

HONG KONG / JUDGMENT

BL v. SJY**[2021] HKFC 148****COURT**

Family Court

DECIDED

28 July 2021

CASE / FILE NUMBER

FCMC7831/2008

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bjbj FCMC 7831 / 2008

**[2021] HKFC 148 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 7831 OF 2008**

BETWEEN BL Petitioner and SJY Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not Open to Public) Date of Trial: 4
and 5 May 2021 Date of Final Written Submissions: 28 May and 3 June 2021 Date of Judgment: 28
July 2021

J U D G M E N T (Relocation)

Introduction

There is currently only one application before the court that requires adjudication, namely the Petitioner Mothers Notice of Application for leave to remove the child of the family out of the jurisdiction of Hong Kong, dated the 29 September 2020. In this application she seeks leave to permanently remove the minor child, S, out of the jurisdiction of Hong Kong in order to relocate with her to the United States on a permanent basis. S is now almost 14 years of age having been born on the XX August 2007. The father opposes the mother s application. He wishes S to remain in Hong Kong and for her to complete her secondary education here. The parties have been in and out of court for the last 13 years or so. The litigation has been chronic with seemingly no end in sight. As things stand the Respondent father continues to refuse to pay the full amount of maintenance for the child, generally speaking not even the amount he proposes in his regular

applications to vary, and the mother is then left with no option but to seek to enforce the same. There is a repetitive element to the dispute with the same arguments being put forward time and again. However, the situation has now altered somewhat in that up until now the Petitioner mother has been allowed to remain in Hong Kong on a tourist visa only. Pre Covid she could come and go and was allowed to remain in Hong Kong on a more or less permanent basis, given that S does have permanent residency status in the territory. However, in a recent letter to the court dated the 19 July 2021, the mother says that she her visa has only been extended for 30-days, which means that she can only remain in the territory until the 30 July 2021. As will be seen, and as highlighted by the social Welfare Officer Mr Y, there is a definite element of risk associated with the mother and child remaining in Hong Kong. There is also a risk associated with S leaving. Thus, the court is required to balance the relative risks associated with S either relocating to the USA or remaining in Hong Kong one against the other. To that end it is of note that the mother is not a permanent Hong Kong resident. She is not entitled to work here as of right and history has shown that she has been unable to obtain work with a work visa in the territory. Further she is not entitled to public housing or to Government assistance for herself. S currently attends a local government school, but her situation and that of the mother remains somewhat precarious. For example, the mother is not entitled to medical care in the public health system, although S is so entitled. Meanwhile the respondent father continues to refuse to pay the full amount of maintenance for S that he has been ordered to pay i.e. the sum of HK\$6,500 per month. Even during the trial, he made no proposals to pay the amount then outstanding, assessed by the mother to be HK\$265,000. Indeed, the impression given by the father was that he expected the mother to forgo that amount. It is not clear how the father expects the mother to maintain both herself and S longer term if she has to remain in Hong Kong and she is unable to find work and if he refuses to fully maintain S or at all.

Background

As I have said this litigation is chronic. The first Ruling on the court file is dated the 21 November 2008 and concerns the mother's then application for maintenance pending suit. In that judgement I note that the parties married on the XX February 1995 and that the child of the family S was then just over a year old. At that stage the mother was 41 years old and she was working as an assistant merchandising manager. The father for his part was the 57 years old and running his own business. Other litigation followed, including an application to vary the interim financial support (see the Ruling dated the 20 February 2009), a defended suit (see the judgement dated the 31 July 2009), a trial on the arrangements for S (see the judgment dated the 19 January 2010) and a trial on final ancillary relief together with the first applications for enforcement and variation, (see the judgment dated the 19 May 2011). By that stage the mother was not working outside of the home and the husband had become a paragliding instructor. In the final analysis the court made an order as follows: Order Upon pronouncement of the decree absolute the husband shall pay the wife a lump sum of HK\$1,282,643.97 plus interest in full and final settlement of her claims for capital ancillary relief. It is directed that the Respondent's conveyancing solicitors namely Messrs Kevin LH Kwong & Co shall release this sum to the

Petitioner wife. Nominal periodical payments to the Petitioner to be paid by the Respondent at the rate of HK1 per annum for her maintenance during the joint lives of the parties or until the Petitioner's remarriage whichever is the shorter, first payment to be made upon decree absolute. The Respondent do pay periodical payments for the child of the family in the sum of HK\$6,500 per month, such payments to commence on the 1 June 2011 and thereafter to be paid on the 1st day of each month until the child attains the age of 18 years or ceases full time education, whichever is the later, or until further order. The Respondent shall pay the arrears in the sum of HK\$85,935.50 by instalments of HK\$3,000 per month for 28 months plus one final instalment of HK\$1,935.50, commencing on the 1 June 2011 and thereafter on the 1st day of each succeeding month until full payment. The Petitioner's judgment summonses dated the 10 September 2010 shall be adjourned sine die with liberty to restore.

- 7) There shall be an order nisi to be made absolute in 14 days that there shall be no order as to costs both in relation to the ancillary relief trial and in relation to the judgment summons hearing. Issues continued with respect to the maintenance for S assessed in the sum of HK\$6,500 per month. This was premised on the basis that each parent should contribute towards 50% of S's then expenses. Other applications followed including an application to vary the arrangements for S (see the second judgment also dated the 19 May 2011) and applications for leave to appeal and leave to appeal out of time. On the 13 September 2012 the father was sent to prison for the first time for two weeks for refusing to pay a small sum then outstanding. I am told that the husband then paid the sum due and owing after he left the court and prior to him being sent to prison. Other applications followed. Generally, the mother would seek leave to enforce the arrears of maintenance for S and the father would issue applications to vary. On one occasion the mother also applied to vary the maintenance up. Reference should be made to the other judgments in this respect, including inter alia those dated the 26 April 2013 (where reference was made to a potential relocation application for the first time), the 12 February 2015, the 19 January 2016 and the 5 October 2016. On that occasion the father was sent to prison for a second time for a period of two months for failing to pay the sum of HK\$190,665. Again he paid after leaving the court room and before he was sent to prison. A further judgment followed on the 21 October 2019. The parties have tended to represent themselves, although they have had the advantage of legal representation from time to time. In the last judgment dated the 21 October 2019 I summarized the position as follows:

Introduction

1. This is the second application by the respondent husband for a decrease of maintenance for the child of the family S, a girl who was born on the XX August 2007, from HK\$6,500 per month down to HK\$5,000 per month. He does not propose a general decrease down. The summons was drafted by lawyers and he was legally represented at the time. The application is in exactly the same terms as his previous summons in 2015 and reference should be made to the judgment dated the 19 January 2016 in that respect.

2. I also attach a copy of the last judgment in this extraordinary piece of litigation, dated the 5 October 2016, which was in relation to the wife's 3rd, 4th, 5th and 6th judgment summonses. In particular reference should be made to paragraphs 2 and 3 where I summarize the situation from the court's perspective. It is of note that there are further judgment summonses in the wings. It is also of note that although the husband has consistently said that he is willing to pay HK\$5,000 per month for S's maintenance, that historically this has not always been the case. Updated background
3. S, the child of the family, who remains the central player in the ongoing war between her parents, is now 12 years old. The wife has just turned 50. She does not work and is a full-time housewife. She relies on the maintenance from the husband and presumably the original lump sum that she received on the divorce and her other investments. (Reference is made to the buying of stock in her Answers to the Respondent's Questionnaire dated the 29 January 2019). The husband for his part is now 68 years old. He has remarried and his new wife is a social worker. On his case his previous work as a part time paragliding instructor has come to an end and he has no other sources of income. The wife says that she relies also on a financial contribution from her family.
4. As indicated previously, at this stage of the process I do not find either party to be wholly credible, although the wife is rather more credible than the husband. It is then, in these rather extraordinary circumstances, that I am asked to now adjudicate upon the mother's application. She is now 53 years of age and is originally from the Mainland China and her parents continue to reside in Beijing. She is a US citizen and has the ability to work in the United States. As indicated above, she is not a Hong Kong permanent resident and she is not entitled to any of the benefits associated with that including public housing, medical and CSSA. The father will be 70 years old in October. His current residency status is unknown, although it is of note, and again indicated above, that he has remarried a Hong Kong Chinese woman. The updated position Applications remain outstanding with respect to enforcement of maintenance, but notwithstanding that the mother has decided to proceed with her application to relocate. She says, and I accept what she says in this respect, that she had not realized that she could relocate without completing the enforcement proceedings first. As indicated above, it is not clear, if or when those proceedings will ever be finally completed. The mother wishes to relocate to Irvin, California. She has identified a suitable school for S and her parents will continue to assist her from a financial perspective in the short term. She intends to look for work almost immediately. The main issues The main issues then are these: Should permission be given for S to relocate to the United States with her Mother? And what is in the best interests of S overall? The Law Relocation In Hong Kong we continue to follow the guidance provided by the English authorities and in particular *Payne v Payne* [2001] 1 FLR 1053. This has recently been reconfirmed in the Court of Appeal's decision *H and W*, [2021] HKCA 733, which was an appeal from this court, where it was stated *inter alia* that: In Hong Kong the paramount consideration is whether the relocation is in the best interests of the child. Hence whether a relocation application is made by a primary carer or a non primary carer does not give rise to any presumption in favour of or

against the applicant. There may be myriad reasons why such a parent applies for the relocation of the child. Ultimately it is one of the factors to be considered in the overall assessment whether the relocation is in the best interests of the child and the weight to be attached to this factor depends on the facts of the case. The value of *Payne* is that it identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case per Black LJ at [144] in *K v K*. In my view *Payne* is not to be jettisoned. The relevant factors provide a structured framework in which the appraisal is to be made holistically. With respect I agree. It is of note that in this case there is no dispute that the mother is and always has been S's primary care taking parent. Reference may also be made to the Court of Appeal's previous comments made in the judgment of *BA v BL (Child Relocation)* [2019] 4 HKLRD 23 [2019 HKCA 822, CACV 18/2018 and in particular to the welfare centric approach which was also referred to in the English case *Re F*, where Ryder LJ said as follows: Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary... Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or left behind parent) from being side-lined in a linear analysis. Not only is it necessary to consider both parents proposal on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse. It is accepted that a welfare analysis will also be necessary in this case. However, before we get to that stage, it might be helpful to refer back to the actual and most often quoted passage from Lord Justice Thorpe who said in *Payne* (where the relevant factors were originally identified) that in order (40). To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion: Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean, founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow. If, however the application passes these tests then there must be a careful appraisal of the father's opposition; is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland? What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate. In suggesting such

a discipline, I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological wellbeing of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor. To reiterate then, the one and only authentic legal principle that I need be concerned with, when considering whether or not S should relocate with her mother to the United States, is that the best interests of S remain the court's paramount concern. I will though largely rely on the guidance provided by Payne in coming to a decision on that issue. I will also undertake a welfare analysis of the proposals advanced by each party, such as they are, within that guidance. List of factors to be taken into account In addition, reference may also be made to the list of factors found in the Children's Proceedings (Parental Responsibility) Bill. As in H and W, this has also proved helpful in the past when considering issues relating inter alia to the best interests of children. It may also be referred to when considering a welfare analysis, as referred to above. The checklist states that the following matters should be taken into account by the court when determining matters of this nature:

- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding); the child's physical, emotional and educational needs; the nature of the relationship of the child with each of the child's parents and with other persons; The likely effect on the child of any change in the child's circumstances; The child's age, maturity sex, social and cultural background and any other characteristics which the court considers relevant; The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents Any harm which the child has suffered or is at risk of suffering; Any family violence involving the child or a member of the child's family; How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; The range of powers available to the court under this Ordinance in the proceedings in question. Any other fact or circumstance that the court thinks is relevant. In this instance paragraphs a), b), c) and f) are of particular importance. The proposals from each party Mother's proposal The mother set out her proposals in point form in her supplemental affirmation dated the 17 December 2020 as follows: Accommodation: The Village at Irvine Spectrum Add: XX Prism, Irvine, CA92618 Web: irvinecompanyapartments.com Schooling: X High School (It's a grade A+ school.) Add: XX, Irvin, CA 92604 Web: HYPERLINK "http://Xhigh.iusd.org/" http://Xhigh.iusd.org/ Employment: I've been online searching jobs nationwide in state these days. Amazingly I have received a few responses from US already. Unfortunately they will not consider me if I am not physically in state. I will have to apply for jobs once I relocate and I'm very optimistic for my future job in state. Attached please find 3 contacts I've recently received for your reference. Visa Both S and I are American citizens which we are all entitled with local welfare. We don't have any visa issues at all. Covid-19 The tentative relocation date

is next July 2021. That is a perfect timing for S enroll into Grade 9 the beginning of high school level in state. The TVB Pearl news dated December 8, 2020 said the seniors and frontline medical staffs have started taking the covid-19 vaccine both in US and UK. By then I believe the covid-19 have cooled down already and the vaccine will be available in the market worldwide already. S s Personal Documents

- American Birth Certificate
 - Social Security Card(SSN) Both above documents are very important for S when she lives in the US. The Respondent has been holding them ever since I moved out from the matrimonial home in 2008. I d like to ask this honorable court get these back to us as soon as possible. In so far as access is concerned, she suggests as follows in her updated affirmation dated the 13 May 2021:
8. According to my record, the Respondent has travelled back to the states 4 times in 2019. This can be verified by Hong Kong immigration. In his own statement (my bundle 4/34 paragraph 10 bottom line, social report page 3 paragraph 10 bottom line) quote"He returned to the US about once every four months to meet his relatives and friends there"unquote. His most recent traveling to the US was February 2020. I insisted that he waited for 14 days to meet our daughter after he returned from the states last February. Obviously the Respondent does travel frequently back to the states. He is obviously financially capable, time wise he can manage too. Therefore I recommend,
- The Respondent can stop to meet our daughter each trip he returns if he wishes;
 - Winter break December 21 January 3: We take turns to spend time with S just like the current arrangement for Christmas. In case S flies back from overseas, i.e. Hong Kong, she must return back to US one day in advance before school resumes classes so that she can adjust jet leg, i.e. arrive at home January 2nd;
 - Spring break March 29 - April 4: We can make this holiday flexible. The Respondent can spend time with our daughter in state but no international travel to Hong Kong. If he can t make it, I will enjoy this short break with our daughter.
 - Summer break June 7 - August 18 (currently is 73 days): arrangement, the current arrangement, the Respondent will spend the 1st half time with our daughter. I shall take the 2nd half. Hong Kong trip can be arranged but the Respondent does need to provide a round trip ticket for S. In case I take S to Beijing during the 2nd half holiday, I will cover half of the cost for the air ticket. Father s proposal The father s position is set out in his submissions where he states inter alia as follows: Condition 1A) S resides in Hong Kong (Petitioner stays in Hong Kong) Schooling: S continues to attend the same school A College which is a Band 1 secondary school that she picked up by herself. She is benefited with the Anglo-Chinese School education system with proficiency in two languages. Living Conditions: remain unchanged according to the previous court ruling Access and visitation: remain unchanged according to the previous court ruling unless petitioner is willing to allow join custody.

Condition 1B) S resides in Hong Kong (Petitioner resides in United States) Schooling: S will attend the same school until Hong Kong Diploma of Secondary Education Examination (HKDSE) with the assistance and support from the respondent and his wife. If S gets good grade in the current school, she is under the employee's benefit scheme for scholarship from respondent's wife's employer which she has been working for more than 25 years and is under the same organization of S's current school. Living Conditions: S will live with the respondent and his wife at a spacious unit at Sai Kung with her well-facilitated private room to study. Visitation and Phone Access: The petitioner could have free phone and social media access to S after school. The petitioner could have her visitation time for 2nd half of summer holiday and Chinese New Year in Hong Kong at the time when she always goes back to Beijing for family trip at least twice per year. If the petitioner affords the round trip air tickets of S going to the states, the petitioner could have the visitation time with S in the states with prior approval from Marital Court in Hong Kong. Also, which can be considered, if respondent and wife are traveling back (air fare) during shared vacation time the cost of travel could be split between the respondent & petitioner in which case one part of travel (return) would be taken by S alone. Condition 2) S resides in the States Schooling: Petitioner must provide full details of school and show proof of confirmed enrollment. Besides, petitioner should allow the access to school managerial or teachers about S's school performance and adjustments in school. Living Conditions: Petitioner must provide full details of residence address with valid rental contract showing the terms and conditions and time of rental period. Respondent objects to petitioner taking S to co-habit or temporarily reside (even in short term stay) with her friends or anyone with unknown history which may pose unforeseeable risk or unnecessary psychological stress to the child. Visitation and Phone Access: Petitioner must allow phone and social media access by respondent without any interruption. As of now, the respondent does not have plan going back to the states for holiday or family reunion. For Summer holiday and Christmas visitation by respondent, the respondent will pay visit to S in the states only when the respondent has the full financial ability to cover his necessary expense incurred. Discussion I must now turn to consider the issues, the law and the parties evidence as set out in their affidavits and as given orally by them during the hearing. I have also heard from the Social Welfare Officer, Mr. Y. The Social Welfare Report Recommendations made to the court in Social Welfare Reports, although not binding are considered persuasive. In the event that the recommendations are not followed then reasons should be given for that in the judgment. As will be seen, in this instance, I have fully accepted both Mr. Y's insights and his concerns. In his Remarks and Recommendations, he states inter alia as follows: Conclusion and Recommendation

36. This is an application concerning the mother's permanent removal of the child, S, to the US. The gathered information reveals that the mother is a US citizen who has no right of abode in Hong Kong. She is neither allowed to work nor entitled to any local welfare and health benefits. To sustain her and the child's living, she lives on her savings and financial support from her parents in Beijing. However, as her savings is dwindling, her parents financial support is not endless, and the father's maintenance to the child cannot be guaranteed, the

mother is facing a survival issue in Hong Kong. She has no choice but a genuine need to go back to the US, where she can still find a job as long as she has the working capacity or apply for welfare assistance as and when necessary to support her and her child's living. Having been the primary carer of the child since the child's birth with a strong mother-child bonding, the mother's application for relocation with the child and securing a better education prospect for the latter is comprehensible. Despite her disputes with the father, the mother has been on the whole able to comply with the holiday and access arrangement stated in the Court Order dated 25 November 2013 that the father's physical access to the child has been maintained over the years. In addition, she regards the father's continual concern to and contact with the child important for the child's healthy development. It is believed that the mother has no intention to exclude the father from the child's life in connection with the present application.

37. Throughout the present investigation, the child S is impressed to be a genuine, mature, and thoughtful teenager. She is consistent in expressing her clear wish to relocate to the US and pursue her study, interests and aspirations there. While she fully trusts her mother in implementing the relocation plan, she has also been doing research to try familiarizing herself with life and schooling there. She is psychologically prepared for the worst scenario and is confident of facing any possible challenges with the mother in the US. For parent-child relationship, S appreciates the quality time with her father but bemoans that it has become less and less. In the meantime, she reveals her pressure of living with the father and the stepmother and feels not being really listened to and understood by her father. She thus has resistance towards the father's proposed care arrangement. On the other hand, the child prefers continuous care by the mother, with whom she feels more secure and adapted to live than on the father's side. Continuous care by the mother, who has the capacity to understand, accept and respect the child, is assessed to be comparatively better for the child's emotional well-being, developmental needs and growth, which is in her best interest.
38. In regard to her application, the mother plans to move to Southern California with the child in June 2021. By then, the child will turn 14 and can enroll in the first high school year in time. The mother admits that, apart from the contact means and address of her friend in Los Angeles, with whom she and the child will briefly stay upon arrival, she is unable to provide further concrete details regarding her future accommodation, the child's school enrollment, and her employment at the moment. This can only be done until she has physically arrived at the American soil together with the child to proceed and materialize the plan. On the side of the father, though the child has a more distant relationship with him, he is considered having genuine concern over the child, as reflected by his initiative and effort to see the child outside her school after class or school activities aside from weekend access. As the mother fails to present concrete and adequate information about her relocation plan, the father's objection towards the mother's present application is understandable. Apart from doubts about the mother's financial capacity in sustaining the child's living, the father has worry over the child's health and safety issues in the US as well, where the COVID-19 pandemic is more rampant. Having little trust towards the mother, the

father also fears that the mother will exert negative influence on the child, and block, restrict or prevent his visitation to and communication with the child after relocation, resulting in an adverse impact on his continuing connection with the child. He thus prefers the child to stay in Hong Kong and continues her present schooling in Hong Kong until she reaches 18. In case the mother has to relocate to the US alone, the father is willing to take care of the child together with his wife, who also expresses concern about the child.

39. Notwithstanding the lack of concrete details of her removal plan at the moment, given the mother's non-resident status in Hong Kong where she has scarcely any means to make a living, she and her child being US citizens who are entitled to live and protected under the state welfare system in the US, the research she can reasonably do in her present circumstances with respect to accommodation, schooling and employment, her plan to do the necessary precautionary measures and arrange vaccines for her and her child against COVID-19, the possible help she can enlist from her friends in Southern California, and the financial backup from her parents, the mother's plan is considered not unreasonable and unrealistic at all. Despite her disputes with the father over child maintenance, the mother has managed to comply with the access arrangement stipulated in the Court Order. She also indicates her support for the continual contact between the father and the child for the sake of the child's healthy development. On the other hand, if the mother's application is declined, she will probably have no choice but to stay in Hong Kong with the child continually in view of her close and inseparable emotional ties with the latter. Nevertheless, it is expected that she will face constant financial insecurity and health stress, which will have a significant and detrimental impact on her emotional well-being. This is by no means in the best interest of the child, who is emotionally attached to the mother.
40. In consideration of the mother's genuine need for removal, the child's explicit wish for relocating to the US, the strong emotional ties between the child and the mother, the parenting capacity of the mother. in addressing the. Child's developmental needs, the research the mother can reasonably do in her present circumstances while both she and the child are US citizens, the financial support which the mother can obtain from her parents, the assistance which the mother can receive in the country to be relocated, and the mother's support of the father's continual contacts and access to the child, the mother's relocation application, which is assessed to be in the best interest of the child, is supported. Meanwhile, to ensure the father's love and concern to the child, which is beneficial to the child's continuing development, daily indirect access between the child and the father through phone calls or messaging apps with respect to the care of the child is suggested. The father is also recommended to have reasonable access to the child when he visits the child in the US to facilitate his quality time with the child. To allay the father's concern and worry over relocation, the mother is advised to provide more concrete information with regard to accommodation and school enrollment once they are available. With respect I agree with all that is said here. During the trial Mr Y reiterated his concern that the mother faced considerable risks by remaining in Hong Kong. He did not accept that S had been coached by her mother to support the relocation plan. In so far as the father's suggestion

that S might live with him and his new wife, Mr Y reiterated that although this was a possibility that he was concerned about S's relationship with her step mother which was not that harmonious. To put it colloquially Mr Y acknowledged that although both parents clearly loved their daughter, that it seemed clear to him that S derived her sense of security from her mother. In his report he said that S had described her relationship with her father as complicated. Relocation Should permission be given for S to relocate to the United States with her Mother? The Payne guidance and the welfare analysis Generally I accept that the mother's plan is genuine and not motivated by a desire to exclude the father from S's life, notwithstanding the chronic nature of the ongoing litigation. I further accept that the mother has tried her very best to make the current arrangement work, but that she has really reached the end of her tether. This is especially given the father's clear reluctance to fully support S financially going forward. Is the mother's plan realistic, i.e., founded on practical proposals both well researched and investigated? I accept that the mother's plan is realistic. When considering her proposals, I shall also compare them with the father's proposals if S were to remain in Hong Kong as part of the so called welfare analysis. Housing Housing is a significant issue for the mother in Hong Kong. She is not entitled to public housing and rental is expensive. According to her latest Form E, dated the 20 October 2020, the mother receives financial support from her family in the sum of HK\$27,000 per month and she is supposed to receive maintenance from the father for S in the sum of HK\$6,500 per month. Her rental alone is HK\$15,000 per month and this is likely to increase in time. This is by far her largest expense. The father takes issue about the so-called financial support from her family. However, at this stage, it matters not whether that money comes from the original lump sum awarded to the wife in 2011 or if her family are actually supporting her from their own resources. It is clear that it was never the court's original intention that the lump sum would be sufficient to provide for the mother and S in the longer term. The mother said in the witness box that she had already made enquiries about accommodation and that she intended to sign a lease as soon as she and S arrived in the United States. She said that she needed to do this right away as this was also the basis upon which applications were made for schools. I accept what she says in this respect. In the immediate to short term, she had also identified a serviced apartment, which she said would also be suitable for her and S. Reference has also been made to them being able to stay with a friend if necessary. Although the father objects to this, for the avoidance of doubt the court has no difficulty with this proposal, which seems to be eminently sensible in the circumstances. In contrast the father proposes that S stay with him and his wife either with a view to the mother going first and S following, or on a permanent basis. S has said quite clearly that she is not agreeable to either proposition. I accept what she says in this respect. It is of note that the father has not filed a summons to vary care and control. Schooling The mother has located a school called X High School in Irvin, California. She says that S is very excited at the prospect of going there and that they have also undertaken their own research into different schools and that this was S's preferred choice. In so far as education generally is concerned, the mother says, and this is also mentioned by Mr Y, that S struggles in the Hong Kong education system. In particular, she finds the Chinese language very challenging

notwithstanding the fact that her mother is originally from the mainland. Mr Y summarizes S's views in his report as follows: Child's Views on Permanent Relocation

32. S shared to the investigating officer her explicit wish for living and studying in the US, the thought of which began to appear about three to four years ago. She revealed that she did not have a strong sense of belonging in Hong Kong. Though she has tried hard in learning Chinese, she felt highly stressed and frustrated with it. She was worried about her study and prospect in Hong Kong if she failed in Chinese, which is a major subject. Moreover, she was unable to develop deep friendship with her classmates and had the feeling of being excluded as her Chinese was no good. On the other hand, with a good command of English, she expected that she would have less study stress and could make friends easier in the US. Having great interest in acting, singing, drawing, English speech and debate with the wish to become an actress or a lawyer as her second choice in future, she found the curriculum and extra-curricular activities of X High School very appealing as they were compatible with her interests and aspirations. Besides, she felt insecure with her family's financial condition if she and her mother continued to live in Hong Kong in view of her mother's limited savings and need to rely on support from others while her mother could not work in Hong Kong.
33. About the idea of moving to the US and studying there, S said that she had talked to Madam C once and seized the chance to mention it to her father repeatedly on her birthday, at Christmas, and during summer holiday starting from her upper primary school years, which was met with lukewarm response. Though her father mentioned bringing her to the US for a look in the past, it turned out to be his empty promise. On the contrary, S said that she could openly share with her mother about her wish, and thoroughly discussed with the latter about the feasibility of the plan. While her mother was responsible for drawing up the concrete plan of relocation, she also had an active participation by contributing her ideas. She explained that she fully trusted her mother in carrying out the relocation plan as her mother was helpful and readily available in giving her advice and pacifying her emotions whenever she had difficulties throughout her upbringing. Meanwhile, she also had the psychological preparation for the worst scenarios in case her mother could not find a job readily and settle in the boundary area of the target school district, that they might need to count on the help from others for an extended period of time and she might need to find another school. Nevertheless, she expressed her confidence in facing the possible challenges with the mother in the US.
34. S clearly stated that she wanted to go to the US together with her mother in the coming summer and start schooling there right after the summer vacation so that she could catch the time to enter the first year of the high school. As she had been so close to her mother that the latter had become a part of her life, she expressed deep worry if her mother went to the US first and left her to the care of her father and stepmother even for a few weeks, which she could hardly accept. She would like to maintain contacts with her father through phone calls and WhatsApp and welcome his visits and physical access to her after she was relocated to the US. From a financial perspective it would not be possible for S to attend an

international school in Hong Kong. I accept though that it seems that she may very well benefit from a more Western education system and one where English is the medium of instruction. The father points out that S's current school is a Band 1 school and is therefore considered to be a very good local school. All things being equal S would stay at this school until she completes her senior school education. He also points out the advantages to S if she perseveres and is able to master both English and Chinese. The difficulty, however, is that S is currently failing in Chinese and Chinese related subjects. It does not seem likely that this will change in the foreseeable future. Thus I tend to agree with the mother that moving S now, so that she is able to complete High School in the US is a good option for her from an academic perspective.

Finances and employment The mother said that she has many different employment choices in California and that she was confident that she would be able to secure a job quickly. In the short term she would also be able to rely on her family for financial support and she hoped that the father would contribute to S's expenses as he has been ordered to do. In the final analysis, she said that she would also be entitled to certain government subsidies including Single Parent benefit, Employment benefit and other benefits related to the Covid-19 pandemic. In contrast she pointed out that she is not entitled to any form of Government support in Hong Kong and that she has no financial safety net. This is accepted.

Access The mother pointed out that prior to Covid the father had travelled to the US on a regular basis and that it should therefore not be too difficult to arrange access when he is in the United States. She said that she had no difficulty in continuing to split the school holidays going forward. She confirmed that S communicates with her father by WhatsApp and other social apps and she anticipated this continuing once they had relocated. The Covid-19 pandemic Both the mother and S have received their vaccinations for Covid. The father is concerned about the pandemic and its changing nature. This is understandable. He is also concerned about his ability to travel to the United States at present. Again this is also understandable. However, notwithstanding that I also accept that given S's age, it would be optimal for her to relocate over the summer so that she is able to commence High School in August 2021. I am told that the term commences on the 18 August 2021. Is the Father's opposition motivated by genuine concern for the future of S's welfare or is it driven by some ulterior motive? As I have pointed out above, the parties have engaged in a form of litigation warfare for a considerable period of time and for little purpose. It is not clear whether or not the father's opposition is motivated by a genuine concern for S's welfare, or if it is simply that he is opposing it because the mother has requested it. I am also of the view that he is deeply motivated by the financial aspects of this case and his perceived sense of unfairness around some of the decisions that have been made. Having said that it is also of note that he is now nearly 70 years old and that in any event his earning capacity is likely to diminish over time. Thus, in the longer term I also tend to accept that the mother will need to work and take on the lions share of supporting S from a financial perspective. It is therefore imperative that she is in an environment that will allow her to do that going forward. What would be the extent of the detriment to the father and his future relationship with S, were the application granted? Once the Covid travel restrictions lift I agree that it should be possible for the father to spend time with S in

the US, when he is there for training or business purposes, or when he is vacationing there. Alternatively, S could fly back to spend time with him in Hong Kong. The relocation will mean that he is not able to see S as regularly as before. But I do not accept that this will mean the end of his relationship with his daughter or that the mother will use this as an opportunity to undermine their bond. Nor do I accept that the mother has engaged in alienating type behaviours. What would be the impact on the mother of a refusal of her realistic proposal? I accept that refusing the mother's application would place her in a completely untenable position. The list of factors As indicated above the list of factors can be a valuable tool when assessing what might be in a child's best interest. In this case it seems to me that paragraphs a), b), c) and f) are of particular import. These will be discussed briefly in turn below: the ascertainable wishes and feelings of the child concerned considered in the light of his [her] age and understanding); S is now a teenager. She is nearly 14 years old. She appears bright and articulate. She has stated clearly that she wishes to relocate to the United States and she has stated her reasons for that. I do not accept that she has been coached or that there are any other reasons why her views should not be given considerable weight. the child's physical, emotional and educational needs; S is a mixed-race child who excels in English and English related subjects but continually fails in Chinese. I accept that from an educational perspective it makes sense for her to relocate to the States at this stage of her education, so that she can commence High School there. This should also place her in the best possible position for College applications in the longer term. This is also a more affordable way forward. It seems very unlikely that either parent would be able to support an overseas application by her for a US College or that she would be able to go otherwise.

- (c) the nature of the relationship of the child with each of the child's parents and with other persons; I accept that the mother has been S's primary care taking parent and that S is naturally closer to her than her father. It is of note that S does not appear to have a good relationship with her step mother. Further the step mother was not called by the father to be a witness. Further, it is of note that the father has not made a formal application for a variation of care and control. The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents The father has not fully supported S from a financial perspective for a very long time and has seemingly little insight into the effect that this could have both on her and their relationship in the longer term. The parties in the witness box I have come to know the parties well over the years. As I have said in other judgments I do not, at this late stage find either side to be wholly credible, but I do find the mother generally more credible than the father. I also agree that the father has behaved appallingly with respect to the financial aspects of this case and has on occasions placed both the mother and S in an almost impossible position. Having said that I have also found both parties to be generally likeable. They are both reasonably bright and capable. The fact that they have found themselves locked in this repetitive cycle of litigation and re litigation is of itself a terrible reflection on our system. What is in the best interests of S overall?
- Conclusion on relocation Having considered all of the above and having weighed up the

pros and cons in the welfare analysis, I accept that it would be in S s best interests to relocate to the United States over the summer. I do not accept that it would be in her best interest to live with her father and step mother, either in the short or longer term or to continue to attend school in Hong Kong, given the alternative. She also clearly needs to continue to live with her mother. They are both US citizens and it makes sense at this juncture for them to begin a new life there together. Access For the avoidance of doubt the access arrangements for the school holidays shall generally continue as set out in the court order dated the 25 November 2013 and as confirmed in the court order dated the 6 March 2014. The mother has made sensible proposals with respect to the issue of access and how the flights should be paid. As a general indication it seems to me that the cost of flights for S to return to Hong Kong to see her father should be split equally in the event that the mother is also returning to Beijing with S to see her family. Otherwise the father should be responsible for those costs in their entirety. Costs Finally, on the issue of costs, given that this is a child related matter I will make an order nisi that there shall be no order as to costs, to be made absolute at the expiration of 14 days. Order Consequently, an order shall be made as follows:

- 1) Leave be given for the child of the family namely Y, SJ, a girl born on the XX August 2007, to be removed out of the jurisdiction of Hong Kong on a permanent basis in order to relocate to California, USA, with immediate effect;
- 2) For the avoidance of doubt the access arrangements for S s school holidays as set out in paragraphs 1 4 of the court order dated the 25 November 2013 shall remain in place. Orders 6 and 7 shall be discharged.
- 3) Going forward the father shall have reasonable access to S, including remote access inter alia by WhatsApp, telephone and Zoom.
- 4) There shall be an order nisi to be made absolute at the expiration of 14 days that there shall be no order as to costs. IT IS FURTHER DIRECTED THAT The Respondent do immediately hand over to the Petitioner, the child s American birth certificate and her Social Security Card (SSN) prior to her relocation out of Hong Kong; A penal notice be attached to order 5); Upon arrival in the United States the Petitioner do inform the Respondent of her address, whether on a temporary or longer term basis, her telephone number, S s telephone number and details pertaining to S s new school, once registered. Liberty to apply on an urgent basis. (Sharon D. MELLOY) District Judge The Petitioner and the Respondent both appeared in person PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk tmgm gd~V gd~V gd~V gd~V gd~V gd~V gd~V gd~V gd~V gd~V gd~V gd~V gdQj gdQj gdQj gdQj gdQj gdQj gdQj gdQj gdQj gdQj hMts hMts hMts hMts hMts hMts h:M| hMts hMts gdQj gdQj gdQj gdQj slslseYese h_O4 hS'T ui` | gdC~ h-& h,ed gdQj gdQj gdQj gdQj zoicZP gdG\$ gdm] B+B+ hY]p gdQj gdQj gdQj gdQj gdQj gdQj gdQj zvvzvzvzok hY]p hY]p hjmW gdQj gdQj gdQj gdQj hY]p hiMm hiMm hjkX gdQj gdQj gdQj gdQj gdQj gdQj gdQj gdQj ztzkzkzkzbzbzkzbztzkb\ hbw+ h{ix hbw+ kb\V h{ix hbw+ hL-X hY]p hbw+ gdQj gdQj gdQj gdQj gdQj gdQj hbw+ hbw+ gdQj gdQj gdQj gdQj gdQj gdQj }si`W hL-X hY]p gdQj gdQj gdQj gdQj gdQj gdQj ntnt hcX+ gdQj gdQj gdQj gdQj |v|v &`#\$ gdQj H I J K L M N O P Q R S T

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