

HONG KONG / JUDGMENT

CHK v. CKT

[2023] HKFC 83

COURT

Family Court

DECIDED

9 May 2023

CASE / FILE NUMBER

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FCMC 7553 / 2021

[2023] HKFC 83

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NO. 7553 OF 2021

BETWEEN

CHK

Petitioner

and

CKT

Respondent

Coram: Her Honour Judge Elaine Liu in Chambers (Not Open to Public)

Dates of Hearing : 10 and 11 January 2023

Date of Closing Submission : 1 February 2023

Date of Reply Submission : 8 February 2023

Date of Judgment: 9 May 2023

JUDGMENT

(Care and Control, Access)

A.

BACKGROUND FACTS

This is the trial on the care and control of and access to 2 children of the parties (the “Sons”). The elder son (“Elder Son”) is 8 years old and the younger son (“Younger Son”) is 4 years old.

The Petitioner (“Mother”), aged 28, and the Respondent (“Father”), aged 32, were married in May 2014. Prior to their marriage, Mother worked as a restaurant staff. She became a full time housewife after the birth of the Elder Son. Father is working as a manager in a café.

The Elder Son is a primary 3 student. He has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD), Autism Spectrum Disorder (ASD), speech and language impairment, borderline to low average intellectual functioning. He has specific learning difficulties in reading and writing. The Younger Son is a kindergarten student.

The parties separated in December 2019. Mother has a stable boyfriend since January 2020. Between December 2019 and January 2021, the Sons continued to reside with Mother, while Father would drop off and pick up the Elder Son at school and take him out during Father’s holidays. Between January to April 2021, Father had staying access to the Elder Son and substantial day access until 10:00 pm to Younger Son every Friday to Sunday. During the long holiday in early April 2021, the Sons moved to reside with Father for 7 to 9 days because of maternal grandfather’s temper at that time. From 11 April to 14 June 2021, the Sons stayed overnight at Father’s home every Friday morning to Sunday night (i.e. 2 nights per week).

The situation changed after an incident happened in a carpark on 14 June 2021 (“Carpark Incident”). Police was called to the scene. It is not necessary nor helpful to go into details of the Carpark Incident save to note that after the Carpark Incident, Mother blocked the communication with Father. Father only resumed limited access to the Sons on 7 August 2021 with the assistance of social workers.

Mother has been diagnosed with mild depressive episode since 2019. She first attended the psychiatric clinic of a public hospital in January 2020 and was treated with medication. Her symptoms improved with the treatment of medication. In her medical consultation in September 2021, she reported to have stable mood and coped with child care well.

By the Order dated 11 February 2022 (“2022 Order”), joint custody of the Sons was granted to both parties. The interim care and control of the Sons was granted to Mother, while Father has defined access to the Sons, viz: day access on every Saturday from 1:30 pm to 8:30 pm, pick up and drop off at a co-parenting support centre, and the actual arrangements and activities were to be coordinated by social worker.

The following reports were adduced:

a Social Welfare Reports dated 27 January 2022 prepared by Mr Chan (“1st SIR”);

an updated Social Welfare Report dated 23 December 2022 prepared by Ms Wong (“2nd SIR”);

a Clinical Psychologist Report dated 22 December 2022 prepared by Ms Wong (“CP Report”); and

an Educational Psychologist’s Report dated 8 September 2022 prepared by Mr Tang concerning the educational needs of the Elder Son (“EP Report”).

In addition to the oral testimony of the parties, the two social welfare officers, Mr Chan and Ms Wong, and the Clinical Psychologist, Ms Wong gave evidence at the trial.

At the beginning of the trial, the parties confirmed their agreement to joint custody of the Sons, and a supervision order for 12 months irrespective of the result of this trial. They disputed the care and control of the Sons and the access arrangements.

Mother wanted the sole care and control of the Sons. Her case is that she has been the primary carer of the Sons since their birth. She wanted to maintain the access arrangements in the 2022 Order, with the addition of a video access every Friday at 8:00 pm on the condition that the video access shall not be recorded, and the conversations during access shall not be adduced as evidence. She did not agree to overnight access. She said that the Elder Son did not want to stay overnight with Father, he would cry and scream if he was asked to do so. She also insisted that the Sons’ medical consultations and school activities must be attended by her in the absence of Father. She said that Father is the cause for her anxiety and depression. She agreed to a gradual increase of access but she has no plan or timeframe for the increase.

Father also sought the sole care and control of the Sons. He referred to various incidents of Mother objecting to his involvement in the care of the Sons, their school activities and medical consultations. He wanted to participate in the Sons’ school and medical related matters, and requested for sharing of information. He contended that there is no reason to deny his staying access to the Sons. The Sons were happy staying with him. They used to have 2 nights’ stay at his home before the Carpark Incident. Mother had even requested for his assistance to take care of the Sons in April 2021 when maternal grandfather has emotional issue. He took care of the Sons with the assistance of his parents when he was at work. He is the manager of a café and can arrange his working hour flexibly to cater for the child care needs. The Sons have always asked to stay longer with him at the end of the day access.

Father proposed that if he is granted the sole care and control of the Sons, Mother would have 2 nights staying access to the Sons at weekends (if necessary, he was open to a gradual introduction of staying access), and the proposed arrangements for long holidays as stated in sub-paragraph (5) below. If Mother has the sole care and control of the Sons, he proposed the following defined access:

For the first 3 months:

Week 1: staying access from Friday 7:00 pm to Sunday 7:00 pm;

Week 2: day access on Saturday from 10:00 am to 8:30 pm;

Week 1 and 2 to take place alternatively.

From the fourth month onwards, and subject to the social welfare officer's recommendations:

The first 3 weeks of each month: staying access from Friday 7:00 pm to Sunday 7:00 pm;

The 4th and 5th week (if any) of each month: staying access from Friday 7:00 pm to Sunday 9:00 am.

There be a supervision order of 12 months, with a progress report to be submitted in 6 months.

Staying access arrangements shall be reviewed once every month by the social welfare officer during the period of the supervision order.

The following access arrangements irrespective of which parent is granted the care and control of the Sons:

Long school holidays be split between the parties equally, and parties should come to an agreement as to how the school holiday should be equally split between the parties 1 month before the holiday starts.

The Sons shall spend with Mother on Mother's birthday, the birthday of Mother's parents, and Mother's Day.

The Sons shall spend with Father on Father's birthday, the birthday of Father's parents and Father's Day.

For single day public holidays that do not fall within long school holidays, parties shall take turns spending the same with the Sons.

The parties shall alternate the Sons' birthdays and important holiday, namely winter solstice dinner, dinner on the eve of Lunar New Year, and dinner on the first day of Lunar New Year on a yearly basis.

For special occasions provided for in (ii) to (v) above, the access time shall be between 10:00 am to 9:00 pm on a holiday or weekend, and between after school until 9:00 pm on a school day.

The handover shall take place at a shop on the ground floor of XX Shopping Centre.

There be made up access to take place within 1 month.

In relation to all school meetings (including but not limited to parent-teacher meetings or meetings with the school social worker), events and activities of the Sons, and medical appointments or check-ups of the Sons:

If only one parent is permitted to attend, Father and Mother shall take turns attending the same.

If both parents are permitted to attend, Father and Mother may both attend the same.

If only one parent attended, he/she shall provide full disclosure and information of the same to the other parent afterwards.

The parties shall share all school notices of the Sons, and the login details of the Sons' HA Go accounts with each other.

At the end of the trial, by consent of the parties, the following defined access was ordered ("2023 Consent Order"):

Father has day access on every Saturday 12:00 noon to 8:30 pm; and from 1 April 2023 onwards, the time for day access was increased to 10:00 am to 8:30 pm.

The pick up place was initially at the co-parenting support centre, and change to a shopping mall near the parties' residences since April 2023.

There was one staying access during Easter holiday from a Friday 7:00 pm to Saturday 8:30 pm.

The removal restriction in paragraph 9 of the 2022 Order remains in effect.

B.

relevant legal principles

The relevant legal principles are not in dispute. The paramount consideration is the best interests of the child.

Section 3 of the Guardianship of Minors Ordinance ("GMO") provides that:

"3(1)

In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property—

in any proceedings before any court (whether or not a court as defined in section 2) the court—

shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to —

the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and

any material information including any report of the Director of Social Welfare available to the court at the hearing; and

shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”

Section 3 of the GMO applies in relation to any order for custody care or supervision which may be made under Matrimonial Causes Ordinance (“MCO”) or Matrimonial Proceedings and Property Ordinance: section 48C of MCO.

The “welfare checklist” was commonly adopted as a guideline or aide-mémoire in considering the custody care and control of minor child. The factors set out in the “welfare checklist” are:

the ascertainable views of the child concerned (considered in the light of the child’s 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 characteristics of the child that the court considers relevant;

any harm that 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 the child’s needs;

the practical difficulty and expenses of the child having contact with a parent, and whether that difficulty or expenses 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 circumstances that the court considers relevant.

The above is not a compulsory nor exhaustive checklist. It is not a list to be mechanically went through to dictate the outcome: *H v N* [2012] 5 HKLRD 498 [29] – [31], endorsed by the Court of Appeal in *ZJ v XWN*, *supra* [25].

Access to a parent is the basic right of a child rather than a basic right of the parent. The child should be given the opportunity to live and share his time with both parents in a manner that best suits his developmental and psychological needs: *H v N*, *supra*, [43] – [44], *PD v KWW* (Child: Joint Custody) [2010] HKFLR 184 [43].

C.

DECISION

C1.

Care and Control

Mother is the primary carer of the Sons. The Elder Son who has special needs, and the Younger Son who is 3 years old, require attentive care by someone familiar with them. All 3 experts observed that the Sons have emotional attachments with Mother, and their relationship with Father is also close and natural. Both parents genuinely love and care the Sons. Both parents have equipped themselves by completing co-parenting courses and courses relating to the care of a child with special needs. Both parents are able to take care of the Sons.

The key concerns raised by Father are firstly, Mother's depression, her reluctance to communicate with Father and objection to Father's involvement in the Sons' affairs; secondly, the maternal grandfather's temper and emotional instability. Father specifically referred to the incident in April 2021 when the Sons had to move out and resided with him for about 9 days because of maternal grandfather's temper. Further, there is a history of the maternal grandfather practicing corporal punishment on the Sons.

The medical report showed that Mother's condition was stable with medication. The SIRs and the CP Report concluded that the Sons received suitable care from Mother. There is no evidence suggesting that Mother is not suitable or capable of taking care of the Sons because of her depression.

Mother admitted that after the Carpark Incident, she felt pressures when communicating with Father, including email communications. She suggested that Father is the cause for her depression. She has refused Father's involvement in the Sons' school activities and medical consultations.

The parent who has the care and control of a child would have direct and immediate information about the child, and thus he/she has to take an active role in the communication with the other parent on child related matters, and in the facilitation of information sharing and, where the parents have joint custody as in the present case, joint decision. The other parent has a similar role to communicate, respond and participate.

Mother's difficulty in communication with Father and her objection to Father's involvement in child matters caused me some concerns as this may affect the building up of relationship between Father and Sons, and hinder the Sons' growth and development. One cannot forget that notwithstanding the divorce, Father is always the father of the Sons, just like Mother is always the mother of the Sons. The Sons should not been deprived of their father's care and guidance because Mother is the primary carer, and vice versa.

I note Mother's acknowledgment of the necessity to maintain the Sons' relationship with Father, and her improvement in the communication after assistance from the social workers.

Given the special needs of the Elder Son and the very young age of the Younger Son, the maintenance of status quo and the continuation of care by their familiar carer bear much weight in the determination of care and control in this case.

Having balanced all factors, it is in the best interest of the Sons that Mother has the sole care and control while Father has substantial defined access to the Sons (as set out in section C2 below). Mother needs to substantially improve her communication with Father on children related matters. I will make a supervision order. This court will keep in view the progress, including the parents' communication and information sharing about the children's affairs. I hope Mother can fully overcome her difficulties in communication with Father soon.

I do not see maternal grandfather's temper justifies a different conclusion. The April incident is a one off event. The reports concluded that the Sons have been living with Mother and maternal grandparents in the same household happily. Mother explained that maternal grandfather did not have the knowledge and experience to take care of a child with autism and ADHD symptoms; nonetheless, he loves the Sons and is ready to assist in taking care of them.

C2.

Access

Access is given in the interest of the child to ensure the continued bonding between parents and child.

Mother strongly objected to have any staying access. She said that it shall only start later and gradually. She placed much emphasis on the Elder Son's objection to staying access.

I will first deal with the view of the Elder Son. The Elder Son indicated to the social welfare officers that he did not want to stay overnight at Father's home. As to day access, at the time of the 1st SIR, he indicated that the access time can be increased, while in 2nd SIR, he considered the time for access is sufficient.

The child's view must be viewed in the context of his age, understanding and maturity. The Elder Son is of a very young age. He has ADHD, ASD and borderline to low average intellectual functioning. I have to approach his view with much caution.

As shown from the reports, the Elder Son was happy playing and interacting with Father during access. In both the 1st SIR and 2nd SIR, the Sons were observed to be happy playing with Father naturally. Father was able to calm the emotion of the Elder Son and guide him to continue playing under the rules of the games. When the Sons arrived at the co-parenting support centre, they rushed into the access area to find Father. They took the initiation to give Father a hug and interact with Father.

The Elder Son's reasons for refusing staying access were that it was not convenient to stay overnight with Father. He liked to live with Mother. If he stays overnight at Father's home, he has to move many things, he could not have the companion of the bus and toys. He did not want to return late. When he was further asked on the topic, his answers were that he did not know.

Ms Wong, the Clinical Psychologist, opined that the Elder Son's objection was not because of his relationship with Father. It was because the Elder Son loves Mother, he did not want to see Mother unhappy. He objected to staying access because he cares about Mother's feeling on the topic.

The above opinion sheds light on the reason for the crying and screaming of the Elder Son when Mother mentioned the topic of staying access.

In light of the Elder Son's young age, lack of maturity, his special needs and borderline to low average intellectual functioning, the Clinical Psychologist's opinion on the Elder Son's rejection to staying access, I would not give any weight to the Elder Son's view on the issue of access.

The Sons used to have 2 nights staying access at weekends before the Carpark Incident. The social welfare officers recommended staying access to Father 3 times a month. Pursuant to the 2023 Consent Order, the Sons had a staying access during the Easter holiday in April. It is time to start regular staying access. I will start with 1 night regular staying access, to be increased to 2 nights and 1 night on an alternate basis after 3 months. From December 2023 onwards, the long holiday shall be split equally. There be special arrangement for special days. By this time, the pick up / drop off point can be at a location close to the parents' residences instead of at the co-parenting centre far away from their residences. There shall also be clear stipulations on information sharing with Father, and his participation in the Sons' school and medical affairs.

D.

ORDER

By reasons of the above, I order that:

Mother has the sole care and control of the Sons.

Father has the following defined access:

Video access for a duration of not more than 30 minutes on one of the weekdays (preferably mid-week) to be agreed between the parents with the assistance of social worker.

For the first 3 months: weekly staying access from Friday 7:00 pm to Saturday 7:00 pm (i.e. 1 night).

Thereafter (i.e. from 10 August 2023 onwards), staying access on a 2-week rotation as follows:

Week 1: staying access from Friday 7:00 pm to Sunday 12:00 noon (i.e. 2 nights);

Week 2: staying access from Friday 7:00 pm to Saturday 7:00 pm (i.e. 1 night).

From December 2023 onwards, long school holidays (i.e. Christmas and New Year, Lunar New Year, Easter and summer holiday) be split between the parties equally. The actual arrangements are to be agreed between the parties 1 month before the holiday starts, and if necessary, with the assistance of the social worker.

The Sons shall spend with Mother on Mother's birthday, the birthday of Mother's parents and Mother's Day. If any of these days fall on an access day under paragraph (b), (c) or (d) above, there will be no made up access for these days.

The Sons shall spend with Father on Father's birthday, the birthday of Father's parents and Father's Day. The access time shall be from 10:00 am to 8:30 pm on a holiday or weekend, and from after school to 8:30 pm on a school day.

Father shall spend with the Sons on their birthday in odd years, and Mother shall spend with the Sons on their birthday in even years. The access time shall be from 10:00 am to 8:30 pm on a holiday or weekend, and from after school to 8:30 pm on a school day.

Father has access for winter solstice dinner in odd years. The access time shall be from after school to 9:00 pm on a school day, or from 5:00 pm to 9:00 pm on a holiday or weekend. The Sons will have the winter solstice dinner with Mother in even years.

Father has access for dinner on the eve of Lunar New Year in odd years, and dinner on the first day of Lunar New Year in even years. The access time shall be from 5:00 pm to 9:00 pm. If any of the above days fall on Father's access for long holiday under paragraph (d) above, the time under paragraph (d) shall apply. For the avoidance of doubt, the Sons will have dinner with Mother on the eve of Lunar New Year in even years, and on the first day of Lunar New Year in odd years.

The handover shall take place at a shop on the ground floor of XX Shopping Centre as stated in the 2023 Consent Order.

If any access is cancelled for any reason, there shall be made up access to take place within 3 months or to take place at a time and for such duration as consented by the parties or adjusted by the social welfare officer.

There shall be a supervision order for 12 months. A progress report to be lodged into the court by the expiry of the 11th month.

Mother shall share with Father all school notices of the Sons and the login details of the Sons' HA Go accounts.

In relation to all school meetings and school activities of the Sons (including but not limited to parent-teacher meetings or meetings with the school social worker), and medical appointments or check-ups of the Sons:

If only one parent is permitted to attend, Mother can attend and shall provide Father with the information of the meeting and activities. If Mother cannot attend, she shall inform Father in advance and Father can attend that meeting / activity / medical consultation.

If both parents are permitted to attend, Father and Mother can both attend.

The parties do attend courses and services in particular on effective communication as recommended by the social welfare officer.

For the avoidance of doubt, the removal restriction in paragraph 9 of the 2022 Order remain in force.

This is a matter concerning the welfare of the children. I make an order nisi that there shall be no order as to costs, to be made absolute at the expiration of 14 days. Both parties are legally aided, their own costs be taxed in accordance with the Legal Aid Regulations.

(Elaine Liu)

District Judge

Mr. Ken Chan instructed by Yung, Yu, Yuen & Co., assigned by Director of Legal Aid, for the Petitioner.

Ms. Fiona Chong instructed by Hastings & Co., assigned by Director of Legal Aid, for the Respondent.

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