

Series on Children Matters – Children Relocation

Sherlynn Chan and Rachael Leung

Deacons' Family Law Practice was recognized as the “*Family and Matrimonial Firm of the Year*” in the Benchmark Litigation Asia-Pacific Awards 2023, and has extensive experience in handling diverse children matters in addition to financial matters.

In 2023, we published a series of articles on Mainland/ Hong Kong Cross-Boundary Marriages (see [Article 1 on Matrimonial Property rights](#), [Article 2 on Nuptial Agreements](#), [Article 3 on Division of Matrimonial Assets](#), [Article 4 on Asset Dissipation](#), and [Article 5 on Third Party Interests in Family Proceedings](#)). This year, we will focus on children matters, such as relocation, return of children to Hong Kong, wardship, custody, care and control.

This first article will explore the issue of permanent relocation of children from Hong Kong to other jurisdictions. The following is an example of the type of advice often sought from our clients regarding relocation:

“I am from Singapore and followed my husband to Hong Kong after we got married. We are now in the middle of our divorce proceedings and unable to agree on the care arrangements for our 8-year-old son. Can I just leave Hong Kong with our child pending conclusion of the proceedings?”

Court Procedures

The Child Abduction and Custody Ordinance (Cap.512) provides that if there are ongoing proceedings concerning the custody or access of a child, a person must not remove the child out of Hong Kong without the consent of each party to the proceedings. The court may make an order prohibiting the removal of the child out of Hong Kong. Accordingly, parents cannot unilaterally remove their children out of Hong Kong temporarily or permanently, without seeking leave from the court.

The Matrimonial Causes Rules (Cap.179A) stipulates a requirement for parents to make an application for leave to remove their child(ren) permanently from Hong Kong.

For children born to unmarried parents, even though birth mothers are the sole legal custodian of their child(ren) pursuant to the Guardianship of Minors Ordinance (Cap.13) (GMO), they still have the responsibility to make a formal application to the court for relocation and inform the birth father¹. Fathers of children born outside wedlock, on the other hand, will require orders or declarations under the GMO and/or Parent Child Ordinance (Cap.429) to acquire parental rights over their child(ren) before seeking leave from the court for relocation.

The court will take a dim view of parents who unilaterally remove their child(ren) from Hong Kong and usually order their prompt return.

The Legal Principles

¹ LCH v JMC [2019] HKCFI 1894 §43

The principles of the English landmark case of *Payne v Payne* [2001] Fam 473 were adopted by the Hong Kong Court of Appeal in *SMM v TWM* [2010] HKLRD 37 CA, and set out guidance to our courts on approaching relocation applications as follows:

1. The first step is to assess the genuineness of the application and whether the relocating parent's proposals are practical and realistic.

"Is the mother's [father's] application genuine in the sense that it is not motivated by some selfish desire to exclude the father [mother] from the child's life? Then ask, is the mother's [father's] application realistic, i.e. founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow"

Usually, the relocating parent's proposal will set out the detailed plans for him/her and the child(ren) in the new country, including housing/accommodation, schooling, healthcare, finances, and support network (in particular, ties to extended families and whether one is in a new relationship). Another critical element of the proposal is the willingness of the relocating parent to facilitate access between the child and the stay-behind parent, and the actual access plan.

2. If the application is opposed by the stay-behind parent, the Court will consider the impact on him/her, the genuineness of the opposition and the extent of the detriment to his/her future relationship with the child.

"If, however, the application passes these tests then there must be a careful appraisal of the father's [mother's] opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him [her] and his [her] future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal [paternal] family and homeland?"

The court will carefully appraise the reasons for objection and determine whether it is motivated by genuine concern for the future of the child's welfare, or whether it is driven by ulterior motives or spiteful retaliation. In some cases, the court may be of the view that maintaining the status quo is in the best interests of the child. In the Court of Appeal case of *CN v LYP* [2023] HKCA 1173 §124, one of the Judges commented that:

"At the same time, experience and common sense will tell us that, generally speaking, it will be less disruptive to the life of a child if he or she is to be relocated together with a parent who is the primary carer and a child of tender years is best being looked after by the mother".

3. The Court will also consider the impact on the relocating parent, if his/her application is refused.

"What would be the impact on the mother [father], either as the single parent or as a new wife [husband], of a refusal of her[his] realistic proposal?"

In many scenarios involving expatriate families, the relocating parent who is the primary carer of the children, may not have the necessary support network in Hong Kong after the divorce. Not allowing them to return to their home country may negatively impact their emotional wellbeing and ability to care for the children, especially when the stay behind parent has a new partner or is unable to spend meaningful and quality time with the child.

4. Finally, the Court will consider the child's welfare as the paramount consideration in reviewing the application.

"The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate."

Since the Court's paramount consideration is the best interests of the child and his/her welfare, in determining the same, the court will usually consider the factors set out in the welfare checklist

(Welfare Checklist) in the *Children's Proceedings (Parental Responsibility) Bill*² (which has yet to be passed into law in Hong Kong), such as the child's ascertainable wishes and views, his/her physical, emotional and education needs, and relationship with each parent and other persons etc.

Other Matters Considered by the Court

(a) Social investigation report (SIR)

The SIR is a material piece of evidence which the court will consider when assessing a relocation application. It is also common for the court to call for an international SIR to collect information on the child's potential life in the new country.

The SIR is written by a social welfare officer (SWO) of the Social Welfare Department. As the “eyes and ears” of the court, the SWO will interview the child, the parties and other people who are involved in his/her upbringing, such as his/her maternal grandparents and class teachers. Apart from interviewing the child with each parent separately, the SWO may also interview the child alone if he/she is of appropriate age.

The SIR will contain the SWO's factual findings and recommendations to the court. Whilst the court is not bound by such recommendations, it is “*highly desirable*” that the judge should explain why he/she departs from them³.

(b) The Child's View

One factor listed in the Welfare Checklist is the child's view, where ascertainable in light of his/her age and understanding. As a general rule, the court will treat a child's view as follows⁴:-

- For children above 10 years old, the court will give considerable weight to their views.
- For children between 6 to 10 years old, they are regarded as in the intermediate stage.
- For children under 6 years old, their views are treated as often indistinguishable in many ways from the wishes of the main carer (assuming normal development).

However, there are exceptions in some cases, such as *CN v LYP*, whereby the Court of Appeal held that the Family Court Judge erred in placing little or no weight to a 7-year-old girl's views and preference on relocation, as the Court of Appeal found that the child had “*attained a sufficient degree of maturity for the court to take account of her views*”.

To facilitate the court in hearing the child's views, the Judiciary issued “*Practice Direction - PDSL5 Guidance on Meeting Children*” to assist judges in deciding whether it is appropriate to interview a child, and if so, in what circumstances and in accordance with what safeguards. However, it is important to note that the purpose of the child meeting the judge is to “*enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her*”, but not to gather evidence, which is the responsibility of the SWO.

Recent case law in Hong Kong

CN v LYP [2023] HKCA 1173

This case is unusual in the sense that relocation of the children was inevitable and the Court was mainly required to determine the location of the relocation – whether Dongguan with the mother or Singapore with the father.

² Please refer to section 3 (2) of the Children Proceedings (Parental Responsibility) Bill for the full welfare checklist. Link: [https://www.lwb.gov.hk/en/parentalresponsibility_consult/doc/Draft_Bill_\(Eng\).pdf](https://www.lwb.gov.hk/en/parentalresponsibility_consult/doc/Draft_Bill_(Eng).pdf).

³ *WSM v FSY*, CACV352/2004, unreported, 27 July 2005 §22

⁴ These principles are set out in the English case of *Re L (A Child) (Contact: Domestic Violence) [2001] Fam 260* which have been widely adopted in cases in Hong Kong such as *CN v LYP*.

The mother is a Mainland resident and the father is a Singapore national. Following the breakdown of the marriage, the father returned to Singapore on his own in late 2020, whilst the mother unilaterally removed the elder child from Hong Kong to the Mainland without the father's consent, and left the younger child in her sister's care in Hong Kong. In the following few years, the mother would visit Hong Kong frequently to look after the younger child through repeated renewal of her double-entry permit. Since the father's return to Singapore, he only had physical access to the children 4 times.

In emphasizing the children's developmental and emotional needs to maintain physical ties with the mother, the Court of Appeal overturned the Family Court's decision allowing the father, who was almost a stranger to the children, to relocate them to Singapore and instead, granted leave to the mother to relocate the children to Dongguan.

SG v GDV [2023] HKFC 15

The father applied to permanently remove the children to the USA on the premise that the mother would have one hour daily online access and three round trip tickets to the USA each year paid for by him. The mother opposed the application because she feared that her relationship with the children would cease after relocation. Given the father's past consistent efforts in sabotaging the mother's relationship with the children, the court accepted that the father would not try to maintain the same after relocation.

Whilst the father appeared to be generous in purchasing 3 sets of round-trip tickets to the USA for the mother each year, the court considered such offer to be "disingenuous", as it did not cover accommodation and other costs of the trip for the mother, who was unemployed, had no stable income and extremely limited savings. Further, in dismissing the father's application, the court accepted the expert evidence of a USA immigration law expert that it would be very difficult for the mother to visit, let alone to immigrate, to the USA given her immigration history and employment status.

Conclusion

At the end of the day, each case depends on its own facts, and the court will consider all relevant factors and circumstances before arriving at a decision which is fair and reasonable to the parents, with the best interests of the child as the paramount consideration.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters involving children issues. Please reach out to us if you would like to know more.

Want to know more?

Paul Kwan
Partner
paul.kwan@deacons.com
+852 2826 5354

Sherlynn Chan
Partner
sherlynn.chan@deacons.com
+852 2825 9328

Cecilia Lau
Consultant
cecilia.lau@deacons.com
+852 2826 5330

The information contained herein is for general guidance only and should not be relied upon as, or treated as a substitute for, specific advice. Deacons accepts no responsibility for any loss which may arise from reliance on any of the information contained in these materials. No representation or warranty, express or implied, is given as to the accuracy, validity, timeliness or completeness of any such information. All proprietary rights in relation to the contents herein are hereby fully reserved.
0224 © Deacons 2024

www.deacons.com