HCMP 500/2022

[2022] HKCFI 2001

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

MISCELLANEOUS PROCEEDINGS No 500 OF 2022

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IN THE MATTER of YL, a girl, born on 17 April 2020, a minor (the “**Minor**”)

and

IN THE MATTER of an application under sections 10 and 15 of the Child Abduction and Custody Ordinance (Cap. 512) and Order 121 of the Rules of the High Court (Cap. 4A)

and

IN THE MATTER of section 10 of the Guardianship and Minors Ordinance (Cap. 13)

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BETWEEN

MY Applicant

and

FT Respondent

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Before: Hon Au-Yeung J in Chambers (Not Open to the Public)

Date of Hearing: 30 May 2022

Closing Date for Written Submission: 8 June 2022

Date of Decision: 30 June 2022

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D E C I S I O N

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1. Introduction

The Father abducted the Minor (“**YL**”) and disappeared without trace since 16 April 2022. The Mother instituted proceedings under the Child Abduction and Custody Ordinance, Cap 512 (“**CACO**”) against the Father. She obtained location orders, which were served but not responded to by, amongst others, the Father. Out of concern that the Father would enroll YL for education and medical services in a foreign country and try to establish a “status quo” for YL, the Mother obtained, on 23 May 2022, orders against medical entities including the Commissioner for the Electronic Health Record (“**Commissioner**”) and the Director of Health (“**Director**”) directing them, amongst others:

* + - * 1. not to change the “substitute decision maker” (“**SDM**”, currently the Mother) as regards YL (“**1st Order**”); and
        2. not to release and/or disclose any health information and/or records (including vaccination records) of YL to any person except to the Mother (“**2nd Order**”).

1. At an *inter parte* hearing on 30 May 2022, Mr Chan and Mr Yeung, government counsel, confirmed that the Commissioner and the Director were in possession of the information under the 2nd Order and that the Mother was the only SDM. The Commissioner and the Director however, sought to set aside the Orders on **Jurisdiction Grounds** that:

In respect of the 1st Order, the Electronic Health Record Sharing System Ordinance, Cap 625 (“**EHRSSO**”), did not give a power to “change” the SDM; and

In respect of the 2nd Order, the Court had no power to issue an injunction against the Commissioner and the Director when they were not parties to the proceedings.

1. The matter was adjourned for further written submissions, to be lodged such that the application can be disposed of on paper.
2. On 13 June 2022, YL was located in Singapore with the Father. The Singapore Court has taken up the matter under the International Child Abduction Act.
3. Having considered the submissions, I find the Jurisdiction Grounds established. I decide to set aside the Orders on 2 further grounds:

(1) Any purpose that the Orders seek to achieve has been overtaken by events (“**Purpose Ground**”); and

(2) Continuation of the Order is not in the best interests of YL (“**Best Interests Ground**”).

1. Background

YL was born and raised in Hong Kong.

1. The Mother and Father have commenced divorce proceedings in the Family Court. The Father exercised his access over YL on 16 April 2022 but later disappeared with YL without trace. At that time, YL was aged 2. The Father cut all contacts with the Mother, including moving out of his residence and blocking her off from all telephone messages. It appears that the Paternal Grandmother and Paternal Grandfather joined in the exercise and cut all contacts with the Mother as well.
2. It transpired from subsequent enquiries with airline companies that in fact the Father had removed YL on 16 April 2022 out of Hong Kong to Bangkok.
3. The Mother commenced the present CACO proceedings and on 5 May 2022 against, amongst others, the Father and the Grandparents, and notified them of the same, amongst others, through WhatsApp messages. The Father has blocked off the Mother’s solicitors from the WhatsApp messages such that the latter has to use a different phone card to send messages. Apparently, the WhatsApp messages containing the Location Orders had been received by the Father and the Grandparents, latest by 7 May 2022.
4. By an affirmation filed on 23 May 2022, the Mother sought the Orders. Her bases are that having served the Location Order, she came to realize that the Father had no intention of complying with it. It prompted her to realise that if it was the intention of the Father to remove YL to a foreign country for a longer period of time, YL’s educational and medical needs would come into play. If she were to enroll in a school or seek medical attention in a foreign country, then her health and vaccine records would be required. The Mother had in fact been notified by a private clinic which previously treated YL that a person claiming to be the Father had approached the clinic to request for disclosure of YL’s vaccine record, but the clinic refused to provide it.
5. Further, the Mother has been registered as the SDM of YL under the Electronic Health Record Sharing System of the Food and Health Bureau, also known as eHealth (“**the System**”). At 1:14 pm on 18 May 2022, she received 3 text messages from the eHealth platform at her mobile phone number, showing that a “carer” of YL was attempting to access and/or otherwise make changes to YL’s account. She was told by the System operator and the eHealth Office that so long as the person requesting for information was able to provide YL’s birth certificate or her ID card number (which the Father had), he could have access to YL’s information in the System and even change the registered SDM to another person. Unless with a court order, the eHealth system could not refuse to disclose YL’s information if her identity documents were provided.
6. Out of concerns that it would further facilitate the Father’s abduction if he could obtain the health information and vaccine records of YL and then set up a status quo for YL at an unknown foreign country, the Mother applied for and obtained the Orders on 23 May 2022 on *ex parte* basis.
7. The Mother obtained a further Location Order on 8 June 2022 and discovered that the Father may go to Singapore.
8. On a date unknown, the Father and YL left Bangkok and went to Singapore. With the assistance of the Singapore Central Authority, the Father and YL were intercepted and prevented from leaving Singapore.
9. *Jurisdiction Ground*

*C1. Power to change SDM under the 1st Order*

1. The Commissioner submits that he has no power to “change” an SDM. He can only “add” an SDM (sections 6 and 8 of EHRSSO) or an SDM can withdraw from being one (section 8).
2. Under section 3(2)(a) of the EHRSSO, a parent who accompanies YL can apply to be an SDM of YL. The parent can apply electronically to be an SDM. If the parent is already registered in the System (eg being a patient himself/herself), there is no need for the Commissioner to verify his/her identity. If he/she is not already registered in the System, he/she can still apply electronically to be registered as an SDM, but he/she has to appear in person at eg a hospital to have his/her identity verified.
3. Once registered as an SDM, that parent can have access to the vaccine record, appointment time and allergies of YL. The SDM can gain access electronically. Every time someone accesses YL’s data, a one-time password (“**OTP**”) would be sent to the SDM.
4. In respect of YL, only the Mother is the SDM. If the Father wants to access YL’s information, an OTP will be sent to the Mother. The Mother can forward the OTP to enable the Father to access the information.
5. If the Father applies to be the SDM of YL, an OTP would be sent to the Mother. If the Mother does not forward the OTP to the Father, the Father cannot be registered. He can still apply electronically but he will not be registered even if he has the identity documents of YL. He needs to go in person before the registration office for verification. Once his identity is verified, he can be registered as an SDM. Upon registration, he and the Mother will get notification that he has been registered. Once he is registered, the Father can have access to YL’s information; no more OTP is required.
6. YL has other information such as medical diagnoses kept by the Director. To gain access to such information, the SDM has to make a separate data access request by another channel under the Personal Data (Privacy) Ordinance, Cap 486. The Father (not being an SDM) can also make a data access request for YL’s diagnoses and vaccine records by using YL’s ID card (which he has).
7. There is no limit to the number of SDMs, so long as a person falls under section 3(2)(a) of EHRSSO. As demonstrated by Mr Chan, I agree that there is no mechanism for “change” of SDM. A person can apply to withdraw or add himself/herself as an SDM. Hence, even if the Father successfully applies to become an SDM, he cannot remove the Mother as such unless the Mother voluntarily withdraws. The 1st Order was thus made in error of the law and should be set aside as a matter of principle.
8. The 1st Order also cannot prevent the Father from having access to YL’s records of diagnoses and vaccination by using YL’s ID card, which would defeat the main purpose of the Mother’s application for the Orders in the first place.
9. Mr Li, counsel for the Mother, however, submits that the word “change” in the 1st Order” does not only mean “removal” but “add another” SDM as well. He suggests that the wording of the 1st Order should be changed so that the Commissioner “be directed not to add any third party (in particular the Father) as the [SDM] (currently registered to be [the Mother] …”.
10. Mr Li relies on section 49(1) of EHRSSO, which provides that the Commissioner has, amongst others, the following functions:

“(a) to establish, *operate and maintain* and develop the System;

(b) to regulate and *supervise* the sharing and *using of data and information* contained in the System;”

Under Section 49(2),the Commissioner may do anything necessary for, or incidental or conducive to, the performance of a function of a Commissioner.

1. Mr Li therefore submits that the Commissioner retains a “catch-all power” in regulating and supervising the use of data and information stored in the System, including the refusal to register an additional SDM, even though this power is not spelt out specifically.
2. With respect, there is no summons before the Court to change the wording of the 1st Order.
3. Further, section 49 of EHRSSO governs the general administrative powers of the Commissioner in operating the System and not in registration of an SDM. A “catch-all” provision cannot override the specific powers of the Commissioner under sections 3(2)(a), 6, 8 and 9.
4. In any case, even if Mr Li’s interpretation of section 49(1) of EHRSSO is correct, whether to continue the 1st Order is a matter of discretion, which I shall come to in the other 2 Grounds.
5. The Commissioner’s first jurisdictional challenge succeeds.

*C2. No injunction should be imposed under both Orders*

1. Mr Chan submits that the Commissioner and the Director are not parties to these CACO proceedings. They were merely served with the Orders. Section 16(2) of the Crown Proceedings Ordinance, Cap 300 (“CPO") provides that the court shall not “in any civil proceedings grant any injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.” See *Next Digital Ltd & others v Commissioner of Police* [2021] HKCFI 1677, §§84, 87 and 90 of Wilson Chan J. The Court would not give any relief against the Commissioner or the Director which could not have been obtained in proceedings against them. Nor would the Court give relief against them in these CACO proceedings. Accordingly, the Court cannot impose the 2 Orders against them. Any injunction against registration as an SDM, if thought fit, should be against the Father. I agree.
2. Mr Li seeks to persuade me otherwise. Firstly, he submits that section 16 of CPO does not apply to the Court’s jurisdiction over minors. This is because in section 2(2) of CPO, “civil proceedings” expressly excludes “proceedings of a nature such as in England are taken on the Crown side of the Queen’s Bench Division of Her Majesty’s High Court of Justice”, ie proceedings concerning criminal and prerogative jurisdiction: *Jade’s Realm Ltd v Director of Lands* [2015] 1 HKLRD 867, §41, Ng J.
3. The Court’s *parens patriae* jurisdiction to take care of those who are not able to take care of themselves forms part of the prerogative and inherent jurisdiction of the High Court: *Tameside Metropolitan Borough Council v AM* [2021] EWHC 2472 (Fam), §47.
4. In circumstances where the statutory scheme does not oust the inherent jurisdiction, it must be open to the court to deploy that jurisdiction where the application of the statutory scheme in circumstances not covered by or anticipated by the Act would result in a failure to safeguard and promote the welfare of the subject child: *Tameside* §77.
5. The inherent jurisdiction of the High Court over a child is well entrenched in Hong Kong in relation to children matters. One should proceed on the basis that in appropriate situations which involve a child who is a permanent resident of Hong Kong, the Court would step in and exercise its traditional protective role over the child if he or she is not physically present in Hong Kong at the time of the application: *QMY v GSS* [2015] 4 HKLRD 641, Cheung JA, §8.3.
6. Accordingly, Mr Li submits that section 16 of CPO does not apply when it comes to the Court’s inherent jurisdiction over YL.
7. Secondly, under CACO, the Court’s jurisdiction to grant injunctive relief is embedded in section 7(1)(a) which provides that before an application under Part 2 (pursuant to the Hague Convention) is determined, the Court of First Instance may give an interim direction as the Court thinks fit “for securing the welfare of the child concerned, or for preventing changes in the circumstances relevant to determining the application”.
8. Thirdly, if that is not enough, Section 21L of the High Court Ordinance, Cap 4 empowers the Court of First Instance to grant an injunction in all cases in which it appears to be just and convenient to do so.
9. I have no doubt that the Court in the exercise of its inherent jurisdiction over a minor, will have powers to impose injunctions for the minor’s protection, whether under CACO or s.21L of the High Court Ordinance or otherwise. I also accept that Section 16 of CPO does not apply to civil proceedings involving a minor, as a matter of principle.
10. However, notwithstanding the wide inherent jurisdiction over minors, the courts choose as a matter of policy not to exercise them because another public authority has power in the substance of the matter: *Rayden & Jackson on Divorce and Family Matters,* 18 ed, Vol 2, at §36.44.
11. The present case involves registration of an SDM as part of the management of the System. As Mr Chan submits, the Commissioner has power to accept registration of a *healthcare recipient* (or an SDM if the healthcare recipient is a minor) if certain administrative steps have been complied with: sections 6 and 8 of EHRSSO. Only if the Commissioner is satisfied that registering the *healthcare recipient* (not SDM) “may impair the security or compromise the integrity of the System” can the Commissioner refuse to register: section 8(2) of EHRSSO. There is no suggestion that section 8(2) applies.
12. Mr Li has not justified why the Court’s inherent jurisdiction over children should be exercised to enable the Court to interfere with the statutory and administrative functions of 2 *non-parties* who have committed no wrong. Mr Li does not even pass the hurdle of showing a serious issue to be tried between the parties in these CACO proceedings and the Commissioner/Director to justify an injunction. Nor has he explained why, eg an injunction against *the Father* to register as an SDM would not suffice.
13. The 2nd jurisdictional challenge succeeds. I therefore set aside the 2 Orders.
14. Even if I am wrong in declining to exercise my powers under the inherent jurisdiction, the fundamental question for the Court is, as always, whether it is in the best interests of YL to continue the Orders, amending the 1st Order as proposed. That brings me to the other 2 Grounds.

D. Purpose Ground

1. YL has now been located and reunited with the Mother. They are in Singapore pending resolution by the Singapore Courts of the issues as to return of YL to her place of habitual residence. The questions of custody will later be dealt with by the courts of the jurisdiction where YL habitually resides. There have been only about 2 months when the Minor had lived with the Father to the exclusion of the Mother before the matter was seized by the Singapore Court. The Singapore Court has, in the interim, ordered that YL do remain in the care and control of the Mother with supervised access to the Father. There can hardly be any status quo in favour of the Father established simply out of these circumstances. Any question of status quo would be dealt with substantively by the courts seized of the custody issue of YL. Any issue relating to education and medical matters can be dealt with likewise. No useful purpose can be served by involving the Commissioner or the Director, or barring the Father from being an SDM or from having access to YL’s medical information. This Ground alone is sufficient to set aside the Orders.

E. Best Interests Ground

1. As Mr Chan informs the Court, the record kept in the information system comprises (i) the dates of medical appointment; (ii) vaccine records and (iii) allergy records. There are also records of the diagnoses but access to them has to be dealt with under a separate data request channel.
2. Those records can hardly assist any parent in establishing status quo or any custody issue. On the other hand, not to release the allergy records, vaccination records and diagnoses to the Father (were he to bring YL to a professional healthcare provider of his choice) does more harm than good to YL because it may prevent her from receiving appropriate medical treatment.
3. This Court had expressly warned the Mother of this effect at the time the Orders were first made, when the type of records referred to in paragraph 45 was unknown to the Court. Mr Li has not addressed this matter in his submission. Having heard Mr Chan and Mr Yeung, and considering the Purpose Ground and Best Interests Ground, the balance is plainly in favour of setting aside the Orders.

F. Conclusion

1. For the 3 grounds set out above, I set aside the 2 Orders in relation to the Commissioner and the Director of Health.
2. On a *nisi* basis, I make no order as to costs, save that the Mother’s own costs be taxed in accordance with Legal Aid Regulations.
3. I thank counsel for their assistance.

(Queeny Au-Yeung)

Judge of the Court of First Instance

High Court

Mr Jeffrey Li, instructed by Patricia Ho & Associates, for the Applicant

Mr Newton Chan, Deputy Principal Government Counsel and Mr Vincent Yeung, Government Counsel of Department of Justice for the Commissioner for the Electronic Health Record and the Director of Health