

HONG KONG / JUDGMENT

# LKK v. CKM

COURT

Family Court

DECIDED

26 May 2009

CASE / FILE NUMBER

FCMC12097/2006

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bjbj FCMC 12097/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 12097 OF 2006

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BETWEEN LKK Petitioner and CKM Respondent

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Coram: Deputy Judge C.K. Chan in Chambers (not open to the public) Dates of Hearing: 14-17  
April 2009 Last Date for Submission of Document: 27 April 2009 Date of Handing Down Judgment:  
26 May 2009

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## J U D G M E N T

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This is a trial on the custody of and access to the 2 children of the family. For the sake of convenience, I shall call the Petitioner the father and the Respondent the mother in this Judgment. Brief History The father is now aged 59, a Sales Manager by occupation. The mother is now aged 46, an editor in a publishing company. The parties married in 1991. They have 2 children and they are: a son, Y.C. who is now aged 16, a Form 5 student (hereinafter called the son ); and a daughter, Q. who is now aged 10, a Primary 4 student (hereinafter called the daughter ). On 29 May 2006, there was a big argument between the parties at the former matrimonial home during which the father was bit on his chest and being hit by a waist belt. The mother also took a chopper from the kitchen and during the struggle, the father s right hand was hurt. The mother was later charged with the offence of wounding and she was eventually being bound over in the sum of \$2,000 to be of good behaviour for a period of 2 years (I shall refer to this as the chopper incident in the rest of this judgment). As a result, the father moved out of the former matrimonial home with the children and they have never resumed cohabitation thereafter. The father issued a petition for divorce based on the behaviour of the mother, the particulars of which were later watered down with the consent of the parties. A decree nisi was

granted on 17 June 2008. Ever since separation, the children stayed with the father who raised them with the assistance of a domestic helper, J. There have been serious problems in the mother's access to the children. The mother said the father has alienated the children from her. The father said the children refused to see the mother because of her use of corporal punishment in the past and the witnessing of the chopper incident by them. On 23 July 2007, the mother issued a summons seeking, amongst other things, interim access to the children. Before the hearing of the summons and during an access arranged by the social investigation officer at her office, there was an altercation between the children and the mother. During the incident, the daughter alleged being hit by the mother and police was eventually called by the children. The mother was arrested and charged with the offence of common assault. A trial took place at the Kowloon City Magistrate's Court but the mother was acquitted of the charge. The current position of the father is that he asks for the custody of both children with supervised access to the mother. On the contrary, the mother's stance is that she would ask for split custody in that the custody of the daughter be granted to her. As to the son, she has no objection for the custody be granted to the father but she would ask for staying access to the son. As the parties failed to reach a consensus on the custody issue, the trial was fixed in my court for a full hearing. The Law The Court's jurisdiction to make a custody order can be found in s. 19 of the Matrimonial Proceedings and Property Ordinance, Cap.192 ( MPPO ), which states:

- (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18 in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;

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

- (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of such property- in any proceedings before any court (whether or not a court as defined in section 2) the court- shall regard the 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; and

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Apart from the above statutory provisions, the court had in previous cases taken into account other matters when determining custody. In the case of YLS v. TL (unreported, FCMC 8396/2007, HH Judge Melloy, 30 May 2008), had this to say at paragraph 14 of her judgment:

14. As I have stated previously (see ZZ v. KYL, unreported, 5 March 2008 and CHFS v. WPLM, unreported, 28 April 2008) there is no statutory checklist in Hong Kong, as exists in other common law jurisdictions, to help both Judges and practitioners, when determining issues relating to children. However, the Law Reform Commission in Hong Kong has recommended a draft checklist of factors based in part on the Children Act 1989 in England and s. 68F (2) of the Family Law Act 1975 in Australia, in its report on Child Custody and Access (March 2005). As in previous cases I intend to refer to the checklist in so far as it relates to the circumstances of this particular case. The factors then are as follows: the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); the child's physical, emotional and educational needs; the nature of the relationship of the child with each of the child's parents and with other persons; the likely effect on the child of any change in the child's circumstances; the child's age, maturity, social and cultural background and any other characteristics which the court considers relevant; the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; any harm which the child has suffered or is at risk of suffering; any family violence involving the child or a member of the child's family; how capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; the range of powers available to the court under this Ordinance in the proceedings in question; any other fact or circumstance that the court thinks is relevant. I will gratefully adopt the above checklist and the approach of the learned Judge whenever they are relevant to the circumstances of this case. Wishes and Feelings of the Child As can be seen from the social investigation reports, both the children have expressed their unequivocal preference to stay with the father. The social investigation officer said this in paragraphs 50 and 51 of her 1st Investigation report (p.626 of the Trial Bundle):
50. [The son] was expressive and consistent in giving his views on staying with the father and younger sister together. He considered the father was more suitable than the mother in taking care of him and [the daughter]
51. [The daughter] clearly stated her wish to reside with her father and elder brother. The girl recalled happy time with the father and elder brother in studying and playing. As for the mother, there was full of unhappy memory of being physically punished by the mother during piano practice and studies. The attitude of the children remained the same when the social investigation officer prepared her 2nd report (p.638 of the Trial Bundle):
28. [The son] expressed that he was annoyed in attending the access with his mother. He said he did not want to see his mother as he hated her. He viewed that the mother-son relationship had never improved. He expressed his wish to live with his father and younger sister in the future .

29. [The daughter] stated that she was unhappy in attending the access as she did not want to see her mother. She stated her wish to reside with the father and elder brother. [The daughter] emphasized that she had independent thinking and ability to choose what she wanted to live. The son, now aged 16, is old enough to make his own choice and so his view should be given full weight. Although the same cannot be said of the daughter as she is much younger (she is aged 10), it is quite clear that she has formed a very negative view of the mother because of past physical punishment being inflicted on her. The mother-daughter relationship was bad to such an extent that the daughter called the police during one of the access claiming that the mother had assaulted her. Of course the mother denied this and she was eventually acquitted of the charge in the following criminal proceedings. But the fact remains that the daughter has shown a very strong rejecting attitude towards the mother. Under these circumstances, the strong view of the daughter should also be one of the important considerations in deciding on her custody issue. Relationship of the Children with the Parties and other Persons It is quite clear that the children have maintained a very close and loving relationship with the father. The fact is that the father has raised the children in the past 3 years with the assistance of a domestic helper and so it is no surprising that they have formed such a close relationship with him. The same cannot be said of the mother. As a matter of fact, both children have formed a rejecting attitude towards the mother and they were every reluctant to see her. I think it is quite fair for the father's counsel to describe their relationships as at worst tense and hostile, and at best non-communicative and distanced. Family Violence or any Harm which the child has suffered or is at risk of suffering It is the case of the father that the mother has been violent to him. The most serious incident was in 2006 when the mother attacked him with a chopper which was witnessed by the children. According to the brief facts of the case to which the mother has agreed in the Magistrate's Court, this is what happened at the time: At the heat of the dispute, [the mother] bit [the father] on his right chest and hit him with a waist belt (E2). [The father] tried to stop [the mother] who then left PW2's room and went to the kitchen where she took a chopper (E1). [The mother] rushed towards [the father] with the chopper in her hand. On seeing this, [the father] immediately grabbed the chopper and in doing so, he was injured on his right hand. Afterwards, a report was made to the police. [The father] was treated and discharged with the following medical findings: Bruising on left forearm, abrasions over left arm, back. Left knee and right leg, 1 cm superficial cut wound on right hand and 2 bite marks at right axilla and right arm. It was most unfortunate that the children had witnessed this incident which had caused psychological distress to them, especially the daughter. According to the social investigation report, the daughter had to attend psychological treatment since August 2006 to which she responded quite well after 4 sessions. However, as the parties continued with their legal battles on custody and other related issues, the daughter had nightmares again and had to resume psychological services in February 2007. There was also history of the mother applying corporal punishment on the children, for example during their music training. The particulars of the punishment included the using of the pipe of a vacuum cleaner to hit the son during piano practice, the slapping on the daughter's face and head with a slipper when the mother was not satisfied

with her performance in studies. The mother did not totally deny the use of physical punishment but she denied using excessive force. On this issue, the father has called the domestic helper, J to testify. In her witness statement (at pp.340-343 of the Trial Bundle), she has listed out the details of the abuse which included: The mother has punished the daughter by: Beating her buttocks forcefully with a thick slipper; Beating her hands with a ruler or stick or even pulling her ears; Shouting and scolding and slapping her face; Taking off her shorts and beat on her buttocks; and Pushing her out of the house and let her cried alone outside for half an hour. The mother has also punished the son by: Scolding and slapping his face because of his use of the electronic dictionary; (ii) Pulling his ears and slapping him because he has scattered the ink of his pen; (iii) Throwing her sandal hitting his forehead; and (iv) Pulling and twisting his ears. I understand that these are very serious allegations and therefore carry with them a very high standard of proof. After considering the father and J's evidence carefully, especially hearing J's oral evidence in court, and also what the children told the social investigation officer during their interviews, I am satisfied that the mother did use physical punishments on the children in the way as described by J. This also explains why the children are holding such a hostile and rejecting attitude towards the mother. How capable is each party in meeting the children's needs The present arrangement is that the father takes care of the children with the assistance of a domestic helper. It is quite clear that the present arrangement is working well according to the information as disclosed in the social investigation reports. The son is now aged 16 and is old enough to look after himself. The daughter is aged 10 and as far as physical care is concerned, I do not see any problem in her physical care. Of course, as far as physical care is concerned, I am satisfied that the mother may equally be capable in providing for the daily needs of the daughter. There is also some force in her argument that as a female, she may even be in a better position in looking after the daughter because they are of the same sex. Her counsel has also cited authority to support the mother's contention that generally speaking, a mother is more suitable to take care of young children, as per Cheung JA in paragraph 19 of His Lordship's Judgment in WSM v FSY CACV 352/2004 (unreported, date of Judgment: 27 July 2005):

19. The second son is now about eight years old, reaching nine in about four month's time. Human wisdom tells us that at this stage the mother plays a more prominent role in his upbringing both in terms of his emotional and physical needs I would respectfully agree with Cheung JA's general observation. But it has to be borne in mind that that was not meant to be an inflexible rule. Each case has to depend on its own facts. In the present case, the daughter is 10 years old and cannot be regarded as in the very young category. She has maintained a very close relationship with the father while holding a hostile attitude towards the mother. She has not had any meaningful communication with the mother in the past 3 years and without effective communication, the mother's ability to take care of the daughter's emotional and educational needs will be in serious doubt. As the daughter has expressed her very strong view to stay with her father, I think her wish should be given due respect. Under these circumstances, any court order forcing her to stay with the mother will not be

conducive to the re-establishment of a more harmonious mother-daughter relationship.

**Likely Effect on the Children of Any Changes in Circumstances and Siblings Unity** For the past 3 years, the daughter has been living with the father, the son and the domestic helper. If the custody or care and control of the daughter were to be granted to the mother, it would mean a change of the status quo. More importantly, that would also mean the daughter has to live apart from her brother whose care and control will remain with the father.

**Other Facts or Circumstances that are Relevant** Did the Father Alienate the Daughter from the Mother? It is quite beyond dispute that the children's attitude towards the mother has been extremely bad. They refused to see or talk to the mother. They only attended the social welfare office for access only because the court ordered them to do so. During access, they were reluctant to talk to or in any way communicate with the mother. There was even an altercation during one incident resulting in the daughter filing a criminal complaint against the mother for assault. Although the mother was eventually acquitted of the charge but that really indicated the level of hostility between the parties. It is the mother's case that all these are the result of the father's effort in badmouthing and alienating the children from her. During the trial, the mother has also called a number of witnesses including a friend, parents of the children's schoolmates and school social worker to support her case. I do not intend to go into each and every detail of their evidence because much of the evidence is either hearsay or being irrelevant. The first and fourth witnesses were Ms. Ho and Mr. Poon who are members of the Parent-Teacher Association of the son's school. They came to know the mother through her participation in the Parent-Teacher Association. There is no evidence that they have talked to the father or the son. We also have to bear in mind that the main issue here is not so much as to the custody of the son but the daughter. I wonder if they have ever met the daughter and so I do not think their evidence can throw any light on the parents-daughter relationship. The second witness is a friend, Ms. Chan who said she had attended the former matrimonial home and observed the interaction between the mother and the children. Upon examination, she said she used to go to the former matrimonial home 4 to 5 times a month between the period of 1997 and 2001 and about 1 to 2 times a month between 2001 and 2002. She rarely went there after 2002. The daughter was 3 years old (the daughter was born in 1999) when she stopped going to the matrimonial home. Again, I find the evidence of Ms. Chan as being outdated and therefore irrelevant to the present issue. The third witness was Ms. Sze who was the school social worker of the son's school. In her affidavit (pp. 274-281 of the Trial Bundle), she reported her dealings with both parents between 2006 and 2008. It suffices to say that she testified to the effect that the mother showed genuine care for the children or that she is a suitable parent to have the custody of both children. My first observation on Ms. Sze's evidence is that she has not conducted a full investigation on the custody of the children. She has talked to the parents but she did not mention she has talked to the son or the daughter on this issue. Secondly, although in paragraph 2 of her affidavit (p.275 of the Trial Bundle), she said:

2. I swear this affidavit in support of the application of [the mother] for more access to the children of the family, namely [the son] and [the daughter] in the short term and for custody in the longer term. But in the rest of the affidavit, she did not explain why she has come up with such a conclusion. In any event, she agreed that she had talked to the social investigation officer and her views had already been included in the subsequent report.
46. The totality of the evidence of these witnesses points to the fact that the mother really loves and cares for the children and therefore she should be given their custody or care and control.
47. I must say I have no doubt in my mind that the mother cares for the children. The issue is whether she has shown her love or care in the proper way. It is my findings that the mother has used corporal punishment on the children in the way as described in the preceding paragraphs, which included the slapping on the head or face of the children, hitting the children with a pipe of a vacuum cleaner or a ruler together with a lot of scolding. These often happened during musical instrument training sessions. I do not think the mother did all these with a sinister motive. Instead, it only showed the mother was too eager to make sure the children work hard but the fact was she had pushed it too far and too hard that it just backfired.
49. In short, I am not satisfied that the bad mother-children relationship is a result of parental alienation by the father. Social Investigation Reports The social investigation officer, Miss Lee has prepared 2 social investigation reports. In both reports, she has conducted investigation and extensive interviews with various interested parties. She confirmed that the children s deep-rooted resent towards the mother was probably due to the past unpleasant memory of frequent physical punishment and the traumatic experience of witnessing domestic violence. Given the children s resentment and rejecting attitude, the mother faced a real difficult position in exercising parental control as the children were not receptive to her guidance, directions and support. Yet the mother had developed little insight into the causes of this problem and kept on imposing her thought of instant disappearance of mother-child conflict if the children were to be placed under her custody. Being pre-occupied of her own thinking and hatred towards the alienation exerted by the father, the mother was not sensitive to read the children s mind and address their negative feelings properly. In her first report, her recommendations were as follows (p.629 of the Trial Bundle):
62. Based on the above findings, both parents were impressed to be loving parents and showed concerns to their children. Yet given their different perceptions of the cause of the relationship problem, they held different opinions on the ways to discipline the children. Taking into consideration that the interest and welfare of the children was of prime importance, it was worthwhile to maintain the continuity of the present child care arrangement in view of the current close father-child attachment, the proven effective parenting skills rendered by the father which was particularly vital for adolescence children, role identity and the expressive wish of the children. On the other hand, to

maintain the mother's continual relationship with the children was equally important, a well-defined access for the mother in a progressive manner was recommended. In short, the social investigation officer recommended the custody of both children be granted to the father with defined access to the mother.

52. A more up-dated report was prepared on 26 September 2008 in which the social investigation officer reiterated the above views and recommendations. Psychologist Report
53. Apart from the 2 social investigation reports, a clinical psychologist report has also been prepared by Ms. Tso. This is her conclusion and recommendation at paragraph 5 of the report (p.650 of the Trial Bundle): 5.1 Results of the current assessment indicated that both children have closer relationships with [the father] than with [the mother]. Based on the direct observation data, [the son] and [the daughter] are angry and resistant to their mother. In the eyes of the children, the father is much more concerned and reasonable as compared to the mother. Although [the mother] believes that the resistance of her children to her is due to the father's subtle alienation, the information collected in the evaluation suggests that the children's negative perception about [the mother] has derived out of the past negative interactions in child discipline and the domestic violence incident. In terms of parent-child relationship, the father is considered to be the better parent for both [the son] and [the daughter]. In area of parenting, [the father] is found to be adequate in asserting authority and providing guidance to his children. Despite [the mother] also demonstrates her knowledge and sensitivity in handling different child-care situations, she has difficulty to carry out the skills and parental role as observed in the mother-child interaction sessions. 5.2 Although joint custody has been explored, it is not feasible as both parents have difficulty in relating and communicating with each other. Since both children report having positive relationship with each other, splitting custody is not recommended in light of the mutual support that the children can benefit. Based on the information showed on the Social Investigation Report prepared by Miss Lee, both children did not have emotional or behavioural problem at school. Both children are under a caring and stable environment provided by the father. Given the children's emotional closeness to the father and a psychologically secured environment that the father can provide, I suggest that the custody of the children be granted to [the father]. It is believed that [the father] can provide continuity in important phases of the children's life including a stable and non-fearful environment. (underlining provided)
54. In short, it is also the recommendation of the clinical psychologist that the custody of the children be granted to the father with supervised access to the mother. The Court's View
55. After considering all the circumstances of the case, in particular, the wishes of the children, the recommendations of the social investigation officer and clinical psychologist and the factors as discussed in the preceding paragraphs, I have no doubt in my mind that the welfare of the children dictates that their custody should be given to the father.

56. I want to reiterate here again that I am not questioning the love of the mother for the children. But that is only one of the factors to be considered. In this case, there is overwhelming evidence that both children hold a hostile attitude towards the mother due to past incidents of physical punishment. The mother has little insight on this by insisting it was due to the alienation of the father. But even if I should leave the cause of the hostile relationship aside for a moment, I think the mother has to realise that the re-building of her relationship, especially with the daughter needs to proceed gradually. It is just unrealistic to force the daughter to stay with her on a full time basis when she refuses to see her even during access. I think the top priority now is for the parties to resume some form of meaningful access so that the mother and children communication can be re-established.
57. Of course, I am fully aware of the mother's contention that she has tried to communicate with the children in the past 2 to 3 years but failed. However, I do not think that the draconian measure of forcefully taking the daughter away from the father will achieve anything towards a better mother and daughter relationship. That will only make an already bad relationship worse which will not be in the interests of both the mother and the children.
58. Based on the above reasons, I would grant the sole custody of both children to the father. As to access, the mother should be given reasonable access to both children which should include at least one Saturday morning meeting a month at the social welfare office under the supervision of a social welfare officer between 11:00am to 12:00noon or at a time to be mutually agreed. The supervised access should last for 3 months only as it would be impracticable to request the social welfare officer to be present at each and every access in the future. The frequency of access should be increased to at least 2 times a month (in alternate weekends) after the first 3 months. As to staying access, I think it is inappropriate for the court to order mandatory staying access at this moment. But I have to remind the parties that under normal circumstances, reasonable access should include staying access and therefore, it is my hope that staying access can be arranged by the parties in not a too distant future. There shall also be a supervision order for 12 months.

## Orders

62. The orders I am going to make are as follows:
- (1) The sole custody of both the son and the daughter be granted to the father.
  - (2) The mother shall have reasonable access to both the son and the daughter which should include at least one Saturday morning meeting at the social welfare office in the presence of a social welfare officer between 11:00am and 12:00noon or at a time to be mutually agreed. The frequency of access to be increased to at least 2 times a month (in alternate weekends) after the first 3 months at a time or place to be mutually agreed but without the presence of the social welfare officer. Supervision Order for 12 months. Costs

63. As I have stated in the Judgment, I have no doubt in my mind that the mother cares for the children. It is my view that the usual order of no order as to costs in custody matters should also apply in this case. Therefore, there will be no order as to costs including all costs previously reserved. This will be in the form of an order nisi to be made absolute after the expiry of 14 days from the handing down of this Judgment. C. K. Chan Deputy Judge District Court Representation: Mr. David Chan, Barrister-at-law, instructed by Messrs. Gallant Y.T. Ho & Co., for the Petitioner Ms. Karen Ma, Barrister-at-law, instructed by Messrs. Ho, Tse, Wai & Partners, 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 &`#\$ pWNJ pWNJ &'L- @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne04: 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 Administrator Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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