. The Father initially responded through Japanese lawyers, but when he was told that they had no ability to represent him in Hong Kong, he instructed local solicitors (Withers), who wrote to the Mother in May 2021 challenging paternity. The Father agreed to undergo a DNA test, and said that in the event the DNA analysis confirmed the biological father/son relationship, he would consent to amendment of the birth certificate to include his name as the father. The DNA test confirmed that he is the biological father of the Minor, but repeated requests by the Mother’s solicitors to the Father for

him to cooperate in the amendment of the birth certificate were unsuccessful. The Father ceased all communications with the Mother and her solicitors. The Father is in breach of the Order dated 25 February 2022 requiring him to file and serve an affirmation in opposition to the Mother's application by 25th March 2022 and to file and exchange his Form E Financial Statement by the same date. The deadline was later extended to 4th May 2022 but nothing has been filed by him, despite all documents, including the Orders, having been personally served on him. The Law Section 10(2) of the Guardianship of Minors Ordinance (Cap. 13) ("GMO") empowers the Court to make various orders for the financial provision of a minor child of unmarried parents, on application made by the parent with custody of the minor. "(2) The court may as regards a minor, on the application of a person with whom, whether by virtue of an order under subsection (1) or otherwise, custody of the minor lies at law, make in respect of the minor any one or more of the following orders— an order requiring payment to the applicant by the parent or either of the parents of the minor of such lump sum (whether in one amount or by instalments) for the immediate and non-recurring needs of the minor or for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order to be met, or for both, as the court thinks reasonable having regard to the means of that parent; an order requiring payment to the applicant by such parent or either of such parents of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of that parent; an order requiring the securing to the applicant by such parent or either of such parents, to the satisfaction of the court, of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of that parent; an order requiring the transfer to the applicant for the benefit of the minor, or to the minor, by such parent or either of such parents, of such property, being property to which the parent is entitled (either in possession or reversion), as the court thinks reasonable having regard to the means of that parent; an order requiring the settlement for the benefit of the minor, to the satisfaction of the court, of such property, being property to which such parent or either of such parents is so entitled, as the court thinks reasonable having regard to the means of that parent." Section 13(3) of the GMO further provides "(3) On an application under section 10 the court may, in any case where it adjourns the hearing of the application for more than 7 days, make an interim order, to have effect until such date as may be specified in the order and containing—

- (a) provision for payment by either parent to the other, or to any person given the custody of the minor, of such periodical payments towards the maintenance of the minor as the court thinks reasonable having regard to the means of the parent on whom the requirement is imposed; and
- (b) where by reason of special circumstances the court thinks it proper, any provision regarding the custody of the minor or the right of access to the minor of either of his or her parents but an interim order under this subsection shall not be made to have effect after the end of the 3 months beginning with the date of the order or of any previous interim order made under this subsection with respect to the application, and shall cease to have effect on the making of a final order or on the dismissal of the application." The principles to be applied by the Court in the exercise of these powers were extensively examined by then Deputy High

Court Judge, now Madam Justice B Chu in *WGL v ASB* [2013] HKCFI 1196; HCMP 489/2013 (28 June 2013). After noting the legislative differences between the UK and Hong Kong, the learned judge adopted as “helpful guidance” the summary of these principles and considerations given in the English case of *Re P (Child: Financial Provision)* [2003] 2 FLR 865: “55. In *Re P*, a summary of the relevant considerations was set out by Bodey J, as follows:

- (i) The welfare of the child while a minor, although not paramount, is naturally a very relevant consideration as one of ‘...all the circumstances...’ of the case (ii) Considerations as to the length and nature of the parents' relationship and whether or not the child was planned are generally of little if any relevance, since the child's needs and dependency are the same regardless: *J v C (child: financial provision)* [1998] 3 FCR 79 at 81. (iii) One of the 'financial needs of the child' (to which by para 4(1)(c) the court must pay regard) is for him or her to be cared for by a mother who is in a position, both financially and generally, to provide that caring. So it is well established that a child's need for a carer enables account to be taken of the caring parent's needs: *Haroutunian v Jennings* [1980] FLR 62 at 66; and *A v A (financial provision for child)* [1995] 1 FCR 309 at 317. (iv) By paras 4(1)(a) and (b) of Sch 1, the respective incomes, earning capacities, property and other financial resources of each of the parents must be taken into account, together with their respective financial needs, obligations and responsibilities. So ‘the child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and the father's present standard of living’: *J v C (child: financial provision)* [1998] 3 FCR 79 at 87 per Hale J.
 - (v) However, as this latter concept lends itself to demands going potentially far wider than those reasonably necessary to enable the mother properly to support the child, ‘one has to guard against unreasonable claims made on the child's behalf but with the disguised element of providing for the mother's benefit rather than for the child’: *J v C (child: financial provision)* [1998] 3 FCR 79 at 87. (vi) In cases where the father's resources permit and the mother lacks significant resources of her own, she will generally need suitable accommodation for herself and the child, settled for the duration of the child's minority with reversion to the father; a capital allowance for setting up the home and for a car; and income provision (with the expense of the child's education being taken care of, generally, by the father direct with the school). (vii) Such income provision is reviewable from time to time, according to the changing circumstances of the parties and of the child. (viii) The overall result achieved by orders under Sch 1 should be fair, just and reasonable taking into account all the circumstances.
56. Bodey J then went on to say in *Re P* that from the experience of that case, he would propose three further considerations: ‘(i) In considering the mother's budget, at least in bigger money cases, the court should paint with a broad brush, not getting bogged down in detailed analyses and categorisations of specific items making up opposing budgetary presentations. Rather, the court should do its best to achieve a fair and realistic outcome by the application of broad common sense to the overall circumstances of the particular case. (ii) Comparisons

with the commercial cost of providing professional care are unlikely to be of great assistance and may only serve to distract. (iii) When setting up a budget for the sort of lifestyle a child should be enabled to have, the court should not generally attach weight to the risk that the father may reduce or withdraw his support when the child comes of age (or ceases education or training) thereby obliging the child to adapt to a lower lifestyle at that time.'

57. In Hong Kong, this court's jurisdiction is discretionary. No factors having been set out in legislation, the only criteria in s 10 (2) of our GMO is what the court deems "reasonable" having regard to the means of the parent to whom the application is directed, which in the present case is the Father. In exercising discretion, this court will have regard to all the circumstances of the case, and in my view, these should include those matters as provided in the English legislation." The Application In the Mother's Note in support of her application, she confirms the interim relief she seeks as: A lump sum payment to cover the costs of the Minor from his birth to the date of the Summons in the sum of HK\$523,000. Upon the Mother's undertaking to apply all sums either to paying legal fees (or to reimburse the Applicant for legal fees already paid): A lump sum payment to cover the costs already incurred for representation of the Minor in the sum of HK\$600,000. Monthly periodical payments of HK\$125,000 per month, or such other sum which the Court considers reasonable in the circumstances, for the specific purpose of legal fees. Interim periodical payments in the sum of HK\$48,550 per month (half of the Mother's current household costs) to increase to HK\$63,800 per month from 1 November 2022 (to take into account the increased costs of the Mother's rent) or such alternative sum which the Court considers reasonable in the circumstances. Needs In her Form E the Mother lists her current expenses as follows General Item HK\$/m Rent, including management 31,000 Utilities (including telephone) 1,100 Food Household expenses 4,200 10,400 Domestic helper 6,000 Sub-total 52,700 Personal Meals out 2,000 Transport Clothing, shoes 2,000 500 Personal grooming 500 Entertainment and presents 5,200 Holiday (estimate after COVID-19) 5,000 Medical/dental 3,200 Tax Contributions to parents 3,000 1,500 Others Legal fees Loan repayment 75,000 3,000 Sub-total 25,900 Excluding legal fees Child Medical/Dental 2,500 Holidays Included in Personal Clothing/Shoes 1,000 Insurance premia 2,700 Other Including educational toys, nappies, treatments, baby feeding equipment 5,000 Sub-total 11,200 TOTAL = HK\$89,800 excluding legal fees The lease on the Mother's flat terminates on 30 November 2022, and she has said that she wishes to move to a larger apartment to accommodate the growing needs of the Minor. Her intention is to move to a larger flat at almost double the current rent. In my view, on an interim basis, it would not be reasonable for the Court to allow an amount in excess of the current rental of HK\$31,000/m. Her present apartment seems more than adequate. At the FDR, and if that fails, at Trial, the issue of long-term accommodation can be explored more fully. I have not ignored the fact that the evidence at this point suggests that the Father is living in much more expensive accommodation. The other items of general expenses seem reasonable and not exaggerated. The Mother argues that half of these general expenses are attributable to the Minor. I will attribute a third of the expenses to him

and all of the costs of hiring the domestic helper, given that she was hired in anticipation of the birth of the Minor and would not otherwise have been employed by the Mother: KLT v CP [2021] HKFC 102 at §§18, 21 (as referred to in paragraph 43(2) of the Mother's Note). Current general expenses I assess at \$46,700 plus the costs of the domestic helper at \$6,000 and \$8,000 for child-specific expenses. The expenses attributable to the Minor are \$15,566 say \$16,000 plus \$6,000 plus \$8,000 = \$30,000 per month. I consider that it is reasonable for the Father to shoulder the majority of these expenses, given the Mother's other commitments and her limited income. In my view it is reasonable at this stage, subject to the question of capacity, for him to be paying HK\$25,000 per month for maintenance for the benefit of the Minor. The Mother asks that the Court backdate the maintenance to the birth of the child, relying on the case of QMY v GSS [2020] HKFLR 528 at §§255-257. That was at a final hearing, however, and on an interim basis, there will be an order backdating the maintenance to 1 February 2022. Litigation Funding There is authority that the Court has the power to grant Currey-type litigation funding for cases such as this, provided the applicant can demonstrate that she could not reasonably procure legal advice and representation, at a level commensurate with the nature of the proceedings, by other means. Financial provision for a child under the GMO may include litigation costs in pursuing orders relating to the child including for final orders on child arrangements and financial provision. See WGL v ASB [2017] HKCFI 2199; HCMP 489/2013 (30 November 2017); R, ER v H, IF [2018] HKFC 229, FCMP 96/2018 (12 December 2018). In the latter case reference was made by Her Honour Judge Melloy to the applicability of the Currey v Currey principles, and to the well-known case of HJFG v KCY [2012] 1 HKLRD 95 where the Court of Appeal deals with the way the Court should approach a claim for litigation funding in an application for maintenance pending suit, specifically that "78. Section 3 of the Ordinance, of course, still required the Judge to be satisfied that any contribution towards the wife's ongoing legal costs was reasonable. That meant that he had to be able to conduct some analysis of the nature and extent and purpose of the contributions sought. On the part of the wife, that required some breakdown of her anticipated costs.

79. Aside from the fundamental requirements of supplying a sufficiently detailed breakdown of the anticipated costs, I am of the view that the following principles articulated by Wilson LJ in Currey v Currey should in future be adopted as providing prudent guidance to both judges and practitioners in this jurisdiction.
80. In the view of Wilson LJ, the initial, overarching inquiry should be into: ... whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding services.

81. As Wilson LJ pointed out, satisfying that condition alone may not be sufficient. In the broad exercise of discretion, a judge may consider that other factors must come into play: The subject matter of the proceedings will surely always be relevant; and, insofar as it can safely be assessed at so early a juncture, the reasonableness of the applicant's stance in the proceedings will also be relevant.
82. The period over which an allowance for legal costs was to be paid was also considered by Wilson LJ to be a factor of considerable relevance. Applicants should not therefore expect that an order that the allowance be paid until the final determination of all proceedings will be the inevitable order. It was observed that if the application for an allowance for legal costs was made before the FDR hearing, it may well be wise to order that the costs allowance should fund the applicant only up to that hearing: The FDR appointment is a watershed and all reasonable inducements to both parties there to negotiate positively in the light of informal judicial indications should be in place. The knowledge of a spouse in receipt of a costs allowance that, absent settlement at or in the immediate aftermath of the FDR, she will have to apply for a further allowance, which may or may not be granted, seems to me to amount only to a reasonable inducement, as opposed to improper pressure, to reach settlement.
83. In this regard, as Wilson LJ pointed out, if the FDR hearing fails, it will be for the new judge, on the basis of material properly before him – for example, rival open offers of settlement – to determine whether a new allowance for legal costs should be granted and, if so, in what amount.” Reference should also be made to the more recent case, *WW v LLN (No 2)* [2020] 2 HKLRD 487, where the Court of Appeal re-examined the principles relating to litigation funding including the evidential requirements imposed on a party seeking such funding as to the amount of legal costs incurred and estimated to be incurred leading up to and including the FDR, after which time (if negotiations are unsuccessful) a new allowance may be considered. It is relevant in this case to repeat with emphasis that the Father has chosen deliberately to ignore all of the Court's directions/orders and to play no part in these proceedings. This has served to add considerably to the Mother's legal costs. I am further satisfied that the Mother is justified in obtaining legal advice and representation from a firm specialising in this area. Her ability to continue to afford such representation from her own resources is quite limited. Aside from using her savings and income towards these costs, she has taken out a personal loan of HK\$100,000, which she is repaying at HK\$3,000 per month. She has no assets against which she can reasonably be expected to obtain raise further loans to fund her legal costs. She has considered the possibility of applying for legal aid but she has worked out that she will not pass the means test. She exhibited the result of the LAD means test calculator to her 2nd Affidavit. I am also satisfied that it is reasonable for her to instruct counsel. She has indicated she wishes to engage Mr. Richard Todd who, while he is not yet appointed Senior Counsel in Hong Kong, is a well-known specialist matrimonial silk in England and whose fees may be higher than other junior counsel in Hong Kong. I note that the Mother has to date been ably represented by Ms. Booth, a member of the Bar with considerable experience and expertise in this area. The Mother sets out her costs incurred

by 13th January 2022 (the date of her 2nd Affidavit) at HK\$610,491, being (para 8): “Billed between April 2021 and December 2021 8.1 Solicitors’ costs HK\$460,533 8.2 Counsel fees HK\$25,000 8.3 Counsel’s assistance with drafting HK\$40,000 8.4 Disbursements HK\$958 8.5 Work in progress as at January 2022: HK\$84,000 8.6 TOTAL: HK\$610,491” By her Form E dated May 2022, the Mother estimated her outstanding legal fees from April 2021 onwards to be HK\$860,000, or approximately HK\$66,000 per month over 13 months. Moving forward, the Mother estimated she will be incurring the following costs: Directions appointment: HK\$50,000 Written statements in reply: HK\$100,000 Attendance at a private 1-day FDR: HK\$400,000 (assuming Father’s engagement with proceedings, and the Mother instructing Mr. Richard Todd QC) Analysing the Father’s disclosure: HK\$100,000 4-day trial: HK\$1,600,000 (assuming the Father’s engagement with proceedings and the Mother instructing Mr. Todd QC) Fairly, Ms. Booth in paragraph 52 of her Note in support of the Summons invites the Court to “adjust the litigation allowance of HK\$2,250,000 put forward by the Mother in her 2nd Affidavit if the Court is satisfied that there is no reasonable prospects of the Father engaging in these proceedings and that the proceedings should be expedited in the interests of the Minor.” She puts forward an alternative budget, totalling HK\$330,000 if the Court decides to direct a callover, PTR and a shortened 1-day trial. At this point, and despite the Father’s non-participation to date, it cannot be confidently predicted that he will refuse to participate at all in the future. The declaration under the PCO has just been made. The Father may, in the face of that and this Judgment, decide to re-instruct solicitors to act for him. In that event, the Court may well consider that this is an appropriate matter to proceed in the usual way to an FDR, of course after he has made proper financial disclosure. The Mother’s application asks that the Order to be made on her Summons should provide for the costs she has already incurred and been billed together with estimated unbilled costs. In *WW v LLN (No 2)* the Court of Appeal emphasised that a backdated sum in respect of costs should only cover costs already incurred, including any incurred but not yet paid and that the remainder of the allowance should represent estimates of future such expenditure: at §§69-70. Exercising my discretion, I will award the sum of \$500,000 to cover costs, disbursements and counsel fees incurred and billed up to the date of the Summons, a further \$250,000 for the costs incurred by the Mother but not yet billed to date, and further litigation funding at the rate of \$50,000 per month with effect from 1 December 2022 and up to the FDR or until further order. This will be on the basis that the Mother undertakes to apply such sums towards her legal fees or in reimbursement of those already incurred but unbilled as yet. Capacity I have set out the Mother’s current financial position. There is no indication that this will improve in the short term. The question is whether the Father is in a position to meet the proposed orders for periodical payments including the orders backdating such payments to 1 February 2022. The Father’s complete silence in the face of repeated Orders entitles the Court to draw inferences. In the context of matrimonial cases where applications for interim maintenance or MPS are made, and where the Court is satisfied that disclosure by the paying party is “obviously deficient”, the Court is entitled to make robust assumptions about his ability to pay: *HJFG v KCY*, at §37(d). Counsel for the Mother refers in her Note to the passage in *Rayden and Jackson* on

Relationship Breakdown, Finances and Children (issue 17), §13.101 on this issue (by reference to the case of *Moher v Moher* [2020] 1 FLR 225), namely The Court would be entitled to draw such adverse inferences as were justified, but that did not require the Court to engage in a disproportionate enquiry. The Court is not required to provide a figure for or a bracket of the financial resources in every case when confronted with non-disclosure. When faced with uncertainty consequent on one party's non-disclosure, in appropriate cases, the Court was entitled to infer that the resources were sufficient or were such that the proposed award did represent a fair outcome. That approach was both necessary and justified to limit the scope for a "cheat's charter". That did not mean that the Court should jump to conclusions as to the extent of undisclosed wealth simply because of some non-disclosure, but it had to be astute to ensure that the non-discloser did not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations. There could not be a clearer case of non-disclosure than the present one. The Father has had multiple opportunities to assist the Court as to his financial position and he has failed to do so. The Father holds a director level position in a company with apparent connections to his family business(es). He lives in a luxurious flat. He is a member of a family the head of which is very wealthy. In my view, it is a reasonable and rational deduction from these matters that the Father is in a position to meet the payments I intend to order. Conclusion and Order I will therefore grant the Orders in the terms set out below. As the Mother had no choice but to apply by her Summons, and although I have not made all the orders she sought by it, she will have her costs of the Summons, to be assessed on a summary basis. The Mother is to lodge a Statement of Costs within 14 days from this Order, such Statement to be served on the Father within the same period. The Order on the Mother's Amended Inter-partes Summons dated 14th January 2022 is as follows: UPON the Applicant's undertaking to apply all sums granted by this Order for litigation funding towards the payment of legal fees incurred or to be incurred in these proceedings IT IS ORDERED that The Respondent do pay to the Applicant periodical payments of maintenance for the benefit of the Minor in the sum of HK\$25,000 per month, with effect from 1 February 2022 and on the 1st day of each calendar month thereafter until further Order; The Respondent do pay to the Applicant the sum of \$500,000 representing legal costs, including disbursements and counsel fees, already incurred and billed, a further \$250,000 for incurred but unbilled costs including disbursements and counsel fees, and periodical payments of \$50,000 per month as future litigation funding allowance to be paid on 1st day of December 2022 and the 1st day of each calendar month thereafter, until the FDR or further Order whichever is earlier; The Respondent do pay the costs of the Summons to be summarily assessed. Certificate for counsel is granted. Penal notice to be endorsed on this Order. I note the Order for ongoing payments of maintenance is effective for a period of 3 months only pursuant to section 13(3) (a) of the GMO. However, it is generally accepted practice that the period may automatically be extended every 3 months, to save the trouble and expense of the parties returning to Court, provided that the extension is justified: *IDC v SSA* [2019] HKFC 255; *FCMC 158/2011* (27 September 2019) at §18. No doubt, if the Father does instruct solicitors, they will advise him of this provision. (Peter Barnes) Deputy District Judge Ms. Madeleine Booth instructed

by Oldham, Li & Nie, for the Applicant The Respondent in person

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