

HONG KONG / JUDGMENT

YSYM v. LHB

[2020] HKFC 35

COURT

Family Court

DECIDED

25 February 2020

CASE / FILE NUMBER

FCMC19025/2012

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

FCMC 19025 / 2012

[2020] HKFC 35

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 19025 OF 2012

BETWEEN

YSYM

Petitioner

and

LHB

Respondent

Coram : Deputy District Judge J. Chow in Chambers

Date of Hearing : 5 November 2019 – 7 November 2019

Date of Judgment : 25 February 2020

J U D G M E N T

(Relocation & Education

/ provision of school reports & referral to family therapy)

Introduction

Two applications taken out by both the petitioner (“the mother”) and the respondent (“the father”) were heard together:

the mother’s summons filed on 17 January 2019 to seek an order to remove / relocate both children of the family to Vancouver, Canada for further studies; and

the father’s summons filed on 25 February 2019 for an order against the mother to (a) to provide school documents; and (b) to refer both children of the family, the mother and the father himself to a clinical psychologist for family therapy.

Background

The mother filed her petition on 28 December 2012. Decree nisi was granted on 9 April 2013; decree absolute was granted on 8 January 2015. They have two sons aged 13 and 12 at time of this trial (“the children / the elder son / the younger son”).

Ancillary relief

I quote the following as the parties’ background in the judgment of HH Judge Bruno Chan (as he then was) handed down on 11 February 2014 on ancillary relief matters.

“5. Both parties were born and raised in Hong Kong, with the Wife obtaining her university degree in business from UK in about 2000, and has since worked in various employments in marketing or financial management, while the Husband graduated from Chinese University Medical School in 1997 and now practises as a specialist in orthopaedic surgery at Queen Mary Hospital and as noted above under the employment of the Hospital Authority.

6. They became acquainted after the Wife’s return to Hong Kong and started cohabitation in about 2001 in some rented accommodation when the Husband was then working at Kwong Wah Hospital. On 30th September 2003 he started a side business, a newsstand located in a side street in Mongkok behind Kwong Wah Hospital and which was acclaimed for employing disabled persons as its staff (“the newsstand”).
7. Shortly thereafter the said business of HMC was formed initially in the office space behind the newsstand to provide medical and physiotherapy services in which the Husband together with 2 former colleagues at Kwong Wah Hospital, a Dr Yen, and a Dr Lee whom the Wife suspects to be the mistress, were registered as partners in late 2003 in the Business Registry. Dr Lee soon left Kwong Wah Hospital to work full-time at HMC, while the Husband would carry on with his employment under the Hospital Authority, using only his spare time

to run certain administrative and accounting works of both the newsstand and HMC business, which has since grown to 2 clinics, one in Mongkok and the other in Chaiwan, and has diversified into also selling and supplying medical equipments, of which I will no doubt go into more details later in this judgment.

8. About 6 months later in March 2004 the Husband withdrew his registration from the Business Registry and on the same date his mother Madam To was registered as a partner. One month later on 14th April 2004 Dr Yen also followed suit to withdraw from the registration and in his place was registered his mother Madam Law. In June 2004 the Husband's contract with the Hospital Authority was extended for 3 years for a position at the Queen Mary Hospital, and that he would after work or in his spare time continue to be involved in those administrative and accounting works of the business, while the Wife also helped out from time to time in both the newsstand and the clinics including promoting and selling medical equipments for the company and earning commissions.
9. In late 2005 when she became pregnant with the elder son, the Wife ceased working and the parties decided to formalise their relationship by registering their marriage on 14th February 2006. 3 months later on 27th May 2006 the Wife gave birth to the elder son and became a full-time mother. One year later on 28th May 2007 she gave birth to the second son.
10. In early 2008 the Wife returned to full-time employment in an insurance company, and the Husband's mother Madam To started to come to their home during weekdays to assist in looking after their children together with their domestic helper while the parties worked. Meanwhile the Husband would continue to be involved in the administrative and accounting works of HMC, and there was a period when the elder sister of the Wife was also hired to work in the clinic.
11. However later in the same year the Wife suspected the Husband of having an affair and issued a petition for divorce against him, but later withdrew it after the parties had reconciled, and later in 2009 they purchased their rented apartment at Tai Shing Building, Caine Road, Hong Kong from their landlord in their joint names with the assistance of certain personal loans and a bank mortgage ("the former matrimonial home").
12. Sadly their relationship did not improve and instead there were increasing conflicts over various issues in particularly the Wife's suspicion of the Husband's affair with Dr Lee, and after a confrontation with him one day in May 2011 over the alleged affair during which she demanded to divorce him, the Husband moved out of the former matrimonial home allegedly into his parents' home at Shaukeiwan.
13. Their conflicts unfortunately exacerbated which on some occasions led to police interventions, cumulating in one particularly ugly incidence in September 2011 which led to the Father being arrested and later charged for allegedly assaulting the Wife in public, and while he was subsequently acquitted after a trial, sadly it was to be the shape of things to come over the next 2 years during their many disputes in particular over their 2 children

with the tendency to involve the police at the slightest drop of a hat mostly on the part of the Husband, of which the Wife complains as part of his scheme to harass and pressurise her into submission in their litigation but to which he of course denies.

14. On 15th July 2011 the Wife issued a divorce petition under FCMC 9565 of 2011 based on the Husband's behaviour including his alleged affair with Dr Lee named as the 2nd Respondent, thus triggering off what can fairly be described as a most bitter and acrimonious proceedings on all fronts with numerous applications from both side with almost 20 court hearings over the next 2 years or so, first as noted above on every issue over their 2 children, then followed by their present financial disputes, as evidenced by the resultant 24 affirmations filed by and for the parties and the 4 Social Investigation Reports which made up the bulk of the 8 trial bundles before the court.
15. I do not propose to go into the details of those disputes involving the children for the present purpose, save that it is part of the Wife's case that the Husband deliberately instigated most of them together with his many police reports as noted above to try to wear her down and to force her to settle her financial claims on his terms, and which she claims to have actually caused her to loss her previous jobs and with such traumatic impact on the children that they required regular psychological counselling, while the Husband insists that he was merely trying to safeguard the children's interests as the Wife was not a suitable parent to have their care and control and that she had been most obstructive in every way to his access to or contact with them.

HH Judge Bruno Chan (as he then was) ordered in his judgment on ancillary relief, inter alia,

"171. (a) the Respondent Husband shall upon the decree nisi of divorce being made absolute and in any event not later than 31st December 2014 transfer all his share and interests in the former matrimonial home to the Petitioner Wife absolutely and free of all mortgages and encumbrances at his costs and expenses;

- (b) Until the transfer he shall continue to pay the monthly mortgage repayment, utilities and management fees of the said property as before and as and when they fall due;
- (c) The above terms shall be in full and final settlement of all claims between the parties which shall be dismissed;
- (d) The Respondent shall pay to the Petitioner HK\$20,000 per month for the maintenance of each child of the family totalling HK\$40,000 per month until the child reaches the age of 18 or completes full time education whichever is later;"

It has been 5 years since the ancillary relief judgement. As an update, the mother sold the matrimonial home (which was transferred to her pursuant to the order) over HK\$12 million. She conceded during hearing before me that she has kept the sale proceeds as fixed deposit. The mother then rented a premise at HK\$60,000 per month in a high-end housing estate in Hong Kong. The mother claimed she has been suffering from health problem and was unable to work since September 2018.

The father continued his private practice as an orthopaedic specialist. He has been living with his cohabitee girlfriend and his 4 year- old daughter. The father rented a premise as his dwelling. The father has been paying HK\$40,000 child maintenance to the mother since the above ancillary relief order.

Custody, care & control, access

On 1 November 2012, HH Judge Bruno Chan (as he then was) granted the first order on custody in FCMC 9565 of 2011, the mother was granted with sole custody, care and control of both children of the family with defined access to the father.

The father said weekly access was ordered since November 2011 and staying access ordered from July 2012, he complained access was not smoothly carried out. Notwithstanding this, the mother applied to reduce access in November 2014, her application was refused. The mother then refused to participate in psychological therapy with both children. From August 2015 onwards, access was unsatisfactory.

On 19 October 2016, the father applied to vary the said custody order to one of sole custody, care and control of both children to him. I heard the trial on such variation and I have ordered in my judgment dated 21 September 2018 that the mother should continue to have sole custody, care and control of both children with variation of defined access to the father. My orders on variation of defined access are as follows:

“(i) The husband (the respondent) do continue to have supervised access with the two children of the family once a month, on the first Saturday of each calendar month, from 3:00 pm to 6:00 pm.

(ii) The said supervised access shall be arranged by the handling social investigation officer, to take place at the office of the social investigation officer, Wanchai office or any other place agreed by the wife (the petitioner) and the husband (the respondent).

(iii) The handling social investigation officer may extend or abridge the duration of the supervised access as he sees fit.

(iv) The wife (the petitioner) do create a separate email account for two children of the family solely for communication between the children with the husband (the respondent). The wife (the petitioner) shall inform the handling social investigation officer via email of the new email address within 7 days. The handling social investigation officer do forward the said email address to the husband (the respondent) via email forthwith.”

The present applications

The mother and the father took out their applications 4 months and 6 months respectively from the handing down of my judgment on variation of custody, care and control. In light of the mother's application to remove both children to study overseas, the father did not apply for an order to vary the custody, care and control of both children. The father only applied for an order for provision of school reports and family therapy.

At the call over stage of the mother's application, she indicated both children were accepted by an overseas school in the United Kingdom. As the father opposed to send both children for overseas studies, the said school offer has lapsed already. At time of trial, the mother is pursuing an order for both children to study in Vancouver, where she has managed to secure a job for herself. The mother said both children are accepted by a school in Vancouver. ("the Vancouver school").

Having knowledge with 12 social investigation reports, I called for a fresh social investigation report for the subject disputes. The mother's application was premised on two important factors, (i) the mother has obtained a job offer from a company in Vancouver; and (ii) both children have obtained school offers. The mother said, at time of application, she could not confirm the place of accommodation. She planned to rent a premise after she and both children landed in Vancouver. In view of this, I see it is impracticable to call for an international social investigation report.

At time of trial, both children are still attending Form 2 and Form 1 in the same direct subsidy school in Hong Kong respectively.

The mother's summons – overseas studies / relocation

The mother's case

The mother said it has always been her plan (and the father) to send both children to study overseas. For reason of the on-going matrimonial dispute, the father had caused the plan to delay for two years. The mother complained the father had caused embarrassment at school, both children have difficulty to make friends. Both children dislike studying in local school, they dislike local school rules. Both children could not perform well in local curriculum, particularly Chinese language. To be enrolled in the Vancouver school, they could achieve better grades in English and could have enjoyed a higher chance to be admitted in a university. Therefore, it is in the best interest of both children to be removed to Vancouver for further studies.

On the mother's part, she further complained the father took out applications continuously with false accusations against her, she was required to attend numerous court hearings since the petition commenced. The children are always in anxiety. Both children's wish is to study in Vancouver, an environment with less demanding homework; an environment that they could focus to study.

The mother has been unemployed for more than one year. She was unable to look for a job in Hong Kong. She cherished the opportunity to work in Vancouver, she is very fond of starting her new life there.

The mother put the blame on the father that he has been refusing almost everything asked by the children. Both children were unhappy with the limitations from the father, for instance, they were unable to go freely for holidays including school tour. Having aggrieved with the father's conduct, both children expressed they are reluctant to have access with the father.

The mother keeps saying both children could not adapt to local education, it would be their best interest to be removed and further their studies in Vancouver. The mother then said both children cannot be enrolled in an international school in Hong Kong, she named a popular international school which she had applied for. The application was unsuccessful.

The mother will proceed in emigrating to Canada even when I have refused her to remove both children from the jurisdiction. She as the mother proposed the children to stay in either (i) foster home arranged by the Social Welfare Department; (ii) her sister's home; or (iii) to stay with the father. The mother considered foster home is the best option. Her view did not change even when she was challenged. She did not consider the following were important that the children all along has been provided with high living standards.

The mother also relied on current social unrest as a reason to relocate with the children.

The husband's opposition

The father opposed. He deposed in his affirmation that both children have done well in the local direct subsidy school, the father was not informed of the children's plan to study overseas. The father said it was the mother's ulterior motive to oust him from the children's life.

Access was smooth at time of petition but it had become unsatisfactory gradually. Since 2015, both children defaulted access, only 21 access were arranged from April 2015 to March 2018. The father does not wish to see the children disappearing in his life. The mother once mentioned she was sick and could not work. The father does not believe the mother is able to take good care of both children in Vancouver without assistance.

The father was not comfortable with the children's education plan. The father considered the children performed satisfactorily in the current school. If the children do not find the direct subsidy school suits them, the mother should have considered a lower banding school or a local international school at this moment.

The father's summons – school reports and therapy

The father's case

The father complained the mother did not provide him with the children's school reports or school notices. Coupled with the fact that access was unsatisfactory, he knew nothing of the children. The mother blocked all means of communication with the father, including telephone, whatsapp and email. The only phone number the father has had is not a daily phone used by the children. All calls were diverted to voicemail. Save and except an email account was created between the father and the children, the father was unable to discuss anything with them. He seeks an order against the mother to provide him with the children's school report and other relevant information. The father also seeks an order to refer both children, the mother and himself to participate in family therapy which he sees it would be effective in rebuilding the father – son relationship.

The mother's opposition

The mother opposed. She complained the father has caused the children's resistance. Both children are unwilling to attend therapy. She sees family therapy unnecessary.

Social investigation report

The social investigation officer ("the SWO") compiled his report on 6 June 2019 on both applications. He updated the current life of the father, the mother and the children.

The mother resigned from work since September 2018, she had undergone an operation in same year. She was mentally fit and healthy without major abnormality. The mother and the children moved to a rented premise measured 120 square metres.

The father continued to be in private practice as an orthopaedic specialist. He has been living with his daughter and his cohabitee girlfriend in a rented premise measured 65 square metres.

Both children are studying in secondary 1 and primary 6 of the same school. The elder son ranked 116 amongst 198; the younger son's academic performance was average.

Only 5 sessions of access were carried out after the SWO's submission of his updated report on 11 January 2017. The duration of access on 13 October 2018 was satisfactory, yet the other 4 sessions lasted from 3 – 8 minutes only.

After the judgment on variation of custody was handed down on 21 September 2018, access continued to be unsatisfactory. Both children resisted access with the father, they intended to end the sessions as soon as possible. On 17 July 2018 and 22 March 2019, both children had access with the father to discuss issues on summer school and studying overseas. Email communication or telephone access were not constructive. The children complained the father did not return calls and emails promptly and positively.

The SWO referred both children and the mother to psychological service of the Social Welfare Department by the end of November 2018. The mother agreed to attend an appointment with clinical psychologist. The mother once made an appointment with the clinical psychologist but she failed to attend at the end. The children did not attend as well.

The SWO gave a clear analysis on the issue on further education / relocation. He understands both children were stressed by the volume of schoolwork, they longed to study overseas. Both children did not have good grades in Chinese language. At the same time, the mother sees both children could not perform well in local school, she opted to remove both children to Vancouver for further studies. Both children resisted to have access and to stay with the father. The mother sees it is appropriate to remove the children with her. Both children preferred to continue to stay with the mother.

The mother admitted she was eager to remove the children for overseas studies so as to “get rid of persistent stress of court proceedings repeatedly raised by [the father].” She is looking forward for a better life – work balance environment. She was happy to obtain the job offer in Vancouver. She is able to provide the same living standard to both children. The mother had no intention to isolate both children with the father. She has encouraged both children to discuss to the father on their overseas studies. The mother said both children will be emotional after access especially the father’s refusal to give consent to allow them to study overseas.

The mother proposed the following child-care plan. The mother can meet both children’s daily expenses by her income and the father’s monthly children maintenance. She will be working in the investment and insurance field earning CAD 70,000 per annum. She has cash reserve of HK\$12.6 million for the children and herself to settle in Vancouver. The mother planned to rent an apartment with 30-minutes travel from the Vancouver school at an expected monthly rental of CAD 1,000 – 2,000.

Both children are accepted by the Vancouver school with an annual school fee around CAD35,805 (junior) / CAD38,040 (senior) for a dayschooler or CAD 71,490 for a boarder. Both children paid visits to the Vancouver school during their summer trip in 2018 where they were satisfied with the school environment.

The mother will continue to be the primary carer of both children. She was required to work 40 hours per week. She does not see a live-in domestic helper is necessary. She is able to obtain assistance from a relative living in Vancouver. That relative promised to give her a helping hand should there be any emergencies.

The mother undertakes to arrange at her own costs for the two children to return to Hong Kong once a year either during summer holidays or Christmas holidays. She suggested the father can have access with both children in Vancouver during term breaks.

The mother made it clear that she would accept the present job offer and move to Vancouver regardless the result of her removal application. She did not see fit for both children to live with the father. She reluctantly accepted the SWO's suggestion to look for residential homes for both children.

The father was of the view that both children had performed well in school, studying overseas would not bring any good to them at this stage. The children should attempt studying in an international school in Hong Kong instead of studying overseas. The father criticized the mother was unfamiliar with the difference in education systems in Hong Kong and Vancouver. The mother only intended to start a new life without concerning the well-being of both children.

The father is willing to take care of the two children should the mother's removal application failed. He can provide them with accommodation.

The father blamed the mother as the culprit of the poor father – son relationship. Family therapy will assist in bonding.

Both children expressed their positive views to study in Vancouver. They complained of the volume of homework and studies in the direct subsidy school. Although the father preferred the sons to follow his path to be a doctor, the elder son said he has no interest in studying medicine. The elder son is very disappointed that the scholarship offered by the school in United Kingdom has lapsed. Both the children favour to stay with the mother and they do not want to be involved in the fight between their parents. The elder son was disappointed that the father refused to grant consent to them. Both children preferred to live in a residential home rather than staying with the father in event leave is refused.

The SWO investigated on the family support in Vancouver. He confirmed a relative of the mother is able to help to her should there be any needs. He is a retired businessman, aged 67, living with his mother. He, the mother and both children had a good relationship.

In summary, the SWO found the mother's removal application is genuine, not motivated by intention to sever both children from the father. He shares the mother's view that both children are not suitable for local education. The mother is determined to "get rid of the stress of persistent stress of court proceedings repeated raised by [the father] in Hong Kong over the years and to start a new chapter of life for herself and two children is understandable". The mother has a job offer; both children have school offer; the children are happy to stay with the mother.

The SWO did not agree the father's allegation that the mother intended to oust him from the children's life. He admitted it was difficult to assess the impact on father-son relationship because access was very limited. The SWO expects the children's resistance against the father would be intensified in due course.

With regard to access, the SWO encouraged the mother to arrange both children to return to Hong Kong for access in each long school term break "provided no school learning activities to be affected". There are three term breaks: Spring, Summer and Winter. The father can be granted with unlimited access with the two children in Vancouver and unlimited telephone access. The

SWO suggested to the mother to install Whatsapp in both the children's cellphone that the father can text them instantly. The SWO agreed the mother should provide and update the father of the children's life and studies in Vancouver should leave be granted to remove both children for overseas studies.

The SWO concerned the impact on the children if this removal application is refused. By then, the mother will move to Vancouver, the children will most likely to stay in a residential home in Hong Kong.

The SWO supports the mother's removal application.

The SWO supported family therapy save it will only work with consent and participation. The mother maintained she will not be involved in participating in such therapy. The SWO suggested the mother should motivate the two children to attempt.

The mother elected not to attend and joint family therapy sessions with the father. She complained the father's motive was to prolong Court proceedings instead of rebuilding the father – son relationship. She left the choice to the children whether to attend the therapy.

Both the children refused to attend family therapy arranged by a clinical psychologist.

Applicable legal principles – overseas studies

In one recent Court of Appeal case, *BA v. BL (Child Relocation)* [2019] 4 HKLRD, Cheung JA clarified the principles on relocation should be the child's paramount interest, the tests laid down in *Payne v. Payne* should not be a decisive test. The principles are best illustrated as follows.

“4.1 Recently in respect of relocation applications this Court in ZJ v XWN [2018] 3 HKLRD 644 adopted the approach of Black LJ of the English Court of Appeal in Re C (A Child) (Internal Relocation) [2016] Fam 253 at [26] :

“26.

... The only principle to be applied when determining an application to remove a child permanently from the UK is that the welfare of the child is paramount. Guidance from the Court of Appeal as to factors to be weighed in the search for what is in the best interests of the child, such as that in Payne v Payne ... is valuable in so far as it helps judges to identify factors which are likely to be of importance but it is not to be applied rigidly. ...’

4.2 This Court further held at [28] that :

‘28.

Whilst we respectfully agree with Black LJ that whatever guidance fallen from earlier cases should not be applied rigidly and Vos LJ's comment on the holistic approach, it is not mandatory for a judge in Hong Kong to set out the welfare checklist mechanically item by item to demonstrate that she has considered the same.’

4.3 The Judge granted leave because she considered that guidance may be needed from this Court on applications made by parents who are not the primary carers of the children.

4.4 In order to understand the dispute on Payne and the Judge's reason for granting leave, it is necessary to go back in time to the cases before Payne. Very often in these cases the mother was a foreign national married to an English man and lived with her father in England. She was usually the primary carer of the children and wished to return to her homeland together with the children to start a new life either on her own or in a new relationship. Payne was a case where the applicant mother had the residence order of a child of the family. Thorpe LJ at [26] stated :
'26.

In summary a review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions: (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.'

4.5 An observation of these earlier cases is that there was a tension between, on the one hand, a reluctance to interfere with the reasonable choice of the parent with custody as to how, and where, they should live and, on the other hand, the principle that the welfare of the child is the primary consideration in deciding whether to give that parent permission to relocate elsewhere. The conflict was reconciled by the recognition that the child's welfare was inextricably tied to the happiness of the custodial parent and the stability of the home that the parent could provide and the happiness and stability would be likely to be threatened if the parent was compelled to adopt a manner of life contrary to his or her wish. Hence in *K v K* [2012] 2 FLR 880 Black LJ at [97] stated :

'[97]

I have found it helpful first to consider *Payne v Payne* in its historical context, which begins with *Poel v Poel*. In these early cases I detect a struggle to reconcile a disinclination to interfere with the reasonable choice of the parent with custody as to how, and in particular where, they should live with the undoubted principle that the welfare of the child is the primary consideration in deciding whether to give that parent permission to move to live outside the jurisdiction. The answer to the conundrum was found in the conviction that the child's welfare was inextricably bound up with the happiness of the custodial parent and the stability of the home that he or she could provide and that that happiness and stability would be likely to be threatened if the parent was compelled to adopt a manner of life that he or she reasonably did not want.'

4.6 Although the last sentence of Thorpe LJ in *Payne* at [26] seems to suggest that the primary carer's application will be granted unless the Court concludes that it is incompatible with the welfare of the children, he clearly did not intend it to operate as a presumption. As he emphasised :

‘

40.

However, there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption, then there would be an obvious risk of the breach of the respondent's rights not only under article 8 but also his rights under article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

4.7 The discipline or guidance given by Thorpe LJ on the Court's approach on relocation cases which the Judge in this case adopted can be summarised as follows :

(1)

Is the Mother's proposal genuine and realistic?

(2)

Is the Father's opposition genuine? What is the extent of the detriment to him if leave is granted and how far may this be offset by the child's relationship with the maternal family and homeland?

(3)

Impact on the Mother of a refusal of her proposal.

(4)

The outcome of the second and third appraisals must be considered in the overriding review of the child's welfare as the paramount consideration.

4.8 Dame Elizabeth Butler-Sloss P in *Payne* also identified seven relevant factors to be weighed in the balance.

4.9 In *SMM v TWM*, while I together with Hartmann and Kwan JJA adopted the *Payne* approach, I emphasized at [32] that there is no presumption in favour of the primary carer when the all relevant factors are being considered.

4.10 Black LJ in *K v K* at [144] stated the *Payne* guidance is not a rigid principle so as to dictate a particular outcome. She specifically stated that Thorpe LJ had not intended there should be a presumption in favour of the primary carer's proposal to relocate.

[143]

Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe LJ said so in terms in *Payne v Payne* and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of para [26] ('Therefore her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children') for reevaluation to a status akin to that of a determinative presumption.'

4.11 The controversy surrounding *Payne* is that some subsequent cases had treated *Payne* as prescribing a decisive emphasis on the impact on the primary carer of a refusal of leave.

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

4.13 This view continues and is maintained in *Re C (Internal Relocation)* per Black LJ at [26] which this Court adopted in *ZJ*.

4.14 In Hong Kong the paramount consideration is whether the relocation is in the best interests of the child. Hence whether a relocation application is made by a primary carer or a non primary carer does not give rise to any presumption in favour of or against the applicant. There may be myriad reasons why such a parent applies for the relocation of the child. Ultimately it is one of the factors to be considered in the overall assessment whether the relocation is in the best interests of the child and the weight to be attached to this factor depends on the facts of the case. The value of *Payne* is that it 'identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case' per Black LJ at [144] in *K v K*. In my view *Payne* is not to be jettisoned. The relevant factors provide a structured framework in which the appraisal is to be made holistically.

The issues – overseas studies

Following the guidelines in *BA v BL (Child Relocation)*, I bear in mind no factor shall be determinative and the child's welfare / child's best interest is paramount. There is no presumption in favour of the mother as the primary carer. It is appropriate to analysis in accordance with the following factors:

Is the mother's application to remove the children to study in / relocate to Vancouver genuine in the sense that it is not motivated by some selfish desire to exclude the father from the children's life?

Is the mother's application realistic and founded on practical proposals both well researched and investigated?

Is the father's opposition motivated by genuine concern for the future of the children's welfare or is it driven by some ulterior motive?

What would be the extent of the detriment to the father and his future relationship with the children were the application granted?

What would be the impact on the mother, as a single parent, of a refusal of her proposal?

The review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate.

The issues – school reports and therapy

I shall then consider the arrangement on provision of the children's school report and whether to refer the father, the mother and the children to family therapy. The father's summons shall be considered within the boundaries of best interest of the children.

My view – overseas studies

- (a) Is the mother's application to remove the children to study in or to relocate to Vancouver genuine in the sense that it is not motivated by some selfish desire to exclude the father from the children's life?

The father submitted the mother has ulterior motive. The mother intends to deprive him of re-establishing bonding with both children by removing them out of jurisdiction.

The mother reiterated her decision to remove both children to Vancouver was to provide them with a good education environment. Her decision was supported by Mr Lau's recommendation which he finds to be genuine. The mother said her first move to arrange both children to study overseas was in 2018, a school offers and scholarships in a school in England were obtained. The school offers lapsed only when the father refused to give consent. She then attempted Vancouver which she managed to secure a job offer and two school offers.

Throughout the application, the mother had made herself clear she is determined to start a new life abroad. The mother explained she and both children were stressful over the years. She would be happy to see the children to focus on their studies in a more relaxed environment. The children would be happy to see her with a stable job. She is capable and confident to keep the job.

The mother claimed the father gave her pressure when filing applications with Court. The mother also wished "to be freed" from legal proceedings in future. The mother anticipated when she does not need to attend court hearings, both children would result "a healthier quality time when they meet the father".

I do not entirely share the mother's view. when mother complained the father to commence applications with Court, she had herself applied for variation of children maintenance in 2019. She took out summons for hearing as well.

I cannot be sure of whether the mother has an ulterior motive to exclude the children from the father's life but I can be sure the mother definitely wished to exclude the father from her life. The mother explained she was devastated because of the father's intervention of her life (and also the children). The mother would attempt all means to untie herself from the father's control, including leaving both children behind to stay in boy's home shall leave for further studies / to relocate is refused.

The mother could not pass the Payne v. Payne test. She would have known it would not be the children's best interest to put them in boy's home (or foster family). The mother admitted in her evidence that both children had no idea of how the life would be if they had chosen to stay in such institute. It is irresponsible to instigate both children to elect this option without giving them a full picture of what their life would be like. I should expect at least, the mother would arrange her sister or some members of her maternal family to take up interim care and control of both children after her departure. Or alternatively the mother should have explained to the children the plausibility to stay with the father. I see none has been arranged. The mother simply put the burden on the social investigation officer and this Court to arrange the accommodation for the children. When a mother prioritise her interest over the children, if it is without ulterior motive, she is selfish.

The mother did not give concrete evidence on the fallback position when I refused leave to both children to study in the Vancouver school. She simply says her sister might help or to be taken care of by social investigation officer. The children's alinement with the mother is obvious. Even if I do not comment on whether parental alienation existed, the mother's support and care to both children is vital. The mother and the children bonded lovingly, I anticipate the children will be supportive to the mother's move. When the mother intends to go, the children will follow. The mother was granted with care and control of the children from the outset, I regret to see her choice to leave both children to any third party (not the father) after her departure.

The mother repeatedly said she was unable to bring both children to the social welfare officer's office for monthly access with the father. She explained they were big kids and she has difficulty to persuade them to go. I accept this is the situation. To think of the way forward, for a mother who claimed access within the jurisdiction with the father is unsuccessful, it is hardly to believe she has parental authority to bring the children for access with the father when all three of them are staying overseas. The mother welcomed wide range of access from staying access, day access, phone, whatsapp, email or facetime access with the father. The children echoed with the mother on access which I have doubt.

To scrutinize the mother's application, she is applying for leave for the children to study in Vancouver, but in reality, in her evidence, she admitted this is an application for permanent relocation of the three of them. The mother said she will have with her all cash. She would first

rent an apartment after landing and then to purchase a house in due course. The mother agreed, at this moment, she will land in Vancouver on the strength of a working visa without an application on permanent residency. Of course, she could elect to do so if she has worked there for a couple of years. This is not a case where the children will return to town after they completed their studies but a case where they will leave the jurisdiction almost permanently. The children will be uprooted from a place that they have been brought up since birth. This is a very strong indication on the motive of the mother to bring the children with her and to exclude the father permanently.

Up to this stage, I see the mother is caring over the children. I do not believe her would leave the children behind in the jurisdiction and to go to take up the job in Vancouver alone. I consider the mother only persuading me by exaggerating her future move to proceed to Vancouver should leave be refused. I anticipate the mother will stay with the children in the jurisdiction. I conclude the mother has no real ulterior motive to exclude the children from the father's life save and except her has acted in a way created such an impression.

- (b) Is her application realistic and founded on practical proposals both well researched and investigated?

Daily life

The mother said her plan for the children to study overseas was well researched and investigated. After landing in Vancouver, the mother will find an Airbnb to live for a while. She will rent an apartment near the Vancouver school with minimal travelling distance.

The Vancouver school has boarding facility for the elder son, the younger son will be on day school basis for 1 year before taking on the boarding arrangement. School starts at around 8 am and finishes by around 4 pm. There would be school bus service. The mother will stay with the younger son in her apartment. She is able to return home when the younger son finished school on a school day. Both the mother and children visited the campus of the school when they travelled to Vancouver in the summer of 2018. The mother found both children are very fond of the school.

The mother was able to take care of both children on her own. She clarified in evidence that she has had an operation to remove gall stone previously, she was in good health at trial. She was only stressful when facing court hearings. She is mentally fit.

The mother has a job offer from a company in Vancouver, it was well - established in the industry. She said the job will be permanent and stable. She kicked off by receiving basic salary at a modest level, around CAD70,000. She expects a substantive raise in salary after she has obtained an insurance licence in near future. The working hours are flexible, too. She and the children are able to enjoy medical benefits. Her future employer promised to sponsor her permanent residency application in the future.

The mother is financially sound with the sale proceeds of the matrimonial home. She has over HK\$10 million cash with her, she is able to purchase a property in Vancouver in next couple of years. She suggested to the father that his could have paid up the children maintenance, HK\$40,000 per month annually or twice every year.

The mother is able to secure extended assistance from her uncle who was living in Vancouver. Her uncle agreed to look after both children if she was not available. Her uncle also agreed to be her referee when looking for an apartment.

The father challenged the mother's plan. He argued the mother's salary was alarming low compared with her income in Hong Kong. Although the mother was unemployed for more than one year, she could have earned nearly HK\$200,000 per month when she was working in the insurance industry previously. Her move to Vancouver was irrational, taking up the job which is only 1/6 of her salary in Hong Kong. It could never have been a career development. The mother failed to explain how she is able to make ends meet with her salary after tax.

I agree with the father. Even I accept the mother's financial plan and the daily plan, there are obvious uncertainty which I have some concern. My concern is not with the mother but the children.

Firstly, the mother is the primary carer and only person to take care of the children in Vancouver. Save and except her uncle, she has no assistance at all. The mother was required to sit for the insurance licence examination. I have no idea of the nature of the examination, passing rate or other relevant information of such examination. The mother did not give a concrete plan on the time management to take care of both children on the one hand, and to spare her time for revision on the other. Bearing in mind the mother is on her own, without the assistance of domestic helper, it might be better for the mother to land alone without the children, she can take care of herself. It is unreasonable and risky to take up the job and to shoulder the burden to take care of both children at the same time.

Secondly, I share the father's concern that the mother is only holding a working visa at this point of time. The working visa is subject to her working contract. In event the employment contract ended, the mother is required to leave Canada. The elder son might be able to take care of himself at boarding school, the younger son who is in day school would be left unattended. There is no evidence before me whether the mother's uncle is able to be responsible to take care of the younger son. No contingency plan has been submitted. The safety of both children cannot be safeguarded.

Thirdly, I agree with the father's submission that the mother had no connection in Canada. The mother's uncle is a retired gentleman in his 70s. He is living with his wife in the vicinity. The mother's uncle, the only relative living in Vancouver, was very distant to her and was only reconnected two years ago. He was initially described by the mother and the SWO being very supportive in assisting childcare. The mother admitted in her evidence that her uncle would not agree to assist her to arrange accommodation but only as an emergency contact. Both children had paid visits to him at his home. I understand it would be difficult for the mother's uncle to

testify in Court on the extent of assistance that he can rendered to both children. The SWO contacted the uncle via phone. Without the assistance of an international social investigation report, it is difficult to ascertain the true extent of assistance that the uncle is able to offer. I have reservation. Apart from that, the has no personal friends but former clients from her previous company. I find the mother has insufficient support in Vancouver.

The education itself

I doubt the mother's choice of school. The mother first applied for schools in the United Kingdom which both children have school offers. The school offers lapsed because the father refused to give consent. She and the children then planned for work and studies in Vancouver. The father takes issue that the educational systems of United Kingdom and Canada are different.

The mother was overwhelmingly occupied by her desire to leave the jurisdiction without a clear understanding of the education or examinations that both children will be facing in their life ahead. The mother had no concrete idea of the difference in both places. The mother made no thorough research on the difference in curriculum between United Kingdom and Canada. When being cross-examined, the mother mentioned a few subjects under the International Baccalaureate (IB) curriculum offered by the Vancouver school. It was discovered these subjects were not offered by the school because the school offers curriculum under British Columbia provincial education system.

With regard to language skills, the mother testified she has only arranged Spanish lessons for the elder son during weekends. The mother said if the elder son were not able to meet the Spanish level required in Vancouver, he can opt for Putonghua as a second language. Albeit this is not a point insisted by the father, I expect it will be vital for a Chinese parent to keep up the Chinese language ability of children nowadays. The mother swayed in a manner by leaving the Chinese language skill of children at a very low priority which is not to their best interest.

The transition period from local curriculum to Canadian curriculum. Both children had attended summer camp arranged by the Vancouver school in 2018. The mother did not arrange the children to attend summer preparatory course in 2019. The mother had no knowledge on the Canadian curriculum. It is always desirable to arrange the children to attend summer preparatory course operated by the school. The information about preparatory camp was well advertised in the school website. The mother testified that she was not aware of this. There is risk the children may not be able to adapt to the new environment, especially to be enrolled after Winter break. I have no evidence from the Vancouver school to comment on the ability of the children.

The mother did not arrange fall-back plan for the children when both or either of them could not adapt to the Vancouver school. The mother has no plan if the children cannot meet the requirement of the Vancouver school. The Vancouver school ranked high in academic achievement in Canada. There might be a significant risk the children might not be able to meet its demand especially when the children had not attended any bridging courses nor have been exposed to the material.

The mother suggested the children will be able to attain higher English standard with a good chance to be admitted in universities, less effort can be put in learning Chinese. Nonetheless, the mother was unable to demonstrate her understanding with the education system in British Columbia, Vancouver. No statistics were shown in her evidence on the probability that the children might be accepted in universities.

Access

The mother is willing to bring both children back to Hong Kong at least once a year for access or the children can return by themselves with airline unaccompanied minor service. Both children can stay with the mother's sister during access. The mother also welcomed the father to communicate with both children by email, whatsapp, facetime and telephone. The father is able to have access with both children during term break if he travelled to Vancouver. The mother suggested the father could bring both children on vacation. The mother sees the father and both children is able to rebuild their relationship.

As I have mentioned earlier, I doubt the mother can put her access plan in action. Both children resisted the father, access within the jurisdiction was very limited. The children are unwilling to see the father. During those limited access, it normally turned to a fight and had ended very soon. The mother repeatedly claimed she has difficulty to bring both children from home to the SWO's office for access. The mother explained the children are young gentlemen now who would not follow her instructions unquestioned. I am in serious doubt how the mother or the children will carry out the access plan after leaving this jurisdiction. I see the father had continuously attended access even though he had no idea whether both children will come. The father left the social investigation officer's office with nothing. It seems to me the children are setting a precondition for access in exchange for the father's consent on removal.

With reasons foregoing, I find the removal plan was inappropriate and insecured, it was not well researched nor investigated.

- (c) Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?

Communication between father and sons

The mother said the father has disregarded the children's request to study overseas deliberately. The children had sent an email to the father as early as 22 March 2019 where no reply was noted until 4 April 2019. The father was not active in considering and discussing the children's plans but a blanket refusal of all proposals, including this application.

The SWO testified the father and son relationship deteriorated since 2015. It was his observation that it was unrelated to the cancellation of trip to United Kingdom years ago. He said the father has been continuing refusing to allow the children to participate in overseas school trip which had caused them frustration.

The SWO confirmed the father had arranged a meeting with the children discussing their overseas studies with solid suggestions. In turn, the father requested for some detailed information. He later confirmed the details requested by the father was relevant. The children (or the mother) did not reply to the father adequately.

The SWO considered the father had the means and ability to take good care of the children. His concern was about the reluctance of the children to stay with the father. The SWO considered the children would not feel abandoned even their mother would leave them in the jurisdiction while she would continue her plan of relocation to Canada.

The SWO in his oral evidence agreed the father is the best person to take care of the children if they agreed to stay with him.

I understand there was almost nil communication between the mother and the father. The mother asked both children to discuss their education plans with the father. The discussions fell apart after the father had canvassed the plan. The father had certainly raised inquiry on the viability of doing so. Both children could not answer his questions on studying overseas adequately. I am glad to see, at least, there are some communications between the father and sons. Nonetheless, the father expected both his sons to answer his questions at an adult comprehensible standard that both children are unable to meet.

Having said that, the father's concerns were relevant. Both children are at school age, they do not think as thorough as the father does. Access has never been smooth since 2015, the children do not favour even to talk to the father. Given the current situation that both children affiliated to the mother, it is understandable that they were only waiting for green light from the father only. As a result, the discussion on studying overseas between the father and sons was unsuccessful.

The father's child care plan

The mother complained the father did not apply for variation of custody, care and control of the two children, he should have known should leave be refused, both children will be left in abeyance and may have resulted to reside in boy's home. The mother criticized the father has no genuine intention to take care of both children should leave be refused. He had only intended to ruin the children's opportunity to study overseas. The mother denounced the father of his

inability and insincerity to comfort the children should leave be refused. The father's plan to rent a flat next to his rented property was only disclosed at trial, the mother described it as an impromptu gesture.

The father considered the children performed satisfactorily in the current curriculum. If both children were unhappy in school, the mother shall consider local international school and to see if they could achieve better grades. Chinese is a core subject to students in Hong Kong. It is not a good reason to go for overseas studies solely because the elder son had failed in Chinese language. The mother should look for assistance from school or private tuition. The younger son can cope with Chinese language. The mother may have deprived the younger brother to learn Chinese if she had elected leave at this stage.

I disagreed with the mother's criticism against the father that he had obstructed the children's attempt to be enrolled in an international school in Hong Kong. So far as the evidence is concerned, the mother had only applied for one popular international school in town. There are abundance of choices not being considered or applied for.

The father is an orthopaedic specialist, I trust his knowledge in looking for medical schools worldwide. Although it is premature to say whether both children will be admitted in medical schools, his view on choice on schools should be given due consideration.

The mother submitted both children feel under pressure at school, they do not like schools. I dare to say this is something children will normally promulgate. The mother bears responsibility to explain to both children correct values in life. The mother has chosen the Vancouver school which ranked high among other, both children might feel under pressure again if they could not cope with the syllabus. Both children might not like the school rules in the Vancouver schools. This is the least attractive argument in the mother's application. The father has reasons to challenge the mother lacks parental skills. Be it may not justify, the father has a valid reason to oppose.

I am not persuaded by the mother. I agree the father has genuine concern of the children's education.

The SWO could not comment on the impact on father-son relationship by the relocation. In his report, he however mentioned, "it may be worse more as the two children may feel free by living overseas and in absence of a Court order on supervised access, may see no need at all to have connection with Mr [X](the father)".

The SWO investigated on this point as well. He accepted the father's opposition is genuine. On this part, I share the same view.

- (d) What would be the extent of the detriment to the father and his future relationship with the children if the application been granted?

The father and son relationship remains uncertain. The SWO said the tension persisted because the father refused to give consent to the children to study in Vancouver. He advised the father to consider agreeing to the mother's application. The children might think positively and resulted a better relationship. The father sees it differently. He submitted both children will leave him permanently. The father and son relationship will end. He quoted examples that the mother persistently denied access. He had grievance the mother did not comply with the Court orders for access. He has difficulties to see his sons. Both children affiliated with the mother for quite a substantive time. The father anticipates the mother will deprive him of access with both children after allowing them to study overseas. He expects no further information of both children will be conveyed by the mother, the father will be ousted from the life of both children.

I am uncertain of the father and son relationship after the children's departure. I am not confident that the mother is able to facilitate children's access with the father. The mother will be shouldering household chores, coping with new job, preparing for her professional examination. Both children need to adapt to the new environment. Given the disappointing access record here, I see it would be more likely than not that access would be worse than now. The chance of rebuilding father – son relation is almost impossible.

(e) What would be the impact on the mother, as a single parent, of a refusal of her realistic proposal?

The mother blamed the father did not concern her feelings, he has no empathy on her. The mother is always in a state of distress. Yet she is determined to start a new leaf in her life in Vancouver should leave for removal be refused. Let alone the mother's emotional feelings, she has no impact on refusal of leave.

The mother even agreed to leave the children behind in the jurisdiction when leave is refused. She said the children had been supporting her decision to go by herself to start her new life. She also said she had been sacrificing enough for the past few years and she should earn back her life. This is a de facto situation the custody, care and control of the children are given up. She did not consider the children would be upset or felt abandoned if she left them behind in case the Court ruled against her.

(e) Children's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate.

Children's view

Children's view is a vital part to consider. Both children are aged 13 and 12 at time of trial. They expressed their unequivocal view to the SWO that they wished to continue to stay with the mother and to study in Vancouver school. They have high expectation that the Court will grant leave for removal. Both children are very determined and are very supportive to the mother's move to Vancouver. In event leave for removal be refused, both children indicated to the SWO that they are still happy to see the mother to move on to her new life in Vancouver. The children have concern with the poor relationship with the father, they were not well acquainted with his

cohabiting girlfriend and his young daughter. The children had chosen to stay in the boy's home or a foster home (to be arranged by the Social Welfare Department) but not with the father after the mother's departure.

The children's view is highly respected. This is not case where the parents are disputing care and control or access where all can be ordered and supervised by Court orders. I am now looking for the best arrangement for the children's future in light of the mother's application, to remove them to a foreign place with no substantive connection. The bondage between mother and the children is very strong, it is not surprising both children elected to follow the mother's choice. The mother's persistent wish to leave the jurisdiction triggered the children's feelings. The children are willing to do anything for the mother, even to sacrifice their luxury homes to stay in boy's home. At this moment of life, the mother is everything in their life. I can only say the children's view is very well noted but there are other more imperative factors to be considered.

Children's academic results

On the point where the children's academic results in Hong Kong, I note from the academic result of the elder son was a fair one, he ranked 116 over 198 in the school, he has good achievements in music, he had only failed in Chinese language. The mother said local tuition have no positive effect on the elder brother. The younger brother has all rounded performance in his primary six school year. I am not convinced that the sole failure of Chinese language for the elder son equals further his studies in Vancouver, or overseas in general. I can only regard this is one of the elder brother's weakness in his academic performance which required special attention or assistance. Having said that, unsatisfactory academic result is only one of the reasons that parents would consider to arrange their child to go for overseas studies. I see this point is rather neutral.

The mother said she was unable to enrol both children to an international school in Hong Kong. I take judicial notice that there is abundance of international schools in Hong Kong. The mother has opted for two very popular ones in Hong Kong and it would not be surprising that admission would be very difficult. Again, I do not agree both children lack opportunity to study in Hong Kong, it was only the mother's choice rendered them in this uncertain situation.

Social Investigation Report – whether recommendation be adopted?

The approach in considering social investigation reports is well settled in *Naziya Aslam v Rafaqat Ali (Custody and Removal)* [2009] HKFLR 294, the Court of Appeal made observation on the status of a recommendation in a social welfare officer's report:

“[27] It is important, however, that the status of a recommendation in a report from a Social Welfare officer is not raised to the status of a decision which should only be interfered with on grounds similar to an appellate court interfering with an exercise of discretion. The references to the cases referred to are instructive in this regard. Wood J in the case of Stephenson v Stephenson pointed out, at pages 1145-1146, that the role of the welfare officer was to assist the court by informing the court of factors which the court would otherwise not know. He went on to say that the officers usually conclude their

reports with a summary of the factors for and against each course which it is open to the court to take. He then said “. . . in some cases, he or she may feel sufficiently strongly about a case to make a positive recommendation - indeed, on those occasions when they give oral evidence the court sometimes asks for the view of the welfare officer.”

[28] I would agree with Wood J, that the welfare officer's position to make a recommendation should arise when the circumstances of the case are particularly clear. The welfare officer should not make a recommendation as a matter of course and should certainly not do so where it is a question of a balancing the relative merits of one course or another, unless specifically invited to do so by the court. The exercise of the judge's discretion should not be trespassed upon. In any event, it seems to me that the correct approach to a recommendation made by a welfare officer is set out in the judgment of the Court of Appeal in *Re V* (residence: review) [1996] 3 FCR 101 at p.110F:

‘In a judgment where a Judge gives reasons for his decision and those reasons demonstrate that his decision is not manifestly wrong he is not under any further duty to spell out his reasons for departing from the court welfare officer's report. In this situation the Judge's reasons for reaching his own decision are normally the very reasons for his declining to follow the court welfare officer's recommendation.’”

(emphasis added)

The father submitted the SWO did not fairly evaluate the mother's application, in particular, the risk and benefit of the removal on children's wellbeing. He supported the removal application by children's wish rather than their actual long-term welfare. He failed to consider thoroughly the father's opposition. He accepted the mother's proposal on hearsay information. The father said the SWO was very biased.

The father complained the SWO's inability to assist in supervising access with the children. All social investigation officers have limits in solving family problems. In this case, the SWO has put his utmost effort in doing so especially he was a contact person, a messenger, a liaising person between the mother, the father and the children. The mother shut down all communication between herself and the father. The mother arranged a cellphone specifically for the communication between the father and the children. The father said the children never answer his phone and so on. The children's strong resistance elevated the tension. This is spiral effect. The SWO's recommendation aimed to ease the tension and to give all parties an opportunity to rest.

What I can see from the SWO report is a recommendation for the mother. I do not find the SWO biased on the mother because I trust him to very familiar with this case. He has followed both children for years and a number of social investigation reports have been compiled. The SWO has sympathy for the mother and the children. He repeatedly stated in his evidence that it might be a turning point for the relationship for father and the children if the father agreed to let the children to study in Vancouver. The children might feel pleased and their attitude will change gradually. In fact, the SWO has same difficulty as I do in making a decision. I see his helplessness

here and giving them a break might achieve positive results.

Despite the fact above, the SWO opined both the mother's application and the father's opposition are genuine. He had chosen to give weight to the children's view with a positive recommendation.

I agree with the father that Mr Lau may not be able to consider the education plan to the fullest extent. In the mother's application, she did not give thorough evidence on the education plan of the children. She has my indulgence because she was not represented. I do not intend to repeat myself with the analysis above.

For one point that I notably concur with the father is the mother's landing status. Vancouver is not an alien city to Hong Kong people, the mother should be absolutely fine to take up her job there. She could proceed with her application with permanent residency after a few years' time. Or else, the mother can choose to return to Hong Kong or to leave Vancouver if she had later found the place does not suit her. The only concern that I have had now is that the mother is taking both children with her with a working visa. She lands in Vancouver without an application of permanent residency which can only be applied for after a certain period of time. If the mother's working visa be revoked for any reason, she has to depart. This is a situation that I have serious concern.

I failed to see the SWO has explored the situation that I have mentioned. With caution, I exercise my discretion not to adopt his recommendation.

Current social phenomenon

The mother said due to current social unrest, it would be in the children's best interest to bring them abroad for education. The mother said it is best interest for the children to leave Hong Kong that she could attain effective parental control over the children. The mother's concern is certainly valid but it is far from a determinative reason to bring the children with her.

Children's accommodation after the mother's departure

The mother made herself clear to leave for Vancouver in early 2020. The care and control of both children should be explored with the SWO or any social investigation officer in charge. The SWO agreed it would be in the best interest for the father to have care and control of both children after the mother's departure. The father undertakes to continue the current arrangement for the children including the employment of the current domestic helper, the extracurricular activity, schooling and social function.

The mother proposed to arrange the children to stay in foster home or boy's home. Having said that, as I understand from the SWO that both children were not aware of the real conditions of either foster family or boy's home. I shall direct a hearing with the presence of the SWO or social investigation officer in charge to explore the choice of accommodation of the children after handing down this judgment.

Due to the outbreak of the new coronavirus (COVID – 19), for public health consideration, the Judiciary had announced a general adjournment period since 29 January 2020. This judgment was handed down during the general adjournment period. No direction hearing can be fixed for the children's choice of accommodation. I shall fix a directions hearing date upon resumption of Court hearings. The mother, the father and the social investigation officer will be notified accordingly.

I am uncertain whether the mother will leave the children behind, the father might need to take out an urgent application for variation of custody, care and control of both children in event the mother left the jurisdiction. For reason the general adjournment period is unprecedented, the father may fix his summons (if any) to be heard together with the direction hearing I mentioned above or to seek directions before a duty judge.

Conclusion on mother's summons

With the reasons foregoing, I refused the mother's application to remove both children to Vancouver for further studies / relocation.

My view – school reports and therapy

School reports

The father, the non-custodial parent, seeks to exercise his rights on the children. He relied on PD and KWW (Court of Appeal 188/2009, 9 June 2010), Hon Hartmann JA explained the principles of joint custody and particular on point the rights of a non-custodial parent:

"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. That 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 the 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."

The father took out his application because he is disappointed with access with the children. Not only the children defaulted in access, if they had attended, no quality time had ever been noted. The father had proposed to do activities with the children but were declined. The children turned down the opportunity to meet with their step sister. Sometimes, the children aborted the access in less than one minute.

The father complained, the mother had not provided the him with sufficient school information or notice or extracurricular activity for at least past 4 years. To exemplify, while there were 3 school reports for secondary school and 4 school reports for primary school each year. The mother had only provided 4 school reports to the father in the past 3 years. The father accused the mother had only provided some school notices to him only. She did not inform him the children's extracurricular activities, holiday arrangement and health issues.

The SWO confirmed the mother did not provide any school information to the father since 2015. The quality of visit access was poor because of children's attitude.

When I recall the background of the parties, it is not surprising that the provision of school calendar, school notice and students' reports are not to the expectation of the father. It is advisable to clarify the mother's responsibility on this issue to avoid future dispute. I should adopt the same method by ordering the mother to create a new email account solely for

provision of the above information to the father. The mother should simply forward an attachment in clear image to the father without written messages. The mother once complained the father wrote lengthy email to her. I would suggest to the father to refrain from doing so.

The mother retained the right to give reply on school notices, I do not intend to allow the father to log in to the school intranet.

Any questions concern the children should be made to the school, the arrangement here is solely for the smooth provision of school information. The father is in fact entitled to know the health conditions of both children. I also would suggest to the mother to keep it as a practice, whenever she had received important information from school or doctors, the first thing to do after reading is forwarding to the father by way of an attachment in an email.

For avoidance of doubt, I the categories to be provided to the father should be as follows:

student reports (report cards);

all school notices involve parent participation;

school notices and relevant information on the children's extracurricular activities;

school calendar; and

medical reports of the children (if any).

Family therapy

An order of professional therapy could not be ordered without consent of the mother. The mother considered clinical psychologist input has no value and thus could not see any need of such arrangement. She did not attend the session with a clinical psychologist specializing in counselling and family therapy during the SWO's investigation.

Family therapy will be carried out usually on recommendation of social investigation officers. The important part would consent of all participants. I understand the father (with professional medical knowledge) sees professional intervention is necessary in rebuilding bonding between the sons and himself. I am of the view, in this case, would have limited result when the mother and children maintained an incorporative attitude.

No order on family therapy by a clinical psychologist will be ordered.

Conclusion & the way forward for the father's summons

I have sympathy for this family. The mother first commenced a divorce petition (it was withdrawn) as early as 2009. Their matrimonial dispute has been ongoing for more than 10 years. The children's life has been intertwining with matrimonial litigation. The elder and younger sons are now 13 and 12 years old. To some extent, I agree with the SWO that both the mother and the father should stop accusing the other. Or else, the disputes will be never ending and certainly it is not in the best interest of the children.

I refused the mother's application to remove both children to Vancouver for overseas studies and I hope the mother would reconsider whether to leave both children in the jurisdiction.

I clarified here what children information the mother has to provide and the mode to do so. I hope the father will be comfortable to learn the children's happenings at school and also health issues.

The father, as a medical professional, might have to tone down a bit when discussing issues with the children. A fatherly figure is of significance in son's upbringing. The father and both children have wasted enough time in the past decade. I sincerely wish the parties could rethink what is best interest of both children.

Court Orders

I ordered as follows:

The further studies / relocation summons:

The mother's (the petitioner's) summons filed on 17 January 2019 be dismissed.

Costs order nisi that there be no order as to costs of the mother's (the petitioner's) summons filed on 17 January 2019. The said costs order nisi be made absolute unless either party to vary by an inter parte summons with supporting affirmation within 14 days from the date of this judgment.

The direction hearing be fixed upon resumption of Court hearings with 30 minutes reserved for directions of the interim arrangement of both children.

The social investigation officer do attend the direction hearing.

The school reports and family therapy summons:

the mother do create a separate email account solely for the purpose of provision of children information to the father within 14 days hereof.

the mother do provide the following to the father by way of attachments within 2 days from receipt:

student reports (report cards);

all school notices involve parent participation;

school notices and relevant information on the children's extracurricular activities;

school calendar; and

medical reports of the children (if any).

Costs order nisi that there be no order as to costs of the father's (the respondent's) summons filed on 25 February 2019. The said costs order nisi be made absolute unless either party to vary by an inter parte summons with supporting affirmation within 14 days from the date of this judgment.

(J. Chow)

Deputy District Judge

Petitioner : appeared in person

Respondent : appeared in person

Source & reproduction note

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

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=128325

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/ysym-v-lhb-2020-hkfc-35>

Prepared on 26 October 2026 · Esheria