

HONG KONG / JUDGMENT

Y v P

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

CACV 140/2009 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL CIVIL APPEAL NO. 140 OF 2009 (on appeal from FCMC NO. 9498 of 2005)

BETWEEN Y Petitioner and P Respondent

Before: Hon Rogers VP and Le Pichon JA in Court Date of Hearing: 6 August 2009 Date of Handing
Down Judgment: 14 August 2009

J U D G M E N T

Hon Rogers VP: 1. This was an appeal from a judgment of Deputy District Judge KW Wong given on 25 March 2009 whereby he ordered that there be joint custody of the child of the family, namely E, to the petitioner and the respondent with care and control to the petitioner and that the respondent do have access to E during her term time as follows:- “ a) Week 1: from Friday after school to Tuesday morning the following week (Week 2); and

b) Week 3: from Monday after school to Tuesday morning the same week. The cycle repeats Friday that week;” 2. The judge made other orders at the same time that are not relevant to this appeal. 3. On this appeal the petitioner sought orders that she be granted the sole custody, care and control of E with defined staying access to the respondent on alternate weeks as follows:- “ Week 1: from Friday after school to Saturday at 8:00 pm; Week 2: from Saturday at 8:00 am to Sunday at 8:00 pm. The cycle repeats thereafter. The said child shall be picked up and dropped off at Mui Wo Pier.” 4. At the conclusion of the hearing of this appeal judgment was reserved which we now give.

Background

5. The petitioner was born in Hong Kong and is now aged about 50. She obtained a diploma in social work in 1984 and worked thereafter in the social welfare services. Four years later she went to England and obtained a masters degree and, later, a Ph.D in May 1994. Whilst in England she met the respondent who is slightly younger than her. He obtained a music

degree in London and a postgraduate diploma in music and drama in 1989. It was in that year that he met the petitioner. They commenced living together in York and were married in 1994. The couple came to Hong Kong later in 1994 and E was born in 1998. 6. The petitioner works as a part-time lecturer in two of the universities. When he first came to Hong Kong, the respondent taught English to private students and around 1996 he commenced teaching at the Hong Kong International School ("HKIS"), first part-time and, later, full-time. His contract was not renewed in about 2005 and he then worked part-time at South Island School and, in the last year, he has become a full-time teacher there. 7. Marital problems appear to have emerged in about 2004 when the petitioner became aware that the respondent was having an affair, or at any rate a very close relationship, with a helper at the HKIS, who was the mother of one of the students; she was originally named as the third respondent. It would seem that in early 2005, the petitioner became aware that a close relationship had developed between the respondent and a Miss P, who was then a colleague of the respondent and also lived in Mui Wo, where the petitioner and respondent lived. At least by about April 2005 it became clear that the respondent was having an affair with Miss P and that the marriage had broken down. Eventually these proceedings were commenced in the summer of that year. The respondent now lives with Miss P in Braemar Hill. 8. E is now 11 years old and has completed her primary schooling at Kennedy School; in the coming academic year she is to move to her secondary school. From all accounts E would appear to be gifted and talented. She has progressed well at school. Kennedy School is situated in Pokfulam. The journey between the school and Mui Wo is, by any standards, a lengthy one. Nevertheless, E has had the advantage of being able to travel with a number of school friends. The bulk of those would appear to be moving to West Island School to which E is also moving after this summer holiday. 9. Numerous difficulties have arisen between the petitioner and the respondent since the time when the respondent left the matrimonial home. The parties have, apparently, communicated for a large part by e-mail. This court has been presented with what would appear to be copies of the majority of those; they are contained in no less than 7 box files. They demonstrate that there is a deep-rooted communication problem between the petitioner and the respondent. Miss Irving, who appeared on behalf of the respondent, sought to argue that the fault for that failure in communication lay with the petitioner. Having read large parts of the e-mails I cannot agree with her submission. 10. It is a fact that, in early 2005, when the parties first considered divorce, the communication does appear to have been relatively straight forward, given the prevailing circumstances. However, no doubt when it became clear that the respondent was becoming romantically attached, to say the least, to Miss P and the respondent was making no attempt to hide his association with her and was, indeed, leaving the respondent and E to be with Miss P at times which caused some concern given the lateness of the hour, it is quite understandable that the petitioner was put under considerable strain. 11. Nevertheless, having looked through the e-mails and considered the various incidents which have arisen since 2005, which have been the subject of voluminous correspondence, I am constrained to say that I have found the e-mails emanating from the respondent anything but conducive to good relations between the parties. 12. The judge dealt with a number of matters which

arose in his judgment. He described in detail what he referred to as the “October 2005 Incident”. That occurred during a week in October 2005 when the respondent suddenly took E away, without telling the petitioner beforehand or where he was, at a time when the petitioner had already planned at least one outing for E during the mid-term break. The respondent was eventually ordered by court to return E. Naturally, that incident hardly supports protestations, on behalf of the respondent, that he has sought to cooperate with the petitioner. The judge referred to the respondent’s taking E in October 2005 as having been obviously wrong. 13. However, the judge went on to consider a number of other incidents. There was one that was referred to as the petitioner retrieving E’s immunisation record from the school. 14. That matter commenced when the petitioner informed the respondent that E had been given the measles, mumps and rubella vaccination which had been provided by the Department of Health at school during the previous week. The petitioner asked the respondent to look out for any signs of fever, rash or other reaction whilst she was with him that weekend. That prompted an e-mail the following day in which the respondent complained of not being consulted prior to the vaccination, he complained that the petitioner had taken the trouble to go to the school to collect the immunisation record and attributed that to the petitioner having “gone out of your way to restrict my access to information yet again.” The e-mail also requested that a copy of the “immunisation information” should be sent by e-mail. 15. The reply from the petitioner reminded the respondent that the petitioner had been arranging for E to take the appropriate immunisation injections since birth and had followed the recommendations of the Department of Health. It went on to explain that the petitioner had herself passed the immunisation record to the school nurse on the Wednesday and had retrieved it back on the Friday. Subsequently the respondent complained that the scanned copy of the record, which the petitioner had sent in response to his request, was not sufficiently clear and that he should be provided with a clearer copy or a photo copy. It may be noted that the immunisation record dates back to 2 days after E’s birth. It had clearly been kept safely for more than 10 years and it is quite understandable that the petitioner would want it to continue to be kept safely and not carried around by a 10-year-old child with the possibility of its getting lost. On this aspect it may be mentioned that the respondent said in evidence that he had forgotten the immunisation record existed. In paragraph 81 of the judgment, the judge said that he viewed the wife’s explanation for keeping the immunisation record safe “with scepticism”. That criticism appears to be not only harsh but, in all events, misplaced. Clearly, that record should be carefully kept and, obviously, it was the petitioner who should continue to keep it. It is not clear why the respondent should have been so anxious to have a copy and Miss Irving was unable to explain it other than by saying that the respondent wished to continue to have some control in “parenting”. 16. Another matter which was the subject of some controversy between the parties and observations from the judge was the matter of glasses for E. As the judge recorded, the parties had taken E regularly for eyesight tests to Polyvision, an eyesight clinic run by the Hong Kong Polytechnic University. At one stage the respondent wished E to have a second pair of glasses and requested that he be given the prescription in order to have them made. It has not been explained why the

respondent could not have a second pair of glasses made at Polyvision since they would have the prescription and could no doubt produce a second pair very easily. What does appear to have emerged is that the respondent took E to another optician and was told that she needed a different and stronger prescription. With a matter which is as important as eyesight, it can only be doubted whether it would be wise to use two opticians at the same time. Unless there were reasons for not using the services of Polyvision it would appear to have been unnecessary and ill-advised to change. Nevertheless the judge observed in paragraph 81 when dealing with this matter, that “The fact that a child’s eyesight test having been perfectly arranged with the best opticians in town does not mean that a parent has monopoly to that arrangement and the examination result.” Other factors which the judge referred to in paragraph 81 as being criticisms of the petitioner also appear to me to be less than convincing. 17. The judge said that he did not doubt the petitioner’s ability solely to take care of E, he went on to say that undoubtedly the petitioner had done “a great job”. For her part, Miss Irving, echoed what the judge had said and emphasised that there was no criticism of the way the petitioner had looked after E. 18. The judge appears to have accepted that the parties found difficulty in co-operating and that their relationship that was, in effect, antagonistic. The judge appears, however, to lay much of the blame for that on the petitioner feeling hurt and aggrieved at being betrayed. He went so far as to say that anger might lead to actions which were, perhaps, rash. He clearly attributed much of the reason for non-cooperation to the wife. 19. In coming to the conclusion that there should be a joint custody of E the judge said in paragraph 86: “I do not consider that the Husband has any malign intention of interfering with, or disrupting the Wife’s role of managing E’s routines. In the circumstances of this case the Wife must be encouraged to cooperate. An order for custody for the purpose of recognising the Husband’s role in E’s upbringing is required. I do consider that a joint custody order would better reflect the respective roles of the parties in E’s upbringing. It is hoped that with this order in place the parties can be encouraged to overcome their differences and co-operate for the benefit of E in future.” 20. As regards access, the judge came to the arrangement which is set out in paragraph 1 above on the basis that E went to ballet class every Monday in Central and did not finish until 7:30 pm. Whilst giving care and control to the petitioner he devised an arrangement which was some way between the arrangement which the petitioner had put forward which was, in effect, the arrangement which had been in existence since September 2007 and that which the respondent put forward which was somewhat more complicated. This appeal 21. On this appeal the first matter which must be considered is the question of custody. In this respect, attention has been drawn to the decision in *ML v YJ*, HCCM 13 of 2006, a decision of Rimsky Yuen SC, sitting as a Recorder, given on 23 May 2007. The Recorder’s judgment usefully sets out the law relating to custody. As the Recorder pointed out in paragraph 24, the first consideration as to whether to grant joint custody to both parents or sole custody must be the welfare of the child. The Recorder went on to state that whether or not a joint custody order is workable depends very much on whether the parents can co-operate. The Recorder continued: “(3) A joint custody order may in appropriate cases be made for the purpose of encouraging parents to overcome their differences and co-operate for the benefit of their

children. Joint custody in such circumstances can serve the purpose of recognizing the role of both parents in the child's upbringing. However, if it is clear that a joint custody is not workable, it seems unlikely that the Court will nevertheless make such a joint custody order solely for the purpose of encouraging the parties to overcome their differences or to recognize the continuing role of the parties. As stated above, a joint custody order which is unlikely to be workable cannot be in the best interests of the children as the adverse consequences will far outweigh the benefits that it may bring." 22. It was made clear that a custody parent did not have the right to make all the decisions about the particular child and if there were disagreement on major matters they could be referred back to the court. 23. It is quite clear from the judgment that the judge did appreciate that, at least at present and since 2005, the parties were not in a position to co-operate. Whilst the judge had attributed the blame for that to the wife, I consider that having read the e-mails and, indeed, considered such of the transcript that was put before this court, the judge was unduly critical of the wife and, to a large extent, blind to the fact that the tone of many of the respondent's e-mails was such that they would themselves have generated resentment and antagonism. 24. The important point, nevertheless, is whether given the existence of the lack of co-operation between the parties it would be right to order there be joint custody. The basis upon which the judge so ordered appears to have been what has been referred to as aspirational. In other words it was an order made so as to encourage the parties to co-operate. In my view that is more a matter of wishful thinking than a matter of practical reality. The reality was emphasised in something the judge himself said during the course of the hearing on 10 September 2007: "So even though sole custody is granted to the father or to the mother, if one is not satisfied with the arrangement they will come to court, say, for example, as regards the education arrangements, as regards travel plans for this year, they will definitely come to court; I can smell from the file that will be the case, even though I grant custody to one party, I can smell that they will come to court very often as regards future arrangements." 25. In so saying the judge was to a certain extent prophetic. On this appeal, this court's attention was drawn first of all to passages in the transcript of the respondent's evidence which dealt with the arrangement which had been made in respect of E's school. In his oral evidence the respondent agreed that there had been prior agreement that E would go to West Island School when she left Kennedy School. It is true that the respondent said that the matter had not been discussed recently, but he was prepared to accept that as a concluded arrangement. After the hearing in the court below, the respondent clearly changed his mind. There is a series of e-mails in which he began to suggest that E should go to the South Island School. There was an interchange about that but it seemed that arrangements remained on foot for E to go to West Island School. The respondent then, without warning, went so far as to take E away from Kennedy School for her to be able to attend a 2-day orientation program at South Island School. He did so without telling the petitioner that he intended to do so. This naturally caused some consternation. The exchanges of e-mail became more heated and the respondent then made it clear in an e-mail of 24 May 2009 that far from putting the matter up for discussion with an open mind he had already made up his mind that he objected to E going to West Island

School. The respondent pushed the matter further and arranged for a mediation to take place which was unsuccessful. Eventually the respondent relented and conceded that E should go to West Island School as had previously been agreed and arranged and as he had acknowledged when he said previously in the final passage when had given evidence: “In terms of her going to West Island School, it’s probably the best conclusion. However, the best conclusion doesn’t mean to say the best process has got to the best conclusion.” 26. Given the current relationship between the parties it appears to me that the only order which could be made as to custody is that one or other of the parents should have sole custody. In this case, clearly it is the petitioner who should have custody of E. As Mr Recorder Yuen pointed out, that does not mean that all major decisions would be made by the petitioner. If no agreement could be reached about a major decision in respect of E then, no doubt, resort can be had to the court. In respect of other matters, which would not be regarded as major matters, those decisions would no doubt be made by the parent having custody. In so far as the respondent would not have control in respect of such lesser, day-to-day, matters, that is an inevitable consequence of a sole custody order with care and control. 27. It should be remembered that even where there is a joint custody order, it would, inevitably, fall to one of the parents to decide minor everyday matters. The court is able to make a joint custody order when it is satisfied that the parties would co-operate. Co-operation does not mean that the parties are expected to be of the same mind or opinion about everything, but it does entail the parties being able to leave decisions on less important matters to the other party. If that were not the case the joint custody would be unworkable. Each party has to be able to trust the other party to the extent of leaving such decisions to the other party. In a joint custody situation each party has to be prepared not to micromanage every aspect and every minutiae of a child’s life. In this case, that clearly cannot happen. It is wrong to attribute the inability for that to happen to the petitioner. The e-mails demonstrate the respondent has attempted to be involved in every minutiae and his e-mails have ranged from the petulant to the offensive in their patronising and, at times, didactic tone. 28. It would appear that one aspect that obviously influenced the judge to a considerable extent was the respondent’s wish to continue “parenting”. By that is understood being involved in every aspect and detail of the child’s life. That, however, is a consideration which more directly affects the rights of the parent rather than directly affecting the welfare of the child. As already noted, it was readily conceded that the petitioner had looked after E properly. 29. Turning to the question of access, one matter which the judge clearly appreciated was the difficulty presented to E by having to travel between Mui Wo and her school. It was for that reason that the judge considered it right to arrange matters on the basis that E would not travel back to Mui Wo on 2 Mondays out of 3 after the ballet class. The arrangements with regard to the ballet class were not explored during the hearing of this appeal other than the fact that this court was informed that E now took ballet lessons on a Tuesday. There was some disagreement between the parties as to whether that was a matter of choice or a matter of the class being changed. Whatever, the fact of the matter is that it is common sense and experience that the days and times on which children’s extra curricular activities take place will change depending upon the age

and advancement of the child in the particular activity. It could not be supposed that E would go on remaining in the same ballet class indefinitely. To put it another way, with regard to most activities, a child would either progress to another level or cease that activity. 30. The arrangement as to access which the judge ordered was cumbersome. It involved E staying for some of the school week in Mui Wo and for some days at Braemer Hill with the respondent. It is quite clear that when going to school E will have to take the necessary books and papers for the particular day. Undoubtedly, if E has to go to school from different places this will present considerable logistical difficulties as well as complicate the matters which need to be remembered. During the hearing of this appeal there was some mention of the fact that because E would be in secondary school there would be an additional item to be taken care of, namely, a computer. 31. One of the matters upon which it is clear that E has expressed a view is her wish not to break up the school week by requiring her to stay for part of the week at Braemer Hill and part of the week at Mui Wo. Mr Kwan, the social welfare officer assigned to the case gave evidence. It was clear that he considered that he had had good communication with E who had been able to express herself without being under the influence of either parent. She was, nevertheless, worried that she might make her father, in particular, unhappy by anything she said and she did not want that to happen. It is quite clear that E had told the social welfare officer that she wanted the status quo in relation to access to remain; specifically she did not want to stay overnight in North Point, Braemer Hill, during the school week. 32. This is a matter which is perfectly understandable for a number of reasons. Not merely the logistics of handling the school material but the fact that E has a number of friends with whom she travels between Mui Wo and school every day. It can only be imagined that there is considerably more communication between children during the time when they are travelling together than when they are in school, presumably the bulk of the time when at school is in class. Maintaining stability is particularly important and travelling with the same friends for long periods is conducive to that. 33. I would mention that although the court is not bound by any conclusion to which a social welfare officer may come, as with any person who is in a similar position to an expert witness, it is important that the court should understand what is being said. In the case of *Naziya Aslam v Rifaqat Ali*, CACV 144 of 2003, 19 March 2004, this court considered that there were serious flaws in the way the social welfare report had been prepared. For that reason it was considered that the statements in the report and its recommendations carried little weight. As with many instances, previous decisions are of little assistance where they turn on the facts of a particular case. 34. The arrangements which were in place prior to the order made by the judge below and which are reflected in the order sought by the petitioner, would appear to be practical and sensible. The arrangement provides stability for E and creates the minimum disruption to her school and home life whilst giving very generous access particularly to the respondent. It gives the respondent considerable access to E at a time when he would be free to devote his time to E. It will mean that E will stay and be with the respondent for substantial periods. It is undoubtedly necessary to consider the interests of E first. In so far as the pre-trial arrangement impinges upon any interest or “parenting” right which the respondent is anxious to preserve, it has to be considered in the light of the fact that

he has chosen to leave the family home where E has hitherto lived. In so saying I am not apportioning blame but it is a choice which the respondent has made and there are inevitable consequences resulting from his choice to live with somebody other than the petitioner. 35. I would therefore allow this appeal. I would make an order that there be sole custody of E to the petitioner and that there be defined staying access to the respondent on alternate weeks as follows: “ Week 1: from Friday after school to Saturday at 8:00 pm; Week 2: from Saturday at 8:00 am to Sunday at 8:00 pm. The cycle repeats thereafter. E to be picked up and dropped off at Mui Wo Pier.” 36. Since this is a custody case I would make an order nisi that each party bear its own costs of this appeal. Hon Le Pichon JA: 37. I agree. Hon Rogers VP: 38. There will accordingly be orders in terms of paragraphs 35 and 36. (Anthony Rogers) (Doreen Le Pichon) Vice-President Justice of Appeal Mr Neal Clough, instructed by Messrs Tang, Lai & Leung, for the Petitioner/Appellant Ms Frances Irving, instructed by Messrs Weir & Associates, for the Respondent/Respondent

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=67094

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/y-v-p-2009-38bdfd93>

Prepared on 29 October 2026 · Esheria