

HONG KONG / JUDGMENT

Y v. L

COURT

Family Court

DECIDED

6 August 2007

CASE / FILE NUMBER

FCMC4933/2006

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bjbj FCMC 4933 / 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 4933 OF 2006

BETWEEN Y Petitioner and L Respondent

Coram : Her Honour Judge Sharon D. Melloy in Chambers (Not Open to Public) Dates of Hearing :
31 May 2007, 20 June, 19, 23, 24 & 25 July 2007 Date of Judgment : 6 August 2007

J U D G M E N T

Introduction

1. This is a contested application for custody of the only child of the family, a eight year old girl, born on the 13th October 1998, who I will call WS.
2. The petitioner father originally sought custody of WS in his petition dated the 29th April 2006. The respondent mother has similarly applied for custody of her daughter in the Form 4 Acknowledgment of Service dated the 10th June 2006. On the 6th September 2006 it was ordered by consent that the respondent mother have interim staying access to the child every alternate weekend from 8:00 am on Saturday to 3:00 pm on Sunday. For convenience sake I will refer to the parties as mother and father in this judgment.

Background

3. The parties married on the 28th February 1997. Twenty months later, on the 13th October 1998, WS was born in Hong Kong. The father is a Hong Kong resident and the mother was originally from Guangzhou, China. After giving birth in Hong Kong, the mother returned with WS to Guangzhou and WS was brought up by her there. In 2001, WS came to Hong Kong so that she could attend a local Kindergarten.
4. From 2001 - 2004, WS was mainly cared for by her father and her paternal Grandmother Mdm P. The mother visited her as often as possible, usually for three months at a time. When she was in Hong Kong the mother resumed her care of WS. The father also took WS to the Mainland to stay with the mother when the child was on school holiday. In this way the care of WS was shared between the father, mother and the paternal Grandmother. In addition WS also spent time with a paternal Aunt, with whom she is said to be very close. The mother was granted a single entry permit in September 2004. The mother then joined the family permanently. They lived in a public housing unit held in the name of Mdm P in Shatin. Unfortunately the marital relationship deteriorated. In May 2005, the mother moved out of the matrimonial home following an argument with the father. Initially the mother returned to China for two weeks. On her return it was agreed that the father would move out of the matrimonial home and live in a unit initially privately rented by the mother. The mother then moved back into the public housing unit, so that she was able to look after WS, with the assistance of Mdm P. This arrangement carried on for just under a year. In April 2006 there was another argument between the father and the mother and the police were called. As a result the mother moved back to the unit and the husband returned to the public housing unit. Since then WS has been mainly cared for by her father and her Grandmother. This arrangement has therefore been in existence for approximately 15 months prior to the present hearing. At no point was it with the mother's agreement.
5. On the 29th April 2006, the husband filed for divorce. On the 6th September 2006 there was an order that the mother have staying access to WS every alternate weekend. A social welfare report was also called for. On the 13th March 2007 the mother filed an application for further directions. She sought disclosure of medical reports from a Government hospital setting out the present medical / health condition of the father and Mdm P. She also sought disclosure of the father's previous criminal record. The court allowed the third request only. On the 20th April 2007 the mother asked for a further social welfare report on the basis that the first one had not specifically taken into account the father's criminal record. The court ordered that the social welfare officer be requested to consider the criminal record of the father and if it affected the previous recommendations, ordered the social welfare officer to file an updated report. In any event an updated report was filed on the 25th May 2007. Drug dependency

6. During the course of the original hearing on the 31st May it became clear that the father's drug habit was of concern to the mother. It was also of some concern to the court. The father said that he no longer had a drug habit and agreed to have a urine test to prove it. Consequently the matter was adjourned to the 20th June to enable a urine test to be taken. On the return hearing date, however, the results of the test were still not available. The Social Welfare officer said that it would be safer to adjourn the matter until after the 9th July when he felt sure that the test results would be available for the court. Consequently the matter was adjourned for a second time to the earliest date after the 9th July i.e. to the 19th July. The matter was then heard over the course of a further 2 1/2 days.
7. On the 6th July 2007, the court received the results of the urine test. The father tested negative for all routinely examined drugs/substances. The Law in Hong Kong
8. It is necessary before turning to the evidence to look at the law governing applications concerning children in Hong Kong. Section 19 Matrimonial Proceedings and Property Ordinance, Cap. 192 states that
 - (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18- (Amended 69 of 1997 s. 28)
 - (a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;
9. The general principles governing such applications are set out in s. 3 of the Guardianship of Minors Ordinance, Cap. 13, which says that : GENERAL PRINCIPLES
10. (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-
 - (a) in any proceedings before any court (whether or not a court as defined in section 2) the court-
 - (i) shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to- (A) the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; and (ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father;
 - (b) except where paragraph (c) applies, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and shall be exercisable by either without the other; For the avoidance of doubt s. 48 C Matrimonial Causes Ordinance, Cap. 179 adds that . section 3 of the Guardianship of Minors

Ordinance (Cap 13) (which provides that the welfare of the minor shall be the first and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192). Other matters to take into account

11. The solicitor for the father helpfully referred me to the welfare checklist set out in the English Children Act 1989. Previously the Family Court has used this checklist as a guide.
12. Although there is no statutory checklist in Hong Kong, as there is in other common law jurisdictions when determining custody, there are a number of factors, which generally speaking need to be taken into account or considered. For convenience sake I have listed them below. Some of these mirror the checklist referred to above. This is not meant to be exhaustive list, but simply a useful guide when considering issues relating to custody, care and control and access and the welfare of children of generally. Some of them may overlap. These are
 - a) The recommendations made by the Social Welfare Report
 - b) Recommendations made in any other reports and/or by other experts
 - c) The ascertainable views of the child concerned (considered in the light of her age and understanding)
 - d) How capable each of the parents and any other person is, of meeting the child s needs
 - e) The parties child care plan
 - f) Any physical / mental disability or illness of either parent
 - g) The child s particular physical, emotional and educational needs
 - h) Sibling Unity (if relevant)
 - i) The personality and character of the parties
 - j) Any matrimonial misconduct affecting the children
 - k) Any harm which the child has suffered or is at risk of suffering
 - l) Any other factors which the court considers relevant bearing in mind the child s age, sex and background
 - m) The status quo of the child and the likely effect of any change in her circumstances
13. I will consider these sections in turn when I discuss the parties evidence. Case law
14. Both lawyers also referred me to some helpful cases. The solicitor for the father pointed out that it was an established principle that the court as a general rule favoured maintaining the status quo if it was found to be working satisfactorily. (Chow Cheung Suk-king v Chow Yan-Piu CACV 180 of 1984 and Re : Lee Cheuk-wah (an infant) CACV 2678 of 1983 refers). In the first case the Court of Appeal overturned an order that two young children aged 1 1/2 and 5

years be returned to their mother. Silke J.A said We feel that the trial judge, even with all the care he exercised, underestimated two matters. First of all the disruption in the lives of the two children would we think, be somewhat greater than he envisaged it to be. It is important for children of this age that status quo, a loving and caring environment to which they are accustomed should not be disturbed. There is little doubt that this would be disturbed if they were to go to the very confined, comparatively, living quarters of the mother. And second he under-emphasized the nature of the new environment. It is clear that their present home environment is much the more preferable. Further, the arrangements for care and supervision by the father are more certain and more advantageous to the welfare of the children than those of the mother

15. The mother s solicitor also referred me to another, more recent Court of Appeal decision namely L v C CACV 333 of 2007. This case concerned the custody of a child who was then nearly 5 years of age. The Judge at first instance had ordered that the child remain in the custody of the Father. On appeal the child was returned to its mother. Referring first to the Social Welfare Report, The Hon Rogers VP said, The report acknowledges that, at the time it was written, the child was living with the father and that was regarded as the status quo. It went on, however, to make the point that it could be considered in the long term interest of the child that he should be looked after by his natural parent And later The importance of status quo would vary from case to case. In a case such as this it is merely some confirmation that the existing circumstances are not adversely affecting him. In this case there is no reason to suspect that if the mother s proposals were to be accepted any change would be adverse of itself and hence the significance of the status quo is of very small importance
16. Consequently although it is clear that the issue of status quo is important, it will nevertheless need to be assessed on a case by case basis, depending on the individual circumstances of the case in question. Status quo will be more important in some cases than in others.
17. In so far as the role of the natural parent is concerned the Hon Rogers VP, said What seems to me to have been overlooked in this case was the importance of one of the natural parents being the primary carer of the child. In this case it is quite clear that, albeit both parents work and have similar working patterns, that if the father were to be given custody, the paternal aunt would fulfil that role. Without in any way suggesting that the paternal Aunt does not devote full care and attention to the child, the importance of the natural parent being the primary carer must not be lost sight of. Coupled with that if the parent proposed to be the primary carer is the mother, this too is highly significant because of the natural role of the mother in the rearing of very young children. In this respect I would add that the judge does not appear to have considered the role of the mother in the child s life in comparison to that of a paternal aunt, however devoted she may be

18. In contrast I was referred by the father to earlier authorities, which supported the father's contention that there is no rule of law that young children should necessarily remain with their mother. Each case turns on its own facts. (refer to RE: B (an infant) [1962] 1 ALL ER 872, Wong Yip Yuk Ping v Wong Sze Sang Michael CACV 116 of 1985) The issues
19. The present issues before the court are :
 - 1) Should custody and care and control vest in the sole name of the father or the mother?
 - 2) What access arrangements should be put in place for the non-custodial parent? The father's case
20. The father says that the existing status quo should continue. At present, he says that WS is looked after jointly by himself and his mother, Mdm P. On occasion, his cohabitee, who works full time as a sales assistant, also assists. The father says that Mdm P's main responsibility is to cook meals and to do the household chores. His main responsibility is to take WS to and from school. When he is working or has other commitments, a neighbour who also has a daughter at the same school, will take WS to school or to her tutorial class. As the father only has very limited education he has also arranged for WS to attend a tutorial class from Tuesday Friday, 3:30 6:00 pm.
21. In so far as his previous conduct is concerned he says that he has not taken drugs since WS was born, because he did not want her laughed at. He says his criminal record has no bearing on his ability to parent WS effectively.
22. In so far as housing is concerned, the father's case is that WS should continue to reside in the public housing unit in Shatin. Mdm P is the registered tenant. The apartment is 35 square meters and is partitioned into one bedroom, a living room / dining room, a kitchen and a toilet. The bedroom is separated by a curtain. The father sleeps in a double bed with Mdm C on one side and WS and Mdm P share a bunk bed on the other. The family i.e. the father, Mdm P and WS rely on CSSA. The mother's case
23. The mother's case is that she is better able to provide appropriate care and guidance to the WS. She points out that she was the main carer until the child was about 2 1/2 years old and that after that time, the care was shared between herself, the father and the paternal grandmother, Mdm P. The mother has recently resigned from her job, with the intention of being a full time mother and housewife over the next two to three years. Thereafter, when WS is a little older, she intends to return to work. She will apply for CSSA in the short term. She says that she will be able to assist WS with her homework. Further it is her case that WS wants to live with her. She is also concerned about the father's ability to parent. Concerns were also raised about his previous criminal record and his previous addiction to drugs. The mother believes that she is a better role model. The mother shares a flat with a female friend. It measures approximately 30 square meters. There are two bedrooms, a living room\dinning room, kitchen and toilet. The mother proposes that WS should live with her in this accommodation. They would share a bedroom. In so far as Mdm P is concerned, the

mother does not believe that she will be able to provide appropriate long-term care for WS. The evidence

24. I must now turn to consider the issues, the law and the parties evidence as set out in the parties affirmations and as given orally during the hearing. For the avoidance of doubt, in so far as the matters set out in this judgment differ from the evidence of the father or mother, that is because I have preferred the evidence of the other party or because I do not find the evidence given credible, or because I consider that the documents produced confirmed my findings of fact. In addition I have had the opportunity to observe the demeanor of the parties while they gave evidence in court.
25. I heard evidence from the father and the mother and Mr. W, the social welfare officer who wrote two social welfare reports for the court, the first dated the 23rd November 2006 and the second dated the 25th May 2007.
 - a) The Recommendations made in the Social Welfare Report
26. In the first social welfare report dated Mr. W recommended that the status quo be maintained and that custody of WS be granted to the father with reasonable access to the mother. This was reiterated in his second report. The main reason being that a stable environment is important for WS s healthy development at this stage. With the present satisfactory care arrangements being provided by WS s father, together with the strong support from her paternal grandmother, and that WS is receiving better social support from her paternal relatives which might not be equally available from her mother, it is believed that WS might benefit from the present living arrangement .
27. In so far as the father s criminal record is concerned, the Social welfare officer said There was no evidence to suggest that [the father s] past criminal records had given rise to significant negative effect onto his taking care of WS Further, he said Having considered WS s good adjustment to the present living and school environments, her good relationship with her father, paternal grandmother and father s girlfriend, it was considered to be in WS s interest if the present care arrangement could continue .
28. Recommendations made to the court in social welfare reports, although not binding are persuasive. If the court decides not to follow the recommendations made then reasons must be given.
29. The Social Welfare Officer was asked a number of questions by the court. Firstly he was asked whether he thought that a girl, as she gets older, should perhaps more properly be looked after by her mother?
30. The social worker concurred saying that in general he thought this observation was correct. However he said that when he had made his recommendation he had also taken into account the wider family. In other words he was placing great reliance on the paternal grandmother s role in coming to the decision that he did. This is of some concern. In both his oral testimony and in the social welfare report he says that Mdm P had been the main

carer of WS after she came to Hong Kong to attend Kindergarten. Further he said that the mother had never taken care of WS single handedly since coming to Hong Kong in 2001. The same of course, can be said of the father.

31. The Social Welfare Officer was also asked what he said to the argument that it is preferable for a child to be cared for by a natural parent as opposed to other family members ?
32. Again the social welfare officer concurred, saying that in general the argument was right, but we have also to be concerned with whether the carer has the true heart to take care of the child .
33. In this case, for reasons that will become apparent and as set out below, I have decided not to follow the Social Welfare Officer s recommendation.
 - b) Recommendations made in any other reports and / or by other experts No other reports have been filed in this case.
 - c) The ascertainable views of the child concerned (considered in the light of her age and understanding)
34. WS is only 8 years old. Notwithstanding that however, she has expressed her own views through the social welfare reports. She has repeatedly said that she wished to live with her mother. She thought her mother was the best person in the world She was frank to express her preference of living with her mother, before her father and paternal Grandmother
35. I have some concerns that WS may have been placed unfairly in the middle of this dispute. The mother exhibited a copy of a letter apparently written by WS of her own volition dated the 10th December 2006. This was exhibited to the mother s first affirmation. In it WS expresses a preference for living with her. Likewise the father exhibited a copy of a letter dated the 13th January 2007 in which WS says that she only wrote the first letter because her mother had asked her to and she did it because she knew that it would make her mother happy.
36. Whatever the truth or otherwise of these assertions, parents must be discouraged in the strongest possible terms from involving their young children in litigation of this nature. It is both damaging and unnecessary. I have placed no weight on either letter.
37. I have though placed some weight on what WS has said to the Social Welfare Officer. In addition to expressing a preference for living with her mother the Social Welfare Report also said WS indicated her preference of living with her father or mother when she was interviewed at their respective abodes. It was understandable that WS did not want to disappoint either of her parents and her reaction was probably due to her not wanting to be caught in the issue of custody
38. In his oral testimony the social welfare officer elaborated. He said that he had tried his very best to find a place where he could speak to WS privately. When asked WS has said that she was happy to live with either parent. He said In my first report WS s view was more clear. In

my further report I also visited WS again and in a relatively isolated place. I spoke to her privately. I asked WS what was her view to stay at her father's abode. Her answer was ambivalent but I could see that she nodded her head and showed happiness. She nodded her head and she had a smile on her face.

39. It seems to me that WS has a strong attachment to both parents and also to her Grandmother and paternal Aunt. I am very concerned that unnecessary pressure may have been placed on her by both sides. I have no doubt that to some extent she has been caught in the middle and that she doesn't wish to upset either parent.
40. It seems to me that WS should ideally be able to continue to have a good and loving relationship with both of her parents and with her wider family.
- d) How capable each of the parents and any other person is of meeting the child's needs
41. Cases of this nature are always difficult and I have found this one particularly difficult. I have no doubt that both parents love WS very much. The issue is not however, whether they love WS, the question is who can best provide appropriate care for WS. A child has physical and emotional needs. Both parents appeared to be capable of meeting WS's immediate physical needs. The father had set up a timetable which worked. He said that there was a division of labour whereby WS was cared for appropriately by himself, his mother and his cohabitee. Unfortunately neither Mdm P or Mdm C were called to give evidence. Therefore it was not possible for the court to assess their ability to meet WS's needs. The mother also appeared to be capable of meeting WS's physical needs, in the immediate and longer term. Both the mother and the father said that they had a close relationship with WS. I believe that to be true. I also accept that WS has a close relationship with her paternal Aunt, although again this cannot be tested as she was not called to give evidence. Longer term though, having seen both the mother and the father in the witness box, I believe that the mother will be the more appropriate person to meet WS's emotional needs. As children get older they often gravitate towards their same sex parent. This is natural. I am of the view that all things being equal, the mother as the natural parent is the more appropriate person to guide WS, as opposed to either the grandmother or the paternal Aunt, however loving and supportive they may be. The mother is certainly the most appropriate parent to guide WS through puberty. The Social Welfare Officer indicated that other women within the household could undertake this role. This may be true. It was also suggested by the father's lawyer that she could discuss any issues that she might have during access visits. Again this is true. However, it is not ideal.
- f) The parties child care plan
42. In summary the father has asked for the status quo to continue and the mother has asked for it to be changed. Further details are set out below.
43. In addition the court asked each parent what arrangements they would like for access, in the event that a) they had custody or b) the other was awarded custody.

44. The father said that he was pretty easy going and that if he had custody he was happy for the mother to have free access to WS. When pressed he said that the mother could see WS any evening after the tutorial class had finished. He was also happy for the weekend access to be altered so that the mother could see WS more frequently over the weekends.
 45. If the mother was granted custody the father said that he did not wish to disrupt WS's studies but that he would like to see her over the weekends. He also asked for the school holidays to be split 50:50.
 46. The mother, when asked the same question said that if she had custody she was happy to split the school holidays and for the father to have access on alternate weekends and on alternate days during the week if he was free.
 47. If custody was granted to the father and the mother was not working she asked for access after school from 3:00 6:00 pm so that she could help WS with her homework. Otherwise she asked for access on alternate days. She said that she was happy to split the school holidays but it was not clear how this would operate if she was working. The mother would be entitled to 7 days leave per annum.
 48. Both parties were asked if they would consider joint custody. Neither thought this would work given their poor relationship at present.
- f) Any physical / mental disability or illness of either parent
49. Neither parent appears to have a physical / mental disability or illness save that reference was made to the father suffering from hypertension and a kidney problem. The father did not appear to have suffered any side effects from his previous drug addiction. It was suggested that Mdm P might be suffering from normal age related illnesses. This was unproven. The mother was fit and healthy.
- g) The child's particular physical, emotional and educational needs
50. WS does not have any special physical, emotional or educational needs. The mother appears to be more able to assist WS with her homework. The father admitted that his own educational level was low and that he only knew a few Chinese characters. The father said that the mother would frequently scold the child when helping her with her homework. This was denied by the mother. I believe her. In her oral testimony the mother describes one occasion where she physically punished WS for using tippex to obliterate a bad report from school. The mother said this was done with the agreement of both the father and Mdm P. Again I believe her. I found her testimony to be wholly convincing. There is nothing to suggest that WS has been mistreated in any way by either parent, or by any member of the wider family.
- h) Sibling Unity (if relevant) WS is an only child. The personality and character of the parties

52. Much was said during the trial about the father's criminal record and his previous drug problems. In his second affirmation the father sets out details of his criminal record including attempted wounding with intent to do grievous bodily harm (26/8/83), claiming to be member of a triad society (31/8/1993) and possession of dangerous drugs (various). His last criminal conviction was in December 2000. In total he has 12 convictions. In 1983, he was originally charged with murder and the mother's lawyers were quick to point out that on that occasion a person died. However he was not convicted of murder but of wounding with intent. He was 19 years old at the time of the conviction.
53. The mother is concerned that the father still takes drugs. Given the urine test I do not find that to be the case. The father says that he has turned over a new leaf largely due to the birth of his daughter. I believe him. He also says that this does not affect his ability to be a good parent. In general I would agree.
54. In so far as the mother is concerned, the father made a number of unsubstantiated allegations against her. In particular there was a dispute concerning the public housing unit in Shatin. In the main I found the allegations made to have little weight and to have no bearing on the issue of custody.
- j) Matrimonial misconduct affecting the child
55. Likewise both parties had made further allegations against the other concerning alleged matrimonial misconduct. The social welfare report said, and I would accept this, that despite that the couple had been on the verge of domestic violence, WS was not involved in past conflicts. Presently WS does not appear to have been greatly affected by these conflicts, as reflected from her satisfactory relationship with her family members
- k) Any harm that the child has suffered or is at risk of suffering
56. The child does not appear to have suffered or to be at risk of suffering any harm.
- l) Any other factors ?
57. There do not seem to be any other factors that need to be taken into account here, save for those set out below.
- m) The status quo of the child and the likely effect of any change in her circumstances
58. In this case the existing status quo has only been operating since April 2006 i.e. for the past 15 months. This is not a case where the child has been solely looked after by one care taking parent for the majority of her life. Her care has been a joint endeavour. In the immediate past WS has been looked after by the father and Mdm P. Prior to that i.e. from September 2004 she was looked after by both her mother, her father and Mdm P. By mutual agreement the mother looked after the child with the assistance of Mdm P for almost a year i.e. from June 2005 to April 2006. I agree that in all of this, the grandmother has been a constant source of care for WS. However, given the circumstances of this case I am of the view that the status quo is somewhat fluid and that it should not be regarded as being cast in stone.

59. Given that what weight should be given to the existing status quo ? And is this to be preferred to the alternative offered by the mother ?
60. In my view although in the normal course of events significant weight should, quite properly, be attached to the existing status quo, it seems to me that given the fact that the existing status quo has only been in operation for 15 months, that less weight should be attached to it than might otherwise have been the case.
61. It is also necessary to evaluate what this means longer term. The child is a girl. She is 8 years old. At present she is being looked after in the main by her father and her grandmother. She is undoubtedly very fond of both, but the grandmother is 74 years old. She is said to be in good health. However she did not participate in these proceedings. No affirmations were filed and she was not called to give evidence. It is not possible for the court to form its own impression of Mdm P's child caring capabilities. When asked by the court, the father's solicitor said that she did not wish to come to court. Consequently I am not able to form a view of her capabilities going forward. In 10 years time WS will be 18 and Mdm P will be 84. In the intervening years, if she is still alive, will she have been able to guide WS through her adolescence and through puberty ? It seems to me that the mother is better placed to do this than either the father or the grandmother.
62. Who then is to be preferred the father or the mother ? I have no doubt that the father is providing appropriate care for WS. He acknowledges his own short-comings and has dealt with them by enrolling WS into a tutorial class and by seeking the assistance of a neighbour to take WS to and from school and to take her to her tutorial class. In contrast WS could have the benefit of a full time natural parent taking care of her going forward. She undoubtedly also loves her mother very much. The mother will be able to help her with her homework and guide her through her adolescence.
63. If however, WS is to live mainly with her mother it will mean changing schools and adapting to a new living environment. The Social Welfare Officer identified potential adjustment problems as a reason for not recommending that the mother be given custody. It should be noted however that WS has said, through the social welfare officer, that she is ready to face those changes. She also told that she was ready to change living and school environment as well as to meet new friends, should she be arranged to live with her mother in the future .
64. She will have her mother to assist her with this. The mother has looked into the possibility of changing schools and has identified two that may be suitable, namely the K School and F School. These changes, although regrettable, do not appear to me to be insurmountable. The advantages also appear to me to outweigh the disadvantages.

65. It has also been said that the father has a better support system than the mother in that he can rely on Mdm P and his cohabitee, as well as his wider family. However it does not seem to me to be unnatural for a parent's first port of call to be the other parent when faced with some difficulty or other. When asked the mother said that she could cope and that if need be she would call on the father for assistance. This seems to me to be wholly proper and I would not criticize her for this.
66. In so far as the accommodation is concerned. I believe that although WS has lived in the PHU in Shatin since she was 2 1/2, that this accommodation may not be suitable longer term. I was particularly concerned about the sleeping arrangements in the PHU. When asked if the father's sexual relationship with Mdm C might cause inconvenience, the social welfare officer answered that If the Petitioner and his girlfriend had a sexual relationship in the presence of the child then, yes, this is a problem. But in my investigation I did not discover that such a situation had happened. I have no means to estimate whether the Petitioner and his girlfriend have a sexual relationship. The couple and the paternal grandmother live in the same room. My personal estimate is that if there is such a relationship happening, I think the paternal grandmother would not consent / allow such thing to happen. But it is only my personal guess
67. With respect I find this to be unbelievable. It seems to me to be highly probable that the father and his cohabitee have a normal sexual relationship. This may be easier to conduct when the child sharing the room is quite young. It will become more difficult as WS gets older. I believe the mother's living arrangement, although not ideal is to be preferred in the longer term. The mother may also be eligible for a public housing unit in due course. Who should have custody of WS?
68. It is in my view unfortunate that the very term custody conjures up notions of ownership. This is to be discouraged.
69. Given that neither party favours joint custody and in view of the comments that I have made above concerning the status quo in this case and the role of the mother as the natural parent, I will make an order that custody be to the mother with generous access arrangements to the father. In this way I hope that both parents and the father's wider family, will continue to play an active role in WS's life going forward. Costs
70. Given the nature of this dispute I will make no order as to costs (see London Borough of Suttons v Davis (Costs) No. 2 [1994] 2 FLR 569). Both parties are legally aided. Consequently both parties costs will be taxed in accordance with Legal Aid Regulations.
71. Having read the parties affirmations and having heard the parties give oral evidence. Also having heard from the social welfare officer and having read both of the social welfare reports I will make an order in the following terms :
- 1) Custody of the child of the family, WS, a girl born on the 13th October 1998 be to the Respondent mother with generous access to the Petitioner father to include the following :

- a. staying access on alternate weekends, the time to be determined between the parties
 - b. evening access one evening per week to be determined between the parties
 - c. staying access for one half of the school holidays by agreement between the parties to include the summer vacation, Christmas, Chinese New Year, Easter and the school half terms.
- 2) There shall be no order as to costs. Both parties costs to be taxed in accordance with Legal Aid Regulations. (Sharon D MELLOY) District Judge Mr. B. Fu of Messrs Kevin Li & Co for the Petitioner Mr. T. Ho of Messrs Peter K.H. Wong for the Respondent PAGE - PAGE - PAGE
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