

HONG KONG / JUDGMENT

ZZ v. LX

[2026] HKCA 868

COURT

Court of Appeal

DECIDED

27 April 2026

CASE / FILE NUMBER

CAMP283/2023

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CAMP 283/2023, [2026] HKCA 868

On appeal from [2023] HKFC 62

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 283 OF 2023

(ON AN INTENDED APPEAL FROM FCMP 167/2018)

IN THE MATTER of Section 10 of the Guardianship of Minors Ordinance, Cap 13

and

IN THE MATTER of the Parents and Child Ordinance, Cap 429

and

IN THE MATTER of the custody of ZCT, a minor

BETWEEN

ZZ

Applicant

and

LX

Respondent

Before: Hon Barma JA and Ng J in Court

Dates of Written Submissions: 14, 28 August and 5 September 2023

Date of Judgment: 27 April 2026

J U D G M E N T

Hon Barma JA (giving the Judgment of the Court):

This is a renewed application by the respondent, by Summons dated 14 August 2023 (“the Summons”), seeking leave to appeal against the judgment of District Judge S Lo (“the Judge”) dated 31 March 2023 (“the Judgment”), a stay of execution of the orders made in the Judgment pending the intended appeal (if leave to appeal is granted), and leave for the respondent to adduce fresh evidence (the last of these applications having since been disposed of by consent).

These are family proceedings concerning the grant of custody and access in respect of a boy born in September 2017 (“the Son”). The Son’s natural father and mother are respectively the applicant (“F”) and the respondent (“M”). They were, and are, not married.

After a 3-day trial in November 2022, by his Order dated 31 March 2023 (“the Order”), the Judge held (for the reasons set out in the Judgment), inter alia (insofar as relevant to M’s intended appeal), that:

joint custody of the Son be granted to F and M ([1] of the Order) (see [76(1)] of the Judgment);

care and control of the Son be to M (this was not disputed by F at the trial) with defined access to F, inter alia, that F may have 4-hour day access per week during long school holidays, namely, Easter, Summer vacation etc., with time and date to be mutually agreed by the parties ([2(iii)(d)] of the Order) (see [76(2)(iii)(d)] of the Judgment).

M applied for leave to appeal against [1] and [2(iii)(d)] of the Order. She also applied for a stay of execution of the Judgment. On 1 August 2023, the Judge handed down his decision on those applications (“the Leave Decision”), by which he refused to grant the leave to appeal sought (see [19] of the Leave Decision), and dismissed the application for a stay (see [20], Leave Decision).

Background and the parties’ cases below

The material facts of this case and the parties’ respective cases have been set out at [4] to [27] of the Judgment, and need not be repeated in detail.

However, for the purposes of the renewed application for leave to appeal, we would highlight the following aspects of the background facts and the parties' dispute.

M and F were both raised in the PRC, and are both very well educated, to Masters level ([4] & [8], the Judgment). M was and is a very successful businesswoman, owning and operating a global investment business, being extremely wealthy and living a luxurious lifestyle ([6], the Judgment). Although F's earnings and wealth are less than M's, he is a specialist in global development of crypto assets, and was employed by a company in Hong Kong as an Investment Director under the Admission Scheme for Mainland Talents and Professionals ([6] and [7], the Judgment).

M and F met in 2008, and had co-habited since around 2015 to early 2016 ([11], the Judgment). In 2015, F became the Godfather of M's elder son from a previous relationship ("Elder Son"). Both the Son and the Elder Son attended the same school ([5] & [9], the Judgment).

In January 2017, M became pregnant with the Son. F thereupon proposed marriage, which M declined ([13], the Judgment). Having attended to his fatherly duties (such as attending prenatal check-ups with M) and staying in a flat near to M's during the pregnancy, F was eventually told by M to vacate the flat ([14]-[16], the Judgment).

In December 2017, M asked F to give consent for the Son's application for an Australian Visa under that country's Business Innovation and Investment scheme for the purpose of migration to Australia ([17], the Judgment). Consent was given by F upon representation by M that the consent was required as a "routine procedural matter" and that the Son would not be relocated to Australia ([17], the Judgment). After F gave his consent, M ended their relationship ([18], the Judgment).

Thereafter, on being notified by the Australian Consulate office that his consent for the Son to apply for an Australian Visa was not a mere procedural matter, F became concerned with his legal status as natural father to the Son, and he withdrew his consent ([19], the Judgment). After the withdrawal of consent, F was blocked from all communication (including via WeChat) with M and her friends (these being the main media on which information about the Son was posted) ([20], the Judgment). Since then, M insisted that all communication by F with her had to be made via her solicitors. She also instructed her friends and family not to divulge any information concerning the Son to F ([20]-[21], the Judgment).

Since the commencement of these proceedings by F in 2018 seeking joint custody of and access to the Son, M had unilaterally changed the Son's surname (from F's to hers), refused F all forms of communication with the Son, directly or otherwise, and failed to update F as to the Son's routines and schedule, such as his school activities ([25]-[27], the Judgment).

M's case was that sole custody should be granted to her because, inter alia, there was a complete lack of communication and mutual mistrust between her and F, with no reasonable prospect of the parties co-operating to serve the best interests of the Son ([42], the Judgment). On the issue of the breakdown in communication, F's position was that M had herself blocked all forms of communication by blocking his account on WeChat and by requiring that all contact must be made via her solicitors ([43]-[46], the Judgment).

The Judge's findings

The issues before the Judge at trial were inter alia (1) whether an order for sole custody (to M) or joint custody (to M and F) of the Son should be made ("the Custody Issue"); and (ii) as there was no dispute but that care and control should be given to M, whether defined access should be given to F, and if so, on what terms ("the Defined Access Issue"). In his determination of these issues, the Judge had regard to the following legal principles and authorities (see Judgment at [28]-[34]):

section 3 of the Guardianship of Minors Ordinance (Cap 13), which sets out the general principles the court should have regard to when determining issues of custody or upbringing of a minor, including inter alia that the best interests of the minor should be the first and paramount consideration in any proceedings before any court and that the court shall give due consideration to any material information including any report of the Director of Social Welfare available to the court at the hearing;

PD v KWW (Child: Joint Custody) [2010] HKFLR 184, in which Hartmann JA (as he then was) explained at [31]-[57] the principles relating to issues of custody and care and control in some detail, including that (a) an order of joint custody was in principle to be made in the best interests of the child, and that strained relations between parents was not of itself a reason militating against a joint custody order, unless their ability to make rational decisions for the child was impaired to such an extent that the child's interests would be prejudiced (Y v P [2009] HKFLR 308); (b) there is a thin line between sole and joint custody; and (c) care and control awarded to one parent with rights of access to another, as a form of shared care and control in practice, was generally in the best interests of the child as it ensures continued bonding between both parents and the child;

H v N [2012] 6 HKC 591, where Poon J (as he then was) held (at [36]) that although Social Welfare Reports ("Reports") and their recommendations are not to be treated as legal presumptions requiring rebuttal, and that the final decision on matters such as custody rests with the Judge, such reports contain material information compiled by social workers (who will have carried out detailed background investigation) to which the court should pay due regard (WSM v FSY [2005] 3 HKC 319). The overriding approach should be one that avoids becoming enmeshed in technicalities.

Before the court were 2 Reports prepared by a Social Welfare officer, which contained the following findings and recommendations (Judgment, [35]-[41]), to which the Judge had regard:

the Son's relationship with F was intimate and harmonious;

M was a good carer of the Son while F was a coach and playmate for the Son;

the Son could benefit from the love and care of both parents in his upbringing;

(iv)

the Son would seek assistance from F when he had a problem, and F in turn coached him with patience;

for the Son's healthy development, the involvement of both parents was of vital importance;

joint custody was recommended in both Reports;

regarding access, the first Report recommended a monomonthly 4-hour day access to F whereas the second Report recommended a bi-monthly 3-hour day access on the weekend.

The following factual findings and conclusions reached by the Judge, based on his assessment of the evidence and the legal principles set out above (and in the Judgment), are of particular relevance to the present application:

it was not inappropriate for F to have attempted to contact M via her friends and family members without going through M's legal representatives, and such do not amount to harassment ([46], the Judgment). There were no good reasons for M to require F to contact her only through her solicitors ([50], the Judgment);

F's withdrawal of consent for the Son to apply for the Australian visa was not of itself sufficient to establish the 'mutual mistrust' alleged by M ([49], the Judgment);

M and F are competent and loving parents who must be presumed to be able to make rational decisions in the interests of the Son by co-operating with each other ([51], the Judgment);

M's allegation that F did not concern himself with the Son's major affairs was rejected, as the evidence showed that F had attempted, without success, to take part in discussions with M concerning the Son's affairs (such as his education) ([56]-[61], the Judgment);

joint custody of the Son between M and F would not on the facts and evidence hamper the growth and development of the Elder Son ([62]-[65], the Judgment);

it is in the best interests of the Son for joint custody to be granted to M and F ([65], the Judgment);

it is undesirable for access arrangements to be made on a one-off basis through the parties' lawyers ([66], the Judgment).

Legal principles

Section 63A(2) of the District Court Ordinance, Cap 336, provides that leave to appeal shall not be granted unless this court is satisfied that the appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the appeal should be heard.

It is well-established that there is a high threshold to be met for any challenge to a trial judge's findings of fact, as they are reached with the benefit of live oral evidence. The Court of Appeal will therefore not intervene or disturb these findings unless they are shown to be plainly wrong, or there is some palpable error on the Judge's part. A mere assertion that the finding of the judge is against the weight of the evidence is not an error coming within that category. See *Ting Kwok Keung v Tam Dick Yuen & Ors* (2002) 5 HKCFAR 336; *China Gold Finance Ltd v CIL Holdings Ltd & Ors*, unrep, CACV 11/2015, 27 November 2015; *Young Ivy Shui Heung v Yau Koon Sum & Ors* [2019] HKCA 221.

M has put forward a total of 16 proposed grounds of appeal in her draft Notice of Appeal ("Draft NoA") annexed to the Summons filed on 14 August 2023. The intended appeal is, however, within a narrow compass, as it is only directed against [1] and [2(iii)(d)] of the Judge's Order.

The grounds on which M now seeks leave to appeal are, in gist:

(a)

Regarding the Custody Issue, that:

(i)

the Judge erred in stating at [33] of the Judgment that *Y v P* and *ML v YJ* [2008] HKFLR 88 "have very little significance" after the case of *PD v KWW*;

(ii)

the Judge erred in his findings in relation to, and his understanding of, the parties' cases regarding the issues of lack of communication and mutual mistrust, and also in his evaluation of F's evidence at trial;

(iii)

the Judge failed to have regard to relevant factors, such as the tacit consent given by F for M to be the sole custodian of the Son, and the fact that he had no experience in making any decisions that a custodial parent would make;

(iv)

the Judge failed to consider that F was disinterested in child-related matters concerning the Son; the Judge ought to, but did not, conclude that F was not a credible witness and erred in accepting his oral evidence as to his apparent willingness to communicate and co-operate with M;

(b)

Regarding the Defined Access Issue, that it was plainly wrong for the Judge to order an additional 4-hour day access per week during the long school holidays and that he had failed to appreciate that M, the Son and the Elder Son take an average of 3 trips a year during school holidays.

Ms Anita Yip SC (with her Mr Perlman Sam) for M lodged written submissions for the leave application and the stay application on 14 August 2023. Ms Audrey Eu SC (with her Ms Dora KH Chan) for F lodged their written submissions in response on 28 August 2023. Thereafter, Ms Yip SC lodged her reply submissions on 5 September 2023.

Having considered the papers, we decided to exercise the power under Order 59 rule 2A(5)(a) of the Rules of the High Court, Cap 4A and will determine this application without an oral hearing, on the basis of the written materials filed with the court.

Leave to appeal

The proposed grounds of appeal in the Draft NoA are lengthy and are in effect submissions as to the Judge's supposed errors in evaluating the evidence and reaching his factual findings.

As we have stated at [18] above, there is a high hurdle for M to cross in her challenges against the Judge's factual findings. It must be shown that such findings were plainly wrong, and it does not suffice to complain that the findings were against the weight of the evidence.

We therefore do not think it necessary to discuss each and every paragraph and subparagraph in the proposed grounds of appeal as set out in the Draft NoA. It suffices for us to highlight the following.

The grounds at [1] and [2] of the Draft NoA complain that the Judge erred in law by stating at [33] of his Judgment that Y v P and ML v YJ have "very little significance" after the Court of Appeal's decision in PD v KWW. In the Leave Decision at [4] to [7], the Judge explained that when he made that comment, he did not mean that ML v YJ and Y v P "have no weight". In our view, given that PD v KWW is a Court of Appeal decision decided after ML v YJ and Y v P, and does not, to our mind, conflict with or contradict those earlier previous cases, PD can be regarded as the "leading authority for the issue of joint/sole custody", and the Judge was not in error in giving it the weight that he did.

We do not consider it reasonably arguable that the Judge had misapplied the law. He had regard to all the applicable principles on issues regarding custody, and was well aware that each case turns on its own facts. In essence, he decided to adopt the recommendations in the Reports, which he was fully entitled to do. It is not reasonably arguable that the Judge had erred in law by treating PD v KWW as the leading authority on the Custody Issue.

The remaining intended grounds of appeal are no more than repeated attempts to challenge the Judge's factual findings.

As to the issues of lack of communication and mutual mistrust (see Draft NoA, [3]-[4]), the Judge explained in detail in the Judgment (at [43]-[52]) that (1) the lack of communication was caused by M's own unilateral requirement that F's communications with her had to be conducted via solicitors; (2) F had genuinely tried to contact M regarding discussion on parental care plans, and such attempts to contact M did not amount to harassment on the facts; (3) there was, on the evidence, no merit in M's complaint of mutual mistrust by reason of F's withdrawal of consent

regarding the Son's application for an Australian visa.

Likewise, complaints regarding F's apparent lack of interest in child-matters related to the Son, or his lack of experience in making custodian decisions, clearly do not stand up against the findings of the Judge (based on the findings in the Reports, which he was entitled to adopt) that F is a loving father who is able to make rational decisions in the best interests of the Son (at [51]). Complaints that the Judge erred by failing to rule that F is not a credible witness plainly do not surpass the required threshold for leave to appeal to be granted.

As for the Defined Access Issue, this was a decision made by the Judge as to what was appropriate on the facts of the case. It clearly cannot be said to be plainly wrong.

None of the grounds of appeal in the Draft NoA are reasonably arguable. We accordingly refuse to grant leave to appeal.

Stay of execution

Given that leave to appeal has been refused, the application for stay for execution of the Order falls away.

Disposition and costs

The threshold requirement for granting leave to appeal has plainly not been met. In our view, there is no reasonable prospect of success in this intended appeal, nor is there some other reason in the interests of justice why the appeal should be heard nevertheless.

For the above reasons, we refuse to grant leave to appeal to the respondent (M), and we accordingly dismiss the Summons filed on 14 August 2023.

As the leave application is, in our view, wholly without merit, we make a further order pursuant to Order 59 rule 2A(8) that no party may under rule 2A(7) request the determination of this application to be reconsidered at an oral hearing *inter partes*.

Costs should follow the event. We make an order nisi that the respondent (M) do pay the applicant (F) the costs of this application. Having considered the statement of costs of the applicant (F) for summary assessment, we consider the sums stated therein to be on the high side given that the issues have already been canvassed in the court below. Taking a broad brush approach, we summarily assess the applicant's costs of this application in the amount of HK\$180,000, also on a nisi basis.

(Aarif Barma)

(Peter Ng)

Justice of Appeal

Judge of the Court of

First Instance

Written submissions by Ms Anita Yip SC and Mr Perlman Sam, instructed by John CH Suen & Co, for the respondent

Written submissions by Ms Audrey Eu SC and Ms Dora KH Chan, instructed by Robinsons, Lawyers, for the applicant

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