

HONG KONG / JUDGMENT

YCKS v. MPKC

[2023] HKFC 113

COURT

Family Court

DECIDED

28 June 2023

CASE / FILE NUMBER

FCMC5771/2018

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FCMC 5771 / 2018

[2023] HKFC 113

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 5771 OF 2018

BETWEEN

YCKS

Petitioner

and

MPKC

Respondent

Coram : Deputy District Judge S. Allison in Chambers (not open to public)

Dates of trial: 2, 4, 5, 8 & 9 May 2023

Date of closing submissions: 23 May 2023

Date of decision: 28 June 2023

JUDGMENT

(Variation of Custody, care and control or access)

Background

This is a trial concerning the care arrangements for the two youngest children of the family, namely the daughter, L, born in xx2006, (“L”) and the youngest son of the family, T, born in xx2008 (“T”) (collectively referred to as “the Children”). At the time of trial, L and T were 16 years old and 14 years old respectively. There are also two older children of the family, who have reached majority.

The parties of this case were married in 2001. In 2015, the mother filed her petition for divorce (under FCMC 8480/2015). Since then, the parties have been in constant litigation, predominantly on the care arrangement for the four children of the family.

In 2018, there had been a three day trial on custody and access. In its judgment dated 28 February 2018, the Court granted sole custody, care and control of the four children to the mother, with defined access to the father (“1st Custody/Access Order”). The background facts regarding this family are set out in the 2018 judgment. The father was not satisfied with the 2018 judgment and applied for leave to appeal, which was refused.

A year later on 21 February 2019, the father filed a summons for variation, seeking joint custody and more extensive access. This variation summons was later settled by consent on 15 November 2019. The mother continued to have sole custody, care and control of the four children. The father had defined access to the Children, in pairs, twice a month for no more than 5 hours in the presence of their maid, plus other additional specific public holiday access (“2nd Custody/Access Order”).

The father’s current application arises from his summons filed on 21 October 2021 (dated 15 October 2021) to vary the 2nd Custody/Access Order in respect of the access to the Children (“Access Variation Summons”). Three months later, on 21 January 2022, the father filed another summons to vary the 2nd Custody/Access Order, in which he sought orders for sole custody, with care and control of the Children be granted to him (“Custody Variation Summons”).

In the Custody Variation Summons, the father also requested for the appointment of Family Separation Clinic (“FSC”) to undertake an assessment with clinical trial on the Children. The Court made consequential directions and Orders dealing with both the Access Variation Summons and the Custody Variation Summons on 7 March 2022. The father then filed another summons on 27 April 2022 seeking to vary the 7 March 2022 Order, again seeking that the FSC be appointed as experts to undertake an assessment and to prepare a report.

The father's applications for the appointment of the FSC as expert was refused in the Decision dated of 26 September 2022. The father sought leave to appeal against the Decision, which was refused on 16 January 2023.

Notwithstanding the Court's refusal to appoint FSC as experts, during the trial, the father asked the court to appoint the FSC as the treating therapist for the family. This application was not set out in the father's Access Variation Summons or the Custody Variation Summons. I will address the issue of the appointment of the FSC as treating therapist below.

The Issues

The questions for the Court's determination which arise from the father's applications, are:

What orders should the Court make in respect of custody, care and control? That is, should the Court vary the current order of sole custody, care and control to the mother?

If the orders regarding custody, care and control are not varied, in the alternative, what orders should be made regarding the father's access with the Children?

What orders should the Court make regarding ongoing therapy for the Children and the parents, and should the Court make orders regarding family reunification therapy?

Father's proposals

This is a high conflict case. The ongoing litigation over the past eight years regarding the children makes it clear. The parties have filed various affirmation evidence and submissions. I do not intend on referring to all part of the evidence or submissions. Nevertheless, I have them well in mind when reaching this Judgment. I have also kept in mind that both the parties were not legally represented at trial.

The father's open proposals which he filed before the trial asked for the existing orders to be varied such that the parties be granted joint custody or that he has sole custody of the Children. Further, the father wanted the care and control order to be transferred to him and the Children to move to live with him with immediate effect. Access to the mother to be determined by the court. In the alternative, if the court did not vary the custody, care and control order, the father wanted the existing order for defined access to be amended. However, no specific details were provided by the father as to what or how he wanted access going forward to be revised.

In his open proposal, the father also wanted an order that the Children have reunification therapy with a therapist chosen by the father as soon as practically possible. The father's choice of reunification therapy was the FSC programme. Since the FSC is located in London, their programme would possibly have to be in conjunction with a partnering local therapist. The father wanted the court to order that the children and both parents were to participate as directed by the therapist and to follow any subsequent treatment plan designed by the therapist. The father also wished for the older two children to be invited and encouraged to participate in the assessment and treatment programme.

Finally, the father proposed that the FSC was to file a report with the court outlining their assessment and recommendation for tailored treatment programme, and any structured intervention including access, residence and custody.

The father's priority in filing the Access Variation Summons and the Custody Variation Summons was, for the appointment of the FSC, whom he believed held the key to resolving all the access problems with the Children. This was expressed in his opening submissions - "the primary purpose of these applications and the proposals by the Respondent is simply so that treatment therapy from FSC may finally be facilitated and introduced. This is in order to protect the children, [L] and [T] from further damage of alienation..."

Following the social welfare officers and the clinical psychologist giving evidence, the parties were given a chance to file their updated proposals during the trial. This was done on the fourth day of the trial in order for both parents to consider their positions having heard from the experts and to be given the opportunity to explain to the court while in the witness stand, how they had arrived at their updated proposals. I explained to the parties that the updated proposal had to be detailed and realistic in terms of access going forward.

The father's unnumbered updated proposal is replicated here, for convenience:

One access visit per quarter in person (Together or individually).

One access on/ around Birthday.

Unlimited reasonable access (child determined)

1x video (whatsapp, wechat) activity per week. (individually) Includes possible conference call with other family and friends.

Re-unification Therapy. FSC with local therapist.

Mother directed to participate.

Parties to attend Psychological assessment/ treatment

Parties to attend further co-parenting counselling

Parties to attend discussions/ mediation. (Remote Vc, in person or mediated with 3rd party).

Parties to utilize Parent Co-ordinator.

The father's case on access was presented as an alternative to having sole custody and care and control vested in him. The father expressed his frustration repeatedly during the trial about the "quality of access" with the Children. The father was unhappy that the Children were only interested in having a quick meal with him; he complained that they would often eat in silence and then leave as soon as they could. The father also complained that the Children would not agree to do any other activities with him apart from meals on Hong Kong island or shopping. I note that the father's complaint about "quality of access" was an issue he had raised during the 2018 trial.

The father's complaints regarding access stemmed from his firmly held belief that the mother had alienated the Children against him, and that this was the reason why the Children were disinterested or resisting access with him.

It was difficult to always follow what the father wanted for access. On the one hand, the father stated that access should be more structured, and for longer periods of time because that was what worked in the past. The father believed that if there was more time during access the relationship between the Children and him could improve. But the father also proposed that he was happy with very infrequent access such as once every quarter or even once a year. The father envisaged that these infrequent access would be for a significantly longer period of time, such that the time which would have been spent during regular access, was to be cumulatively rolled up into one big access.

Another confusing stance taken by the father was his complaints that he had permitted the Children to guide access in terms of arranging dates, times and activities to be done. The father described access as "not meaningful" because of the Children's choices. However, in his evidence or proposals he was not able to explain how on a practical level how the court was to structure access for teenage children. At the same time, the father confirmed that he remained opened to the idea of the Children continuing to initiate and determine the nature of access.

In his closing submissions, the father repeated that his primary objective was for the appointment of FSC. On the issue of access, the father "considers that access proposals alone, whether they are the original request for tighter definition and frequency and release of the children from decision making process for access, or for the opposite and the release of any obligation for any minimum contact are of little consequence".

Mother's proposals

The mother's case was that it was not in the Children's best interest nor was there any legitimate reason, to vary the current custody or care and control order. On the question of access, the mother believed that the father's dissatisfaction with the quality of access was one that only he could address.

The mother's opening proposals filed on 18 April 2023 was that the sole custody, care and control of the Children was to remain with her. This proposal accorded with the recommendations set out in the latest Social Investigation Reports and Clinical Psychologist Report. In terms of access, the mother proposed that the father to have defined access to L and T, in pairs, once a month for a duration no more than 5 hours during school term and long school holidays. The mother also proposed that the father have telephone access with L and T respectively.

In her updated proposal given during the trial, the mother's maintained her stance that there should not be any change to the custody, care and control order. However, after having heard and considered the evidence given by the Social Welfare Officer and the Clinical Psychologist, the mother considered that the defined access order should be varied to a reasonable access order, in pairs. The mother explained that this would alleviate the pressure faced by the Children on

having to meet the father twice a month. The mother hoped that reasonable access would encourage the father and the Children to meet more often if that could be arranged and agreed between them. The mother again proposed that the father have telephone access with L and T.

The mother's proposal was amended only slightly in her closing submissions. She repeated her position on custody, care and control and reasonable access to the father, however she proposed that the father only have telephone access to the Children on their respective birthdays.

Applicable legal principles

Section 3 of the Guardianship of Minors Ordinance, Cap. 13 requires the Court to have regard to the best interest of the child as the paramount consideration

“3(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—

in any proceedings before any court (whether or not a court as defined in section 2) the court—

shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to —

the views 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

any material information including any report of the Director of Social Welfare available to the court at the hearing; and

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.”

In considering the custody care and control of minor child, the Court may seek guidance from the “welfare checklist” as an aide-mémoire. The “welfare checklist” is set out in the Children Proceedings (Parental responsibility) Bill. Although it is not a compulsory list, it is nevertheless helpful for the court to consider the factors potentially relevant when considering a child's welfare within the circumstances of each case. It is not an exhaustive checklist, and it not also necessary for the court to set out each factor mechanically to demonstrate that each of them has been considered.

The factors set out in the “welfare checklist” are:

the ascertainable views of the child concerned (considered in the light of the child's age and understanding);

the child's physical, emotional and educational needs;

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

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

the child's age, maturity, sex, social and cultural background and any characteristics of the child that the court considers relevant;

any harm that the child has suffered or is at risk of suffering;

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

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

the practical difficulty and expenses of the child having contact with a parent, and whether that difficulty or expenses will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

the range of powers available to the court under [this Ordinance] in the proceedings in question;

any other fact or circumstances that the court considers relevant.

Custody

The case law, as it relates to the concepts of sole and joint custody is explained in the leading Hong Kong authority of *PD v KWW* [2010] 4 HKLRD 191.

“36.

It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent. Any such potential misunderstanding was quashed in *Dipper v Dipper* [1980] 3 WLR 626 in which Ormrod LJ said:

“It used to be considered that the parent having custody had the right to control their children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement has to be decided by the court.”

37.

In the same case, Cumming-Bruce LJ, another experienced family judge, said:

“... it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. This is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court.”

38.

A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.

39.

While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent to make a final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter.

40.

Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent.

41.

For this reason, it is often said that there is a thin line between sole custody and joint custody.”

Whether an order for sole or joint custody is to be made is by reference to the level of cooperation to be expected having regard to the relationship of the parties.

“55.

Accordingly, the issue for the judge is whether, with the court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on the questions of importance that will determine the upbringing of their child, both recognising that, as difficult as it may be for them, this process of co-operation is in the best interests of the child.

56.

In determining this issue, the judge is entitled to proceed on the presumption that competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child will be able to co-operate with each [other] concerning matters of importance in the interests in the upbringing of the child.

57.

At all times, of course, the welfare of the child remains the first and paramount consideration. As this Court has recognised (see, for example, *Y v P* [2009] HKFLR 308), there may be occasions when the ability of the parents to reach any rational accord in respect of important matters concerning the upbringing of their child is so deeply undermined that to compel attempts at cooperation will not protect the interests of the child but only leave the child more vulnerable.

Access

Access to a parent is the basic right of a child rather than a basic right of the parent. Giving access to a parent so as to enable the child to keep in contact with that parent is essential to the minor's emotional and material growing up in the long term. Access should, therefore, suit the developmental and psychological needs of the child which will change throughout the child's life.

Parental alienation case law

As stated above, the father believes that the “poor quality of access” with the Children stems from parental alienation on the part of the mother. The father in his opening submissions provided five case authorities which addressed the issue of parental alienation. Three of the cases are English authorities.

The first English authority provided by the father is *Re S (parental alienation: cult)* [2020] EWCA Civ 568, which helpfully sets out the law regarding parental alienation and how the court should best approach allegations of this nature.

“The law concerning parental alienation

7.

At the outset, it must be acknowledged that, whether a family is united or divided, it is not uncommon for there to be difficulties in a parent-child relationship that cannot fairly be laid at the door of the other parent. Children have their own feelings and needs and where their parents are polarised they are bound to feel the effects. Situations of this kind, where the concerned parent is being no more than properly supportive, must obviously be distinguished from those where an emotionally abusive process is taking place. For that reason, the value of early fact-finding has repeatedly been emphasised.

8.

As to alienation, we do not intend to add to the debate about labels. We agree with Sir Andrew McFarlane (see [2018] Fam Law 988) that where behaviour is abusive, protective action must be considered whether or not the behaviour arises from a syndrome or diagnosed condition. It is nevertheless necessary to identify in broad terms Judgment Approved by the court for handing down. *Re S (A Child)* 5 what we are speaking about. For working purposes, the CAFCASS definition of alienation is sufficient:

“When a child's resistance/hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.”

To that may be added that the manipulation of the child by the other parent need not be malicious or even deliberate. It is the process that matters, not the motive.

9.

Where a child's relationship with one parent is not working for no apparent good reason, signs of alienation may be found on the part of the other parent. These may include portraying the other parent in an unduly negative light to the child, suggesting that the other parent does not love the child, providing unnecessary reassurance to the child about time with the other parent, contacting the child excessively when with the other parent, and making unfounded allegations or insinuations, particularly of sexual abuse.

10.

Where a process of alienation is found to exist, there is a spectrum of severity and the remedy will depend upon an assessment of all aspects of the child's welfare, and not merely those that concern the relationship that may be under threat. The court's first inclination will be to reason with parents and seek to persuade them to take the right course for their child's sake, and it will only make orders when it is better than not to do so. Once orders are required, the court's powers include those provided by sections 11A to 11O of the Children Act 1989, and extend to consideration of a more fundamental revision of the arrangements for the child. We agree that whilst a change in the child's main home is a highly significant alteration in that child's circumstances, such a change is not regarded as “a last resort”: *Re L (A Child)* [2019] EWHC 867 (Fam) at [53] to [59] per Sir Andrew McFarlane P. The judge must consider all the circumstances and choose the best welfare solution.

11.

Cases at the upper end of the spectrum of alienation place exceptional demands on the court. It will recognise that the more distant the relationship with the unfavoured parent becomes, the more limited its powers become. It must take a medium to long term view and not accord excessive weight to short-term problems: *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 per Sir Thomas Bingham MR at 129. It must, in short, take action when and where it can do so to the child's advantage. As McFarlane LJ said in *Re A (Intractable Contact Dispute: Human Rights Violations)* [2013] EWCA Civ 1104; [2014] 1 FLR 1185 at 53: “53. The conduct of human relationships, particularly following the breakdown in the relationship between the parents of a

child, are not readily conducive to organisation and dictate by court order; nor are they the responsibility of the courts or the judges. But, courts and judges do have a responsibility to utilise such substantive and procedural resources as are available to them to determine issues relating to children in a manner which affords paramount consideration to the welfare of those children and to do so in a manner, within the limits of the court's powers, which is likely to be effective as opposed to ineffective.”

The case of Re S was applied by Melloy, J in C, RYL (formerly known as S, R) v C, S [2002] HKFC 8 (unreported, FCMC 12228/2018, 11 January 2022) which was the second case authority provided by the father.

In C, RYL (formerly known as S, R) v C, S the child completely refused to see his father for access. The single joint expert made a recommendation that the parents consider sending the child to boarding school in England so as to provide some relief from being constantly caught in the middle of the parental conflict. The parents agreed to send the child to boarding school and the court made a further order that the child was to participate in reunification therapy provided by FSC in England.

The third case authority is LEYY v UKWK [2020] HKFC 68 (unreported, FCMC1393/2015, 19 March 2020). In that case, the father had made serious allegations of abuse against the mother and her partner which were held to have not taken place. In order to protect the child, the court granted a change of the child's residence, and suspended access between the child and her father, his family in the short term pending a report from the Official Solicitor.

The father provided the fourth and fifth case authorities, Re A and B (Parental Alienation: No. 1) [2020] EWHC 3366 (Fam) and Re A and B (Parental Alienation: No. 2) to demonstrate how the FSC have been successfully involved in cases concerning parental alienation. In those children's proceedings, the mother was found by the court to have caused and continued to cause the children emotional and psychological harm, and the children remained vulnerable to the changes in their mother's mood and behaviour. The court was satisfied that the father was able to meet the best interest of the children and provide them with stable, secure and loving home together with the father's new wife, and consequently, the children's care was transferred from the mother to the father.

Each case turns on its own facts. These case authorities on parental alienation do not assist the father in his application that FSC should be providing therapy to the Children as each of the case authorities can be easily distinguished from the current circumstances before the court.

Social Investigation Reports

A total of 6 social investigation reports have been prepared since the commencement of these proceedings. The latest updated social investigation reports were prepared by Ms Kwan dated 10 November 2021 and Ms Sin dated 9 September 2022. Ms Kwan and Ms Sin both attended court to give evidence and I find them both to be credible witnesses. I have also found their recommendations in their respective reports to be helpful.

Ms Kwan reported that the father's relationship with the older two siblings came to an end when they sought financial support from the father for their tertiary education and were turned down by him. However, the father continued to have a relationship with L and T, meeting up with them twice a month. Ms Kwan also reported on the difficulties the mother or the Children faced in access taking place. Examples given by Ms Kwan included the father complains that he had been given insufficient notice regarding access or the fact that the father disliked having to be sat at two separate tables during the Coronavirus pandemic when there were group gathering restrictions. Observations by Ms Kwan of the Children during access with the father's access were described as tense, with limited interaction between the Children with the father and the Children avoiding of eye contact with the father. The father confirmed at trial that Ms Kwan's description was an accurate reflection of the problem he faced during access.

The father accused Ms Kwan of lacking formal training and awareness of alienation. I find this accusation to be an unfair one. Ms Kwan was alive to the father's claim that Children's resistance in meeting with him was a result of the mother's parental alienation, and she impressed me with her balanced observation of the issues surrounding this family. She reported that the Children's rejection of the father was based on them having witnessed his violence against the mother, the father's continual intimidation of the Children to comply with his demands regarding access plus the father's refusal to financially provide for the four children which led to each of them being suspended from high school for varying periods of time in 2018. Specifically, L and T were suspended from school for several months between February 2018 to June 2018, because the father did not pay their school fees.

Ms Kwan suggested that if the father presented a nice attitude and treated both Children fairly during access, the Children's negative feelings towards the father would reduce with regular contact. There was a further suggestion that the father was to receive continuous psychological treatment to improve his emotional management and communication skills with the Children. Ms Kwan was in favour of L arranging access with the father.

Clinical Psychologist Report

The Clinical Psychologist, Ms Kwok ("CP") prepared a single report dated 9 September 2022 and attended court to give evidence.

On the question of whether the Children are alienated, paragraph 10.1 of the CP Report states:

“From the data collected, I opine that [L] and [T] are exposed to psychological harm. However, the harm is not administered by either one of the parents, but their interaction and the system as a whole.”

When questioned by the father during trial, the CP answered that the children are in a state of alienation. However, she emphasized her finding in her report the Children are exposed to psychological harm but such harm was attributed to the parental conflict, rather than either one of the parents.

The CP was of the opinion that on the surface, the father wanted to have a better plan for access. However, by rejecting the Children’s request for access for several months, the father had overlooked their feelings and that the Children were trying their best to arrange access with him. The report recognized that the Children would have been frustrated with the father’s rejection, and they would have been unable to make sense of the father’s behaviour, since this was happening at the same time when the father was pursuing the Access Variation Summons and Custody Variation Summons.

The report did highlight some of the mother’s behaviour which could be improved, such as her not sharing the children’s school, medical or athletic details with the father. In her evidence, the mother explained, that the father had previously turned up unannounced at the Children’s events causing them distress, and the Children have voiced their objection to the mother sharing such information with the father. The mother further explained that the Children objected to the father having any information about their schooling due to the fact that their suspension from school was as a result of the father’s refusal to pay maintenance. In any event, the father has access to the Children’s school reports directly provided by the school principal.

The CP, like Ms Kwan was firm in her evidence that the views of the Children should not be ignored, given their age. To vary custody against the Children’s will would not benefit the father-child relationship nor the Children’s psychological health. To do so would intensify their resistance to the arrangements and perpetuate the ongoing cycle of litigation and psychological harm.

Having heard all of the evidence, I agree with the CP that the Children’s attitude towards access has been caused by various factors. It is not, as the father claims, that the Children have been alienated against him by the mother.

Views of the Children

Neither of the Children wished for there to be a change to the current care arrangements in place.

Ms Kwan’s reported that L was uncomfortable around the father as he would get angry easily, nor did she want to meet the father alone without T. L’s view was to decrease access from twice to once a month. L expressed her lack of confidence that psychological treatment would enable the father to manage his emotions and improve their relationship. This lack of confidence translated into L refusing to have psychological treatment to address father-daughter relations.

T told Ms Kwan that it was his preference to not have to meet his father at all. T felt that the father gave L preferential treatment and ignored T when he asked for something. T also complained that instead of shouting, the father should listen to what T had to say. On whether the father had in fact improved after therapy, T shared similar doubts as L and refused to have specific therapy to address his relationship with the father.

According to the mother, the Children were currently attending therapy at Hospital. L was seeking psychological treatment to address her stomach pain which were likely due to stress while T was seeing both a psychologist and a psychiatrist to help him work through and process his issues. The mother did not believe that additional therapy would be beneficial to either of the Children, especially if it was specifically to address access issues or with FSC.

The Court of Appeal in *YSYM v LHB* [2020] HKCA 586 emphasized the importance of a court taking into account the wishes of children by citing the following English cases: -

“71. Rix LJ had this to say in Re R (Residence Order) [2010] 1 FLR 509 at §§57 and 58:

“[57] The importance of listening to a child once he or she has reached the age of 10 ... has been stressed in the authorities. Thus in Re L (A Child) (Contact: Domestic Violence) [2001] Fam 260, [2001] 2 WLR 339, [2000] 2 FLR 334 at 271-271, 347 and 340 respectively, Dame Elizabeth Butler-Sloss P sitting in this court cited with approval Contact and Domestic Violence – The Experts’ Court Report [2000] Fam Law 615 at 624 on the subject of a child’s wishes:

“...while this needs to be assessed within the whole context of such wishes, the older the child the more seriously they should be viewed and the more insulting and discrediting to the child to have them ignored. As a rough rule we would see these as needing to be taken account of at any age; above 10 we see these as carrying considerable weight with 6-10 as an intermediate stage and at under 6 as often indistinguishable in many ways from the wishes of the main carer (assuming normal development). In domestic violence, where the child has memories of that violence we would see their wishes as warranting much more weight than in situations where no real reason for the child's resistance appears to exist.’

See also *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961 per Baroness Hale at para [57]:

‘But there is now a growing understanding of the importance of listening to the children involved in children’s cases. It is the child, more than anyone else who will have to live with what the court decides.’

[58]

I respectfully conclude that the judge has erred in not giving any real effect to the child’s wishes expressed in this case. He has referred to them, accepted them, but thereafter essentially ignored them. He has attempted to reason against, and reject, the child’s (partial) rationalisation of them. He has in effect wholly discounted them. And yet, the child was a mature and thoughtful child close to the age of 10, who expressed his wishes rationally and, in my judgment, with

considerable emotional understanding. Moreover, those wishes, in part natural given his love for his mother and his successful upbringing to date – and therefore to be given all the more attention rather than discounted ... I do not understand why these well-evidenced concerns were overborne by a call for greater sophistication: in reality this was little more than a way to reinforce the judge's conclusion that he would not disturb the boy's "settled" status."

L and T are currently 16 and 14 years old. To place the Children's situation in context, the Children have experienced their parent's litigation since they were 8 years old and 6 years old. Their views and wishes regarding care arrangements and access, have been plainly expressed on numerous occasions. It is unsurprising that the Children have expressed their frustration and refusal to continue to meet with more social welfare officers, experts or therapist regarding their care arrangements.

In respect of whether family therapy should be undertaken, the CP's report was unambiguous that participation in psychotherapy had to be voluntary and it was not appropriate due to the children's refusal to participate. The Children had to be given time and space to want to repair their relationship with the father for family therapy to be meaningful and effective.

Discussion

Both parents conducted themselves appropriately during the trial. The mother was composed throughout the whole proceedings until she gave evidence about the four children being suspended from school and how it impacted each of the children. I accept that this would have been a very distressing time for the children and her.

I acknowledge the father's belief that he has put in great effort into improving his communication and managing his anger when speaking with the children. The father gave evidence that he had attended coparenting therapy, and undertaken various counselling regarding how to improve his relationship with the children. The father expressed his frustration that despite his best efforts with seeking therapy, that there has not been any positive change in access with the Children. He sees having family reunification therapy as the final resort in getting the situation under control. I can appreciate that he feels frustrated that his efforts do not appear to be reciprocated with the same level of enthusiasm or acceptance by the Children.

The mother gave evidence that the father did not listen to the Children at all or respect their views. She explained that the father is capable of having positive communication with the Children because he had arranged access directly with L prior to November 2021. The mother took the court through WhatsApp messages exchanged between the father and L, which showed the father adopting a flexible attitude towards access arrangements and access taking place with the Children.

However, from November 2021 onwards, there was a change in the father's communication; his messages displayed an insistence that certain conditions be met before he would agree to meeting with the Children for access. The father demanded that he be informed of what, where and how access was to be conducted and that access take place for the full 5 hours before he would agree to meet with the Children. Failure by the mother or L to provide this information meant that the father would not agree to access.

This in turn, then led the father not agreeing to meet up with the Children for access between December 2021 to February 2022. The father met the Children once in February 2022 on 2 February 2022, being the second day of Chinese New Year.

There was no access between 2 February 2022 until next agreed access date on 1 December 2022. Apart from the Children, the mother or the father contacting COVID at various times, the main reason why the father did not have access for almost ten months was due to the father turning down the access dates offered by L and / or the mother. There was one other access on 20 December 2022.

I have read the exchange of WhatsApp messages exhibited by the mother and produced at trial. These messages cover the period from January 2021 to May 2023, and were exchanged between the father and L or between the father and the mother. The messages reveal that L and / or the mother were proactively trying to arrange access with the father. Sadly, the messages showed that the father did not take up every opportunity to see the Children because he was focused on his own agenda.

Not only did the father refuse to meet the Children for access, but he had also sent negative, hurtful messages directly to L. One striking example, was the father stating access in its "current format offers no joy or positive interaction or development to anyone". In light of these messages, it is not difficult to see how the children retain negative views of the father.

While the father appeared to acknowledge in court that his refusal to meet with the children when they offered him access would cause them harm and distress, this is not a new issue raised for the first time. It had been raised previously in the 2018 trial. The fact that the father cannot appreciate how his rejection of the Children and their proposals for access could hurt their feelings, until it is expressly pointed out to him, or that he has not learnt to change his behaviour since 2018, demonstrates that the father has little insight as to how his own behaviour has a negative impact on his relationship with the children.

I am of the view that the father's inability to accept the children's views and choices on access activities and length of time, presents a stumbling block towards the father enjoying access.

In addition to not taking up all access when offered, on those occasions he does have access, I believe that the father attempts to assert pressure on the Children during access in order to compel them to do things his way. The mother gave evidence regarding an incident on 2 February 2022 when the Children left lunch access with the father early because they could no longer handle the father's questioning. On this occasion, the Children had been accompanied by the

helper. After the Children left the restaurant, the father did not permit the helper to leave with the Children. He kept the helper trapped on the inside of the restaurant seating booth. The helper was distressed because the children had left without her and she was meant to take care of them. The mother's evidence was that the helper could only leave by crawling under the restaurant table to get away from the father. I do not accept the father's explanation that he kept the helper there in the hope that the Children would return.

By refusing to allow the helper to leave, the father's actions were meant to intimidate the Children into returning for access. Given the father's history of domestic violence with the mother and some of the children, the father's behaviour caused anxiety not just to the helper, and the mother, but more importantly to the Children. It is unsurprising that the father's own actions directly reinforce the Children's negative perception of him.

Should the current orders of custody, care and control be varied?

Having considered all of the evidence and recommendation by the experts, I am of the view that the current custody and care and control arrangements should remain in place and not be changed.

In the present case, there is simply no evidence that L and T are exposed to harm arising from their mother's care which warrants a change of their living arrangements. Furthermore, the father has not demonstrated that he is able to provide the Children with adequate care or that he has made any arrangements for their care. For example, there is no evidence from the father regarding his living situation, such a photographs of his home or even any pertinent information as to how the Children will commute between his home in Yuen Long to their schools. There is simply no evidence before the court to assess whether the father's proposal for the children's residence to be changed is realistic or even suitable.

It is obvious from the father's submissions and evidence, that the father is seeking an order for sole or joint custody so that he can compel the Children and the mother to undergo family reunification therapy. Major decisions relating to the children are multi-faceted and I am not convinced that the father will bear the Children's best interest in mind when making major decisions for them. The father's insistence that he will only have access with the Children on his terms, which has resulted in him not seeing the Children for several months does not give me any confidence that the father has the necessary insight into his actions.

Furthermore, in the present case, the evidence does not support that the L and T have refused to see the father. In fact, the evidence shows L proactively seeking the father's agreement to meet up for access on several occasions. Unfortunately, the father ultimately choose to not take up some of this access due to what he perceives to be "poor quality" access. There is, therefore, no need to change the current care arrangements in place.

What orders should be made regarding access?

I take the view that there should be an order for reasonable access between the father and the children.

Although Ms Kwan had recommended that access was to remain unchanged twice a month with a defined time of five hours on alternative Saturdays, I do not think that going forward this will be appropriate. The mother has explained that the children value their rest day on the weekends. It is not uncommon for teenagers to wish to rest at home on the weekend after a full week of school and extra curricular activities. The children's previous experiences of travelling from their home to Hong Kong island for access only for their father to not turn up, caused the Children to feel that their free time was wasted in travelling and waiting around for the father. Hence, it was the Children's preference to meet with their father on Thursday on their way home after school. The mother explained that the Children could continue to travel home if the father did not turn up for access. Thursday was also ideal for the children because neither of them had any after school activities on Thursday.

The father claimed that he was never provided with an explanation why Thursday was the only day that the Children could meet with him. However, L had previously sent a text message to the father explaining that Thursday was their free day.

In their evidence, both experts stressed the importance of the Children maintaining their relationship with the father but they were also at pains to note that the father needed to understand the need to be flexible with the Children.

I do not think that the present situation will improve with defined access or stipulating of the number of hours the children need to spend with the father. I hope that the father will be encouraged by the Children's efforts to meet with him, and reciprocate in an appropriate manner.

For the avoidance of doubt, there is no need for make-up access to be arranged if either the father or the Children miss access.

Should FSC be appointed as family reunification therapist or alternatively, should any family reunification therapist be appointed?

There was a discussion on the first and second days of trial regarding whether the father's application of FSC as the family reunification therapist was an outstanding issue for the court to determine.

In this regard, paragraph 11 of the Decision dated 26 September 2022 by G. Chan, J was invaluable. I replicate the pertinent parts of the paragraph here which relate to the appointment of FSC:

15/11/2019 (at 1.07 pm)

Father filed a summons to appoint a private and English speaking clinical psychologist to assess L and T on the parental alienation ("1st Expert Application").

30/12/2019

The Deputy Judge ordered that the 1st Expert Summons be adjourned sine die, pending the judgment of the AR trial (which was later handed down on 10/11/2020, and the father has lodged an appeal of the AR Judgment).

27/11/2020

Father filed another summons on a number of matters, including the appointment of an English speaking alienation expert ("2nd Expert Application") and recusal of the Deputy Judge to hear this application.

25/1/2021

Return date of the 2nd Expert Summons before me. I made the following orders (only relevant parts will be stated):

By consent of the parties, the 2nd Expert Summons be orally amended to become an application for appointment of a family therapeutic treating doctor on how to foster father-and-children relationship. The matter was adjourned to 10/6/2021 for the parties to nominate a treating doctor, and for SWO to provide information on available services offered by the Social Welfare Department and/or other voluntary organisations on parent-and-child relationship and the fees thereof;

Leave to the father to withdraw the 1st Expert Summons.

10/6/2021

No agreement was able to reach on the appointment of a family therapeutic treating doctor. In the end, I made no further order in respect of the 2nd Expert Summons.

The father's application for the appointment of FSC as experts was, therefore, comprehensively addressed in the Decision dated 26 September 2022. However, the father made oral submissions at the trial that his application for the appointment of a family therapeutic treating doctor on how to foster father-and-children relationship was still outstanding. This application was set out in his Summons dated 27 November 2020 as amended on 25 January 2021 ("November 2020 Summons").

It was pointed out to the father that the November 2020 Summons had been addressed by G. Chan, J in the Order of 10 June 2021, when the Judge directed the "no order to be made for the appointment / 2nd Expert Summons".

"No order to be made" is not legally the same as a dismissal of an application. "No order made" means that the court effectively has declined to determine the application. Its intended consequence is not the same as a dismissal. Accordingly, there was no adjudication on the merits of the father's application for the appointment of FSC as expert or any family reunification therapist. This was an outstanding issue to be determined.

The father's evidence to questions on the costs of the FSC therapy and how he would fund it, was that he would borrow from his extended family. The father estimated the initial costs for FSC was approximately HK\$100,000. This did not include the costs of a local therapist if one was to be

involved, or even ongoing therapy if recommended. It was unclear how much ongoing therapy would cost. The father confirmed, albeit reluctantly, that he had not paid any maintenance for the four children since 2018. It is remarkable that the father would prefer to borrow funds for FSC therapy than provide funds to the older children for their tertiary education or even contribute towards the Children's maintenance.

There is overwhelming evidence for me to conclude that the mother has not alienated the Children from the father. The Children's behaviour during on access and their feelings towards the father can be reasonably explained. In addition, the Children's objections to the further involvement and engagement with more experts, and to participate in more interviews and reports are unequivocal. I believe that on balance, that if the Children are forced to undertake family therapy at this stage that more harm than good may be done to the Children's already delicate relationship with the father.

Consequently, it follows that I will not be making an order for the Children or the parents to attend family reunification therapy with FSC or any other provider.

On the issue of attending further coparenting therapy, both parents attended coparenting therapy with The Hong Kong Catholic Marriage Advisory Council Specialised Co-parenting Support Centre. The mother did not understand how after attending the therapy the father, did not take up the access offered by the Children but instead issued the Custody Variation Summons and Access Variation Summons. Consequently, the mother did not believe that coparenting therapy was of use and it did not make sense for her to participate in more coparenting therapy when it seemed to her to have made things worse. The mother considered that a parenting coordinator would similarly provide limited assistance when the children were offering the father access, but he was not taking it up due to his demands that his conditions had to be met before access could take place. I agree.

Any other measures to protect L and T?

The mother has asked the court to consider putting in place measures to prevent further unmeritorious applications by the father regarding the children, since each application continues to place stress on them.

In her report, Ms Kwan noted that resorting to legal means to regulate access and forcing the children to comply will only induce more resentment in the children. I agree with Ms Kwan that it is only natural for the teenage children to resist, the more the father pushes for longer access particularly when this is not agreed to by the Children. I am mindful of Ms Kwan's observation that the children's fragile mental state has arisen due to their exposure to the family's issues. To ignore the Children's views on access will make them feel further disempowered in their relationship with the father and cause further harm.

The father's applications regarding the Children's care arrangements have placed them in an untenable situation of repeated interviews with social investigation officers and experts, which would entail them having to recall traumatic events from their past. In particular, I am note the CP findings that

“[12.2]

It should be noted that both [L] and [T] have been suffering from the repeated procedures and parental conflict for years. There are different warning signs in their body showing their stress and poor psychological well-being.”

The Children need a break from this cycle of investigation caused by the father's numerous applications regarding their care. I note that L will be in the last two years of high school and this is a critical time for her academically speaking. The CP's reported that L was under stress balancing various aspects of her life. It is a parent's duty to alleviate a child's stress as much as possible, not to add to it.

The number of applications brought by the father cannot be conducive to cultivating good relationship between the father and the Children generally. The Children are at an age when their consistent views regarding access with the father and care arrangements generally must be given serious consideration.

I am aware of various family cases in Hong Kong where the court has exercised its inherent jurisdiction to direct that a party or the parties may only file a fresh application with the court's leave. I have however, not been able to find any reported decisions on this issue.

In weighing up whether there should be an order restricting future applications without the court's leave I have, therefore, considered the English authority of *Re H (Child Orders: Restricting Applications)* [1991] FCR 896; [1991] 1 WLUK 146. This case was decided before the enactment of the Children Act 1989, which has specific legislative provision concerning restriction orders. Hong Kong does not have the equivalent of the Children Act 1989.

In *Re H*, Butler-Sloss LJ had said:

“In my judgment, the power of the court to restrict applications by parties in the exercise of the court's inherent jurisdiction should be used sparingly. There are occasions where applications are being made too often and where the other party and the child are seen to be suffering from them, or are likely to suffer if such applications continue. It is then desirable that the court should put that barrier in place and restrict the opportunity to make needless and ineffective applications. The sort of case I have particularly in mind is that of a father who has been denied access so there is no access at all; or indeed that of a father who has had an order for custody to the mother after as full hearing, who goes ahead and applies to vary that order to himself in circumstances where there is no prospect of success. Such applications are undoubtedly detrimental to the child and are a waste of public money and a waste of the court's time; however, they fall short of a man or a woman being seen as a vexatious litigant. There may be two stages here. It is a very useful weapon in the court's arsenal to keep litigants in family matters, who are carried away by an excessive view of the case or by excessive bitterness, from taking up

the time of the court or and upsetting the other family. It is not, in my judgment, a run of the mill type of order, nor should it generally be used in that fortunately a minority but nevertheless substantial minority of cases where the bitterness between the parents inevitably is detrimental to the child.”

To make such an order restricting further applications does not necessarily remove the father’s fundamental freedom to access the court but incorporates an initial screening process. This can ensure that the Children are not placed under further pressure or drawn into proposed proceedings with more investigations by experts until the father has been able to persuade the judge that he has an arguable case with some change of success. If the application is hopeless and leave by the court is refused, then the mother and the Children will have been protected from the involvement in the proposed application and unwarranted investigation.

There is a fine balance which needs to be achieved. As such, having considered all the circumstances, I decline at this stage to direct that the father requires the court’s leave prior to the making of any application in respect of varying the Children’s care arrangements going forward. I hope that the father is able to gain some perspective into how his litigation is impacting the Children negatively, and that increasing the quantity of access does not necessarily lead to an improvement in quality of access.

The father should turn his focus on enjoying the access time that the children are willing to have with him rather than insisting that access become something else he expects it to be. If the father can learn to appreciate the time he has with the children before they start tertiary education, there is very chance that he will find access to be more meaningful and enjoyable.

In any event, the father has now been placed on notice that if he does continue to pursue varying the Children’s care arrangements in circumstances where there has not been any material change from the present facts or there is no prospect of success, it is likely a restriction order will be imposed on the father.

Conclusion

The following orders should be made as follows:

The Respondent’s Summons dated 21 January 2022 be dismissed. The Petitioner do continue to have sole custody, and care and control of the Children as per paragraph 1 of the Order dated 15 November 2019.

Paragraphs 3 and 4 of the Order dated 15 November 2019 be varied as follows:

“The Respondent shall have reasonable access with L and T in pairs”

Paragraph 5 of the Order dated 15 November 2019 be varied as follows:

“The Respondent do have telephone or WhatsApp access with the Children. The Respondent to respect the Children’s wishes regarding such telephone or WhatsApp access.”

The Children do continue with their clinical psychologist therapy at the Queen Mary Hospital.

Costs

The mother in her closing submissions has asked to be reimbursed her costs in obtaining the various medical reports for the purpose of the father's application. On this issue of reimbursement, I exercise my discretion to make an order that the father shall reimburse to the mother the sum of HK\$1,790 being the costs of T's medical reports which is to be paid by the father to the mother within 14 days of the date of this decision.

As for the costs of this application, since both parties are acting in person and it is a children's matter, I make an order nisi for no costs of these applications, which shall be made absolute within 14 days from the date of this decision.

Sasha Allison

Deputy District Judge

The petitioner (mother) acting in person

The respondent (father) acting in person

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