

HONG KONG / JUDGMENT

F v. L

COURT

Family Court

DECIDED

7 June 2007

CASE / FILE NUMBER

FCMC11896/2005

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bjbj FCMC 11896 / 2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 11896 OF 2005

BETWEEN F Petitioner and L Respondent

Coram : Her Honour Judge Sharon D. Melloy in Chambers (Not Open to Public) Dates of Hearing :
24, 18 & 28 May 2007 Date of Judgment : 7 June 2007

J U D G M E N T

Introduction

1. This is a cross application for custody and care and control of three children, two boys and one girl. The Petitioner wife has applied for sole custody and care and control of the children, with supervised access to the Respondent, such access to take place in the presence of a social welfare officer. The Respondent husband has similarly applied for custody and care and control of the children with reasonable access to the wife. For convenience sake I will refer to the parties as husband and wife in this judgment.
2. The matter was originally listed for hearing for three days and first came before me on the 2nd May. It was clear from the start that the wife, who was legally aided, had certain unresolved issues with her legal representatives. At the beginning of the husband's cross-examination by the wife's solicitors, an application was made by the wife for an adjournment. It seemed that the wife had lost confidence in her lawyers and wished to seek assistance from the Legal Aid Department to change solicitors. Notwithstanding the lateness of the application, I adjourned the matter to a call over hearing on the 18th May. On that occasion the wife was represented by a new firm of solicitors and the matter then proceeded

to its conclusion on the 28th May. The husband represented himself throughout the hearing, his legal aid certificate having been discharged in May 2006.

Background

3. The parties met through a matchmaker in China in 1995. Shortly thereafter, on the 9th February 2005, they married in Guangdong. The wife is now aged 37 and the husband aged 40 years. The wife is a secondary school teacher by profession, and was educated up to tertiary level. She has not worked since the marriage. The husband presently works installing air conditioners in Hong Kong.
4. It appears to be common ground that at first like many couples in Hong Kong, the parties conducted a long distance relationship the wife living on the Mainland and the husband visiting her there as often as possible. In late December 1995, the Petitioner was diagnosed with heart disease and she underwent an angioplasty procedure.
5. The first of the three children of the family, a boy who I will call N-H was born on the 17th January 1999 and is now 8 years of age. On the 24th October 2000, a second child, a girl, was born. I will refer to her as Y-L. She is now 6 years of age. On the 26th September 2002 the third child, a boy, who I will call N-K was born. He is now 4 years of age. On the 21st January 2002, N-H was granted a single entry permit and on the 30th January 2002 he joined the husband in Hong Kong. It was the wife's evidence, and this does not appear to be disputed by the husband, that she was in Hong Kong from April 2002 until November 2002, the third child N-K being born in September of that year. She then returned to Hong Kong for a short while in January 2003. The wife was eventually granted a single entry permit on the 23rd January 2003 and she and N-K then joined the husband and N-H in Hong Kong. In the meantime Y-L remained on the Mainland and was cared for by the wife's mother. On the 2nd September, some eight months later, Y-L was granted a single entry permit. In September 2003, the parties and the two boys moved into a new home. Y-L joined her family in Hong Kong on the 19th November 2003. Background to the present application
6. It seems that there is no dispute between the parties that on the 26th May 2005 there was a violent incident at the matrimonial home during which the husband beat N-H, who was then 6 years of age, with a rattan cane. The child was admitted to the UC Hospital for treatment, where he remained under observation for 10 days. The wife moved out of the matrimonial home with the other two children and sought refuge from a battered women's shelter, where she was to remain for the next seven to eight months. In June there was a multi disciplinary case conference, in which it was concluded that the incident should be classified as child discipline, as opposed to child abuse. Notwithstanding that, the husband was bound over for the same offence in the sum of HK\$2,000 for 12 months. When asked by the bench why he was bound over the husband replied Because at that time the petitioner made the complaint, accusing me of having ill treated N-H. Subsequently the police interrogated me over the incident and it was finally concluded that what I did was just disciplining the child and not ill-treating him. Well although I was not ill-treating the son of mine, however I had beaten

him up and the police told me not to do it again .

7. In October 2005 the wife issued a divorce petition based on the husband s unreasonable behaviour. An application for a non-molestation injunction and interim custody and care and control followed. On the 28th December 2005 the court made an order. I think it would be useful at this juncture, if I highlighted part of that order. It said, inter alia that the wife was to have interim custody and care and control of the children with reasonable access to the Respondent, such access to be in the presence of the social welfare officer and to be arranged by the social welfare officer .
8. Since then, a period of approximately 17 months, the husband has had access to the children on nine occasions at the offices of the Social Welfare Department. In other words he has seen the children, on average, once every two months.
9. On the 12th January 2006 a decree nisi was granted and on the 26th January the court ordered inter alia that the husband pay interim maintenance of HK\$100 per month for each child. The law in Hong Kong
10. It is necessary before turning to the evidence to look at the law governing applications concerning children in Hong Kong.
11. Section 19 Matrimonial Proceedings and Property Ordinance, Cap. 192 states that
 - (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18- (Amended 69 of 1997 s. 28)
 - (a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;
12. The general principles governing such applications are set out in s. 3 of the Guardianship of Minors Ordinance, Cap. 13, which says that : GENERAL PRINCIPLES
 - (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-
 - (a) in any proceedings before any court (whether or not a court as defined in section 2) the court -
 - (i) shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to - (A) the wishes 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 (B) any material information including any report of the Director of Social Welfare available to the court at the hearing;

13. For the avoidance of doubt s. 48 C Matrimonial Causes Ordinance, Cap. 179 adds that section 3 of the Guardianship of Minors Ordinance (Cap 13) (which provides that the welfare of the minor shall be the first and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192). Other matters to take into account
14. Although there is no statutory checklist, as is the case in other common law jurisdictions when determining such issues, there are nonetheless a number of factors, which generally speaking need to be taken into account or considered. For convenience sake I have listed them below. This is not meant to be exhaustive list, but simply a useful guide when considering issues relating to custody, care and control and access and the welfare of children of generally. These are
 - a) The recommendations made by the Social Welfare Report
 - b) Any matrimonial misconduct affecting the children
 - c) The status quo of the children
 - d) Recommendations made in any other reports and / or by other experts
 - e) The age of the children and their own views
 - f) Parenting ability
 - g) Any physical / mental disability or illness of either parent or any of the children The personality and character of the parties Sibling Unity
 - j) A childcare plan
15. I will consider these matters in turn in so far as they are relevant to this application when I discuss the parties evidence. I will also consider the parties attitude towards corporal punishment. The issues
16. The present issues before the court are :
 1. Should custody and care and control of the children vest in the sole name of the wife or the husband ?
 2. What arrangements should be made for access for the non-custodial parent ?
 3. Should the court order be supervised by the Social Welfare Department and if so in what manner ?
 4. Should general leave be given for either or both parties to take the children to the Mainland from time to time ? The husband s case

17. In essence the husband's case for custody seems to be that the wife is not caring for the children properly. He complains about their health and says that he can more ably assist with their studies and that historically he has been more involved with the children's schools and other activities. He also makes various allegations against the wife, including that she is lazy. He maintains that he cared for the children when they were all living together, cooking for them and undertaking other household chores. He further maintains that the wife does not feed the children properly. He also alleges that the wife leaves the children on their own and that she also uses corporal punishment to discipline the children.
18. In so far as access is concerned he maintains that the wife has prevented access from taking place or alternatively that she has made access more difficult to arrange than necessary. He also says that she has prevented him from speaking to the children over the telephone. The wife's case
19. It is the wife's case that the husband wanted her to have many children, despite any apparent risk to her health and the family's often precarious financial situation. The husband denies both of these allegations. In so far as the children are concerned the wife's case is that the status quo should continue. She says that she has looked after the children on her own for almost two years with supervised access to the husband, and that this arrangement should continue. She says that she is the caretaking parent and that the children have flourished under her care, despite what have often been very difficult circumstances. She maintains that the husband is a violent man, who has on more than 70 occasions beat the children by using a bamboo cane. She says that the husband has also assaulted her on more than 20 occasions. She also makes one allegation of sexual abuse by the husband against N-H. The wife's case is also that she is the more capable parent and that she is better able to help the children with their homework. She points to the fact that the children's school results have improved. She also says that the children are happier and healthier than before. The evidence
20. I must now turn to consider the issues, the law and the parties' evidence as set out in the parties' affirmations and as given orally during the hearing. For the avoidance of doubt, in so far as the matters set out in this judgment differ from the evidence of the husband or the wife, or from the evidence of the Social Welfare Officer, that is because I have preferred the evidence of the other party or because I do not find the evidence given credible, or because I consider that the documents produced confirmed my findings of fact. In addition I have had the opportunity to observe the demeanor of the parties while they gave evidence in court. The Recommendations made in the Social Welfare Report
21. The court has had the benefit of two Social Welfare Reports filed, both written by a Ms W, the first dated the 30th March 2006 and the second dated the 18th April 2007. The first report recommended that the wife be granted custody of the children with reasonable access to the husband. The second report seems to reaffirm this although it is nowhere explicitly stated. However, Mdm W did confirm the recommendation in the witness box. In the second report Mdm W also recommended mandatory professional intervention in order to facilitate access

arrangements. By that Mdm W said that she meant counselling, but that this would only work if the parties were ready to co-operate with each other and with the Social Welfare Department. When asked about the present supervision she said We can supervise the access, but I can t see the necessity that a Social Welfare Officer be present during the access .

22. Mdm W agreed that defined access was an option and that it could take place in a public place, such as a Western style fast food restaurant, or in a park, as all three children are very active. She suggested that defined access should take place once a month.
23. In so far as staying access is concerned Mdm W made the following observation : At the initial stage there should be face-to-face access. Regarding staying access it has to be considered in the future when they have agreement. Since they have different opinions on access, so usually I recommend an access order and the Social Welfare Department are then prepared to supervise the case for one year .
24. Recommendations made to the court in social welfare reports, although not binding are very persuasive. I have taken the recommendations made by Mdm W into consideration when reaching this judgment.
25. One other point should perhaps be mentioned. The wife was very concerned about two sentences in the second Social Welfare Report, which I will repeat here, namely that She did not object to reasonable access to the children by the father should the custody of them be given to her. However, she favoured visiting access as long as the children did not object .
26. It was the wife s case that she had never said this to the Social Welfare Officer and she even addressed me on this point directly, so strong were her feelings on the issue. Further this appeared to be one of the reasons for the breakdown in the relationship between her and her first set of lawyers. She further objected to the section of the report entitled Views of the Children towards the custody and access as she maintained that Mdm W had never interviewed the children directly. When asked by the Bench, Mdm W confirmed that she had interviewed the children directly. She also said that she understood Mdm W s views with respect to custody and staying access and that these were expressed later in the report. Having heard Mdm W, I am of the view that these two sentences were probably taken out of context and that they are not representative, nor ever had been, of the wife s position. In other words the wife did not and has never agreed that the husband should have reasonable access to the children. She wishes any access to be supervised, as it is now, in the direct presence of a Social Welfare Officer. Further she did not agree to the children having visiting access, by which I assume she refers to staying access, in China. In so far as the interviewing of the children is concerned I find that Mdm W did interview the children in a manner appropriate to their age and understanding. Matrimonial misconduct affecting the children
27. In his closing submission, Mr Luk for the wife pointed out that although there was much dispute between the parties concerning the allegations of assault generally, there was no dispute that there had been an incident on the 26th May 2005. The husband says he was

disciplining the child. The wife says that he assaulted N-H and that this was the worst in a long line of assaults. Reference is made to the husband's general attitude towards corporal punishment in the first social welfare report as follows : As a traditional father, he does not consider the use of corporal punishment to be something serious and unacceptable as he believes that this is a practical way to stop the child's misbehaviour

28. Given the fact that this incident is pivotal to the case I think it is worth going into some of the detail. The wife says that the husband often beat the children for very minor misdemeanours, either using his hand or a rattan cane. She says that he beat the eldest child more frequently than the others and that would also sometimes kick him on the shins. In the cautioned interview with the Police the husband explained the incident thus I was at home cooking noodles for the children to eat. After they finished eating the elder son told me that he wanted to go downstairs to play I said it was raining outside and asked him not to play downstairs in the street. At the time, I was not wearing any top, only a pair of shorts. I was washing the dishes in the kitchen. My elder son was very angry and scratched my back with his hands. So I walked out to the living room and got a rattan stick to discipline him I scolded the elder son loudly, saying that he was disobedient to his father. So I beat the elder son with the rattan stick. I aimed at the elder son's hand, but the elder son dodged around. That's why I ended up hitting him on his body and on his face. I did not use a lot of force in beating the son. Perhaps the end of the rattan stick was starting to split open, so it led to marks being left on the wound .
29. Later he expresses remorse and says that he did not mean to hurt N-H. In his later affidavits, the husband changes his story and says that the N-H used a sharp object to scratch his back. Whatever the reality I am satisfied, having seen the photographs of the injuries suffered by the son, that the husband completely over reacted and that the punishment inflicted was out of all proportion to any act of naughtiness allegedly committed by N-H. In the discharge summary at the UC Hospital the injuries are described as follows : A 8.5 cm linear reddish mark over the left face, two 3 cm linear marks over the left arm, a 2cm reddish mark at the right forearm and a 2 cm mild reddish mark at the left upper buttock .
30. I do not accept that this level of corporate punishment inflicted on a young child, N-H was then only 6 years of age at the time, is acceptable. So-called discipline of this severity cannot and should not be countenanced in a civilised society. Even though this was not classified as a child abuse case, it is interesting to note that the husband was none the less bound over. I accept that repeated physical punishment of this form must have affected the children greatly. The evidence by the wife is that the Y-L had started to self-harm and that N-H had a history of bed-wetting. I accept that evidence entirely. Given that I also accept that any access should be supervised in some way by the social welfare department. I do not accept however that it necessitates access only taking place only in the actual presence of a social welfare officer.

31. More difficult is the wife's allegation that the husband sexually abused N-H. This is said to have occurred in mid 2002, whilst the wife was pregnant with the youngest child and she was in Hong Kong prior to obtaining her single entry visa. The wife says that she observed N-H lying on top of the husband, both had their underpants off and both had their hands on the husband's penis. N-H was only 3 years old at the time. The wife says that because of this and the history of physical abuse the husband should not now, some five years later, have access to his children unless he is in the actual presence of a social welfare officer. I have some difficulty with this. Firstly the wife did not report this matter to the Police at the time, or move out of the matrimonial home, or take any other obvious steps to prevent a reoccurrence. She continued on course, obtained her single entry permit and came to Hong Kong to live permanently. She says that she became extra vigilant and made sure that the children were never left alone with the husband. However she confirmed that once the family were all living together in Hong Kong that the husband would sleep in a bed with N-H and Y-L, whereas she slept with the baby. I find the wife's evidence in this respect inconsistent. If she had been so concerned surely appropriate action would and should have been taken by her at the time. In any event there is no suggestion that anything similar has happened since. I do not accept that this one incident, which is hotly denied in any event, and took place five years ago, should be used as a basis to stop the husband having proper and appropriate access to his children now. In particular I again agree with Mdm W that even if access is to be supervised it need not necessarily take place in the actual presence of a social welfare officer. Present attitude towards corporal punishment
32. The wife says that she does not use corporal punishment preferring to reason with the children. I do not find the suggestion made by the husband that she also resorts to corporal punishment to be believable. When asked what his attitude towards corporal punishment was now, the husband said Well, at the time when I inflicted corporal punishment on the child, it was because I had a job during daytime and when I returned home, I had to do household chores. So I had no time reasoning with the child. That's why I inflicted corporal punishment on him. Well my present attitude is that if I got the time, I would try my best to reason with the child. I very much hope that this is the case. The status quo of the children
33. The children have lived with their Mother for two years. The social welfare report confirms that the children are doing well at school. The husband's suggestion that they suffer from ill health appears to be unfounded. Likewise his suggestion that N-H's poor adult teeth are due to poor diet and that this is the fault of the wife, also seems to me to be unfounded. Mdm W said that there was no evidence that the children's health was better or worse than before the breakdown of the marriage. I agree.
34. Generally speaking if the status quo is found to be working satisfactorily the courts will be reluctant to intervene. I am certainly of that view in so far as custody and care and control is concerned. I am also of the view however, that the present arrangements for access do not appear to be working satisfactorily. I will refer to this again later in this judgment. The age of the children and their own views

35. In so far as the children themselves are concerned, although they are quite young they have expressed their views through the social welfare officer. The two elder children have both expressed a strong preference for living with their mother. The youngest child is too young to do so, although the social welfare officer has noted a strong physical and emotional attachment to the mother. Neither of the elder children was opposed to seeing their father. Parenting ability
36. It is clear that the wife has a proven track record when it comes to taking care of the children. In the words of Mdm W, With the exception of [the husband], all other sources contacted have confirmed [the wife s] ability and affection towards her three children. Hence the mother who would be more available for childcare and whom the children have greater attachment which seems to be a preferred choice as custodial parent . And also It is thus clear that [the wife] .would be more available for childcare and whom the children have greater attachment with is definitely in a more advantageous position to claim the custody not to mention that the father s caring ability has yet to be tested .
37. I agree. I did not find the husbands attempts to undermine the wife s parenting abilities credible. The husband says that he was the main caretaking parent prior to the breakdown of the marriage. I do not agree. I accept the wife s evidence on this point entirely. Any physical / mental disability or illness of either parent or the children
38. None of the parties or the children has any physical or mental illness or disability that needs to be taken into account. Personality and character of the parties
39. I have had the opportunity to view both of the parties in the witness box. The wife suggests that the husband is fond of talking to himself, takes laxatives and is very autocratic by nature. Likewise the husband says that the wife is controlling and difficult to get along with. There may be some truth in what each says about the other. I am sure however, that notwithstanding the very poor relationship that exists between them as spouses, that they both love their children very much. That however, is not the issue. The issue rather is who would be best suited to be the custodian of the children and who would be best suited to take care of them on a day-to-day basis. I have no doubt, having seen both of the parties at length that the wife is more suited to that task. Sibling unity
40. At one point the husband indicated that if he couldn t have custody of all of the children then he would like to split custody with the two elder children going to the wife and the youngest son going to him. In situations like this the courts try as far as possible to ensure that the children stay together so that they are able to provide each other with mutual support and comfort. Reference C v C (Minors: Custody) [1988] 2 FLR 29. I can see nothing on the face of this case to suggest that this situation might be any different. The wife for her side wishes the children to stay together. N-H has also expressed a wish in the social welfare report not to be separated from his siblings. I agree. Child care plan

41. The wife's childcare plan is to continue with the status quo. When asked the husband said that if custody were granted to him that he would stop working, rely on CSSA and spend all his time caring for the children. He also said that he would move back into the matrimonial home. At present he works from 9:00 am to 6:00 pm, five or six days per week, alternating long and short weeks. The husband lives in a one-room apartment measuring about 15 square metres. Given the circumstances I find the wife's child care plan preferable. Should custody and care and control of the children vest in the sole name of the mother or the father?
42. Given the evidence I am satisfied that the wife should have sole custody and care and control of the children. What arrangements should be made for access for the non-custodial parent?
43. As indicated above I am not of the view that the access arrangements should continue as they have over the last 17 months. There was one unproven allegation of sexual assault and that in any event took place approximately 5 years ago. There has been no alleged incident since. I do find that the husband used excessive force when administering corporal punishment. Again he appears to acknowledge that this action was inappropriate. In any event the issue at present is not one of staying access, but of regular access during the day and therefore the issue of corporal punishment is unlikely to arise. Access has been said to be the right of the child. The two elder children have indicated that they will accept seeing their Father. I do not accept that reasonable access amounts to seeing the children once every two months. Consequently I will make an order for defined access in order to ensure that the husband has the opportunity to see his children more frequently. When asked what access arrangements he would like, if custody were granted to the wife, the husband said, I would try to squeeze as much time as possible to have contact with my children.
44. The husband indicated to the social welfare officer that he would like access once a month. The Social Welfare officer also suggested that access should take place once a month. Given that the husband also said that he would like access as often as possible, I am inclined to order that he should have the opportunity to see the children twice a month. The wife also said that she did not object to the husband having sight of the school reports and I will so order. Should the court order be supervised by the Social Welfare Department and if so in what manner?
45. I will give a direction that the order be supervised for the next year and that there should be a progress report nine months from now. However the access need not take place in the actual presence of a social welfare officer or at the social welfare department. Access arrangements are however to be facilitated by the social welfare department. It is my hope, now that this matter has concluded that both parties will co-operate with the social welfare department as fully as possible. Should general leave be given for either or both parties to take the children to the Mainland from time to time?

46. Another issue was also raised during the hearing, although neither party had filed a requisite summons or evidence in support of their application. The wife said that she would like to be able to take the children to the Mainland to visit her family, without first seeking the consent of the husband. In a similar vein, on the 28th May, the husband asked the court to order that the children be allowed to go to the Mainland the next day i.e. on the 29th May so that they may pay their last respects to his Grandmother who had recently died. He wished them to be present for the burial. I denied both requests. In the event that either party wishes to take the children out of the jurisdiction of Hong Kong and the other party does not consent, an application shall be made to the court in the normal way. Costs
47. Given the nature of this dispute I will make no order as to costs (see London Borough of Suttons v Davis (Costs) No. 2 [1994] 2 FLR 569.
48. The Petitioner wife is however legally aided and therefore her costs will be taxed in accordance with Legal Aid Regulations.
49. Consequently having read the parties affirmations and having heard the parties give oral evidence. Also having heard the social welfare officer give her evidence and having read both of the social welfare reports, I will make an order in the following terms.
 - 1) Sole custody and care and control of the children of the family shall be granted to the Petitioner wife.
 - 2) The Respondent husband shall have defined access to the children, such access to take place twice a month, the manner and form of such access to be supervised by the Social Welfare Department for the next 12 months.
 - 3) The wife shall provide the husband with copies of the children s school reports within 7 days of receipt.
 - 4) An updated progress report to be filed with the Court nine months from now.
 - 5) Neither party shall have general leave to remove the children of the family out of the jurisdiction of Hong Kong. In the event that either party wishes to do so an application should be made to the court in the normal way.
 - 6) There shall be no order as to costs. The Petitioner s own costs to be taxed in accordance with Legal Aid Regulations. (Sharon D MELLODY) District Judge Ms M da Luz of Messrs Joseph Li & Co and Mr Luk of Messrs Fairbairn Catley Low & Kong for the Petitioner The Respondent acted in person PAGE - PAGE - sgsgs `W`W` xjxjxj tdXdt zmzm^ &`#\$ ~!P] j% Td ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ 1 #' :L- E{k' XW(\$ s `)H/0 -3*\$ 43*\$ c7*+ :p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p M|;\$ wzO?p= H#@\$ 3i@\$ nSDH IEFE 5)GTd kxL\$ /eNH S\$O\$ vuWOTd c;R\$ Y CR D)U"lv G%9UT nm{V RW!W C:~W x% X\$ x8Y\$ L}YH (Yq[*n\T]fM|; #b2^ \$ Q^f Y6xc\$ e>tD ? Dep= ZJg\$ hx;r N)/h EUhp}6c vCip= T{sk lmZ"D TCn\ o8'q "hsTd gsTu\$ 4xv\$ Epxfa` + xDs\ \*y\$ Yay~ \_ \_\_z4w | >\$> C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 IEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[ :p . s ` (vuWO c7*+ Y CR T{sk 1 #' RW!W o8'q nm{V 0i|8 @\\Hc-

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