

HONG KONG / JUDGMENT

YLK v. LWK**[2019] HKFC 42****COURT**

Family Court

DECIDED

22 February 2019

CASE / FILE NUMBER

FCMC3255/2018

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bjbj FCMC 3255 / 2018 2019 HKFC 42 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 3255 OF 2018

BETWEEN YLK Petitioner and LWK Respondent

Coram: His Honour Judge I Wong in Chambers (Not open to Public) Date of Hearing: 24 January 2019 Date of Judgment: 22 February 2019

Judgment

(Maintenance Pending Suit)

Application AUTONUMOUT This is an application taken out by the petitioner/wife on 21 June 2018 for interim maintenance for her and the child of the family.

Background

AUTONUMOUT The parties were married in November 2013; hence this is a short marriage. This fact, however, is not relevant for the purpose of the present application. AUTONUMOUT There is one child of the family, a daughter, born in October 2016. She is now slightly over 2 years old. AUTONUMOUT Since marriage the parties, and later on with their daughter after she was born, had lived in an apartment in Tai Kok Tsui (the former matrimonial home) that was purchased in the sole name of the respondent. This was the situation till January 2018 when the petitioner, taking the daughter with her, moved out of the former matrimonial home and returned to her maiden home. AUTONUMOUT On 22 March 2018 the petitioner commenced divorce proceedings

on the ground of the respondent's unreasonable behaviour. AUTONUMOUT On 11 June 2018 I gave an order that the respondent shall pay the petitioner a monthly sum of \$2,250 as the child's interim maintenance. Subsequently, I increased the monthly sum to \$4,000, commencing from 1 September 2018 by way of an order on 28 August 2018. AUTONUMOUT I was told by Mr Lau who appeared for the petitioner that the respondent has been in compliance with the interim orders. AUTONUMOUT The petition for divorce is being contested by the respondent. As of now, the decree nisi has not been granted. Present Situation of the Parties AUTONUMOUT The petitioner, aged 33, was a housewife during the marriage. Before then, she was a clerk in building management business. AUTONUMOUT Since moving out of the former matrimonial home, the petitioner and the daughter have been living in her maiden home. This is a public housing unit currently accommodating 5 persons, namely, the petitioner, the daughter, the petitioner's mother and her younger sister and brother. The petitioner and the daughter are not approved occupiers of the unit. AUTONUMOUT The petitioner continues to take care of the daughter on a full-time basis and so she does not have any income of her own. She is effectively having the care and control of the daughter. By an order of 7 January 2019, the respondent has been given interim defined access to the daughter pending the submission of a Social Investigation Report by the Director of Social Welfare on the issues of custody and access. AUTONUMOUT As for the respondent, he is living alone in the former matrimonial home which is subject to a mortgage for which the respondent has always been responsible. He is 46 years old, a system analyst by profession, and is earning \$26,700 per month. Parties Open Offer AUTONUMOUT There is no doubt that during the marriage the respondent was the sole breadwinner of the family. It is also not in dispute that since the petitioner's moving out in January 2018, the respondent did not pay any living expenses for the petitioner and the daughter. It was not until the order of 11 June 2018 that he started to make some contribution towards the maintenance of the daughter. AUTONUMOUT The petitioner said she had virtually defrayed all her savings in supporting herself and the daughter. Initially, she sought, in her open offer, a total sum of \$13,462.71. At the substantive hearing, Mr Lau, on her behalf, rounded the figure down to \$13,400, with \$6,000 for herself and the remainder \$7,400 for the daughter. AUTONUMOUT As for the respondent, before the hearing he maintained that he could only afford \$4,500. During the hearing, Ms Cheng, who appeared for the respondent, conceded that the respondent can afford \$5,800. Legal Principles AUTONUMOUT Under section 3 of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (the MPPO), the court may order either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of presentation of the petition or the making of the application and ending on the date of the determination of the suit, as the court thinks reasonable. AUTONUMOUT The Court of Appeal in *HJFG v. KCY* [2012] 1 HKLRD 95 summarised the established principles,

33. Jurisdiction to award maintenance pending suit to a spouse is statutory, being governed by the provisions of s.3 of the Matrimonial Proceedings and Property Ordinance, Cap.

192. By that section the court is given a discretion to make an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance as the court thinks reasonable , subject to the condition that the duration of any such order is limited to the period of what may broadly be called the divorce litigation.
34. By definition, therefore, maintenance pending suit is restricted to payments which constitute maintenance , which are reasonable in the circumstances and which will endure for no longer than it takes to determine the divorce litigation. Maintenance is a broad concept. I do not seek to define its exact meaning but it seems to me that it must be restricted to those payments necessary to meet the recurring costs of living at whatever standard of living is appropriate. That being the case, no matter how great the wealth of the parties and how unevenly distributed that wealth may be at the time an application for interim maintenance is made, the court has no jurisdiction to make orders which for all practical purposes result in a form of pre-trial capital re-balancing. In the present case, the judge recognised the long-established approach of looking to the immediate and reasonable needs of the wife and son.
35. As to the amount of maintenance pending suit that may be paid, the Ordinance provides only that it must be reasonable , that is, having regard to the circumstances of the case, that it must be fair.
36. An important factor in determining fairness is a consideration of the marital standard of living. In th`is regard, each case must be considered according to its own circumstances. It is not simply to be assumed that great wealth equates to great extravagance. Some married couples who enjoy great wealth spend with comparative modesty and with a discipline born of discretion, others enjoy consumption on a grand scale.
37. The principles that have emerged over time to guide judges in matters of interim maintenance have been fashioned in the main to ensure fairness. This is well illustrated in the judgment of Nicholas Mostyn QC, sitting then as a deputy High Court judge, in *TL ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* [2006] 1 FLR 1263, at 1289, in which, having looked at earlier authorities, he derived the following principles that speak specifically to fairness or are based on the need to ensure it. For present purposes, it is sufficient to cite the relevant principles without citing the judge s reference to the source of those principles:
- i. The sole criterion to be applied in determining the application is reasonableness , which is synonymous with fairness .
 - ii. A very important factor in determining fairness is the marital standard of living. This is not to say that the exercise is merely to replicate that standard.
 - iii. In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration.
 - iv. Where the affidavit or form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his

ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation, the court should err in favour of the payee.

38. Finally, it is to be noted that in applications for interim maintenance, when the amount to be paid is for a limited period only and not all of the evidence is necessarily before the court, it is not appropriate, nor indeed in most cases possible, for the court to conduct a detailed investigation into the finances of the parties. While, in order to determine what is or is not reasonable, some analysis is always required, that analysis can be conducted on a broad-brush basis. AUTONUMOUT As for the interim maintenance for the daughter, the empowering provision is section 5 of the MPPO. It is unnecessary to set out the provision here. In short, whether it is the interim maintenance for a spouse or for a child of the family the test is one of reasonableness in the circumstances, and the court should look at the reasonable needs of the petitioner and the daughter, and the ability to pay on the part of the respondent. In doing so, the court should adopt a broad-brush approach. AUTONUMOUT Guided by the above principles, I now turn to the application. Issues in Dispute AUTONUMOUT It has been pleaded by the petitioner as one of the respondent's unreasonable behaviour that the respondent refused to pay any sufficient maintenance for her and the daughter's expenditures: para 10(2) of the petition. This is contrary to what she said in her affirmation of 19 June 2018 in support of the present application that, before separation the respondent provided sufficient maintenance to support her and the daughter's living expenses by allowing her to withdraw money in such sum and at such time whatever she likes from a joint bank account as well as the respondent's personal bank accounts and by giving several supplementary credit cards for her use. Notwithstanding this discrepancy, the respondent, being the sole breadwinner during the marriage, does not dispute his liability to maintain the petitioner and the daughter. AUTONUMOUT According to his affirmation, the respondent's has two grounds in opposition: first, the reasonableness of the expenditure that goes to quantum; and secondly, his financial situation that goes to his affordability. AUTONUMOUT At the hearing, Ms Cheng submitted, for the first time, that the petitioner has earning capacity. She could return to employment by placing the daughter under the care of the petitioner's mother or a nursery. This submission was unsupported by any of the respondent's affirmation and consequently, the petitioner did not have any opportunity to respond to it. There is a dearth of evidence as to whether the petitioner's mother is ready, willing and able to take care of the daughter who is merely 2 years old or whether any nursery is available to the petitioner. AUTONUMOUT Ms Cheng also mentioned that the respondent has since the last interim maintenance order of 11 June 2018 incurred further debts but again this is not supported by any evidence. AUTONUMOUT There is also a dispute as to whether the petitioner is keeping some gold ornaments that she received as wedding gifts and which the respondent said are worth \$100,000. The petitioner said with the consent of the respondent, she gave some of the ornaments to her mother shortly after the wedding; and as for the rests she already disclosed them in the Form E. Without the benefit of oral evidence, the court would not be able to come to any conclusion in one way or the other at this stage. This has to be dealt with in trial if the parties are not able to settle

their ancillary relief. AUTONUMOUT It seems to me quite clear that, as can be seen from their Form Es, the parties did not have any substantial savings during the marriage. The respondent's salary was almost entirely spent on making the ends meet. AUTONUMOUT To start with, given that the respondent's income was just sufficient to meet their needs when there was only one household but now the parties have spilt into two, common-sense informs me that some of the fixed costs and basic necessities might inevitably have to be duplicated. Consequently, it would be difficult for them to maintain the previous living standard, whatever that standard was. Mr Lau agreed that this must be the case and the petitioner has already lowered her living standard since separation. In this regard, I also agree with Mr Lau that if the living standard has to be compromised somewhat due to limited financial resources, it is only fair and reasonable that both have to face the harsh reality. AUTONUMOUT The reality is that there is only \$26,700 available for the maintenance of the parties and their daughter. There are certain items that cannot be compromised, viz. the monthly mortgage payment (\$6,399) and the management fees (\$929) of the former matrimonial home, the MPF contribution (\$1,275) and the loan repayment to the Open University and the Working Family and Student Financial Assistance Agency for the respondent's degree course (\$983). The implication is that, after all these items having been taken care of, the parties would have a disposal income of \$17,114 only (\$26,700 (\$6,399 + \$929 + \$1,275 + \$983)). If this \$17,114 is to be divided equally amongst the three of them each would have \$5,704 only. I believe this would have been roughly the same situation when the parties were together. Indeed, given that before February 2018 the respondent used to have a salary of \$25,500 only, I would have thought the situation then should have been even less favourable. According to the statistics of the Census and Statistics Department, the median monthly income of economically active households for a household of 3 persons was \$30,000 in 2017, which is even higher than this family before me. Seen in this light and with what has been pleaded in the petition for divorce (see [20] above), I have some reservation over the veracity of the petitioner's assertion regarding the standard of living she used to enjoy. AUTONUMOUT After having heard arguments from both sides, it seems clear to me that this is a case where the parties should be prepared to resort to austerity by reducing, where possible, some of their financial needs so as to keep their living at a certain reasonable level. The objective fact is that during the marriage this family of three was solely in reliance upon the earnings of the respondent. Notwithstanding the parties have separated, this objective fact remains unchanged. It is somewhat fortunate that the petitioner has been able to return to her maiden home and did not have to incur much costs in establishing a separate household. Given that there being no suggestion in any of the affirmation evidence that the petitioner could work, it is of no use for the respondent to say although he agrees that the petitioner and her daughter would need \$9,174 per month, he could only afford to pay \$5,800 and the petitioner should find her own solution as to how she could make up the deficit. Likewise, it is of no use for the petitioner to say she needs a reasonable sum of \$13,400 without giving due regard to the economic reality. Thus, in my view, what is determinative of the application before me is the question of how the respondent's monthly salary could reasonably be distributed between the parties within

their frugal budgets. Some of the items that they took for granted during the marriage might have to be substantially sacrificed so that they may live within a budget of \$26,700 per month. This is a juggling exercise that pleases neither party. AUTONUMOUT For the purpose of the present application, it is unnecessary for me to conduct a detailed investigation into the finances of the parties. In assessing their reasonable needs, the analysis can be conducted on a broad-brush basis; and in the course of doing so, I shall bear in mind the limited financial resources available for the parties. Needs of the Parties Needs of the Petitioner and the Daughter AUTONUMOUT The petitioner said she needs a monthly sum of \$13,400 for the upkeep of her and the daughter. On the other hand, the respondent in his affirmation initially maintained that they need about \$7,281 only this is the figure reckoned by me by adding up the figures proposed by the respondent. In her skeleton submissions, Ms Cheng conceded that they would need \$9,174 per month. Yet, she maintained that this sum is entirely beyond the means of the respondent. During argument, she made further concession that the respondent should be able to afford \$5,800. AUTONUMOUT As said above, it is useless for the respondent to say although he agrees that the petitioner and her daughter would need \$9,174 per month, he could only afford \$5,800. The parties must live within the confines of \$26,700. I have therefore made adjustment to the quantum of some of the items even the parties have no dispute over them. AUTONUMOUT The petitioner said she used to buy quality products. Since the daughter is of tender age some of the food consumed by her are fresh or organic food. This is said to be \$3,300 per month. Further, she needs \$2,105 for the Others item which includes powdered milk, diaper, books, toys and other daily consumables. For the reasons I have said above, I am afraid she might have to compromise somewhat, at least for the time being. AUTONUMOUT Despite Mr Lau's forceful argument that the contribution to the petitioner's mother in the sum of \$2,000 is the de facto costs of accommodation, I have determined not to include this item simply for the reason that there is no spare money for this purpose. The evidence is that the petitioner has not been paying this sum and there is no suggestion that the petitioner's mother has been pressing for payment. AUTONUMOUT Doing the best I can and taking a broad-brush approach, I assess the petitioner and the daughter's needs as follows: The Petitioner and the Daughter's Monthly Expenses General Item Amount (HK\$) Utilities (electricity, gas, rates, telephone & water) Food 2,500 Household expenses Total monthly household expenses 3,200 Personal Item Amount (HK\$) Meals out of home Transport Clothing / Shoes Personal grooming (including haircut and cosmetics) Entertainment / presents Holiday Medical / Dental Insurance premia Total monthly personal expenses 2,448 The Daughter Item Amount (HK\$) Medical / Dental Holidays Clothing / Shoes Insurance premia Others (including formula, diaper, books, toys and daily consumables) 1,000 Total monthly expenses for the Daughter 2,727 Total Monthly Expenses 8,375 AUTONUMOUT Therefore, their needs are about \$8,375. Needs of the Respondent AUTONUMOUT The respondent stated in his Form E of 7 June 2018 that his total monthly expenses are \$30,475. Within less than a month, he said, in his affirmation of 3 July 2018, that the sum should be adjusted upward to \$31,996. Ms Cheng said, in her written submissions, that the respondent is prepared to sacrifice some of his spending and his monthly needs could be reduced to \$29,672. AUTONUMOUT It should

be noted that the first 2 figures (ie \$30,475 and \$31,996) are exclusive of any interim maintenance while the last figure of \$29,672 already includes an interim maintenance of \$4,500 that the respondent is prepared to pay. Thus, if the interim maintenance is discounted, there is a difference of about \$5,000 to \$6,000 between the first 2 figures and the last one. That said, Ms Cheng realistically conceded in the hearing that the respondent should resort to frugality for the time being in order to squeeze out some of his earnings for the maintenance of the petitioner and the daughter. She accepted that the respondent could spend much less on some of the items, such as, \$300 on clothing/shoes, \$300 on personal grooming and \$200 on holidays and finally came down to \$20,881, exclusive of interim maintenance. On that basis, Ms Cheng accepted that the respondent is able to afford \$5,800 per month. AUTONUMOUT Judging from the respondent's initial figures, I agree with Mr Lau that the respondent adopted a double-standard. He had a very high tolerance as regards his expenditure but was very mean to the petitioner. AUTONUMOUT I also agree with Mr Lau that the respondent has exaggerated his monthly expenditure. The respondent has since January 2018 been living alone and said he needs about \$30,000 to \$32,000 per month. If this were true, it would mean the family expenses during the marriage should have been much higher than what he is spending now but the fact is he is only paid \$26,700 per month. Before the pay rise in February 2018, his salary was merely \$25,500. If what he said were true, the family should have been in the red long before the breakdown of the marriage. There is simply no explanation on why he would have had a negative cash-flow when he was living alone and when he did not have to pay any interim maintenance. AUTONUMOUT In assessing the reasonable needs of the respondent, I would adopt the same approach that I have applied as regards the petitioner. I would also take the following matters into consideration. AUTONUMOUT First, there is evidence that at least for the year 2016/2017 the respondent is not liable for any tax payment. There is no reason to expect he would have any tax liability in the coming fiscal year. AUTONUMOUT Secondly, on the basis of the documentary evidence adduced by him, I accept that the respondent would need some medical expenses on the top of the medical insurance provided by his employer. AUTONUMOUT Thirdly, notwithstanding that the respondent claimed he owes some monies to his family, these are soft-loans and there is no suggestion that these monies have to be repaid forthwith. I would not take these into considerations. AUTONUMOUT Doing the best I can, I assess the respondent's needs as follows. The Respondent's Monthly Expenses

General Item	Amount (HK\$)
Mortgage instalments	6,398
Utilities (electricity, gas, rates, telephone & water)	1,500
Management fees	Food 3,000
Household expenses	Insurance premia
Total monthly household expenses	12,613
Personal Item	Amount (HK\$)
Transport	Clothing / Shoes
Personal grooming	Holiday Medical / Dental
Insurance premia	1,100
MPF contributions	1,275
Loan repayment to the Open University and the Working Family and Student Financial Assistance Agency	Total monthly personal expenses
	5,738
Total Monthly Expenses	18,351

AUTONUMOUT Based on the above assessments, the petitioner and the daughter would require \$8,375 per month while the respondent would need \$18,351, totalling \$26,726. This total sum is within the affordability of the respondent. AUTONUMOUT Stepping back and taking an overview of the figures, I am conscious that with a disposal

income of \$17,114 (see [27] above), the petitioner and the daughter are taking up roughly half of it (48.9%) only. The respondent has to commute to work on a daily basis and he may have to dine-out for lunch during most of the working days, thus larger sums are given for his transport and food expenses. Yet, he should consider preparing his own dinner and breakfast in order to live within the budget. Taking all the factors in a round, I consider \$8,375 is a fair and reasonable sum. AUTONUMOUT The petitioner's general expense in the sum of \$3,200 is to be shared by the mother and the daughter equally. The figure for the petitioner is therefore \$4,048 ((\$3,200

- 2) + \$2,448)); and the figure for the daughter is \$4,327. I would round down the petitioner's sum to \$4,000 and round up the daughter's sum to \$4,400. AUTONUMOUT Mr Lau seeks to have the interim maintenance to be back-dated as from February 2018. However good the arguments he had, nevertheless Mr Lau agreed that there are no funds from which the back-dated maintenance could be paid out. For this reason, I decline to give the order. AUTONUMOUT I am conscious that the daughter will go to kindergarten this September. By then, more money will be required. In my view, where possible, parties should seriously consider suspending some of the less-basic expenditure; for instance, they may consider seeking suspension on payments of some of their insurance policies if the relevant terms and conditions allow them to do so.

Orders

AUTONUMOUT For the above reasons, I give an order that the respondent do pay (1) \$4,000 per month to the petitioner as her maintenance pending suit and (2) \$4,400 per month to the petitioner as the interim maintenance for the child of the family, such payments shall commence on 1 March 2019 and subsequently on the 1st day of each succeeding month until further order of the court. Costs AUTONUMOUT As far as quantum is concerned, both parties have been successful in part. It appears to me that in such circumstances the appropriate costs order should be no order as to costs (including all costs reserved) and I so order. Both parties own costs are to be taxed in accordance with the Legal Aid Regulations. This is by way of a costs order nisi. (I. Wong) District Judge Mr R Lau of Tsang, Chan & Woo, Solicitors (on the instruction of the Director of Legal Aid), appeared for the petitioner Ms L Cheng of KB Chau & Co, Solicitors (on the instruction of the Director of Legal Aid), appeared for the respondent - PAGE PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V h:)k hl}o hFd# h/n- h/n- h/n- h:)k hSj+ h/n- h8ge hFL; hFL; hFL; hSj+ h/n- hEqz kd1 kd{ {r{rnf{r{rn{r{rnb hSj+ hSj+ hSj+ hm:g hm:g hm:g hFd# hSj+ &`#\$ gdwF &`#\$:pwF :pwF [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"

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