

HONG KONG / JUDGMENT

YCKS v. MPKC

[2022] HKFC 204

COURT

Family Court

DECIDED

26 September 2022

CASE / FILE NUMBER

FCMC5771/2018

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FCMC 5771 / 2018

[2022] HKFC 204

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 5771 OF 2018

BETWEEN

YCKS

Petitioner

and

MPKC

Respondent

Coram : Her Honour Judge Grace Chan in Chambers (paper disposal)

Date of written submission : 30 August 2022

Date of decision : 26 September 2022

DECISION

(Appointment of expert in children's matter)

Background

The parties of this case were married in 2001. The petitioner is the wife/mother. The respondent is the husband/father. Four children were born within their wedlock, namely:

A, a boy born in February 2002, and is now 20 years old;

M, a boy born in September 2003, and is now 19 years old;

L, a girl born in August 2006, and is now 16 years old;

T, a boy born in September 2008, and is now 14 years old.

Since the mother filed her petition for divorce in 2015 (under FCMC 8480 of 2015), she and the father have entangled in various rounds of acrimonious litigation. The major battlefield concerns their children. There was already a full-blown trial on custody and access in 2018 leading to a judgment dated 28 February 2018, under which the Family Court granted sole custody, care and control of the children to the mother, and the father had defined access (“1st Custody/Access Order”). The father was not satisfied with the judgment and made an application for leave to appeal, which was refused.

A year later on 21 February 2019, the father filed a summons for variation, such that he would joint custody and more extensive access. This variation summons was later settled by consent on 15 November 2019, under which the mother continued to have sole custody, care and control of the children, whereas the father had defined access to L and T, in pairs, twice a month for no more than 5 hours in the presence of their maid, and other additional day access during Christmas, Chinese New Year and Chung Yeung Festival (“2nd Custody/Access Order”).

Due to the continued disputes of the parties in relation to their children, a total of 6 social investigation reports and 2 clinical psychological reports from the government clinical psychologist(s) were prepared between 2016 and 2019. These reports reveal that the children had witnessed the disputes between the parents from time to time during the marriage, as well as after the separation of the parties. For example, on 19 June 2015, the father waited for T at the Central ferry pier intending to bring him home for staying access. A dispute then broke out between him and the mother during which there were pushing and pulling of each other. The incident took place in the presence of L and T, and was also witnessed by C and R as they just arrived at the ferry pier from school. Since that incident, the father could not contact or see the children smoothly and/or regularly. According to him, the children did not reply or respond to his emails or telephone calls while he was in the UK from July to December 2015, and that they told him on and off that they did not want to see him.

Further, it was recorded repeatedly in many of these reports that the children indicated their unwillingness or dislike in meeting the father, mainly because he easily lost temper and became angry during access from time to time, and would then scold at them or push them. In particularly, the elder 2 children, C and R, exhibited strong resistance to meet him. The younger 2 children, L and T, refused to meet him alone, and must have the accompany of each other, as well as their maid, in each access. They repeatedly told that they felt tense and uncomfortable during access, would demand to leave immediately after they finished the meal(s) with him.

Against such background, the father filed on 21 October 2021 a summons (dated 15 October 2021) to vary the 2nd Custody/Access Order in respect of the access to L and T (“Access Variation Summons”).

Three months later on 21 January 2022, he filed yet another summons for varying the 2nd Custody/Access Order, such that sole custody, care and control of L and T would be granted to him (“Custody Variation Summons”). In the same Custody Variation Summons, he also asks for the appointment of Family Separation Clinic to undertake assessment with clinical trial on L and T, and other consequential directions (“1st Application for Expert”).

Due to the Covid-19 pandemic, all court hearings were generally adjourned from 7 March 2022 to 11 April 2022. As a result, this court gave case management directions by way of paper on 7 March 2022 in respect of the aforesaid Summonses, such as calling for the preparation of a social investigation report on the variation of custody, care and control of, and/or access to L and T, and filing and service of affirmations by both parties. Above all, I directed that a clinical psychological report be prepared by the government clinical psychologist on the following matters (“7/3/2022 Order”):

the mental state of L and T;

their relationship with the respective parent;

whether they are subject to any emotional or psychological harm administered by either parent, and if yes, describe the same;

custody, care and control, and access;

whether the children and/or any parent should receive any psychological treatment or therapy, and if yes, briefly describe the same.

The 7/3/2022 Order also provides that the pre-trial review of the father’s applications for variation of custody and access is fixed for 26 September 2022, on which day the matters will be set down for trial.

Subsequent to the 7/3/2022 Order, the father filed yet another summons on 27 April 2022 and sought to vary the 7/3/2022 Order, such that the Family Separation Clinic (Ms Karen Woodall) shall be appointed as an expert to undertake their assessment with clinical trial and to prepare a report (“2nd Application for Expert”).

This decision will deal with the 1st and 2nd Applications for Expert, and will concern only with L (now aged 16) and T (now aged 14), as the elder 2 children, C and R, have reached majority.

Applicable legal principles

By virtue of paragraphs 8 and 9 of Practice Direction 15.12, the Family Court may exercise the case management powers under Order 1B of the Rules of the High Court, Cap 4A (“RHC”), having regard to the underlying objectives of the Civil Justice Reform under Order 1A, and the control of expert evidence under Order 38 is one of the measures that the Family Court applies (NPYJ v MRCS, CAMP 255 of 2020, [2021] HKCA 183).

Order 38 rule 36 of the RHC provides that except with the leave of the court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any matter. Order 38 rule 4 of the RHC gives a wide discretion to the judge to limit the number of experts who may be called at the trial.

In an application for leave to adduce expert evidence under Order 38, the burden is on the applicant to show that the proposed expert evidence is relevant to the issues in dispute. The court’s discretion as to whether to grant leave is to be exercised within the ambit of its management powers (Fung Chun Man v Hospital Authority, HCPI 1113 of 2006, date of judgment 24/11/2011). The court retains complete control over the use of expert evidence, the purpose of which is to limit expert evidence to what is reasonably necessary to resolve the issues for determination at time. The court has to be satisfied as to the relevance of the proposed expert evidence (Hong Kong Civil Procedure 2022, Vol 1, para 38/36/1 at p959). Simply put, the applicant has to show that the proposed expert evidence is relevant and necessary.

Further, in proceedings relating to children’s arrangement, where the paramount consideration is the interest and welfare of the children, there is an even greater need for the court to be proactive and to manage and exercise control over expert evidence to be adduced well before the trial (LYAG v YSG(YX), HCMP 802 of 2016, date of reasons for judgment 14/11/2016 at §34 per Chu JA).

The 1st Application for Expert

For easy reference, I shall first of all set out the relevant part of the father’s application as follows:

“2.1

That the Family Separation Clinic be appointed under the Family Procedure Rules Part 25 – experts and assessors, to support the court as experts, and to undertake their Assessment with clinical trial (ACT).

Such appointment to explicitly include the following requirements:

the case must remain in court for at least the first 12 weeks of the ACT programme delivery.

the Family Separation Clinic (the Clinic) must have permission to return the case to Court for guidance at any point it considered necessary.

the Court must give permission for the Clinic to see the children in clinical observation with each parent as required.

the parties accept the right of the Clinic to record as digital video or audio files any interviews, meetings and/or other sessions with them and their children.

the parties agree not to make a Subject Access Request to the Clinic at any point before the expert report is due to be filed.”

The father relies on his 12th affirmation (which encloses also his 11th affirmation) in support of his application. In gist, he says that the children “are damaged emotionally and psychologically, and are at significant risk of further harm”, due to the acts of the mother who has administered continued and active exclusion of him from their lives by denying and obstructing his access, by not complying with court orders, and by refusing to share information about the children. The children “need a proper relationship with their father and their paternal family”, which are not available so long as they remain living with the mother.

On his proposed expert, he says these:

The Family Separation Clinic and the Woodalls are a renowned global authority, and are highly respected. Their Assessment with clinical trial (ACT) offers unparalleled clarity in uncovering the underlying dynamics that are causing rejection, and proposals for treatment supported by international research;

The Family Separation Clinic has been active in supporting the Family Court of Hong Kong, such as in the case of LEYY v UKWK, FCMC 1393 of 2015, [2020] HKFC 68;

The fact that they are UK-based should not be a barrier, because they have confirmed that assessment can be remotely done;

The clinical psychological reports prepared by the government clinical psychologist(s) in 2016 and 2017 are both long out of date and stale;

The social investigation reports made since the 1st Custody/Access Order in 2018 have failed to address to the issue of ongoing parental alienation;

An English speaking expert from the private sector should be appointed in this case (it is noted that the parties and the children of this case are predominantly English-speaking).

Since the return of this summons of the father fell within the Generally Adjournment Period (GAP) due to the Covid-19 pandemic, I gave out my case management directions as per the 7/3/2022 Order, after taking into account the following matters:

The father says that the proposed expert is to be appointed under Family Procedure Rules Part 25. However, the Family Procedure Rules are English rules which are not applicable to this jurisdiction;

The father has not provided the curriculum vitae or details of the qualifications of the Family Separation Clinic or the Woodalls. I am in no position to assess if they fulfill the requirements as an expert pursuant to Order 38 of the RHC. Importantly, in the case of LEYY v UKWK (supra) cited and relied on by him, the Family Separation Clinic was not an expert appointed pursuant to the said Order 38; it was merely a provider of therapy to the child of that case;

For whatever the reasons there may be, it remains indisputable that the children are resistant to seeing the father. The court cannot downplay their very likely resistance to meet the expert solely chosen by the father, complicated by the fact that his suggested expert is not based in Hong Kong. It has to be remembered that L and T are already in their adolescence (L is 16 and T is 14);

It is unclear as to how the father can finance the proposed expert report, as well as to how to solve the problems of travel restrictions and/or quarantine requirements, if the proposed expert was to fly to Hong Kong, amidst the 5th wave of the pandemic. Notably, he ran a case in the final ancillary relief trial that he has no income and has been unemployed for long time. L and T were suspended from school for about 5 months between February to June 2018, because he did not pay their school fees;

I generally do not accept the other points made by the father at [18], because they are a non-pointer.

Due to the matters aforesaid, the 1st Application for Expert was already dealt with by me by way of the 7/3/2022 Order. By making the 7/3/2022 Order, I effectually did not approve of the 1st Application for Expert for the reasons set out above.

The 2nd Application for Expert

I now come to the 2nd Application for Expert which is repeated below:

“1.

To vary the Procedural Directions given by Order Nisi on date 7 March 2022 by HH Judge G Chan, such that Ms Karen Woodall, of the Family Separation Clinic, be appointed as expert to undertake their assessment with clinical trial, to prepare report to assist and advise the court.

2.

In the event that the requested application for appointment of the above said Family Separation Clinic and Ms Karen Woodall as expert be rejected, then Written Reasons for such rejection is requested.”

In support of his application, the father relies on his 13th affirmation. On the whole, he repeats what he has said in his 12th affirmation about the Family Separation Clinic. But this time, he has exhibited the curriculum vitae of Ms Karen Woodall. I accept her qualification in the field.

Additionally, the father is adamant in saying that the government clinical psychologists:

lack the specialist expertise in the field of parental alienation and this form of child abuse;

lack any up-to-date training, manpower and resources to deal with long and difficult cases;

fail to provide their resumes, qualifications or experience to him for consideration and comparison;

are not native English speakers;

have themselves contributed to the current very sorry state of affairs. Further reports from them would render their conclusions and recommendations vulnerable to internal conflicts of interest.

First of all, the 7/3/2022 Order is not a nisi order. Moreover, the said Order was already perfected and there is no appeal lodged in respect of it. In any event, the time for leave to appeal has long expired.

Second, I am not able to agree with the comment of the father on government clinical psychologists at [23]. In my view, whether the government clinical psychologists are native English speakers or not are totally irrelevant. It is noted that all previous reports prepared by them are in English.

The parties, especially the father, would have to ample chance to cross-examine the government clinical psychologist(s) in the trial, after which the court will form her own factual findings on the relevant issues. I fail to see at this stage how the conclusions and recommendations in the government clinical psychological report(s) would be vulnerable to internal conflicts of interest.

In *NPYJ v SMRC*, FCMC 9098 of 2018, [2020] HKFC 250, the father there filed an application for leave to appeal against my case management direction of appointing the government clinical psychologist to prepare a report on his alleged parental alienation. I refused to grant such leave and he renewed his application before the Court of Appeal (CAMP 255 of 2020, [2021] HKCA 183). In refusing his application, the Court of Appeal commented that,

“29.

The Father attacked the Appointment claiming that it was made without any evidence of expertise/experience of the government clinical psychologist.

30.

This ground is entirely without merit. As stated by the judge in the Leave Decision at §38, the Family Court judges have from time to time ordered clinical psychological reports from government clinical psychologists and in many of these instances allegations of parental alienation were made. We agree with the judge there is no reason to doubt the experience of government clinical psychologists in advising on parental alienation or that they are not well qualified to give an opinion in this regard.”

Third, I shall reiterate all the points set out by me at [19] to [20] of this decision for appointing the government clinical psychologist, which are also applicable as reasons for refusing the 2nd Application for Expert.

Fourth, it should be noted that the pre-trial review (PTR) of the Access Variation Summons and the Custody Variation Summons will take place on 26 September 2022. The updated social investigation report, as well as the clinical psychological report from the government clinical psychologist ordered under the 7/3/2022 Order, are ready and have already sent to the parties. The matter is ready for trial. Allowing another expert report to be prepared at this stage will significantly delay the trial, which is not in the interest of the children and the parties, and is not in line with the underlying objectives of the Order 1A of the RHC, including (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court, (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable, and (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings.

For all the matters aforesaid, I reject the father’s grounds for obtaining the proposed expert report. I reach the conclusion that such proposed expert report is not necessary or for fairly disposal of the matter.

Conclusion

I shall dismiss the father’s 1st and 2nd Applications for Expert.

Since both parties act in person, I shall exercise my discretion to make an order nisi for no costs of these applications, which shall be made absolute within 14 days from the date of this decision.

Grace Chan

District Judge

The petitioner (mother) acting in person

The respondent (father) acting in person

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