

HONG KONG / JUDGMENT

FKYP v. KHYF

COURT

Family Court

DECIDED

28 August 2013

CASE / FILE NUMBER

FCMC7952/2012

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bjbj FCMC 7952/2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 7952 OF 2012

BETWEEN FKYP Petitioner KHYF Respondent

Coram: Deputy District Judge K K Pang in Chambers (Not open to public) Dates of Hearing: 20-21,
23-24 & 27-31 May, 8-9 & 15 August 2013 Date of Judgment: 28 August 2013

J U D G M E N T (Custody)

I will refer to the petitioner father and the respondent mother as the father and the mother respectively. Application before the court 2. This is the trial of the mother's application for the custody, care and control of her twin daughters (hereinafter the elder one called and the younger one called), who were born on 28 February 2007 in Hong Kong. Since about January 2012, the parties have brought the children to attend school and stay with the father in Shanghai where the father was working. In the present application, the mother requested the return of the children from Shanghai to live with her in Hong Kong but the father sought to maintain the status quo. One of the issues for decision in this case is whether the mother should be allowed to bring the children back from Shanghai to Hong Kong.

Background

3. The father was born and brought up in Hong Kong. The mother was born in mainland and she moved to live in Hong Kong in 1991. The parties were classmates in university where they studied actuarial science. They worked as professional actuaries after they graduated from university in 1997. They cohabited together in the same year and were married in the US in June 2000.
4. The parties have worked in the PRC and Hong Kong since their graduation from university. The mother was pregnant in 2006. She resigned from work in about September 2006. The children were born in February 2007 in Hong Kong. Then the mother became a stay-at-home mother. The father had his base of work transferred from Shanghai to Hong Kong in about August 2007. The parties disagreed as to when the father returned to live in the former matrimonial home (hereinafter called Mei Foo). The father said he lived in Mei Foo from August 2007 but the mother said that he did not live in Mei Foo until about August 2008. The mother resumed working in August 2009. The father packed up and left Mei Foo in March 2010. He admitted he had an affair at that time. He said he returned to live in Mei Foo after about 3 months. The mother said that the father has not lived in Mei Foo for the period from about March to September 2010. The mother resigned from work in October 2010 and resumed working again in March 2011. The parties had a fight after a quarrel in April 2011, which resulted in the father s detention overnight in a police station. The father did not return to Mei Foo immediately after he was released from the police station. He said he returned to live in Mei Foo a few days later but the mother said subsequently he only occasionally came back to Mei Foo. The father started to work in Shanghai in October 2011.
5. The children were brought up in Hong Kong. They used to live with their parents and the maternal grandmother in Mei Foo. Since they were about 1-year old, the family have employed a home helper. In about January 2012, they were brought to study and stay with the father in Shanghai. The parties disagreed as to how long that they originally envisaged the children would stay in Shanghai.
6. From about January 2012, the children began to live with the father, his parents and a home helper in Shanghai as the mother worked and studied for the examination for the Fellowship of Society of Actuaries in Hong Kong. She paid regular visits to the children and the father in Shanghai. The mother resigned from her last employment in April 2012, having been dissatisfied for a long time with the job requirement to take frequent business trips. The mother sat the said examination in May 2012. She had some contacts with head hunters about work positions in Shanghai during the period from about March to June 2012. The present arrangements for the children
7. The father filed a petition for divorce on the mother s unreasonable behaviour on 5 June 2012. The mother received the petition on 11 June 2012. She took out an ex-parte summons for the return of the children to Hong Kong, interim custody, care and control of the children and maintenance pending suit for the children on 4 July 2012. Since her resignation

from work took effect in about early July 2012, the mother has stayed in Shanghai and had regular access to the children. By the order of Deputy District Judge A. Yim dated 6 July 2012, the status quo was maintained pending further order of the court.

8. Since the beginning of these divorce proceedings, the mother's access to the children has been a continuing source of a high conflict throughout the proceedings. In an attempt to reduce the parties' conflict on access, the court put in place a defined access arrangement. By the order of Deputy District Judge A. Yim dated 23 August 2012, the mother was allowed defined access to the children as follows: Day access twice a week on every Monday and Wednesday from after school to 9 p.m.; and Staying access on every weekend from Friday after school to 5 p.m. on Saturday. Subsequently, by the order of Deputy District Judge A. Yim dated 27 September 2012, the mother's access to the children was increased to from every Monday to Thursday from after school till 6:30 p.m., and staying access on every Friday from after school till Saturday 6:30 p.m. during the school days. Up to-date, school holidays were split between the parties on an approximately shared basis. The evidence
9. A lot of evidence was adduced. Both parties filed voluminous affidavit evidence sworn by the parties and the witnesses. The parties, the maternal 4th aunt, and the grandparents of both sides all testified during the trial. I also heard evidence from Ms. Poon, a social worker, who prepared an International Social Welfare Report dated 15 October 2012 and Mr. Lam, a social worker, who prepared a Social Investigation Report dated 6 November 2012. The mother's evidence
10. The mother and the maternal grandmother have taken care of the children since they were born. The grandmother moved in to live with the mother. The mother has breast-fed the children for 6 months. They have employed a home helper since the children were about 1 year old. They also had assistance from the maternal aunts coming from the PRC from time to time. The father did not return home regularly from the children's birth. Initially, he worked in the PRC. He only saw the children over the weekends. Before the children were 1 years old, he only came home when it suited his schedule. He did not live in Mei Foo until about August 2008. When he lived at home thereafter, he would occasionally render assistance to the care for the children. For the period from around March to September 2010, the father has lived away from the family. This was when the children were 3 years old. His reason for doing so was that he had an affair. During the aforesaid period of his absence from home, he only returned home occasionally to visit the children. The mother had to rely on her parents and her sister to help taking care of the children during her absence from home for work. There was another time that the father moved out of Mei Foo. In April 2010, over a physical fight between them, the parties were brought to a police station. Both the father and the mother were bound over for good behaviour. The father did not move back at all to Mei Foo thereafter. Later, at the father's request the family took a holiday trip to Japan in October 2011. In October 2011, the father went to Shanghai to take up the present job.

11. In about January 2012, the children began to live with the father, his parents and a home helper in Shanghai as the mother worked and studied for the examination for the Fellowship of Society for Actuaries in Hong Kong. According to the mother, due to the inconvenient fact the children were born in the month of February, they were 5 years 6 months by September 2012, which was too young for attending the class of primary one, but the mother wanted the children to attend primary one rather than repeat K.3 for the school year 2012/ 2013. For that reason, she agreed to the father's suggestion to enroll the children to K.4 in an international school in Shanghai. She has never agreed that the children were to live in Shanghai on a long-term basis. Once the children were students of the school in Shanghai, the parties could apply to internally transfer the children from the international school in Shanghai to her sister school in Hong Kong. She planned to have the children transferred back to Hong Kong by the end of June 2012. During the period which the children stayed in Shanghai, care would be split among the maternal grandmother, the paternal grandparents and the father's grandfather. The mother would visit the children whenever practicable.
12. The mother said the children have been exposed to moral danger since they lived in Shanghai. At the trial, the mother played a video clip which showed MK suddenly climbed on the maternal grandmother, put her hand into her chest and unbuttoned her shirt. It happened when they were having dinner in a restaurant on 10 July 2012. The maternal 4th aunt had similar experience of being touched on the chest by MK. The mother saw on another occasion that MK lifted her skirt and put the lid of a cup to her private part. The mother said the father sometimes watched adult video in the presence of the children. She suggested that MK was copying the actress's indecent behaviour. On 13 July 2013, the maternal grandmother told her that she heard the children said something about a big tail 'Y>\ them. She worried about the father exposing his naked body to the children and feared it might have adverse effects on them. The father slept together with the children. The mother considered the father should move the children into their own room.
13. The mother has stayed in Shanghai to take care of the children since about early July 2012. According to the mother, she will not resume working until the future arrangement of the children, such as where the children are to be located, to which school they are going, etc. is fixed and she can figure out the extent of her help that will be required to be rendered to them. She is prepared to withhold working for another 1 or 2 years in order to help the children cope with the future arrangement. The maternal 4th aunt and the maternal grandmother's evidence
14. In a gist, the witnesses gave evidence in support of the mother's case. The father's evidence
15. He is a hands-on father and there is a strong emotional bonding between the children and him. When the children were born, he was working in Shanghai. In order to be close to the family, he gave up his position as Vice President in Shanghai and accepted a demotion to Assistant Vice Present in Hong Kong to move his base of work from Shanghai to Hong Kong. As stated in his employment records, he was transferred back to Hong Kong in August 2007. The father said he returned to live in Mei Foo at the same time. Since then, despite being a

working father, he has spent as much time as he could at home with the children and all along has been significantly involved in the care of the children. A couple of examples of his high level of involvement was given, such as how he used to feed milk to the babies in the evenings and at small hours in the mid-nights, how he used to play with them, read to them and how he used to bath them and even wash together with them as they grew older.

16. The father and the children accompanied the mother on her trips to Tokyo in August 2009, September 2010 and October 2011 respectively. On all 3 journeys, the father looked after the children by himself on the flights. For the first trip commencing on 15 August 2009 when the children were about 2 years old, the mother has left the father to care for the children by him for two weeks. He described to the court how he changed their nappies, bathed them, took them to the amusement parks etc. The father said it proves he took a hands-on care of the children.
17. Against the backdrop that the mother sought to portray her as the primary carer, the father said as the mother's career has required her to work for long hours and to travel abroad frequently, she relied very much on the significant participation of the father and the helper in the day-to-day care of the children during her absence from home. Contrary to the position she portrayed to the court, she is career-minded and was not the primary carer of the children.
18. The father said the mother is not a good carer. She resorts to excessive corporal punishment. She is a foul-tempered person and her threshold level of frustration is low. In view of her unrealistic demands on the children and questionable disciplinary methods, the children keep a distance from her.
19. The mother allowed the children to leave for Shanghai while she was to stay in Hong Kong so that she could continue working and at the same time having more time to study for the examination for the Fellowship of Society for Actuaries with a view to improving her career. The father denied that it was expected that the children were to be returned to Hong Kong in June 2012. Instead, it was meant by the parties that the children would stay in Shanghai without an end date so far as they would adjust well in Shanghai.
20. There is no substance in the mother's allegations of moral harm and this is a desperate attempt by the mother to discredit the father in the hope of advancing her case on care and control.
21. For the period from about March up to as late as 11 June 2012, the mother has exchanged emails with head hunters about work positions in Shanghai. It shows the mother's intention to continue working. Her present position that she wants to be a stay-at-home mother is tactical, designed to bolster her case for custody, care and control.
22. She is not a good custodial parent as her judgment is clouded by her bitterness and she is unlikely to facilitate access or comply with court orders. The parties had a lot of arguments over the access of the children. The mother took unilateral steps to extend her time with the

children by disobeying court orders fixing a time limit for the children's return. Pursuant to the order of Deputy District Judge A. Yim dated 6 July 2013, the children has been returned to Hong Kong and resided with the mother at Mei Foo for the period from 11 to 19 August 2012. The mother was supposed to return the children to the father on 19 August 2012 but she did not do so. The father took out an ex-parte summons on 23 August 2012 for the return of the children. By the Order of Deputy District Judge A. Yim dated 23 August 2012, it was ordered that the mother shall return the children to the father before forenoon on 24 August 2012. Despite this, the children were not returned until 25 August 2012. The mother is always late in returning the children to the father and his parents. They had to spend in average up to one and a half hour in collecting the children from the mother. The mother refused to answer their calls. The delay in the return of the children disrupted the children's meal time and their daily routine. In breach of her undertakings to the court not to give the children dinner before they return to the father's home for the evening meal, the mother repeatedly fed them so as to deliberately defeat the court's plan for the children to have dinner with the father and in such a way frustrated the court's order as to access.

23. His parents have a good relationship with the children and have assisted the father in a good and secure arrangement for the children.
24. There is no reason why the mother must live in Hong Kong. The true purpose behind the mother's application for relocation of the children is to distance the children from the father.
25. The father is holding a sanguine expectation that his employment in Shanghai will be extended when his current three years contract expires in September 2014. The paternal grandparent evidence
26. In a gist, the witnesses gave evidence in support of the father's case. Withdrawal of the evidence of the home helper
27. It is noted the father has decided not to call the home helper as his witness. This decision allegedly is for the purpose of cutting short evidence. However, she is an important witness. She has lived with the family since March 2009. She must have witnessed many incidents and is in a position to offer considerable assistance to the court, especially in regard to the parties many disputes on the facts. It is unfortunate she was not called and as such, her affirmation will be totally disregarded. International Welfare Report dated 15 October 2012
28. Ms. Poon interviewed the parties and the children in their living environment in Shanghai. She observed the home environment in Shanghai was comfortable and spacious with an indoor living area of about 2,500 sq. ft. The children were close to the father and his parents while they were also close to the mother and the maternal grandmother. She held the view that the children were well taken care of and settled down very well in Shanghai. Social Investigation Report dated 6 November 2012

29. In the Social Investigation Report dated 6 November 2012, it is Mr. Lam's observation that:
31. the children seemed to adjust well in Shanghai under the care of the father, paternal grandparents and foreign domestic helper. They established a close relationship with the caregivers and seemed to enjoy the school there, the children are adaptable to the new environment as the daily routine is more or less the same, except that the extra-curricular activities in Shanghai are fewer than those in Hong Kong.
32. Observation on parent-child interaction by the Investigation Officer in Hong Kong and by Ms. Poon in Shanghai confirmed that the children related very closely and intimately to the parents and the paternal grandparents and were attached to them spontaneously. The children at this age were hard to understand divorce and the forthcoming issues. They were loyal to both parents. They were attracted by the comfortable home environment in Shanghai and refused to return to Hong Kong on one hand, but missed their mother and preferred to stay with her every-day in Shanghai on the other. The children were ambivalent to choose between staying in Shanghai and staying with their mother.
33. The in-law relationship between the mother and the father's parents were tense and unsatisfactory since marriage. The marital relationship turned sour since 2008 as evidenced by series of domestic violence. After the father petitioned for divorce, the focus of the parties turned to child custody and access. Their dispute on the access issue further aggravated their relationship problem and undermined the base for cooperation.
34. The father's family has all along resided in Hong Kong and their social support in Shanghai was limited. If not for the sake of taking care of the children, the father's parents will not be staying with the father for long. The care of the children to a large extent rests on the paternal grandparents. The paternal grandmother had history of stroke and brain surgery. If the health of the paternal grandmother deteriorates, it will greatly affect the care plan of the children in Shanghai since the foreign domestic helper could not take care of the children single-handedly. The father seemed to have no contingency plan on this occasion. Besides, the father's work plan will directly affect the care plan of the children. Whether his present contract will be extended upon its expiry in September 2014 will affect the continuity of residence and schooling of the children in Shanghai. These are the uncertainties that the Court has to consider if the custody is granted to the father.
35. The mother took full time care of the children before they attended kindergarten in Hong Kong. She resumed work in 2009 and was unable to take full care of the children, but she was still concerned about the education and extra-curricular activities of the children. She has established a long term bonding with the children since their birth. The children were under her good care when they were in Hong Kong. The Investigation Officer considered the mother a capable and involved mother, judging from her affluent childcare experience in the past. Her bonding and relationship with the daughters is irreplaceable especially when the daughters enter the puberty and adolescence. However, she needs to improve her temper control and parenting skills and avoids using physical punishment to discipline the children. She should also be alert of not arranging too much extra-curricular activities and

exerting too much pressure on the children on their academic pursuit.

36. A stable home environment with continuity of physical and emotional care is of paramount consideration to the children. The Investigation Officer inclined to believe that the mother will achieve the continuity if she undertakes to take care of the children on a full time basis in Hong Kong and recommends her to be granted the interim custody of the children. Since the children seemed to adjust well in Shanghai, if the mother is not prepared to take full time care of the children in Hong Kong, the Investigation Officer prefers status quo for the children to continue with their living in Shanghai. Joint custody is not recommended as both parties are in high conflict and cannot reach reasonable compromise at present. The applicable law
30. The mother's application is for permission to remove the children back from Shanghai to Hong Kong. In view of the legal submissions made before me about the law in relocation cases, it may be useful to make an introduction on the applicable legal principles before I embark on a discussion on the factual disputes.
31. I accept the mother's submission that this is primarily a custody case. The parties are Hong Kong permanent residents and so are the children. The father is living in Shanghai for work on a 3-year contract. This contract will presumably expire in October 2014. Even if his contract is renewed, his status to live in Shanghai will be work related. Shanghai is not his permanent home base. Up to-date, Hong Kong is still the home of the parents of the children. The extended families are all here except for the paternal grandparents who have gone from Hong Kong to Shanghai since about March 2012. The paternal grandparents went to Shanghai purely for the sake of taking care of the children. It appears they still look on Hong Kong as their home base.
32. This is not a standard relocation case where there is already in place a custody order and where one parent is asking permission to leave the jurisdiction to go to a foreign place for good. In the circumstance, I consider I should approach the mother's application preliminarily in accordance with the general principles governing applications relating to children as set out in s. 3 of the Guardianship of Minors Ordinance, Cap. 13, which provide that: -
3. 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 best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to- (A) 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 (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; and (ii) 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; except where paragraph (c) applies, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and shall be exercisable by either without the other

33. The Hong Kong Family Court has on many occasions taken into account a checklist of factors based on the Law Reform Commission of Hong Kong's Report on Child Custody and Access dated 7 March 2005 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 sex, social and cultural background and any other characteristics which the court considers relevant; The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; Any harm which the child has suffered or is at risk of suffering; Any family violence involving the child or a member of the child's family; How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (a broader formulation along the lines of) The practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; The range of powers available to the court in the proceedings in question; Any other fact or circumstance that the court thinks is relevant. I shall refer to some of these factors in so far as they appear to be relevant to the present case.
34. The mother is seeking permission to bring the children back to Hong Kong. For that reason, it is also required to discuss and consider how the court would apply the guidelines governing relocation cases in *Payne v Payne* [2001] EWCA Civ 166 to the present case. I shall do so in the latter part of the discussion.

Issues

35. The issues are likely to include:- Was the mother the primary carer? Was the father significantly involved in the care of the children? Did the mother use excessive corporal punishment on the children? Was the children's move to Shanghai intended for a long/ short term? Have the children been exposed to moral harm since they went to Shanghai? The present arrangement of the children. Will the mother resume working in the near future? The welfare checklist The application of the *Payne* principles to the present case. Overall, what are the arrangements in the best interest of the children? Discussion Was the mother the primary carer?

36. The mother said she was the primary carer before the children moved to live in Shanghai in January 2012 but the father did not agree. The parties also disagreed on how much time and effort they spent on the care of the children.
37. The father said the mother's career required her to travel abroad frequently for long periods so that she relied very much on the father and the home helper to care for the children during her absence. At the father's request, the mother produced her travel record for the period from August 2009 to 27 January 2012. The mother resumed working in August 2009, while the children went to Shanghai with the father on 27 January 2012. The travel record shows the mother was outside Hong Kong for 49 days from August to December 2009, 89 days during 2010 and 63 days during 2011 respectively. The father said the large numbers of days of the mother's absence from Hong Kong call in question the mother's assertion that she was the primary carer of the children.
38. It is obvious that the mother has struggled to balance between work and her mother role. The way I see it, she has done her best in this regard. When she was working overseas she would squeeze time from the trips to take care of the children: - During her 3-week business trip to Tokyo for the period from 15 August to 4 September 2009, she made the arrangement that the father and the children went along with her at the first two weeks; During the first 2 weekends of her 4-week business trip to Seoul for the period from 9 November to 4 December 2009, she returned to Hong Kong to look after the children; During the first 2 weekends of her 3-week business trip to Taipei for the period from 17 January to 5 February 2010, she returned to Hong Kong to look after the children; During the first weekend of her 3-week business trip to Bangkok for the period from 9 to 28 May 2010, she returned to Hong Kong to look after the children; During 3-week business trip to Seoul for the period from 25 July to 18 August 2010, she returned to Hong Kong on the first Friday to look after the children; During her 3-week business trip to Tokyo for the period from 20 September to 8 October 2010, once again she made the arrangement that the father and the children went along at the first two weeks. During the 2-week business trip to Vietnam for the period from 4 to 19 August 2011, at the 2nd weekend she went back to Hong Kong to attend the children's ATV show video taking; At the end of the business trip to Taipei during the period from 12 to 24 February 2012, upon arrival from Taipei at 9:27 p.m., the mother changed luggage with the help of her mother at the Hong Kong airport, took flight at 10:32 p.m. on 24 February 2012 (Friday) to spend the weekend with the family in Shanghai; The mother sought special leave to work at home so that she could celebrate the children's 5 years old birthday on 28 February 2012 in Shanghai. She took evening flight back to Hong Kong on the same day.
39. The parties exerted themselves to show how much time they spent on the children. In the course of the trial it became clear to me that the mother indeed spent a considerable amount of time with the children on a day-to-day basis. The mother gave up 3 years of her prime time from September 2006 to August 2009 to stay at home to take care of the children full time until they were 2 years old. After she resumed working in August 2009, she tried her best to squeeze time to take care of the children. She has been a stay-at-home mother again

during the period from October 2010 to March 2011. Since the birth of the children, she has been a devoted mother. I regard the children have been primarily cared by the mother, with the help of her mother, the maternal 4th aunt and the home helper, since the birth of the children until they went to Shanghai. When the children started schooling in Shanghai on 1 February 2012, the mother personally took them to school and collected them after school. She flew back to Hong Kong on 3 February 2012 and immediately headed for London for training. She asked for leave to work at home on 27 February in Shanghai in order to stay with the children to celebrate their 5-year old birthday on 28 February 2012. The mother has stopped working since early July 2012. She is still fully involved in the care of the children. Was the father significantly involved in the daily care of the children?

40. The father maintained he returned to live in Mei Foo in August 2007, and thereafter he was significantly involved in the daily care of the children. Regardless of that, the mother and the maternal grandmother asserted the father has not lived in Mei Foo for the period from about August 2007 to July 2008. They said the father only saw the children over the weekends before they were 1 years old. The mother said for a long time she has been given the wrong impression that the father was based in Shanghai up to about July 2008. Unbeknown to the mother at that time, the father purchased a flat in Lai Chi Kok on 3 August 2007. The mother was not told about his purchase of the flat until about a year later. The mother suggested the father has lived in the Lai Chi Kok flat for the period from August 2007 to about July 2008. The father sold the flat on 20 July 2009.
41. Despite the fact that the father denied he lived in the Li Chi Kok flat, I consider the undisputed fact that father has hidden his purchase of the Lai Chi Kok flat from the mother for about a year militates against his credibility. The father explained that the acquisition of the flat, notwithstanding registered solely in his name, was a joint venture by his parents for investment purpose. For all that, he did not tell the mother about it. I am incredulous to his explanation. At any rate, such purchase must be a significant event to the family. I regard that the father is surreptitious to choose to conceal it from the mother. As well, when the mother went to the flat in about August 2008, she saw furniture and the father s clothes hanging in the wardrobe in the master bedroom. I agree with the mother it shows probably the father lived in the flat. Altogether I prefer the mother s case that the father has not lived in Mei Foo for the period from about August 2007 to July 2008.
42. On 13 March 2010, the father packed up his bags and left Mei Foo. He admitted he had an affair with a woman. The maternal grandmother recalled the father has been packing up in front of the children for hours and the children were hysterically crying and begging the father not to leave but the father ignored them. Her evidence in this regard has not been challenged. It is also undisputed the father did not discuss any custody, care and control issue with the mother. He simply selfishly left. Nevertheless, the father alleged he returned to live in Mei Foo after about 3 months and during the period of his absence he regularly returned to visit the children at Mei Foo, while the mother s assertion is that for the period from 13 March 2010 to about September 2010, the father has not lived in Mei Foo and during

such period the father only occasionally returned to visit the children.

43. The father walked out on the mother and the children again in April 2011 after a fight with the mother which resulted in his detention in the police station overnight. The father said he returned to Mei Foo after a few days but the mother's assertion is that he only occasionally came back to Mei Foo afterwards.
44. I regard the father's case that he is a hands-on father who was significantly involved in the care of the children does not sit well with the fact that the father had the abovementioned multiple displeasing periods of absence from home.
45. When a couple is living together, if a party intends to leave home to work abroad, it seems to me it is reasonable that he will discuss his intention with his living partner. The father took up a position in Shanghai on a 3-year contract in 2011. It is not disputed that before he took up the employment, he did not have any discussion with the mother about his intention to work in Shanghai or his future role in the care of the children. I also regard such undisputed fact does not befit his allegation that he returned to live in Mei Foo a few days after the incident dated April 2011.
46. The father and the children accompanied the mother on her business trips to Tokyo in August 2009 and September 2010, and the parties went for a family holiday to Tokyo in October 2011. The father contended had he lived away from Mei Foo from March to August 2010, the mother would not have let him join her on the business trip to Tokyo in September 2010. By the same token, if he lived away from Mei Foo since April 2011, the mother would not accompany him to Tokyo in October 2011. The explanation given by the mother is simple but convincing to me:- She wanted to salvage her marriage.
47. The first of the said trips to Tokyo took place in August 2009 when the children were 2 years 5 months old. During this two weeks trip, as the mother was working, the father took care of the children during the day time. The father emphatically submitted that it shows that he is always a hands-on father. As for me, I am not sure how the father's conduct at a short term overseas trip can throw light on the question of whether or not the father has been significantly involved in the care of the children at home since the birth of the children. To give the father his due, I consider it appears he would be capable of significantly taking part in the care of the children if he was willing so to do. As yet, was he willing? According to the mother, he only occasionally offered assistance to care for the children at home.
48. The father has tried to convince the court that he has been a hands-on father since the birth of the children by helping in feeding the children, washing the children etc. When it was suggested to the maternal grandmother that the father fed milk to the babies in the middle of the night, she laughed and spontaneously said of course not. The maternal grandmother told the court that all along, she was the one who give milk to the babies at night. She was sleeping with the babies. I prefer the maternal grandmother's evidence to that of the father.

49. The paternal grandparents testified they were denied by the mother to entry into Mei Foo to visit the grandchildren. While it must be a painful and humiliating experience for them, surprisingly, neither of them remembered what happened on the alleged incident. They were unable to tell who opened the door. The paternal grandfather said it was the mother who opened the door but he forgot about the content of the conversation. The paternal grandmother initially said it was the home helper who opened the door. She then changed to say it might be the maternal grandmother. Then again she changed to say actually she did not see anything because she was standing behind her husband. It is unbelievable that she actually did not see or hear anything if the incident happened.
50. The father testified the mother would not dare to tell his parents to leave in front of him but the paternal grandfather told the court the mother told them to leave in front of the father.
51. The paternal grandmother initially denied the mother's allegation that she had a poor relationship with her own father-in-law, but with further cross-examination, it was revealed not only the relationship between them has turned sour since about 1997, but also their relationship was so bad that on one occasion the old man assaulted her on which a report was made to the police.
52. When being asked in cross-examination whether he has made enquiry with his mother about the alleged indecent behaviour of the children, the father replied that he did and further said his mother then told him that there were no such things at all. In the cross-examination of the paternal grandmother, however, she told the court outright loudly that the father has never made such enquiry with her.
53. It appears the father and the paternal grandparents are far from being reliable witnesses.
54. After having seen and heard the parties and the witnesses, I prefer the maternal grandmother and the mother's evidence to that of the paternal grandparents and the father in regard of how much time and effort the father spent on the care of the children. I find the father and his parents exaggerated his involvement in the care of the children. All things considered, I also find the father is not as truthful as he should be about his evidence on how much time he actually spent on living in Mei Foo. I accept the mother's assertion in this regard. I find that the father only occasionally returned to Mei Foo during the periods of his absence from home and he did not take much part in the care of the children on a day-to-day basis even when he lived there. Corporal punishment
55. The children remembered that the mother hit them by a backscratcher on the limbs or buttocks, while the father hit their palm. The father said the mother is impulsive and has a volatile temper and uses excessive corporal punishment on the children.
56. MK remembered that on one occasion the mother threw MS on the sofa as she did not eat when the mother visited them in Shanghai. I accept that it is inappropriate for the mother to have thrown a temper tantrum on the children in such manner. The mother put the blame partly on her unhappy marriage and her intense relationship with the father as well as the

paternal grandparents that caused emotional distress to her. On the upside, the mother acknowledged she has difficulties in child discipline. She took time to reflect upon her parenting skills. She read books on the subject. She plans to take lessons to improve her parenting skills. The mother admitted she used corporal punishment on the children but it does not appear that she was indulgent in using excessive or inordinate corporal punishment on the children. At the trial, the mother recognized that infliction of physical pain as a method of child discipline should be discouraged. I do not regard that she is a violent or abusive mother. Was the children's move to Shanghai intended for a long/ short term?

57. Although it is common ground that the parties agreed to send the children to Shanghai, it is disputed how long the parties envisaged the children would continue to study and live with the father in Shanghai.
58. The father said it was meant by the parties that the children will stay without an end date so far as they adjust well in Shanghai. The mother said the parties planned to have the children internally transferred from the international school in Shanghai back to her sister school in Hong Kong by the end of June 2012. To refute the father's allegation that there was no such plan, the mother produced: e-mail written by her to a dance school in Hong Kong in which she suggested that the children were to return to Hong Kong from Shanghai for good on 1 July 2012; e-mails exchanged between her and the said sister school in Hong Kong during the period from 18 to 23 May 2012, in which she remarked that she wanted to move the children back to Hong Kong.
59. After having carefully considered, I agree with the father's contention that, had the mother all along planned to return the children to Hong Kong by June 2012, she would have initiated concrete steps for the application for the internal transfer between the sister schools much earlier than May 2012. Before May 2012, no step was taken to transfer the children to the school in Hong Kong. It is significant that the mother said she observed changes in the attitude of the children about two months after they lived in Shanghai and under the care of the paternal grandparents. She worried there were deliberate attempts to destroy the good relationship between the mother and the children. The mother also said the children had become rude and impolite. It is to be noted the throwing MS on a sofa incident happened during the mother's visit on 16 to 18 March 2012. In the circumstance, it is probable the mother had second thoughts about the then existing arrangement and wanted to take some action to remedy the abovementioned worrisome development. In my view, she was precipitated by this later development to write the abovementioned emails.
60. Also, the mother exchanged emails with head hunters for work positions in Shanghai during the period from about March to June 2012. It shows the mother intended to work in Shanghai.

61. Taking into consideration that every flight is supposed to have a return date, which is subject to change from time to time, I agree with the father that the air tickets for the children having a return date on 30 June 2012 is neither here nor there.
62. Accordingly, I am not persuaded there was a definite plan to bring the children back to Hong Kong in June 2012.
63. Notwithstanding, I do not agree with the father's contention that the children's move to Shanghai was arising from the mother's own selfish motive of pursuing her career advancement. I have found in the above the mother is devoted to the interests of the children. In all likelihood, as asserted by the mother, the move of the children to Shanghai was a family decision jointly taken by the parties in consideration of the children's best interest in their schoolings. Have the children been exposed to Moral harm since they went to Shanghai? Alleged indecent behaviour of the children
64. The mother suggested the children were exposed to adult video and they were copying the actress's indecent behavior. The father admitted he watched adult videos but was adamant this did not happen in the presence of the children. I regard it is within general knowledge that young children are generally curious about their bodies and wish to explore them. They are also curious about adult bodies and may try to touch adult sexual body part. This is young children's normal behaviour. That is why children like playing games such as Doctor . They are curious about questions such as the physical difference between males and females, body organs and functions. It is important that carers should understand what sexual behavior in children is normal and what is not normal and to respond appropriately. I have watched the video taken by the mother and have carefully considered the mother's evidence in this respect. I regard that the children's behaviour is normal. I do not believe they were copying adult videos. The mother reported the allegations of moral harm to the police. The matter was investigated and the children were interviewed by police psychologist and no prosecution was initiated. big tail 'Y>\ 'Y>\ 'Y>\ is like? Answer: When it's small tail it's like this, the tail. If it's big, it's like this. Question: Ha? How did you see it big? Answer: I saw when it's big it's like this, when I saw at Yew Chung, the small is like this Question: Where did you see dad's big tail? Answer: Em.. when showering Question: When you showered with Dad? Answer: Inside Block 8 Question: When you showered you saw dad's big tail? Answer: Yes. Also, when we were at school Yew Chung, teacher Zhu, Ms Daisy, Ms Tammy, Ms Anne, I also saw boys were like this Question: Really? Like dad Answer: Yes, yes I saw the little children's ones are small like this and big ones dad is like this After having carefully considered the evidence, I agree with the father that probably the children picked up the abovementioned descriptions from school and the descriptions of small tail and big tail are referring to the genital of a little boy and that of the father respectively. Accordingly, the big tail description is not an illustration of an erected penis. Father showed his naked body to the children

66. The mother took great exception to the father taking bath with the children naked. The mother agreed that the father occasionally helped the children take bath when they lived in Mei Foo but she did not agree the father bathed together with the children. The mother produced a photo of the mother lying inside the bathtub at the en suit bathroom of the master bedroom in Mei Foo. She suggested that the single size bathtub that could barely hold the mother would be too small for the children and the father going in together at the same time. I agree that it will be very crowded to have all of them gone inside the single size bathtub at the same time but it is not impossible. The father's evidence is that for 2 or 3 times he has gone into the bathtub for a short while. After having carefully considered, I accept the father bathed with the children in Mei Foo. At the same time, I take the view probably the mother did not know it. The mother trusts the father will not molest the children or harm them physically but she worries about the father exposing his naked body to the children. She fears it might have adverse effects on them. Despite this, I accept the father bathed with the children because they enjoyed taking bath together. I do not regard he has committed any act of indecency. I do not consider the children were exposed to moral danger but, nonetheless, as the children grew older, he should stop having bath together with them naked. Father and the children slept together
67. It seems to me there is credible evidence showing that before the children went to Shanghai, sometimes the father and the children slept together in the master bedroom as the mother slept in a separate room or in a sofa in Mei Foo. After they moved to Shanghai, the arrangement that the children slept with the father continued. Again, I do not regard the father has committed any act of indecency. On the other hand, I agree with the mother as the children grew older, they should move to their own room. Since this matter became an issue, the children have moved to their own room.
68. The father has felt very bitter that the mother raised the allegations of moral harm against the father. He took it as an attempt on the part of the mother to manipulate the proceedings and boast her fight to get back the children. The father's bitterness is understandable but I regard the issues were raised due to the mother's genuine concern about whether the children were exposed to indecent adult sexual acts. She heard the children making descriptions of small tail and big tail that she thought were referring to penis erection. Coupling with the discovery of that the father took bath together with the children in a bathtub and showed his naked body to them, it is not unusual the mother who witnessed her children exhibiting sexual behavior became alarmed. The present arrangement of the children
69. As stated by the social worker, since the children were brought to live with the father in Shanghai in January 2012, in practice the care of the children to a large extent has been rested on the paternal grandparents and the home helper. The mother and the maternal grandmother have stayed in Shanghai and had regular access including staying access to the children since July 2012. In the meanwhile, both parties are significantly involved in the care of the children. Given that the children have to spend significant periods of time with the

parents, the grandparents and the home helper, it appears that this has become a case of shared care. Will the mother resume working in the near future?

70. Prior to the service of the petition on her, the mother was looking around for work in Shanghai. The father said it shows the mother intended to continue working and not to take full time care of the children and the mother's present position that she wants to be a stay-at-home mother is tactical, designed to bolster her case for custody, care and control.
71. It is not in dispute the mother considered working in Shanghai. Out of the blue while thinking of the possibility of moving along with the family and to bring her close to her family in Shanghai, she was served with the father's petition for divorce on her unreasonable behaviour. Immediately following that, she had a change of heart and halted the job search. The father contended that her move is tactical. Contrary to the father's contention, I take the view that the mother's present position that she wants to be a stay-at-home mother in the near future is made out of her genuine love and care for the interest of the children and is not a tactical decision. It is given that divorce introduces a massive change into the life of young children. I regard it is understandable that, in face of the father's petition for divorce, the mother now wants to take care of the children on full time basis and commit to the making of a new family arrangement work. The welfare checklist The views of the children
72. The children have expressed the view that they do not wish to return to Hong Kong and prefer to remain in Shanghai. In his report, Mr. Lam stated that: The children at this age were hard to understand divorce and the forthcoming issues. They were loyal to both parents. They were attracted by the comfortable home environment in Shanghai and refused to return to Hong Kong on one hand, but missed their mother and preferred to stay with her every-day in Shanghai on the other. The children were ambivalent to choose between staying in Shanghai and staying with their mother. I take note of Mr. Lam's observation that the children at their age were hard to understand divorce and the forthcoming issues. After having carefully considered, I do not give much weight on the children's expressed wishes as I consider they are not sufficiently mature. Reference was made by the father to *In Y v M*, HCMP 695/2010, a decision of Poon J dated 4 June 2010, in which the mother's application for permission to relocate a 4-year old child who has settled in Hong Kong since December 2009 was refused. In that case, although the court did not take into account the child's wishes as the child was not sufficiently mature, it took into account the child's expressed anxiety about the move. It is given that the children might have some anxiety about a removal from Shanghai to Hong Kong but there is no evidence that it is a matter of any significant concern in the present case. His physical, emotional and educational need; His age, maturity, sex, social and cultural background and any characteristics of the child which the court considers relevant

73. The father working full time would have to rely on his parents and the home helper to take care of the children. It being the case that the mother is ready and willing to give up her career to take care of the children in the near future, she is able to give more time than the father to the children's needs. Mr. Lam's observation on the mother's involvement in the care of the children is as follows:
35. The mother took full time care of the children before they attended kindergarten in Hong Kong. She resumed work in 2009 and was unable to take full care of the children, but she was still concerned about the education and extra-curricular activities of the children. She has established a long term bonding with the children since their birth. The children were under her good care when they were in Hong Kong. The Investigation Officer considered the mother a capable and involved mother, judging from her affluent childcare experience in the past. Her bonding and relationship with the daughters is irreplaceable especially when the daughters enter the puberty and adolescence. I agree with his observation. In addition, the mother is supported by her parents and sisters, who have taken care of the children and have been close to them since their birth.
74. Regarding the paternal grandparents ability to take care of the children, Mr. Lam's observation is as follows:
34. The father's family has all along resided in Hong Kong and their social support in Shanghai was limited. If not for the sake of taking care of the children, the father's parents will not be staying with the father for long. The care of the children to a large extent rests on the paternal grandparents. The paternal grandmother had history of stroke and brain surgery. If the health of the paternal grandmother deteriorated, it will greatly affect the care plan of the children in Shanghai since the foreign domestic helper could not take care of the children single-handedly. The father seemed to have no contingency plan on this occasion. Notwithstanding the paternal grandmother told the court she is fully recovered from the stroke and she is physically fit for the care of the children, I agree with Mr. Lam that her health is a cause of concern over the father's care plan.
75. In spite of the fact the father is confident his employment in Shanghai will be extended when his current 3-year contract expires in September 2014, actually what would happen in due course is presently unknown. The cold hard fact that we know is the father has already changed his place of work between Hong Kong and PRC for a few times since his graduation from the university in 1997. He is professionally qualified in the US, PRC and Hong Kong. From a practical point of view, he can look for greener pastures in New York, Beijing, Shanghai, Hong Kong or other financial hubs of the world. As and when it happens, it will not be in the interest of the children to move along with their father in accordance with his place of work. They should grow up with security of having a home city. This is also the view of Mr. Lam.
76. Hong Kong is the children's home. They live here. In my view, it is their need and is in their best interest to live and grow up in the social and cultural background of Hong Kong.

77. The children are now the 3rd and the 4th on the waiting list for P.2 places in the aforesaid sister international school in Hong Kong. There is a real possibility that they can go to that school. The fall back is another local Putonghua/ English teaching school. In any case, they can continue to receive Putonghua/ English teaching in Hong Kong. It is accepted by all parties that they are bright kids. While they are doing well in the international school in Shanghai, so far as I can see there is no reason why they cannot thrive in a new school in Hong Kong. The likely effect on the child of any change in the child s circumstances
78. The father contended that as the children have settled happily in Shanghai, status quo should be maintained because the disruptions caused by uprooting them and requiring them to begin all over again cannot not be underestimated.
79. Status quo is important, but its importance would nevertheless need to be assessed on a case-by-case basis, depending on individual circumstance: *L v C* [2004] 2 HKC 387. In cases where both parents have maintained very close contact with the child and the child is thoroughly familiar with the surroundings offered by both parents, the disruption caused as a result of a change in custody will be much less: *Liu Lau Oi Yuk Shellydy v Liu Chian Hsiong*, Civil Appeal Action No. 126 of 1997, 17 October 1997, per Saunders DJ. In my view, this is such a case. Status quo is in favour of the father, but I do not regard it as a determinative factor in the present case. The children s root is in Hong Kong. They have lived in Hong Kong for about 5 years when they went to Shanghai, while their stay in Shanghai till now is about 19 months. After they went to Shanghai, they returned to Hong Kong 7 times. Hong Kong is not a strange place but a completely familiar place for them. When they return to Hong Kong, they are coming to their home. They are going to live in Mei Foo and taken care of by the mother and the maternal grandmother, who have been fully involved in the care of them since they were born. In the circumstance, I do not foresee that the children will have any significant adjustment problem if they are to be removed back to live in Hong Kong. Any harm which he has suffered or is at risk of suffering; Any family violence involving the child or a member of the child s family
80. I do not consider that they have suffered or there is any risk of suffering any harm no matter whether they are going to stay with the father in Shanghai or be removed to Hong Kong to live with the mother. How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs
81. The father said his parenting skill is preferable to that of the mother, as he is able to teach without appearing to scold. Mr. Lam s observation on the mother s parenting skills is as follows: The investigation Officer considered the mother a capable and involved mother I agree with Mr. Lam s observation. Regarding Mr. Lam s observation that the mother needs to improve her temper control and avoid using physical punishment on the children, the mother acknowledged her difficulties in child discipline and is prepared to improve herself. The nature of the relationship of the child with each of the child s parents and with such other persons; The attitude of the child, and to the responsibilities of parenthood, demonstrated by each of the child s parents

82. It is not in dispute that the parties and their parents all have close and intimate relationship with the children. 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
83. I shall return to this factor in the latter part of the discussion (See para. 97-98 below).
- i) The Payne guidelines
84. Although this is not a standard leaving from Hong Kong relocation case, the mother is seeking permission to bring the children back to Hong Kong, and the father's main concern would be his reduction in contact and influence over the children since his present employment requires that he stays in Shanghai. It is therefore important to discuss and consider how the court would apply the guidelines governing relocation cases in Payne to the present case.
85. In *SMM v TWM* [2010] 4 HKLRD 37, the Hong Kong Court of Appeal held that the Payne guidelines should be applied in Hong Kong. In short, it was held:-
- (a) The welfare of the child was always paramount;
 - (b) There was no presumption in favour of the applicant parent;
 - (c) The reasonable proposals of the parent with a custody order wishing to live abroad carried great weight;
 - (d) Consequently, the proposals had to be scrutinised with care and the court had to be satisfied that:
 - (i) there was a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end; and (ii) that the application was founded on practical proposals well researched and investigated;
 - (e) The effect upon the applicant parent and the new family of the child of a refusal of leave was very important;
 - (f) The effect upon the child of the denial of contact with the other parent and in some cases his family was very important;
 - (g) The opportunity for continuing contact between the child and the parent left behind might be very significant (See para. 19-21, 25-28 of the judgment)
86. I am bound by *SMM v TWM*. In spite of that, it is submitted by the father that the facts in the present case are substantially different from the usual relocation application envisaged by Thorpe LJ where residence with the applicant mother is not a live issue. In the present case, as the mother is not the parent with a residence order, and residence is a live issue, this is not a standard relocation case for which great weight may be given to the applicant's reasonable proposals. In the circumstance, I should not start off with any presumption in

favour of the mother. I agree.

87. I found in the above discussion that this has become a case of shared care. The English Court of Appeal reviewed the law in relocation cases and for the first time considered whether or not there is a distinction between cases where there is a clear primary carer and where there is no primary carer and both parents are involved in the care of the child in *K v K (Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793, in which it was held *Payne* was not to be applied in a shared care situation and instead the judge below should have considered and applied *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (per Thorpe LJ, see para. 28, 30 and 35 of the judgment). *K v K* has not been considered by the Hong Kong Court of Appeal, while the Hong Kong Family Court did: *YY v CHOA*, [2012] 1 HKC 365, *BWBP v T-KP nee DP*, FCMC 2128/2099, HH Judge Melloy, 1 February 2012, *JHCI v MSYI*, FCMC 12528/2011, HH Judge Melloy, 15 January 2013, *FCMC 15416/2010*, HH Judge Melloy, 25 January 2013. For my part, it appears that *K v K* is a reiteration of the best interest principle and a recognition that guidelines in *Payne* are but guidance and the court will have to decide each case on its facts. With or without the guidance of *Payne*, it is trite that in any event the best interest of the children is the first and paramount consideration. It is also clear and well-established law which has been reiterated in judgments in Hong Kong that in a case like this, to make a decision that the court consider to be in the best interest of the child, the judge has the duty to take into consideration and weigh all relevant factors properly.
88. It is also remarkable that the guidance which was given in *Payne* was not confined to cases where the applicant was the primary carer. It was a guidance that may be utilized in other kinds of relocation cases if the judge thought it helpful and appropriate to do so: *Re F (a child) (removal from jurisdiction)* [2012] EWCA Civ 1364.
89. In summary, I regard the guidelines governing relocation cases in *Payne* should be applied in the present case as follows:
- a) The best interest of the children is the first and paramount consideration.
 - b) To make a decision I consider to be in the best interest of the child, I have the duty to have regard to the social welfare reports and take into consideration and weigh all relevant factors properly. The welfare checklist is to be used as guidance.
 - c) Admitting this is not a standard leaving from Hong Kong relocation case and both parent have been involved in the care of the children since they went to Shanghai, I am entitled to have regard to the guidelines in *Payne* as guidance.
 - d) As the mother is not the parent with a residence order, and residence is a live issue, this is not a standard relocation case for which great weight may be given to the applicant's reasonable proposals and I should not start off with any presumption in favour of the mother. Was there a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end?

90. I have no doubt the mother loves and cares for the children. I consider that she wants to bring the children back to Hong Kong because she thinks it is in the interest of the children that they are to be brought up under her care in Hong Kong. She acknowledges it is in the best interest of the children to maintain their close relationship with the father. She is ready to offer not ungenerous access including staying access to the father in the event that she is to be granted the care and control of the children. I do not believe that the mother's present position that she wants to have the children removed back to Hong Kong is tactical or has been motivated by the desire to exclude the father from the children's life.
91. Along I have no doubt that the father loves and cares for the children and he wants the children to stay in Shanghai because he thinks that it is better for the children if the status quo is to be maintained. The children seemed to have adjusted well in Shanghai. He also offers generous access including staying access to the mother if he will have the care and control of the children. I consider that his opposition to the mother's application for care and control is driven by his genuine concern for the children's best interest. Was the application founded on practical proposals both well researched and investigated?
92. The children were born here and have lived in Hong Kong for a long time. She and the children are permanent Hong Kong residents. She lives in Mei Foo where she can provide a stable life for the children. The children can continue to receive Putonghua/ English education. Being a stay-at-home mother, she requires support from the father, who is a high earner. The mother's plan is realistic to me. What will be the effect on the mother if her application is refused?
93. The mother is likely to be devastated if her application for the children's relocation to Hong Kong is refused. The father contended there is no reason that the mother cannot and should not live and work in Shanghai. I do not agree. The mother has basically followed the children to Shanghai in order to continue to care for the children. It is clear that the mother presently stays in Shanghai only to serve this single purpose. The mother does not have any substantial connection in Shanghai. Contrary to the father's contention, in my view it is unreasonable to keep the mother in Shanghai. What will be the effect on the father if the mother's application is granted? What is the opportunity for continuing contact between the children and the father?
94. The father's relationship with the children will be undermined if his application for care and control is refused and the children are to return to Hong Kong with the mother. Despite that he may have generous access, working in Shanghai, he will have to exercise his access by flying to Hong Kong, or by the children flying to Shanghai, during weekends and holidays, which means for the time being he may not be able to have access to the children during the weekdays like he wants.
95. It is clear from the evidence that the relationship between the paternal grandparents and the mother was not good and it has become worse since the parties were entangled in the present custody dispute. It is worthy of noting that the parties had a lot of arguments over

the access of the children. The mother disobeyed court orders for the returning of the children to the father. She admitted she has been inflexible about the father's access. The father also blamed the mother for her breach of her undertaking to the court by continuing to feed the children dinner before they were returned for dinner. The mother admitted that she gave the children soup and vegetables, but denied that she fed them with dinner. In any case, the father said the difficulty over access speaks ill omen of the opportunity for continuing contact between the children and the father if the mother's application for relocation is allowed. Without regard to the father's worry, I do not foresee that the father will have difficulty in continuing contact with the children if the mother's application for relocation is allowed. The mother does not strike me as an unreasonable person. The way I see it, last year has been an incredibly difficult time for the mother. No doubt she has been struggling to deal with the present situation. She has come a long way and I regard that although she was devastated by the breaking down of her marriage she is now ready to move on. In my view, the present difficulty over access to a great extent is the result of lack of trust and a high tension between the parties which is largely a by-product of these proceedings. Overtime things will improve. The mother accepts that it is in the best interest of the children to maintain close relationship with their father. Once the question of custody, care and control issue is determined, I believe she can cooperate with the father again and can offer facilitation of his access. Overall, what are the arrangements in the best interests of the children?

96. I remind myself of the provisions of s. 3 of the [HYPERLINK "https://www.lexisnexis.com:443/in/legal/search/runRemoteLink.do?A=0.0840167540983392&bct=A&service=citation&risb=21_T17952061989&langcountry=GB&linkInfo=F%23GB%23UK_ACTS%23num%251989_41a_Title%25\" \"_parent\"](https://www.lexisnexis.com:443/in/legal/search/runRemoteLink.do?A=0.0840167540983392&bct=A&service=citation&risb=21_T17952061989&langcountry=GB&linkInfo=F%23GB%23UK_ACTS%23num%251989_41a_Title%25\) Guardianship of Minors Ordinance, Cap. 13 which provide that when a court determines any question with respect to the custody or upbringing of a minor, 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 social welfare reports and all relevant factors. Using the welfare checklist as guidance, I consider the factors that are important in this case are the children's emotional and educational needs, the likely effect on the child of any change in their circumstance, and their age, maturity, sex, social and cultural background. The status quo is working well, which favours the father. However, given both parents have maintained very close contact with the children and the children are thoroughly familiar with the surroundings offered by both parents, I regard that the children will not have significant adjustment problem if they are to be removed back to Hong Kong. It appears the importance of the status quo is of comparatively minor significance in the present case. I place a particular weight on the fact that Hong Kong is the home of the father, the mother and the children. I also place a particular weight on the fact that the mother is able to give more time than the father to the children's needs. She has been the children's carer from the time of their birth and she is willing at least in the next 1 or 2 years to continue to play this role. When in all other respects, the ability of either parent to care for a child cannot by themselves be criticised, the ability of one parent to give more

time to the child will weigh with the court in determining where the child's best interests lie: *Liu Lau Oi Yuk Sheldy v Liu Chian Hsiong*, Civil Appeal Action No. 126 of 1997, 17 October 1997, per Saunders DJ. Also, the fact that the parent proposed to be the primary carer is the mother is highly significant because of the natural role of the mother in the rearing of very young children: *L v C* supra at para. 20. It seems to me it is in the children's best interest that they are to be taken care of by the mother in Hong Kong. Custody

97. I now turn to the question of whether I should put in place a joint or sole custody arrangement.
98. The Court of Appeal had in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191 looked at the question of joint custody. Mr. Justice Hartmann JA in his judgment stated that:
 31. 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.
 32. 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. Joint Custody: the proper approach
52. Today, although there has been no changing our law similar to many other common law jurisdictions, orders of joint custody are in no way exceptional. This is because it is accepted that, in principle, such orders are in the interests of children.
53. In all but the most exceptional circumstances, the effect of divorce on the children of the marriage, especially children of tender years, is deeply felt. In all but the most exceptional circumstances, such children desire that they should continue to be protected and guided by both parents.
54. In the result, in the best interests of the child, the fact that, as a result of the breakdown of the marriage, relations between the parents are strained is not of itself a reason to refuse to make a joint order of custody. Nor is the fact that the parent to be given care and control does not agree. Such orders look to the future, they will govern a limited area of exchange between the parents, albeit one of the greatest importance.

99. I have quoted extensively from this judgment because it seems to me it might be helpful to the parties to have the benefit of reading it so as to have an understanding of the nature and extent of the concepts of custody, care and control. In the present case, in spite of that the parties have had a high conflict and have experienced a lot of difficulties over the access for the children, I regard that of itself should not preclude the making of a joint custody arrangement. In my view, the parties are competent and loving parents who being well educated should be able to make rational decisions in the interests of the children. I believe they will be able to cooperate with each other concerning matters of importance in the upbringing of the children. In the hope that the parties will be able to work towards cooperating with each other in the future, I decide that there shall be an order for joint custody. No doubt in the short term they parties will have to work together to make a decision on the children s schooling. I take note there was disagreement between the parties on the arrangement of the extracurricular activities of the children. To reduce the opportunity of conflict in the future, it is directed that the mother will be responsible for deciding upon and arranging for the children s extracurricular activities that will take place when the children are in her care. The mother shall provide information pertaining to these activities to the father. The father will be responsible for arranging the children s schedule during the father s access. Care and control 100. Having carefully considered all of the relevant factors and having given due consideration to the social welfare reports, it seems to me on balance it would be in the best interests of these children to grant the care and control of the children to the mother. For the avoidance of doubt, I give permission to the mother to bring the children back to Hong Kong.
101. Consequently, it is ordered that joint custody of the children of the family be granted to the parties, with care and control to the mother and reasonable access to the father. Access
102. What it seems to me I should do is to put in place a detailed access arrangement in the hope that this will reduce the opportunity for continuing conflict between the parties. In the event that the mother is permitted to take the children to Hong Kong, the father wishes to have enlarged holiday access and a scheme in place that will permit him ad hoc staying access in Hong Kong, should he visit Hong Kong. In principle, I agree with the father that he should have enlarged holiday access and generous and flexible access. The parties are directed to endeavour to reach an agreement on a detailed access plan within 7 days of the date hereof, failing which hgp6 hgp6 hHhm hgp6 hHhm hgp6 hgp6 gd;>n gd;>n gd;>n gd;>n gd;>n gd;>n ytHhm gd;>n ytHhm gd;>n gdBj gd;>n hHhm hgp6 hHhm hgp6 hgp6 hgp6 gd;>n gd;>n gd;>n o]O>/ hgp6 h\$ij hgp6 gd:=c gd:=c gdf< gdf< gd|TV gd|TV qcq} }qcq} h|Ui h?nV hKLY cUcF h*1 h?nV h?nV hQ#/ h Za hKLY h Za h Za qeqW sg^U^g hKLY ve\RK h\$ij hKLY gdd9` gdd9` gd:=c gd:=c gd:=c h Za h:=c h:=c h`?V hKLY {j[O[C[ hb9| hb9| hb9| h3d" h1%0 h1%0 h1%0 oha[T[M[M[h[ h3d" hb9| lflflf hb9| h3d" xlxl h<1` h<1` h<1` h<1` h<1` h<1` h!>B h3d" hKLY hKLY h<1` |u|nhnan| h:=c gd;>n gd>. h3d" h:=c h3d" h:=c h:=c h:=c h:=c pwpfpf_Xfpf h{I hs7(h:=c h:=c h:=c h{I md[TNGNTAT gdKM` gdd9` gd;>n hR|{ hV(| hKM` hKM` hR| { yly_P hKM` hV(| hV(| hKM` hV(| hKM` scRcsBs hKLY hKM` h!>B gd>. gd%' gd%' hKM` gXG9+ hKM` `n`n`nRnCn ~o~o~oao~o~o~oSoEo hKM` ugugYugF hKM` gdF1 gdO/Q gdO/Q

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immediately make a joint report in writing to the court. In this case, the court will fix a
hearing date for access as soon as possible. If the parties are able to reach an agreement, the
father shall procure a consent summons containing the terms of the agreement and file the
same for the court s consideration and approval within 14 days of the day hereof. As a
stopgap measure, the present access arrangement continues until further order of the court.
Costs 103. As this is a child related matter I make an order nisi that there shall be no order as
to costs, which becomes absolute 14 days after the date hereof unless a party has applied to
vary the order.

104. I am grateful for the considerable assistance offered by counsel to the court. (K.K. Pang)
Deputy District Judge Ms. Corinne Remedios instructed by Messrs Howse Williams Bowers
for the petitioner Ms. Jennifer Tsui instructed by Messrs Kevin Ng & Co. for the respondent
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