

# A Key Judgment on Interim Maintenance For a Child Under the Inheritance (Provision For Family and Dependants) Ordinance

Case Analysis of FCMP 234/2022 [2024] HKFC 59: The Law Clarified and The Family Court's Take on Winnie Lo Fee Arrangements

*By Frances Tsang, Associate, Hugill & Ip  
Christie Lee, Barrister, Pantheon Chambers*



In May 2023, a 14-year-old boy (A), through his mother as the next friend (M), applied for financial provision out of his deceased father's estate pursuant to s.3(1)(v) of the Inheritance (Provision for Family and Dependents) Ordinance, Cap. 481 ("IPFDO"). She then applied for interim maintenance ("IM") pursuant to s.7 IPFDO.

This application was one of the first interlocutory applications heard in the Family Court following the introduction of the new Masters System, whereby Family Court Masters have jurisdiction to hear interlocutory applications. Any appeals against their decisions will be heard by a Family Court Judge, the nature of appeals is a hearing de novo.

The application was originally dismissed by the Master on 6 October 2023, as the learned Master was not satisfied that A was in immediate need for financial assistance. She appealed against this decision together with an application to adduce further evidence on appeal. On appeal, A sought IM under the following heads: private accommodation, domestic helper, and other personal expenses (including but not limited to extra tuition and ECA).

In December 2023, A's appeal was heard

by His Honour Judge C. K. Chan, and is one of the very first appeals against a Family Court Master.

A's appeal was successful, and her application to adduce further evidence was granted. She is granted IM at HK\$7,200 per month.

The Appeal Judgment provides important insights on the following:

1. Legal principles applicable to a claim for IM under the IPFDO;
2. A's immediate financial needs and available financial resources;
3. The welfare of a minor ought to be considered in IM applications under IPFDO; and
4. How will a *Winnie Lo* fee arrangement be viewed in the Family Court.

#### Legal Principles Applicable to an Interim Maintenance Claim Under IPFDO

The IPFDO was introduced to replace the now-repealed Deceased's Family Maintenance Ordinance ("DFMO") upon the Law Reform Commission's recommendation. It continues the spirit of the DFMO to provide a safety net for close relatives who have not received reasonable financial provision for the purpose of maintenance from the deceased's estate.

A's claim for interim maintenance is based on s.7 of the IPFDO. Section 7(1) IPFDO reads:

Where on an application for an order under section 4 it appears to the court –

- (a) that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section; and
- (b) that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant,

the court may order that, subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that, subject to this Ordinance, such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under section 4 or decides not to exercise its powers under that section.

Given the limited number of IPFDO cases in Hong Kong, case laws on IM for IPFDO are also limited, in particular, those concerning a minor child who was dependent upon the Deceased.

At §29 of the Judgment, the learned Judge took the opportunity to clarify the legal principles applicable in deciding interim maintenance claims under the IPFDO. In summary, it is a 3-stage test:

In the sub-section, there are 2 pre-requisites for an IM application, namely that the applicant must be in immediate need of financial assistance, and that the estate is in a position to meet such needs of the applicant. Only with satisfaction of these 2 pre-requisites, then the court would consider whether to exercise its discretion in granting such an IM order in view of all the circumstances of the case. Therefore, it is a 3-stage test, namely:

- (1) Whether the applicant has any immediate financial needs.
- (2) If yes, whether the estate is in a position to meet those needs.
- (3) If yes again, then the court would consider whether to exercise its discretion in granting such an IM order in view of all the circumstances of the case.

He went on to confirm the definition of "immediate financial needs" as



“something which calls for immediate action”, adopting the definition by Lam JA in *ACLS v HSB(T)L* [2013] 2 HKLRD 444.

It is anticipated that going forward, a similar 3-stage test will be deployed in deciding IM claims under the IPFDO.

### What are A's Immediate Financial Needs?

The learned Judge disallowed A's claim for private housing and domestic helper on the basis that they are faced with challenges on practicality. Nonetheless he found that A had immediate financial needs. The estate is in a position to meet those needs, and this is a “clear case for this court to exercise its discretion in granting an IM order in favour of A, and the only issue is how much” (at §61).

The learned Judge considered A's immediate financial needs total HK\$9,708. They include care home residential fees (HK\$1,500), extra-curricular activities (HK\$2,500), meals out of home (HK\$600), mobile data plan (HK\$138), holidays (HK\$200), school lunches and pocket money (HK\$1,200), and other miscellaneous expenses. Extra tuition, which the deceased had provided to A before he passed away, forms part of A's immediate financial needs (HK\$2,720).

A's net immediate financial needs is reduced by some leftover funds in A's DSWI account, which can be used to meet his care home expenses, to HK\$8,208.



### What Are the Resources Available to A?

While M does have some financial resources available to her, it is important to look at the bigger picture. M is earning a salary of HK\$4,730 with HK\$1,196 for food allowance. She is spending HK\$900 on herself per month only. While she is maintaining her elder son, the resources saved from her expenses on her older son are not enough, nor should it be diverted to be used on A. It is reasonable for her to continue to retain a little more financial resources for her own use, if an IM order is made against the estate. M's plot of land in the Philippines could not be sold or liquidated within a short period of time to meet A's immediate needs. Considering the bigger picture, M is ordered to contribute HK\$1,000 to A's IM.

Furthermore, the estate has sufficient liquid assets, which can be used to meet A's immediate financial needs.

It was also argued, *inter alia*, that A had no immediate needs as he had access to public assistance in the form of CSSA and that as the Applicant was able to retain counsel, he must not have access to other source of funds. The learned Judge rejected such arguments.

The net immediate financial needs of A amount to HK\$8,208

per month, and it is reasonable for M to contribute HK\$1,000 towards that sum. Bearing in mind the size of the estate, the learned Judge ordered the estate to pay HK\$7,200 per month as IM for A.

### Welfare of the Minor

The judgment concluded with the following remark, emphasising the importance in protecting A's welfare (at §63):

“... I have to remind myself that we are now dealing with the welfare of a minor, who has lost the care and long term financial support of his father. His whole life was turned upside down due to no fault of his. He was required to stay in an institution as compared to a normal home which he used to enjoy during the lifetime of his father. Therefore, it is important that a reasonable IM order should be put in place so as to minimise the adverse impact on A due to the death of and the cessation of financial support from the Deceased.”

### Fee Arrangements and Winnie Lo

A special feature in this case is that A is not legally aided, unlike most applicants for financial assistance with very limited means. A's solicitors are charging on a Winnie Lo basis, pursuant to which they will look to the Respondent for a favourable costs order.







Such fee arrangement was discussed in detail in the case of *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16-71, in which the Defendant, a solicitor in Hong Kong, agreed to take on a personal injury case on the basis that she would look to the other party for costs. In the decision, the CFA confirmed that:

“It was not maintenance or champerty for a solicitor to agree to act in litigation without charge or for a reduced amount in any event or whether the solicitor agrees to look to a hoped-for favourable costs order against the other side to recover his ordinary costs and disbursements. This applied equally to cases where the solicitor took the burden of paying the client’s disbursements in the hope of recovering them from the other side, subject to the cause of action or defence being reasonable and the absence of champerty.”

In the current case, the Respondent complained that since M was able to engage Counsel in all these proceedings, she must have been able to provide for the legal fees. The learned Judge accepted that charging on a *Winnie Lo* basis is perfectly acceptable under the current legal framework in Hong Kong. No adverse inference was drawn against A or M. This is despite the fact that M had Counsel appearing on her behalf.

The Respondent’s complaint likely stems from the practice for solicitors to collect costs on account before briefing Counsel. Whilst such practice is common, it does not imply that the lay client has a direct

liability to pay Counsel’s fees.

Pursuant to The Hong Kong Solicitors’ Guide to Professional Conduct Volume 1, Chapter 12, Commentary 12.04, “in the absence of reasonable excuse a solicitor is personally liable as a matter of professional conduct for the payment of a barrister’s proper fees.”

Accordingly, if a practising solicitor decides to charge the client on a *Winnie Lo* basis and does not secure costs on account before briefing Counsel, the solicitor will be personally liable to pay Counsel fees. The fact that Counsel is briefed under a *Winnie Lo* fee arrangement therefore does not automatically imply that the client must have provided costs on account for the same. Nor does it imply the client must be unable to substantiate their claim for financial assistance.

### **Winnie Lo Versus Other Options For Legal Costs Assistance**

Those who constantly go in and out of the Family Court will not be unfamiliar with this story:

Following a painful separation or the loss of a loved one, a dependent was suddenly cut out of all financial resources. On a seemingly peaceful afternoon, they were locked out of their own house, and all access to bank accounts and credit cards were stopped.

They belatedly realised that they had been brutally betrayed by their once-

family.

With young children to feed and bills to pay, they have no available funds to start a litigation. They felt helpless against the bullying from the financially stronger party, and were completely at their mercy.

More often than not, lay clients in such a position would find themselves in one of the following scenarios :

1. They would apply for and be granted legal aid. Their litigation outcome will be subject to the Legal Aid First Charge, meaning that Legal Aid will have the first bite of the final award to pay off the legal fees incurred in the proceedings, with the balance to be released to the aided person.
2. They would not be entitled to legal aid. If they are fortunate enough to find a law firm willing to start a case for them without adequate costs on account, they would most likely bring a litigation funding application right away against the estate or the breadwinner, asking for the other side to fund their litigation.
3. In the very rare scenario, they might be able to find a law firm willing to act pro bono.
4. If none of the above happens, they might decide to act in person.

Without going into the details of the pros and cons of all the above options, we believe we share the following sentiments with our fellow practitioners:

- a. The Legal Aid Department has an astonishing workload. An application for legal aid could easily take 2-3 months to process, which leaves a large window for the other side to take unfair litigation advantage that might be very difficult to rectify.
- b. Litigation funding applications, whilst convenient, are inherently subject to litigation risks. It is subject to a high burden of proof, and a litigant may or may not get enough litigation funding to carry on all that is necessary to conduct their case in the best way possible. Practically speaking, this creates a situation that is often unfair to the receiving party, not only because they are at the mercy of the paying party to make payments on time, but also because they only have "that much to spend" a month, whilst the paying party will often have more available funds to cater for their litigation needs.
- c. Pro bono arrangements in essence removes the potential costs liability of the opposing party and reduces incentive to settle. Such arrangement is therefore most commonly seen in public law litigation and is seldom suitable for contested matrimonial and IPFDO matters.

We also add that there is no direct authority that the *Currey* test for litigation funding in divorce suits is directly applicable for IM applications under the IPFDO.

With the current Judgment confirming that a *Winnie Lo* fee arrangement will not necessarily jeopardize a dependant's claim for financial assistance, the legal profession would be afforded with another option to assist distressed claimants with a genuine case.

Arguably, a *Winnie Lo* fee arrangement can, to a certain extent, rectify the embarrassing situation of a party

receiving litigation funding where their hands are often tied as to how they can strategically plan for their litigation. A *Winnie Lo* fee arrangement puts the litigation risks back to the financially more capable party - they will have to constantly be aware of their potential costs liability, and make sure they take a reasonable litigation approach and make concessions where necessary, lest they face a big bill from their opponent who has managed to obtain costs against them at the end of the proceedings. (Of course, taxation proceedings will be able to ensure that a fair costs assessment is given.) Solicitors acting on a *Winnie Lo* basis will also have the incentive to make sure their clients have a good case in order to aim for a favourable costs order. In Family Court cases where emotions are heightened and litigants are sometimes less rational than they would like to be, this might be a good tool to remind all parties to act reasonably with an aim to reduce as much unnecessary conflict as possible.

In *Ladd v London Road Car Co Times Newspaper* (1900) LT Jo 80, Lord Russell of Killowen LCJ commented that:-

"...it was perfectly consistent with the highest honour to take up a speculative action in this sense - viz, that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed."

We agree. We have been taught since Law School that it is basic human rights for

all to have equal access to justice. Yet, in the practical world, this is easier said than done. With the current Judgment accepting a *Winnie Lo* fee arrangement in the Family Court context, we hope this will provide more incentive for practitioners to provide assistance to those who are desperately in need, knowing that they will be able to recover their costs from the opponent as long as they have a good case.

### Takeaway

This is the first published judgment setting out the 3-stage approach on IM applications by an infant child of the deceased under IPFDO. There is no need to demonstrate an infant child's reasonable financial needs, or that he was substantially maintained by the deceased prior to his death.

This case also sheds light on how a *Winnie Lo* fee arrangement sits within the Family Court context, and confirms that it is available to practitioners and lay clients. Whilst it is good news that lay clients adopting such a fee arrangement will not be jeopardized in their maintenance claim, practitioners should tackle the same with care given the associated litigation risks and Counsel fee liabilities. When used wisely, a *Winnie Lo* fee arrangement can not only benefit financially deprived litigants but can also provide incentive for all parties to run a litigation as reasonably as possible. ■

