

HONG KONG / JUDGMENT

MAO v. NCB

COURT

Family Court

DECIDED

19 March 2012

CASE / FILE NUMBER

FCMC14742/2010

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bjbj FCMC 14742 / 2010 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 14742 OF 2010

BETWEEN MAO Petitioner and NCB Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not Open to Public) Dates of Hearing:
11 13 and 27 January 2012 Written closing arguments to be mutually exchanged: 10 February 2012
(Petitioner s received only) Written replies to be mutually exchanged: 27 February 2012 (None
received) Date of Judgment: 19 March 2012

J U D G M E N T (Custody)

Introduction

AUTONUMOUT This is an application by a Petitioner mother for sole custody and care and control of the only child of the family, a little boy, M, who is now 5 years of age. She also proposes defined access to the father. The father for his part seeks joint custody and an alteration to the present arrangements for access. He does not seek care and control. Thus by agreement the mother will have care and control of M. AUTONUMOUT This case concerns the arrangements to be put in place for a little boy, where the father has historically behaved in an out of control manner. The mother says that this high level of conflict makes it impossible for the parties to communicate or to make any decisions about M in a sensible manner. The father disputes this. He maintains that the parties are able to communicate and to reach decisions together and that consequently an order for joint custody is appropriate. AUTONUMOUT Constant themes throughout the proceedings have included concerns about the father s mental health with particular reference to his bullying, volatile and unpredictable behaviour which is usually, but

not always, directed against the mother. This is against a backdrop of the father's accepted history of ADD and depression. The mother also alleges that the father has been violent at times and she has threatened to seek injunctive relief from the court when the situation has warranted it. The father denies any physical violence. This is largely accepted by the mother. Her complaint is mainly in relation to what she perceives of as verbal intimidation and harassment. The issues AUTONUMOUT The present issues before the court are: Whether custody should vest in the sole name of the mother, or whether the parties should have joint custody of M? What access arrangement should be put in place once the issue of custody is determined?

Background

AUTONUMOUT The parties, who are both of Australian origin, met in 1997 and married in August 2003 in Australia. The father was working in Singapore at the time and the parties began their married life there. In March 2005 the father relocated to Hong Kong for work reasons and the mother followed shortly thereafter. She then found a job with a bank. M was born in February 2007 in Hong Kong. The mother returned to work shortly after his birth. It seems that sometime during 2008 the father stopped working. This seems to have been the main trigger for the breakdown of the marriage in that on the mother's case the parties could not survive on one salary. She says that this caused considerable friction within the relationship. Debts mounted. The father has not worked since. He says that he is presently looking for work in Hong Kong. This is problematic given that he does not have a dependant's or work visa. He is presently in Hong Kong on a visitor's visa. Consequently he is obliged to leave the Territory on a regular basis. AUTONUMOUT The father says that it was agreed with the mother that given the financial crises that he should stay at home with M and be the primary care giver. This is categorically denied by the mother. She says that it was simply not feasible for the parties to survive in Hong Kong on one salary. She maintains that it was always expected that the father would return to work. Indeed she says that they employed two helpers, notwithstanding their much straightened financial circumstances, in order to ensure that this would be possible. I accept what the mother says in this respect. AUTONUMOUT On the 9 November 2010 the mother issued divorce proceedings. She describes in her affidavits a number of incidences that necessitated police involvement both prior to and since the divorce proceedings were issued. In addition she describes various problems in the marriage prior to this including an incident that led to her being arrested by the police. It seems that the father had been accustomed to driving the family car that was registered in the mother's name. He received a number of tickets for various traffic violations, but did not inform the mother of the same. In May 2009 the mother was arrested at Lo Wu. She had been completely unaware of the problem and was clearly very distressed when she described how as a result she had been imprisoned over night as she had been unable to raise the bail money. In the end the mother pleaded guilty to all of the offences as she had not wanted to get the father into trouble. The father did not seem to accept any responsibility for this debacle. This same sense of chaos and confusion seems to permeate the case throughout. There were also other issues including allegations that the father had forged the mother's signature on bank cheques and that he took money from her purse without agreement. AUTONUMOUT In any event on the 4 January

2011 the mother moved out of the former matrimonial home with M. Initially the mother had asked the father to move out. She was paying the rent and the lease was in her name. The father however refused to do so. The parties then agreed to remain in the property over Christmas. It is the mother's case that it was then agreed that they would both move out to alternative premises. Unfortunately on the 4 January 2011 although the mother was eventually able to move out, the father refused to do so. There was a scene and the police were called. I do not intend to go into the details of what occurred but suffice it to say that access became very problematic thereafter. The mother moved into a new apartment with M and the domestic helper. What follows is described in the mother's affidavit of the 10 February 2011. The mother lists a series of incidences and on the 20 January she suspended access believing that the situation was proving untenable. On the 27 January the father issued a summons for access. He asked to see M every day save for Sunday and for telephone access when needed AUTONUMOUT On the 14 February 2011 I made an interim order which stated inter alia as follows: AND UPON the Petitioner [mother] agreeing to facilitate telephone access between the Respondent [father] and the child of the family referred to below during the early evening on the days that the Respondent does not have access AND UPON the Respondent undertaking to the Petitioner and to the Court not to harass, threaten, molest, or communicate (save for text messages in relation to the handover of M) with the Petitioner and the Petitioner's domestic helpers IT IS HEREBY ORDERED THAT : Interim custody, care and control of the child of the family namely M, a boy born in February 2007 be to the Petitioner. AND IT IS DIRECTED that the said child be not removed from Hong Kong without leave until he attains the age of 18 but provided that if either parent to give a general undertaking to the Court to return the said child to Hong Kong when called upon to do so, and unless otherwise directed with the written consent of the other parent, that parent may remove the said child from Hong Kong for any period specified in such written consent. The Respondent do have defined access to the child of the family each Monday, Wednesday and Friday afternoon from 12:00 p.m. to 4:00 p.m., commencing on 16th February 2011. The child is to be picked up by the Respondent from the kindergarten and to be returned to the lobby of A Hotel by a third party and picked up by the Petitioner or the Petitioner's domestic helper. AUTONUMOUT The decree nisi was pronounced on the 4 March 2011. On the 27 April 2011 the order for access was varied slightly as follows: The Respondent do have defined access to the child of the family namely M, a boy born in February 2007 each Monday and Friday from 12:00 p.m. to 3:00 p.m., and the option to have further access on the first and third Wednesdays of the month from 12:00 p.m. to 3:00 p.m. upon giving the Petitioner at least 2 days prior notice. The child is to be picked up by the Respondent from the kindergarten and to be returned to the lobby of A Hotel by a third party or to the Social Welfare Office, to be picked up by the Petitioner or the Petitioner's domestic helper. AUTONUMOUT The mother continued to express serious concerns about the father's behaviour and the impact that this was having on their ability to co-operatively co-parent M. Notwithstanding this an attempt was made to try to settle matters on a more amicable footing. The mother describes a meeting that took place on the 6 October 2010 in her affidavit of the 4 November 2011. She says The Respondent and I were to file and exchange our Affidavits by 30th September 2011. This was delayed to see if we could come to an agreement on custody matters. The Respondent and I spoke on the telephone in early September and I agreed to meet to discuss

and try to resolve matters. A meeting was arranged on 6th October 2011 together with our respective solicitors to see what agreement there could be on custody. I wanted to know the Respondent's concerns about my having sole custody and I understood he wanted to know my objections to joint custody. The meeting in fact was a disaster and did not last very long. I was reduced to tears and the Respondent stormed out leaving me intimidated by his aggressiveness. It is therefore clear to me that in spite of all our efforts, we cannot move forward on this issue without the assistance of the court. She added: The meeting on 6th October 2011 made things worse as the Respondent made several unpleasant allegations against me. . As in the past all these allegations were based on his own behaviour which he was projecting onto me. I was hoping that we could speak to each other in a rational and civilised manner in the presence of our solicitors. His solicitor had specifically asked for the meeting to be low key with no allegations of blame. In the end I hardly said anything as the Respondent spoke down to me, over me. He would not listen to any of my responses to his barrage of loaded questions or my concerns so we could not discuss any proposals before he stormed out. I would say that everyone left in the rooms after he stormed out was stunned by the Respondent's outburst. He does show the same and sometimes worse behaviour when it is just the two of us talking. I therefore have to minimise contact out of fear he will continue these verbal abusive attacks which prevent open communication on matters relating to M. AUTONUMOUT

The trial took place from the 11 13 and 27 January 2012. At the end of the trial I gave a direction that on the 10 February 2012 closing submissions should be a mutually exchanged between the parties. Likewise on the 27 February 2012 replies were also to be mutually exchanged. On the 10 February I received the mother's closing submission as ordered. None was received from the father. On the 27 February 2012 I sent a memo to both sides stating that if the father did not file his closing submission by close of business on the 2 March 2012, that the court would proceed on the basis that he did not wish to file such a submission. On the 3 March the father replied asking for an extension of time to the 6 March. This was granted. As at the 13 March 2012 no closing submission had been received. Consequently on that date I sent a second memo confirming that no late submissions would now be entertained. I have heard nothing from the father since. The law in Hong Kong

AUTONUMOUT Mrs Casewell for the mother has referred me to a number of cases which discuss the issue of joint custody versus sole custody. This issue was also addressed in the recent Court of Appeal decision PD v KWW, Civil Appeal No 188 of 2008, 9 June 2010. In that case the Hon Mr Justice Hartmann, JA, said as follows: The concepts of custody and care and control As our law has developed and now presently stands, when a marriage breaks down and the court must ensure the best interests of any child of the union, it will invariably do so by bringing into play the dual concepts of custody whether it be sole or joint custody and care and control . Neither concept, however, is defined in our statute books. Regrettably, empirical evidence suggests that there is a large measure of misunderstanding as to the nature and extent of the two concepts, certainly among lay persons. At a practical level, a convenient way of understanding the two concepts is to compare the nature of the decision-making that is required to put them into practice. The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the

child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child's legal representative. By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline. We have spoken of the misunderstanding that exists as to the nature and extent of the two concepts. This is most often manifested in the misperception that, if sole custody is given to one parent, that parent thereby wins the right to determine all matters big and small in the upbringing of that child while the parent who is not given custody loses the right to have any say in the child's upbringing. The present case is a prime example. It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent. Any such potential misunderstanding was quashed in *Dipper v Dipper* [1980] 3 WLR 626 in which Ormrod LJ said: It used to be considered that the parent having custody had the right to control their children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement has to be decided by the court. In the same case, Cumming-Bruce LJ, another experienced family judge, said: . it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court. A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered. While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter. Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. In

summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent. For this reason it is often said that there is a thin line between sole custody and joint custody. In the present case, therefore, even if the mother is given sole custody of L, she will not be able to determine such matters as L's education, religious upbringing and choice of extracurricular studies free of any involvement by the father. She will remain obliged to discuss such matters with the father and to weigh in the balance all rational advice that he gives. Before leaving a consideration of the dual concepts of custody and care and control, it needs to be emphasised that, when a court awards care and control to one parent but rights of access to the other, as in the present case, the court is effectively awarding a form of shared care and control. This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent's physical custody. Rights of access, it is to be remembered, are given in the interests of the child to ensure continued bonding between parent and child. In the earlier case of *SEB v ZX (Custody)* 165 [2007] HKFLR, I summarized it as follows:

13. In other words the non-custodial parent still has the right to be consulted on all matters affecting the children. If the non-custodial parent feels strongly about a particular issue then the appropriate application may be made to the court in order to clarify matters. Ultimately it is for the court to decide. But it would be true to say, in the words of E and A that whoever has custody has the go. Ms Irving pointed out in her closing, and I would agree with her however, that returning to court on a frequent basis is never the answer.
14. Joint custody means that the parents should be able to make the major decisions concerning their children's life together. Although there have been cases where joint custody has been ordered where the parties find it difficult or indeed impossible to co-operate with each other, the general rule of thumb is that joint custody should only be ordered where the parents are able to work together effectively.
15. Sometimes orders for joint custody are aspirational. They are made in the hope that the parties will be able to work towards co-operating with each other in the future. The mother's open proposals AUTONUMOUT In her closing submission the mother made the following proposals: Given all of the above the Mother's proposals are that: She has sole custody. The father has defined access. The father has asked for a weekend day and the Mother proposes that He has M every alternative Sunday so that he can take him to rugby in the morning during the season, or pick him up 10:00am from B Plaza in Causeway Bay out of rugby season. He is to be returned at 5:00 pm in the evening to B Plaza. She also offers Friday 3:00 pm to 7:30 pm so that the Father and M can have dinner. Staying access can be implemented once the Father's housing arrangements are in order and his lifestyle, mental health and employment are stable. At the moment with his moving from hotel to hotel and going off to Macau to renew his visa, staying access is not feasible. It is not recommended in the Social Investigation Report. She would also like to see some calmness restored in the Father's behaviour towards her and the helper. She offers telephone access on days when the Father

does not see M. This is extended to the Father's family. The father's open proposals AUTONUMOUT The father for his part seeks an order for joint custody. He also wants to have access on one day of the weekend either on Saturday or Sunday. He also seeks staying access possibly on one weekend per month or something similar. He asks for telephone access to M every night at approximately 6 pm on days that he does not see him.

AUTONUMOUT The father says that he is still seeking employment. He also suggests that he might begin working for his father in Hong Kong. He acknowledged that if he could not find a job that he would have to return to Australia. It is not clear whether or not the father is ordinarily resident in Hong Kong at the present time or where he is living. The evidence AUTONUMOUT I must now turn to consider the issues, the law and the parties evidence as set out in the parties affidavits and as given orally by them during the hearing. For the avoidance of doubt, in so far as the matters set out in this judgment differ from the evidence of the father or mother, that is because I have preferred the evidence of the other party or because I do not find the evidence given credible, or because I consider that the documents produced confirmed my findings of fact. In addition I have had the opportunity to observe the demeanor of the parties while they gave evidence in court. AUTONUMOUT I have heard evidence from the father and the mother and the social welfare officer. The Social Welfare Report AUTONUMOUT Recommendations made to the court in social welfare reports although not binding are generally considered to be persuasive. AUTONUMOUT In this case the social welfare officer filed two reports. In her first report dated the 13 April 2011 she said: Considering the present stable caring arrangement, the close parent-child relationship, the satisfactory quality of care provided to the child and the mother's stable condition, I incline to recommend that the sole custody, care and control of M be granted to Ms O, the mother. While the father's employment plan, accommodation arrangement as well as his status for staying in Hong Kong are yet to be cleared, it is difficult to give views on the defined access arrangement at the present stage. Undoubtedly, access to the child should be supported for the non-residing parent, in order to maintain their relationship and to lessen psychological harm caused to the child after parental separation. In consideration of the child's needs for maintaining bondage with his father who had developed intimate relationship with him, Mr B should be given reasonable access to the child. AUTONUMOUT This was followed by these observations and recommendations in her updated report of the 30 November 2011:

23. Upon the granting of Interim Order by the Judge in mid February 2011, the parents could better work on the access arrangement. In spite of arguments over access issue in the first few months, the access was gradually conducted in a right direction and both parties tried their best to adhere to the Order. With more communication and both the parents awareness on the well-being of M as the paramount concern, the access arrangement was kept on the right track and they even managed to make the arrangement without the intervention from the Investigation Officer since mid June 2011. Besides, both parties could sometimes exercise flexibility to arrange access according to the needs of the child. Being a young child who is in need of a stable living routine, M also got used to the pattern of

meeting his father almost the other day and he enjoyed the access time with his father and gathering with his paternal grandparents. However, the incident happened on 23.11.2011 gave a big blow to the trust and cooperation built up between the two parties over the past few months.

24. Undoubtedly, both Mr B and Ms O showed love and care for M with close attachment. They were attentive to the emotional needs of the child and interacted with him in a patient manner. From the direct observation, M interacted spontaneously and affectionately with both parents. There is no dispute over the care and control of the child while M was under proper care of his mother. However, on the custody issue, Ms O insisted on sole custody while Mr B considered joint custody in the best interests of the child. Over the past few months, it was apparent that both parties had tried to put great efforts in maintaining cooperation with a common objective to reduce the possible psychological harm to M arising from the parental separation as minimal as possible. They even managed to come up to an agreed schooling plan for the child. Nevertheless, Ms O expressed high psychological stress on discussing with Mr B in times of divergent views between them. Coupled with the latest incident happened on 23.11.2011 which Ms O considered as having surpassed her bottom-line (intrusion of peace, safety and her privacy), joint custody seems to be not feasible without the cooperation and trust of the parties. In view of the foregoing, I incline to recommend that the sole custody, care and control of M be granted to Ms O, the mother. While Mr B had no concrete plan to stay in Hong Kong at the present stage, it is difficult to give views on the access arrangement in the long run. Yet, the present defined access might still apply during the time when Mr B stays in Hong Kong for vacation. For reasons that I will elaborate upon further I largely accept the recommendations made by the social welfare officer. Should custody vest in the sole name of the mother, or should the parties have joint custody of M? High level of conflict between the parties AUTONUMOUT After the mother issued divorce proceedings relations between the parties seemed to deteriorate even further, with a number of incidences which led to the non molestation undertakings referred to in the interim order above. In particular I was extremely concerned by the photographs produced showing the state of the former matrimonial home after the mother left with M. She describes a frightening and violent altercation with the father which took place immediately prior to her being able to extricate herself. Although the father seeks to down play this now, I have to say that I found the mother extremely credible when she described what had taken place. AUTONUMOUT I was also extremely concerned by the bundle of e-mails and SMS messages produced. In those messages the father often uses quite unnecessary and abusive language. At the beginning of the father s cross examination he apologised for those messages, only to retract from that stance later. For the avoidance of doubt the father s use of language was at times totally unacceptable. His responses were on occasion completely out of all proportion to the Mother s alleged indiscretions. I can quite understand why the mother felt bullied by some of these e-mails given the badgering tone used. Certainly putting it at its lowest either the father has very little insight into the effect of this behaviour on the mother or he was doing it with the intent of deliberately bullying her.

All in all it seems to me that these emails and text messages are indicative of a worrying state of mind. AUTONUMOUT The incident referred to by the social welfare officer on the 23 November 2011 above was also rather concerning. This is described in a letter from the mother's solicitors dated the 25 November 2012 as follows: N [the father] who was away earlier in the week came back and insisted on seeing M even though it was not one of the Wednesdays when he would have access. M [the mother] agreed to this nevertheless. Later in the afternoon N turned up at M's home in breach of his undertakings. It seems that he had got the address from drilling M. He banged violently on the front door and yelled abusively at T [the domestic helper] to open the fxxxxxg door or (he) would rip it down, or words to that effect. He had demanded earlier for M to be brought down to him so that he could play with him in the park. He was furious with M when the request was refused and T would not open the front door. Apparently he had arranged to take M to the Happy Valley Park without consulting M. M tried to speak to N on the phone but was met with further disgusting verbal abuse, bullying and nasty allegations. She persuaded him to wait downstairs in the lobby so that M could be made ready to be brought by T. As soon as he reached the lobby he called M again abusing and screaming at her because T and M were not yet downstairs. He returned to the front door and continued his violent behaviour. He called M several times again using abusive language. M was trying hard to keep back her tears. N upon realising this accused her of turning on the waterworks and made pretend crying noises to mock her. M again asked N to wait in the lobby which he eventually did reluctantly and continued his abusive and foul language. When T brought M downstairs, he decided to take M to the Doctors and insisted that T go with him. He continued to abuse and terrorise T on the way to the Doctors, again in front of M. Throughout the above episodes N's use of the f-word was prolific. N's behaviour has once again become dangerous and detrimental to M. It is not for him to make arrangements directly with M to meet him and take him to the park. M is concerned at the way he is manipulating the young child, confusing him, obtaining information from him and in his presence displaying angry abusive behaviour towards M and T. In court the father admitted that this incident was not his finest hour. Nonetheless he maintained that the mother had exaggerated it.

AUTONUMOUT In addition the mother gave evidence that the father also sought to frighten and intimidate her in other ways. This was summarized by her counsel in her closing submissions as follows: The Mother also gave evidence on the following: He called her an f-ing pig when she was holding M and pinched her neck. He tried to trip her up, blocked her path and used intimidating behaviour in front of M. She felt undermined as a mother and he made her feel that she was not doing a good job for M. She was very frightened in late October 2010 when he flew into a rage after she informed him that her father would come to Hong Kong. The attack on the flat frightened her. Exhibit P3 is a bundle of photographs of the former matrimonial home after that rage. She produced photographs (P4) of his drilling a lock in M's door whilst she was moving and looking smug about this. The Father filed a missing child report after he had spoken to the child and knew he was with the Mother. The police had been called 4 times. His demands for overnight staying access, additional dinners, change of pick up times have been very harassing. She gave evidence on his knee jerk

reaction to her request to go on holiday to Shanghai which is found in his email on pages 150 to 153 of exhibit P7 AUTONUMOUT As I have said although the father seeks to now down play his behaviour there is no doubt that the mother s fears were genuine and based on fact. The father says that he has not changed, that he is the same person that he has always been and that the mother is exaggerating. With respect I do not agree. AUTONUMOUT I also do not find that there is any substance to the father s allegations that the mother is attempting to marginalize him from M s life or that she has denied him access. I can find no evidence to support his theory that the mother may be trying to alienate M from him. I would however accept that notwithstanding the fact that there is little substance to the father s concerns that they did serve to fuel the escalating conflict between the parties. The father s mental health AUTONUMOUT The father has a history of suffering from ADD for which he has historically taken ritalin. He is also presently on an anti depressant namely remeron. Dr W AUTONUMOUT The father exhibited a letter from his GP who said inter alia as follows: Past history indicated he [the father] has a long history since childhood of ADD (Attention Deficit Disorder). Modern day medicine shows ADD basically is a hereditary disease which the patient is born with. Symptoms include lack of attention and concentration, easily become frustrated, a mild to moderate erratic temperament with occasional outburst of temper. At that time, in Australia, his doctor started him on Ritalin which is very common amongst ADD patients, he stopped taking his medicine when he felt better N is a huge guy and I witnessed him losing his temper, raising his voice to his mom a couple of months ago when they both came for help and advice. It was intimidating indeed, but after this short outburst of argument, he became very amiable and reasonable during the rest of the consultation. To the divorce, N expressed regrets and acceptance. He put the blame on himself, on his illness and on his over-protective attitude towards M. I think N s total devotion and attention towards M is a result of his great love for M. He wants to make sure M is well taken care of, raised properly and become a better person than himself. The intention is very admirable and touching indeed. With proper treatment, and hopefully with the moral and physical support from M, he will become more motivated in receiving the treatment given to him. If that is the case, he will definitely get better over time. AUTONUMOUT The mother expressed concern about the last paragraph of Dr W s letter as referred to above and suggests that it is not for the child to support the father either morally or physically but the other way round. Although there is nothing to suggest that the father shares the same views as Dr W, I would have to agree. Psychologists report- Ms H AUTONUMOUT On the 1 December the father agreed to produce a psychologists report on his general mental health. I had expected the parties solicitors to write a joint letter of instruction and for the psychologist to be shown copies of the pleadings. Unfortunately that did not take place. Ms H was shown a copy of the court order and the two social welfare reports. She also had an opportunity to speak to the father s general practitioner Dr W as referred to above. Ms H concludes that

16. Based on the documentation I have been provided with and my interview with Mr. B, it is my opinion that Mr. B s general mental health is sound. Mr. B s present situation is such as to cause a high degree of physical and mental stress. The subject matter of the interview was at

times extremely distressing. Despite these difficult circumstances, Mr. B's physical appearance, attitude, behaviour, mood and affect, thought coherence and general demeanour demonstrated no apparent abnormalities. Mr. B seems to have accepted the breakdown of his marriage and come to terms with his role in its demise. He is clearly focused on the well being of his son and appears completely willing to co parent M with Ms. O so far as he is able to do so. The character of the parties The mother AUTONUMOUT I found the mother to be entirely credible. She came across as a level headed woman who was trying her very best to deal with a situation that had verged out of control on numerous occasions and through no fault of her own. I accept that she is genuinely frightened of the father and that his bullying behaviour has caused her distress. I accept that she has created a good home environment for M. I also accept that she is doing all that she can to facilitate the father's relationship with his son in very trying circumstances. I have no doubt that she is a good Mum and that she loves her son very much. The father AUTONUMOUT Although quite charming at times the father did come across as being loud and somewhat robust. He clearly thought he was justified in his actions and found it difficult to take responsibility for some of the things that he had said and done. I have no doubt however that he loves his son very much and that they have a close bond. AUTONUMOUT The mother has set out her concerns with respect to joint custody in her affidavit. She says:

19. I fear that the joint custody will not work because of the Respondent's attitude and behaviour towards me. He continues to accuse me of trying to destroy M's relationship with him. Some of the things he has accused me of are: Sending a letter to Immigration Department and spreading rumours to ensure that he does not get a job and a visa to remain here. I have not made any complaints about the Respondent to the Immigration Department nor badmouthed him. That I have spread lies about him to our mutual friends and threatened me with legal proceedings for slander, perjury and defamation. This is totally untrue. I have only shared with the close friends some of the things that have happened to me and they have helped and supported me. That I have been influencing M against him by telling M that Daddy says bad words about me. As stated I am encouraging the relationship between the Respondent and M. I encourage M to call his father and make time for evenings phone calls as best as I can. M has asked me about Daddy saying bad words to T [the domestic helper] and me and why Daddy shouts at T and me. I have asked T to lie about him. He has even made allegations against T which I know are not true and asked me to dismiss her claiming he will get rid of her.
20. The Respondent continues to twist things that I have said. He pretends not to receive messages that I have sent. To cover his lies, he makes up more. In July he vehemently denied telephoning my office 13 times in one day. When I proved he had made the calls he falsely claimed he had to call as I had not responded to a SMS message, which actually he had not sent. He also pretended that his mobile phone automatically dialled my work number, an excuse he used another time after a similar number of calls .

21. I cannot see how joint custody would work. When it comes to making decisions, the Respondent threatens and bullies me to try to get what he wants. I would not be able to discuss anything with him calmly and rationally with his incessant questions and inability to listen to alternative views. He would take it as an opportunity to continue to harass and bully me. The fact that the Respondent gave undertakings not to harass and molest me has made no real difference to his behaviour. When he is upset he will act without thinking and say nasty things about me and make scurrilous accusations against me. The thought of joint custody fills me with dread.
22. The Respondent has also threatened that if given custodial rights over M I will be in trouble, implying he will abuse this right to get his way. This is frightening.
23. My reasons for seeking sole custody is that I can provide a sound foundation to guide M through life. I can help him make decisions in a calm and rational manner. I do not believe that the Respondent is always capable of discussing M's matters with me in calm and rational manner. He becomes aggressive and domineering.
24. Whilst I am a logical, strong and intelligent person, I am not able to handle the Respondent when he threatens, manipulates and lies to cover his bad behaviour and insists on his own way. He does this by raising his voice over the top of mine until I have to give in or am numbed into silence and lose the confidence to respond at all. When I shut down he complains that I do not respond to him. During the marriage I have been frightened of the consequences would be more shouting and abuse or a twist of the situation to make me feel wrong for raising difficult questions. The Respondent often threatens that unless so and so happens he will be very upset and I or the domestic helper will have to bear the consequences. For example, I ended up moving out of the former matrimonial home with M, rather than the Respondent. I could not stop him staying on despite the lease which was in my name ending. I had to pay for all the damage he had inflicted on the property. One of the domestic helpers left her job due to her fear of the Respondent's threats. The Respondent does not realise how verbally aggressive he is. I will not be able to deal with him and handle his behaviour over decisions regarding M whether big or small when he acts this way.
25. The Respondent's nasty behavior and threats towards me do affect the way I make decisions. Even if I am clear in my own head about the right way to go, the Respondent's behavior leaves me shaken and unsure of matters. This is not good for M. On my own, as evidenced this year, I can make decisions which provide M with stability. For example, as I presently have sole custody I have been able to deal with M's application for ESF Schools. I, nevertheless, kept the Respondent informed of all I was doing and discussed alternative options in case ESF does not have a place for M.
26. Although the Respondent loves and cares for M his behavioural, social and mental issues often cloud his view and judgment of what is normal and right. This can lead to extreme views or interpretations. For example, he claims I am trying to poison M against him and

other things like M watches TV all day every day just because when he calls M is having TV time. Also medical issues can be blown out of proportion and he even filed a missing child report the night we moved out after speaking to M on the phone. The Respondent claims to be a victim over access and this will be a landmark case. Yet he has constant regular access as chosen by him.

27. The Respondent's oppressiveness and possessiveness over M regularly explode into anger and aggression when he does not get his own way. Often he projects his own needs onto M and fights aggressively. In doing so he is only trying to look after his own needs rather than thinking about what is right for M. This was born out over the months of January to about April 2011 when he did not get his own way over the schedule of access. It is also demonstrated by his attitude towards the domestic helpers when they did not comply with his wishes, for example, meeting him to discuss the divorce and custody issues. He threatened to report them to the Immigration Department for theft, illegal activity and profit sharing. He threatened to have T put in jail, in M's hearing which caused M considerable distress. In fact, he has often attacked T verbally in front of M which upsets him. He frequently complains about her and attacks her integrity because she will not answer his questions about these proceedings and my activities.
28. I would like the court to grant me sole custody of M with care and control to me and defined access to the Respondent. My concerns are summarized as follows: The Respondent has commitment issues and cannot adhere to agreements and undertakings given. We are unable to resolve conflicts in the past unless I submitted to the Respondent for an easy life. I left the marriage for that reason yet the Respondent still bullies me and tried to force me into his way of thinking. We cannot reach agreement. The Respondent is emotionally abusive towards me and I would need a third party with me to be able to deal with the Respondent. In fact the process of deciding and discussing issues is a traumatic experience for me, even if carried out in the presence of third parties such as our respective lawyers. I therefore seek sole custody, care and control of M with defined access to the Respondent. She adds: The Respondent's aggressive attitude and nasty behaviour which involve yelling abuse at me and shouting excessively means I cannot agree to joint custody. I am not able to handle the Respondent's anger, his aggression and his threats. They prevent any rational calm discussion about the issues at hand. It all becomes focused on what the Respondent himself wants for M. I accept what she says in this respect. AUTONUMOUT By all accounts M is doing well at school and generally. He has a good relationship with both parents. I accept that he is now in a good routine and that he is thriving.

Conclusion

AUTONUMOUT Given the present circumstances it seems to me that the welfare of M is best served at the present time by an order for sole custody in favour of the mother. I accept that to do otherwise would place an intolerable burden on the mother's shoulders. What access arrangements should be put in place? AUTONUMOUT The father now seeks weekly access on

either a Saturday or a Sunday presumably on the premise that he will shortly be working. This seems reasonable. The mother also offers access on Friday afternoon/evenings, which again seems reasonable. The time will be dependent on whether the father is working or not. Given that I am unsure whether or not the father is in Hong Kong at the present time it seems unlikely that there can be any staying access until the situation has been further clarified. I would however expect that to change in due course. In the meantime the father should also have the ability to spend time with M during public holidays. Single public holidays will be alternated between the parties. Other public holidays to be split equally between the parties. Costs AUTONUMOUT Given the nature of this dispute I will make an order nisi to be made absolute at the expiration of 14 days that there shall be no order as to costs. Consequently I will make an order as follows: AUTONUMOUT

- 1) Sole custody and care and control of M shall be granted to the mother with defined access to the father as follows:
 - a) Access on alternate Sunday s commencing on Sunday the 25 March 2012. The father shall either take M to rugby or pick him up at 10:00 am from B Plaza in Causeway Bay. M is to be returned to the B Plaza at 6:00 pm.
 - b) Access on alternate Saturdays commencing on the 31 March 2012 from 10:00 am 6:00 pm
 - c) Single public holidays to be alternated commencing on the 4 April 2012. The father is to have access to M on that day. The mother shall have M on 1 May 2012 and so on and so forth. The father is to have access to M from 10:00 am - 6:00 pm.
 - d) The Easter holiday to be split between the parties. The father shall have access to M on Friday 6 April and Monday 9 April 2012 from 10:00 am 6:00 pm on each day.
 - e) Access on each Friday from 3:00 pm 7:30 pm or at such other time as may be agreed between the parties.
 - f) On each occasion M is to be picked up and dropped off by the father at the B Plaza in Causeway Bay.
 - g) Daily telephone access on days when the father does not see M at approximately 6:00 pm in the evening.
 - h) Other access to be by agreement between the parties.
- 2) An updated Social Investigation Report be called for in 9 months time with respect to access.
- 3) Liberty to apply generally.
- 4) There shall be an order nisi that there be no order as to costs. Such order to be made absolute in 14 days time. (Sharon D MELLOY) District Judge Mrs Usha Casewell of Messrs Boase Cohen & Collins for the Petitioner The Respondent acted in person 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 hc*{ h nX hc*{ h

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