

HONG KONG / JUDGMENT

A v. B**[2022] HKFC 203****COURT**

Family Court

DECIDED

23 September 2022

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**[2022] HKFC 203 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 9824 OF 2015**

BETWEEN A Petitioner and B Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing:
16 19 November 2021 and 4 7 January 2022 Dates of written closing submissions: 11 February 2022
Date of written replies: 28 February 2022 Date of Judgment: 23 September 2022

J U D G M E N T (Relocation)

Introduction

This is an application by the Petitioner mother dated the 5 October 2020, for leave to permanently remove the only child of the family out of the jurisdiction of Hong Kong in order to relocate with her to Sydney, Australia. The child N was born on the XXXXXX 2011 and is now 11 years of age. She was 9 years old at the time of the application. The father opposes the mother s application. Unlike in other cases, there are no additional applications before the court. By virtue of a court order dated the 26 February 2018 the parties have joint custody of N, with care and control to the mother. The access arrangements are defined and are set out in considerable detail in that order, which is in part due to the fact that the consent summons was ultimately based on a mediated agreement. The father enjoys regular access, including overnight staying access and contact otherwise when he has supper with N or he takes her to school. He sees N, sometimes for short

periods, sometimes for longer periods, for 10 days out of every 14 during term time. The parties also share the school holidays. In the event that the relocation is denied neither party makes any further application to change these arrangements. However, there is disagreement with respect to the access arrangements in the event that the relocation is permitted. The parties agree that they shall continue to have joint custody of N whether she goes or she stays. All relocation cases are difficult, given that they are, by their very nature binary, but this one is perhaps more difficult than most. Both parties are bright, and they each have the benefit of a specialist family law firm to assist them. They have each presented a very arguable case, although one, that in so far as the mother is concerned at least, has changed considerably over time. I should add that I have found it a difficult case to determine. The mother has termed this a going home case although this is not accepted by the father. The other point to note is that this is not to be categorized as a financial application either. The parties finally reached an agreement on their finances during the course of their divorce proceedings and a consent order to that effect is dated the 18 August 2017. The decree absolute was granted on the 28 March 2018. Thus, this application is a standalone application brought approximately 2 and years after the divorce proceedings were concluded. The mother appears to have been very well provided for under the terms of the financial agreement. She says that she has recently sold the former matrimonial home and that she has 5 other investment properties, which she is also in the process of selling. She also holds a number of other investments. Although she says that she intends to set up an online XXXXXX business it is not clear whether or not she is necessarily going to need the income from that business going forward. But the application is also brought at a time when the global Covid-19 pandemic continues to dictate how and when we can travel. Although many countries have lifted all restrictions, including Australia, Hong Kong has not. Although it would be fair to state that the situation has eased significantly when compared to that either at the date when the wife made her application in October 2020 or at the time of trial in late 2021\early 2022, or indeed when the closing submissions were filed. But the fact remains that at the time of writing Hong Kong was still in the grip of the so-called 5th wave with infections sometimes topping 10,000 a day. Travellers still need to quarantine in a hotel for a short period of time and to observe certain protocols, although that is now more limited when compared to the stringent requirements imposed previously. But as things progress and given that China continues to maintain a zero Covid policy, there is still the possibility that things may change again and that more stringent travel restrictions may be imposed in the future. Of course, the hope is that this will not be the case and that Hong Kongers will shortly be able to enjoy international travel with no requirements for hotel quarantine. But this is in no way guaranteed. What then are the main issues to be considered? The main issues then are these: Should permission be given for N to leave Hong Kong in order to relocate to the Sydney, Australia with her mother? Should any further orders be made once that issue has been determined?

Background

Although the parties eventually reached an agreement on all matters in dispute, it would be wrong to categorize this case as in any way amicable. The parties were at logger heads for much of the litigation and were in and out of court frequently. There are three Rulings/Judgments on the court file, the first dated the 22 August 2016, was a ruling on choice of schools and the father's access arrangements, the second, dated the 25 January 2017 was a judgment on discovery and the third dated the 23 June 2017 was a judgment on maintenance pending suit/interim maintenance and litigation funding. In the last judgment I set out the background to the case as follows:

11. In short, the parties met in 1996 in Hong Kong and married on the X October 1999. Both sides of the family had emigrated to Australia in the 1980s and both parties were educated in Australia as a result. It seems that the marriage was not a particularly happy one, with periods of separation and subsequent reconciliation. The parties finally separated for good in July 2014 when the husband moved out of the former matrimonial home. On the 31 July 2015 the wife issued a divorce petition based on the husband's alleged unreasonable behaviour. This was initially defended, but thankfully the parties were able to come to terms on this aspect of the case at least and in November 2015 the particulars were amended to ones that were more agreeable to the husband. The divorce petition then proceeded on the basis of mild unreasonable behaviour particulars. The decree nisi was pronounced on the 21 December 2015.
12. The parties have one child N who will shortly turn 6 years of age. Unfortunately, there has been a great deal of disagreement concerning the arrangements for N and the parties have been in and out of court on a fairly regular basis since the petition was issued arguing over arrangements for her care, access and schooling. In the event that the parties are not able to reach consensus it is anticipated that this aspect of the case will need to be set down for trial. The father has made it clear that ultimately, he would like an order for joint custody and either shared care or joint care and control. This is resisted by the mother, although there seems to be a tacit understanding that there should be an order for joint custody. However, to date no consent summons has been filed to this effect. It is hoped that the parties will now be able to narrow their issues with respect to N and that the matter can then be set down for trial without further ado. The parties have already attended one Children's Dispute Resolution hearing and there has also been a further hearing on education.
13. There has also been a lot of disagreement with respect to the parties' finances and there have been ongoing issues with respect to discovery. It is the wife's case that the husband is a man of great wealth and that this wealth emanates from a number of family companies. She maintains her position that the husband has not been full and frank in his disclosure to date. On a smaller scale there have also been issues with respect to monies held by the wife, which she maintains are ultimately beneficially owned by her father. In the Ruling on choice of schools and access arrangements, I had also set out the background to the case by reference to the submission from Mr Pilbrow S.C for the mother. I shall repeat some of that

again here, as it sets out what appears to have been a common understanding at the time, namely that N would, in due course, attend XXXXX School in Sydney. As I understand it XXXXX is an independent non-denominational girls school for both day girls and boarders. It does not appear to be disputed that N was put down at birth for a number of schools in Sydney and elsewhere, including Hong Kong and the UK, in order to ensure that she had a maximum number of educational choices as she got older. In this instance it seems that the understanding was that N would board. However, as is clear from both parties affidavits/affirmations, it is also evident that no subsequent agreement was reached in this respect. In particular, the mother has stated on a number of occasions that she is not prepared to allow N to board, even though the issue of boarding does not form part of the present application. The father, for his part, says that there has not been any agreement that N should leave Hong Kong, either to board or otherwise. The submission states inter alia as follows:

4. Both counsel have set out the background to this matter in their respective submissions. Mr Pilbrow S.C. for the mother says as follows: Both the Petitioner s and the Respondent s families emigrated to Australia in 1984. As a result both parties received most of their secondary and the whole of their tertiary education in Australia. The parties and N carry HKSAR and Australian passports. Both parties returned to Hong Kong after graduation in 1992. The parties met in 1996 and married in 1999. N was born on XXXXXXXX 2011 and will thus very shortly be 5 years old. The Petitioner ceased employment in 2008 and so became N s primary carer from birth. The parties separated for 9 months or thereabouts in 2004 but reconciled. From 2012 onwards, both parties, according to the Social Welfare Officer, accept that their marital relationship deteriorated. In July 2014, the Respondent moved out of the matrimonial home and in July 2015, the petition herein was issued. N started attending XXXXXXXXXXXXXXXXXXXXXXXX XXXXX commencing in September 2013. She started in K1 in 2014 and K2 in 2015. Normally, N, would be set to commence K3 this month, but the school has indicated that, if she is to continue at XXXX, then they would require her to repeat this year in K2. The Petitioner believes that the environment and teaching methods of XXXX do not suit N at this time and wishes her to attend an international school, namely XXX XXXXXXXXXXXXXXXXXXXX. It appears to be common ground that N should attend XXXXXXXXXX in XXXXX, Australia in Year 7, where she had already been accepted. It is also of note that it was common ground, at that stage, that N was struggling at school. She was only 5 years old at the time, but she was said to be far behind the basic reading requirement of the school syllabus (English syllabus). She was also anxious and could cry easily in class. She also struggled with Chinese, particularly with the dictation requirement. In addition, she also failed to meet the school academic syllabus in General studies and Math. All in all, the school recommended that she repeat K2 because she was not up to standard with the K2 academic requirement . N also appeared to be struggling emotionally and there were significant issues with respect to access. Dr Yuen wrote a psychologist s report at that time and commented that N had a separation anxiety disorder which probably arose from the harmful effects of her parents divorce and ensuing emotional battle . At paragraph 28 of the Schooling Ruling, I added as follows:

28. Unfortunately, N is struggling a little. In the words of Dr Yuen:
19. Her anxiety is mostly manifested in her hyper-vigilance when away from her primary attachment figure, namely her mother, refusing to sleep alone, taking a long time to fall asleep, bed-wetting, nightmares and her poor school performance. It is most likely that her anxiety is related to the lack of appropriate parental interaction, extensive parental conflict, tension from the divorce proceeding, being overly protected by mother on the one hand and ambivalent reaction toward father on the other. Consequently, in my order dated the 28 August 2016 I directed inter alia that N have an educational assessment, to be filed prior to the next Children s Appointment. It was also directed that N attend therapy, possibly play therapy given her age, for what appeared to be her mild anxiety disorder, and generally. I also asked that the parents also have therapy or attend counselling, given the effect that their ongoing disputes appeared to be having on their young daughter. Ultimately, I also ordered that N repeat K2 at her current school. At the hearing on the 4 January 2017, I was told that N s anxiety issues had improved and that she was having play therapy. Both parents were also receiving some form of therapeutic support. At that stage the father was seeking increased overnight access, which was again resisted by the mother. At some point the play therapist was replaced by a Mr. Lau, a psychologist from the Hong Kong Sanatorium who became N s counsellor. It is common ground that N has now had therapy for many years and that she still continues to see Mr. Lau, but more on an ad hoc basis than before, given the restrictions imposed by Covid etc. Prior to Covid she had a weekly session scheduled. It was though acknowledged that she did not always attend every week, even then, as other things sometimes came up. But it is clear that certainly the mother, and possibly the father too, was of the view that N continued to need this level of psychological support on an ongoing basis. The mother has said that she will look for someone to replace Mr Lau in Sydney and that he will assist in the interim. She does not say that there is no longer any need for this level sort of psychological support for her daughter. In so far as the educational assessment is concerned, this is dated the 14 November 2016. Thankfully it found that there were no particular difficulties. Unfortunately, however, disagreements between the parties over N continued. CDR hearings took place on the 17 March and 13 June 2017. On the 18 August 2017 the parties agreed joint custody, but the practical arrangements with respect to N s day to day care were still not agreed. It was on that occasion that I ordered that an updated child psychological report be prepared by a Single Joint Expert. That report is dated the 17 November 2017. Following receipt of that report the parties were able to reach a detailed agreement with the assistance of a well-known mediator and on the 26 February 2018 a consent order to that effect was made. In doing so the father stepped back and no longer pursued the issue of joint care and control or shared care. The parties agreed inter alia as follows: D. AND UPON the Petitioner and the Respondent agreeing and Undertaking to the Court and to each other that they agree that the arrangements for the Respondent to spend time with N are as follows:-

- (i) Week 1. N will spend time with the Respondent on Monday evening from 5:30pm to 8:30pm. N will have overnight staying access with the Respondent from 5:30pm on Thursday night to 8:30pm Saturday night. (ii) Week 2. N will spend time with the Respondent on Monday evening and Thursday evening from 5:30pm to 8:30pm. N will have overnight staying access with the Respondent from 10:00 am Saturday morning to 10:00 am Sunday morning and the Respondent will return N to Church or the lobby of the Petitioner's home and the Petitioner will notify the Respondent with one hour's notice if the drop off is to be at Church. (iii) In addition, the Respondent may also collect N from the Petitioner's home and drop N off at school one day per week ("Drop Off Day"). The Respondent will inform the Petitioner of the Drop Off Day for the coming week by email on the Saturday prior to the commencement of the school week. The Respondent will collect N from the lobby of the Petitioner's home on the agreed Drop Off Day. (iv) They agree that the Respondent may need the assistance of a helper or licensed driver to collect N for the start of access. Reviews and Others on Access F. AND UPON the Petitioner and the Respondent agreeing and Undertaking to the Court and to each other that:- (i) They will review how the arrangements set out in Recitals D and E are working for N and for each of them in mediation in the second half of November / early half of December 2018 and prior to the commencement of the Christmas school holidays, with the intention of considering (i) to extend overnight access and (ii) an additional pick up from school on Monday and / or Thursday, earlier than the current schedule at 5:30pm or another afternoon as mutually agreed. It should also be noted that despite this agreement that these arrangements have not altered since. I am told that the parties have been in further mediation on seven separate occasions since the 2018 agreement was reached. Although of course, those sessions remain completely private and confidential, it is of note that no further consent summonses have been filed in court nor have I been informed of any other agreements reached between the parties during this period of time. The court therefore began the trial with this background information to hand. HH Judge Melloy had been the docket judge throughout. She regarded this as a high conflict case and she was concerned to get an update about N's current emotional and psychological well-being. To that end it is clear from the affidavits filed by the parents that both parties believed that N had made some progress, but that she was still somewhat vulnerable. For example, the mother said *inter alia* as follows in her 11th affidavit filed in support of the relocation summons dated the 16 October 2020: Anxiety, Disturbed Sleep & Emotional Issues
44. As the Court will be aware, N has had issues over the years with anxiety, sleeping troubles and emotional difficulties. In particular, N experienced separation anxiety when she was not with me. These difficulties have not totally diminished and, in my view, the relapses she experiences from time to time are exacerbated by the style of education she is at present receiving. The pressure will only increase on her as she moves up through the school system, here. This style of schooling suits some children, but not our daughter. I have respected K's wish to provide N with a "solid foundation" in Chinese, and acknowledge his reasons for this, although I feel that achieving that goal has been at the expense of N's overall welfare and wellbeing.

48. N is most anxious when she is away from me. Other issues that trouble her little soul are her Chinese studies, her insomnia, and worries around her relationships with Madam C [the paternal grandmother who has since passed away] and K's [the father s] partner, V, although she worries less about Madam C now that she is spending less time in her care. N is still afraid of the dark and she continues to sleep in my room at night, and with K when she stays at home. In his affirmation in response and at trial the father explained how he had assisted N in sleeping in her own room when she was with him. The mother confirmed that this had been tried at her house, but that N was still sleeping with her. The father, for his part, also commented *inter alia* in his 10th affirmation dated the 6 January 2021 that
20. Both of us wished for N to have a stable environment in which to grow up and thrive. E [the mother] tends to be risk-averse, resists change and is overly protective of N whether socially or at school. E's approach has been to emphasise the importance of stability and the status quo for N. She has historically been very firm on adhering to the agreed access schedule, which she thinks should always be fixed. Fortunately, during the 3 years that have elapsed, N has become used to being in our respective homes and spending time with us separately. She is enjoying her school life and has made friends. I am cautiously optimistic that N has turned the corner but acknowledge that her newfound confidence remains fragile: according to E, she still contacts her counsellor Mr. L. The mother s case and her proposals for access in the event that the relocation is permitted In her affidavits the mother paints a picture of a fragile child who is not really coping with the demands of her present school. She says that the school that she has identified, namely XXXXXXXX in Sydney, would be a much better fit for N. She also emphasizes its strong Christian ethos and pastoral approach, which she approves of. She also reiterates that she wishes to return home and that she would have done so long ago had she not been committed to ensuring that the relationship between the father and N was on a strong footing. She says that she is concerned for her own father and that she wishes to be more on hand given his advanced age and health concerns. She also wishes N to have an opportunity to create a stronger bond with her maternal family, just as she has done with the paternal side. She sets out in detail the practical arrangements surrounding the proposed move. The mother s case on access in the event of a relocation is set out in her response to the father s updated proposals, which were handed up to the court during the second tranche of the trial, on the 6 January 2022. These state as follows: [Please note that the father s proposals are in black and the mother s response whilst originally in red, are now in bold for the purposes of this judgment]. B Relocation Allowed - N to relocate to Australia with M Term time access Subject to his work commitments and being able to take leave, F will endeavour to have access to N in Australia
- a) Up to 1 week with weekends on either side whenever he is able to take time off work so that N could stay with him See b) below

- b) F would endeavour to fly to Australia on the 1st half of each month to exercise such access Not agreed. Given the change in proposal in respect of the sharing of the holidays, M proposes only three such fixed visits per year. Therefore, M's proposal is that F have up to one week in Terms 1, 3 and 4 - to be agreed each year in advance taking into consideration those holidays F is to enjoy each year, in order to bridge the "gaps" between the term holiday access.
- c) F will provide prior notice as early as possible if he is not able to make it so that an alternative date I time can be found See b) above
- d) In any event, notice will be given to M not less than 1 week before travel, together with details of flights and residence Agreed Holiday access (Aiming for a roughly overall 55:45 split to F and M respectively) The percentage split of holiday shall be approximately 50/50
 - 1.2.1 Australia's summer holiday (December and January 50 days)
 - a) To be shared between F and M on equally (F intends to spend the holidays with N in Hong Kong) Agreed - save that M proposes that N need travel out of Australia for access with F only twice per year.
 - b) N to return to M's care not less than 2 days before start of term to prepare for school Agreed
 - c) Christmas holiday dates to be alternated with F to have the first half of the holiday even Years Agreed The first half of the Summer holiday will encompass Mother's Birthday, Christmas Day and Boxing Day.
 - d) Parent intending to travel out of Australia with N to provide travel itinerary and accommodation details at least one month before travel Agreed
 - 1.2.2 School term breaks
 - a) End of Term 1 (early April) - 19 days To alternate with F to have even years Agreed
 - b) End of Term 2 (late June, overlaps with HK's summer break) - 24 days F to have entire term break Not agreed - M proposes that this holiday is shared equally each year.
 - c) End of Term 3 (mid-September) - 16 days To alternate with F to have odd years Agreed F would want to bring N back to Hong Kong for the Term 2 term break to spend time with paternal family and cousins Noted: save M's proposal that N only need travel out of Australia twice each year for access.
 - 1.2.3 Emergency Access N to travel to Hong Kong in case of family emergencies Agreed
- Travel arrangements
 - a) If intending to travel out of Australia with N, F will provide travel itinerary and accommodation details at least 2 weeks before travel Agreed
 - b) For travelling outside of Australia, F (or 1 of 3 nominated family members / friends to be agreed) do pick up N from Australia (unless M will also travel to Hong Kong, then M may bring N to F) Agreed
- Other matters
 - a) Electronic access: Daily (6pm - 9pm Australia time) Agreed

- b) Information sharing
- i) Regardless of which school N will attend, there be a mutual sharing of school info, events and ECAs Agreed ii) School to be informed of family situation and school / M to arrange for duplicates of all school info / report cards, etc. to be provided to F Agreed As indicated above and as pointed out in the father s closing submission, the mother s case at trial was significantly different from the case she presented on affidavit. Ms Remedios explains it thus: M's Case
6. M says that she wishes to relocate to Australia with N to be with her family and so that N can discover her Australian background and get to know her maternal family. There are significant inherent contradictions in M's case. M's documentary evidence placed emphasis on N's fragile emotional state, including the fact that she has been receiving counselling since 2015. M alleges that N was not coping with the "local" approach to education at XXXXXXXXXXXX XXXXXXXXXXXX and says that N should relocate to a school which had a more pastoral approach. At trial M shifted her position: (a) she accepted that N was an able student and "The Mother views N's education at XXX as acceptable... XXX is okay". [Petitioner's Opening, para 24]; (b) she sought to downplay N's emotional vulnerability, brushing off the SJE expert evidence as "nonsense!". With respect I agree. I should add that the experts would not have been aware of this change in stance ahead of the trial. The father s case The father summarized his position in his affirmation as set out in paragraph 39 below. Put simply he does not accept the mother s case at any level. The father s updated open proposals on access, in the event that the relocation is permitted (see paragraph 22 above), were changed following an indication from the court that it was not feasible to expect N to travel to Hong Kong more than twice per annum for holiday access, whilst the Hong Kong s hotel quarantine measures remained in place. Again, referring to Ms Remedios closing, she summarized his case as follows: F's Case
7. F's case is consistent throughout. Relocating is not in N's best interests and in any event is premature. N is prone to anxiety and the divorce has greatly affected her sense of security. Her resilience is thin. Whereas M is herself an anxious person who over protects N, unlike M, he offers N a chance to strengthen her resilience and build her confidence. This is important for N's well-being and healthy development, particularly in the turbulent years ahead, approaching her teens. N aligns with M and M's wish to go, but at ten N does not appreciate what she would be losing, which cannot be replaced by international access, especially during the pandemic. The Father-Daughter relationship will be sorely tested.
8. It is submitted that F's analysis contained in his January 2021 affirmation, is substantially confirmed by the subsequent SJE Report in October 2021. With respect I accept much of what is said here. The Law There is no dispute over the law. It is accepted that the best interests of N remain the court s paramount concern . It is also accepted that the original guidelines as set out in the string of cases following Payne remain relevant. In our own Court of Appeal s decision in H v W [2021] HKCA 733 this protocol was reframed slightly as follows:

- (1) Is the applicant's proposal genuine and realistic in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
 - (2) Is the respondent's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?
 - (3) What would be the impact on the applicant, either as a single parent or as a new spouse of a refusal of his/her realistic proposal?
 - (4) The outcomes in (2) and (3) must be considered in the overriding review of the child's best interests as the paramount consideration. In that judgment a delayed relocation was overturned in part because of the continuing nature of the Covid 19 pandemic. At paragraph 89 of their judgment the Court of Appeal stated as follows:
89. In light of the above, we have come to the view that the Judge had plainly erred in the exercise of her discretion. The Mother's application for relocation was rushed and premature and made during a period with the pandemic having no end in sight and normal frequent travel was not possible, and her application for relocation should not have been allowed at that stage. It has now been almost a year since the trial, and very likely there have been further changes in circumstances with A having started and settled in her present school for some 6 months. Even though schooling had been by remote, we understand that from 24 May 2021, in person schooling is to resume in Hong Kong. Discussion I must now turn to consider the issues, the law and each party's evidence as set out in their affidavits and as given orally by them during the hearing. I also heard evidence from the Social Welfare Officer who filed a report dated the 2 November 2021. In addition, I had the benefit of the original Single Joint Expert's report dated the 17 November 2017. This report was prepared by the Jadis Blurton Family Development Center. Three examiners are listed, Dr Jadis Blurton herself, Dr Kristie Craigen and Dr Alison Cook. The report is described as a Child Development Evaluation. As I have said this report assisted the parties in coming to terms with respect to the arrangements for N originally. In addition, an Updated Child Development Evaluation was filed on the 18 October 2021, shortly before the commencement of the trial. By then Dr Blurton had retired and the examiners are listed as Dr Craigen and Dr Cook, as before, plus a psychometrician Mr Ben Ho. N was 6 years and three months old at the time of the first report and 10 years and two months old at the time of the second report. It is of note that the parties had been arguing about her care in one way or another for most of her life. The experts' evidence The law and the approach taken in this case This matter was originally set down for a four-day trial, after discussion with both sides. Although it was clear that the two reports had come to different conclusions, the SWR report supported the relocation and the updated Child Development Evaluation did not, this of itself was unfortunate but not that unusual. No other applications were made prior to the trial. For example, the mother did not seek leave to file a further report to challenge that of the Dr Blurton report. Thus, both myself and indeed most probably the father's legal team were taken by surprise by both the change in stance taken by the mother and the somewhat aggressive approach taken by her legal team with respect to Dr Craigen, who appeared on

behalf of the Jadis Blurton group. The mother's stance changed as she sought to downplay the fact that on her case N remained vulnerable. This was no longer seemingly the stance to be taken as counsel for the mother sought to reiterate again and again that N was a normal, intelligent, articulate and gregarious little girl. I pointed out on a couple of occasions that I had been the docket judge throughout, but with seemingly little effect. In a similar vein the mother also accepted that both schools were good schools and much of the basis of her application was consequently swept under the carpet. The difficulty then came in the approach taken to Dr Craigen. She was in the witness box for two and a half days. She was subject to very lengthy and on occasions, as I have said, unnecessarily aggressive cross examination. I was told that the mother's legal team had decided not to make any further applications with respect to the report because they did not wish to adjourn the trial. However, this approach did arguably lengthen the trial. At the end of the day, it went part heard and took eight as opposed to the originally listed four days to complete. I was also completely taken aback by the conclusion reached in the mother's closing submission namely that 51. and thus the tests, interviews, report and its conclusions were all prejudiced. Dr Craigen started with a prejudice, or theory, and worked towards a report was always going to support that theory. It was always a foregone conclusion, right from the start. In these circumstances what weight should be placed upon such a report? This is a very damning conclusion to reach of a highly respected professional psychologist, without another expert's report to support it. The mother maintained that Dr Craigen had predetermined the case and that all of her numerous tests and other collaborative interviews were done with that in mind. For the avoidance of doubt this is not accepted. I note that exactly the same approach was taken with respect to both reports. The first was accepted, the second was not. Presumably because it did not accord with the mother's case. Should permission be given for N to leave Hong Kong in order to relocate to the Sydney, Australia with her mother?

Introduction

Is the mother's case genuine and realistic in the sense that it is not motivated by some selfish desire to exclude the father from the children's life? I accept that the mother's application is most probably genuine, but I did have some concerns about the timing of her application and the fact that as the case progressed, the Covid 19 pandemic also progressed. This meant that it soon became clear that if the relocation had been allowed earlier, that that would have meant, in reality that there could have been no physical contact between father and child, certainly in the immediate to short term. It was just not feasible in a scenario where after each flight the person coming into Hong Kong either N (and the mother or a third party) or the father, would be required to do 21 days hotel quarantine, or even worse, that they would need to go somewhere else first. In such a scenario it might have been more sensible for the mother to have sought to adjourn matters pending the easing of the pandemic. This did not happen. At the time this led the court to question the mother's motives, especially as there was no particularly pressing reason for the relocation to take place immediately. N was still young, there was no reason from

an educational perspective why she had to relocate quickly. There were also no financial constraints, nor was there a job or a partner in the wings in Sydney, although I do accept that the mother was concerned about her own father. As it happens there was a considerable delay caused by Covid and the court's own unrelated difficulties and at this stage the quarantine requirements although difficult are not as impossible as before to circumvent. By the same token, there is no doubt that the mother's plan is realistic. I accept that it is both well researched and investigated. I don't accept the father's concerns in this respect (e.g., that the mother could not cope without significant domestic support that would not be forthcoming in Sydney etc). The mother has set out her proposals in full, she will buy a flat in a reputable area of Sydney, reasonably close to N's school. She has the money to do so and financing the purchase should not be a problem. She has located a good school for N, X and she has maintained a place for her by paying for the fees pending receipt of the judgment. Although much of the mother's affidavit evidence centred on X being a better fit for N, than her current school in Hong Kong, as I have already said this shifted at trial when it was accepted that both were good enough schools. Much was also made both in the affidavits and at trial of the fact that the father had also attended the interview at X. For the avoidance of doubt, the father is not to be criticized for this. The court had indicated on several occasions that it was important to maintain as many educational options for N as possible going forward. Just because the father took part in the interview process at X, did not mean that he accepted that N should in fact attend that school. It represented one option and it was therefore sensible of him to have participated in the process. With respect N should also have been made aware of this. The mother has also said that she wishes to return home and that she still considers Australia home, even though she has only actually lived in Australia for 8 years. She is now 51 years old. Like many Hong Kong families both she and her family, had emigrated from Hong Kong in the 1980

- s. Her father and brother remained in Australia. She returned to Hong Kong and has lived in Hong Kong since. Both mother and father, plus N are Australian citizens and they hold Australian passports. But they are also from Hong Kong originally and are Hong Kong Chinese by birth. This is the only home that N has ever known. I do not therefore accept that this is a returning home case in the same way as an ex-pat who is on a short-term secondment returns home. I do though accept that the mother genuinely wishes to relocate to Australia, in part to be close to her ageing father. I also accept that she has retained some friends there and that she is keen to resume closer contact with her brother and his family. I am also sure that she would cope with the transition, despite the father's obvious misgivings in this respect. 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? I accept that the father's opposition is also completely genuine. In his affirmation dated 8 January 2021 he provides an overview as follows: Overview
3. E's present application to permanently remove N from Hong Kong to Sydney, Australia is not in N's best interests.

4. I do not accept that E's reasons for relocating are justifiable or properly investigated or realistic.
5. E and I originated from Hong Kong. Our families went to Australia when we were in our teens and we finished our education there, over a period of 8 years only (1984 to 1992). Since then, we separately returned to and have reinstated Hong Kong as our home for over 25 years. It is the only home N has ever had.
6. N thrives on the love of both parents and the security this gives to her. She was very upset by our divorce but appears to have found some stability in the routine we have put in place. Normally, she sees me on 10 out of every 14 days and spends a considerable amount of her time with me and my family. As an only child, she is very close to her cousins. She has settled well into her current school here in Hong Kong, is doing well academically and has made friends. It would upset her equilibrium tremendously if all that were to change, and she was only to be with me for short periods of time and was to have long periods of time apart from me, her cousins and her friends.
7. I do not accept that E will be creative or flexible with access. The access arrangements set out in the Consent Order have been in place for almost three years now. On the whole they are working but E is not flexible. She does not engage and tends to go silent, not answering my communication. Consequently, we have had to return to mediation on for at least 7 sessions between 2019 and 2020 since the Consent Order was pronounced. This is one of my concerns for the future, particularly if we were to live in different continents. It is one matter to try to make alternative arrangements when we are in the same jurisdiction. This is hard enough but potentially is insuperable if we were living in different continents.
8. There is currently no opportunity for continuing contact between N and me, with no reliable end in sight. The restrictions imposed by Covid-19 will mean that travel between Australia and Hong Kong will not resume for a long time. The father and daughter bond will be sorely tested and, in all likelihood severed if she permanently relocates. Some of these matters have been discussed in part above. However, I would like to touch upon some that have not. In particular, I accept that N is close to her paternal cousins, who are of similar age to her. The father has a younger sister and a younger brother. N spends a lot of time with them and she is said to be particularly close to her cousin, M, who is two years younger than her and who lives in the same apartment block as the father (the father's sister's child). Both children are only children and the father said that their relationship is more akin to that of sisters than that of cousins. I accept that these bonds are likely to be very important to N. I also note the fact that although the mother has consistently stated that the paternal cousins will go to Sydney for schooling purposes, this has also been denied by the father. It does not seem to me that this is something that can be relied upon one way or another. I further accept, and this will be discussed in more detail below, that after a rather rocky start that N is now doing better than before. Although she is clearly closer to her mother than her father, she has a good relationship with her father who she sees and speaks to frequently and who remains an extremely important part of her life. Any disruption to the current status quo

should be approached cautiously. I further note the father's concerns about access, which shall also be discussed in more detail below. What would be the impact on the applicant (mother) either as a single parent or as a new spouse of a refusal of her realistic proposal? I accept that the mother is likely to be devastated if her application is refused. She has said that she will seek leave to appeal and I accept that this is a likely outcome. However, she has lived in Hong Kong for a considerable period of time, she is Hong Kong Chinese by birth and Hong Kong has been her home for most of her life. She has friends here. She is part of a Christian church here. If she wished to, she could work from here as easily as in Sydney, especially if she is wedded to the idea of setting up an online XXXXXX business. She could also visit Australia for extended periods of time either with or without N, in order to spend time with her father and other family members. I also accept that the father's relationship with N could be severely undermined if the relocation application is approved. This is especially the case if travel continues to be problematic. Although I accept that N might benefit from being in close proximity to other family members including her paternal Grandfather and some of her elder cousins (who are now aged 16 and 14), on her mother's side, I also agree that this would not be sufficient to counteract the loss of her father and his wider family to whom N is very close. Likewise, I accept that the father would be equally devastated if N was allowed to relocate. The evidence of the experts The Social Welfare Report dated the 2 November 2021. It is trite but worth repeating for the record, that recommendations made to the court in social welfare reports although not binding are generally considered to be persuasive. The reports are said to be the eyes and ears of the court. In the event that a court does not accept the recommendations made, as here, then reasons should be given. In this case the report was a little odd in that although it supported the relocation it made no recommendations at all for access save that at the end of the first term it suggested that N should spend more time in Australia over her first term break. To that end the report concluded that:

55. For access arrangement, the difficulty in part was that Mr. C [the father] could not access N as close as the way she remained in Hong Kong. Virtual access is not as personally at time. Concerning the N's adjustment of her new school life and social peers, I inclined to suggest, during the first school term breaks, N spending more time in Australia instead of a 50:50 split. It was hoped that both of Madam L [the mother] and Mr. C [the father] could learn to work out a practical access schedule together with N.
56. As concluded, the Petitioner mother Madam L and the Respondent father Mr. C were encouraged to have empathetic understanding and co-operation to avoid the family child X be trapped between them. They should work together for the best interests of the daughter throughout her developmental growth. I, based on the above analysis, remarks and conclusion, would like to make the following recommendations for Your Honour's consideration:

- i) The family child N to be relocated to Australia, under the care and control of the Petitioner mother Madam L aid that this had been deliberate and that she had tried to avoid the Covid question. When I responded that the court could not simply ignore the impact of Covid, she seemed not to know how to respond. She also said, during the course of her examination that the parties should learn to communicate better. Whilst I would agree with this, it did not in any way seem to impact her recommendations. She also disagreed that N was emotionally fragile, but did agree that she had some anxiety issues. All in all, I found the report to be rather unhelpful, as it was very clear that these particular parents would not simply be able to work out the access arrangements if the relocation was granted. Nor was it open to the court to simply ignore the impact of Covid. Further she seemed to have taken what N had said to her at face value. In other words, because the child said she wanted to go, her views should be given weight, therefore she should be allowed to go. She reported that not going was making N anxious. There seemed to be no consideration at all of the fact that in reality many things might be making N anxious. Although I accept that the SWO genuinely tried to report what she had observed, there was no fuller analysis of the situation other than that. Given the complexity, I do not therefore intend to place weight on the recommendations made. The reports from the Jadis Blurton Family Development Centre The First Report dated the 17 November 2017 As I referred to above the first report was ordered because the parties were unable to reach an agreement with respect to the day to day care arrangements for N. The father favoured either a shared care arrangement or joint care and control, on a more or less 50:50 basis and the mother sought a more traditional one whereby she retained care and control and the father had defined access. It is of note that both reports are in a similar format. A group approach was taken with two or three examiners and a psychometrician to administer the psychological tests. There are a significant number of tests attached to each report. N was 6 years old when the first report was undertaken. Of note is that the mother and father reported as follows: In September 2016, N was very unhappy at having to repeat K2 and suffered teasing by her peers. She was very reluctant to attend school, often cried and in the mornings before school hid under the table at home. She also voiced, "I will jump out the window". She received weekly counseling with psychologist Mr. Lau at Hong Kong Sanatorium & Hospital and since December 2016 has received play therapy with Ms. Lora Lee. In August 2017 N entered K3 at XXXX. Currently, Ms. L reports that N seems very sad at times, cries (particularly after visits with her paternal grandmother) and continues to occasionally state she will jump out of the window. She further reports that N continues to show signs of anxiety when she has been apart from her. However, she notes that N is no longer unhappy about attending school and is now accepted by her peers. N has also progressed very well academically in K3. Mr. C feels that N is emotionally well adjusted and has had no emotional difficulties in the past; however, he reports that Ms. L believes N has had previous emotional difficulties. He further believes that N's recent statements that she would jump out of the window have been taken too literally, and that she simply wants to get to her destination by the fastest route. He also reports that she is doing well in school. In so far as N herself is concerned the report stated While there is no doubt that N loves both her parents, it is clear that her primary attachment

figure is her mother, which is possibly a consequence of her mother's availability during her infancy and early childhood and the absence of her father due to his extremely demanding job. In the foreseeable future, N is likely to express an increased desire to solidify her attachment bond with her father; however, at this point it is important that the relationship with her primary caregiver remains consistent as prolonged separations from main attachment figures, especially during stressful transitions, such as starting a new school or undergoing serious medical procedures, can be extremely distressing and confusing. Access to both parents is important, yet it is even more important for N's parents to listen to and observe her behaviour for cues as to her readiness for change with regard to listen to and her behavior for cues as to her readiness for change with regard to altering the existing access arrangement so as to ensure that appropriate changes are facilitated in line with her developmental and psychological needs. The report concluded, inter alia, that the father's access time to N should not be increased at this time. Interestingly it also added that the parties should find better ways to communicate. It also recommended that N should have ongoing and weekly therapy to assist her with her emotional literacy. Both Dr Blurton and Dr Craigen were signatories to this report. The Second Updated Report dated the 18 October 2021 There was no dispute over who should be appointed to undertake the second report. However, significant criticism has been made of it by the mother, after the event, including for example, the number of tests and types of tests undertaken as part of the overall approach. For example, it was suggested that there was no need for the parents to undertake a test about domestic violence. With respect, I do not agree. This is a high conflict case. Matters of violence can often be hidden from view. It was, with respect very sensible of the examiners to ensure, via a neutral test, that there were no other issues that had not been revealed to date. In conclusion the report did not support a relocation at this time. In its Clinical Implications and Recommendations, it stated as follows: CLINICAL IMPLICATIONS AND RECOMMENDATIONS Pursuant to the Order of Her Honour Judge Melloy dated May 14th, 2021 an Updated Child Developmental Evaluation has been called for in relation to the mother's application to permanently remove the only child of the family, N, from the jurisdiction of Hong Kong to live in Sydney, Australia.

79. The L and C family appear to have made steady and significant progress towards becoming a functional and slightly more unified family system; N's relationship with her father has improved greatly and the current access arrangements appear to be running smoothly with little to no problems during handovers. Therefore, with the help of the Family Law Court, Ms. L and Ms. C appear to have successfully negotiated and are appropriately navigating their shared parenting responsibilities.
80. Furthermore, there is evidence to suggest that over time, Ms. L and Mr. C are becoming less polarized with respect to their views on parenting and somewhat more aligned with respect to their awareness of the socio-emotional challenges N continues to face.

81. Although Ms. L and Mr. C still seem to approach parenting from very different perspectives, their styles remain complimentary as their individual strengths appear to counterbalance each other's weaknesses.
82. Relocation is one of the most highly rated stress-producing challenges than can be experienced by a family. Moving can disrupt important relationships and friendships and the research indicates that the impact of losing contact with existing support networks, starting a new school, and making new friends are most problematic for children, like N, predisposed to anxiety.
83. Furthermore, relocations are stressful on parents too and domestic help is not as accessible in Australia as it is here in Hong Kong. Should Ms. L's own anxiety increase, possibly due to a combination of the stress involved with the physical act of relocating in addition to deficits/changes in her existing support structure, as a then possibly emotionally needy participant in an already clearly aligned parent-child relationship, there is some degree of risk with respect to propagating further, more serious psychological enmeshment and creating a pathological alliance with N against the absent parent.
84. Children enjoy better overall adjustment when they have quality relationships with both parents. Better levels of child adjustment seen in intact families can be best accounted for by increased access to resources and social capital. "Social capital refers to the benefit a child derives from the social and psychological resources available to him/her in a particular living environment, community, or family, especially the most significant relationships for the child. It is derived from parents, extended family, peers, teachers, coaches etc. and is accrued in the form of positive models, trust, values, financial resources, commitment, instruction, discipline, and friendship. Some living environments will be richer than others in depth and breadth of social capital available " (Austin et al, 2013, pg 490).
85. Therefore, weakening the connection between N, her father, and her father's family/friends can be seen as a huge loss of social capital and is not recommended at this time.
86. Due to Ms. L's desire to relocate to care for her elderly father, and to provide N with, in her view, a better lifestyle and schooling opportunities, her request should be revisited at a time when (1) significant improvements in N's emotional wellbeing have been achieved and objectively measured, (2) travel bans and general travel uncertainties are no longer a global concern, and (3) Mr. C is in agreement with Ms. L that relocation and a change of schooling is in N's long-term best interest. Although I tend to agree with counsel for the mother, that she would most likely cope with the proposed relocation and I have some reservations about paragraph 83 generally, other than that I tend to accept what is said here. In particular, and given the recent Court of Appeal comments on this issue, I agree that a potential relocation should only be revisited once travel bans and general travel uncertainties are no longer a global concern. I also accept that it is still premature to allow N to relocate at this juncture. I accept that although she has made good progress that she is still emotionally vulnerable. I also agree that it is important to maintain the status quo, including her very close

relationships with her paternal cousins at this stage. The outcomes in (2) and (3) must be considered in the overriding review of the child's best interests as the paramount consideration. Overall, would the relocation be in the best interests of N? Other matters to be considered How often would the father realistically be able to travel to Australia? The father had some real concerns about his ability to travel to Australia regularly, especially given the possibility of a change to the Australian tax regime. He was criticized for this, but I accept that this is a genuine concern and that although he aspired to see N monthly, in reality this might be very difficult. Is the mother likely to accommodate the father's request for flexibility with respect to the access arrangements? My own experience of the mother has been that she has generally seemed resistant to any attempt by the father to increase access, including staying access. On one occasion, when the parties had been in court arguing over the father's application for holiday access, I had had to direct the mother NOT to go separately to the same place as the father and his family. Counsel has argued that the mother has been accommodating throughout and that there is little evidence to support the suggestion that she can be difficult or non-communicative. But there is some evidence. Hostile communication going back and forth between the parties, the mother refusing to accommodate a 15-minute change in an access arrangement, inflexibility over some special occasions. I tend to share the father's concerns in this respect, i.e. that the mother could make access very difficult indeed if the relocation is approved. The views of N N had told the SWO that she would like to see me and on the 23 November she came to court, in the company of Dr Craigen, so that she could express her views to me directly. She was charming. Quite petite and studious looking with glasses. She was clearly nervous and blinked rather rapidly at times, but she was clear about what she wanted. She wanted to go to Australia. She was also under the possible misapprehension that other family and friends might also be going to school in Australia or possibly relocating there, in part because they had Australian passports. She said that she was fine quarantining because she liked being in hotel rooms. However, it is of note that she wasn't sure if she had actually been in quarantine before. Later it was confirmed that she had not. This is of course a concern as those of us who have quarantined know that the reality is that the experience can be quite tough on both adults and children alike. When I asked if there was anything that she wished to say if I ordered that she stay in Hong Kong, she was a bit thrown and said that she wasn't sure, but she did raise the issue of possibly changing schools. All in all, I greatly enjoyed meeting N. But she was only 10 years old at the time and as one might expect she saw the issues in simple and child-like terms. I think the reality of the proposed relocation might be very different from her perception. Conclusion on the relocation Having considered all of the different factors it seems to me that on balance it would not be in the best interests of N to permit her to relocate to Sydney at this point in time. I tend to accept that the application was and is premature, although I also accept that this is something that the parties may wish to consider again at a later date. Consequently, the mother's summons dated the 5 October 2020 to relocate to Sydney, Australia shall be dismissed. Should any further orders be made once that issue has been determined? As I said at the beginning of this judgment, there have been no further applications made with respect to access, in the event that N was to remain

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