

HONG KONG / JUDGMENT

K v. C

COURT

Family Court

DECIDED

9 October 2006

CASE / FILE NUMBER

FCMP173/2004

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bjbj FCMP 173 of 2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 173 OF 2004

BETWEEN K Applicant and C Respondent

Coram : Deputy District Judge Kot in Chambers Date of Hearing : 4 September 2006 to 7
September 2006 and 12 September 2006 Date of Handing Down of Judgment : 9 October 2006

J U D G M E N T

This is the parties contested application for custody of their daughter, A (the child) who was
borne on 12th February 2002.

Background

The Respondent (Father) is now 37 and works in a family business. The Applicant (Mother) is also 37 and is operating a studio. They met each other in August 2000 and started to have a relationship. By June 2001, the Mother was pregnant and both parties moved to live with the parents of the Respondent. In November 2001, the Mother moved to a serviced apartment and later lived with the Father in a rented flat. After the child was born, the parties stayed for 9 months and then moved to live at another flat provided by the parents of the Father. The child started nursery school in February 2004. The Mother and the child moved out in May 2004. Ever since then, the Father and his parents enjoyed generous access to the child, but such was denied in October 2004. On 12 November 2004, the Mother commenced these proceedings seeking custody, care and control as well as maintenance for the child. The Father, by a summons dated 15 December 2004, asked for joint custody with care and control to the Mother. By consent, both summonses were adjourned sine die with liberty to restore on 6 January 2005. In April 2005, the

Mother had arranged for the child to study at another kindergarten. On 19 April 2005, by another summons, the Father asked for joint custody with care and control to him and for the child to be restored to previous kindergarten. Social Investigation Report was being called for which was filed with court on 22 July 2005. The Father started to pay \$9400 per month as maintenance for the child since September 2005. By consent, access arrangement was agreed on 17 January 2006 (Access Order) with terms as per recommendations in the Social Investigation Report. By August 2006, the child started schooling at Canadian International School (CNIS). At this trial, it is agreed that: Care and control of the child be to the Mother; Access Order to continue except with some fine tuning as to time for routine access and how school holidays are to be shared; Maintenance order to be made in accordance with the terms of the Consent Summons dated 6 September 2006; A declaration that the child is a habitual resident of Hong Kong; An order under Section 3(1)(d) of the Guardianship of Minors Ordinance that the Father shall have all the rights and authority that the law would allow him if the child was legitimate; An undertaking by the Mother that she would consult the Father on all major decisions concerning the child. The only issue remains to be decided by this court is whether joint custody should be considered in this case.

The Mother's Case The Mother is asking for sole custody be granted to her since she is not able to communicate with the Father and they cannot agree on anything. Even though the Mother accepts that they can agree on sending the child to the first kindergarten but after their separation, experience tells that they have to resort to the assistance of their respective lawyers to get things agreed, including question of access. After the Access Order was made, both parties just followed the order without any communication. They can never communicate effectively and the Father could not discuss with the Mother calmly or attempt to agree without extreme measure. And the Father was seeking to exercise control over the child's life and with his parents, were always interfering in the Mother's daily care of the child. They failed to see the importance of maintaining a regular life pattern for the child which is something the Mother striving hard to achieve. The Mother cited examples of this include the Father taking the child out of the first kindergarten before school finished, taking child out for access at anytime convenient to them in ignorance of the child's eating or sleeping time, late in pick up and return of the child at access. All these displayed the Father's lack of consideration that made cooperation between them fraught with difficulties. With joint custody, the Mother worried that this may give the Father and his parents a licence to interfere. Although the Mother accepts that there had been no interference since January 2006, she feared that this is just because of the pending court case since this is not the natural behaviour and character of the Father. The Mother also worried that with joint custody, she can't raise the child in an uninterrupted way if the Father maintained his unreasonable behaviour even in the discharge of his duty as a father. The Father is not prepared to cooperate. This can be demonstrated in an incident occurred in June 2005 when the Mother requested the Father to sign on the child's application for renewal of her passport. The Father went up to the relevant office but insisted will only sign on the application if he's allowed to pick up the passport. Upon denied such request, the Father just left without signing. The Father only went up to sign after some negotiations between the lawyers and raising the issue of additional summer access in return (passport incident). The Mother said that the Father's insistence of depositing the monthly maintenance for the child into a joint account as opposed to her request

of her sole account also showed that he wanted everything his way and never prepared to cooperate. And when his wish was denied, he just ignored the needs of the child and paid nothing till September 2005. The Mother accepts that the Father should be consulted on major decisions but not to the extent as to the appointment of a new maid which should be within her sole decision as the parent with care and control. She can foresee that there ll be argument as to what are major decisions. And as for her undertaking to consult him, she meant she will let the Father know. She also agreed that she had not consulted the Father when she arranged for the child to receive a dental treatment in August 2005 which involved general anaesthetic to be administered. But the treatment was only done after she had obtained expert advice both in Hong Kong and in Canada. She is satisfied that this has to be done and an anaesthetist was present during the treatment. The Mother stressed that being a mother, she won t do anything bad for the child and since she and the Father were not on speaking terms then, she had not consulted him of this; otherwise she surely would. The Mother explained her move to withdraw the child from the first kindergarten to the new kindergarten was because of the fact that the first one only offered pre-nursery and nursery education whilst later one offered more option, both local and international schools. Moreover, in view of the Father s sporadic contributions financially, she was worried that should the Father decided to stop making payment for the school fees, she would not be able to afford. And she only told the Father information of the new school after some time, because she was confused and afraid he ll stop her from so doing by applying to the court. As to the change to CNIS, since the child s application had already been running late and was secured with the assistance of her client, she could not consult the Father beforehand but had to act fast. She also admitted entrusting the child to a close friend instead of leaving the child with the Father when she went on a trip in September 2004. This was because she was afraid that the Father would keep the child and would not let her have the child back on her return from the trip. In fact, when the Father discovered this, he had made a scene with her friend at her place and eventually took the child away for 2 days. This proved her worry was not unfounded. As a result of this incident, she stopped all access including telephone contact but she didn t intend this to be long but just want to shield the child from disruption before she got her lawyer s advice. In February 2005, when she again went on a trip, even though she had not informed the Father of it , she had arranged for the child to stay with the Father for 3 days so as to enable them to spend the Chinese New Year and the child s birthday together. The Father s Case The Father is asking for joint custody of the child. He said he was prepared to set aside differences and to cooperate with the Mother as a responsible parent. In fact, after the Access Order was made, he is able to discuss with the Mother about any changes in the child s arrangement for access and there had been hardly any disagreement since then. With sole custody granted to the Mother, it is the Father s worry that the Mother will continue with her contemptuous attitude and approach towards him as the child s father and continued with her campaign to ostracize him from properly playing a vital role in the child s life as demonstrated by the Mother s behaviour in the past. He had all along been very involved in the child s bring up and it is important for the child to have involvement and close interaction with both parents in her upbringing. The Father commented that the Mother thought that she had complete and absolute right over the child and gives no consideration to his role as a father. She had never consulted him or let him know of any

major decisions made for the child. The dental procedure, the change of school time and again, the change of maid, taking the child out of jurisdiction without informing him or any undertaking given and leaving the child with her friend instead of him when she s away abroad, were incidents that showed the high-handed approach of the Mother. As for the dental procedure, he is not objectionable to the treatment but to the use of anaesthesia instead. Should the Mother consult him beforehand, he ll slow her down and seek other expert opinion. He s not happy about the Mother s failure to consult and to share the expert advice. He did not accept the use of anaesthesia was a routine procedure in dental treatment and that s what made him alarmed. He also denied ever causing any interference to the Mother s care of the child. All allegations made by the Mother concerning interference were at times when their relationship was at a time of upheaval. Since he was being denied access, he had to go to the first kindergarten to see the child and had lunch with her. That s why he took her out of school before school ended and this only occurred twice. As for his parents, they had no contact with the Mother since October 2004 and would not cause any interference to her. The refusal of his offer of maintenance to be paid into a joint account by the Mother upset him but there continued to be exchange of correspondence between the lawyers on this topic. Eventually on 8 April 2005, it s been agreed at a joint meeting that he would deposit the money into the Mother s sole account. Unfortunately, few days thereafter he discovered the Mother had unilaterally withdrawn the child from the first kindergarten and caused him to fight for care and control of the child, so he had not made any payment according to the agreement. The Recommendations of the Social Welfare Officer Ms. Wong, the Social Welfare Officer was involved in this case since early May 2005 and has prepared a Social Investigation Report (the Report) which is dated 22 July 2005. She had not met the parties after the submission of the Report and was not aware of any recent development in this case. In preparing the Report, she had obtained information from the Father and the Mother, the paternal grandparents, the maid and the teachers of both kindergartens. She had also observed each parent with the child and conducted home visits. Miss Wong has come to the conclusion that both parents loved the child deeply and were very involved. But during the investigation, she found the parents were difficult in having direct communication and to reach agreement. Judging from this, she found joint custody is not practicable in this case so recommended sole custody to the Mother. Having said so, she also agreed in her evidence that if the parents had improvement in their relationship and can reach agreement, she would be more apt to recommend joint custody. The Law Custody orders are made under the provisions of Section 10 of the Guardianship of Minors Ordinance, Cap. 13 which empowers the court to make such order as it thinks fit having regard to the welfare of the minor and to the conduct and wishes of the parties. By Section 3 of the Ordinance, the court is required to regard the welfare of the minor as the first and paramount consideration, with due consideration for the child s own wishes if he is old enough to have formed a proper view, and any material information including that from a social investigation report. The father may not per se be regarded as having a superior claim, and the same goes for the mother. Joint custody orders involved a sharing of all parental rights that might otherwise have been granted to one parent exclusively under a sole custody order. A joint custody order is surely an order that will best promote the welfare of the infants with co-parenting involved. According to the case of *Jussa v Jussa* [1972] 2 All ER 600, a

joint order for custody with care and control to one parent only is an order which should only be made where there is reasonable prospect that the parties will cooperate. Failure to communicate It is not in dispute that before the Access Order, the Father and the Mother has not been able to discuss any matter involving the child and had to resort to the assistance of their lawyers. And the Mother tends to avoid consulting the Father on matters concerning the child including the dental procedure and change of school. In fact, the argument over the dental procedure can surely be avoided if the Mother allowed the Father to be involved in the consultation with the specialists. Without sharing the expert advice, the Father cannot be blamed in making noises about the use of general anaesthetic when he discovered such had been done on a child of only 3. The same applies to the change of school from Highgate to Victoria. All along, the Mother had not given the Father an opportunity to be consulted but simply claimed that they cannot communicate and cannot reach any agreement. I think such a claim is only self-serving. Even if the Mother's allegation was founded, this seemed to be history and no longer be the case after the Access Order was made. There had been communication and consensus reached from January 2006, including change of pick-up and drop-off time to accommodate the child's schedule, re-schedule of the child's ballet lesson to accommodate the Father's access, access arrangement over the summer holiday, arrangement for the Father to attend school functions when the Mother was away. All these demonstrated that the parties are moving towards a more constructive communication pattern and there is nothing to suggest that this will change after the conclusion of this case. Interference of the Father in the daily care of the child The Mother's allegation that the Father had upset the child's daily schedule with access had also been cured after the Access Order. There is no complaint of similar nature and the Mother also accepts that there is no interference and the situation had in fact been improving after January 2006. The Father's taking the child out of the first kindergarten before school ends is an isolated incident at a time when he's denied access. For the Father who used to be so involved with the child, it is understandable for his drastic act like this. I found the Father is able to adhere to the agreed access terms and had already learnt to pay heed to the child's routine schedule. The Mother's worry of further interference is unjustified. Father obstructive and not cooperative The passport incident did show that the Father had been difficult in this matter. But I hate to say that the Mother is also unreasonable in handling the Father's request for summer access. Though the Father appeared to be obstructive in the beginning, he had eventually gave in to the request of the Mother even before his demand was met. This is inconsistent with an obstructive and uncooperative behaviour. The Father is always eager to maintain his access with the child and the denial of access by the Mother has always triggered argument or drastic act on the part of the Father. With the Access Order in place, the Father's behaviour tends to be more sensible and this can be seen from his reaction to the change to CNIS. I found the Mother's concern about the Father's behaviour on this not substantiated. Social Investigation Report Miss Wong has conducted a very thorough investigation in this case. Unfortunately she had not been involved in this case after the preparation of the report. She did not have the benefit of considering the facts and evidence that have evolved from the hearing, in particular those occurred after the Access Order. With this shortfall, I don't think this court should place any reliance on the recommendations of the report. Reasonable prospect to cooperate Judging from the above

findings and what transpired between the parties after the Access Order made, I found there is cooperation between the parties since the issue of access had been settled. There is nothing to suggest that this will not be forthcoming after the conclusion of this case. There are ample evidence after January 2006 to suggest that there is reasonable prospect for both parties to cooperate in future and joint custody is feasible in this case and is in the best interests of the child. And a joint custody order will encourage cooperation between the parties. It will surely be in the best interests of the child if both parents can adopt a sensible and understanding approach to each other in future. The Father had all along been very involved in the upbringing of the child and I don't see any justification in denying him this after the parties separation. Although the Mother undertakes to consult the Father of all major decisions made but the Mother's interpretation of consult is not good enough. Judging from the past, the Mother has failed to consult the Father and had in fact been shutting him out from major decisions involving the child. This is certainly not in the best interests of the child.

Conclusion

Having considered all the facts and evidence as well as all those matters required of me by statutes, I am satisfied that it would be in the best interests of the child for her custody be granted to the Father and the Mother jointly. Costs As for costs, the general practice in custody cases is that there be no order as to costs where both parties have been reasonable in their approach. In view of the nature of the application, I believe the appropriate order would be for each party to bear his/her own costs. Order My order is therefore as follows:- Custody of the child be granted to the Applicant and the Respondent jointly with care and control be granted to the Applicant; Access Order to continue except time for weekday access on Wednesday be varied to 3pm to 8pm, time for visiting access on every other Saturday varied to 9am to 8pm, time for staying access on alternate weekends varied to 4pm on Friday to 8pm on Saturday. And for holiday sharing, it starts with the Applicant having Christmas and New Year holiday for 2006/2007, the Respondent is to have the Chinese New Year 2007 and the Applicant is to have the Easter/Spring holiday 2007 and to alternate between the parties on equal and alternative year basis; Order in terms of the Consent Summons dated 6 September 2006 for maintenance of the child; A declaration that the child is a habitual resident of Hong Kong; The Father shall have all the rights and authority that the law would allow him if the child is legitimate; No order as to costs of this application including all costs reserved. This is an order nisi to be made absolute at the expiry of 14 days.

(Angela Kot) Deputy District Judge Mr. N. Clough instructed by M/s. Wong & Wong for the Applicant Ms. M. Rattigan instructed by M/s. Hampton, Winter & Glynn for the Respondent PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#\$ 0:&P @\ \\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc- oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wff B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wff B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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