

HONG KONG / JUDGMENT

Y v. Y

COURT

Family Court

DECIDED

29 January 2007

CASE / FILE NUMBER

FCMC3654/1994

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bjbj FCDJ 3654 / 1994 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES DIVORCE JURISDICTION NUMBER 3654 OF
1994

BETWEEN Y Petitioner and Y Respondent

Coram : Deputy District Judge T Chan in Chambers (Not Open to Public) Date of Hearing : 1st &
18th December 2006 Date of Closing Submissions by Respondent: 10th January 2007 Date of
Closing Submissions by Respondent: 12th January 2007 Date of Handing Down of Judgment : 28th
January 2007

J U D G M E N T

1. This is the Respondent s application for variation of a maintenance order made on 14th
September 2004. The Respondent shall be referred to as and the Petitioner in this judgment
for easy reference.

Introduction

2. The parties were married in 1990 and have a daughter now 16 (the Child). The Child has
since divorce and is now residing in the U.K. with W. She is still undergoing full time study.
3. On 27th May 1994, W petitioned for a divorce relying on the fact that parties have lived apart
for a continuous period of at least two years immediately preceding the presentation of her
petition and H consented to a decree being granted. In September 1994, W was granted a
decree nisi of divorce, which was eventually made absolute in November same year.

4. On 14th September 1994, there was an order made by consent of the parties (the Consent Order) whereby : W and H be granted joint custody of the Child with care and control to W and reasonable access to H to include staying and holiday access in the particular but not limited to access each alternate Christmas from December 1996 and during school holidays such access time to be agreed between the parties. W be granted leave to permanently remove the said child of the family from the jurisdiction of Hong Kong upon filing an undertaking to return the Child to the jurisdiction of Hong Kong when called upon to do so by the court. (iii) H do pay or cause to be paid to W periodical payments for the benefit of the Child in the sum of US\$ 975.00 per month payable on the first day of each calendar month from 1st October 1994 until she attains the age of 17 years or ceases full-time education whichever shall be later or until further order and for so long as the W and the Child shall permanently live in the United States of America such sum to be increased on the 1st day of January each year in line with inflation with reference to the U.S.A. Retail Price Index such increase to commence on 1st January 1996.
5. Arrangements made by the parties concerning the Child have remained smooth since divorce except H had once in May 2002 taken out a summons asking for defined access to the Child.
6. In or about June 2006 W started to complain that H had not been complying with the Consent Order and there have been arrears of maintenance. Application for issuing a Judgment Summons was made by W on 14th June 2006. W alleged that there were arrears amounting to US\$7,982.38 since May 2005.
7. A Judgment Summons was eventually issued by W on 30th June 2006. W by her affirmation dated 24th June 2006 in support says that since the divorce they have moved to the UK instead of the US. H paid the periodical payments in pounds sterling and had the same increased on an arbitrary basis to f the court that there is change of circumstances so that the Consent Order should be varied. Legal Principles
10. In exercising its power of variation, this court is required by s. 11 (7) of the Matrimonial Proceedings and Property Ordinance (MPPO) to 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
11. All the matters mentioned in s. 7 of MPPO are to be considered for the purposes of s. 11 (see Jones v. Jones 1971 3 All ER 1201, and also CCS v. LSB CACV 126 / 2004).
12. S. 7 (1) and (2) provides as follows :
7. Matters to which court is to have regard in deciding what orders to make under sections 4, 5 and 6

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- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say
- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
 - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.
- (2) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say -
- (a) the financial needs of the child;
 - (b) the income, earning capacity (if any), property and other financial resources of the child;
 - (c) any physical or mental disability of the child;
 - (d) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (e) the manner in which he was being and in which the parties to the marriage expected him to be educated;
 - (f) and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him . H s Financial Circumstances
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13. H says he has all along been willing to pay maintenance to the Child. He, as admitted by wife, has been increasing his payment from time to time over the past 11 years. He however says that the Consent Order should not be referred to as the parties have no intention to continue to be bound by that, at least as far as the amount of payment to the Child is concerned. The reason being that W and the Child did not stay in the US as planned at the time the Consent Order was made. Throughout these years they have stayed in the UK instead and the living standard there has been and still is lower than that in the US. This is more the case as they are staying at a location with lower living cost than London. So even at the very beginning, he had never paid US\$975.00 per month. W has never objected to that in the past. He has adjusted the payment from time to time to meet the increased requirements as the Child grows up and as requested by W from time to time. He says he has been performing his duty in making payments. According to paragraph 5 of his 2nd Affidavit, he has increased payment to hange of circumstances in his financial situation. On 21st July 2006 H filed a Financial Statement (Form E) wherein he states that the worth of his assets at that time were about HK\$3.85 m. His income was about HK\$8,000 per month and his expenses were about HK\$79,580 per month including HK\$11,960 for the benefit of the Child. Situation has changed rapidly since then. He says he was last paid HK\$8,000 by his business in November 2006 and he has received nothing since. He also says that his personal expenditure is no long the same as stated in his Form E.
15. According to H, the change was due to the downturn of business of his family business operated in the name of T Ltd (T Ltd). It was caused by a fraud and theft case occurred to T Ltd. T Ltd has operated television equipments business for 16 years. As the television business continues to drop in recent years, a new line of business has been started for manufacturing and sale of telephones. This accounted for 50% to 55% of the total business of T Ltd. The business managed to provide for a comfortable living for his parents and himself. T Ltd. had paid the salary of H, his expenses and also the household outgoings.
16. In 2004 during Christmas time, he was not in Hong Kong but learned that something untoward had happened to the factory in Dongguan. He returned in January 2005 only to find that one of his employees had colluded with one of the customers to steal about 10 tons of plastic and the moulds. The case was reported to the ICAC in Hong Kong.
17. Due to this incident, the business could not go on as in the past. T Ltd has to be downsized. The number of staff was reduced from 60 odd to 2 full-time and 1 part-time. As so many staff had to leave at the same time, he had to pay them compensation under the employment law also at the same time. The present financial situation of T Ltd has become worse. In fact the company is facing some possible suits which may put it into liquidation. It is anticipated that the business would be closed by end of 2006. T Ltd has a liability of \$1m to its creditors.
18. He says since then he has been looking for a job but to no avail until this moment. He no longer receives any salary from T Ltd. His only income is his share of the rental income of HK\$62,000.00 received from the property at Pokfulam where his parents and he had lived for years. Out of the rental income a sum of \$2,000 is set aside to pay off rates. This property is

inherited from his father. He is one of the joint tenants co-owning the property with his brother and mother. He says that he holds 25% of the beneficial interest only whereas his mother is the beneficial holder of 50% of it and his brother holds the remaining 25%. In any event, he says there is no chance of its being realised for cash for the time being because he and his brother have promised their father not to do so during the life time of their mother and his brother would not allow him to sell the same. He says that his brother has not asked to take his 25% share of the rental and that amount goes to support the family outgoings.

19. The property at Pokfulam has now turned from the family's accommodation into an income-earning asset. To resolve the financial problem, he and his brother have decided to relocate the family (his mother) to Thailand. The plan was materialised by early July 2006. The household expenses have since come down to about HK\$50,000 per month which could be covered by the rental received. The expenses include HK\$19,000 for rental, a nurse, the husband of the nurse and a daughter of them, and a Filipino maid, utilities, food and car expenses etc. The reason why a team of staff is still being kept is that his mother is suffering from Alzheimer's disease and requires 24 hours of nursing a day. Such household expenses could be taken care of by the rental income of the property at Pokfulam.
20. He says he has tried his best to save the business, he started cutting all kinds of expenditure hoping that situation would improve. He has not much ob.
21. Under cross-examination, H admits that on top of US\$975 as stated in the Consent Order he had to pay some other expenses like education, dental and medical insurance and a domestic helper. He says he had not paid those items. He denies that the US\$975 in the Consent Order represented half for the household expenses for W and the Child. He agrees that the maintenance payment should be adjusted according to inflation but he is of the view that the cost of living in the UK is cheaper than that in the US and should not be linked to the US index.
22. He admits that back in May and June 2005, about the time he started to reduce the maintenance, he had some assets with him. H however says that as things did not seem to work out well and that debt was climbing, he had to plan ahead and cut all sorts of expenditure he could. He did try to maintain the Child as he has been trading securities but that was for his mother and the money went to his joint account with his mother. He further says that the securities trading was to make some income for the family instead of leaving the fund idle in the bank account. He says he has no interest in the joint account with his mother. W's Financial Circumstances
23. W filed her Form E on 27th July 2006. She did not turn up on trial day saying that her means did not allow her to do so. At present, W has a landed property roughly and extensively cross-examined by legal representatives acting for W, Mrs. Heathfield first and then Mrs Casewell who are very experienced lawyers in the area.

26. After the hearing, the parties submit to the Court thorough written submissions as well. Ms. Irving for H submits that although it is so spelled out in the Consent Order that the maintenance should be increased every year in line with the USA Retail Price Index, H is not bound by it because W and Child has never moved to the US. The increase of maintenance made by H in the past was not linked to the US nor the UK index and in any event W had never produced evidence to show that it was the case. W's representative submit that H is estopped from saying that he is not bound by the clause because he had in the past acted on this basis and had led W to believe that he accepted it and she had relied upon that sum. I cannot agree with these submissions. I find that the argument made for and on behalf of W not supported. W's evidence in her affidavit that whenever there was a request from W for an increase, he would accede to it as he could afford it at that time. He made no reference to the Consent Order or any index when making the increase. I find that parties have reached agreements from time to time to adjust the payment to suit the requirements for maintaining the Child. For this reason I could not accept the submission made by Ms. Irving that the amount H should have paid is US\$970 per month. I find that the last adjusted payment in the sum submitted that there has been huge spending through his credit cards account and the credit cards balance has been paid off. Evidence of H on this is that he has been using the credit cards to support the business and he gives brief account for the expenditures. Most were related to business. H provides some explanations for the using up of the funds in his accounts including that he had to pay for the credit cards, legal fees, and some HSBC stocks bought for the Child. He says that there are still some outstanding balance owing to the banks through his credit cards as neither he nor T Ltd has the cash flow to pay off. As to the joint account with his mother, H's explanation is that he has no interest in it, he operates the accounts together with his brother.
28. Having considered all the evidence before me, I find H believable. H was not shaken under cross-examination. I accept that he was a credible and reliable witness. I accept his evidence that when he was enjoying good financial situation, he had been generous with the Child and never argued with the wife on her requests for increase. He gave the Child the best he could. I accept that there was change of circumstances to the extent that he had to relocate his family from Hong Kong to Thailand for budgeting purpose. I find that since December 2006 his only income is his share in the rental received and that is about HK\$15,000. I find that his assets have been used for paying off household and business expenses and legal fees.
29. H is now 48 years old enjoying good health. According to him his work experience is quite limited and he has difficulty finding a job even though he tried. He is planning to join the sailboat trading industry and is still awaiting replies from his connections. I accept his evidence and find that it would take him a while to be on his feet again after the drastic change to his business and family arrangement.

30. On the case for W, I find the budget set out by her for the Child at the rate of HK\$8,580 per month on the high side. Expenses on holidays, clothing/shoes and others making up a total of HK\$4,000 might have to be reduced in the financial circumstances of H. I find that W's expenses do not commensurate with her expenditure. She did not attend court to be cross-examined and I could give little weight to her Financial Statement especially in those areas where she has not produced evidence in support. I find her reason for leaving the employment not very convincing but if that was the case, that was her choice. From evidence before me, I find it difficult to believe that she is making only about HK\$2,900 a month after quitting a job with stable income. As to her health, I do not see concrete evidence saying that her health has affected her earning capacity. She is a professional physiotherapist at the age of 44. I find that she has the earning capacity to take care of herself and to share the responsibility of maintaining the Child.
31. Having considered all the circumstances including the reasonable needs of the Child above, the proposed reduction by H would not cause much inconvenience or hardship to the Child and W. I am sure, as past records show, H would make up for the Child as soon as he could afford to do so. I allow H to reduce the maintenance payments to the Child to such payments are to be adjusted on the 1st day of January 2008 and same date in each year thereafter in line with inflation/deflation with reference to the consumer price index in the UK and are to continue until the Child attains the age of 17 or ceases full-time education whichever shall be later or until further order. (ii) Such payments are to be paid to W direct through her bank account. H do pay all charges or fees for remittance of such payments due from the payer and bank charges on the side of payee, if any, be borne by W.
33. After considering the whole of the circumstances, including the financial situation of both parties and the award I make hereinabove, I order W to pay the costs of H in this application, including all costs previously reserved. This is an order nisi, which shall be made final after 21 days. (Tracy Chan) Deputy District Judge Mrs. Heathfield and Mrs Casewell of Messrs Boase Cohen & Collins for the Petitioner Ms Frances Irving instructed by Messrs Hampton, Winter and Glynn for Respondent PAGE - PAGE - &`#\$ @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 &Kek &Kek Title Microsoft Word Document MSWordDoc Word.Document.8

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