

HONG KONG / JUDGMENT

YCKS v. MPKC

[2023] HKFC 7**COURT**

Family Court

DECIDED

16 January 2023

CASE / FILE NUMBER

FCMC5771/2018

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FCMC 5771 / 2018

**[2023] HKFC 7 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 judgment : 16
January 2023

DECISION (Leave to appeal)

Background

This is yet another piece of acrimonious matrimonial litigation in the Family Court. Ever since the petitioner (“mother”) filed her petition for divorce in 2015 (under FCMC 8480/2015), the Family Court has handed down 9 judgments/decisions on this case, including but not limited to full-blown trials on custody and ancillary relief, with related applications on leave to appeal, and committal proceedings whereby the respondent (“father”) was committed to an imprisonment of 4 weeks for failure to pay maintenance pending suit/interim maintenance as ordered by the Family Court. On 21 October 2021 and 21 January 2022, the father took out his applications for variation of access and variation of custody respectively, which is his 2nd rounds of variation applications concerning the children of this family. Ancillary to these variation applications, he also applied for appointment of the Family Separation Clinic (Ms Karen Woodall) to be an expert to undertake an assessment with clinical trial as to parental alienation. On 26 September 2022, I

handed down a written decision rejecting his application to appoint the Family Separation Clinic to be an expert on parental alienation (“Judgment”). The reasons for rejection are set out at §19, §24 to §29 of the Judgment, which I shall not repeat here. Suffice it is for me to say that on 7 March 2022 (which was during the General Adjourned Period), I have already directed that a government clinical psychologist report shall be prepared on the points set out at §8 of the Judgment. In the previous trial on custody and access of this case, the Family Court has ordered that government clinical psychologist(s) reports be prepared. On the same day of 26 September 2022 (which is the pre-trial review hearing of the father’s aforesaid Summonses), I gave a series of case management directions, including filing of a composite affirmation by each party and fixing his aforesaid variation applications for trial, which shall commence on 30 January 2023 (“Case Management Order”). By his summons filed on 7 October 2022, the father now seeks the following: Leave to appeal against the Judgment; Stay of execution of the Order made by me on 26 September 2022. In the following, I shall adopt the abbreviations and defined terms used in the Judgment, unless stated the otherwise. I have set out the relevant background (concerning the children’s matters) at §1 to §10 of the Judgment. As said in the Judgment, the major battlefield of the parties is related to their 4 children, 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 A and M have now turned majority, the father’s Custody Variation Summons and Access Variation Summons is related to L and T only. As at the date of the Judgment, a total of 6 social investigation reports and 2 clinical psychological reports were prepared in relation to the dispute of the parties surrounding their children. It is generally reported in these reports that the children were not very keen or did not want to see the father, as they said that he lost his temper easily and scolded at them during access. The father, however, is of the view that the children are adversely affected by the alienation administered by the mother, which the Family Court has failed to make an express finding on parental alienation. Table of chronology For easy reference and discussion, it may be helpful to set out the major applications and/or orders on custody and access since the mother filed her petition for divorce in 2015 (under FCMC 8480/2015): Date Applications/Orders 9,11-12/1/2018 Trial on custody and access before Deputy Judge Josephine Chow (“Deputy Judge”) (under FCMC 8480/2015). 28/2/2018 Judgment on custody and access handed down by the Deputy Judge, in which the 1st Custody/Access Order was made. 9/3/2018 Father applied for leave to appeal of the 1st Custody/Access Order. 17/5/2018 The Deputy Judge refused to grant leave to appeal of the 1st Custody/Access Order. 21/2/2019 Father filed a summons to vary the 1st Custody/Access Order (“1st Variation Application”). 29/10/2019 The Deputy Judge ordered that the 1st Variation Application be heard immediately after the ancillary relief (AR) trial fixed for 12-15/11/2019. 14-15/11/2019 The Deputy Judge heard oral evidence from the social investigation officer (Ms Leung) and both parties on the 1st Variation Application. 15/11/2019 (before lunch) The Deputy Judge made an order in terms of a draft consent order submitted by the mother’s lawyers (2nd Custody/Access Order). There is no appeal in respect of the 2nd Custody/Access Order. 15/11/2019 (at 1.07 pm) Father filed a summons to appoint a private and English speaking clinical psychologist to assess L and T on the parental alienation (“1st Expert Application”). 30/12/2019 The Deputy Judge ordered that the 1st Expert Summons be adjourned sine die,

pending the judgment of the AR trial (which was later handed down on 10/11/2020, and the father has lodged an appeal of the AR Judgment). 27/11/2020 Father filed another summons on a number of matters, including the appointment of an English speaking alienation expert ("2nd Expert Application") and recusal of the Deputy Judge to hear this application. 25/1/2021 Return date of the 2nd Expert Summons before me. I made the following orders (only relevant parts will be stated): By consent of the parties, the 2nd Expert Summons be orally amended to become an application for appointment of a family therapeutic treating doctor on how to foster father-and-children relationship. The matter was adjourned to 10/6/2021 for the parties to nominate a treating doctor, and for SWO to provide information on available services offered by the Social Welfare Department and/or other voluntary organisations on parent-and-child relationship and the fees thereof; Leave to the father to withdraw the 1st Expert Summons. 10/6/2021 No agreement was able to reach on the appointment of a family therapeutic treating doctor. In the end, I made no further order in respect of the 2nd Expert Summons. 21/10/2021 Father filed the Access Variation Summons. 21/1/2022 Father filed the Custody Variation Summons, seeking sole custody of L and T, and appointment of Family Separation Clinic to assess L and T on parental alienation ("3rd Expert Application"); 7/3/2022 I made case management order, including appointment of a government clinical psychologist on matters set out at §8 of the Judgment. 27/4/2022 Father filed another summons for appointment of Family Separation Clinic to assess L and T on parental alienation ("4th Expert Application"); 26/9/2022 PTR of the Custody Variation Summons and Access Variation Summons -ditto- The Judgment was handed down. 7/10/2022 Father filed summons for leave to appeal. Leave to appeal Section 63A(2) of the District Court Ordinance provides that leave to appeal shall not be granted unless the intended appeal has a reasonable prospect of success or that there is some other reason in the interests of justice that the appeal should be heard. The relevant test of whether an appeal has a reasonable prospect of success is whether the applicant for leave can show that he has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success therefore means an appeal with prospects that are more than "fanciful" but which do not need to be shown to be "probable": SMSE v KL [2009] 4 HKLRD 125; KNM v HTF, HCMP 288/2011. Where an application for leave to appeal is directed to a case management order, an appellant faces a "very high hurdle" in showing that the first instance judge has gone clearly wrong and made orders which will clearly involve an injustice or inability for the trial court to carry out its task. Chu JA has propounded in the case of NPYJ v SMRC [2020] HKCA 832 the following principles in an application for leave to appeal against various case management orders made by me: "23. It is also well established that case management is pre-eminently within the province of the trial judge and the appellant court will only interfere in very exceptional circumstances: Cheung Yee-mong v So Kwok-yan [1996] 2 HKLR 48, 51. This Court has consistently held that an appellant faces a high hurdle in showing that the first instance judge had gone clearly wrong and made orders which clearly involved an injustice or an inability for the trial court to carry out its task or had erred in principle or that his order was irrational: see Lee Tak Yee v Chen Park Kuen [2001] 1 HKLRD 401; Kan Miu Wah v Aeroflot Russian International Airlines (unreported) CACV 142/2006; and Wong Kar Gee Mimi v Severn Villa Ltd [2012] 1 HKLRD 887." There are 13 grounds of appeal listed in the husband's draft notice of appeal that is attached to his summons: I erred in prioritizing case management above

the overriding guiding principle of procedural fairness (“Ground 1”); I erred in not performing the duty of exceptional diligence that is demanded in cases of alienation (“Ground 2”); I failed in my duty to determine the best evidence (best expert) to be adduced in children’s care proceedings (“Ground 3”); I erred in the application of my wide powers of discretion to manage expert evidence to be adduced by exercising this discretion to not appoint the Family Separation Clinic (“Ground 4”); I erred in the application of my wide powers of discretion to seemingly purposefully avoid the appointment of the Family Separation Clinic to assist the court (“Ground 5”); I erred in the lack of leeway extended to him in his capacity as a litigant in person (“Ground 6”); I erred in portraying the Family Separation Clinic as an unknown entity (“Ground 7”); I erred in my consideration and analysis and my duty to exercise exceptional diligence in cases of alienation (“Ground 8”); I erred in my consideration and recollection (“Ground 9”); I erred in a number of procedural matters (“Ground 10”); I erred by not fully taking into account of all relevant circumstances of the case, by misconstruction of the history and background, and by insufficient consideration of factors, when making my determination to not appoint the Family Separation Clinic (“Ground 11”); I erred by undertaking no exercise in evaluation or comparison between experts to determine the best evidence and by limiting the number of experts to only one (“Ground 12”); I erred by having predetermined the outcome and as such prejudiced the forthcoming trial (“Ground 13”).

Ground 1 The father relies on *Re C (A Child)* [2015] EWCA Civ 539 and submits that the English Court of Appeal overruled the supremacy of case management, and held that the circuit judge’s approach to the magistrate’s decision that a case management decision should not be interfered with was a “superficial” approach to an important question of procedural justice. It is not helpful that a copy of the said *Re C* is not provided in his documents filed for his application for leave to appeal. Upon the court’s own research into *Re C*, it is noted that the parents in that case have a dispute as to whether the father there should have supervised contact with his 3-year’s old son, as the mother was concerned with the psychology of the father. The English Court of Appeal made the above comment in the context that the lower court had wrongly acceded to the mother’s “oral” application for a psychological assessment of the father and made consequential directions on experts, without complying with the “mandatory” statutory scheme under rule 25.1 of the Family Procedure Rules 2010 and section 13 of the Children and Families Act 2014 of the English jurisdiction. It is clear that the facts of *Re C* can easily be distinguished from this case. I thus fail to see how *Re C* can assist the father’s case any further.

Ground 2 The father refers to the English authority of *Re S (parental alienation: cult)* [2020] EWCA Civ 568 and submits that in cases of alienation, the court should emphasise the duty to exercise exceptional diligence and the need for early and urgent intervention, but not superficial investigation and assessment. Again, the father has not provided a copy of *Re S* to the court in his papers. Upon my own research into the case, it is noted that in *Re S*, the father there sought to vary an existing order such that his 9-year-old daughter could live with him, instead of sharing her time equally between both parents. The trial judge accepted the father’s case that there was a process of alienation of the daughter from the father since the mother started to adhere to Universal Medicine, an organization held by the trial judge to be a cult. However, the trial judge refused to vary the existing order. Both parents appealed. The English Court of Appeal, after explaining the law on parental alienation at §7-§13 therein, allowed the father’s appeal but

rejected the mother's cross appeal. It was of the view that the lower court, when considering the daughter's medium to long term welfare, had failed to balance the long-term nature of harm arising from the cult and from parental alienation on one hand, and the short or short-to-medium term of harm that would cause to the daughter by a change in her living arrangement (§96 of the judgment). In the result, the Court of Appeal directed that a hearing of the father's original application be fixed before the President of the Family Division for final welfare decision. All I need to say is that the case of Re S is not related to appointment of experts in children-related proceedings. The comment of the English Court of Appeal is made in the context that there was already a confirmed finding of parental alienation. However, in the case now before me, the trial has yet to take place and thus it is pre-mature to say if the court will return a finding of parental alienation or not. I cannot see there is any reasonable prospect of success in his intended appeal on this ground. Grounds 3, 4, 8 & 12 By these 4 grounds, the father argues that I erred in not conducting any evaluation or comparison between the experts and by limiting the number of experts to only one. He says, in particular, that I erred in not appointing the Family Separation Clinic as a "second single joint expert". He further argues that I erred in not comparing the expertise, experience and specialization of the government clinical psychologist with those of Ms Woodall of the Family Separation Clinic. I have set out the father's concern on the expertise of the government clinical psychologist at §23 of the Judgment. His concern was already considered but rejected by me, with reasons set out at §25 to §28 of the Judgment. Implicit in these reasons is that I have taken into account, after comparing the government clinical psychologist and the Family Separation Clinic, that the former has the advantage of being able to meet the children face to face in Hong Kong and that the children will be more inclined to see the government clinical psychologist than the father's suggested Family Separation Clinic, so that an assessment on alienation can be made. As observed at §19(3) of the Judgment, L and T are now adolescent who are less likely to be forced to do things that they may not like. On the other hand, it must be pointed out that the father never says in his 2 summonses that his applications are for appointing the Family Separation Clinic as the "second single joint expert". Grounds 5 & 13 I shall deal with these 2 grounds together. By these grounds, the father suggests that I "seemingly purposefully" avoid the appointment of the Family Separation Clinic. He further suggests that when the conclusions and recommendations of the latest social investigation report and government clinical psychologist's report already known to the court at the time of the Judgment, and given the heavy reliance of the court on these reports, the outcome of the trial is pre-determined and prejudiced. In my view and with respect to the father, there is simply no basis for him to suggest that this court "purposefully" avoids the appointment of the Family Separation Clinic. Reasons for refusing to appoint his suggested expert are set out in the Judgment. Further, it is a very serious allegation made against this court that the outcome of the trial is pre-determined. I have not yet made any finding that I would (or would not) rely on the recommendations in the updated social investigation report or the clinical psychological report prepared by government clinical psychologist, for oral evidence has not been received. There certainly lacks any reasonable prospect of success in his intended appeal on these 2 grounds. Grounds 7, 9 & 11 In gist, the father says that I erred in portraying that the Family Separation Clinic as an unknown entity, but: in fact he has provided the information of the Family

Separation Clinic to me in the hearing of 25 January 2021 and 10 June 2021; he has also addressed to the issue of financing the appointment of the Family Separation Clinic in the aforesaid 2 hearings; I have come across the Family Separation Clinic in another case of NPYJ v SMRC, FCMC 9098/2018. Further, he complains that some of the background facts described in the Judgment are wrong or other important facts are omitted. For example, I have wrongly described the order made on 15 November 2019 (§3 of the Judgment) as a “consent” order. I have omitted important information/background set out more particularly at §11(2) of his draft grounds of appeal, such as what was/were discussed in the hearings of 25 January 2021 and 10 June 2021, or the ancillary relief judgment and his leave to appeal of the same was granted on some 20 grounds. In order to put the matter into proper prospective, I should say something about the hearings of 25 January 2021 and 10 June 2021 by referring to the table of chronology at §11 of this decision in the following. I came to seizure of the case on 25 January 2021, which is the return day of the father’s 2nd Expert Application. In the hearing, the mother informed me that T has mood problem and has been receiving both psychological and psychiatric treatment, and that he had incidents of showing violence. The father, on the other hand, submitted that since 2018, he has repeatedly suggested that there is parental alienation administered by the mother, and that there has been no improvement in his relationship with the children. As to the 2nd Expert Application, I told him that the court would not usually make any expert directions, because there was no forthcoming trial in this case at that point of time. Thus, I tried to ascertain from him if he intended to have an expert to give an opinion relating to his application for varying of custody to be made, or to have a treating doctor for family therapy. He then confirmed to me, at least twice, that he wanted the latter. It was under such circumstances that I allowed that the 2nd Expert Application be orally amended to become an application for an appointment of “a family therapeutic treatment doctor” as to how to “foster father-and-children relationship”. The matter was then adjourned to 10 June 2021. I gave directions for parties to file an affirmation to give suggestion on the treating doctor. In the intervening period, the father filed his affirmation dated 1 February 2021, in which he continued to suggest to appoint the Family Separation Clinic as the treating doctor. He said that the initial assessment fee for the whole family is GBP 6,000 which he would pay by raising a loan. But he suggested that the “subsequent therapy” recommended be “split” between himself and the mother. The mother filed her 37th affirmation in response, saying that the father’s continued suggestion to use the Family Separation Clinic meant that the treatment would be premised on the notion of “parental alienation” to which she did not agree. She said that the father himself was primarily responsible for the children’s fear and resistance to him. Due to his repeated applications, the children had to meet the social welfare officers and/or government clinical psychologists for numerous times when they were asked to revisit the traumatizing memories, which in turn has caused them frustration and emotional turmoil. Besides, the finances of the family, especially that he has not paid any interim maintenance since April 2018 save and except the rent, means that his suggestion of splitting the undetermined costs on therapy between the parties infeasible. Upon reading the above affirmations and on my own motion, I directed the social investigation officer to prepare a short memo to the court to inform the court of the available services offered by the Social Welfare Department and/or other voluntary organizations on how to re-build or improve parent-and-child relationship, and the

fees thereof. A memo dated 27 May 2021 (which describes the service available) was received by the court, and was provided to both parties on 31 May 2021. However, in the hearing of 10 June 2021, both parties insisted on their own stance as reflected in the above affirmations. As there was no room for further amicable negotiation, I made no further order of the 2nd Expert Application (as amended), with the understanding that the father would formally take out another round of variation application concerning L and T. It is thus clear that the application that was dealt with in the hearings of 25 January 2021 and 10 June 2021 is of a totally different nature (namely the appointment of a “treating” doctor) from the application that the Judgment has to determine (namely the appointment of an “expert” to give an opinion). It is thus erroneous of the father to suggest that the court should have relied on the information provided by him in the hearings of 25 January 2021 and 10 June 2021 to determine his applications that the Judgment dealt with. On the other hand, whether I am aware of the Family Separation Clinic in another case of FCMC 9098/2018 is a non-pointer. After all, each case has to be decided on its own facts. As to the father’s complaint that I have omitted the important background facts in the Judgment, I fail to see how the final ancillary relief judgment and his subsequent leave to appeal are relevant in an application for expert(s) in children’s custody and access matters. Applications by way of letters, if any, are not proper and formal applications, which in my view need not and should not be mentioned in the Judgment. There leaves only the Order made by the Deputy Judge on 15 November 2019, which was described by me as a “consent” order. I described so in the Judgment because attached to the handwritten note of the Deputy Judge was a “consent order” which recorded the same terms of the Order of 15 November 2019. It is thus mistaken that the said Order was a consent order. But this would not affect the consideration and analysis made by me in the Judgment, nor would this affect the outcome of my decision. In conclusion, I conclude that there is no reasonable prospect of success in these 3 intended grounds of appeal. Ground 10 On this ground, the father says that I erred in a number of procedural matters, which major points are summarized as below: no hearing was conducted on 10 March, 5 August and 1 September 2022; handing down the Order of 7 March 2022 as perfect and absolute without first allowing an opportunity for the matter to be discussed before the court or by submission in answer to the concern of the court, or for materials prepared in support of the application at the scheduled hearing of 10 March 2022; not providing reason for rejection of the Family Separation Clinic (ie the handing down of the Judgment) until the pre-trial review, some 3 weeks after the scheduled hearing of 5 August 2022 but not sooner. The Judgment was delayed to until after the production of the social investigation report and government clinical psychologist’s report. I shall deal with the above 3 major points according to their sequence in the preceding paragraph. On point (1) above, I have already explained in the Judgment at §8 that due to the Covid-19 pandemic, all court hearings from 7 March to 11 April 2022 were generally adjourned. It is incorrect for the father to say that there was no hearing on 5 August 2022, which was the call-over hearing of his 4th Expert Application. He himself was present but not the mother. I gave directions for filing of affirmations and fixing the application for argument on 1 September 2022. At §8 of the Order made on 5 August 2022, I directed that upon receipt of the written submission, the court may give further directions for the father’s summonses be dealt with by way of “paper disposal” and “dispensing with the attendance of the parties on 1 September 2022”. On 31 August 2022, the

court informed the parties via letters and by telephone that their attendance on 1 September 2022 could be dispensed with. There is no appeal in respect of this Order made on 5 August 2022 and 1 September 2022. On point (2) above, I accept that the court has not invited further submission on the 3rd Expert Application, as the call-over hearing of 7 March 2022 fell within the General Adjournment Period of the Judiciary due to the pandemic. But the father had already filed his supporting affirmation dated 21 January 2022, with attached exhibits and case law, which means that I had the chance to consider his case and his authorities. I cannot see how his case can be further advanced even if further written submission was there and then invited. Neither can I see how he was prejudiced when his supporting affirmation with case law attached was already duly considered by me. On the aforesaid point (3), I hope the father is not trying to suggest that this court deliberately delayed the handing down of the Judgment until the pre-trial review, or until all the reports are ready. I hope he can appreciate that the Family Court are among one of the busiest jurisdictions in the District Court. The Judgment was finished and handed down within 26 days after its original argument hearing, only made possible by the court by working on weekends. I have to say that the father is not able to convince me that there is any reasonable prospect of success on this ground. Conclusion on the leave to appeal There are some other minor or convoluted points mentioned by the father in his 16-page of draft grounds of appeal, which I shall not go into details any further. They have been duly considered by me but I do not hold the view that they have any reasonable prospect of successfully argued before the Court of Appeal. I am of the view that the above analysis is sufficient for me to make an overall conclusion that there is no reasonable prospect of success on his draft grounds of appeal. His leave to appeal application should be dismissed. Stay of the Order of 26 September 2022 For the records, I have made 2 Orders on 26 September 2022, namely the Order contained in the Judgment, and the Case Management Order. It is unsure which Order that the father now seeks a stay of execution. If it is the former, then with my conclusion that I will not grant leave to appeal, it follows that the application for stay of that Order has to be dismissed as well. If it is the latter, then I have to say that the father has not provided any reasons to support his application for a stay of the Case Management Order. Further, given that the applications are children-related, I am of the view that they should be tried earliest possible. This is also the rationale behind the Case Management Order. In view of the above, his application for stay has to be dismissed.

Conclusion

I shall dismiss the father's summons filed on 7 October 2022, with costs to the mother, to be taxed if not agreed. Grace Chan District Judge The petitioner (mother) acting in person The respondent (father) acting in person

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