

HONG KONG / JUDGMENT

RM also known as RH v. SRM

COURT

Family Court

DECIDED

7 September 2016

CASE / FILE NUMBER

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FCMC 8500 / 2014

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 8500 OF 2014

BETWEEN

RM also known as RH

Petitioner

and

SRM

Respondent

Coram: Deputy District Judge Susan Wong in Chambers (Not Open to Public)

Date of Hearing: 27 - 29 January, 3 - 5 February, 20 April, 1 - 3 June and 8 June 2016

Date of Closing Submission: 8 August 2016

Date of Judgment: 7 September 2016

JUDGMENT

(Relocation, care and control)

This is the Petitioner Mother's application for the relocation of the two children of the family, G and L, both boys to Japan where she said she has extensive family support which the Respondent Father opposes this application.

Background

The Mother is Japanese who was brought up in Chiba, Japan. She is now 41. Her parents are retired government officers still living in Chiba. The Mother has a brother in Japan who is married. The Mother, after graduation at the age of 22 in 1997, went to Germany and married her German boyfriend whom she met in a summer school in the United Kingdom (UK). During her time in Germany, the Mother worked for a Japanese company. The Mother's first marriage only lasted until 2000 and there was no child by the marriage.

The Father is British and was born and brought up in Hemel Hempstead in the UK. He is now 36. He was the only son although there were two half-sisters from his mother's previous marriage. The Father's parents were separated when he was 11 and he remained in the care of his mother though he kept regular contact with his father. His mother later remarried in 1999 and the Father has kept close contact with his mother and step-father ("his parents").

The parties met in 1999 during the Father's business trip to Germany. At that time, they both worked for Sanyo, a Japanese company with the Mother working at the German office and the Father at the UK one. They soon started a courtship and visited each other during weekends and long holidays.

The parties married in UK, a week before the elder child, G was born on 19 March 2004. After that, the three of them lived at a rented unit near the home of the Father's parents in UK. About 6 months after the birth of G, the Mother resumed working in various Japanese companies in UK. G had been placed under the care at nursery, of baby-sitters as well as his paternal grandmother.

In 2007, the Father was offered a job opportunity to work in Hong Kong and the whole family therefore moved to settle here. Initially the Mother stayed at home to look after G with the assistance of a domestic helper. She later resumed working at a Japanese company. The youngest child, L was born on 9 August 2012. According to the Mother, L was a planned child with a view to save the marriage but the relationship between the parties did not work out.

Although the parties gave different accounts of the marital breakdown, it is not in dispute that the Mother moved out from the matrimonial home with the two children in April 2014 when the Father was on a business trip to England and she started cohabiting with her Japanese boyfriend ("Mr Y") at his rented abode in Cullinan.

In June 2014, the Mother took out divorce proceedings on the ground of unreasonable behaviour against the Father whereby the Father defended and cross-petitioned alleging the Mother's adultery. The parties subsequently came to an agreement that the divorce main suit be started afresh and proceeded on the ground of two years' separation.

In relation to the children's matter, both parties agreed to have joint custody at some stage of the proceedings but they both ask for sole care and control.

Whilst the issue has not yet been resolved, the Mother took out the present application for the permanent removal of the children to Japan and the trial was initially set down for 6 days commencing on the last week of January and purportedly ending just before the Chinese New Year 2016. Unfortunately, the length of the trial had been grossly underestimated and in view of the family court's diary, the trial had to be adjourned with some dates fixed in April and some in June 2016.

In the meantime, the Mother asked for leave that G be allowed to leave Hong Kong for two periods; the first one from the evening of 21 January to the morning of 24 January 2016 and the second one from the evening of 1 February to the afternoon of 7 February 2016 so as to enable G to respectively take a preparatory course and an entrance examination in GIS Japan where the Mother intended him to study. Although G would be missing school on 22 January, the Mother said it would be helpful for G to take the course so that he would be better prepared for the entrance examination. At the time of the application, she asked for leave to take L with her as well.

The Father on the other hand objected not because he minded G taking the course and examination but he did not like the idea of G missing his school which G managed to have 100% attendance rate. The Father also alleged that his parents would be visiting Hong Kong during those periods and they would love to see their grandchildren. Furthermore, the Father said that G does not want to be relocated to Japan.

For the purpose of this determination, I would not go into details of my previous rulings save that I had only allowed G to go and the Father would look after L during the Mother's absence in Hong Kong. In relation to the second removal period, I had substituted other dates because I did not like the idea of the Mother leaving G to be looked after by the maternal family members when she herself ought to be present at these proceedings in Hong Kong.

As for the April part-heard hearing, shortly before it resumed, the Mother changed her entire legal team from Messrs Ip & Heathfield instructing Ms Yu to Messrs Stevenson Wong & Co instructing Ms Tsui. This last minute change inevitably resulted in the Mother asking for adjournment so that her new legal team would have the opportunity to peruse the transcripts. Although I allowed the Mother's application, I ordered her to pay for the Father's costs of and incidental to the adjournment. Needless to say, the case had to be adjourned once again.

It was against this background that G who was at the beginning of the trial studying Primary 6 at the JIS but because it runs a Japanese school system with its academic year starting in April, by the time this trial concluded, he has already entered into the secondary schooling at HKJS. As for L, he also started his kindergarten schooling in April 2016.

The Mother's case

As in all relocation applications, the Mother said that she is lonely and she wants to go back to Japan where she said she has family support.

In her 2nd Affirmation filed on 23 January 2015 in support of her relocation application, she said:

"15. The breakdown of our marriage has long strained my life in Hong Kong. Even prior to our separation, I often found it difficult to have the emotional support I needed in times of turmoil when my family and close friends were not here with me....However, our relationship had inevitable broken down and I find no reason to stay in this foreign city, where I cannot find any refuge or support to my distress."

17. "After all, both Respondent and I have no roots or ties in Hong Kong and the day will come when we will ultimately return to our own countries. I believe this is the right time to return to Japan with the Children....The Children will be able to enjoy a stable lifestyle with family members they are familiar with."

Her application to relocate was based on i) emotional support; ii) financial position and iii) her boyfriend. In Court however, the Mother said that she has no plan to re-marry in the foreseeable future.

As to the condition in her hometown, the ISS social workers ("the ISSSW") made a report on 11 May 2015 consisting of 5 pages with some photographs of the maternal parents' home attached. The followings are some of the extracts:-

"..... the maternal grandfather is 69 whereas the maternal grandmother is now 68 years of age.... It was reported that they live on pension while the maternal grandfather also works part-time at a cleaning company 7 hours a day and six times a week."

"(The maternal grandfather's) annual income is 4,250,000 including his annual salary at the cleaning company whereas the maternal grandmother's is 1,600,000. Their combined annual income amounts to 5,850,000 which is sufficient enough to support themselves, the Mother and her children. They are ready to support the Mother.... especially in paying the tuition fees."

"They are living in a two-storey house with two carports which they bought that for a long time since their marriage in 1973. They own a car and keep a dog that G loves so much. The maternal grandfather is enjoying good health and he walks 40,000 steps per day. He said that he has confidence in his stamina and is sure that he can play enough with the grandchildren."

“(The maternal grandparents) consider the environment is suitable for children to grow up and their house is spacious enough so that (the Mother) and children can occupy the two bedrooms and a shower room on the second floor.”

“As for schooling, the ISSSW said, “Admission to public school is possible at any time, however, they need to register beforehand to the Board of Education of the city to get properly admitted.”

“By way of conclusion, the ISSSW found that (the maternal grandparents) are physically, mentally and financially prepared to support the Mother and her children. The residential and educational facilities in the area are suitable to children’s growing up. Their willingness and readiness to provide support for the Mother and her children is evident and they would like to see as soon as possible that their grandchildren are leading a normal and stable life. The ISSSW therefore conclude that it is for the best interest of the children to live with their mother in Japan with the support of the grandparents.”

The Father’s opposition

The Father simply does not believe the Mother’s plan.

As to the real reason why the Mother wants to go to Japan, the Father said in his 2nd Affirmation:

“10.

It is perfectly clear that my wife does not intend to return to Japan to live with her parents and to bring the children up there. My wife is only returning to Japan because of (Mr Y). I believe that she should tell the truth about this....

9.

My wife has obtained leave to remove the children to Japan on 3 occasions since (Mr Y) has been recalled back to Japan. Prior to this time she only went back to Japan less than once per year

As to the relationship between Mr Y and the Mother, the Father said in his 2nd Affirmation:

“3.

The Petitioner met (Mr Y) through the Yahoo Japan website. (Mr Y) described himself on the site as only 40 years of age, single and gave a false job description. They first corresponded on the website and met on 9th October 2013. I understand that they had sexual intercourse 2 days later.

5.

In addition I am informed (Mr Y) has been married twice before and makes no reference to the first marriage in the affirmation. This is probably a material nondisclosure especially as I am informed that he is a serial womaniser.

6.

..... They had both told....G, not to say anything to me. I found this out later as G was hurt and uncomfortable at the position into which he was placed.

7.

..... It appears well known that (Mr Y) is a serial womaniser who married on a second occasion into the Ajinomoto family, who are one of the richest families in Japan. It is also quite clear that he had 2 children with this second wife and that she was angry with respect to his philandering. It was on that basis that in April 2014 and thereafter for a few weeks that she contacted me through an agent about the activities of (Mr Y)

The Father has exhibited the email from the agent in his affirmation:

"... and (Mr Y) understands how much of serious trouble he is in, should my client decide to go public with the information she owns.

My client is absolutely not interested in reconciliation with Mr Y..... This all comes from pure revenge, or I should say pure justice - the fact that (Mr Y) is continuing to be a 'very naughty boy'. He deserves punishment for what he has done, and even I can see that he deserves to be punished for what he has done, and how he has treated your wife ever since they met last October.

My client wishes and is confident that she should be able to seal this case before he leaves Hong Kong.

I am sure you have the upper hand with the solid fact that your wife has started a relationship with another man, prior to a divorce.

Please let your wife know that (Mr Y) is NOT a man that she thinks he is. (Mr Y) is an extremely selfish sex maniac. Once he has had enough of a relationship with a girl, he has no hesitation in dumping her as if she is a some stranger to him.

Justice shall be served."

What are the views of the children?

In the 1st Report, Ms Ching said that:

"32.

Regarding the future living plan, (G) clearly stated that he hoped to live in Hong Kong continuously and he would not mind staying with either parents as long as he would stay in Hong Kong. He admitted that he had close friends in Hong Kong and he enjoyed football activities in Hong Kong.

33.

L was too young to express his view. But as observed, he did enjoy staying with either parent."

Social Welfare Reports

There were altogether three social welfare reports made by two different officers plus the ISS Report. The 1st local report was prepared by Ms Ngan before the Mother's application for relocation and therefore both Ms Yu then representing the Mother and Mr Pickavant representing the Father have agreed not to call her but only Ms Ching who had prepared two subsequent reports respectively on 30 May 2015 and 13 January 2016 ("the 1st and Updated Reports") addressing the issue of the Mother's relocation application. In short, Ms Ching recommended split care and control because:-

"21.

The sibling has an age difference of 8 years and their needs are considered as different. G is approaching 12 and adolescent stage. Instead of basic care, he increasingly needs autonomy, sense of identity and self-achievement as well as life plan. He has peers network in Hong Kong and develops interest which can meet his need. He benefits from a complete developmental experience in a secure environment. Furthermore, he maintains good relationship with his father, who is considered more able to provide guidance and advice to him. Therefore, it is genuine for him to clearly express that he prefers maintaining status quo to stay in Hong Kong, which for him is of his best interest. His wish to stay in Hong Kong would be given weighty consideration. The possible adverse effect to his development if he is not ready to move to Japan should also be taken into account. Therefore, his staying in Hong Kong is recommended.

22.

L, being in tender age, is in need of basic care and attachment in order to build on a sense of security. Both parties actually are capable of providing basic care. However, since birth, L is living with the mother, being taking care of by her with assistance of the helper. L is able to see her almost every day and she is in his life on a daily basis. The mother has accompanied more time with L before and after parents' separation. L has developed a close bonding and emotional dependency with the mother. Hence, the mother is of a better position to render quality care in terms of continuous consistent parenting, attending to L's daily need and attachment need. To consider L's most desirable caring arrangement, continuity of the motherly care would benefit L and is hence recommended.

23.

For the 8-year age gap between G and L, G's role is understandingly more contributive and a caring role from him is sometimes expected. G has considered and understands he will meet the younger less frequently when he expresses his preference to stay in Hong Kong. To keep G to stay with L in Japan against his wish may not benefit the siblings' relationship. For the benefit of both children while taking into their individual needs and future development, though reluctant, it is considered that split care and control of the siblings as the better option if the mother decides to return to Japan."

Issue

(i)

Is it in the best interest of the children to go to Japan?

(ii)

If yes, should both children go or just L as recommended by the social welfare officer? If it is in the latter situation, as the Mother has already confirmed in her oral testimony that she would still go leaving G to the Father, the Mother and the Father will inevitably have the care and control of L and G respectively.

(iii)

If both children's relocation application is refused, shall the Mother or the Father have the care and control?

The Law

In relocation cases, our Court of Appeal in *SMM v TWM (Child: Relocation)* [2010] 4 HKLRD 37 has confirmed the applicability in Hong Kong of the guidance laid down by the English Court of Appeal in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473.

In *Payne*, the Right Hon Lord Justice Thorpe said as follows:

“40

...To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

(a)

Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean, founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.

(b)

If, however, the application passes these tests then there must be a careful appraisal of the father's opposition; is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c)

What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

(d)

The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

41.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor."

This is in line with the principles summarized by Dame Butler-Sloss P at 500G in paragraph 85:

"In summary, I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.

The welfare of the child is always paramount.

There is no presumption created by section 13(1)(b) of the Children Act 1989 in favour of the applicant parent..

The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

Consequently the proposals have to be scrutinized with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

The opportunity for continuing contact between the child and the parent left behind may be very significant.

26 In summary a review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

the welfare of the child is the paramount consideration; and

refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore, her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

Discussion

Mr Pickavant tried to convince me that the test in *Payne v Payne* does not apply here because the parents have been having share care arrangement since their separation in April 2014 in the effect that the Father now spends more quality time with the children than the Mother. Mr Pickavant submitted that by virtue of the Father having staying access over the weekends from between 7 and 9 am every Saturday to 8 pm the next Sunday and a short dinner access one day per week, it means that the time spent by the Father with the children is far more than the Mother because she only returns home after work at 8 pm; therefore, as Mr Pickavant put it, the Mother has at most 3 hours per day x 5 days = 15 hours. In light of that, he said that the Father and Mother are having share care arrangements. With respect, I do not agree.

There is no dispute that the Mother has been in gainful employment shortly after she settled down in Hong Kong and throughout the subsequent time even after L was born. The Father also does not dispute that he had to travel frequently because of the nature of his employment, the most being 161 days in 2011. I have no hesitation in finding that the Mother has been involved in the children's day to day care since their birth with the assistance of the domestic helper. In Court, the Mother could say in details as to the children's daily schedule. I accept her evidence that for example she has been heavily involved in G's school PTA Committee, School Bus Committee etc and that she is the one who is responsible for signing the handbook which enables her to tell G what to do and what to prepare every day.

By saying this however, I am not criticising the Father's extensive travel pattern. I accept entirely that the Father, who has not pursued tertiary education, has been working very hard since he came to Hong Kong in 2007 and as a result, he is now in the director level. I accept that he travelled extensively for the benefits of the family.

Nevertheless, when determining who has been the main carer of the children, I have no difficulty in finding that the Mother must be the one. Although I accept that the Father, after the parties' separation has spent some quality time with the children by playing with them and at the same time has made a lot of effort to arrange classes and activities for them during the weekends' staying access, the Mother still remains the primary carer of the children.

Having reached this conclusion, the principles in *Payne v Payne* apply to this case.

Is the Mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the Father from the child's life?

Although the Father had been denied staying access to L for nearly half a year since the Mother moved out and there had also been ugly scenes in the presence of the children whereby the Father unilaterally refused to return L at the night on 25 October 2014 (Saturday) and only returned him at 9:00 am the next Sunday and there was also another heated argument between the parties about the staying access of L on 29 November 2014 when the Mother was denied entry to the former matrimonial home and the Police were almost called, I accept that the Mother has since been co-operative with the Father for the weekend staying access arrangements albeit reluctantly at the beginning.

The only two accesses that the Father missed in 2015 were in no ways the fault of the Mother but because of the Father's urgent commitment. I therefore do not find that the Mother's application for relocation of the children is to exclude the Father from the children's life.

Is the mother's application realistic i.e., founded on practical proposals both well researched and investigated?

Financial support

One of the concerns that the Mother raised is that she finds it hard to maintain the standard of living here. So what has been the Mother's financial situation in Hong Kong?

In paragraph 18 of Ms Ngan's Report dated 10 December 2014, it is noted that, "(The Mother) has been working.....since April 2010 and she is now a Senior Manager, Finance and Administration. Her current salary is \$37,800." In Form J filed on 2 March 2015, the Mother stated that her monthly income was HK\$44,968 per month.

Looking at the two figures, the Mother had been doing very well because there was a substantial increase in her salary within a short period of three months. With that amount of salary together with the sum of HK\$27,500 paid by the Father as maintenance coupled with the Father being solely responsible for the ESF school fee of HK\$2,000 for L, HK\$600 for G's Kumon and all the extra expenses on football, tennis, golf and swimming classes (which the Father alleged being close to HK\$35,000 per month), I would say that the Mother has been enjoying a middle class standard in Hong Kong.

On the contrary, if she were to go back to Japan, I agree with Ms Ching that the Mother's financial situation would be somewhat uncertain.

The Mother at the initial stage of the proceedings said in paragraph 25 of her 2nd Affirmation filed on 23 January 2015 that she intended to continue working once she returned to Japan.

The Mother in her oral testimony however said that she would not work for the first or two years so as to make sure that her children settle down in Japan and she would rely on her parents' support. When the Mother was asked how she knew that her parents would help her financially, she said, "the ISS report and according to the report, my parents have over 6 million yen annual income" and she had talked to them and they are happy to support her and the children. The Mother called her mother ("the maternal grandmother") to give evidence.

Although the maternal grandmother confirmed that she is willing to support her daughter and the grandchildren, when she gave evidence in Court, she had great reservation about her husband's and her own financial condition. She asked for some time during cross-examination so as to enable her to write down a breakdown to show that there would still be surplus after taking up the three extra burdens.

When the Court resumed, she produced a chart on which she wrote down she and her husband usually spend 250,000 yen and her daughter and grandchildren would spend another 150,000 yen making a total of 400,000 yen leaving 100,000 yen per month for safekeeping. Nonetheless, the maternal grandmother lost her temper when Mr Pickavant cross-examined her in details as to the amount of their respective pensions.

In reply to Mr Pickavant about the pension, she said:

"Yes, but I think this is getting a bit too much into personal details, and I think some – maybe you should respect my privacy."

When pressed by Mr Pickavant for an answer, she said:

"I think you know very well what the situation should be when Japanese Government employee retire, what kind of terms they retire under and what kind of amount they receive. The fact that you're asking is just being mean and you're not being gentlemanly."

She refused to give the information and maintained that it was personal even after I told her that the Court needed to know. When Mr Pickavant asked her:

"Do you still have your lump sum? Is it still there to support you?"

She said:

"Yes, there is still a remainder, although please do not ask me of the amount because I don't see the need for answering that."

When Mr Pickavant again said:

"I don't want to fall foul of your temper. But tell me about this lump sum that your husband got, please. If you don't want to disclose your own....."

She said:

"How many times do I have to tell you there's no need to disclose the amount?"

The maternal grandmother insisted that the information was publicly available and asked us to check ourselves. She accused Mr Pickavant of being mean and insulting.

“Please refrain from this line of question, because as public servants previously, all – the payments of our pension obviously came from tax dollars, and all the information regarding it is publicly available. I find it hard to believe that as legal professionals such as yourself you would not be able to have that information ready in your head. So why are you trying to delve into my pocket?”

When Mr Pickavant asked her, “Do you have emotional problems? These outbursts, do you suffer from them?” She replied, “No, I do not. I am trying to speak normally and I’m trying to tell you what I really think when you’re asking questions.” “And if – and I’m not being angry and I’m not being instigated...”

When asked whether she could manage two small children herself, she said, “Why are you saying this? And I’ve already produced that chart, and yet you are still asking me like this, and as for making this longer than it should be, I’m just answering your questions.”

When this Court asked whether she is prepared to fund her daughter and the grandchildren, the maternal grandmother’s reply again was to ask us to see the chart she had provided.

Looking at the chart, there were altogether 7 items that the maternal grandmother put down; (i) electricity; (ii) food; (iii) insurance, tax and other government rates; (iv) communication, education and books etc; (v) transport petrol etc; (vi) mortgage; and (vii) leisure and other reserves. For item (iv), the maternal grandmother put down 10,000 yen for 1 person, 25,000 yen for 3 persons and 35,000 yen for 5 persons. Although I don’t understand what this item entails, obviously it is not the tuition fees that the maternal grandparents told the ISSWR that they were prepared to pay for their grandchildren.

As the ISS report only stated the respective maternal grandparents’ annual amount of pension but did not mention that their bank accounts had been verified, I am doubtful as to whether the maternal grandmother has extra money in reserve.

When she gave evidence in Court, it was rather obvious that the maternal grandmother flew into a temper whenever money issue was raised. She refused to answer anything about her pension but kept on asking us to see the chart. The maternal grandmother gave me the impression that she is rather money conscious. In her oral testimony, she confirmed that it was the Mother who paid for her air-ticket to come to Hong Kong to give evidence and she also said that the sum of 70,000 yen to see the ISSWR was paid by the Mother which in the maternal grandmother’s own words was “quite an expense”.

If the maternal grandmother is conservative about her spending and given her relationship with the Mother which I would discuss later, I doubt very much that she is prepared to bear the 3 extra burdens.

As for the maternal grandfather, I doubt whether he is financially capable to assist the Mother. The ISS report mentioned that:

“The maternal grandparents enjoy together walking, going to museums or concerts, and trip both domestic and overseas.”

If the statement is true, isn't it the perfect time for the maternal grandparents to travel to Hong Kong together to show their support since their air tickets would be funded by the Mother and the maternal grandfather has already come to Hong Kong more than ten times?

The Father however said in his 2nd affirmation:

14.

I believe that the reason why Petitioner's mother has been requested to provide evidence is because her father is still undergoing intense employment and does not have time to come to Hong Kong to deal with this matter as he is working long hours. He lost a great deal of his retirement savings by investing in the stock market in or around 2011/2012 and tried to borrow money from my wife to cover for the lost sums. He can have little time with anybody or anything let alone the children as he works 7 hours a day 6 days per week.

When cross-examined by Mr Pickavant as to why her husband needs to work, the maternal grandmother said that it is very common for pensioners to work to stay healthy and to enjoy life in line of their duty. I don't believe that. One would not work 7 hours a day, six times a week at the age of 69. The Father's version is therefore more credible.

If indeed the Mother does not have her parents' support as she claimed and it is the Mother's case that she would not be working and her boyfriend is not supporting her, how is she going to survive with the two children?

Even if I am wrong that the maternal grandparents would indeed support the Mother, looking closely at the ISS report, “They consider they can financially support the Mother, even paying premiums for her National Health Insurance and National Pension until she could find a job...” (my emphasis in bold). The maternal grandparents never made any promise that they would support the 3 extra dependants for one or two years.

In any event, the maternal grandmother in her oral testimony said that the 3 extra dependents need only 150,000 yen extra per month which is around HK\$12,000 after conversion. In light of this, I agree with the Father when he pointed out that the Mother's financial position is much better in Hong Kong.

Relationship between the Mother and the maternal grandmother and her physical support in Japan

The Father said in his 2nd Affirmation:

15.

My wife repeatedly told me from the days that we first met that she had left Japan and came to Europe mainly to get away from her parents as she was brought up by her grandparents who have since died. She said that her parents had little or no time for her because they both worked full time and had passed my wife and her brother to their maternal grandparents who basically brought them up.

I found some truth in this statement. When this Court asked the Mother what her plan would be if this case cannot conclude before the commencement of school term. She said in her oral testimony:

“....can I explain about Japan? Everybody goes to the new school in April and if you miss April, it’s going to be a big, big delay for him and he has to enter the school as a....like a stranger....everybody starts in April....so....my real wish is not to delay....”

If this is the case, why did the maternal grandparents tell the ISSWR that they wanted the Mother and her children back to Japan as soon as possible, hopefully by August so that G could catch up school after the summer holidays? In my view, the maternal grandparents who were civil servants before their retirement were likely to have left their children’s care to their own parents when their children were young and had not been involved in their children’s care.

As to the relationship between the Mother and the maternal grandmother, the Father said that they have always been on bad terms. In his 2nd Affirmation, he said:

“17.

I can sincerely inform this Court that my wife has for the past few years spoken of her mother with complete disrespect as they consistently argue. She calls her “bubba” (a word I had not heard before) and says that she is senile and describes her as constantly talking and complaining.

16.

..... Actually she did not officially divorce her German husband until around 2000. This was deliberate on her part as she desperately did not wish to return to Japan.”

When cross-examined by Mr Pickavant as to why the maternal grandmother failed to see the Mother when she visited Hong Kong and England, the maternal grandmother in reply said that:

“....as soon as I retired from my job I wanted to come to Hong Kong, but unfortunately.....The Japanese guided tours are very packed...and the only time that could have been – when I could have been free to meet (the Mother) was only during the lunchtimes. But she was working, so she couldn’t just come to the places that I was in to meet me. And the thing is why I took that guided tour to Hong Kong was I tried to go and meet her and tell her that I’m....retired, and I wanted to meet her straight away, and that’s why I came to Hong Kong in the first place. And yet you’re here suspecting this and suspecting that, and I think that you are – you simply lack the conscience of parents and you lack faith in humanity.”

As to why the Mother did not take half day off to meet her, she said:

“You have no idea how harsh the conditions my daughter’s work was.... and yet she had to cope with such harsh hours and also take care of the children, and why can’t you understand this kind of life?”

When questioned about the maternal grandmother’s UK guided tour that the Mother did not meet her for even 10 minutes, she said:

“... when I went to UK, I had to try and use those old pay phones to try and call her up, and I wasn’t familiar with that. I couldn’t really get through to her what I really wanted to tell her, and when I was there I couldn’t really do anything because I didn’t know English, so – and she had to be a responsible person and take care of her work duties. So that’s just why I had to give up trying to meet her.”

She denied that the Mother did not want to see her and further denied that she had a bad relationship with the Mother.

The Mother on the other hand also maintained that she had a good relationship with both of her parents. She explained that when the maternal grandmother went to England, she was on package tour and was well looked after. It was therefore not necessary for her to travel 40 minutes by way of coach to Heathrow to see her mother just for 10 minutes. I do not believe their evidence.

When the Maternal Grandmother was questioned why she was not present (i) at the Mother’s wedding and (ii) at the Mother’s pregnancy and on the day when G was born, the Maternal Grandmother said that she was being framed. When pushed again for an answer, she said:

“I was there, and such questions are so unkind, and it’s trying to frame me in a certain way, and I just can’t believe why there are such questions.”

The maternal grandmother’s evidence was however in direct contradiction with that of the Mother. The Mother in her oral testimony admitted that the maternal grandmother did not attend the wedding and was not around in the period shortly before or after G was born. If this is the case, why did the maternal grandmother lie in Court? In my view, the maternal grandmother simply could not explain why she was absent on these two important dates of her only daughter, presumably because the maternal grandmother was not invited as stated by the Father.

The maternal grandmother was also cross-examined by Mr Pickavant as to why she mentioned to the ISSWR that she had regretted not taking enough time to listen to the Mother before she got divorce. The maternal grandmother simply denied that she had mentioned the word ‘regret’ and she said it was wrongly interpreted by the Japanese person who interviewed her.

The maternal grandmother also said that although the telephone costs in Japan are expensive, she still calls her daughter at reasonable intervals. I doubt that very much.

When asked by this Court, the Mother said that the maternal grandmother knew about the breakdown of her marriage and Mr Y in January 2014 at the time when the Father moved out from the matrimonial home for 1 week so that the Mother could think the matter over.

From the first social welfare report however, I noticed that, "...the Mother started to know her boyfriend in October 2013..." If indeed the maternal grandmother and the Mother have all along been on good terms and that they have talked over the phone at reasonable intervals, why didn't the Mother tell the maternal grandmother about her marital problem and the new relationship earlier?

Judging from the above, I do not believe the relationship between the maternal grandmother and the Mother is good. Again, even if I am wrong, what support can the Mother gain from the maternal grandparents in Japan?

As I have already said, the length of the hearing has been grossly underestimated. The Maternal Grandmother could not finish her evidence at the hearing in February.

At the resumed hearing in June 2016, the Maternal Grandmother did not attend Court to continue her oral evidence. Ms Tsui submitted that she was not well. Upon Mr Pickavant's request, Ms Tsui provided a letter written by a doctor Eishi Miki, M.D. from Miki Clinic, Chiba, Japan dated 3 June 2016 which said:

"This is to certify that (The Maternal Grandmother) (born on March 13, 1948) has been continuously visiting my clinic for the treatment of diabetes mellitus using oral agents, increased recently as shown below.

Her diabetes, which had not been so well controlled during the past 4 years until the end of last year, has deteriorated acutely this year after her visit to Hong Kong in February catching cold there.

This worsening of her disease and slow recovery has probably been related to her mental burden accompanying the visit to Hong Kong.

Her diabetes has not been markedly improved recently.

Therefore, it is recommended that she does not go to Hong Kong until her condition is clearly improved and becomes safe to travel."

The Mother maintained that her parents in particular her mother would render her physical support.

However, as the Mother has always been working (except for a few months) even after the two children were born, could she manage all the household work? Looking at the history, when the Mother was in the UK, she had the support from the paternal grandmother and the nursery in looking after G. In Hong Kong, she has the assistance from the domestic helper. If the maternal grandmother's health condition is in issue and the paternal grandfather works full time, where is the physical support that the Mother claimed she would have in Japan?

On the other hand, if the Mother would work full time, who is going to look after L?

I am therefore not satisfied that the Mother's physical support is better in Japan than in Hong Kong where she has the assistance of the domestic helper and the Father.

Living environment

The Mother claimed that she could live in her parents' house rent-free.

The Father however said that the maternal grandparents' home is cluttered and messy. He said in his 2nd Affirmation:

"19.

There can be no real question about the parent's house in Kisarazu other than it is of poor standard and is very run down. Both my wife and her mother in the affirmation drafted by the Hong Kong lawyers paint a picture of this being a 7 bedroom house of a reasonable standard. I have visited there with the boys on numerous occasions and it bears all the hall marks of a home inhabited by pensioners. It is not kept very clean and nearly all of the rooms other than the living room and main bedroom are used to store goods. It is full of stored accumulated clutter such as old furniture and clothes.

20.

A more realistic picture of the condition of the parent's house can be seen from the photographs attached to the ISS Report. One can clearly see that old curtains, table clothes, sheets etc. are used to cover up the goods that are being stored. This is so even in the rooms designated for use as shown in the photographs. No photographs are produced relating to the rest of the unused rooms in the house. They have only produced the groomed photographs of the used rooms in the property."

From the photographs attached to the ISS Report, it is obvious that some of the furniture is covered.

Furthermore, I also query why the ISSWR could not see the first floor area even though the maternal grandmother was half way cleaning up. The ISS Report mentioned that the maternal grandmother likes to keep things. In my view, it is probably because the maternal grandmother could only manage to pack some of the accumulated stuff, keepsakes etc and had to store the rest in the area, that's why the ISSWR was denied access.

The Father when cross-examined by Ms Tsui agreed that the mess (if any) could be cleared up if one was minded to do so. The Father however said that the maternal grandmother's mental and physical conditions are not good and she is also unstable, senile and erratic and it is therefore unlikely that she is willing to do so.

Having heard and observed the maternal grandmother in giving her oral evidence, I believe the Father.

If the living condition in the maternal grandparents' home is not satisfactory, I accept that the Mother's living condition is better in Hong Kong given that her former matrimonial home was a 1000 square feet 3 bedroom flat and thereafter she was living at the Cullinan; one of the most expensive apartments in Elements.

School planning for the children

The Mother said in her evidence in Court that the Chiba Kokusai International Junior and High School that she had in mind as a backup school for G had closed down because it went bankrupt. When she last visited Japan in January 2016, her parents suggested to her to consider Shigakukan High School where she and her brother had studied as G's backup school instead.

As for L, she said there is a kindergarten nearby GIS school and he can be admitted at any time because he is Japanese. Furthermore, there are also private kindergartens available though the school fees are higher.

When this Court asked her what she would do if this case cannot conclude before the school term started in April. The Mother's answer was rather confusing and appeared to me that she did not have any concrete idea as to what to do. She said:

"...but it must be subject to the availability. But...it's a very difficult to find G's room in school. So to be honest with you, I have to really check with them."

"After taking exam on 20th, I will speak about the possibility of delay to the school....I don't want to talk about the cost but I will pay for the entrance fee to GIS to secure his place until we settle the matter and until we go to Japan."

"Of course we have to stay in Hong Kong...."

"L can go to the same kindergarten that G used to go....Oisca...they have always room for L.....so I am not worried about L...."

Subsequently, this Court was however informed that to the disappointment of the Father, L could not secure a place in Oisca and therefore he has to attend another Japanese kindergarten in Taikoo Shing.

In this respect, I agree with the Father that the Mother's school planning for the children was not well thought out. When cross-examined by Mr Pickavant, the Mother could not answer for example how many expatriate teachers there are at the GIS. In reply to Mr Pickavant's question as to whether the children had met any teachers at the international section at GIS when they went to Japan, the Mother's answer was no but she said G had viewed some real classes.

Nevertheless, I recalled that when the Mother applied to me in January for the two temporary removals, she stated that G would use the spare time during 22-23 January 2016 and 2-4 February 2016 to meet the teachers and visit the admission department so as to know more about the school and what junior high school life was like. I am puzzled as to why she failed to do so after all.

When questioned by Mr Pickavant as to the poor ranking of GIS and Shigakukan High School, the Mother said she had no knowledge but in her view, academic was not the most important thing. She also alleged the ESF Island School that the Father had in mind for G has a bad reputation because her friends said so.

From the evidence given by the Mother, I doubt that the children's schooling in Japan has been well thought out because the Mother is uncertain what would be the situation for G if the school term in Japan has already started. For L, I agree with the Father that it is even worse because the Mother seems uncertain which kindergarten he would be enrolling in.

On the contrary, if the children stay in Hong Kong, G has already secured a place in HKJS and he is enjoying his new school so much that even the Father has abandoned the idea of enrolling him in the ESF. As for L, it is the Father's case that he would keep on trying to get him enrolled in Oisca because it is a through-train to JIS and HKJS. In any event, even if it fails, L is already studying at a kindergarten now. I am therefore not satisfied that the children's schooling would be better in Japan.

In the light of my findings, I am not satisfied that the Mother's plan is realistic.

Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the children if the application was granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

I find that the Father is also a caring and devoted parent. Since 6 months after the parties' separation, the Father has been having staying access for both children with no difficulties. As a matter of fact, I would say that the Father has been coping very well in that he was the one who potty trained L and slept with him, that's why L could sleep through the whole night. I accept that he has genuine concern for the children's welfare.

I note the worries of the Father when he alleged that the Mother was inconsiderate of the children's feelings, needs and wishes because on two occasions when the Mother and the children were supposed to stay with the maternal grandparents, when the Father tried to obtain more details about the trip, G cried and told him in fear that they had been staying in a small room with Mr Y in a hotel and G was specifically told by the Mother not to say a word of this to his father. I share the Father's concern. In my view, children should not be taught to tell lies, in particular to their natural father simply to suit the Mother's self-interest.

I do not accept the Mother's evidence when she explained that she stayed in the hotel because it was a gift by the maternal grandparents as it was late at night when they landed. Under cross-examination by Mr Pickavant, the Mother said she could not remember how many days she had stayed in the hotel. I don't accept her evidence. I find her lying when she said taking a taxi to the maternal grandparents' home which was 45 minutes away from the airport was more expensive than staying in the hotel.

The Father also complained that the Mother had lied at Court when she applied for temporary removal in the beginning of the year because G did not only miss one school day. G subsequently told the Father that he was unhappy to have missed the Open day that Saturday which all students had to attend and parents were invited as well. When I asked the Mother, she simply said that she did not count Open day as a school day because there was no class.

I do not understand why the Mother placed such a great priority on her own interest. It was clear and obvious that she did not want to reveal the truth to me at the hearing of her temporary removal application. It is nonsense for her to say that the Father could have checked the missing information from the school website if he so wished even though she conceded that it was all written in Japanese.

The Father claimed that the Mother has a short temper and would shout at G to pressurise him. I agree with the Father that it is not in G's interest if the Mother tries to manipulate and force him to adopt the views which are not his. I find the situation unacceptable.

I find it alarming that the Mother even tried to bribe G to suit her own agenda. When Mr Pickavant put to her that G told the Father that she had bought him a second-hand I-phone because he was co-operative with the social inquiry officer and the Mother made another offer to buy a new one if G would co-operate again, the Mother's answer was very evasive. In reply, the Mother denied but said she had forgotten when she bought the mobile phone. She alleged that the Father could have made up those stories. I don't believe the Mother.

In the Updated Report,

"14.

After G having attended the first interview with Investigation Officer, the Mother subsequently told Investigation Officer on the day of observation conducted on 10.12.2015 and before the start of conducting observation, that G would have something more to talk to the Investigation Officer about his positive view on going to Japan. The second independent interview was arranged for G at Investigation Officer's office on 17.12.2015 and G still stated that he preferred living in Hong Kong and admitted that he did not fully express his wish to stay in Hong Kong to her."

Ms Ching in her oral testimony confirmed that she had set up an independent meeting in the absence of the Mother so that G would be free from any influence.

For my part, I entirely accept that G is reluctant to go to Japan. It is obvious from both Social Welfare Reports that G does not want to go to Japan. Furthermore, from the text messages produced by the Father which were not challenged, I notice the following exchanges between G and the Father:-

What is the number of the court? I want to call them and say I want to stay in Hong Kong with my friends and u

Thu, 18 Dec, 07:13

I want to stay in hk with my friends and u.

The second I said mama because if I said dad then mama will get mad

At me

Second means second interview

Sun 1st March, 14:15

But one thing I will not go to Japan I will stay in hk with u

It's the truth

No matter what happens I will be in hk with my friends and YOU

In the Updated Report, Ms Ching said:

“13.

Further discussion with G revealed that he knew clearly the role of the Investigation Officer who acted as an independent third party to represent the court to collect his views towards his mother's relocation plan to her homeland Japan. He was aware that he was free to express his views and true feeling. G was interviewed on 5 November 2015. He revealed that he showed a little growing interest in living Japan from 20 % in the past up to 40 % right now. But he still preferred living in Hong Kong while he expressed that the mother has not truly realized his ascertain wish. He highlighted that he hoped to stay in Hong Kong for at least two more years as he still had a lot of friends living in Hong Kong. He regarded the present living arrangement as perfect and he was not willing to change. He stated that staying in Japan was not in his type. He was ready to live with his father in Hong Kong continuously when he chose to live in Hong Kong and he did not mind living separately with L if needed. Furthermore, he added that he did not have any a kind of rejection towards her mother's boyfriend who was living in Japan now.”

Ms Ching said in her evidence that G had refused to answer any more questions about the boyfriend, she felt that she was obliged to write the last sentence so that everybody could read that.

Ms Ching said in her oral testimony, “Because G has said that now he didn’t want to move and he wanted to stay in Hong Kong for a few more years. So if the mother is aware of this factor, would she defer her plan for a few years?” I share her view. If the Mother is loving and caring, she should put her children’s interest ahead of hers.

The Father was also worried about the relationship between Mr Y and G and the children’s situation in Japan. In his 2nd Affirmation, he said:

“8.

It is well known that expatriate European people are referred to in Japan as Gai jin and that it equally applies to the children of mixed race couples as in the case of G and L. Pure ethnic Japanese people are given certain advantages such as citizenship rights both in law and in practice. The relationship that G had with (Mr Y) was abusive and G was made to cower in his presence. When it became clear in mid 2014 that (Mr Y)’s wife and the Ajinomoto family were making life difficult for him both personally and at the bank I understand that he looked upon G particularly (L was very young at the time) as unnecessary baggage (Mr Y) would have known that his second wife was prepared to make life difficult for him and that she possibly had passed intelligence to me about him and he began to verbally abuse G. The affirmation of (Mr Y) is untrue and misleading.....wherein he stated that he supported G’s studies and played sports with (him) on a regular basis. Nothing of this is mentioned in the Social Welfare Reports and in fact the opposite appears to be true. For (Mr Y) to now justify his abuse by referring to it as a “strict” approach is direct lie. They resided together for 3 months during which time G became very scared of him. The overriding feeling that G had been left with is psychologically disturbing. To place G back into a situation within his sphere of influence would be catastrophic for his welfare.

12.

G clearly told the Social Workers and me that not only was he scared of (Mr Y) but that he was told by my wife that he could not telephone his father in front of (Mr Y) as it was not respectful or proper and that it may upset him. Instead G was told that he should wait until (Mr Y) had left the home. (Mr Y) has in paragraphs 21-22 of his affirmation tried to cover his abuse of G by saying he is a serious person. This is plainly untrue. When G is with him I fear for G’s safety and welfare. There is clear recorded evidence of improper treatment.

13.

I, on the evidence, am also concerned and indeed afraid that if (Mr Y) somehow is re-instated to a favoured position once again in the bank and is sent to another overseas posting that my wife will move again on a whim. Once again this would affect the children. As mentioned I have not taken overseas postings in Europe and U.S. so I could focus on the children in Hong Kong. If my wife had the children’s best interests at heart she would make a similar sacrifice.”

I agree. When Mr Y was called to give evidence in the resumed hearing in June, Mr Y explained why G might have been scared of him. Mr Y was of the view that adults should tell children what was right and what was wrong and this was his duty. He gave an example that on one occasion when they went to the bathroom at a gym, G splashed with water and the water got on to others, he at once taught G not to do so in public places. He meant to teach and educate but not to punish him. He said G now knows that he means to teach him. He considered that this would do G good in future and did not intend to scare him. He also has no intention to take over the Father's role but opines that he has the responsibility to support G to become a gentleman.

Mr Y admitted that there had been tension between G and him but as they have known each other for nearly 2 years, the relationship has improved. In order to show how close they are, Mr Y said in his oral testimony that on more than one occasions, G, the Mother, he himself and sometimes L would share one bed. He said that G had also invited him to sleep at their serviced apartment the day before the hearing on which Mr Y was supposed to give evidence even though he had already booked a hotel. For my part, I do not consider this kind of arrangement proper and appropriate and even though G might have made the invitation, in my view, the Mother and Mr Y should explain to him and decline his offer.

Looking at Mr Y's evidence, I can understand why G was scared. They have different cultures. G and L were brought up by (adopting the Father's own words and with no disrespect) a mixed raced family, G might see nothing wrong e.g. in splashing water at the bathroom or might not understand why he had to immediately put down the phone when Mr Y was around even though G was only talking to the Father (which evidence was not challenged). Mr Y has apparently adopted a much stricter set of rules than what G has used to which confused him.

I also share the Father's concern that since the present proceedings have commenced, the Mother has failed to inform the Father some of the material changes of the children's situation. For example, the Father said that the Mother only informed him that they would go to Japan without seeking the Court's approval for temporary removal and she further refused to tell the Father where the three of them would be staying. It was only through G that the Father subsequently learnt that on occasions when they went to Japan, they stayed in a hotel with Mr Y. Although the Mother claimed that she had informed the Father of it, she failed to produce any form of evidence in support. I believe the Father.

In addition, the Father also said that the Mother refused to disclose to the Father they have moved 4 times since the expiration of the tenancy with Cullinan. Although the Father was never invited there, G let him view the flat by Skype and video call. He only knew that they were serviced apartments with one bedroom which is not satisfactory especially since L would have to sleep with the domestic helper in the sitting room. I agree.

I therefore accept that the Father has some genuine concerns for the children's future.

As to the contact between the maternal grandparents and the children, the Father said that G only likes to spend time with his maternal grandfather but not his maternal grandmother. In any event, the Father said that G viewed his trip to Japan as duty visit rather than enjoyment. I believe that.

In paragraph 13 of the Updated Social Welfare Report, Ms Ching also said:

“He (G) opined that he was more familiar with his paternal grand-parents more than maternal grand-parents although, in 2015, he visited the maternal grand-parents for few days in Japan thrice with the company of the mother.”

In any event, as it is the Mother’s case that the maternal grandfather has already visited Hong Kong more than 10 times and the air tickets are now cheap (using the Mother’s own words), I believe that the maternal grandfather could come to visit them if he misses his grandchildren.

Having reached the above conclusion, I agree with the Father that the situation for the Mother in Hong Kong is clear, settled and certain whereas in Japan, it is unclear, unknown and not desirable. No matter whether the Mother would work, the maternal grandmother would be the one who would assist in looking after L. For G, he would be taken away against his wish without any friends or connection.

I therefore entirely agree with Ms Ching when she said in her Updated report:

19.

While the mother is firm to return to Japan, her plan on her occupation, financial support and living arrangement seems not very solid. Apart from uncertain work condition and financial resources, what makes the mother having need and urgency to move to Japan at this moment remains a doubt. It is especially she has left her maiden family and homeland for approaching 20 years. Mostly importantly, it is quite obvious that the mother has not taken much consideration on the influence of the children, especially G who shows reluctance, on the relocation. He needs to separate with his father, detach from his present peers and network. The mother simply considers G could adjust and accept the changes gradually. The relocation plan is more for the interest of the mother who lacks an attention to G’s psychological need and readiness.

For the above reasons, I refuse the Mother’s application for permanent removal.

Would the Mother be unhappy in Hong Kong?

The Mother said that she is lonely here with no friends and therefore she needs to go back to Japan for her family support where she has a lot of friends. I do not accept this part of her evidence. In her oral testimony, she mentioned that she could live in her friends’ home when she travelled to Hong Kong to let the Father see the children. Furthermore, in denial of the Father’s allegation that she met Mr Y in Yahoo website, she said that she met Mr Y through the introduction of others at dinner. In any event, didn’t she say that ESF Island School had a bad reputation because her friends said so? I believe that she has friends here. On the contrary, the Mother having left Japan as soon as she was graduated at the age of 22 and had never expressed a

desire to return to Japan even after her 1st failed marriage, who are the close friends she mentioned she misses in Japan?

Mr Pickavant submitted that the Mother has a HKID card and she has lived here for 8½ years, and has been working in the company for 5½ years which she enjoyed and got promoted. I agree. Apart from Mr Y, I see no reason why the Mother needs to go back to Japan.

Care and control

Having reached the above conclusion and given that I have already found that the Mother is the primary carer, it ought to follow that she should have care and control of the two children. However, I have serious doubt as to whether the Mother would stay in Hong Kong.

Ms Ching in her oral testimony confirmed that she did ask the Mother what she would do if she cannot take either or both children to Japan, the Mother replied that she would continue to pursue it and Ms Ching was of the view that the Mother would fight the case resolutely.

When the Mother was recalled to give evidence in June to update her situation, I had also asked the Mother if her relocation application was refused, what she would do. In reply, she said it depended on my decision as to the care and control. If I granted it to her, she would stay. If not, she would leave. I then asked her what if I granted joint care and control or share care, she thought about it for a minute and replied that she might leave or stay.

At the resumed hearing in June, Ms Tsui informed this Court that the Mother has moved and she has also lost her job. From the 2 further affirmations in reply to my direction that she has to provide the reasons for all her changes, she said that she has lost her job because she resigned. She said in her 10th Affirmation dated 7 June 2016:

4. “When the hearing of my relocation application commenced in late January 2016, I was advised by my previous solicitors Messrs Ip & Heathfield that I had a good case, and it was likely that my relocation application would succeed and I would relocate to Japan. Since my previous employment requires a 2 months’ notice, I informed my previous employer that I would be leaving Hong Kong soon and tendered my resignation.”
5. “The hearing was then adjourned to April, so I requested my previous employer to extend my last working day. My previous employer informed me that I could work until May 2016 the latest, since they had already hired another person to replace my post.”

I do not understand why the Mother resigned from her permanent job as early as 14 January 2016 when this trial had not even commenced. Should her application for relocation be refused, what is she going to do? In paragraph 5 of another updated Affirmation of hers filed on 3 June 2016 (“the updated Affirmation”), the Mother said that she got a new job in May but she would only be paid an hourly rate at HK\$85. She said:

6. "I chose the current part-time employment as I did not want to commit to another permanent employment. As my salary has been reduced, I can only afford a smaller apartment ..."
7. "Meanwhile, I also informed my maid Emily that there was a chance that the children and I would leave Hong Kong and that she would be released from employment. I wrote to the Immigration Department so that Emily could start looking for another employment. However, Emily likes the children and wants to stay with us for the time being."

In the same paragraph, the Mother also said that due to the low income and her poor financial situation; she can only afford a one-bedroom apartment because she claimed that the price of a two-bedroom apartment in Hong Kong Island would cost more than HK\$40,000. I don't believe that.

The Mother had already said in her oral evidence in January that she would move to Hong Kong Island because the children's school and her office were in North Point and Quarry Bay respectively. However, she also mentioned that she would move to a serviced apartment because she "didn't want to commit two years, or one year even."

As for the domestic helper, the Mother informed me that she had written to the Immigration Department, the extract is as follows:-

"I am currently applying to HK Family Court (case No. FCMC 8500/2014) for my relocation to Japan with my children. The next trial hearing is scheduled in April and June 2016. Until the case is settled, I have no choice but stay in Hong Kong. As this temporary period of waiting for the court is around 2-3 months, I cannot enter a regular tenancy agreement but just can temporarily take serviced apartment for three months in King's Road, North Point (382 sqft), because I cannot afford two bed room serviced apartment."

After explanation on my current situation to my helper Ms. B, she agreed to move into 1 bed room apartment where she can stay in living room with partition. Considering, I am female, my elder son has just turned 12 years old and younger son is only 3, she has no concerns about the new living condition, and we mutually agreed."

Looking at the above, if the Mother were to stay in Hong Kong, it means she would have no permanent job and nowhere permanent to live because in the licence agreement exhibited by her in her updated Affirmation, the period of stay in the current serviced apartment was only 3 months and the check out date should be 26 July 2016.

The Mother said in paragraph 8 of her 10th Affirmation:

"If my application is allowed, the children and I would be able to move to Japan in a short time. If my application is disallowed, I can either stay at my current accommodation and employment so that I can have more time to look after the children, or I can look for another full-time job with a higher salary so to afford a bigger apartment for the children."

If this is the case, why has she resigned, moved to a one-bedroom serviced apartment and terminated the domestic helper's contract in the first place? This simply does not have a ring of truth.

The Father in his oral testimony which was not challenged also said that G had told him that the furniture and the children's stuff had already been shipped to Japan because their new apartment was ready. In view of all these, would the Mother really stay?

From the Mother's evidence, I find that she is impulsive by nature. The fact that she wrote to the CEO at midnight demanding that the Father be excluded from the company's drinking activities is one of the examples. At Court, she said that there was nothing wrong because she felt lonely and needed the support of the Father at the time. Furthermore, the Mother said that she knew the CEO personally and therefore the situation was different. I do not agree. The fact that she together with the Father had been invited by the CEO for lunch twice coupled with the fact that G and she had been treated to go on a business trip with the Father to Paris did not mean that she personally knew the CEO. Even if what she said was true, he is still the boss of her husband. Surely she should have thought of the embarrassment that might have caused to the Father before writing the email.

When cross-examined by Mr Pickavant as to why she had developed the relationship with Mr Y unbeknownst to the Father for about 7-8 months, the Mother said that she had warned the Father. When asked by Mr Pickavant:

"The boys think that they have a dad at home with a mum, but then the mum takes the two boys with her boyfriend to go to Disneyland...do you think that was right and proper?"

In reply, the Mother said that:

"Yes, because in priority....in prior to cohabit with my boyfriend, of course the children should know the person...I have to introduce my children to him in order to get to know each other..."

I find that the Mother would do things her way without considering others' feelings. One classic example is her sending the dogs to Japan without considering how much the children would miss them.

Mr Y informed this Court in his evidence that he at first lived with his parents when he moved back to Japan in July 2014 and he moved to another apartment in January 2016 solely because the Mother, after the termination of her tenancy at the Cullinan, moved to a serviced apartment where dogs were not allowed. The Mother therefore took the 2 dogs to Japan in January 2016. Mr Y explained that the reason he moved to the new place was to take care of the two dogs.

The Mother has attached her new licence agreement for her current serviced apartment in her updated Affirmation. From the Schedule at the back of the licence agreement, paragraph 2 in the House Rule stated that:

No pet or animal is permitted in the Premises except with the prior written consent of (the Landlord).

In that case, why didn't the Mother seek consent from the landlord to keep the dogs in Hong Kong in view of G's love for the small dog and he sometimes even slept with it? Even if the dogs must be sent away, why they are not sent to the Father's home (the Father confirmed that he would be delighted to keep them) so that at least the children can visit them during the weekend staying access? In Court, the Mother appeared to be saying that because the dogs were bought by her, therefore they belonged to her. Presumably, she means that she has the final say. Be it as it may, in my view, the two dogs have been reared by the family for years. They are pets to the children which they have grown up with. I do not accept Mr Y's evidence that G is mature enough to understand the situation and has agreed to move the dogs to Japan. On the contrary, I believe the paternal grandmother's evidence when she said that the children miss the dogs very much.

Furthermore, isn't it the Mother's case that she would be staying at her parents' home if her relocation application is granted? Why were the dogs sent to Mr Y instead of to the maternal grandparents' home if she really intends to stay with them in Japan? I do not believe Mr Y's evidence that the 3 dogs might have conflict with one another.

Although the Mother said she had no plan to get married again, her evidence was in direct contradiction with Mr Y who said that as soon as his divorce was concluded; he planned to marry the Mother. He initially said within ½ year and subsequently told us that there was a legal requirement in Japan that before a woman could re-marry, she had to wait for a 100 days' period after her divorce was concluded (even though the proceedings took place in Hong Kong).

Although there is nothing wrong for the Mother to remarry Mr Y in the foreseeable future, for the above reasons, I am of the view that the Mother is bent on going to Japan regardless of what my decision is.

Ms Ngan when recommending care and control to be given to the Mother said in paragraph 56 of her report that:

"Provided that (the Mother) would live in Hong Kong at the same place with (the Father) to facilitate his regular access in the children, in view of the young age of L and the close relationship between G and L, maintaining the present care and living arrangement would give them a stronger sense of security." (with my emphasis in bold)

However, if the Mother is bent on leaving, would it be in the interest of the children in particular L that she be granted care and control?

The Mother in paragraph 19 of her affirmation said that:

".....it is important not to separate an infant from significant person for lengthy periods of time, or to FORCE separations even for short periods of time. Moreover, "primary residence is based on caretaking history" meaning that a 2 year old should stay at the primary carer's residence and should not be subjected to an unfamiliar environment."

I agree. However, the Father is still living in the former matrimonial home which was the primary residence of the children. The Mother on the other hand has moved several times after moving out from the matrimonial home.

Is the Father capable of looking after the children?

I have no difficulty in finding for the Father in the case of G. As Ms Ching said in her report,

“31.

G has indicated that he has really enjoyed relating with the Father who is willing to involve himself more in his joyous activities together. It is observed that the Father has started to show more awareness of the importance of G’s academic learning but also other leisure activities like football and golf playing that he is willing to share and enjoy together with the children. Thus the Father, being the same gender with G, would be more appropriate figure in giving G guidance under his present development stage and staying with the Father would be conducive to G’s growth and development.”

In her oral testimony, Ms Ching added that for a 11 year old child:

“....what is required is that a parent will have to be proactive and the child will have to be proactive in doing things and he or she has this kind of responsibility....from this stage onward, the role of a parent can be reduced gradually.”

I agree.

How about L who is still young?

Ms Tsui in her closing submission drew my attention to the case of WSM v FSJ (CACV No 352 of 2004, 27 July 2005, unrep) when she submitted that the Hon Cheung JA had remarked at para 19 the:

“Human wisdom tells us that at this age the mother plays a more prominent role in his upbringing both in terms of emotional and physical needs.”

Ms Ching also said in her report,

“39.

Being less capable of self-care because of young age, L is in need of more physical and personal care. Therefore, it is desirable that L would receive the Mother’s direct care in Japan or might be arranged under the care of the Mother’s family members i.e. his maternal grandparents, should the Mother resume working there. It is conducive to L’s upbringing need under the familial care during his present developmental stage.”

I accept that young children are better under the care of the Mother. However, as I seriously doubt whether the Mother would stay in Hong Kong and her plan in Japan is not realistic, my only concern is whether the Father is capable of looking after L emotionally and physically in view of his tender age.

In her report, Ms Ching noted that:

36.

..... it is assessed by Investigating Officer that the Mother and the Father each possessed respective adequate strength to support the living of two children and provide a decent physical living environment with the assistance of employed maid arrangement or the assistance of family support.

38.

As such, the Father is the one who is willing to continue living in Hong Kong although he, whenever he wants, can have a choice to return to his homeland UK also, as he has claimed. However, he is willing to choose to sacrifice himself to stay in Hong Kong continuously so as to make sure the need of the children be met.”

57. Given (the Father’s capability in child care and his harmonious relationship with the children, coupling with the assistance of the helper, there should not be any big problem for (the Father) to take care of the children even for L during the staying access.”

As I have already found that the Father had been coping very well during the weekly staying access over the past year, the only question is whether he can also handle the weekday’s arrangement for L?

The Father said that with the understanding of his boss, he now works 2-3 days at home. In order to support that, he produced a letter from his employer:-

December 2014

Re: (The Father)

To Whom It May Concern:

I wish to make it clear that I understand (the Father) is currently going through a contentious divorce and we are happy to assist in anyway we can as (the Father) is a valued member of staff.

I confirm that (the Father) may spend 2-3 days per working week working from home. This will enable him to spend more quality time with the children.

I write this letter for the avoidance of any doubt as to our intention to assist (the Father) at this time as he is a valued and trusted member of staff.

XXX

Chief Sales Officer

Ms Tsui submitted that the working home arrangement is only a bare assertion of the Father and that he is senior enough in his company to orchestrate any arrangement to please the social welfare officer and the Court. I find no merit in this argument. As a matter of fact, the Mother has also written to the CEO and received a similar reply.

On 15 January 2016 at 10:25, the Mother Wrote:

Dear CEO,

Hope all is well with you.

Sorry to bother you to ask you suddenly about this after such a long time.....

I note the Father claims that he has been promoted to Key Account Director since June 2015. Is it true that he does not need to travel overseas anymore currently and in the future too?

Kind regards,

The Mother

From: CEO

To: The Mother

Date: 2016/1/15, Fri 19:11

Subject: Re: Hi

Hi the Mother,

I hope you are well and I am sorry for the issues your family is going through. I hope you will manage to solve them in the smoothest possible way.

Regarding the Father's career within AI, I can confirm that he has indeed been moved to a Key Account Director position, following a request from him to stop travelling to be able to spend more time with his sons and he is indeed planned to stay in that position as long as he performed, of course !

With kind regards,

CEO

On Friday, 15 January 2016, the Mother wrote:

Hi CEO,

Thank you for your reply! Yes indeed, I really want to solve it ASAP.

Really sorry to bother you.

But I still note that the Father is often overseas, I believe he needs to travel regularly to China and so on.

Are you sure he does not need to travel at all and stay at home 3 days a week now and in the future forever??

Kind regards,

The Mother

From: CEO

Date: 15 January 2016 at 03:51:30 GMT-8

To: The Mother

Subject: Re: Hi

I don't want to interfere in your divorce proceeding and can only speak from a professional and CEO's point of view.

Hong Kong is a very small place so overseas is a very large concept...Yes you are right, sometimes the Father is required to go to our SHENZHEN office but these are day-trips I believe as our office is 1 hour away from his apartment.

Also, I have pushed and encourage all our staff to use video calls instead of travelling as this is better for environment, save time, fatigue and money.

And I am sure that the Father is very serious about making the time and availability for his sons.

Kind regards,

CEO

I accept this entirely. I don't believe that the CEO needs to lie to the Mother.

As for travelling overseas, the Father in his oral testimony said that after his promotion, he has travelled less but at the same time has earned less commission. I believe that. The CEO also confirmed this in his email.

Ms Ching in her oral testimony said that the Father had mentioned that if it was necessary to take a long trip for more than 4 days, he would consider seeking the help of the Paternal Grandmother and his stepfather on top of the assistance of the domestic helper but the Father also said that none of his business trip was urgent as they were all planned.

Ms Ching has doubt on the support from the paternal grandparents but she said:

20.

“...yet has believed that with his attitude and financial condition, strengthening the support during his short business overnight trip is not difficult to overcome.”

I accept that.

I understand that young children need physical and personal care. However, when L was under the care of the Mother, he was left with the domestic helper the whole day as the Mother's evidence was she returned home from work before 8 but L went to bed at 8:30 pm. In this respect, I am not criticising the Mother at all. I agree with Ms Tsui's submission that she is no different from other working mothers in the local community. However, I am of the view that if care and control is given to the Father, the situation will remain more or less the same as before.

The Mother in her oral testimony admitted that before their separation, it was the Father who found the playgroup for L and it was usually the domestic helper who took him there because the sessions were on weekdays.

It is also not disputed that L slept with the domestic helper when he was under the care of the Mother whereas he slept with the Father during staying access.

It is the Father's case that his domestic helper cooked and baked all the food including bread and cakes and G described her as a super chef. Even Ms Tsui in her closing submission called her a super wonderful maid. I accept the Father's evidence.

As there is no dispute that the siblings are attached to each other and enjoy doing activities together such as football, swimming, golf and cycling. Ms Ching in her updated report also said:

23.

The information gathered reveals that G and L relates harmoniously and involves much playing in their interaction. For L, he loves and attaches to his elder brother, whom he may consider as a playmate while play and exploration to the environment are major development task of a toddler.

If L grows up separately from G, Ms Ching in paragraph 39 of her report said that;

“...such siblings' separate arrangement would deprive of the siblings' bonding and sacrifice the children's best interest and healthy development...”

Weighing the balance, I consider it is best for L to be with the Father so that he would have the company of G rather than to be with the Mother who would no doubt soon make an application to this Court for the relocation of L.

I do not believe that the Father has a habit of taking sleeping pills and I accept his evidence that he might from time to time take one tablet the first night after returning from trips when he suffered jetlag. I also do not believe that he took Marijuana, which was just a bare assertion of the Mother.

As for the issue of drinking, even Ms Tsui in her closing submission said that:

“the Mother is not concerned whether the Father still drinks but her concern is he should have time for the children and his drinking should not affect the time and quality that he bonds with the children.”

For my part, I do not believe that the Father would pursue his drinking habit (if any) at the expense of the children. I consider that he is a loving father who would put the children's interest ahead of his.

As the Father has undoubtedly demonstrated his ability to look after L, I am therefore satisfied that the children could be properly looked after by the Father and the domestic helper.

I am of the view that the children should move back to the former matrimonial home with 3 bedrooms which the children are familiar with. G could have his own room just as before and L could sleep with the Father just like what he did during the staying access.

After taking into account of all the factors, I therefore grant care and control to the Father.

Before I conclude and to all fairness to Ms Ching, her recommendation for split care and control was made without the benefit of seeing either the maternal grandmother or Mr Y and knowing the subsequent development of the Mother's situation. In my view, her recommendation and evidence have been given in the most professional manner.

Access

Ms Tsui said in her submission that if care and control of the children were given to the Father, it means that the Mother would only see the children over weekends; she would therefore leave Hong Kong and just come back for access. The Father on the other hand said that he would never get in the way for the Mother to see the children and he would be honest and fair. For my part, I have no difficulty in trusting that the Father would give reasonable access to the Mother.

Order

i)

The Mother's relocation application is refused;

ii)

There be joint custody of the children to the parties with care and control to the Father and reasonable access to the Mother.

Costs

As this is a child related matter, I will make an order nisi that there shall be no order as to costs, to be made absolute at the expiration of 14 days. There shall be certificates for Counsel.

Last but not least, it remains for me to express my gratitude to Ms Yu and Ms Tsui for the Mother and Mr Pickavant for the Father for their helpful assistance in this trial.

(Susan Wong)

Deputy District Judge

Ms Lily Yu instructed by Messrs Ip & Heathfield and Ms Jennifer Tsui instructed by Messrs Stevenson Wong & Co for the Petitioner

Mr Pickavant of Messrs John Pickavant & Co for the Respondent

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