

HONG KONG / JUDGMENT

SG v. GDV

[2023] HKFC 15

COURT

Family Court

DECIDED

9 January 2023

CASE / FILE NUMBER

FCMC10217/2020

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FCMC 10217/2020

[2023] HKFC 15

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES NO. 10217 OF 2020

BETWEEN

SG

Petitioner

and

GDV

Respondent

Coram: Her Honour Judge Thelma Kwan in Chambers (not open to public)

Dates of Trial: 6 - 9, 13 – 14 September 2022

Opening Submission for the Petitioner: 5 September 2022

Opening Submission for the Respondent: 2 September 2022

Closing Submission for Petitioner: 12 October 2022

Closing Submission for Respondent: 11 October 2022

Date of Judgment: 9 January 2023

J U D G M E N T

(Relocation)

This is the Respondent's ("H") application to permanently remove the children of the family – "L" born on XX August 2010 and "P" born on XX October 2012, now 12 and 10 respectively (together the "Children") – to Connecticut, USA ("Relocation Application"); on the premise that the Petitioner ("W") will have one hour of daily online access; and three round trips tickets to the USA per year, paid for by H.

W opposes the Relocation Application.

I have decided to dismiss H's Relocation Application.

Background

The parties' relationship

H and W are both 49 years old. H is a US citizen and was born in the US. He is of Greek heritage. W is from Kyrgyzstan. In 1999, W obtained a student visa to study in the US, thereafter she obtained a US work permit. H and W met in the USA in 2002. They married there on XX May 2004. They moved to Hong Kong shortly thereafter. They have lived in Hong Kong since, and are now both permanent residents here.

After H and W moved to Hong Kong, H founded B (HK) Ltd ("Company") on XX July 2005. The Company operates a digital platform for real estate agencies, as well as an online portal for real estate listings. H was the sole director and shareholder of the Company until September 2019.

W previously ran a tailoring shop in the US between 2003 and 2006. She sold the shop when she and H moved to Hong Kong. Between 2006 and 2016, she occasionally assisted H with his business. She is also a minority shareholder of the Company, but she says H controls the shares.

L and P were born in Hong Kong and have always lived here. Both Children are Hong Kong permanent residents. They are also US citizens and hold US passports.

After the Children were born, W became a full-time housewife. She had always been the Children's primary caregiver, until August 2021, when it was ordered that L would be under the H's interim care and control. Following the order, W and P moved into a separate household. P remains under W's care and control.

Problems in H and W's marriage began as early as 2012. It was around this time when H started drinking heavily. W alleges that H would become verbally abusive when intoxicated. H never specifically denied this allegation.

H ceased drinking in around 2015, and it appears that the parties' relationship improved slightly thereafter.

However, from 2016 onwards, H's drinking resumed and the parties' relationship became increasingly frayed. In particular, W's written evidence details an incident in August 2016, when H got drunk and started yelling at W, causing W and the Children to take refuge in the Children's bedroom. H denies this allegation.

Divorce was brought up in around 2017. The parties attempted marriage counselling but those attempts were not successful. W alleges that H has since been spending more time with the Children. In her view, H has become competitive with her for the Children's time, and constantly undermines her parenting.

The parties' relationship was also violent at times. Both H and W acknowledge that a number of violent altercations between them happened between 2018 and 2019. For present purposes, it is not necessary to go into these allegations.

As to the Children, P has gravitated towards W over the years, whereas L is becoming increasingly influenced by H. W says H has raised L to become rude, brash, arrogant and bullying towards her. H calls P a "wimp" and "mummy's boy". P is constantly at the receiving end of H's mockery.

According to the W, H has been trying to sabotage her relationship with the Children since 2019. W gave the following examples in her written evidence:

H told the Children that W was "worthless and cannot even pay a single bill". (H admitted saying this)

On an occasion in 2019, H told L that W wanted to put him in "retard school" and that "Mom told your teacher that you're a kid with special needs", when all W did was make inquiries about possible ADHD diagnoses after H's cousin told her that this condition runs in H's family.

On an occasion in October 2019, H told the Children that they had to stick with him, as he was the provider whilst W had "nothing but bad friends and family".

On an occasion in March 2020, H told the Children that "Your Mum kept you hungry. See, I told you, thank God you have a daddy who will feed you" and ask inappropriate question such as "Kids, do you want to go to America with Daddy or stay here with Mom?"

On an occasion in April 2020, H "followed L into the bathroom and told him he had to make a choice as to who he [wanted] to live with". At that point, L was nine years old.

H behaviour as aforementioned continued and worsened after the parties' divorce proceedings started in November 2020. In particular, what H did to P during this period is nothing short of denigration and emotional blackmail. W gave evidence as to the following examples:

Sometime in 2021, H told P that "You can just go pick garbage out of a beach. This is the kind of shit you are gonna be doing." The incident was recorded. He also told P "You're going to have hard little life buddy. It's alright. There's plenty of community colleges out there for you. Nice Hong Kong public school."

On an occasion in August 2022, when P was having access with H, H made remarks to P, including "Why do I deserve this shit from you?", "[L's] got a shot at making something of life. You ain't got nothing", "Are you dead to me or not? And maybe you are...". The incident was also recorded.

H often reminds the Children, especially P, that if they stay in Hong Kong, they will be studying at community college, make "loser friends", work at "poor job like at 7-11".

The impact of H's conduct on P is unfortunately quite predictable. By Orders dated 23 February 2021 and 14 December 2021, HHJ Melloy ordered two government clinical psychologist reports respectively. The latter report observed that P had described H's conduct as bullying, and that H tended to give P a sense of insecurity and pressure.

In addition to emotionally abusing P, H has also elicited worrying behaviour from L. As noted in the latter report, L would unreasonably blame W for the parties' marital breakdown on grounds that she told lies, destroyed H's company, and was lazy for not going to work. It is of particular note therein that L's descriptions and language were remarkably similar to H's.

W's immigration status

W's current immigration status is an important element in this case. One of the focal points of the Relocation Application has been whether W would be able to immigrate to, or visit the US, such that she can maintain a meaningful relationship with the Children should the Relocation Application be granted.

When W first arrived in the US from Kyrgyzstan, she was able to acquire Political Asylum Residency Status in the US, as Kyrgyzstan was then politically unstable. On that basis, she was also granted a work permit.

W was granted a US Green Card through marriage on 8 December 2005. At that point, she would have become a permanent US citizen if she had returned to the US and completed the necessary procedures. Given H's assurances that they would return to the US soon, she did not do so. They did not go back in time, and W was forced to abandon her Green Card. H said this is W's fault.

In December 2017, W obtained a 5-year US visitor visa. The visa has since expired in December 2022.

W sought to make a second Green Card application in October 2019. H told W that he would sponsor her application if she agreed that the family would stay in Connecticut over the upcoming Christmas.

H unilaterally withdrew the second application on 4 February 2020. He says this is because W made a fake report to the police in January 2020, and he says that in around that time, W did not want to work on the marriage, and therefore he did not want to support the marital visa application in the circumstances.

At present, W does not have any immigration or residency status in the US. H instead says W will have no problem obtaining a new visitor visa, and may do so even without an interview.

On 9 June 2022, I ordered that expert opinions be obtained by H for W's immigration status in the US, and her ability to enter and remain there; W was given leave to reply to the H's immigration lawyer / consultant's opinion with her own expert evidence.

H's expert evidence was not in compliance with Order 38 rule 37. Further directions were given to him on 24 August 2022 to comply with the said rule but he failed to do so. The H's expert was not called as witness and therefore I am unable to rely on the expert opinion produced by H.

W's expert was called to give evidence at this hearing via VCF and was cross examined by the H.

Procedural History

W's petition for divorce and interim orders

W petitioned for divorce in November 2020. On the same date, she also took out an ex parte application to restrain any removal of the Children from Hong Kong. The application was granted by HHJ Melloy by an order dated 12 November 2020. Upon the joint application of H and W, a further order to the same effect was made on 19 November 2020.

On 11 January 2021, W took out an application for maintenance pending suit, as well as interim periodical payments for the Children. Two days later, she took out an application for interim care and control of the Children. A month later, on 20 February 2021, H took out an application for joint interim care and control.

By an order dated 23 February 2021, HHJ Melloy ordered that H and W were to have shared care of the Children, each with exclusive care at specific times.

However, following W's application for a non-molestation and ouster order in August 2021, the February 2021 order was varied on 16 August 2021. Consequently, W has interim care and control of P and H has interim care and control of L, both parties will have access to both Children at particular times. W and P moved out of the matrimonial home shortly thereafter.

On 13 August 2021, HHJ Melloy handed down a judgment on the issue on interim maintenance. She ordered that H should pay W HK\$44,000 per month (with HK\$8,000 as maintenance pending suit and HK\$18,000 for each of the Children).

The Relocation Application

Around one month after the MPS judgment on 20 September 2021, H took out the Relocation Application. He says that the Relocation Application is necessary because he is on the verge of bankruptcy and the Company is on the verge of insolvency, whereas his family in the US will be able to provide for the Children if they moved to the US.

H alleges that his dire financial situation is because of proceedings brought against him in relation to the Company. In late August 2019, H caused the Company to issue his mother, father, and sister approximately 31.52% of its shares. The value of the shares issues is around HK\$18.31 million. A major shareholder (“S”) says this was done improperly, and has commenced proceedings to have the said transferees removed as shareholders. H has been a defendant in those proceedings since 23 October 2020 (“Shareholder Proceedings”). S also alleges fraud and breach of fiduciary obligations against H. The Shareholder Proceedings consist of two related actions in the High Court. H says W has sided with S against him.

H applied to go for vacation to visit his family in Greece and the US in late 2021 and mid-2022. On both occasions, the applications were turned down by HHJ Melloy and myself respectively. A major reason for both dismissals is the Court’s concern that H might be a flight risk.

There are three outstanding Summons:

School Summons

W has on 29 July 2022 issued a Summons requesting this Court to order the parties to enrol L into an ESF school. This was taken out because H insists that he has to home school L because he is impoverished. H says he has put L on internet learning courses, which he claims is paid for by his parents. In the meantime, P who lives with W, is still attending another international school. This matter was adjourned sine die by me on 2 August 2022, pending this relocation decision.

W’s Section 17 Summons and Joinder Summons

W has on 29 August 2022 issued a S. 17 Summons against H. She asks for declaration that H’s parents and sisters’ shares in the Company are in fact held in trust for H and an Order setting aside the transfer; and on 21 September 2022 a Summons for joinder of these parties to the proceedings. On 26 September 2022, I ordered for service of the parties in the US. As H says that issues in this application overlaps with the Shareholder Proceedings, he has been given a chance to provide evidence on those overlapping issues. This matter has been adjourned to February 2023.

The Legal Principles with regard to Relocation

My starting point is found in s.3 of the Guardianship of Minors Ordinance (Cap. 13), which states that the best interest of the minor is the first and paramount consideration.

The applicable principles governing relocation application were based on the English Court of Appeal case of *Payne v Payne* [2001] Fam 473 and adopted by our Court of Appeal in *SMM v TWM* [2010] HKFLR 308, [2010] HKLRD 37 CA where Cheung JA summarised them at §21 of his judgment as follows:

“(a)

...

(b)

...

(c)

The application should be approached as follows:

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, i.e. founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow.

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?

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?

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 in so far as appropriate. (per Thorpe LJ at paragraph 40)

(d)

In short, the relevant factors are :

(i)

The welfare of the child is always paramount.

There is no presumption created by section 13(1)(b) of the English 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 scrutinised 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. (per Butler-Sloss P at paragraph 85)”

In the recent case of BA v BL (Child Relocation) [2019] 4 HKLRD 23 the Court of Appeal per Cheung JA reiterated and further elaborated on the approach to be taken in relocation cases:

“4.12 This led to the more recent decisions of the English Court of Appeal such as K v K where it is stressed that, in the determination of applications for permission to relocate, the welfare of the child was the paramount consideration ... The three judges in K v K, Thorpe, MooreBick and Black LJ were of the same view on this point.

4.13 ...

4.14 ... Ultimately it is one of the factors to be considered in the overall assessment whether the relocation is in the best interests of the child and the weight to be attached to this factor depends on the facts of the case. The value of Payne is that it "identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case", per Black LJ at [144] in K v K. In my view Payne is not to be jettisoned. The relevant factors provide a structured framework in which the appraisal is to be made holistically.

4.15...”

I also found the following from Lady Justice Black (as she then was) in the abovementioned case of K v K [2011] EWCA Civ 793 to be of assistance:

141.

The first point that is quite clear is that, as I have said already, the principle – the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court’s paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.

HHJ I Wong has in his recent case of *JTMW v NAV FCMC* 8504/2017 [2020] HKFC 244 succinctly summarized important points of principles enunciated in the case of *ZJ v XWN* at paragraphs 53 - 55:

53.

The Court of Appeal endorsed what Vos LJ said in *Re C (A Child) (Internal Relocation)* at [82] and [83],

82. I add a few words in an attempt to summarise the position that has now been reached. As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.

83. ...

54.

The Court of Appeal also dealt with the use of the “welfare checklist” in the balancing exercise. The “welfare checklist” is only an aide-memoire. A judge is not required to mechanically list every factor to demonstrate that he has considered the same.

55.

The Court of Appeal emphasized that the guidance in *Payne* or *SMM v TWM* or the welfare checklist are simply tools to assist a Family Judge in making the multifactorial assessment to reach a result which is in the best interest of the child after taking account of the potential impact on the parents: at [30].

The consideration of guiding legal principles will be incomplete without citing what has been referred to as the welfare checklist factors, which have been listed in our “Children’s Proceedings (Parental Responsibility) Bill, and has yet to be passed as law in Hong Kong (the “Welfare Checklist”). These are factors that should be taken into account when determining issues relating to children and where their best interest is to be considered:

the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding;

the child’s physical, emotional and educational needs;

the nature of the relationship of the child with each of the child’s parents and with other persons;

The likely effect on the child of any change in the child's circumstances;

The child's age, maturity sex, social and cultural background and any other characteristics which the court considers relevant;

The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

Any harm which the child has suffered or is at risk of suffering;

Any family violence involving the child or a member of the child's family;

How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

The range of powers available to the court under this Ordinance in the proceedings in question.

Any other fact or circumstance that the court thinks is relevant."

With these principles in mind, I shall proceed to apply them to the case at hand.

Issues

While the parties have filed extensive evidence and detailed submissions, their cases can be briefly stated.

H says the proposed relocation is in the Children's best interests because he is in dire financial difficulties, and on the verge of bankruptcy. He can properly provide for the Children in the US with the assistance from his family, but not in Hong Kong. He relies on two Social Welfare Reports, which both state the proposed relocation is in the Children's best interests, to support his case.

W says the proposed relocation is not in the Children's best interests. She says:

The Children can be well provided for in Hong Kong;

She will cease to have a relationship with the Children if the Proposed Relocation is allowed;

It is a corollary of the Relocation Application being granted that H will have sole custody, care, and control of the Children, and that is not in the Children's best interests; and

I should not attach any weight to the two Social Welfare Reports' recommendations.

In view of the parties' cases, the following issues fall for my determination:

Whether the Children will be well provided for in Hong Kong if I dismiss H's Relocation Application (it being obvious that he can provide for them in the USA);

Whether W will cease to have a relationship with the Children if the Relocation Application is granted;

Whether it is in the Children's best interests that H has sole custody, care, and control of them; and

What is my view on the two Social Investigation Reports that H relies on for his application.

Ultimately, based on the analysis of the above, is the relocation in the best interest of the Children.

I will address each of these issues as I apply the legal principles set out above to the facts of this case.

Reports

There are three Social Investigation Reports ("SIR") and two Psychological Reports ("PR"). The first SIR and the first PR, both dated 2 August 2021, the second SIR dated 3 December 2021; and the most recent SIR and PR both dated 8 August 2022. The SWO Ms Fong who wrote the December 2021 and August 2022 reports and the Government psychologist Ms LAM who produced the August 2022 Report both gave evidence at this hearing.

The last two SIRs support the Relocation Application, while the two PRs gave useful and relevant information with regard to the dynamics of the parties and the Children for my consideration of this application. The contents of those reports are elaborated below.

Credibility of the Witnesses

This Court heard from 7 live witnesses: (i) W; (ii) H; (iii) H's sister; (iv) H's mother; (v) Ms. Roli Khare Rastogi, W's immigration lawyer; (vi) the social welfare officer; and (vii) the government psychologist. The H's sister, mother and Ms Rastogi gave evidence via VCF from the US.

W was a credible and impressive witness. Her evidence was clear, concise, and to the point. She was not even slightly shaken by H's cross-examination. Where her evidence conflicts with H's, I accept hers without hesitation.

I find the H neither credible nor impressive. Time and again, he would answer the question he hopes was asked, rather than the one actually asked. Almost all of his answers in cross-examination were rambling, evasive, and irrelevant. Some of his answers on critical matters were directly contradicted by contemporaneous evidence. H was repeatedly asked to focus on the question before him; the majority of his evidence was an unfortunate waste of this Court's time, and was only helpful in that it allowed this Court to realise how little weight it could put on his evidence.

As will be clear below, H's sister's and mother's evidence are not much help in my consideration process. Nonetheless, my assessment of their credibility is as follows:

While not as bad as H, H's sister was not an impressive witness either. While she would directly answer the questions asked of her, some of her answers on crucial topics were incoherent, and obviously biased in H's favour. I do not think it is a coincidence that her incoherent answers were also the ones that are so biased;

While H's mother was not asked many questions, she did not offer direct answers to the questions she was asked. What was impressed upon me is that she said she would support the Children if they are in the US but not if they are in HK.

Ms. Khare was an impressive and credible witness. Her evidence was cogent, well-articulated, and accords well with common sense.

While they sometimes struggled to give direct answers, I accept that the government psychologist and the SWO both tried to answer the questions asked of them to the best of their abilities. I find them to be credible witnesses.

Discussion

Drawing the threads together from the abovementioned legal principles, I will approach the following questions accordingly.

Is the application genuine and not motivated by H's desire to exclude M from the Children's life

I am of the view that there maybe a few reasons for the H's Relocation Application, but not the reasons he gives to Court. In my view, his application is motivated by a desire to exclude W from the Children's lives, and possibly to avoid his financial obligations in Hong Kong as well as the Shareholder Proceedings.

H is always denigrating of W and appear to have already successfully create a divide between L and her;

The SWO and government psychologist's evidence makes it abundantly clear to me that H has no intention of engendering a good relationship between W and the Children;

The Relocation Application was taken out around 5 weeks after HHJ Melloy handed down the MPS judgment in August 2021. Ever since then, H has not been in full compliance with the MPS Order and payment has been haphazard, to the extent that Judgment Summons proceedings has been taken out by W. Up to August 2022, outstanding payment from H amounts to HK\$162,500;

As mentioned, H is facing the Shareholder Proceedings which is clearly taking a toll in many aspects of his life.

In considering this limb for the Relocation Application, I need to look at the H's financial position.

H says the Children can be provided for in the US, but not Hong Kong. In particular, he says:

He cannot provide for the Children in Hong Kong because he is in dire financial straits. He points to the Form E he filed to support his case;

H's family can provide for the Children in the US. H and the Children can live in H's family home rent free; and H's family will pay for the Children's expenses, allowing them to (among other things) attend top private schools, and partake in a wealth of extracurricular activities while H tries to get back on his feet;

H's family cannot provide for the Children in Hong Kong, because Hong Kong's living expenses (rent, in particular) is too expensive, and would bankrupt H's family members.

There is no evidence to suggest that the Children will not be well provided for in the US if the Relocation Application is granted. It is clear from H's case and from his family members' evidence that his family is a financial resource to him.

Can H personally provide for the Children in Hong Kong?

Despite what H says in his Form E, I find that H has not come up to proof that his financial situation is as catastrophic as he says it is.

H has had ample opportunity to prove that he and the Company (which he is CEO of, and has significant shareholding in) are on the verge of insolvency. To do so, he need only have filed evidence to that effect, which (if they exist) he should have ready access to. Tellingly, he did not file any such evidence.

That the Company is financially healthy is especially clear from information arising from its Annual General Meeting held on 19 August 2022 ("AGM").

There is a video clip of the AGM which was attended by the W, which shows H telling his shareholders that the Company is cashflow positive with HK\$300,000 revenue per month; and will (if all goes according to plan) soon be listed through the back door, causing the Company to be worth between EUR4-9 million;

H prepared a slide deck for the AGM. It shows that the Company has CAD1 million in annual revenue, and CAD10-22 million revenue in the pipeline.

In cross-examination, H said the Company was far less financially healthy than he had suggested at the AGM. In particular, he said he gave a rosy picture at the AGM to get S to drop the Shareholder Proceedings, and that it is in fact unlikely that the Company would get listed through the back door.

I reject H's evidence. Quite apart from the fact that H's evidence is completely unsupported by documentary evidence; it is also inherently incredible, because:

It suggests he is lying to his shareholders at the AGM, which, bearing in mind the likely consequence, is inherently unlikely per se; and

It does not make sense. S brought proceedings against the Company because (in his view) H wrongfully caused the Company to issue his family members shares. It is unclear why S would drop this litigation simply because the Company is doing well financially.

As I disbelieve the H's depiction of the Company's finances, it follows that H is also financially healthy, because:

On H's own admission, he holds significant shareholding in the Company: while H initially stated in his Form E that he holds all of the Company's shares on trust for his mother, he admitted in cross-examination that he, in fact, beneficially owns all those shares;

H admitted in cross-examination that he is in fact entitled to a lot more shares under the Employee Stock Ownership Plan in his employment contract, this was not declared in his Form E;

H's employment contract shows he is entitled to HK\$2.34 million annually from the Company. H also claims that he has been drawing less income from the Company as it is not doing well and therefore the Company owes him outstanding salary, amounting to HK\$2.8M over the period from September 2019 to 30 June 2022. Since the Company is financially healthy, it is able to pay H what it owes him.

I find H and the Company to be both financially healthy, H clearly has more than enough resources to provide for himself and the Children in Hong Kong.

Can H's family provide for the Children in Hong Kong?

Having concluded that H has more than enough resources to provide for himself and the Children in Hong Kong, it is unnecessary for me to additionally address whether H's family members can provide for the Children in Hong Kong if H cannot. I will nonetheless do so briefly.

H, his mother, and his sister have all given evidence to the effect that whereas H's family can provide for the Children in the US, they cannot provide for the Children if they remain in Hong Kong.

I reject their evidence; it is unequivocally clear to me that they are saying what they need to say to back up the Relocation Application.

None of them have given any good reasons why they would only be able to provide for the Children in the US, but not if they are in Hong Kong. Quite the contrary, one would have thought instead that, cash being as good in Hong Kong as it is in the US, if H's family can provide for the Children in the USA, they must also be able to provide for them in Hong Kong. Looking at the H's mother's affidavit, she has provided a table showing her intended financial support, which adds up to US\$5770/month (Food, private school and insurance for the two Children), equivalent to HK\$44,717. There is no reason why this amount cannot be made available to W and Children support in Hong Kong. Coincidentally, this accords with what HHJ Melloy ordered for their interim maintenance.

In fairness to H and his family members, H and his sister have made some attempt at explaining why H's family would only pay for the Children if they were in the USA, but not if they are in Hong Kong. However, their explanations are incomprehensible, and I do not accept them.

H says the Children's current living costs in Hong Kong are much higher than what they would be in the US. However, his assertion is without any supporting evidence, and I have no reason to take his word at face value.

Even if what H says is true, it appears that this is in large part because H has decided that the Children (and himself) should have a high standard of living in Hong Kong. For instance, H decided to sign a new lease in August 2021 for an apartment in Mid-Levels at Macdonnell Road that is currently paid by the Company at HK\$56,500 per month. (H explains that this is paid by the company as he is currently working from home). This is after having said to W when she was looking for alternative accommodation that he cannot afford to pay for two households. As such, especially if one bears in mind that H's family intends to provide for the Children comfortably in the US, it appears that H's family is able more than able to provide for the Children if the Children live a more modest (but by no means frugal) life.

As for H's sister, she says H's family would not be willing to pay for the Children's expenses in Hong Kong because she is not willing to "throw good money after bad" into H's failing Company.

This is plainly a bad point. Quite apart from the fact that I have already found that the Company is, in fact, beyond solvent; H's family can pay the Children's expenses directly, instead of injecting money into the Company.

In the premises, I also find that H's family is an available resource to provide for the Children in Hong Kong.

I therefore do not accept the basis of the Father's Relocation Application.

Is the application realistic and found on proposals well researched and investigated

H calls it a "No Cost" stable "Safe Haven".

H's plan is to return home to Connecticut where he is from. He says his mother and sister can provide a place to live, access to elite school and care for the children:

The house is 2,700 square feet with 4 bedrooms in a prime neighbourhood

There be "warrantied" elite private schooling paid for by the grandparents for as long as needed until the father is able to do so again

Large supportive and loving extended family

Children will enjoy a vibrant Greek Orthodox Church community and a vibrant community which knows the H and family for 50 years as they own a pizza business beloved by the entire community

Enjoy a “A” Alumni network and community (H was a “A” graduate)

H’s mother and unmarried sister will provide the back-up care for the Children.

He therefore said that the Children can be homed without costs on his part while he “re-establishes” himself. He provides the name of two possible private schools but no supporting evidence that any application has been made or if the Children will have a place.

H offers to make available daily online access for one hour per day for W at pre-determined time, and his sister will also assist to ensure that daily online access runs smoothly.

He also offers US\$3,000 to the W to pay any US immigration lawyer of her choice to establish permanent residency in the US.

W says that H’s mother is in her mid-80s and not very mobile. She states that H’s previous holiday application was premised on his mother’s old age and maybe her last Christmas (2021) and now he proposes that his mother can be a backup carer for the Children. W also says H’s sister does not have a very close relationship with the Children, having only spent 4 holidays with them; that she is not married, has no childcare experience and should be busy with the family pizza business. She further says that neither of them will promote the relationship between her and the Children.

I am not of the view that the H has a well-researched and investigated plan. All he is doing is describing his mother’s home and the neighbourhood. From what he said, he is going to be living off his family, and has no plans on how he is going to “re-establish” himself and how long he intends to take. And as explained hereunder, I find his offer of three round trips tickets to the W disingenuous.

Will the relocation Application be detrimental to her and her future relationship with the Children

W says she will cease to have a relationship with the Children if the proposed relocation is allowed because: (i) realistically speaking, W cannot immigrate to the USA; and (ii) H will not try to help W and the Children maintain a relationship if the Relocation Application is granted.

I will address W’s claims in turn.

Can W immigrate to or visit the USA?

In my view, realistically speaking, W cannot immigrate to the USA; and there are serious doubts on whether she can visit the USA. The W’s prior visitor visa has come to an end in around 7 December 2022.

This Court has the benefit of reading Ms. Khare’s expert evidence on these two matters, as well as hearing her oral evidence on the same.

First, on the question of whether W will have difficulty obtaining a visitor visa renewal: To get a visitor's visa, W will have to show lack of immigration intent and strong ties to Hong Kong. However, she will have difficulty showing both those things.

Apparently, the US immigration looks at visitor's visa application with a presumption of immigrant intent which puts the burden on the applicants to show that they will leave US once the stated purpose of the trip is over. Her previous visitor visa does not guarantee a visa re-issuance. If this Relocation Application is granted, W will have difficulty showing her lack of immigration intent because both Children have US Citizenship and would be residing in the US, which will cause US immigration to suspect that W intends to immigrate to the US to be with the Children. Further, W has previously been issued a marriage-based Green Card, which suggests W at least once upon a time intended to immigrate to the US. Therefore, even if W can get a visa in Hong Kong (which Ms Khare seriously doubts), she will likely be stopped at the US port of entry and be asked to turn around by a US Customs and Border Protection officer who will likely conclude that once she arrives, she will be inclined to stay behind.

She will also have difficulty showing that she has strong ties to Hong Kong, because she does not currently have a job or stable income in Hong Kong, and has extremely limited savings in her Hong Kong bank account. If H and the Children leave Hong Kong for the US, her ties with Hong Kong will be even more tenuous.

Secondly, W is clearly no longer entitled to a marriage based green card. While there are other ways a person can obtain Permanent Residency in the US (e.g. employment related visas for extraordinary ability or special skills; through the Diversity Visa lottery or wait for the Children to sponsor her when they turn 21); none of those ways are realistically available to W.

H asks me not to accept Ms. Khare's evidence for two reasons.

First, he says Ms. Khare is "clearly biased", because she admitted in cross examination that she is Mr. Marwah's (W's counsel) "College friend and known to him for many years".

I reject this reason. The following exchange extracted from H's cross-examination of Ms. Khare makes it clear that while Mr. Marwah and Ms. Khare have known of each other for many years, there is nothing about their relationship that would compromise Ms. Khare's impartiality:

Q:

How did you come in touch with Boase, Cohen & Collins for this engagement?

A:

I was in touch with Mr. Marwah and he knows that I specialise in US immigration law, and then he put me in touch with the law firm that's handling this case.

Q:

So you did have a pre-existing business relationship, this wasn't just a random found you on the internet like my opinion.

A:

This is – I mean as we practice immigration law, I think I do know Mr. Marwah, we had studied together many, many years ago, but he does know that I practice immigration law.

Q:

so you studied together, so you have a close relationship and that's how you...

A:

I don't think it's a close relationship, but we do have – we are both graduates of the same school for undergraduate.

(emphasis added)

Secondly, H says W has once successfully acquired Political Asylum US Residency status and (based on that) a US work permit; and Ms. Khare's opinion does not mention that. On that basis, he says Ms. Khare's expert opinion is defective, and should be accorded little weight.

I agree that Ms. Khare's opinion does not address W's previous Political Asylum US Residency status. In my view, it was right not to, as it is irrelevant to whether W can obtain Permanent Residency in the USA going forward.

Insofar as H thinks that piece of information is relevant to Ms. Khare's opinion because it suggests W can obtain Political Asylum US Residency status again, he is plainly wrong. W previously obtained that status because she was facing persecution in Kyrgyzstan. This could not possibly assist W if she tries to apply for Political Asylum US Residency afresh now, when she is living in Hong Kong as a Permanent Resident.

Furthermore, since I cannot rely on H's expert opinion, there is nothing to contradict Ms Khare's evidence. In the premises, I accept Ms. Khare's evidence, and find that W cannot immigrate to the US or be granted visitor status to enter the US.

It is opportune to now look at what the H proposes in this context. He promises 3 sets of round-trip tickets. This offer is limited to just the travel costs, it is completely silent on where she can stay or other costs of the trip; I find this offer disingenuous. W is clearly not in funds to travel for an extensive period to spend time with the Children. Coupled with the above analysis on the W's inability to enter US, I cannot see how these visits can possibly take place.

In H's written closing submission, he has now additionally offered to send the Children to go see W three times a year in Hong Kong. This offer was not made before or during the hearing, and comes out of nowhere. Due to the following analysis, I am not confident that this will actually happen.

Will H try to help W and the Children maintain a relationship?

W rests her case quite substantively on parental alienation. As I do not have independent assessment on this issue, I shall refrain from drawing any conclusion in that regard. However, in my judgment, H will not help W and the Children maintain a relationship if the Relocation Application is granted. I say so for two reasons.

First, I find that at least one of the reasons why H took out the Relocation Application is to separate W from the Children. He repeatedly said W initiated an “unannounced” divorce, suggesting to me that he was oblivious to the level of discord between the parties, and generally lacking in empathy. He clearly thinks little of W and made no attempt to hide that fact from the Children; he consistently speaks ill of W in front of them. L is openly rude and challenging to W and I have no doubt that the behaviour is instilled and encouraged by the H.

On W’s evidence, on 11 March 2021, H threatened to take the Children back to the USA, mocked W by saying she would not be able to step foot in the USA, and told W that she would only get supervised access if he allows it. While H denied in cross-examination that he ever said those things, I believe that he did. W made the allegation as early on as 28 July 2021, well before this trial commenced. If the allegations are false or in any way unfair, H would have denied them in writing on the earliest possible occasion. Tellingly, he did not do so.

Secondly, it is beyond peradventure that H has made consistent efforts to separate the Children from W since 2019. This was already mentioned in paragraphs 15 and 16 above.

Again, I accept these allegations to be true, as aforesaid, H did not make any efforts to deny these allegations while he had ample time to do so. Also given what I have said about W and H’s credibility, I have no hesitation in taking W’s word over H’s.

Holistic assessment of what is in the best interest of the Children

Is H having sole custody, care, and control of the Children in the Children’s best interests?

H asks that should the Relocation Application be allowed, that he be granted sole custody as this will be required in the US for enrolment into private school and medical emergencies.

In my judgment, H having sole custody, care, and control of the Children is not in the Children’s best interests.

First, as aforesaid, H has made consistent efforts to undermine W’s relationship with the Children since 2019, and those efforts have yielded troubling effects on both Children. Those efforts may well intensify if H has sole custody, care, and control of the Children, and especially if he relocates with them to the US. That is plainly not in the Children’s best interests, as it is important that they maintain a meaningful and on-going relationship with W.

Secondly, without any intention of criticizing H’s personality, values, and beliefs, it appears that H has a tendency of exposing the Children to concepts that are inappropriate for children their age. According to W, H had kept the Children up to watch “Games of Throne” and “Zombieland” with

him. H had actively encouraged use of force. He encouraged the Children to throw stones at animals. W produced evidence (a video clip which was shown in court) showing how H encouraged the Children to destroy and smash up the office premises H was moving out of. H saw nothing wrong with this behaviour.

Furthermore, H has on at least two occasions made misogynistic comments about women in front of the Children:

W has produced a recording dated 31 August 2022 showing H referring to W's female friends as "whores"; and

H has told the Children that W is worthless because she does not generate income. This is something that L repeats at the W.

H having sole custody, care, and control of the Children is especially not in P's best interests, as H's treatment of P has been nothing short of appalling.

First, it appears that H has on at least one occasion made sexually inappropriate comments about P to P. On 3 August 2021, H had a conversation with P. The conversation was recorded. It is worth quoting "...P you 're a real prize buddy. I'm sure you'll get a lot of old men who will want to spend some private time with your ass. And your mother will accommodate that. Just like her mom did for her..." (emphasis added).

Quite regardless of whether H meant what he said, the mere fact that H thinks it was appropriate for him to make such comments to a child aged 9 tells strongly against H's parenting abilities.

Secondly, H has proven to be a particularly abrasive parent to P. It is clear that H is not above using verbally abusive language to address P when he is upset, to cite just some examples:

On 1 November 2020, when P told H that he loved W, H called P a "fxxking moron" and told him "I am at the end of my rope with you"

On 31 August 2021, H had a conversation with P. The conversation was recorded. In it, H says: "You're making have [sic] a choice you fxxking asshole" and "If you want to fxxking stab me in the back worse than [S], fine".

This is the kind of language that he uses consistently with P. He would also tell P that if he stays behind in HK, he will be living off the streets; and then justify saying by saying that he needs to be the "boogeyman" to make sure that P sees the reality. I am therefore of the view that leaving the Children in H's sole custody care and control will not just sever W's relation with the Children; it will also adversely affect P emotionally and mentally.

I seek further support from the two PRs, and have quoted extensively to support the basis of my belief.

The Two Clinical Psychologist Reports

The two PRs give me abundant insights into the relationship and dynamics between the parties and with the children.

Briefly, H is said to take on a polite attitude on interview but is seen to be focused on speaking ill of W and blaming her for the destruction of the Company. He can find no strength in the W, except to say she is the Children's mother. The first psychologist makes initial summary as follows:

"... In Summary, the father was so pre-occupied with attacking the mother and to present himself as a capable father that it was difficult for the discussion to focus on the children's' needs. It is questionable as to whether the father's preoccupation with adults' issues affected his parenting capacity. The father also appeared to hold strong parental value of excellent achievement and staying in control by using physical force. It is worth exploring as to how such value affected the children's behaviours."

M is seen to be polite and co-operative with well-regulated mood. She is able to identify the strengths of the children as well as the H. However, she is assessed to be on the defensive and in fear of losing the younger son.

"In summary the mother appeared to have the potential to understand the children's feelings and be a good parent. However, she appeared to be preoccupied with attacking the father and with defending herself. It is questionable as to whether this affects her parenting capacity negatively. She was also in so much fear of losing her children that it is questionable as to whether she would choose to engage in parenting behaviors that are not in P's best interest."

It is clear that L is under H's influence, and taking "explicit or implicit" cues from him to abuse the W. The psychologist found him to be less sensitive and lacks empathy, with an "all or nothing" attitude. He has no friends in school (when he was attending school which is not the case now) but he idolizes his father and emulates his attitude and conduct. One can only imagine how much hurt this has caused W.

The following excerpts are from the first PR:

"When I asked [L] if there was anything that his mother wanted him to tell me, he said no because he did not talk to his mother. When I asked him if there was anything that his father wanted him to tell me he said that his father made sure that he told me about his mother hitting him. L said he wants to take revenge of his mother by hitting her back."

"He said he would like to get into an elite school, which is consistent with his father's wishes for the boys. He said that his father is his idol and his inspiration. He said he would like to go to A college because he will become rich. ... He said that if he has to stay in Hong Kong with his mother, he will have no money hence he will live on the street. He said that if he moved to USA then his father will fund her to live there so he will get to see his mother frequently. ..."

"L spontaneously told me that his father did not get his mother a green card so that she cannot get welfare in USA. When I asked him how did he know, he said his father told him. L also told me that his mother destroyed his father's company. When I asked him how did he know, he said his father told him."

And from the second PR:

“L’s comments on his mother were negative. He depicted that his mom created arguments over nothing. And his dad did not contact her was to avoid arguments with her. He blamed the mother for the marital problem such as she always told lies, her destroy to father’s company and she was lazy for not going to work. These descriptions were largely in the same line with the expressions of the father.”

The first psychologist finds P to be a more sensitive child, he has a good grasp of the parents’ situation and offers a more balanced view of what is happening at home. While P says he loves both parents, he is protective of his mother and feels that his father is being unfair to her. P told the first psychologist this:

“It started when mom wanted to devour (divorce?) dad started lying to mom and turned L against mom and L is falsely saying that mom beat him up but that is not true. P said that dad is lying and instigating and that mom is reacting and reacting.”

“When I asked P to tell me more about why he said his father was lying, he said that his father told a lie about his company because his father gave all his money to his family and would not give his mother any. He thinks his mother should get half of his father’s money. He said that he feels sorry for his mother as [s]he only gets HKD14000 per month.”

“In the post observation interview, P said that he often felt that his father was bullying him, saying that he is stupid and calling him a fxxking idiot. He said that he did not like his father calling him names.”

“He said he felt that his father was trying to make him agreed with him, forcing him to say yes, his father will keep on asking questions or lecturing him. He said that he nodded because he was afraid of his father taking away his computer or his phone. He said he was afraid to freely express his ideas to his father because his father would not give him basketball classes or would not allow him to play games with his computer. He said that he felt that he had to lie because he is afraid of his father being mean to him.”

The second psychologist echoes similar findings and says that P is better able to describe his emotions.

“P said his mom wanted to be friend with dad but dad did not want so. He converted L to not to like mom. It started when dad was always rude to mom then mom wanted to divorce with him. Then father cancelled mom’s green card. Then now, dad wanted to bring L and him to USA and to leave mom behind.”

Regarding the relocation plan:

“He sensed that father seemed to be nicer to him than before as to convince him to go to USA. However, he did not want to go because mom cannot go. The father may keep them there forever without mom and he cannot see his mom forever. He is afraid that father will bully him because there is no one to help him.”

“P described the father bullied him. Father told him that if they were going to stay in Hong Kong, the two boys would have to study in local public Chinese school or to live in the street as the father no longer have money to support the living expenses in Hong Kong. ... He told he did not dare to tell his father about his own thought ... It seemed to me that P’s description reflected that father’s saying tended to give him a sense of insecurity and pressure and he did not feel secure enough to express his need or fear to his dad.”

Both psychologists made the following observations about L, it is apparent to them that L’s abusive reaction to his mother belies his need for her attention and care. From the first PR:

“L said he will build his own house in USA. He said there will be a room for the father, P and grandparent, but not for the mother. L eventually built a structure that is outside of the house, giving her mother a crib to sleep in.”

“When the mother is alone with L, L did not show any signs of rejection. He began to relax as he started drinking. He also answered his mother’s questions freely. It appeared that when L is able to spend time with his mother alone, L initiated contact with his mother and responded to her questions. There was no sign of resistance.”

“It appeared that L’s negative comments about his mother were somehow disproportional to his experience in the observation.”

“As noted, L’s expressions reflected that he really wanted to get mother’s attention and love despite that he was trying hard to convey a message that he did not need the mom or what she did was totally bad.”

(emphasis added)

And from the second PR:

“L impressed me an intelligent enthusiastic to learn, self confident, keen to share what he knows and also caring to his younger brother P. ... He loves P, his father and still cares about the mother’s attention to him though he denied of it.... he nearly had an all-or nothing perception on his mother. Some were related to his unfulfilled care and love from the mother, while large of his comments and his negative feelings towards the mother were disproportionate to the events he experienced which was biased by his strong preference and loyalty towards his father. Obviously, L still needs mother’s attention and particularly needs father’s facilitation to promote a more balance boundary and view in relating to the mother.”

131.

The first psychologist has this to say about the family dynamics:

“L and P are both currently exposed to destructive interparental conflicts. L expressed a strong preference for the father and he was preoccupied with showing me that his mother is a bad parent (to the extent where he was unable to focus on his own needs). His negative comments on the mother was disproportionate to his experience in my observation. He also actively rebel against his mother during the observation. P preferred equal time with both parents but his answers changed depending on who he was with. Both children’s preference appeared to be under the influence of their parents: L received from

his father explicit and implicit messages to resist his mother and P is under the pressure of his mother father and brother to offer answer that favour them. The mother tended to be more open allowing the children to express freely their wishes; yet this has changed as she felt increasing insecure."

"Both parents' parenting capacity was hindered by their preoccupation in attacking the other parent and defending oneself. Both of them showed that they have potential to be good parent, yet neither of them are putting the children's psychological well-being as the first priority."

132.

I also find the following observations about the H illuminating from the two reports.

"Father was not aware that he has trapped his children in loyalty conflict, which is affecting their psychological health negatively."

"It seemed that the father does not really concern the children's psychological issues in the parental conflicts as noted in the past reports. Regarding to L's relationship with the mother, ... He will not intervene the mother-son relationship and will not ask L to change his attitude towards the mother as it is the mother's problem."

"The father tended to adopt a quite all or none perspective on seeing the mother and minimized her strengths to parent the children"

133.

And in the observation of the father-P interaction, the second psychologist reports the following when P was asked about his choice for the relocation in the father's presence:

"Father looked a bit uptight and serious, saying that there would be no money for them to stay in Hong Kong and their life and career would be over and horrible that they would end up living in poverty and studying in local public school. ... Father then asked P whether he would miss him or L if he was left in Hong Kong. P said yes but he did not want to go to the USA without mom. Father became more pushy and said to P that if he stayed with his mother, he could not meet him and L and would it that ok to him. P kept silent and looked at me As noted in the above conversation, father became tense, pushy and gave pressure to P when P clearly indicated his wish and need for the mother."

134.

I draw a few important points from the concluding paragraphs in the second PR. The psychologist says she "tended to believe that the father's motive is not totally out of cutting the mother son relationship". (emphasis added)

135.

The next point being this, and I flag this now as a similar point is made by the SWO in her last report (quoted below):

“In this case, if both L and P go to the USA, the moving parent’s motivating factor for keeping the sibling bonding by keep the mother-sons relationship would be likely weaken. The moving parent (the father in this case) has to demonstrate his willingness and commitment for co-parenting and mother-sons access should be clearly defined. However the father’s commitment for the co-parenting is in doubt give his negative evaluation on the mother’s parenting and his reservation for communicating with the mother.” (emphasis added)

136.

Last but not the least, I am very conscious of the impact of relocation on P. P is close to the W, and he has repeatedly said he needs her to be nearby. P also seems to be under the impression that if Relocation Application is granted, he will not be able to see his mother “forever”. In looking at his relationship with H, it will take some time before P can gather the courage to speak freely to him. It would therefore not be in P’s best interest to leave him in the sole care of his father without his mother’s balancing forces. Quoting from the second PR:

“P seems to gain emotional security from mother and given his age, he still needs mother to fulfil his physical care.”

“P did not feel secure enough to express his need or fear to his dad’s demand and forcing attitude.”

137.

The legal principles remind me to look at the effect upon the child of the denial of contact with the “staying” parent, and the opportunity for continuing contact between the child and the parent left behind. The welfare checklist reminds me of various factors: a child’s emotional needs, likely effect on a child of any change in circumstances, and any harm that a child is at risk of suffering. I am therefore well supported in taking the above considerations to conclude that the relocation cannot be for the benefit of the Children.

Mother’s view on the Children’s future in HK

138.

I was concerned as to how W can cope with the situation where H will continue to cry poverty and make her life difficult. She was asked this at the close of her oral evidence. It is clear that she has thought these issues through.

139.

She said that she is a designer and had a tailoring business in the US with a small team of employees. She said she intends to re-start a similar business or take up work for a fashion company. She has apparently also researched on more economical English medium schools, which are free or subsidized, and she is ready to move to the school catchment areas to enable the Children to take up studies in these schools.

140.

She comes across as resolute and determined, and as already mentioned, I have no hesitation in accepting her words.

Impact on the Applicant F if Relocation Application is dismissed

141.

Given that I disbelieve H's basis of this Relocation Application, I am of the view that H will not be severely impacted if I dismiss his application. However, it is clear that he will at least be facing the following litigation ahead:

Outstanding MPS payment arrears and associated judgment summons proceedings;

W's School summons;

W's S.17 Application; and

H's Shareholders Proceedings.

Balancing exercise on my part

142.

I make reference to the abovementioned welfare checklist when balancing the pros and cons of allowing H's application, against the pros and cons of dismissing it.

143.

Simply put, I am looking at a situation where I am convinced that the Children's relationship with their mother will be negatively impacted, if not severed if they were to be allowed to relocate; versus a promise of free housing in a bigger house, elite school, large community and church life, and a care plan supported by H's aging mother and sister.

144.

H has not said that if the relocation is disallowed that he will go to the US by himself.

145.

I agree with the W's counsel: Relocation will destroy the relationship between W and the Children.

146.

I am of the view that keeping the Children together in Hong Kong will at least allow a chance for L to salvage his relationship with W, and to that end I would like to see L spending some personal time with W going forward and this needs to be built into the access arrangement. It is also important for P to gradually find more independence from the stress that W is experiencing. In my view, the amount of "tangible" benefits allegedly available in the US cannot outweigh the risk of and impact on these Children growing up without their mother.

147.

It is apparent that both parents have inappropriately involved the Children in the divorce and financial matters. This is clearly wrong, and have thrown the children into the throes of the parties' conflict. But like every family "broken" by divorce, children will adjust if the parents are truly caring of them and put their needs ahead of their own strife. This latter point is clearly a work in progress.

What should I do about the two Social Welfare Reports that support H's Relocation Application?

148.

As mentioned, the last two SIRs state that the Proposed Relocation is in the Children's best interests. H says his Relocation Application should succeed on that basis.

149.

I reject this argument.

150.

The two said reports have similar concluding paragraphs save the highlighted part below. This emphasis was actually added by the SWO in her last report.

"I observed that both P and L loved their parents but presented in different ways since they were all along "trapped" in the middle of their parental disputes. L's preference to the father was clear but yet, he did not resist the care and concern by her mother during the parental observation. P presented his preference with his mother but yet, he related intimately and played hard with his father at my parent-child observation. ... when considering the childrens' wish, L's preference remained firm to relocate to the US, with strong desire to study and live in the US especially together with his younger brother. P presented a shifted mind to stay in HK while it might reflected his uncertainty over further chance to maintain contact with his mother after relocation to the US.

Putting the childrens' interests and welfare as paramount consideration, I still tend to support them to relocate to the US together where they could secure more familial support from the father's family and the education / child care plan is assesses feasible. However, the effect upon the children's reduction with the mother AND the opportunity of continuing contact between the children and their mother left behind are more significant in this case while further addressing the separation anxiety and uncertainty of the young son P. When further considering the parents' communication block under their prolonged conflict with deep mistrust, I strongly suggested the children's access to their mother should be clearly defined, including daily access through electronic means and the father's commitment to arrange physical access between the mother and sons during their long school holidays. (emphasis added by the SWO)

151.

What is apparent is that the SWO is concerned about W's contact with the Children going forward; I note that relevantly, the clinical psychologist shares the same concern.

152.

Having view of the whole case, I have decided to go against the recommendation of the SWO. Here I am guided by the principles cited by Cheung JA in the case of WSM v FSY, CACV352/2004, unreported, 27 July 2005:

“22. As we understand the position, the social welfare report, is, like all other material information, one of matters that the court should pay due regard in determining what is in the best interest of the child. No doubt because the social workers have carried out the background investigation, they are able to provide details of the family situation which are not otherwise available to the court. And to that extent the courts have said in the past that if the recommendation of the welfare officers are not followed then it is highly desirable that the judge should say why he has not done so : see W v W (A minor : custody appeal) [1988] 2 FLR 505.

23. This is a matter of commonsense but as more recent cases show, the judge’s reasons for reaching his own decision instead of relying on the recommendation are normally the very reasons for his declining to follow the recommendation. Unless his reasons are manifestly wrong he is not under any further duty to spell out the reasons for departing from the recommendation : see Re V (residence : review) [1996] 3 FCL 101 and Naziya Aslam v Rafagat Ali (CACV 144/2003). This is an approach we will also adopt. Otherwise the matter will be enmeshed in technicalities.
24. We will further add that a social welfare report is not a special category of material information, nor should the recommendation assume a status somewhat akin to a legal presumption which needs to be rebutted. Ultimately the decision making lies with the judge based on the available evidence and guided by the relevant principles. See also Z and Y [2001] 1 HKLRD 261.”

153.

It is plain from both SIRs that they have accepted the H’s version of events and made their recommendations on the basis (and without having seen all the evidence available to this Court) that H cannot provide for the Children in Hong Kong; and that he would at least try to foster a good relationship between W and the Children if H’s application is granted.

154.

W’s counsel also correctly points out that the SWO did not compare the situation between relocation and staying in Hong Kong. SWO acknowledged as much in cross examination.

155.

However, I have found that H can provide for the Children in Hong Kong, and I am convinced that H will not try to help W and the Children maintain a relationship if this Relocation Application is granted. Furthermore, the recommendation of the SWO is made without the benefit of the immigration expert opinion which points to the realistic possibility of W not being able to live in or visit the US.

156.

In the circumstances, I attach no weight to the concluding recommendations in the two referenced Social Welfare Reports.

Conclusion

157.

In view of the matters stated above, I have no hesitation in concluding that H's proposed relocation is not in the Children's best interests. H's Relocation Application is therefore dismissed accordingly.

Costs

158.

As this is a Children's matter, I shall follow the usual practice and make no Order as to Cost. The Petitioner's own costs is to be taxed in accordance with legal aid taxation, with certificate for counsel. This is a cost order nisi which will become absolute 14 days hereof.

(Thelma Kwan)

District Judge

For Petitioner: Mr Shaphan Marwah instructed Boase Cohen & Collins assigned by Director of Legal Aid

For Respondent: Acting in Person

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