

HONG KONG / JUDGMENT

GKLJ v. WE also known as WFYE

[2018] HKFC 19

COURT

Family Court

DECIDED

12 February 2018

CASE / FILE NUMBER

FCMC16521/2015

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FCMC 16521/2015

[2018] HKFC 19

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 16521 OF 2015

BETWEEN

GKLJ

Petitioner

and

WE also known as WFYE

Respondent

Coram : Deputy District Judge D Cheung in Chambers

Date of hearing : 12th December 2017

Date of judgment : 12th February 2018

JUDGMENT

(Leave to appeal and variation of access pending appeal)

The application

On 24th October 2017 based on the ex-parte application on notice made by the Father, I ordered inter alia, that :

“The Mother whether by herself, her servants or agents or otherwise be enjoined and restrained from assaulting, molesting, harassing, threatening, disturbing, approaching or contacting by any means or in any manner interfering with the child of the family (“the child”) until further Order (“the Injunction Order”) and

Temporary care and control of the child be granted to the Father with supervised access to the Mother until further Order (“the Temporary care and control Order”)

On the return date hearing on 26th October 2017 (“Return Date Hearing”), the Mother applied to discharge the Injunction Order and the Temporary care and control Order. The Mother’s application was refused and I made the aforesaid two Orders to be continued and further ordered that the Mother shall have temporary defined access of the child in the following manner:

Every Monday and Thursday from 4:00p.m. - 7:00p.m.; and

Every Sunday from 9:00 a.m. – 5:00 p.m.;

in the presence of a third party from the service provided by Rent-A-Mum or other similar service provider (“the Temporary Access Order”)

Further direction was given on the Return Date Hearing, namely the trial regarding the variation of care and control be fixed and to be heard on 12th – 20 April 2018 with 5 days reserved and the social welfare report and psychological report were also called for 7 days before the pre-trial review hearing dated 20th March 2018.

By her Summons dated 9th November 2017 (“Appeal Summons”), the Mother sought leave to appeal against my Order made on 26th October 2017, namely the extension of the Injunction Order and the Temporary care and control Order, and the Temporary Access Order.

By her another Summons dated 9th November 2017, the Mother also applied for variation of the Temporary care and control Order and/or discharge of the Injunction Order as follows :

Pending appeal or trial, the Mother do have interim shared care and control or, in the alternative, the Temporary Access Order be varied as follows :

Presence of a third party during access be dispensed with;

The Mother do have interim defined access as follows :

(b1)

interim day access every Monday and Thursday after school to 7:30p.m.; the Mother do collect the child from school for access and return him to the Father or his helper at the McDonald's at King Kwong Street ("KKS McDonalds") after access;

(b2)

if any Monday or Thursday is not a school day, the pick-up time and place be changed to 4:00p.m. at KKS McDonalds;

(b3)

interim staying access

every Friday to Monday and

for half of all school holidays which exceed 4 days; and

(b4)

telephone access for 20 minutes every day.

The Injunction Order be discharged or, in the alternative pending appeal and/or trial, varied to the extent that the Mother should no longer be enjoined or restrained from approaching or contacting by any means or in any manner interfering with the child.

Background

The parties were married in 2009 and within wedlock, they have 1 son who was born on 2nd November 2010 and now aged 7.

On 29th December 2015, the Petition (based on Behaviour) ("the Petition") in the present proceedings was taken out by the Father. The Mother subsequently took out a Cross Petition against the Father. Eventually, the parties were able to reach an agreement and to amend the contents of their respective Petition so as to allow the parties to proceed on an undefended cross-decrees basis. Finally, the Decree Nisi was pronounced on 28th April 2016.

In the prayer of the Petition, the Father prayed for the joint custody, care and control of the child with reasonable access to the Mother, and the Mother contested the arrangement of the child as suggested by the Father.

Various hearings of the Child Dispute Resolution ("CDR") were held and 3 Social Investigation Reports, and 1 medical report and 1 psychological report had been called for before the parties reached an agreement regarding the disposal of the custody, care and control and defined access of the child which terms were embodied in the Consent Order dated 15th September 2017 ("the Consent Order").

In gist, the joint custody of the child were given to the parties and the care and control of the child were granted to the Mother with defined visiting and staying access to the Father. That was the position prior to the Injunction Order, the Temporary care and control Order and the Temporary Access Order.

Admission of New Evidence

Leading Counsel for the Mother, Ms. Anita Yip SC in her submission sought on the Mother's behalf to adduce new evidence in her intended appeal, namely the Mother's 2nd Affirmation filed on 9th November 2017, and the Mother's 3rd Affirmation filed on 11th December 2017, and the Affirmation of her helper ("the Mother's helper") filed on 6th November 2017.

It was submitted that as this is an appeal involving the welfare of a minor child, fresh evidence, including pre-trial matters may be admitted if the welfare of the minor requires it : The Hong Kong Civil Procedure 2018 at 59/10/12, and Re S [1993] 1 FCR 789. I agree with her submission and allowed the Mother to admit fresh evidence even if it does not satisfy the Ladd v. Marshall conditions if the welfare of the child requires it.

Proposed grounds of appeal

The Mother sets out 11 proposed grounds of appeal in her draft Notice of Appeal and in essence the grounds are as follows:

wrong by extending, or failing to discharge, the Temporary care and control Order on ex-parte basis and/or without a full trial;

failed to consider the child's welfare, namely the Mother was the primary carer, the last Social Investigation Report dated 16th March 2017 reconfirmed the close bonding between the Mother and the child, the sudden removal from the primary carer with no staying access;

fail to consider the unsuitability of the Father as the primary carer;

fail to consider the following factors, namely occasionally crying at night time recently, crying were not associated with child abuse;

fail to consider the special features in the substance of the letter from the school counsellor Anson Lam ("Anson Lam") signed by the Executive director, Dr Mark L. Gandolfi of the St. John's Cathedral Counselling Service dated 25th October 2017 ("the Letter");

erred in placing excessive weight on neighbours' complaints and the alleged psychological harm;

erred in failing to give or give sufficient weight to the explanations given by the Mother about the child's crying;

wrong in ordering access between the Mother and the son in the presence of a third party and in refusing any staying access to the Mother;

wrong in failing to accept the Mother's non-molestation undertaking in lieu of the Injunction Order;

wrong in failing to discharge the Injunction Order; and

wrong in making the Injunction Order restraining the Mother which leads to a total suspension of communication between the Mother and the child.

Ms. Yip in her submission summarised the 11 grounds of the intended appeal into the following 4 main grounds :

erred in giving undue weight to the unreliable evidence adduced by the Father, in particular, the evidence of the Father, and the Letter (Grounds 4, 5 and 6);

failed to give due consideration to the undesirable effect of the Injunction Order, the Temporary care and control Order and the Temporary Access Order on the welfare of the child (Grounds 1, 2, 3, 8 and 11);

failed to give weight or give sufficient weight to the explanations made and evidence filed by the Mother (Grounds 7 and 10); and

failed to accept the Mother's undertaking in lieu of Injunction Order (Ground 9).

Applicable Legal Principle

Section 63A(2) of the District Court Ordinance provides that leave to appeal shall not be granted unless the intended appeal has a reasonable prospect of success or that there is some other reason in the interests of justice that the appeal should be heard.

The relevant test of whether an appeal has a reasonable prospect of success is whether the applicant for leave can show that the applicant has an arguable case with reasonable chance of success on appeal. A reasonable prospect of success therefore means an appeal with prospects that are more than "fanciful" but which do not need to be shown to be "probable": *SMSE v KL* [2009] 4 HKLRD 125; *KNM v HTF*, HCMP 288/2011.

The Mother's appeal is directed to the Orders made in the exercise of my discretion. It is trite to say that where the court below exercised a discretion, the appellant court would only intervene when it considered that the judge below had exceeded the generous ambit within which the judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the appellant court preferred a solution which the judge had not chosen (See: *G v G* [1985] 2 All ER 225; *RK v YS*, HCMP 1969/2012 (date of judgment: 1 November 2012)).

Discussion

Error in giving undue weight to unreliable evidence (D1 in her submission)

Ms. Yip complained that I had placed undue weight on the Letter and the Father's account of what the child allegedly told him when the reliability and objectivity of both the Letter and the Father's account were in issue, and excessive weight on the evidence of the neighbour's complaints.

For easy discussion, I shall deal with the evidence of the neighbour's complaints first. Ms. Yip's complaints are as follows :

the evidence was inadmissible as there was no identification of the informant;

the evidence was double hearsay;

the evidence at most is that the child was sometimes crying in the evening;

no evidence that the child was crying for over an hour and was crying as late as between 2 a.m. and 3 a.m.;

the one and the only marked complaint received by the management office was a noise complaint made on 9th October 2017 at about 10 p.m.;

the unknown identity's complaint must be considered and balance against the Mother's evidence.

In my reason for ruling, I stated that I have no hesitation to find that the child had been crying at home and those incidents were so disturbing that an unknown third party made complaint and provided a tape-recording of the crying of the child which subsequently caused the school and the school counsellor's concern and looked into the matter.

I further stated that I am of the view that the persistent crying of the child during night time, at which time he should have gone to bed, is related to the child having a bad quality of sleep and as a result affected the child's physical wellbeing.

Mr. Leung, counsel for the Mother during the hearing on 26th October 2017 had confirmed with me that it was not disputed that there is a tape recording and the recording recorded the crying of the child (see bundle p.2189).

It was also confirmed by Mr. Leung during the hearing that in the draft 2nd Affirmation of the Mother, it was not disputed that the child had been crying, and it was only the reason given by the Mother and the Father that were different as to the cause of the crying of the child (see bundle p.2189).

It was also confirmed by Mr. Leung during the hearing that the crying of the child was so severe that it disturbed the neighbour, and the neighbour's complaint went to the school of the child and the school looked into the matter.

As revealed in my reason for ruling, I had taken those undisputed facts from the neighbour's complaint and the neighbour's complaint was the immediate cause that triggered the school's and the school counsellor's concern and as a result they contacted the Father and the Mother and looked into the matter.

Therefore, it is not correct to say that all the evidence was inadmissible simply because there was no identification of the informant.

In my reason for ruling, I had stated that the child had revealed some facts to the school counsellor when the school counsellor looked into the matter and discussed with the child..... those information that the petitioner received from the child was consistent with the information the school counsellor had received from the child in terms of the treatment from the respondent to the child, and it is the treatment given by the Mother to the child that was my main concern and I cannot see that I had placed excessive weight on the evidence of the neighbour's complaints as my focus was the treatment given by the Mother to the child.

Ms. Yip also complained that there was no evidence at all that the child was crying for over an hour and neither was there evidence that the child was crying as late as between 2a.m. and 3a.m. However, subsequent evidence from the Mother and the Mother's helper revealed that there were occasions that the child cried over an hour though may not be as late as between 2a.m and 3a.m.. However, in my reason for ruling, my concern was not the time between 2a.m. and 3 a.m. but it was the time that the child should have gone to bed instead.

As to whether it is wrong to place weight on the Letter, the following are the complaints :

the Letter was expressed to have been released to the Father only;

Neither Anson Lam nor Dr Gandolfi, but the Father alone, assumed responsibility to the contents of the Letter;

The Letter expressly stated that it is "not an assessment nor a complete and thorough account of the child's statement at school and in counselling";

No clarification with the Mother was sought before the Letter was issued;

There was private communication between Anson Lam and the Father;

Wrong in considering the Letter was somehow corroborative of the child's complaints to the Father, the contents of the Letter was no more than the Father's own evidence given through the mouth of Anson Lam;

Wrong to place weight on matters which a child is unlikely or unwilling to elaborate;

Unsafe and wrong to accept the contents of the Letter as an accurate complaint of the child of his present condition; and

The Letter is at best a selective summary of what the child said to Anson Lam during counselling sessions, and it is not evidence that what the child said was true, accurate, or complete.

Paragraph 2 of the Letter stated that the Letter was a summary of counselling sessions the child had had with his school counsellor at school and at St. John's Cathedral Counselling Service (see bundle p.2426).

In my reason for ruling, I stated that the school counsellor, after having conversation with the child, came to know that the child had related a number of facts which caused concern of the school counsellor. For example, the respondent made the child sleep on the sofa throughout the night with no air-conditioning or fan. The respondent asked the child to pull his ears and stand for hours, that normally happened the night before his visitation with the petitioner. It was also reported that the child had frequently cried for over one hour nearly every night.

I further stated that for whatever reason as to why the child was punished, the petitioner and the respondent had different version, but more importantly, my focus is that in fact what the respondent had done to the child resulted in the child's physical and psychological condition being affected seriously.

Paragraph 3 of the Letter stated that the child commenced counselling at school from February 2016 until now and the child started counselling at St. John's Cathedral Counselling Service from July 2016 until now. The child has been complaining that he was very sleepy at school and could not concentrate and focus with his lessons as a primary reason for commencement of counselling.

Paragraph 5 of the Letter stated that on 7th September 2017, the child recalled that the Mother had locked her bedroom door, the child's bedroom door and helper's room door after he came back from the Father's house from visitation on that Sunday, and the child reported the Mother made him sleep on the sofa throughout the night with no air conditioner or a fan. The child reported he felt very hot and he could not sleep well. It was unclear how often and long this particular event occurred.

Paragraph 6 of the Letter stated that on 14th September 2017, the child also shared in counselling that the Mother asked him to pull his ears and stand for hours that normally happened the night before his visitation with the Father.....the child reported he had frequently cried for over one hour nearly every night.

The last paragraph of the Letter stated that the Letter was not an assessment nor a complete and thorough account of the child's statements at school and in counselling.

I accepted that the contents of the Letter is at best a selective summary of what the child said to Anson Lam during counselling sessions, and that was why in my reason for ruling, I stated that my focus was on what the Mother had done to the child and my conclusion in my reason for ruling was that what the Mother had done to the child resulted in the child's physical and psychological condition being affected seriously.

Although the Letter is at best a selective summary of what the child said to Anson Lam during counselling sessions, but in various social investigation reports, Anson Lam had also related some of her comments to the social work officer, therefore the contents of the Letter should not be treated as a single piece of information, instead it should be read with the social investigation reports.

In gist, the Letter reported that there was an incident when the child was made to sleep at the sofa and an incident when the child was made to pull his ears and the child frequently cried for over one hour nearly every night.

In the Mother's draft 2nd Affirmation which was exhibited in the Affidavit of her solicitors Ms. Anne Hui dated 25th October 2017 to be used on the Return Date Hearing and was subsequently affirmed on 6th November 2017, she stated that at paragraph 15 (paragraph 21 of the affirmed version) that her approach was not to entertain the child's unreasonable requests, but to allow time and space for the child to reflect when he has thrown a tantrum or done something wrong. She usually let the child cry until he became tired and stopped crying, and she believed that this was effective in teaching the child that he should be responsible for his own emotions and the importance of learning how to control it properly.

At paragraph 17 (paragraph 19 of the affirmed version), she stated that at present, the child cried around 2 or 3 times a week, most of them did not last for more than 30 minutes, and she did not deny that there are occasions when he cries for as much as an hour. He usually cried under the following three situations (a) when he faced pressure from homework, tests or exams; (b) when he wants to ask for things like candies; and (c) after coming back from access with the Father, staying access in particular.

Therefore, based on the Mother's admission, it was only the extent and the frequency of the crying that was in issue. In addition, there was also an issue to be determined as to the reason why the child cried.

At paragraph 24 (paragraph 27 of the affirmed version), she stated that she had asked him for not more than 4 times within this year, to stand and hold his ears with his hands, to think and reflect on his acts. She denied having asked the child to kneel on the floor. In her affirmed version, she further added that there was only one time (i.e. the incident on 13th September 2017) when the child held his ears for a sufficiently long time for the domestic helper to notice it.

Again, according to the Mother's admission, she did not deny that she asked the child to hold his ears and stand, and it was only the extent and the frequency of this type of incident that was in issue. In addition, there was also an issue to be determined as to the reason why the child was punished.

At paragraph 25 (paragraph 29 of the affirmed version), she stated that the child threw a tantrum again, and kept opening and closing her bedroom room. Therefore, she asked the child to calm down and reflect in the living room himself, and locked her bedroom door to prevent the child from producing noise from opening or closing the door. She specifically asked the domestic helper to keep an eye on the child from the open kitchen to ensure that he would be fine.

In her affirmed version, she further added that she made no noticeable response to his crying because he was supposed to calm down and reflect.....Once the child fell asleep on the couch cushion which he put on the floor, she carried him to his bed.

She further explained that as she was also concerned about the child's condition, she came out from the bedroom every 10 to 15 minutes to check if the child was alright, and the reason why sometimes she switched off the air conditioner was that the child has a weak immune system and she did not want him to catch a cold. Therefore, she did not allow the child to turn it on again when the room temperature remained fine, and she never banned the child from using a fan.

At paragraph 28 (paragraph 37 of the affirmed version), she stated that the couch in the living room was placed next to the windows. Sometimes she and the child would rest on the couch and looked at the sky before their sleep. The child loved lying on the couch very much, and often wanted to sleep on the couch instead of returning to his own bed. Sometimes she had to urge the child to go sleep properly on his bed.

In her affirmed version, she further added that the child love to pull the couch cushion onto the floor and lie or sleep there. Sometimes she had to urge the child to sleep properly on his bed.

Again, according to the Mother's admission, she did not deny that what had been reported did not take place, and it was only the extent of the treatment of the child on that occasion and also the reason why the child was treated in that way which was in issue.

Going back to the complaints made by Ms. Yip, namely the Letter was expressed to have been released to the Father only, neither Anson Lam nor Dr Gandolfi assumed responsibility to the contents of the Letter, no clarification with the Mother was sought before the Letter was issued and there was private communication between Anson Lam and the Father, my view is that these complaints were relevant as to whether Anson Lam or Dr Gandolfi were biased and deliberately not reporting accurately what the child had conveyed during the counselling sessions.

Regarding this case, up to the present, there were already 3 social investigation reports that had been called for. Of these 3 social investigation reports, the social work officer had gathered collateral information from Anson Lam in 2 of the reports. There have never been any complaints against Anson Lam that she was biased and took sides. In those reports, I find that Anson Lam was neutral, and I do not see there is any reason why Anson Lam would deliberately report incorrectly of the facts related to her during the counselling sessions.

In any event, after comparing the explanations of the Mother in her 2nd Affirmation and the contents of the Letter, I find that the only issue regarding the Letter was whether the contents of the Letter was an accurate complaint by the child of his present condition. This involves whether the child had exaggerated the way the Mother treated him.

Ms. Yip submitted that it was very strange that I would place weight on matters which a child is unlikely or unwilling to elaborate, such as the child's time sense, which is bound to be inaccurate; and such as a child's natural tendency to white-wash his own "wrongdoings".

The Letter was a summary of counselling sessions the child had had with his school counsellor at school. The child just reported what treatment he had received from the Mother and when it happened. He did not explain the reason why he received those treatments. I do not find that there was any need for the child to white-wash his own "wrongdoings".

Further, the Mother stated in her 2nd Affirmation that one of the situations that the child usually cried was after coming back from access with the Father, staying access in particular, therefore, I am of the view that when the child recalled that the Mother had locked her bedroom door, the child's bedroom door and helper's room door after the child came back from the Father's house from visitation on that Sunday, the Mother made him sleep on the sofa, the child had a good collection of the event because the child should be able to recall by linking up the staying access which was familiar to him, and I see no reason why the child needed to specifically related to his access with the Father unless that was what he remembered.

According to paragraph 17 of the Father's 6th Affirmation, he stated that on 20th August 2017 (Sunday), the child told him that he had previously been punished by the Mother by leaving him in the living room alone whilst the mother locked her bedroom door and ignored him. The domestic helper also stayed in the kitchen and ignored him. The child recalled that he was not allowed to switch on the fan and the air-conditioner when he was in the living room, and he felt very hot and uncomfortable. Afterwards, he started to cry but nobody responded to him. He continued to cry until he was too tired and fell asleep on the floor. The child could not recall when it happened, but he recalled that it happened on a Sunday after he had been out with the Father.

The Father alleged that that was what the child told him. I find that the Father reported accurately what the child told him. Firstly, it was admitted by the Mother that she usually let the child cry until he became tired and stopped crying.

Secondly, she admitted that she specifically asked the domestic helper to keep an eye on the child from the open kitchen and that the child was not allowed to switch on the air-conditioner when he was in the living room.

The Mother said that she came out from the bedroom every 10 to 15 minutes to check if the child was alright. The Father's version was that the child continued to cry until he was too tired and fell asleep on the floor. The Mother admitted in her affirmed version that once the child fell asleep on the couch cushion which he put on the floor, she carried him to his bed.

About the aforesaid incident, I am of the view that there was not much dispute on the Mother on the course of the incident. The difference between the Father and the Mother was about the correctness of the complaint made by the Father i.e. the child is punished for spending time with the Father which the Mother denied.

Another incident mentioned in the Letter was that the Mother asked the child to pull his ears and stand for hours that normally happened the night before his visitation with the Father.

At paragraph 16 of the 6th affirmation of the Father, the Father stated that on 2nd August 2017, during his access, the child told him that he was punished by the Mother who ordered him to hold his ears. He asked the child for the reason as to why he was punished but he did not answer. He then asked him if this had happened before. The child said it had happened once before and he was punished to hold his ears until dawn, but he did not say when it happened.....he verily believed that the real intention of the Mother was to punish the Father (and not the child) by making the child exhausted so he could not spend any meaningful time with him.

At paragraph 24 of the Mother's draft 2nd Affirmation (paragraph 27 of her affirmed version), the Mother replied to the allegations made by the Father.

According to the Father's version at paragraph 16 of his 6th Affirmation, on 2nd August 2017, he was only aware that the child had been punished twice by pulling ears. According to the Mother's draft 2nd Affirmation, up to 25th October 2017, she had asked the child for not more than 4 times within this year, to stand and hold his ears.

In the Letter, the key point that the child conveyed was the mother asked him to pull his ears and stands for hours that normally happened the night before his visitation with his Father.

If the Father wanted his own evidence given through the mouth of Anson Lam, the Father could also state that the child told him that it happened the night before the child visitation with the Father, however he gave an account that the child did not say when it had happened.

There was no evidence before me that could convince me that Anson Lam was conspiring with the Father to manipulate the child to say that those incidents normally happened the night before his visitation with the Father.

At paragraph 47 of the Mother's affirmed version, she gave explanations as to why she punished the child on 13th September 2017, but that explanation had nothing to do with the other incidents when the child explained that the punishment happened the night before his visitation with the Father.

In my reason for ruling, I stated that those information that the petitioner received from the child was consistent with the information the school counsellor had received from the child in terms of the treatment from the respondent to the child. I see no reason why the Letter could not be treated as a summary of the child's account of the treatment and incidents that the child had experienced.

Ms. Yip also complained that I failed to consider or sufficiently consider the absence of certain evidence which casts doubt on the Father's case, namely :

no third party has made any sworn evidence to corroborate his allegation of child abuse;

no evidence that the child had ever expressed to anyone that he does not want to live with the Mother;

no evidence of any prior complaints to the parents in relations to the child's condition;

no evidence showing that the child suffered from any abuse, psychological harm or illnesses.

Ms. Yip also submitted that I had placed excessive weight on the alleged "psychological harm", that is (i) "swallowing" of the coloured pencils, and (ii) taking and eating snacks from school mates.

Ms. Yip further submitted that one of the flagrant error is the complete absence of evidence supporting that the child is exposed to real risk of physical or psychological damage.

The above complaints will be considered together with the grounds of failing to give weight to the Mother's evidence and failing to consider the welfare of the child.

Failing to give weight to the Mother's evidence (D3 in her submission)

For easy discussion, I shall discuss this grounds first before I deal with the ground under the topic of failing to consider the welfare of the child.

It was submitted that the Mother had given reasonable and credible explanations for the child's crying, which included (i) school pressure, (ii) throwing a tantrum after failing to get what he wants, or (iii) after access with the Father.

All along, the Mother 's case was that the child had been suffering from food allergy, allergic rhinitis, low immune system, very serious asthma and eczema condition since he was small and his condition was unstable and could deteriorate at any time.

With this reason together with other complaints against the Father, she had been from time to time objecting the Father to have staying access with the child (see paragraph 53 of Social Investigation Report dated 29th February 2016), because she said that the Father had no experience in observing and monitoring the child's airflow during mid-nights or early mornings, which were the most critical time of the child asthmatic attack.

Both the Father's and the Mother's home were equipped with air-purifiers because of the child's special need.

I am surprised to note that while the Mother always stressed the point during various CDR hearing that the child had very serious asthma conditions and had special needs, nevertheless, she will let the child cry until he became tired and stopped crying. She should be aware that exhausting the child should not be good to the child's asthma condition.

Of the incident that the child was punished by the Mother by leaving him in the living room alone, the Mother said that the reason why sometimes she switched off the air conditioner was that the child has a weak immune system and she did not want him to catch a cold. Therefore, she did not allow the child to turn it on again when the room temperature remained fine.

My view is that to adjust the air conditioning to the room temperature so that there will be good ventilation, is totally different from switching it off completely by the Mother. The Mother should also be aware that letting the child cry non stop until he felt tired and stopped crying is not good to the child's asthma condition.

I am also surprised to note that the Mother asked the child to do self-reflection alone in the living room and she locked her bedroom door just to prevent the child from producing noise from opening or closing the door but she could make no noticeable response to his crying until the child was too tired and fell asleep on floor.

My view is that the Mother being so concerned about the child's asthma condition should not put the child in that condition. There was occasion that the Mother would ask the child to retire to his own bedroom, and I see no reason why the child could not retire to his own bedroom to do self-reflection when it was already his bed time.

In the Letter, it was also reported that on 19th October 2017, the child shared in counselling that no matter what he did, he believed that his mother was not pleased with his behaviour. He reported that his Mother frequently scolded him that caused him to cry. He reported that he frequently cried for over one hour nearly every night.

In the social investigation report dated 18th August 2016 at paragraph 12, as observed by the social work officer in the access, the social work officer reported that the child walked slowly to the Father who was kneeling down and opening his arms to greet the child. Facing the Father and walking towards him slowly, the child peeped backwards and whispered "mommy knows". The Father tried to comfort the child and said that it was okay and hugged the child.

At paragraph 18 of the said social investigation report, the child had shared with Anson that the Mother appeared unhappy when he talked with the Father over phone at home. The child therefore did not talk much with the Father. The child, when staying in the Father's place, felt stressful to call the Mother as requested by the Mother, because he was afraid that he would forget to call and the Mother would be unhappy. The Mother also asked the child how he had spent his time with the Father in each access. The child had also shared with Anson that the Mother had asked the child not to say "I love you daddy" or to hug daddy.

Apart from the Letter, the child had previously made complaints to Anson Lam which I considered as signs of manipulation and alienation of the child by the Mother.

At paragraph 17 and 20 of the said social investigation report, Anson reported that the child's emotion grew more stable after the child had regular access with the Father. Anson further observed that the child exhibited hyper behaviours with emotional ups and downs since end of June 2016. The child had also avoided telling further if he wanted to meet his daddy during the counselling sessions thereafter.

At paragraph 26 of the said social investigation report, the social work officer stated that as observed, the child looked stressed when the Father met the child and tried to hug him in the presence of the Mother at the start of the access dated 17th June 2016 and 1st July 2016, but enjoyed the time with the Father at the Father's home.

I am of the view that prior to the child's complaints in the Letter, there were history of manipulating and alienation of the child by the Mother.

As reported in the social investigation report dated 29th February 2016, since the child started studying in 2014, the child would have early dinner and bed time. At paragraph 21 of the said report, it was stated that the child usually woke up at 6a.m., had breakfast prepared by the Mother, and took the school bus downstairs at around 7a.m. The Father also escorted the child to school on Mondays and Wednesdays morning at 7a.m., and later also Fridays morning. The child had dinner at around 5p.m. and went to bed at around 7p.m.

At paragraph 9 of the social investigation report dated 16th March 2017, it was stated that the child maintained a structure daily routine. He went to school by school bus at around 7:05a.m. On Monday, Tuesday and Friday, he returned home by 3:45p.m. and then attended interest classes and arrived home at 5:45p.m. On Wednesday and Thursday, he returned home by school bus at around 5:30p.m. the child would have dinner at around 6:30p.m. and prepare for bedtime at 7:30p.m.

By reason of the child's routine, previously when discussing the staying access with the Father and the Mother at CDR hearings, the Mother insisted on the Father returning the child early for his bedtime.

The Mother had also from time to time objected to the granting of morning access to the Father, namely the Father seeing the child to school instead of the child taking the school bus, and also objecting to the staying access to the Father.

At paragraph 53 of the social investigation report dated 29th February 2016, it was stated that the Mother viewed that the Father always fell deep asleep at night and had no hands on experience in observing and monitoring the child's airflow during mid-nights or early mornings, which were the most critical time of the child's asthmatic attack. She had great concern on his capability in taking care of the child overnight. She therefore strongly opposed to overnight staying access being granted to the Father until the child reaching eight or nine years old.

At paragraph 15 and 16 of the social investigation report dated 18th August 2016, it was stated that the Father had raised concern on the punctuality of the morning access. He reported that the Mother was always 10 to 20 minutes late in escorting the child to meet him at the main entrance

of the housing estate. He worried that with such delay, the traffic condition would become busy that the child might be late for school but the Mother's explanation was that the child was a light sleeper and did not sleep well at night when he suffered from running nose. It took much time to wake the child up and prepare him to meet the Father on time. If that was the case, the child would have missed the school bus, if it was not the Father seeing the child to school.

In the said report, the Mother also voiced out her concern on the child's health condition arising from the staying access, and doubted if it was necessary to continue the morning access during the summer holidays when the child could not sleep more in those mornings, and she had asked this court to suspend the morning access during summer vacation at CDR hearing which was rejected by this court.

At paragraph 24 of the said report, the Mother had reservation on the Father's child care ability, especially when the child suffered from on and off health problems after some of the staying access. Furthermore, she doubted if it was desirable to continue the morning access as the child had to return his storybooks to the library and had his silent reading time in the morning.

At paragraph 11 of the social investigation report dated 16th March 2017, the Father recalled that in September and October 2016, the child refused to follow him or take the taxi to school. In order not to stress the child, the Father therefore only met him for a little while and sent him to the school bus during the morning access. Besides, during the day or staying access in October, the child also had a bit of a struggle with him. The Father worried that the child was under emotional stress, so the Father requested Anson to provide additional counselling session for the child. After the last court hearing, the access went smooth in general.

It was not surprised to note that at paragraph 20 of the said report that the Father worried if alienation existed in view of the child's changing attitude and behaviours during access especially in September and October 2016, and the Mother had impressed the Court at various CRD hearings that the Mother used every excuse to ask the Court to suspend the morning access on Mondays, Wednesdays and Fridays.

At paragraph 7(b) of the Mother's helper's affirmation, she stated in recent months until 20th October 2017, it was almost a routine for the Father to put the child to the school bus soon after they met on Monday, Wednesday and Friday; and the child did not cry. It was usually a school holiday when the child refused to leave with his Father in the morning and cried. The Father would then scold him and threaten to call the police.

While the morning access runs smoothly during school days, I am puzzled as to why the morning access encountered difficulties on school holidays. In the social investigation report dated 16th March 2017, at paragraph 22, the Mother viewed that she had compromised with the visiting and staying access granted to the Father. She disagreed with the Father's allegation that she intentionally deprived him from accessing the child and explained that the child suffered from ill health.

I find it strange that there was resistant from the child in the morning access and some of the day or staying access, on the contrary it was being observed that the child interacted with the Father naturally as reported in various social investigation reports.

According to the first and the second social investigation reports, it was reported that the child maintained a close relationship with the Father. Even in the third report, it concluded that the child related satisfactorily with the Father.

The Mother's explanation in her 2nd Affirmation was that at paragraph 33, she stated that the night before the scheduled morning access on 18th August 2017 (Friday), the child had a nosebleed and could not sleep well. The child was therefore very reluctant to get out of the bed for the Friday morning access. She did try to persuade the child to go down but the child told her that he wanted to sleep more. Failing to convince the child, she asked him to at least tell the Father of his own feeling, hoping the Father would understand. The child went down but he quickly came back saying he was afraid of speaking to the Father. She encouraged the child to go down again. When the child finally came back home after running up and down for 3 times.

The child was very reluctant to get out of bed initially and wanted to sleep more but somehow he was persuaded to get out of bed and even ran up and down for 3 times just to tell the Father that he did not want to go out and the Mother had already prepared to record the phone conversation when the Father called.

I agree with the Father's observation as stated in his 7th Affirmation at paragraph 21 that it was quite apparent that the Mother had no surprise that the child would run back home after talking to the Father and everything was being planned by her, including having recording facilities ready. If she was genuinely concerned about the child tiredness as alleged, she would not let the child run up and down so many times just for the purpose of informing the Father of the child's wishes from the child's own mouth. My view is that if the child really refused to get out of bed, why would the child be bothered to get out of bed and run up and down so many times.

I am also surprised to note that in the transcripts provided by the Mother under exhibit EW3-8, the Mother was so concerned that the child should not leave the building lobby to meet the Father, and it did not appear to me that the reason why the child did not go out with the Father was the reason that the Mother stated in her affirmation. The Mother appears to make the child follow her instruction in order to deny the Father's access, and not even allow the child to leave the lobby to meet the Father but to stay inside the building, and the Mother reminded the helper to make sure that the child did not run off.

The Father further explained at paragraph 22 of his affirmation that on 8th October 2017, the child told him that the Mother asked him to run back when the Father tried to pick him up. I am of the view that the Father's version is believable, and this incident is somehow similar to the one that was mentioned in the social investigation report dated 18th August 2016 at paragraph 12.

At paragraph 4 of the Mother's helper affirmation, she stated that about 2 to 3 times a week since the child's new school term began in August 2017, the child cried loudly like what was recorded, mostly while he was doing his homework. Typically, the child cried for a minute or two and took a break for about 5 to 10 minutes. Then, he cried again and took a break.....These cries and breaks could intermittently last for about 30 minutes to one hour until he stopped crying altogether.

According to the Mother's helper affirmation, it appeared to me that the Mother remained patient and talked softly even though the child was crying or at times screaming for her. Regarding the mid-September 2017 incident, the Mother ordered the child to stand and hold his ears but the child moved around, and the Mother asked the child to retire to bed eventually.

At paragraph 49 of the Mother's 2nd Affirmation, she tried to reason with the child, he cried and she believed that this was the reason why the child complained to Anson Lam on 19th October 2017. She further explained that the child did not know a lot of vocabularies and may not know a better word to substitute "scold".

The Mother's helper said that the Mother remained patient and talked softly even though the child was crying or at times screaming for her. The Mother also said that she reasoned with the child. Given the Mother had used patience in reasoning with the child, I fail to understand why the Mother could not reason and patiently talked softly to the child when the child threw a temper after the Father's access, and that the Mother will be punishing the child by leaving him in the living room alone to cry until he was exhausted and fell asleep on the floor.

The Father's case for the injunction is that the child had been crying and screaming uncontrollably for one to two hours every evening after 6:00p.m., and what had caused the cries of the child was believed to be related to the punishment by the Mother for the child in failing to reject the Father's access and/or return to the Mother residence earlier than the defined access time. The Father believes that the child was suffering from great emotional harm and he believes that measures must be carried out for the protection of the child without further delay.

In the 2nd and 3rd Affirmation of the Mother, she gave an account of various occasions and examples as to why the child cried. I accepted that there may be incidents that the child cried because of pressure from homework, tests or exams or other reasons like asking for candies, but even on those occasions I am concerned why the Mother was not able to respond to the child in order to comfort him and calm him down.

Nevertheless, my overall observation of the conduct of the Mother is that she was very concerned of the child's health and most of the time, she stressed that the child was suffering from bad health and used this as one of the grounds to oppose to the Father's access.

She insisted the child to lead a healthy life by eating and sleeping early, but on the other hand she can let the child cry and gave no response to him until he was exhausted and stopped crying, ignoring the risk of triggering the asthma attack.

The Mother's explanation in her 2nd and 3rd Affirmation to the incident reported in the Letter that the Mother locked her bedroom door, the child bedroom door and the helper's room door after the child came back from the Father's house and also the child was asked to pull his ears and stand for hours before his visitation with the Father, and the Mother frequently scolded the child that caused him to cry remained unsatisfactorily answered to me.

Having considered the allegations made by the Father in his 6th Affirmation at paragraphs 15 to 18, I am of the view that matters complained in the Letter was likely to be related to punishment to discourage the child from seeing the Father given the fact that there are signs of manipulating and alienation of the child by the Mother previously.

Failing to consider the welfare of the child (D2 in her submission)

It was submitted that the Mother had been the child's main carer since he was born, the Mother is the most suitable carer who possesses the necessary knowledge and skills to cope with the child's physical and psychological needs coupled with the complaints that the Father had a history of being violent at times and the Father's unavailability.

At paragraph 57 of the 1st social investigation report, it was stated that the child enjoyed an intimate relationship with the Mother and a close relationship with the Father, and related satisfactorily with the paternal grandmother, the child had been under emotional distress in face with the parents' relationship problem and marital breakup. His emotion had improved gradually with the Father's stable and predictable access since 10th January 2016.

At paragraph 54 of the said report, it was stated that the child loved both parents, wanted to stay with them. When asked if he wished to spend more time with the Father, the child nodded his head.

At paragraph 13 of the 2nd social investigation report, it stated that the child told the social work officer that he wanted to stay with the Mother, spent more time with his cousins, liked to have bus-ride, to play with his friends and did not want to stay in the Father's place. When the officer subsequently asked him to talk about his thoughts again, the child just laughed and said that he had forgotten already.

This was different from what the child told the officer that he missed the Father for a number of days, but not every day, and he liked to stay overnight in the Father's place for one night without explaining the reasons (see paragraph 26 of the said report).

At paragraphs 17 and 19 of the said report, Anson Lam reported that the child's emotion grew more stable after the child had regular access with the Father and opined that the child felt split loyalty as the child enjoyed his time with the Father while the child was also concerned with the Mother's feeling.

I am aware that the child had changed his stance when he was asked about his views and feelings, and the clinical psychologist opined in the psychological report that it was a sign suggestive of his strong insecurity when expressing himself.

Therefore, my view is that the observation by the social work officer in the 3rd social investigation report reflected the wishes of the child instead of what the child told us. At paragraph 28 of the said report, it concluded that as observed in the Father's flat, the child related spontaneously with the Father.

This is consistent with the last paragraph of the Letter which stated that the child reported that he love both of his parents and wants them to be friendly again but noted that they won't talk to each other. He felt very confused and it's very hard. He hoped the father could come back and so he didn't need to go out and the Mother would be happier.

Whereas I agree that the Mother is the main carer of the child and had a close bonding with the child, it was observed by the social work officer that the Father had made much effort to keep himself abreast of the child's condition, equipped himself with knowledge of the child's interested games, and got involved in the child's school work, and as observed the child related spontaneously with the Father. (see paragraph 28 of the 3rd social investigation report)

Since the Father is able to establish a serious issue to be tried and in my reason for ruling, I stated that based on all the evidence before me, there is a real risk that the best interests of the child, which included the physical and psychological wellbeing of the child and long-term relationship of the child with the Mother and the child with the Father, will be seriously affected if the court did not protect the child in the meantime by extending the Injunction Order that I have previously made, I am of the view that the balance of convenience lies in favour of extending the Injunction.

It was submitted that there was no evidence showing that the child suffered from any abuse, psychological or illness.

In the psychological report dated 7th April 2107, it was reported that both the Father and the Mother reported that the child had emotional or behavioural concerns previously, but not anymore at that moment. They both regarded the school counsellor's interventions being effective in helping the child.

Based on the comments I have made on the Mother's case, the continuous and accumulative impact of what the Mother had done to the child posed a real risk to the physical and psychological wellbeing of the child even though the recent incidents may not be classified as a child abuse.

The extent of the molestation in this case may not be sufficient to classify as child abuse case but may still be serious enough to warrant an injunction to be granted in order to protect the best interest of the child in the meantime.

The Father had exhibited a second letter from Anson Lam in his 7th Affirmation. Anson Lam reported that after the child moved in with the Father, she saw the child again on 31st October 2017, 7th November 2017 and 14th November 2017. She reported that the child was happy to be with the Father. He looked much more energetic and not sleepy and tired like before. He shared with Anson freely in the session. He used to hide and was very careful and reluctant to share on matters related to what the Mother taught him to say before. He felt easier to share whatever he likes now. The child missed the Mother but he was also happy to stay with the Father. He was happy that he can always play with his friends and the Father always plays and studies with him in the evening. He reported that he slept very well now and asked the counsellor to check with teachers if he had made some improvement as he said he was not sleepy anymore.

My view is that since I had called for a social welfare report and the psychological report 7 days before the pre-trial review hearing on 20th March 2018, the current interim arrangement of the child should not be disturbed at least pending the said reports, and I do not see that the welfare of the child was not considered and that the current arrangement deprived of any meaningful contact with the Mother.

Failing to accept the Mother's undertaking in lieu of Injunction (D4 in her submission)

The Mother opposed to the Temporary care and control Order and the Temporary Access Order, and since the extension of the Injunction Order will go hand in hand with the said 2 Orders, I do not see that it is appropriate to accept the Mother's undertaking when the Father is able to make out his case for Injunction.

Complaints on full and frank disclosure

It was submitted that the neighbour below the Mother's flat was the one who took the recordings, and said that the child usually cried and screamed for 3 to 4 nights a week instead of "every evening" as previously alleged by the Father and according to the neighbour's version, the child merely cried between 7p.m. and 9:30p.m. which the Father claimed was an "honest mistake" due to "miscommunication" and that it clearly showed that the Father breached his duty to give full and frank disclosure and/or in making proper inquiries before taking out his ex-parte application.

It was further submitted that the Father failed to make proper enquiry and/or to disclose to the Court at the Return Date Hearing that the child did not cry as frequent as the Father previously claimed and/or did not cry at all between 2a.m. and 3a.m. The Mother submitted that (i) the non-disclosure is unlikely to be innocent, and (ii) the non-disclosure related to material facts such that an injunction would not have been granted if the facts had been properly disclosed.

There was also complaint that the child ate a broken nib of a colour pencil instead and the Father failed to disclose this email to the Court.

Whether the child tried to swallow a pen was only a concern to me as to the whereabouts of the child at the time of the ex-parte application and also whether there was any urgency to the said ex-parte application.

It was submitted that the Father made mistakes as to both the frequency and the time of the child's cryings and that they were material facts which had a direct bearing on his ex-parte injunction application and that crying every day differed significantly from crying 3-4 times a week, and crying at 2-3am differed significantly from crying at 7-9:30pm.

In the 6th Affirmation of the Father, the Father exhibited the whatsapp messages exchanged between the Father and the neighbour in the exhibit marked GKLJ-6-3. In the message, the neighbour asked the Father as to whether he was aware that the child cried for 1-2 hours each evening.

As I have previously stated, when I discussed about the evidence value of the Letter, I did not rely on anything about the time and the frequency of the crying of the child as suggested by the neighbour.

I am also aware that the Father's and the Mother's version as to the frequency and the time of the child's cryings were different on the Return Date Hearing.

As shown in my reason for ruling, I was satisfied that even on the Mother's version, those crying happened when the child should have gone to bed, and that would be sufficient.

Exercise of discretion

The Mother's appeal is essentially directed to my ruling and order made in the exercise of my discretion. It is trite to say that where the court below exercised a discretion, the appellant court would only intervene when it considered that the judge below was in fact plainly wrong, and not merely because the appellant court preferred a solution which the judge had not chosen.

In *G v G (Minors : Custody Appeal)* [1985] 1 WLR 647, the English House of Lords authoritatively re-stated what Lord Fraser of Tullybelton pointed out in the exercise of jurisdiction involving the welfare of the children (at p651) that :

"The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed....there are often two or more possible directions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong." (my emphasis added)

The principle to be applied therefore is, he said (at p652), that :

“the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible” (my emphasis added).

Having considered the matters set out above, I am not satisfied that the Mother would have a reasonable prospect of success in all her proposed grounds of appeal described above.

There is no submission that there is “some other reasons” in the interests of justice that the appeal should be heard, and I also do not find that there is “some other reasons” that the appeal should be allowed to be heard.

Variation Summons

It was submitted that the Temporary care and control Order ought to be discharged forthwith so that the child can move back to live with the Mother and that in the alternative, the Mother submitted that in the interim period, care and control of the child should be shared by the parties in line with the Original Care Order or, at most, equally by the Mother and the Father.

Alternatively, and at a bare minimum, the Mother should be given staying access every Friday to Monday and half of all school holidays which exceed 4 days. The Mother also asks for telephone access for 20 minutes every day which is very reasonable and was previously enjoyed by the Father, and the requirement of the presence of a third party is unnecessary and unsupported by the evidence, given that the investigation panel has concluded the complaint of child abuse is not established.

Counsel for the Father, Ms. Irving submitted that what the Mother proposed amounted to almost exclusive care and control, save that the child sleeps at the Father’s place 4 night out of 7. The rest of the time the child would be with the Mother, giving the Father’s time with the child on a Tuesday and Wednesday after school, that is all, with no time at all on weekends and that this reflected how the Mother has always tried to marginalise the Father.

Ms. Irving further submitted that the present arrangement should not be changed when it is clearly to the child’s benefit, and the child is doing well under a new structure of care, and there is no basis to dismantle this and put him back into the situation he was in previously and that the access arrangements put in place on 26th October 2017 should be maintained until the full hearing of this matter.

It was submitted on behalf of the Father that he will agree to the Mother contacting the child by telephone on days when she does not have visiting access, the Mother to make calls to the child between 7:00pm-7:30pm for not more than 15 minutes.

My view is that the present arrangement should not be changed substantially at least pending the updated social investigation report and the psychological report which should be ready 7 days before the pre-trial review hearing on 20th March 2018.

Nevertheless, given the fact that the child told Anson Lam that he sleeps very well now and the Social Welfare Department had concluded that the recent incident is not a child abuse case, I see no reason why there is any need to continue to have a third party to be present when the Mother is having access with the child.

I am of the view that the access should also be relaxed as a result of the new development so that if it is a school holiday on Monday, the Mother could have staying access from Sunday to Monday 7:00pm.

Conclusion

Pending appeal or trial, the Temporary Access Order dated 26th October 2017 be varied as follows :

Presence of a third party during access be dispensed with;

The Mother do have interim defined access as follows :-

interim day access every Monday and Thursday from 4:00p.m. to 7:00p.m.; if it is a school, the Mother do collect the child from school for access and return him to the Father or his helper at the McDonald's at King Kwong Street ("KKS McDonalds") after access; if Thursday is not a school day, the pick-up place be changed to KKS McDonalds;

interim day access every Sunday from 9:00am-5:00p.m.; if Monday is a school holiday, then staying access from Sunday 9:00am to Monday 7:00pm;

telephone access for 15 minutes from 7:00pm to 7:30pm when the Mother does not have visiting or staying access.

Even in children matter, unsuccessful applications for leave to appeal are usually visited with costs orders. I would therefore order that:

The respondent Mother's summons filed on 9th November 2017 for leave to appeal be dismissed;

The respondent Mother do bear the petitioner Father's costs of the 2 Summons both dated 9th November 2017 to be taxed if not agreed, with certificate for counsel. This is a costs order nisi, to be made absolute within 14 days from today;

This order be drawn up by the petitioner Father for approval.

David CW Cheung

Deputy District Judge

Representation:

Ms. Frances Irving instructed by Haldanes for the Petitioner (Father)

Ms. Anita Yip SC leading Counsel with Counsel Ms. Karen Wong instructed by Messrs. Wong Hui & Co. for the Respondent (Mother)

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