

HONG KONG / JUDGMENT

Y v. Y

COURT

Family Court

DECIDED

24 April 2007

CASE / FILE NUMBER

FCMC13527/2005

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bjbj FCMC 13527 of 2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 13527 OF 2005

BETWEEN Y Petitioner and Y Respondent

Coram : Her Honour Judge Susana D Almada Remedios in Chambers (Not open to public) Dates
of Hearing : 14th, 15th February, 2nd and 9th March 2007 Date of Handing Down of Judgment : 24
April 2007

J U D G M E N T

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1. The parents of the child now divorcing, are respectively claiming for sole custody of the only child of the family, a boy now aged 6 years with reasonable access to the other. For ease of reference I shall refer to the petitioner wife as the mother and the respondent husband as the father.

Background

2. The parties were married on 11 October 1999 in China. At that time the father was a Hong Kong resident and the mother was a resident in China. Less than a year later their son was born on 3 August 2000 whilst the mother was in Hong Kong on a visitors permit from China. One month later in September 2000 the mother returned with the son to live in China. They remained living in China but visiting Hong Kong until June 2003, when the son commenced living in Hong Kong with the father and the paternal grandparents whilst the mother remained living in China.

3. Shortly thereafter the father applied twice for divorce in China. The applications were made in September 2003 and August 2004 but the Courts in China dismissed both proceedings.
4. As the mother was granted a one-way entry permit to Hong Kong in August 2005, the mother immediately came and settled in Hong Kong. Three months after her arrival, in November 2005 she petitioned for divorce in these proceedings on the grounds of two years separation. The decree nisi of divorce was granted on 11 May 2006.
5. Once the son commenced living in Hong Kong the mother was denied and refused access by the father and the paternal grandparents to him. For approximately three years, from June 2003 until March 2006, the mother had not seen or had any contact with the son.
6. Despite the mother having applied for interim custody of the son early on 2 December 2005 an order for interim access to her was not made until 20 March 2006 as the original date for hearing of the application on 5 January 2006 was vacated as a result of the father applying for legal aid, and the proceedings being automatically stayed for 42 days.
7. Since the interim access order was made the mother has had regular weekly access with her son. The son continues to live with the father and paternal family. The mother
8. The mother is 29 years old. After the mother gave birth to the son in Hong Kong she returned to China with the son and lived at the paternal grandmother's house. She did not work. She was the primary carer of the son. She lived in the paternal grandmother's China house. She received finances from the paternal grandmother. After the son came to Hong Kong she worked assisting her sister in the shoe industry.
9. Soon after she settled in Hong Kong she worked as a saleslady. After a short interruption to her work to look after her ailing grandmother in China she continued her job as saleslady. At present she works at a consignment counter at W. She earns approximately \$7,500 per month and works shift hours in alternate weeks from 10.30am to 8.30 pm or 12 noon to 10.00 p.m. with one day off a week.
10. The mother now lives in a rented accommodation in Kwun Tong. She shares the unit with the sister-in-law of her godmother Madam L who is from the same native village in China and her two children aged 7 and 5 years. The 500 square foot flat comprises of two bedrooms and a sitting room. She occupies one bedroom of about 150 square feet while Madam L and her two children occupy the other. The father
11. The father is 33 years old. He is now living with the son, his elder brother, sister in law and niece at a public housing unit. His parents have moved out from the unit, but his mother usually stays with him to take care of the son. His father also lives with him when his sister in law and niece return to the China as they are only visitors to Hong Kong.
12. The unit is located at Yiu Tung Estate, Shaukeiwan. It is about 500 square feet in size and has two bedrooms. The father occupies one bedroom while the brother occupies the other. The paternal grandmother and son sleep on a sofa bed in the living room.

13. The father is a supervisor at a Japanese Restaurant where he has been working for the past three years. He works from 12.30pm to 11.30pm but needs to start work from 10.30am twice weekly. He earns a monthly salary of \$9,500.00. He has one day off a week. The son
14. The son is now aged 6 years and 8 months. He lives with his father and his paternal family. He is attending YTB kindergarten in the Eastern District of Hong Kong Island. One of the paternal grandparents escorts him to and from school. The paternal grandmother is his primary carer. His current school performance is satisfactory. The paternal grandparents
15. The paternal grandparents are both retired. The grandmother is aged 70 whilst the grandfather is aged 68. The paternal grandmother is of general good health. The mother s proposed arrangements.
16. As she is not eligible for comprehensive social security assistance as she has not resided in Hong Kong for seven years, she must continue to work to support herself and the child unless the father can provide for them. It is thus the mother s intention to work part time if custody of the son is granted to her. She will continue to work as a saleslady with her present employer. She will be required to work 6- 8 hours a day for six days a week. The difference from a full time and part time position is that she will be able to secure every Sunday off and work 6-hour days instead of 10-hour days.
17. If the father is able to financially support her and the child completely she intends to be a full time carer of the son. If the father is unable to provide any financial support at all and if she is able to apply for comprehensive social security allowance for the son thereby reducing her financial burden so as to earn enough to support herself and her son it is her intention to work for shorter hours and finish work at 4.30pm or 5.30pm.
18. She intends to enrol the son at KF Kindergarten, which is located at about 6 to 7 minutes walk from her flat. Her flat mate Madam L s children also attend that kindergarten. She intends to take and collect the son to and from school. However if she is unable to collect him from school or at times when she is working the mother will seek assistance from Madam L or Madam C her sworn mother to collect and look after her son until she returns from work. The school hours are from 8.10am to 3.10 pm. Madam L and Madam C
19. When the mother arrived in Hong Kong she lived with her mother s sworn sister, her godmother Madam C aged 65 years. Whilst living there she shared a bedroom with Madam C. However as Madam C s daughter came to Hong Kong to give birth and due to insufficient space, in about October 2006 the mother moved out. She moved to live in the present rented flat in Kwun Tong with Madam L.
20. The mother refers to Madam L as her aunt. Madam L is 39 years old. Madam L s husband resides in an old age home. She is a full time housewife and carer of her children. Madam L prepares and cooks meals for the mother. The father s proposed arrangements

21. The father seeks to keep the status quo. That is that the paternal grandmother continue to be the primary carer of the son whilst he together with his family members, that is his brother, his sister-in-law and the paternal grandfather also assist in looking after the son. The son will remain studying at the same school and continue to live with him. The mother's case
22. It is the mother's case that during their marriage the parties spent limited time together. The father seldom visited her or the son in China. He visited them only once or twice a year. After the birth of the son she visited the father in Hong Kong with the son twice a year in 2001 and in 2002, on a visitor's visa. When she came to Hong Kong she stayed with the father at his parents' house in Yiu Tung Estate (the father's present residence).
23. During her stay in Hong Kong in February 2002 she found that the father had indulged in gambling and incurred debts. She did not see him at all for the whole time she and the son were in Hong Kong. She could hardly contact him at all. His mobile number kept changing to avoid his creditors. She believed he had alternative accommodation as he did not return to the house. Most noticeably she realised that he showed no concern to her and their son.
24. It is the mother's case that the father all along showed no concern to the son. Even when the son was sick in China or was hospitalised for treatment the father did not visit the son in hospital or return to China to see the son.
25. Whilst the son has been living in Hong Kong the father has left the caring of the child to the paternal grandmother spending little or no time with the son. Even during his leisure or spare time he does not spend it with his son. In support of the mother's contention she relies on the father's immigration travel records to show that for the period from 6 September 2003 to 23 May 2006 the father went to China almost daily or at least once every two days for pleasure. Further the father has never taken care of the son himself but delegated all his duties, which include more significantly the daily care, attending teacher-parents day, to the paternal grandparents particularly the paternal grandmother. In regard to the son's daily homework and signing of the handbook the father even admitted delegating most of this aspect to his sister-in-law (his brother's wife) who is not even a Hong Kong resident and only visits Hong Kong occasionally. He even permitted the sister-in-law to forge his signature on the school reports. As can be seen the father even failed to complete most of the son's assessment reports. As a result the father has failed to monitor the son's school performance. The father even wrongly stated the child's birth date on the son's school handbook thereby showing doubt on his knowledge and commitment to the son.
26. The mother submits that it is not in the child's interest to remain living with the father or to be taken care of by the paternal grandparents. Most notably she states the father and paternal grandparents took the son to Hong Kong in June 2003 on the pretence of the son attending kindergarten school entrance interviews. However after coming here they kept him here and refused to return the son to her care. Moreover thereafter they deliberately denied her access to the son for three years. Even after the court had granted an interim order for access to her son her access time with the son was never smooth. The paternal

grandmother regularly telephoned her asking her to bring the son home early and or told her that the son must be back early as the son had to attend tutorials.

27. It is obvious that the father and his family are not keen on her. They reject her and have a strong resentment towards her. They bad- mouthed her in the presence of the son and are a bad influence on him. In addition the son s handbook is left blank where it states name of mother. Thus she is not even recognised as the mother of the son.
28. The mother alleges that the father and the paternal grandparents exert undue pressure on the son. She relies on the Social Investigation Report (SIR) at paragraph 15 where it states, The adults (of the father s family members) kept on putting up reasons for rejecting the mother, he (the son) used his hands to cover his ears. And at paragraph 22, when the paternal grandmother continuously kept asking the son to state clearly his preference to stay with the father and she only stopped after he said so.
29. It is the mother s case that custody of the son should be granted to her as she was the child s primary carer for the first 3 years of his life. Interruption to her childcare was forced upon her. It was out of her control. She is the child s mother and she should resume to be his carer. The son should not be deprived of her care for him as his mother any longer. Because of the paternal grandmother s old age and as the son is growing up and is likely to be an active boy it is in the interests of the son to return to the care of the mother instead of the paternal grandmother. More particularly the care from the paternal grandparents is incomparable to the care from his mother. The father s case
30. The father states that the son should continue to live with him as the status quo is satisfactory.
31. The father states that the deterioration of the relationship between him and the mother was mainly due to her heavy indulgence in mah-jong playing. He was told by his sister-in-law who used to live together with the mother in the paternal grandmother s China home that ever since the son was barely able to walk the mother used to bring the son to her friends place nearby and play mah-jong while the son was left to play unattended. Thereafter arrangements were made so that his sister-in-law took care of the son while the mother went out to play mah-jong. He says that the mother has shown little love and affection for the son.
32. The father submits that the mother s proposed arrangements for the son should she be granted custody are uncertain and doubtful. Her proposed part-time job still does not leave her much time to look after the son. She will be in much the same position as he is now with work. She will therefore also have to rely on a caretaker. The caretaker the mother proposes to rely upon is a Madam L. Neither he, the Court or the Social Welfare Officer (SWO) has seen, nor knows anything about Madam L save what the mother has informed the Court about her, as she did not file an affirmation, give evidence in Court nor was she interviewed by the SWO. It is therefore not known how Madam L will interact with the son or even whether she is willing to assist to look after the son.

33. Further the proposed school to which the mother intends to enrol the son has not yet accepted the son and nor has the mother even arranged an interview for the son. It is also undesirable to change schooling towards the end of the school year.
34. The father also submits the mother has no family support in Hong Kong. She is a new resident in Hong Kong. She came here in 2005. She does not have any other family members in Hong Kong. She will therefore have to rely on outsiders/strangers for support. As the father has a very large family support who is already assisting him and can continue to assist him in childcare the child should continue to reside with him.
35. The father acknowledged he went to China frequently for fun as evidenced by the travel records but explained that this was his release from his long hours of work. He travelled to China for leisure as he had a friend who had the use of a house there. However as his friend no longer has the use of the house, he goes to China now much less frequently. In any event, it is now his intention to spend more time with his son.
36. He relies on the contents of the SIR and urges the court to follow the recommendations of the Social Welfare Officer (SWO). The Social Investigation Report (SIR)
37. The SIR is dated the 10 May 2006. The SWO Ms. F recommends that custody of the child be granted to the father with flexible access frequency to be granted to the mother not less than 24 hours notice to the father or his family members by telephone as on school days from 5.00pm to 9.00pm and on school holidays from 10.00am to 8.00pm. She concludes in paragraph 26 of her report that: - The child is in need of the love from both parents. He is happy to resume contact with his mother and enjoys the love of his mother as his classmates do. At the same time, he treasures the strong bonding he has with his father, though they do not have much time together. Although his last separation from the mother does not seem to cast any serious undesirable impact on him, he keeps bearing the unsettled conflicts. Another change not only upsets his need of a stable environment, but also prolongs his suffering by starting a new cycle of conflicts. With further consideration of the father's better support system and promise of facilitating the mother to re-build her relationship with the child custody be granted to the father. Refusal of access to the mother
38. It is admitted by the father that the mother was denied access to the son for approximately 3 years. The reasons given by the father have been multiple and contradictory. Generally the father said such denial was caused by a prior incident when the mother and one of her family members had a serious fight with his nephew in the paternal grandmothers China home and thereafter the mother had threatened to take the son away. He stated in his evidence and his affirmations that he was afraid that if the mother were granted access to the son she would disappear with the child and he would never be able to find the son. In the SIR he told the SWO that he prohibited the mother to meet the son as she had threatened to bring him back to the Mainland and sell him if he failed to give her a lump sum as requested by her. No mention was made to a fight between family members.

39. The father stated that he did not intend to deny full access to the mother but he was not able to arrange access because the mother had disappeared after the fighting incident in July 2003. Further when she came to Hong Kong she did not give him prior notice. Again contrary to his evidence, the father, admitted to the SWO that he restricted the mother to meet the child at home in the past because she remained hostile to him and his family members.
40. It is the mother's case that the father and his family members denied her access because of their resentment and rejection of her.
41. I have taken into consideration all the evidence and submissions made by the mother and the father's legal representatives. Consideration of the evidence
42. I turn now to consider some relevant aspects of the evidence. The SIR is a guide to be used by the Court, the recommendation of the SWO is not binding on the court. In summary it can be gleaned that principally the SWO has recommended that custody of the son be granted to the father in view of the son's strong bonding with the father and the father's better family support. She is of the view that a change of arrangements to live with the mother would mean that his carer apart from his mother would be a stranger, it would upset his needs of a stable environment and prolong his suffering by starting a new cycle of conflicts.
43. It is of relevance to examine some of those observations made by the SWO and the facts stated by her in the SIR. The son's strong bonding with his father
44. In ranking his closeness with his family members, his father came first, then his paternal grandmother, younger cousin, his aunt, paternal uncle, second son of the paternal uncle and the last was his paternal grandfather. When the SWO asked him to include his mother in the ranking he gave the same ranking but added her just before the paternal grandfather.
45. As the son had not seen or heard from the mother in the past three odd years and had only resumed contact with her within a short time of him being asked to give his ranking on his closeness to her, putting the mother at this ranking is in the circumstances not unexpected. Surprisingly however he ranked the mother before the grandfather.
46. In view of the young age of the son it may be expected that because of his youth he would be closest to the person who is his main carer who is the paternal grandmother, but this is not so. Unusually despite the son not spending much time with the father and considerably more time with the paternal grandmother the son still ranked the father as the first amongst the people he is close to.

47. It is clear from the evidence of the SWO and her report that the son proudly showed off the Japanese he learnt when he visited the father's restaurant where he works and informed her of a particular happy occasion when he and the family went to there to have a meal. I accept that the son is fond of his father. He was observed to be happy when he was seen with his father and usually sat close to his father. During her observation she observed that the father taught the child and played with him well.
48. The SWO states at paragraph 25 of the SIR that his family members are ready to help the father, but the quality of care is affected by too many carers and too limited age appropriate activities. Nevertheless the child is under proper care and has established a close bond with the paternal family especially the father. She advises the father to make good use of his time and assume a more active role in nurturing his son.
49. At paragraph 24-26 of the SIR the SWO said that although the father did not have much time to take care of the child it did not mean he ignored the child. She observed he bought clothes and toys for the child. According to her investigation during the father's day off the father spent it with the child.
50. The son had told the SWO that the only time the son shares with the father is in the early morning before the son goes to school he spends some time with the father when he climbs into the father's bed and stays there until it is time for him to go to school. The father does not have meals at home regularly. The son also expressed to her that he liked playing football, swimming and playing in the park but such activities were not frequent. He mentioned to her that he had never played football with his father and she could not recall if he said that the father had taken him swimming. Most of his time was spent at home.
51. The SWO's finding that the father spends his day off with the son is erroneous. The immigration records speak for themselves. For the past three years he has spent his short time off from work indulging in his own pleasure and leisure in China away from the son. He has shown no interest in spending his time in the company of the son. I accept he has not wholly ignored him as he buys toys and clothes for the son however demonstration of the father's love for the child goes beyond just purchasing material items.
52. The son is deprived of all the classic recreational activities a young child enjoys and should have. By reason of the father's absence and limited time with him fatherly nurturing is denied. The grandparents are unable to satisfy the physical or emotional needs of the son due to his young age and their advanced years.
53. The father lacks responsibility and concern to the son. This can be seen by his failing to attend the initial interview with the SWO and not supervising his son's homework or participating in matters relating to his education. The SWO had no knowledge that the signature on the son's school handbook was not the father's.
- s. Nor did she know that it was a forgery by the paternal aunt with the father's consent. She also did not know that the father had failed to complete the son's assessment reports.

54. Despite a letter from the SWO addressed to the father to attend an interview concerning matters relating to the son in connection with these proceedings on the question of custody and the letter informing him if the date of appointment was inconvenient he could ask to change it, the father did not attend the interview but sent his parents along. The paternal grandparents attended the interview stating that they were representing the father. When the SWO asked the paternal parents the reason for the father's absence the paternal grandfather told her that as the father had some medical condition he had to go to China for an injection. When the SWO later saw the father and asked him the reason for his absence he gave her a different reason. It was her evidence that this affected the credibility of the father. The father's integrity was also referred to in the SIR at paragraph 25 where it states the extended family's good intentions also from time to time yields opposite effects that even defeat the father's integrity and exerts unnecessary burden on the child.
55. Another matter the SWO referred to in relation to credibility was as to the sleeping arrangements for the son. Both the father and the paternal grandmother gave different versions, as she did not believe either of them she asked the son.
56. The son's daily life does not involve age appropriate activities. He is starved of outdoor and typical pleasurable activities that a six-year-old child likes. When the SWO asked to see the son's toys the paternal grandmother said she had put his toys away. It appears that even though his father buys toys for him he is unable to play with them.
57. In view of the deprivation of activities, outings and fatherly presence it is not surprising that one of the highlights in the son's life is referring to a meal at the Japanese restaurant where the father works. It is also not remarkable that the son has a high regard for his father as his father as observed by the SWO is able to play with him and teach him well and is the one who buys him toys and clothes. Fortuitously at times he has a 2 years old female cousin (the elder brother's daughter) at home who he could play with but she was not always in Hong Kong. Interaction with the mother
58. It is most fortunate that the son is happy to resume contact with the mother after a three year lapse and that the separation does not seem to cast any serious undesirable impact on him. She was essentially a stranger to him he may have simply rejected her. Although the SWO observed their limited interactions when the son had a meal at the mother's house they were more lively and interactive when they went out. They were observed to become more relaxed and energetic after playing in the estates playground. He was observed to be happy when he was with the mother.
59. Since the mother's access to the son in March 2006 she has taken the son to Ocean Park, gone to the beach, strolled in shopping malls, taken him to eat meals out at restaurants and arranged other activities fitting for a child of his age. Conflicts
60. The conflict the SWO is referring to is the conflicts between the father and his family members and the mother principally concerning access.

61. The SWO said even if the mother worked part time this would not affect her recommendation as she had her reservations about denial of access by the mother to the paternal grandparents. The SWO said when she asked the mother about contact by the father's family with the child, the mother was a bit resistant towards contact with the father's side. She said this was further aggravated as the mother insisted that the father collect and return the child on access and not the paternal parents. She noted that the mother said she would restrict access of the paternal grandparents without the father's presence.
62. It is the SWO's view that as the mother would restrict access to the paternal grandparents this was not in the interests of the son. She stated that she is confident that the child's relationship with the mother would be better as soon as the custody matter was resolved in favour of the father as the paternal grandparents were anxious to have the custody of the child and they would be relieved from the stress of these proceedings.
63. The Court asked the SWO if she considered that this was a dispute between the paternal grandparents and the mother. She replied that if the father-son relationship were not good she would not make the present recommendation because what mattered most is his relationship with his parents. Rightly I agree, the most important matter is the child's relationship with his parents. The main concern here should be given to the parent's relationship, particular the mother's with the son over that of the paternal grandparents.
64. During the interview with the SWO, the paternal grandparents recounted the shortcomings of the mother when the child heard these remarks he covered his ears. The SWO told them to stop but they did not do so. It was only when the father persuaded his parents not to badmouth the mother in the presence of the child that the paternal grandparents stopped. The paternal grandparents visibly show their aversion to the mother. They regrettably have no hesitation to do this in front of the child. Despite the derogatory remarks made about the mother in front of him it is fortunate the relationship of mother and son is good.
65. This resentment of the mother can obviously have a detrimental and lasting affect on the child's relationship with his mother. Although the SWO says that the grandparents can be relieved of their stress this will in my view not relieve the mother or the child of theirs. I accept the mother's evidence when she says that even during the short access she has with the child the paternal grandmother is constantly interrupting it or cutting it short. The only contact she has with the son is once per week access in accordance to the interim order. Any attempt at telephone contact with him is stifled. Although the paternal grandparents say they now accept that they should support the mother to rebuild her relationship with the child it is only upon the father's persistence. I am not confident that approach to access will improve or that their attitude towards the mother will change.

66. The Court asked the SWO that if contact and access is still proved to be difficult to the mother would she still follow her recommendation of custody to the father. The SWO said she would still follow her recommendation as even if the mother had custody one could not guarantee the access with the paternal family would go smoothly. I find the SWO to be placing too much priority on the father together with paternal grandparents interaction with the child and insufficient regard to the relationship of the mother and son relationship.
67. The paternal grandparents and father have admittedly already denied her access to the son for three significant growing years of his life. Difficulties are still continuing during the mother's access. These obstacles are not in the interests of the son. Despite his young age he is well aware of the conflicts and unpleasant remarks made about his mother. He attempts to shut himself out by covering his ears. This is not conducive to his upbringing. Change of environment and carer
68. The SWO is concerned about the carer of the son if he is to live with the mother. Her reservations are that when the mother cannot take care of the son, he needs to be taken care of by strangers. It is stated in the SIR that the mother intended to rent an abode for herself and her son. For the child care arrangement, she planned to enlist her sworn mother's sister-in-law, a married woman with two children aged 5 and 6 to assist her while she would resume the main carer role after her work. This woman is Madam L. I acknowledge that generally if care can be provided by a family member that may be preferable to an outsider. It is however not uncommon that carers of children are taken upon by strangers or non-family members, such as domestic helpers or care-centres. They may change from time to time. The SWO accepted that this maybe so but did not consider it acceptable in this case. She said she it would be acceptable for children to have domestic helpers or change of carers but only when their living environment did not change. It was not desirable in this case to have a change of carer and a change of living environment.
69. Unfortunately the mother did not call Madam L to give evidence. The mother's reason for not calling her was because she was concerned for Madam L and her family's well being. She did not want the father to know her identity as he would know who she was and he might take revenge out on her or her family members in their native village. She did not wish Madam L to be embroiled in these matters.
70. Although the mother mentioned Madam L to the SWO regrettably the SWO did not interview her. It would have been desirable for Madam L to have given evidence or even for the SWO to have interviewed her. Neither was done. I accept that the mother has her son's paramount interest in mind, as does the court. I am confident that the mother will find a suitable and able carer for her son when she is unable to attend to do it herself.

71. If the son moves to live with the mother he will obviously be changing to a new living environment. This is not wholly new to him as the son has been to her new rented abode on a number of occasions. He is familiar with it. As to his carer he has met Madam L on a number of occasions. He plays well with Madam L's children and knows and gets along well with Madam L. The Law
72. Section 3(1)(a)(i) Guardianship of Minors Ordinance says that :- in relation to the custody of a minor.. in any proceedings before any court the court 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 section 3(1)(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 the father.
73. I of course accept that the father or mother should not be superior to the other. I do however consider in this case the importance of one of the natural parents being the primary carer of the child. In so doing I refer to the case of L v C CACV 333 of 2003 where the Honourable Mr. Justice Rogers VP said at paragraph 20 of the judgment :- 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 mother were to be given custody she would be the main carer whereas if the father were to be given custody the paternal aunt would fulfill that role. Without 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 role of the mother in the rearing of very young children.

Conclusion

74. I accept that the child is a happy and active. He is provided with care. Although the SWO considers that the status quo is working and proposes it to be followed my decision is not to follow the recommendation of the SWO.
75. I am satisfied that the mother genuinely loves and cares for the son. She had been the son's main carer for the first three years of his life. As soon as the son commenced living with the father and the paternal grandparents at the age of 3 years, sadly the mother was denied access to him by the father and his family members. Her separation from him followed for the next three years. The son had been deprived of the mother's rearing, care and love in his very young years of growing up from a toddler to a young child. He was even led to believe that he did not have a mother. Despite the mother's restriction to visit Hong Kong as she was a China resident she came here on a number of occasions attempting to see him. Faced with the deliberate rejection by the father and paternal family of her request to see her son she

turned to assistance from the police and social workers in Hong Kong. However her pleas were unsuccessful because of her non-residential status. I find that her love and anxiety to see him never waned.

76. Upon arriving in Hong Kong as a resident she almost immediately sought assistance from the Courts for the return of the son to her care and applied for custody of the son. Whilst awaiting the decision of the court on the question of custody she was granted interim access to the son. Since the order was made she has maintained regular weekly access to him. The son's school teacher Ms. C observed that he was delighted to meet her though he had previously stated he had no mother. He is happy in her company.
77. The father is wholly reliant on the paternal grandparents and other family members for the son's daily care. The son's primary carer is the paternal grandmother who is 70 years of age. The father spends little or no time with him preferring to spend his time off work on his own pleasures. The son is not exposed to age appropriate activities. He spends most of his free time cooped up at home in a small cramped unit. Additionally his elderly grandparents who care for him speak ill against his mother.
78. Although he is now not prohibited from access with his mother interruptions are made during access time by the grandmother. There is noticeably a degree of reluctance to encourage cultivate and rebuild the mother son relationship. To further advance and distance the son from the mother is not conducive to his well being or up-bringing. The son should no longer be deprived of the rearing and nurturing that his mother can provide and is so desperate to give. The mother is agreeable to reasonable access to the father. She does not wholly deny the paternal grandparents access so long as the father is involved in the collection and return. This is not an unreasonable request as it encourages participation from the father.
79. The son has not expressed his wish of living with the mother or the father. The SWO states at paragraph 21 of the SIR that he has no idea of moving away from the family or changing his present arrangement.
80. I am acutely aware that the mother will be enlisting childcare assistance when she is at work and the carer is someone unknown to the court or may even be someone unfamiliar to the child. I believe that the mother will use her best endeavours to provide the son with a competent and able carer whom the child will be properly taken of. I am confident that she will shorten her working hours considerably should the circumstances permit so as to enable her to spend as much time with the son as possible. It is very likely that if the father does not provide any financial contribution to the mother or son at all that at least the son will be granted comprehensive social assistance as he was born in Hong Kong. As a result she will be able to reduce her working hours.
81. Whilst appreciating that the paternal grandmother has devoted her care and attention to the child I consider that the child should be with his mother. As the son is still young I am confident he will adapt to the changes and it will not be unduly disruptive to him. The

mother has undertaken to the Court and the father that should she be granted custody she will not change the son's school until the new school year. I am in no doubt that the mother will fulfil her role as mother and primary carer for her son and satisfy his physical, emotional and educational needs.

82. For the reasons stated above and taking into account that the first and paramount consideration is the welfare of the child, I grant custody of the child to the Petitioner mother with reasonable access to the Respondent father. Costs
83. The general practice in custody cases is that there be no order as to costs where both parties have been reasonable in their approach. In the circumstances I make an order nisi that there be no order as to costs. In the absence of an application by any of the parties to be heard on the order for costs the order nisi is to be absolute upon the expiration of 14 days from today. Both parties own costs be taxed in accordance to legal aid regulations. Her Honour Judge Susana D Almada Remedios Ms. M. Kam of Messers. Iu, Lai & Li solicitors for the Petitioner Mr. A. Chan of Messers Wat & Co. solicitors for the Respondent PAGE PAGE &`#\$ Normal.dot setup Microsoft Word 9.0 Word Microsoft Word "System Times New Roman FCMC 13527 2005; IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION Times New Roman MATRIMONIAL CAUSES NO.h 3527 OF 2005rT

BETWEENrN Petitioner and74 2 * RespondentN 2 6

2 6 Coram : tN Her Honour Judge usana D : Almada Remedios T in Chamberse! (Not open to public) DateT of Hearinge e : e! Times New Roman February, 2 and 9 March 200e: Date of T Handing Down of T Judgment- : > 24 April 2007 __;

Times New Roman J U D G M E N T . ____0; ____: he parents of th; e child now divorcing, are respectively claiming for sole custody of the only child of the family, a boy now aged 6 years' with reasonable access to the other. For ease of reference I shall refer to the petitioner wife as the mother and the respondent hus; band as the father. BackgroundN 2. he parties were married on 11 October 1999 in China. At that ; time the father was a Hong Kong resident and the mother was a resident in ! China. Less than a year)N later their son was born on 3 August 2000 whilst tT the Judiciary Hong Kong SAR FCMC 13527 of 2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION BETWEEN

Background

The mother The father Madam L and Madam C Refusal of access to the mother Conflicts The Law Title Headings Microsoft Word Document MSWordDoc Word.Document.8

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