

HONG KONG / JUDGMENT

F v. W**[2019] HKFC 137****COURT**

Family Court

DECIDED

29 May 2019

CASE / FILE NUMBER

FCMC6824/2016

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj FCMC 6824/2016

**[2019] HKFC 137 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 6824 OF 2016**

BETWEEN Petitioner and Respondent

Coram: H.H. Judge C.K. Chan in Chambers (not open to public) Dates of Hearing: 7-9 June, 24
August, 7 September 2017, 7-8 February, 21 June 2018 Date of Closing Submissions: 20 August
2018 Date of Judgment: 29 May 2019**J U D G M E N T (CARE & CONTROL, ACCESS)**

This is a trial on the issues of care and control, and also access to Y, a child of the family, now aged 6. The Parties Respective Position The Petitioner (mother s position is that she asks for a joint custody order on Y, with sole care and control be given to her. She does not object to access being granted to the Respondent (father) but the extent of such access arrangement is still subject to dispute. The father does not object to joint custody either but his position on care and control has been shifting between sole care, joint care and shared care throughout the proceedings. Nevertheless, as can be seen from the final paragraph of his counsel s Closing Submissions, it was submitted that:

129. If the Mother co-operates with getting proper expert advice there may be prospects for the future. At this stage the proper order is care and control to the Father with reasonable access to the Mother. Clearly, the handover day should revert to Friday. By this, I take that the final position of the father is that he asks for sole care and control to him with reasonable access to the mother. I propose to deal with the more contentious issue of care and control first, leaving the discussion on access to the latter part of this judgment.

Background

The mother is aged 47. She is a civil servant working regular hours from 9 am to 6 pm, Monday to Friday. The father is now aged 52 and works as a police inspector. According to him and in order to care for Y, he has changed his working schedule to regular hours as well, working from 8:30 am to 5:30 pm, Monday to Friday. The parties were married in the year of 2000. Within wedlock, they have 2 children:

- (1) E, the elder son, who was born in October 2000. As E has already turned 18, his custody is no longer in issue. But just for the sake of completeness, E is now studying in USA and would stay with the father when he returns to Hong Kong for holidays.
 - (2) Y, the younger son, who was born in the year of 2012. He is now aged 6 and his care and control is the main issue of this trial. In 2016, the mother issued a petition for divorce relying on the behaviours of the father. Decree nisi of divorce was finally granted on 27 December 2018. As to the issue of Y's custody, the parties have all along agreed on a joint custody order. Despite some changing of positions on the part of the father, both parties now ask for a sole care and control order in their respective favour with access be given to the other party. As they failed to reach an agreement at the CDR hearing and thus the case was adjourned for trial with 3 days being originally reserved. Unfortunately, the trial lasted much longer than expected, starting on 7 September 2017 and the evidence was only concluded on 21 June 2018, meaning that a total of 8 days were being used for the evidence to be heard. The Past and Present Interim Arrangements for Y
10. There is no dispute that upon the failure of the marriage, the mother left the former matrimonial home leaving E and Y under the care of the father, who has later obtained the assistance of his mother (the paternal grandmother) in exercising such care. According to the mother, which I accept, that after she has left, she has continued to exercise some care on Y by visiting him from time to time at the former matrimonial home.
 11. There were subsequent disputes on access resulting in the court order dated 27 October 2016, wherein the interim care of Y was given to the father and interim access to the mother from every Friday 4:30pm to Sunday noon. On 7 September 2017, which was the fifth day of trial, the interim arrangement was varied by consent, that the mother would have access from 6:30pm on every Thursday to 12 noon on Sunday. There were also orders for the sharing of long school holidays. Therefore, the present arrangement is that from Sunday noon to Thursday 6:30pm, Y is under the care of the father and thereafter, Y is under the

care of the mother. The Parties Respective Case The Mother s Case

12. In her supporting affirmation (Bundle pp. 152-178), the mother gave a very detailed description of her care of and relationship with Y. She said after the birth of Y, she breast fed Y for 2 months before she resumed working. But due to the resignation of the then domestic helper, and coupled with her marital problems with the father, the mother became exhausted and later even developed post-natal depression. She sought medical treatment and after medication for 9 months, she has fully recovered and did not require any follow-up treatment since July 2013.
13. The mother said the marital relationship with the father has not been happy for quite some years, mainly due to his uncontrollable gambling habits. In about 2014, she found out that the father was not able to meet his tax obligations for which she had to render him financial assistance. His gambling did not abate thereafter and facing with such total disappointment, the mother realised that she could not live with the father any longer. As the father had exhibited uncontrollable emotions when the topic of separation was raised, the mother decided to move out of the former matrimonial home first in order not to upset him and to avoid any direct conflicts. She said she had never deserted the family as painted by the father. She purposely asked the then domestic helper to stay so that the children s daily living arrangements could be maintained. She also visited the children regularly after work in order to minimise any adverse impact on them.
14. The mother said she was particularly concerned with Y, who was already diagnosed as having autism spectrum disorder. She continued to take care of Y s daily matters, including his medical needs and kindergarten placements. She visited the children for about 2-3 times a week, usually from 7-9pm. She spent time to play and communicate with Y using special tools and behaviour programmes designed for treating autism. She tried to share those communication skills with the paternal grandmother but was refused instantly.
15. The mother said that Y, as an autistic child, is in need of assistance, both in terms of proper treatments and emotional support. She is particularly concerned with Y s language and communication skills. She understands that speech therapy is a central part of treatment for autistic children which will improve their ability to build relationships and function in their daily lives. She said there is an urgency in providing Y with proper treatments before the age of 6, the so-called golden period . However, the father lacks insight as to this urgency.
16. The mother also challenges the father s ability as a hands-on carer for Y. She said history showed that the father s devotion to work and gambling prevented him to be involved in Y s daily care. Therefore, he needs to rely on the paternal grandmother who has insufficient insight in providing care for special needs children. An obvious example is the provision of long time electronic pacifier (long periods of cartoon video so that Y would sit calmly) which is detrimental to an autistic child s development.

17. Although the mother recognises that she also needs to work and therefore, cannot be a full time carer for Y. She has called her sister (the aunt) to testify that she would provide the necessary support to care for Y when the mother is at work. The aunt has recently retired and has previous experience in child caring. However, the mother stresses that she is not seeking to rely on the aunt on any major care duties but rather an extra pair of hand for logistics and basic physical care and related duties.
18. Apart from the aunt, the mother has also called the domestic helper () who helped her to take care of Y at the former matrimonial home. DH basically confirms her good bonding with Y at the time but the fact is that she no longer works for the mother (nor for the father) and therefore, her evidence as to the future arrangement of Y is no longer relevant.
19. Finally, the mother is of the view that she is the more suitable parent to provide the daily care and training to Y, and she therefore asks for the Y s daily care and control be given to her. If that is the case, she offers adequate access to the father and paternal grandmother including staying access during weekends and long school holidays. The Father s Case
20. In his supporting affirmations, the father testified that after Y s birth, the mother seldom held or fed Y on excuse of her painful arms. Therefore, the daily care of Y rested mainly on the domestic helper. The father has also become the sole carer of Y when he was not required to work in the evenings. It is therefore his case that since birth, Y s care has all along been handled by the domestic helper, the paternal grandmother and him together, with minimal input from the mother.
21. Throughout his evidence, the father has placed great emphasis on the mother s desertion of the family in May 2015, leaving the children to his sole care. Facing with such a situation, he had no choice but to invite the paternal grandmother to move in to care for the children when he was at work. From then on, Y has developed a special bonding with the paternal grandmother, the disturbance of which will not be in Y s best interests.
22. According to the father, not only that the mother did not provide care for Y, she had also tried to abduct Y when the father accompanied the elder son, E, to USA for studies in the summer of 2016. He said the mother conspired with DH in removing all of Y s belongings without notifying him. He also alleged the mother in stealing cash and other valuables from the former matrimonial home.
23. In other parts of his evidence, the father also testified on how he has studied on and attended to Y s needs. He said he had attended various seminars and organised Y s training and classes in order to improve his concentration, emotion, speech, learning and reading abilities. He said the Social Investigation Reports (SIRs) have ignored all his efforts in these regards, and also the special bonds that have been established between Y and the paternal grandmother.

24. The father points to the fact that Y has been under his direct care for 5 consecutive years. As an autistic child, Y has special needs and will feel insecure and anxious if he should be removed from the existing familiar environment under the good care of him and the paternal grandmother. The father also said that Y has constantly expressed his strong desire not to live with the mother and to live in the father's home. He said Y's wish in this regard should be respected.
25. In his evidence, the father also tried to introduce the views of the elder son E, who supports his application for the care and control of Y. Therefore, he said the wish of Y's elder brother should also be considered.
26. As to his changing of positions, the father explains that he originally agreed to shared care and control with extended access to the mother from 6:30pm on Thursday to 12 noon on Sunday to see if they work. That was why the original interim access arrangement was changed to those terms. Not only that the offer was not accepted by the mother as a long term arrangement, Y's continued negative reaction to the extended access arrangement during the interim period made him recognise that shared care and control will not work. Therefore, his offer for shared care and control is now withdrawn and he asks for sole care and control which he believes will be in Y's best interests.
27. The father has called the paternal grandmother who testified that after her moving in in 2015, she has become the primary caregiver of Y, together with the father. She said Y was very close to her and would miss her whenever she was away. She would take Y to the Counselling Playgroup after school and there were occasions at the end of the playgroup session, Y has expressed his wish not to go with the aunt or mother. The paternal grandmother has also expressed her strong support to the father in claiming for the sole care and control of Y. The Law
28. The Court's jurisdiction to make a custody order (including care and control) can be found in s. 19 of the Matrimonial Proceedings and Property Ordinance, Cap.192 (MPPO), which states:
 - (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 in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;

29. Section 48C of the Matrimonial Causes Ordinance, Cap. 179 () provides that s. 3 of the Guardianship of Minors Ordinance, Cap.13 () shall apply in relation to any order for the custody, care or supervision of a child which may be made under MCO or MPPO.
30. The general principles as set in s.3 of GMO are as follows:

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

31. In short, in resolving the parties dispute on the issue of custody, care and control of a minor, the guiding principle is always to seek such an arrangement that would serve the best interests of that minor.
32. Apart from the above statutory provisions, the court had in previous cases taken into account other matters when determining custody. In the case of YLS v. TL (unreported, FCMC 8396/2007, HH Judge Melloy, 30 May 2008), had this to say at paragraph 14 of her judgment:
14. As I have stated previously (see ZZ v. KYL, unreported, 5 March 2008 and CHFS v. WPLM, unreported, 28 April 2008) there is no statutory checklist in Hong Kong, as exists in other common law jurisdictions, to help both Judges and practitioners, when determining issues relating to children, However, the Law Reform Commission in Hong Kong has recommended a draft checklist of factors based in part on the Children Act 1989 in England and s. 68F (2) of the Family Law Act 1975 in Australia, in its report on Child Custody and Access (March 2005). As in previous cases I intend to refer to the checklist in so far as it relates to the circumstances of this particular case. The factors then are as follows: 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, 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.

33. I will gratefully adopt the above checklist and the approach of the learned Judge whenever they are relevant to the circumstances of this case.
34. As the main contest in this case is centred on the care and control of Y, it would also be useful to refer to the case of PD v KWW (Child: Joint Custody) , in which Hartmann JA (as he then was) has given a detailed and very useful discussion on the dual concepts of joint custody, care and control which should be borne in mind by all parents and their representatives when they come to consider such issues:
28. As our law has developed and now presently stands, when a marriage breaks down and the court must ensure the best interests of any child of the union, it will invariably do so by bringing into play the dual concepts of custody whether it be sole or joint custody and care and control . Neither concept, however, is defined in our statute books.
29. Regrettably, empirical evidence suggests that there is a large measure of misunderstanding as to the nature and extent of the two concepts, certainly among lay persons.
30. At a practical level, a convenient way of understanding the two concepts is to compare the nature of the decision-making that is required to put them into practice. The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child s health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child s legal representative. By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child s immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline. ..
43. Before leaving a consideration of the dual concepts of custody and care and control, it needs to be emphasized that, when a court awards care and control to one parent but rights of access to the other, as in the present case, the court is effectively awarding a form of shared care and control. This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent s physical custody. Rights of access, it is to be remembered, are given in the interests of the child to ensure continued bonding between parent and child
35. The following principles can be enunciated from the above passage:

- (1) A parent having custodial rights has the authority to make decisions which will have real consequence in safeguarding and promoting a child's health, development and general welfare. On the other hand, the rights to care and control concern with decisions which are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. When a parent is given access to the child, he/she is effectively given shared care and control of that child.
- Discussion The Social Investigation Reports
36. The Court has obtained 2 Social Investigation Reports. The first report was prepared by Ms. Ngan on 13 October 2016, which was at the earlier stage of the litigation. According to Ms. Ngan, after the breakdown of the marriage and leaving from the former matrimonial home, the mother continued to visit the children and for Y, she has also arranged appropriate courses for his training. Equally, the father has also attended various courses for special need children. Due to the special needs of Y, the provision of systematic and quality training has become important for his future development. In this regard, it was the view of Ms. Ngan that the mother could have a better understanding of Y's situation and provide the proper training to suit his needs. Although both parties have to resort to assistance from others to take care of Y when they are at work, the mother's more stable working schedule (at least at that time), means that she would have more regular time to look after Y personally. Furthermore, as Y was still very young, and was more attached to the mother, therefore, she was of the view that the mother was in a better position to become the carer of Y. As far as Y is concerned, Ms. Ngan recommended that both parties to have joint custody of Y, with care and control be given to the mother, and defined assess be given to the father.
37. Having recited Ms. Ngan's views above, I have to remind myself that her recommendations were made at the earlier stage of the litigation when the father was still working irregular hours because of the nature of his employment. According to the father, which I accept, that in order to provide better care for Y, he has already changed to work regular hours and therefore, I do not consider that the mother must have an obvious advantage as far as their working hours are compared. However, I note that when Ms. Ngan gave evidence in court, she stood by her recommendations indicating that she still considered the mother as being the better carer despite the fact that both parents can now work regular hours.
38. The second and more updated Social Investigation Report was prepared by Mr. Chan on 1 June 2017. According to Mr. Chan, after the preparation of the first Social Investigation Report, the father has changed to an administrative position in which he only needs to work regular hours from 8 am to 5 pm. As far as Y is concerned, Mr. Chan was of the view that both parents have used their best endeavours to provide suitable care for Y. They might have different style or arrangement for Y's training, but both of them have made efforts to provide care to Y personally when they do not need to work. But as observed by Mr. Chan, it was the mother who was able to give more effective training to Y. Since Y was still very young, the continuation of a more attached relationship between mother and son would be

beneficial to his future development. Therefore, it was the recommendation of Mr. Chan that the care of Y should more appropriately be given to the mother with defined access be given to the father.

39. In their Closing Submissions, Counsel for the father urged this court not to rely on those recommendations. They have levied very specific attacks on both Social Investigation Reports.
40. As far as the First Social Investigation Report is concerned, Counsel's attacks include:
- (1) Insufficient time (about 1 hour each) used by Ms. Ngan in observing the interaction between Y and his parents.
 - (2) Insufficient regard has been paid to the status quo, in particular, the close relationship between Y and the paternal grandmother.
 - (3) Her unawareness of the father's efforts in attending courses in learning how to train autistic child.
 - (4) Her ignorance of the weakened relationship between Y and the mother after she has left the family.
 - (5) Her failure to interview the aunt who would be relied upon by the mother as one of the carers of Y.
 - (6) Her failure to take into account of E, the elder son's view in the matter.
41. In respect of the second Social Investigation Report, Counsel's view is that the investigation was incomplete citing the following non-exhaustive examples:
- (1) The bonding between Y and the paternal grandmother.
 - (2) Failure to interview the aunt who would assist the mother in taking care of Y.
 - (3) Failure to make inquiries of the School Social Worker.
 - (4) Basing his report on his observation on the parents with Y but no one else.
 - (5) Being oblivious of Y's special needs.
 - (6) Having no knowledge and having made no enquiries as to teaching and therapy techniques for autistic children.
 - (7) Concluding that Mother's care is more important and is better for development of Y without relating this conclusion to any facts that he observed during his investigation. My Views
42. The first thing I notice here is that both reports were made some time ago. The first one in 2016 and the second one in 2017, which was about 2 years ago. Despite this lapse of time, I also note that when the Social Investigation Officers gave their evidence in court, they stood by the contents and recommendations of their respective report. Insufficient Investigation?

43. From Counsel's submissions, there is a general allegation that the Social Investigation Officers have spent insufficient time in interviewing the relevant parties resulting in them only getting a general impression on the issues but not a reasoned recommendation. Counsel also criticised Mr. Chan in observing only the interaction between Y and the parents and not interviewing the School Social Worker as well.
44. My view is that how much time should be spent on an interview; who should be contacted or to be observed really depend on the circumstances which necessarily varies from case to case. It is simply not good enough to say that an hour's interview with each party must be insufficient for the purpose of making a useful or meaningful recommendation.
45. By reading the first Social Investigation Report, I note that Ms. Ngan had conducted interviews with both parties, the elder son E, the paternal grandmother, DH, school principal, 2 teachers and the private tutor of Y, a total 9 persons. Apart from giving some general background of the parties and the family, Ms. Ngan has specifically reported her interviews with the relevant parties and the conditions of the 2 children (E's conditions were also reported as his custody was still relevant at that time). She has also devoted quite some details on Y's autistic conditions and the parties' interaction with him. She described what had happened during her observation on Y's interaction with the mother on 24 September 2016 (mistakenly written as 24 September 2015 in the report); how the mother received Y from the training centre; how she prepared food at home and later how she played with Y. Only after all these observations that she came to the conclusions that there exists a natural and harmonious relationship between Y and the mother; and the mother knows how to give appropriate trainings which were seemingly accepted by Y.
46. Equally, Ms. Ngan has also devoted much details on the interaction between the father, the paternal grandmother and Y. She described how the father taught Y to put different colour cards into the right position (for memory training) but was not followed by Y; how he taught Y to read from some training cards but was not listened to by Y. The situation has become better when the paternal grandmother came into the picture. Judging from the description of Ms. Ngan, there is no doubt that both the father and paternal grandmother have kept a close and loving relationship with Y, despite the fact that Y might not be too receptive to their instructions.
47. As to the second Social Investigation Report prepared by Mr. Chan, similar interviews and observations were made. He reported on the relatively smooth access exercised by the mother in the previous few months. He described how the mother received Y after his training and her care on Y thereafter. He said that the relationship between the mother and Y was good and enjoyable. Y would also listen to the mother's instructions when she tried to teach him through the playing of games.

48. Equally, Mr. Chan has also reported his observation on the father's interaction with Y during an occasion when they returned home after shopping. The father then taught Y on his homework with the assistance of the paternal grandmother. The father would praise Y when he finished a piece of homework, but when Y became distracted, the father would raise his voice and repeated his instructions before Y could follow them.
49. By way of conclusion, Mr. Chan was of the view that both parents have made their efforts in providing proper care for Y. During his observation and by judging from the reactions of Y, it was found that the teachings from the mother may be more effective. In view of Y's very young age, and his attachment to the mother, the maintenance of this attachment between mother and son would be beneficial to his development. Based on these reasons, Mr. Chan also recommended that the care and control of Y to be given to the mother.
50. Judging from the contents of the reports, which were recited in some details above, I am not convinced that the allegation of insufficient investigation is in any way justified. I have also observed and listened to the Social Investigation Officers, particularly when they were under vigorous cross examination in court, I am satisfied that both of them have done a professional job in making their investigations and the subsequent recommendations. Status Quo and the Close Relationship between Y and the Paternal Grandmother
51. There is another allegation that the Social Investigation Officers have not paid sufficient regard to the status quo and that of the very close and dependent relationship between Y and the paternal grandmother.
52. I note that when Ms. Ngan was asked by the wife's counsel on her views regarding the status quo, it was her unequivocal view that after balancing all the facts of this case, the maintenance of the status quo may not be in Y's best interests. Therefore, I think the benefits (if any) in maintaining such status quo must have already been considered when she came to her conclusions.
53. Moreover, I have to remind myself that the so called status quo is that Y is under the care of the mother from Thursday to Sunday, and then under the care of the father and paternal grandmother for the rest of the week. They also share Y's school holidays equally. Therefore, it is only true to say that both parties are spending more or less equal time with Y as far as the status quo is concerned. I do not see that the maintenance of this so called status quo will necessarily be in the either party's favour, especially when both of them are now asking for sole care and control, meaning that both of them are asking for this status quo to be changed.

54. As far as the close relationship between Y and the paternal grandmother is concerned, I do not think this part of the evidence was neglected by the Social Investigation Officers either. We have to bear in mind that the mother is also having a very close and loving relationship with Y. If one really has to put these two close and loving relationships (mother-and-son vs. grandmother-and-grandson) in comparison and to choose one, it is only natural that the mother-and-son relationship would prevail. Insufficient Knowledge of the Father's Efforts?
55. Ms. Ngan was being criticised for not knowing that the father had also attended courses for children with special needs. Ms. Ngan testified that she was never given any such information by the father. After hearing the father's later evidence, I am prepared to accept that he has actually attended some courses but if he has not disclosed such information to Ms. Ngan, I think it is unfair to criticise her in not mentioning this in the report. Failure to Interview the Aunt?
56. There is a common criticism against both Social Investigation Officers for not conducting any interview with the mother's sister (the aunt) who was requested to assist the mother when she was at work. It is true that no such interview was conducted. However, I note from the mother's evidence that the aunt was only required to assist in taking Y to and back from various training after school, and sometimes Y would stay at her home to wait for the mother's return from work. The aunt is simply fulfilling a similar role of the paternal grandmother, who is helping the father when he has to go to work. In other words, the aunt was never meant to be the major carer of Y. More importantly, the aunt has attended court and after hearing her evidence in court, I am satisfied that the aunt is a fit person to give such assistance to the mother, may be for a couple of hours in a day, when the mother is not available due to her work commitments. Other Criticisms
57. On the first Social Investigation Report, there are 2 other criticisms, including Ms. Ngan's ignorance of the weakened relationship between Y and the mother; and E (the elder son)'s view that Y should stay with the father. I do not think these are fair criticisms. I am satisfied that Ms. Ngan was aware of all these when she came to her recommendations in favour of the mother.
58. As far as the second Social Investigation Report is concerned, Counsel for the father further criticised Mr. Chan for being oblivious to the special needs of Y; having no knowledge or making no enquiries as to teaching and therapy techniques for autistic children; and making his recommendations without relating his conclusions to any facts he observed during his investigations.
59. I am not convinced that any such criticisms are in any way justified. There is no doubt that Y is a child in need of special care or training and it is absurd to suggest that Mr. Chan was unaware of that fact. Being a Social Investigation Officer dealing with family dispute in custody cases, I am satisfied that both Ms. Ngan and Mr. Chan must have some knowledge or expertise in dealing with children, be they with special needs or not. That is sufficient for them to prepare a useful report with meaningful recommendations for the court's

consideration. Concluding Views on the Social Investigation Reports

60. After considering the criticisms on the Social Investigation Reports as discussed above, I must say that there is very little substance in them. I would repeat my observation in 50 above, that I find the reports being prepared in a professional manner and I would also take the recommendations into account when I come to my decisions on the issue of care and control and access. Wishes of Children
61. Throughout his evidence, the father seems to be saying that it is the wish of Y to stay with him and the paternal grandmother. It is to be noted that in the afternoon of the last day of trial (Day 8), the father through his counsel made some very late applications for, inter alia, the viewing of some video clips on Y at handovers and to allow a psychiatrist/psychologist report to be prepared. I suppose that the father was attempting to use these videos to show that Y refused or at least was reluctant to go with the aunt or mother at the handovers, whilst the psychiatrist/psychologist report would show the wish of Y in staying with the father and the paternal grandmother.
62. After it was pointed out that both parties have already undertaken at the previous hearing (Day 7) that they would not take any video at handovers, and the court giving its indications, Mr. Clough for the father has sensibly withdrawn his application in submitting the video clips.
63. As for the psychiatrist/psychologist report, such application was refused by the court as it was simply too late as we were already at the last day of trial and all evidence had been heard. Moreover, there was no indication in the Social Investigation Reports that such expert evidence was really necessary in this case.
64. Before I leave the topic on the wish of Y, I have to remind the parties that even if there is such evidence on the wish of an autistic child of very young age, those so called wishes have to be considered in light of the overall circumstances of the case, and in particular, the child's age and his appreciation of the issues in dispute. Y is only 6 years old, and has autism. One has to be extremely careful in considering his wishes as they can be easily manipulated or susceptible to undue influences. In the circumstances of this case, I will not place much weight on those wishes of Y, if there were indeed any.
65. The father also tried to introduce the wish of the elder child, E. According to him, E wishes Y to stay with the father. I agree that generally speaking, whether children can grow up with siblings support can be one of the considerations for granting care to one parent or the other. However, in the particular circumstances of this case, apart from the big age gap between the 2 brothers (E is already 18 years old whilst Y is only 6), E is now pursuing his full time education in USA and will likely to remain there in the coming few years. Therefore, I do not consider that sibling support is a very important consideration in this case. Y's physical, emotional and educational needs and the parties' abilities to meet them

66. There is no dispute that Y is a child suffering from autism. According to the observation of Ms. Ngan, and which I accept, the autistic features as exhibited by Y are not of a very severe nature. Be that as it may, there is no doubt that Y is in need of special care and training.
- Physical Care
67. As far as physical care is concerned, I am satisfied that both parents can provide the same for Y. Both are working parents and need to rely on the assistance of close relatives. The mother would engage the help of the aunt, whilst the father would engage the help of the paternal grandmother. It is true that the paternal grandmother has come into the picture at a much earlier stage, but overall speaking, I am satisfied that both parents could provide the similar level of good physical care for Y with the help of their extended family.
- Emotional Needs
68. As far as emotional needs are concerned, it is clear from the above discussion that both parents are maintaining close and loving relationship with Y. According to both Ms. Ngan and Mr. Chan, Y was observed to be more attached to the mother, which is not surprising at all in view of his young age. Therefore, if by way of a simple comparison between the parents, I would accept that the mother is in a better position to satisfy Y's emotional needs. However, I also need to take into account the relationship between Y and the paternal grandmother, which was also described as close and loving. With this additional consideration, the advantage enjoyed by the mother can be said to be balanced off by the presence of the paternal grandmother. Therefore, I would come to the same conclusion that both parties, with the help of their extended family, are in more or less the same position in satisfying the emotional needs of Y.
- Educational and Training Needs
69. There is no dispute that Y is in need of special training and that is why he has to attend a special school (Heep Hong School) with additional training in speech, occupational and play therapies. Y also attends various trainings on every Tuesdays and Thursdays after school from 4-6pm at Links Development Centre. Due to the lapse of time, some of the training programs may have already been changed by the time of this judgment. But one thing is certain, that is due to the special needs of Y, a regular and stable pattern of care is important for Y so as to minimise any possible conflicts during handovers or discontinuity in his training programs. Therefore, I accept that the parties' respective claim for sole care and control, meaning that Y will stay with one parent for most of the week during school, instead of the present arrangement of a more or less equal splitting of Y's time in the middle of the week (on Thursday) may better serve Y's welfare.
70. The issue now is who should have the care of Y during the school week.
71. I note that from the Social Investigation Reports, both officers are of the views that the mother seems to be in a better position to meet Y's various needs, including his educational needs. Therefore, their recommendations were for the mother to have the sole care and control of Y.

72. According to Ms. Ngan, the first Social Investigation Officer, the mother was in a better position to understand the conditions of Y. She has also equipped herself with the skills in handling autistic child in order to provide the necessary care to Y. Ms. Ngan was also of the view that as Y was still of a young age and being more attached to the mother, coupled with the fact that the mother was able to provide proper care and training to Y, she would therefore recommend the care of Y to be given to the mother.
73. As far as the second Social Investigation Report is concerned, Mr. Chan was of the view that despite their different approaches, both parents have endeavoured to provide suitable arrangements or trainings for Y. During his observation on Y's reactions, the trainings provided by the mother seems to be more effective. Moreover, due to the tender age of Y, he was more attached to the mother and a continuation of this kind of close mother-and-son attachment will be beneficial to the development of a young child. Therefore, he recommended the care of Y to be given to the mother.
74. I have considered the mother's affirmations and also her evidence in court. In her affirmation (Bundle pp.159-166), the mother described in much details on how she discovered Y's autistic features and the arrangements she had made in taking Y to various assessments. After confirmation, the mother had also made arrangements with the Department of Health and other private service centres providing speech, occupational and play therapies for Y on regular weekly basis. At the hearing, I was referred to Y's training records at the Yang School in which most of them were signed by the mother (Bundle pp.399-409). Y's present training sessions on every Tuesdays and Thursdays after school 4-6pm at the Links Child Development Centre was also arranged by the mother.
75. In the father's affirmations and evidence, he has also mentioned how he has arranged Sensory Integration Training for Autism for Y (Bundle p.136, para.13) on Monday and Wednesday. But Y's future educational and training needs seems to form a relatively minor part of his evidence. If one should read the father's various affirmations, and listen to his evidence in court, I think he has placed much emphasis on describing how the mother being an irresponsible mother when Y was still very young and how she has deserted the family leaving the care of E and Y to him. It is clear that the father is still holding much grudges against the mother for leaving the former matrimonial home in 2015.
76. After considering the overall evidence, including the investigations and recommendations of the Social Investigation Officers, I am satisfied that the mother is more alive to the special needs of Y and is therefore, in a better position to satisfy those needs, in particular, his educational and training needs. Desertion by the Mother?
77. It is part of the father's case that the mother had deserted the family in the year of 2015. There is no dispute that the mother did leave the former matrimonial home in that year. However, she explained that it was due to her total disappointment after the discovery of the father's continued indulgence in gambling.

78. The father disputed this allegation.
79. I think there is no point in investigating into whether the father did have such an uncontrollable gambling habit. But one thing is certain, i.e. the marriage was encountering great difficulties at that point of time and the mother decided that it was time for the marriage to end. She chose to leave the former matrimonial home without the children in order not to provoke the father. The mother's stance was totally understandable. More importantly, I accept her evidence that she had not abandoned the children. She left the domestic helper behind so that the daily care and routine of the children could be maintained. I also accept that she continued to go back regularly to look after the special needs of Y. I do not accept that the mother had deserted the family as alleged. Difficulties in exercising access
80. It is to be noted that despite the various orders on interim access, by consent or otherwise, the parties still experienced much difficulty in exercising access.
81. One obvious example was an incident happened on 23 July 2017, which was a Sunday when the mother was supposed to return Y to the father at noon after the weekly staying access. However, a No. 8 Typhoon Signal was hoisted during that weekend which was still in force on that Sunday morning. At about 10:00am, the mother made a request for Y's return to be deferred until the lowering of the No. 8 signal, which was later anticipated by the Hong Kong Observatory to be 2:00pm in that afternoon, i.e. 2 hours after the supposed return time. There is some dispute on the exact dialogue during that period of time, but one thing is clear, that is the father insisted and said he would pick up Y with the court order (presumably because the court order specified 12:00 noon as the return time) and police officers. One would expect these to be empty threats uttered at the heat of the moment. Unfortunately, they were not. What later transpired was that the father did really go up to the mother's residence with a team of police officers and demanded the immediate return of Y. In order to avoid any further conflicts, the mother had to comply and Y was returned.
82. It is regrettable to note that despite all the love he might have towards Y, the father's judgment in the matter has been clouded by his grudges towards the mother rendering him unable to make a sensible or reasonable decision towards the welfare of Y. He chose to ignore the obvious risks that would pose for Y under those adverse weather conditions.
83. The view of the paternal grandmother is also a concern. Under cross examination, the paternal grandmother was still of the view that the mother was not fit to have any staying access to Y, citing the history of her suffering from depression; not holding or sleeping with Y, etc. It is obvious that the paternal grandmother is still holding a very negative view of the mother. It is unrealistic to expect her to facilitate any of the mother's access to Y in the future.

84. Under these circumstances, if the sole care and control of Y is given to the father, there is likelihood that such difficulties in the exercise of the mother's future access to Y might continue or even exacerbate. Conclusion on the issue of care and control
85. Based on the above discussions, I have come to the conclusion that Y's interests will be better served by giving his sole care and control to the mother. Access
86. As far as access by the father is concerned, I note that the mother's proposals are that the father should have:
- (1) Staying access every Friday from 6pm to Saturday 8pm;
 - (2) Weekly dinner access on every Wednesday (or a day to be agreed) from 6-8pm; and
 - (3) All long school holidays to be shared between the parties equally.
87. There can be no doubt that it is in Y's best interests for him to maintain a close relationship with the father. Taking this into account, together with the need for maintaining a regular and predictable schedule for a child with special needs, I am satisfied that the proposals put forward by the mother is reasonable and should therefore be allowed. In addition, I would also allow extra access during some special dates, including the birthday of the father, the Father's Day and Y's birthday.

Orders

88. I hereby grant the following orders in respect of Y:
- (1) The parties shall have joint custody of Y;
 - (2) The mother shall have sole care and control of Y;
 - (3) The father shall have reasonable access to Y including at least the following arrangements:
 - (i) Weekly staying access from Friday 6pm to Saturday 8pm; (ii) Weekly Wednesday (or a day to be agreed) dinner access from 6pm to 8pm; (iii) Equal sharing of all long school holidays including Summer Vacation, Christmas, Chinese New Year and Easter Holidays. (iv) For long school holidays, unless there is an agreement to the contrary, the father shall have the first half of the holidays and the mother shall have the second half, starting from the Summer Vacation in 2019. As from the Summer Vacation of 2020, the mother shall have the first half and the father shall have the second half of the holidays. This arrangement will be on an alternate basis starting from the Summer Vacation of 2019. During the long school holidays, the father's weekly access to Y in (i) and (ii) above will be suspended; (v) The father shall have additional day access for 2 hours on school day or 4 hours on non-school days on every birthday of the father, the Father's Day and Y's birthday if those days do not fall within his regular access time as stated above; and
 - (v) The non-access parent shall have reasonable telephone access to Y.

- (4) The above orders on care and control and access will commence on the first day of Y's Summer Vacation in 2019.
89. The above arrangements, albeit in some details already, cannot cater for all eventualities in the years to come. I do urge the parties to use their best endeavours to reach future sensible arrangements in the best interests of Y. Costs
90. The parties have made their respective written submissions on costs upon the court's invitation.
91. Despite the usual costs order would be no order in children matters, Mr. Li for the mother submitted that costs of these children proceedings should be awarded to the mother in view of the litigation conduct of the father. One obvious example cited was the prolongation of the trial, which lasted a total of 8 days instead of the originally allotted 3 days. It can be seen that pursuant to some case management directions, both parties have already filed their detailed evidence by way of narrative affirmations before trial. As in most civil cases, those affirmations would be admitted as the parties' evidence in chief. But when the father began to give his evidence (at Day 5), and to everybody's surprise, counsel for the father (Ms. Sujanani) still proceeded to examine the father in court, largely by way of re-stating his case in his oral evidence. This was highly unusual, especially when counsel submitted that she would need 4 to 5 hours just to complete his client's evidence in chief. This has caused the court's concerns and subsequent intervention in limiting counsel's time in her examination in chief of the father's evidence. But despite all these efforts, counsel still took some 2.5 hours just to complete the father's evidence in chief.
92. I think there is some force in Mr. Li's submissions that the trial has been unnecessarily prolonged. But at the end of the day, I still have to bear in mind that it is never easy to say who the winner party really is in a trial concerning children. In this particular case, despite the fact that the mother is now awarded the daily care and control of Y, I have to remind myself that we are dealing with a loving father who did what he thought was in Y's best interests. Sometimes, his judgment may have been clouded by his misguided grudges towards the mother, but the issue now is whether he should be penalized in costs in fighting for Y's care and control under those beliefs.
93. Moreover, I cannot be sure whether counsel was instructed to conduct the father's case in the way as she did, or it was counsel's own style of advocacy. If it is the latter, I think it is unfair for the father to face such an adverse costs order. Given the father the benefit of this doubt and considering the case in the round, I am minded not to depart from the usual costs order in children matters, i.e. there be no order as to costs, including all costs reserved.
94. Finally, I hope that by the handing down of this judgement, the parties' dispute on Y's custody can now come to an end so that they could use their best endeavours to work jointly for the future benefits of Y. Ancillary Relief

95. Upon the conclusion of the children dispute and in order to move the case forward, I now fix a FDR First Appointment on 28 August 2019 at Court No.2 at 2:30pm with 30 minutes reserved. I direct that both parties to file and serve their respective Form E 28 days before hearing and to lodge their respective First Appointment Bundle at least 7 days before hearing. C. K. Chan District Judge Representation: Mr. Felix Li, Barrister-at-law, instructed by Messrs Tang, Lai & Leung, solicitors for the Petitioner Mr. Neal Clough (on 21 June 2019 only) and Ms. Bina Sujanani, Barristers-at-law, instructed by Messrs Peter C.O. Wong & Associates, solicitors for the Respondent

[2010] 4 HKLRD 191-201, at paras 28-41 PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A
B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C
D E F G H I J K L M N O P Q R S T U V oJ=o h3 < h3 < h3 < gd3 < vivU o^o^oL gd_Tg gd_Tg
gd_Tg gd & h4-A h_Tg gd(CA gd)? gd)? h(CA h9+% h(CA h(CA h tn h~Vs gdqVd gd(CA hwkh
h4(A hwkh h#3; ~q~q~q~q~q~q~dqW hwkh h zA dqWqWq qdqWqW h#3; hB!6 hi?P h#3;
hqVd hqVd hqVd hqVd hB!6 gdqVd gdqVd gdqVd gdqVd gdqVd gdqVd gdqVd gdqVd gdqVd
hqVd hqVd hqVd hqVd hqVd hqVd hqVd gdqVd gdqVd gdqVd gdqVd gdqVd gdqVd gdqVd
gdqVd s`M`9 hqVd hqVd hqVd hqVd hqVd hqVd hqVd hqVd hqVd hqVd hqVd gdqVd
gdqVd gdqVd gdqVd xdK8' rdrdrU UrdrUGUGU h7I h7I h7I h7I h7I h7I h7I heIC h7I
gd}\ gd7I gd7I gd7I h4)t h7I h7I h7I h4)t h4)t h4)t h4)t h4)t gdDd gd4)t h .2 hzTH hB!6
hzTH h4)t h4)t hzTH hzTH h .2 gpjpgp hgZ< h+iH hzTH h"%: gdzTH gdzTH ododYNYdYd
pepZO hN) h{#t h{#t h|> rgrg hysc h\un zozdWdodLod h\un h\un h\un h\un vdvvdv[v gdU.
hfvt hCWB hfvt h<(; haC) gdU. haC) h4ML }S}S}S hg|2 hg|2 hHvV ui^Si hk}% &`#\$ ^L;L
[Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/
theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V
O&x\$ A8>v ;EUC n 8r *~P(5 .jx E /EE}{ theme/theme/_rels/themeManager.xml.rels 5 6?\$Q
K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK
theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml
version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://
schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2"
tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4"
accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/>7C pWNJ pWNJ
&'L- Draft dc_reporter08 Normal.dotm Windows User Microsoft Office Word Dell
Computer Corp. Draft Title <?xml version="1.0" encoding="UTF-8" standalone="no"?
><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://
schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://
schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml
version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem
ds:itemID="{F3686F16-5DBE-47C4-970E-AC8AA08919FC}" xmlns:ds="http://
schemas.openxmlformats.org/officeDocument/2006/
customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://
schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></
ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=124536

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/f-v-w-2019>

Prepared on 26 October 2026 · Esheria