

HONG KONG / JUDGMENT

YKY v. MSYM**[2023] HKFC 24****COURT**

Family Court

DECIDED

10 February 2023

CASE / FILE NUMBER

FCMC3613/2022

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**[2023] HKFC24 FCMC 3613 / 2022 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 3613 OF 2022**

BETWEEN YKY Petitioner and MSYM Respondent

Coram: His Honour Judge K.K. Pang in Chambers (Not open to public) Date of Hearing: 26
January 2023 Date of Ruling: 10 February 2023

R U L I N G

AUTONUMOUT The parties were married in March 2012 in Hong Kong. There are two children of the marriage, namely a girl born in 2014 and a boy born in 2015. The petitioner wife, aged 50, is a business owner and the respondent husband, aged 52, was a sourcing manager. The respondent's current occupation is unknown to the petitioner. The parties have been living apart since 14 December 2021. AUTONUMOUT The petitioner issued a petition based on unreasonable behaviour on 18 May 2022. The particulars of the respondent's unreasonable behaviour were pleaded as follows: On 14 December 2021, the respondent assaulted the petitioner thrice: - In the morning, the parties had a heated argument. As the respondent returned home in the evening, the petitioner reheated food for him in the microwave. The respondent turned off the microwave and he flung some kitchenware onto a table. Next, a quarrel between the parties ensued. At the heat of the moment, the respondent slapped the petitioner hardly across her face several times. Afterwards, the respondent went to the older child's bedroom. The petitioner followed him. In the presence of the older child, the respondent slapped and pushed the petitioner forcibly so that

she fell on the ground. At the petitioner's request, the respondent packed up and left the matrimonial home. The parties had another round of quarrel when the respondent was about to leave. At the lift lobby, the respondent pushed the petitioner and kicked her thigh. The above assaults caused not only multiple marks and bruises over the petitioner's face and body but emotional distress to the petitioner. AUTONUMOUT The petition was served personally on the respondent on 20 May 2022. He did not file an Acknowledgement of Service (Form 4). The petition was proceeded on undefended basis under the Special Procedure List. The Registrar certified that the petitioner had sufficiently proved the contents of the petition and was entitled to a decree and a Notice of a date of pronouncement of decree nisi was issued on 5 July 2022. The Decree Nisi was granted on 22 July 2022. AUTONUMOUT By a summons dated the 16 August 2022, the respondent applied for an order to set aside the Registrar's certificate dated 5 July 2022 and the Decree Nisi dated 22 July 2022 and for leave to file an answer out of time. The respondent has not prepared a draft answer for the court's consideration and perusal. However, the respondent maintains that he still loves the petitioner very much, that the marriage has not broken down irretrievably and that he has not behaved in such a way that the petitioner cannot be reasonably expected to live with him. It is also his evidence that it was the petitioner who started the physical fights on 14 December 2021. In his Affirmation filed on 16 November 2022, the respondent deposed that the petitioner began the physical fights with a slap in the respondent's chest, the respondent reacted impulsively by pushing away the petitioner and he eventually slapped across the petitioner's face. He furthermore affirmed that he had scratches on his arm and chest, his shirt ripped, and as he left the matrimonial home, the petitioner kept dashing towards him so much so that he had to push her away. Photos that show a small red mark on the respondent's left arm a small tear in a white polo shirt were exhibited and marked MSY1-1 to the respondent's affirmation filed on 16 November 2022. AUTONUMOUT The applicable legal principles were identified by the Court of Appeal in YSP and HFF, HA, CACV 235 of 2003 (15 October 2003, unreported) as follows:

13. The following are the relevant principles gleaned from the authorities on how the court should deal with the delay and extension of time by a party in filing an answer to the petition. The starting point is that under the special procedure the registrar has certified that the petitioner has proved the contents of the petition and is entitled to a decree: *Day v Day* [1979] 2 WLR 681. This being the position an application for extension of time to file the answer should be dealt with by analogy to the principle governing the former procedure of an application for re-hearing after decree nisi: *Day v Day*. This principle is that the application should have been refused unless there were substantial grounds for the belief that the decree would have been obtained contrary to the justice of the case: *Owen v. Owen* [1964] P.277. Each case has to be dealt with on its own facts: *Rogers v Rogers* [1974] 1 WLR 709. Broadly speaking, the cases may be divided into two types. This division is not exhaustive: Where the applicant was not served at all and the proceedings took place without his knowledge. He would get a re-hearing almost immediately. The applicant knew of the proceedings but chose not to defend. He then changed his mind again and asked for time. He had to satisfy the court that it was more probable that the decree was obtained

contrary to the justice of the case. See *Stevens v Stevens* [1965] p.147 and *Nam v Nam* [1985] 2 HKC 144 AUTONUMOUT In the present case, it is undisputed or indisputable that the respondent was personally served the proceedings, but chose not to defend. In the circumstance, he has to satisfy the court there are substantial grounds for the belief that the granting of a decree nisi would be contrary to the justice of the case. AUTONUMOUT It seems to me that the answer to that question must be no. Section 11A(2)(b) of the Matrimonial Causes Ordinance, Cap 179 states as follows: 11A. Proof of ground for petition

(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts ..

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. AUTONUMOUT The appropriate test for this was originally formulated in the case of *Livingstone-Stallard v Livingstone-Stallard* [1974] 2 All ER 766. In that case, the judge posed the following question: Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him? Taking into account the whole of the circumstances and the character and the personalities of the parties. AUTONUMOUT It is both a subjective and an objective test. The issue is not so much whether one spouse's actions are unreasonable per se although that may be the case, but rather whether the particular spouse found the other spouse's actions unreasonable. The court will consider this and will then go on to determine whether or not the petitioner can be reasonably expected to live with the respondent in the circumstances of the particular case.

AUTONUMOUT Photos that show discernible bruises over the petitioner's face and under her left eye, red markings on the upper back of her head and bruises over her right shoulder and back of her body were exhibited and marked YKY-1 to the petitioner's opposing affirmation filed on 18 October 2022. Despite that the respondent has made no admission to the petitioner's allegations that the respondent pushed her forcibly so that she fell on the ground or that the respondent kicked her thigh at the lift lobby, it is undisputed or indisputable that the respondent forcibly slapped the petitioner across her face that caused bruises over the petitioner's face and under her left eye on 14 December 2021. Even for the limited purpose of the present application assuming the respondent's case (that the petitioner denies) that it was the petitioner who started the physical fights and she dashed towards the respondent in such a way that he had to push her away etc. as the respondent stated in his affirmation evidence, still it is totally unacceptable that in the thick of the action, the respondent forcibly slapped across the petitioner's face that caused bruises over the petitioner's face and under her left eye. By reason of matters aforesaid, I am prepared to accept the petitioner's case that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. From the petitioner's perspective the marriage is clearly at an end. I accept that the respondent should not be allowed to defend simply because he wishes to. I take the view that there are no grounds for believing that a decree nisi would be contrary to the justice and hence a fortiori the respondent's present application must fail. AUTONUMOUT The respondent being

unsuccessful in the present application, I can see no reason why the petitioner shouldn t have her costs. AUTONUMOUT In conclusion, it is ordered that: - The respondent s application be dismissed; The respondent do pay the petitioner s costs of the present application, including all reserved costs. (K.K. PANG) District Judge Ho & Ip solicitors for the petitioner wife The respondent husband acting and appearing in person PAGE - PAGE - A B C D E F G H I J K L M N O P Q R 1udk 1udk hJV) hJV) gdrT gdJV) hJV) hJV) hJV) gd|c gd"W hW6[hW6[hW6[&`#\$ hrOB hrOB hrOB D E F G H I J K L M N O P Q R S T U V hrOB [Content\_Types].xml \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q\_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .)x E /,EE\} theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 7lO&~" Z6|N Z6|N 7lO& & 6" CACV Judiciary English.dot Windows User Microsoft Office Word iMM4 l&-< Judiciary CACV Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{78C02F02-E838-4968-B2BF-059CAB37FDEB}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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