

HONG KONG / JUDGMENT

L v. H

COURT

Family Court

DECIDED

31 January 2007

CASE / FILE NUMBER

FCMC2161/2006

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bjbj FCMC 2161 of 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 2161 OF 2006

BETWEEN L Petitioner and H Respondent

Before : Her Honour Judge Chu in Chambers Dates of Hearing : 8 & 12 January 2007 Final
Submissions : 18 January 2007 Respondent s Reply Submissions : 25 January 2007 Date of
Judgment : 31 January 2007

J U D G M E N T

Introduction

1. In this matter, both parties are fighting for custody, care and control of their two sons, aged about 3 1/2 and 2 1/2 (the Children).
2. The Petitioner (H) and the Respondent (W) met when W was visiting Hong Kong from Mainland China in 2002, and they were married in September that year.
3. After the marriage, H continued to reside with his mother at Hing Man Estate in Chaiwan. W would come regularly to Hong Kong on a two-way entry permit for a period of 3 months each time. Up until now, W has not yet obtained residence rights and is still visiting Hong Kong on a two-way permit.
4. It is H s allegation that during the parties marriage and their cohabitation at Hing Man Estate, W did not get along with H s mother, Madam Chan. As a result thereof, the parties and the Children moved to a rented room in Shaukeiwan sometime in 2005.

5. On 27th February 2006, H presented a divorce petition based on W's unreasonable behaviour. He, however, did not immediately inform W of the issue of the petition, and it appears that he continued to reside with W as husband and wife in the rented room in Shaukeiwan.
6. Then, on 17th March 2006, after a day's outing with W and the Children, on their way home, and while supposedly to be waiting for W to go and buy fish at the market, without any prior notice to W, H suddenly disappeared with the Children and temporarily took up residence at his friend's house in Taipo. W later tried to make a report to the police about the disappearance of H and the Children. Eventually, in early April 2006, his solicitors got in touch with W for the purpose of serving her the petition, and it was only then that W realised that H had issued divorce proceedings and had planned his disappearance with the Children. Eventually, in about May 2006, H moved back to his mother's home with the Children. Since the disappearance of H and the Children, W has moved to reside with her aunt and uncle in Ma On Shan.
7. A Decree Nisi of divorce was granted to H in November 2006.
8. After H's disappearance with the Children, the first time W managed to see the elder son again was about two months later, on 19th May 2006, under the arrangement of the Family Services Centre in Chaiwan. Between May 2006 and 30th August 2006, W said she only saw the Children on 4 occasions, but H said there were about 6. Anyway, on 30th August 2006, this Court made an interim access order, allowing W weekly access. The Legal Principles
9. The general principles, in relation to the custody or upbringing of a minor, are set out in s. 3 of the Guardianship of Minors Ordinance, namely this Court shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to the wishes of the minor, if having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and any material information including any report of the Director of Social Welfare available to the court at the hearing. The Parties Evidence
10. The social welfare worker Mr. Lai, who prepared the social investigation report attended trial to give evidence.
11. H filed altogether 2 affirmations and attended trial to give oral evidence. W also filed 2 affirmations, and attended trial to give oral evidence. Further, H's mother Madam Chan and W's aunt Madam Lam each filed an affirmation and attended trial to give evidence.
12. During the trial, I had the opportunity of observing the demeanour of the parties and their respective witnesses. Insofar as the matters set out in this judgment differ from the evidence of the H or W, this is because I have preferred the evidence of the other party or his / her witness. H's Case

13. H is now about 38 years of age. When he and the Children moved out of the rented room in Shaukeiwan in March 2006, they resided at a friend s residence in Tai Po for about two months until May 2005, and H temporarily ceased working to look after the Children.
14. In May 2005, H and the Children moved back to reside with H s mother and two brothers at Hing Man Estate.
15. The elder son is attending K1 at a kindergarten , and the younger son is attending nursery class N1. The kindergarten is in the same estate as their home.
16. H is educated to Form 4 level and is now working as a curtain technician, earning about HK\$8,500 per month. He works Mondays to Saturdays. From Mondays to Fridays, he would get up at about 8 am and would feed the Children, and would then take them to the kindergarten before he goes to work. The Children would then stay at the kindergarten until about 6 pm when Madam Chan would pick them up. H would return home after work at about 7 pm.
17. After picking them up, Madam Chan would help the Children change and take a bath, and then she would start cooking and preparing for dinner. The family would have dinner at about 7 : 30 pm to about 8 pm. At about 9 to 10 pm, the Children would then be given some milk before being put to bed. H himself usually sleeps at about midnight. H and the Children are now sharing one double bed.
18. The kindergarten provides lunch, tea / snack to the Children. According to H, the Children would take a nap at the kindergarten in the afternoons during week days.
19. H works on Saturdays as well, but he says he tries to finish work earlier and be home about 6 pm, and sometimes he takes the afternoons off.
20. The Children attends the kindergarten from about 8 am to 12 noon, and they will be picked up by Madam Chan before 1 pm, and would go home to have lunch, and a nap in the afternoon until about 5 pm, and then H would return.
21. On Sundays, H says he would take them to the parks, beaches, and sometimes to see exhibitions, and they would also go out with his elder sister and her family. His elder sister has a son who is studying Primary 1, aged about 6 or 7. H also says his younger brother has a car, and they sometimes go for a drive.
22. H says he does not gamble and only smokes 5 or 6 cigarettes a day, and usually he smokes in the kitchen, under the exhaust fan.
23. There are mainly 4 reasons why H says W is not suitable to care for the Children : -

- (i) During their marriage, W always stayed home, and seldom took the Children out to parks. (ii) W is impatient in nature, and has scolded the Children in a loud voice, and has hit them with a hanger or a wooden stick. (iii) W is irrational and stubborn, and would create scenes. On one occasion, she threatened to jump off the building with the Children. (iv) W had on many occasions left the Children by themselves at home, when they were living at Shaukeiwan, and when H was away at work.
24. H's mother, Madam Chan, filed an affirmation in support of H's application and attended Court to give evidence.
25. Madam Chan is now 75 years old although her Hong Kong Identity Card shows that she is 10 years younger. She came to Hong Kong in 1962.
26. Madam Chan says her only health issue is a minor one in that she has irritation to her respiratory tract which requires periodic treatment once every three months. Other than this, she says she is in excellent health, and she goes about her daily activities freely and she is agile enough to walk up 100 steps in a part at Chaiwan. W's Case
27. W is now 31 years of age. She received education in Mainland China. According to her, she graduated from junior high school, and has worked as salesgirl, a cashier, and also in a factory.
28. Since marriage, she has not worked and has been a full time mother while in Hong Kong. She told this Court that it is now very easy to apply for the two-way permit, and that after marriage, she would come regularly for 3 months each time, and in between, she would return to Mainland China for 2 to 3 days to renew her visa. It is not disputed by H that W has basically been residing in Hong Kong after their marriage, and that W could continue to visit Hong Kong as before.
29. She denies that she had a very bad relationship with H's mother, but admits that their relationship was a bit poor. She said H's accommodation was rather crowded, and she had suggested that H tried to apply for larger premises. There was an argument on one occasion between her and H over their accommodation problems, and that neighbours from upstairs came down to try and pacify them, but she denied H's allegation that she threatened to commit suicide by jumping off with the Children.
30. W denies H's allegation about her being short tempered, impatient, or emotional. She said she had on rare occasions used a cane to hit the elder son's palm, but never physically punished the younger son as he was too young then.
31. During the marriage, when she was in Hong Kong, she would look after the Children, and helped with cooking and the household work.
32. W denies that during the marriage, she would seldom take the Children out, or had left them in their rented room when she went out on her own to buy food.

33. Since H's disappearance with the Children, she has been residing with her uncle Mr. Ho, who is the brother of her father, and her aunt Madam Lam at Ma On Shan.
34. Although Mr. Ho did not give evidence, he came to court during the two day trial and sat throughout the proceedings to show support to W.
35. W said that her uncle and aunt, ie. Mr. Ho and Madam Lam, give her full support, and will be prepared to accommodate the Children if custody were to be granted to her.
36. Madam Lam gave evidence. She is about 48, in good health. Mr. Ho is about 50. They have 3 children, a daughter aged 25 and married. The elder son is now aged 26 and lives separately. Only their younger son, who is 24 years old, lives with them.
37. Mr and Mrs. Ho's residence is about 500 sq ft, and consists of 3 bedrooms, one being occupied by themselves, one by their youngest son, and one by W. If custody were to be granted to W, the Children will share W's bedroom. There will need to be some new furniture bought, such as a bunk bed, and some re-arrangement needs to be carried out, but basically there should be no problem accommodating the two Children. Social Investigation Report
38. The social worker, Mr. Lai, submitted his report on about 16th November 2006. He also attended trial to give evidence.
39. He has seen both parties, and the Children, and paid home visits. He has also met Madam Chan and Madam Lam, although he did not refer to any detailed interviews with them in his report.
40. Basically, he recommended custody to be given to W as the accommodation of Mr. And Mrs. Ho are a bit more spacious, and more comfortable, and further W, being the natural mother, will be the full time carer.
41. The report was initially called for in connection with the parties interim custody applications, but as Decree Nisi has already been granted, instead of dealing with interim custody, the trial before this Court was on final custody, and Mr. Lai confirmed that his recommendations remain the same.
42. Mr. Lai further disclosed that after the report was submitted to this Court, H had called him to indicate his concern for the possibility of losing custody. Findings
43. Notwithstanding H's allegations, I do not find that there was sufficient evidence to show that W is a short tempered or emotional person, or that she lacks patience.

44. There was no sufficient evidence to show that W had threatened suicide by jumping off with the Children during an argument at the middle of the night. Madam Chan was not asked about this incident when she gave evidence. In any event, even if W did threaten suicide, this appeared to be an isolated incident, and it is not unusual for one to become emotional during a serious argument. There was no other evidence to show that W was suffering from any psychiatric illness or other mental instability, or had any suicidal tendency.
45. H had alleged that W had not taken the Children out during the marriage for recreational activities and that she had left them at home unattended. Prior to H's planned disappearance, he and W and the Children had been living in a rented room for a period of time since they moved out from H's parents' flat in 2005. H was working full time at the time, and admitted that on one or two occasions, he had worked until late at night, and yet, he was content to leave the Children in the care of W.
46. I also find that there was no justification for H's surreptitious and scheming behaviour in applying for legal aid in late 2005, issuing a petition without informing W, continuing with the marriage as if nothing had happened, planning and then disappearing with the Children.
47. It was H's evidence that, after his disappearance with the Children, he called W once on her mobile, and once at the rented room on two days, namely 18th or 19th March to try to tell her what happened. I do not believe for one moment he had tried to contact W. Had he wanted to contact W, I am sure he would have ways to do so, such as calling her uncles and aunts, particularly when he had just been with W's younger brother, and another of her aunt and uncle who live in Shaukeiwan. I am certain that his family would know where he and the Children were, and yet they were not prepared to disclose their whereabouts to W. H had clearly planned carefully for his disappearing act, even moving premises twice in Taipo with the Children, and resigning from his work to look after the Children himself.
48. If indeed he was worried about W's emotional reaction, there were many ways in which he could have discussed his marital problems with W, such as approaching the Legal Aid Department for assistance in late 2005, contacting his present solicitor, who has been acting for him since sometime in February 2006, contacting a social welfare officer to arrange a meeting with W, or contacting a counsellor or a mediator to help.
49. I find his actions of suddenly removing the Children from their mother, who was at that time their primary carer, and thereafter cutting off complete contact until when W was eventually served with the petition on 3rd April 2006 at his solicitors' office were not in the interest of the Children at all. Even after 3rd April, it appears that H was only allowing telephone contact, as it was not until 19th May 2006 that W managed to see only the elder son for several hours. Thereafter, she was only able to see the Children for three more occasions until this Court's interim access order. Even if what H said was correct, namely that W saw the Children 6 times instead of 4, this was hardly sufficient.

50. I do not doubt that both H and his mother love the Children. Madam Chan, although 75, looks fit. However, it appears that from Mondays to Fridays, the Children are really placed in the kindergarten / nursery for long hours, from early morning until about 5:30 pm. Even on Saturdays, the Children are placed in the kindergarten / nursery until almost the time H returns home. Although there, the Children would meet other children of similar age, and have a regular timetable of activities, care of the Children, who are only now 3 1/2 and 2 1/2 has really been delegated to the kindergarten / nursery since their separation from their natural mother. It does not appear that the Children's two uncles (with whom they reside with) take any part in the daily care of the Children, and they both have full time work, although one works in the evenings.
51. W says she plans to look after the Children herself, and only when they start primary school then she may start to work. Madam Lam is 48, and in good health, and does not work. She is fully capable of supporting W in caring for the Children. W says the younger child is too young to be placed in a nursery for such long hours, which I agree.
52. Although H told this Court that early this month he has applied for a larger flat from the Housing Authority on the ground that his present flat is too crowded, and that he expects his application will be granted in about 3 months, there was no evidence to support what he said. Even if he did obtain such larger premises, this would not affect my decision set out hereinafter.
53. I accept Mr Lai's evidence that W's present accommodation is a bit more spacious and comfortable than H's.
54. W told this Court that there are a number of kindergartens / nurseries in the Ma On Shan estate where she now lives, and I accept that for children as young as the Children, changing school should not cause any major adjustment problems.

Conclusion

55. His Lordship Hon Rogers VP has commented in the case of *L v C* 2005 1 HKFLR 199 that the lower court Judge in that case overlooked the importance of one of the natural parents being the primary carer of the child. In that case, both parent worked and had similar working patterns, but if the mother was given custody, she would be the primary carer whereas if the father was given custody the paternal aunt would fulfil that role. In the end, although the 5 year old son had been with his father for almost 2 years when the appeal was heard, the order of the Court of Appeal was to grant custody to the mother. As said by Hon Rogers VP, the importance of the status quo would vary from case to case, and that the importance of the status quo to him to be of comparatively minor significance in that case.
56. Having compared W's proposals, there is no reason to suspect that if W's proposals were to be accepted any change would be adverse of itself, and thus I am of the view that the significance of the status quo is of very small significance.

57. I accept that in the present case, H, when he is not working, takes an active role in looking after the Children. I am, however, of the view, that W, being at present a non working full time mother will be more suitable to look after the Children s physical and emotional needs. This is the main reason why the balance is tilted in her favour.
58. In relation to access, W has not made any concrete proposals and H s proposals appear to be reasonable. I assume that H will be able to take leave during the two weeks staying access period during Christmas and the summer. I therefore will grant him staying access on Saturday night, and two weeks during the Children s Christmas and summer vacation. In view of my following order, I will also grant H staying access during the first half of the Children s forthcoming Chinese New Year holidays. There will be liberty to apply.
59. In relation to costs, there is a general principle that in custody cases, there should be no order as to costs unless one party s conduct in the litigation is unreasonable. In this case, from the evidence produced so far, I see no reason why the general principle should not be followed. Order:
60. My order is thus :
- (i) The Respondent shall have custody, care and control of the Children. (ii) The Petitioner shall have staying access every Saturday night, and for two weeks during the Children s Christmas and summer vacations. The Petitioner shall also have staying access during the first half of the Children s forthcoming Chinese New Year holidays. (iii) The Petitioner is to hand over the Children to the Respondent on or before Sunday 4th February 2007. (iv) There be an order nisi that there be no order as to costs, including all costs reserved, and both parties own costs be taxed under legal aid regulations. The order will be made final after 21 days.
- (v) Pursuant to Practice Direction 15.11, there be a 1st Appointment hearing on 23rd March 2006 at 9 : 30 am. (vi) There be liberty to apply. (Bebe P Y Chu) District Court Judge Mr E Chan of Chan, Wong & Lam for Petitioner Mr N Lo of Lo, Chau & Leung for Respondent PAGE - PAGE - &`#\$~!P] j% Td ,f@- sy \$ ?i: ! he~"Td c(#\$ 0kJ\$\$ @P\$\$ :L- E{k' XW(\$ s `()H/0 -3*\$ 43*\$:p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4@~4= 0b50p FWr7 M|;\$ v:8> wzO?p= H#@\$ 3i@\$ nSDH lEFE 5)GTd 0(\$I kxL\$ /eNH S\$O\$ vuWOTd l6P@~4= c;R\$ nnS(G%9UT C:~W x% X\$ x8Y\$ L}YH [@~4= (Yq[*n\T #b2^ \$ Q^f ULu_ Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/h vCip= TCn\ "hsTd gsTu\$ 4xv\$ xDs\ *'y\$ Yay~ _ __z4w C? } } @~4= R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . s `(vuWO 0(\$I ?i: ! FWr7 v:8> ULu_ @\\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 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj 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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