

HONG KONG / JUDGMENT

CS v. WCT

[2020] HKFC 276**COURT**

Family Court

DECIDED

29 December 2020

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FCMC 5660 / 2020 [2020]HKFC276 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 5660 OF 2020

BETWEEN CS Petitioner and WCT Respondent

Coram: Deputy District Judge Egerton in Chambers Date of Hearing: 18, 20, 21, 24, 25, 26 and 27 August 2020 Date of Petitioner's Written Final Submission: 19 October 2020 Date of Respondent's Written Final Submission: 19 October 2020 Date of Petitioner's Written Reply: 2 November 2020 Date of Respondent's Written Reply: 2 November 2020 Further Solicitors correspondence with the Court: 30 November 2020 Date of Judgment: 29 December 2020

J U D G M E N T (Re. Custody, care and control, access)

Introduction

The Parents were married in Hong Kong on the 3 November 2013. The Mother is now aged 37 and the Father aged 36; both Parents are qualified solicitors. They have two children, B a boy now aged 4, G a girl now aged 3 ("the Children"). The Mother was employed as a lawyer until 2016 when she set up her own company providing offshore services. The Mother works from home and has employee(s) to assist her. The Father left full-time employment in 2018 to be at home for the Children; he resumed employment in August 2019; his working hours are from 9am to 5:30pm. The Mother commenced Wardship Proceedings on 18 February 2019, such proceedings were subsequently withdrawn following the commencement of proceedings in the Family Court. The Mother's Petition was filed on 22 February 2019; although the Father filed an Answer and Cross Petition it was subsequently agreed that there would be a consensual divorce. On the same

day as her Petition, the Wife filed an Ex Parte Summons on Notice inter alia seeking interim custody and care and control of the Children. The application came before the Court on 25 February 2019 and was fortunately in part resolved by the Consent Order of 25 February 2019; inter alia directions were given for the filing of evidence and preparation of a Social Welfare Report. In April and early May 2019 the Parties filed additional evidence; there were cross allegations of physical assaults which had on occasions resulted in the Police being called to the Former Matrimonial Home (“the FMH”). In addition to which in their affirmations both Parties claimed to be the Children’s primary carer. The 1st Social Welfare Report was filed on 18 April 2019 (“the 1st SWR”), the recommendations of which were inter alia as follows: Joint custody Shared care and control on an equal basis on a bi-weekly basis Before the order of the 6 May 2019 the Parents’ respective proposals were as follows: The Mother : Joint Custody Shared Care and Control The Father : Care and Control to the Father Defined access to the Mother On 6 May 2019 the Court ordered interim shared care and control on an equal basis in broad terms reflecting the recommendations of the 1st SWR, listing a CDR on 12 December 2019 and calling for an updated Social Welfare Report and Child Psychologist Report. The Mother moved out of the FMH thereafter in May 2019, and she now lives on the south side of Hong Kong Island. On 3 May 2019 the Father filed a summons in relation to the Children’s education (“Education Summons”) in respect of which the Parents filed numerous affirmations setting out their respective positions. The Education Summons came before the Court on 14 June 2019. Judgment was delivered on 5 July 2019; the Father’s application was dismissed resulting in the Children continuing at their then current schools for the academic year beginning August/September 2019. On 11 October 2019 the Mother filed a Summons in relation to the “autumn break access split”; the matter was resolved by the Consent Order dated 18 October 2019. The current accommodation and schooling arrangements are as follows : i) the Mother lives on the south side of Hong Kong Island ii) the Father lives on the west side of Hong Kong Island The Children attend school on Hong Kong Island Both Parents have the assistance of home domestic helpers and drivers. Application before the Court Determination of the arrangements for the Children as to: Custody Care and control Access The Relevant Law Section 19 of the Matrimonial Proceedings and Property Ordinance (Cap 192), directs that, in any proceedings for divorce, nullity of marriage or judicial separation, the Court may make such orders as it thinks fit for “the custody and education” of any child. Although the discretion given by Section 19 is wide, it is not unfettered; Section 3 of the Guardianship of Minors Ordinance (Cap 13(1)) sets out the principles by which a Court must act. Both Parties’ Leading Counsel have helpfully identified the relevant principles by citing various authorities. I will refer to the authorities of particular substance in chronological order. Besides authorities Mr Pang SC for the Father referred me to the Law Reform Commission report on Child Custody and Access of March 2005 the recommendations of which have yet to be implemented notwithstanding the passage of time of some 15 years. Ms Yip SC for the Mother referred me to *Y v P* [2009] HKFLR 308: “21. On this appeal the first matter which must be considered is the question of custody. In this respect, attention has been drawn to the decision in *ML v YJ*, HMC 13 of 2006, a decision of Rimsky Yuen SC, sitting as a Recorder, given on 23 May 2007. The Recorder’s judgment usefully sets out the law relating to custody. As the Recorder pointed out in paragraph 24, the first consideration as to whether to grant joint custody to both

parents or sole custody must be the welfare of the child. The Recorder went on to state that whether or not a joint custody order is workable depends very much on whether the parents can co-operate. The Recorder continued: “(3) A joint custody order may in appropriate cases be made for the purpose of encouraging parents to overcome their differences and co-operate for the benefit of their children. Joint custody in such circumstances can serve the purpose of recognizing the role of both parents in the child’s upbringing. However, if it is clear that a joint custody is not workable, it seems unlikely that the Court will nevertheless make such a joint custody order solely for the purpose of encouraging the parties to overcome their differences or to recognize the continuing role of the parties. As stated above, a joint custody order which is unlikely to be workable cannot be in the best interests of the children as the adverse consequences will far outweigh the benefits that it may bring.” Both Leading Counsel referred to the seminal authority of *PD v KWW (Child: Joint Custody)* [2010] HKFLR 184, Hartmann JA (as he then was) explained the terminology of custody and care and control : “31. The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child’s health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child’s legal representative. 32. By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child’s immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline.” “40. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent. 41. For this reason, it is often said that there is a thin line between sole custody and joint custody. 42. In the present case, therefore, even if the mother is given sole custody of L, she will not be able to determine such matters as L’s education, religious upbringing and choice of extracurricular studies free of any involvement by the father. She will remain obliged to discuss such matters with the father and to weigh in the balance all rational advice that he gives. 43. Before leaving a consideration of the dual concepts of custody and care and control, it needs to be emphasised that, when a court awards care and control to one parent but rights of access to the other, as in the present case, the court is effectively awarding a form of shared care and control. This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent’s physical custody. Rights of access, it is to be remembered, are given – in the interest of the child – to ensure continued bonding between parent and child.” “Joint custody: the proper approach 52. Today, although there has been no change in our law similar to many other common law jurisdictions, orders of joint custody are in no way exceptional. This is because it is accepted that,

in principle, such orders are in the interests of the children. 53. In all but the most exceptional circumstances, the effect of divorce on the children of the marriage, especially children of tender years, is deeply felt. In all but the most exceptional circumstances, such children desire that they should continue to be protected and guided by both parents. The case before us is an example. In the result, in the best interests of the child, the fact that, as a result of the breakdown of the marriage, relations between the parents are strained is not of itself a reason to refuse to make a joint order of custody. Nor is the fact that the parent to be given care and control does not agree. Such orders look to the future. They will govern a limited area of exchange between the parents, albeit one of the greatest importance. Accordingly, the issue for the judge is whether, with the court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on the questions of importance that will determine the upbringing of their child, both recognising that, as difficult as it may be for them, this process of co-operation is in the best interests of the child. In determining this issue, the judge is entitled to proceed on the presumption that competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child will be able to co-operate with each other concerning matters of importance in the upbringing of the child. At all times, of course, the welfare of the child remains the first and paramount consideration. As this court has recognised (see, for example *Y v P* [2009] FLR 308), there may be occasions when the ability of the parents to reach any rational accord in respect of important matters concerning the upbringing of their child is so deeply undermined that to compel attempts at co-operation will not protect the interests of the child but leave the child more vulnerable.” In the context of the lack of implementation of the Law Reform Recommendation of 2005 it is perhaps worthwhile and appropriate to recall the words of Lam J (as he then was) in the same case: “80. Likewise, as observed by my Lord, the recommendations of our Law Reform Commission in 2005 regarding Child Custody and Access have not been taken forward. Had such recommendations been implemented, the respective rights and responsibilities of the parents towards their children would be more clearly and specifically defined. Judging from the submissions advanced by the parties in this case, I cannot help from observing that with the implementation of such reforms, appeals like the present one could have been avoided. 81. Speaking for myself, I would like to take this opportunity to urge the administration to make some progress in these directions.” During the Trial Ms Yip SC referred me to the decision of Her Honour Judge Melloy dated 20 January 2012 in FCMC 9661/2010. In the context of the particular facts of the case and the Parents’ disagreement in relation to one of the Children’s previous eye surgery the Court ordered sole custody to the Mother on her undertaking to consult with the Father on all important decisions relating to the future with shared care to both parents. In *H v N* [2012] 5 HKLRD 498 Jeremy Poon J (as he then was) set out the approach to Section 3(1) of the Guardianship of Minors Ordinance (Cap.13) (GMO) which had been amended in April 2012 whereby the terms “welfare” and “wishes” of the minor were replaced by “the best interests” and “views”. “D. How to approach s.3(1): 17. Section 3(1) of the GMO, in its current form, provides: (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property: (a) in any proceedings before any court (whether or not a court as defined in s.2) the court: (i) shall regard the best interests of the minor as the first and paramount

consideration and in having such regard shall give due consideration to: (A) the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; and (ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father; (b) except where para.(c) applies, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other; D1. Equality principle: 18. In approaching s.3(1), subject to the position under illegitimacy, the Court will always put the competing parents on an equal footing. Any role or gender discrimination is not permissible. This equality principle reflects the shift in social values concerning parental responsibilities and the universal recognition that the long-term best interests of a child are best protected if both parents are, despite the breakdown of their relationship, involved equally. As aptly explained by Hartmann JA in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191 :

D3.3. Use of "the welfare checklist": 26. In assessing the best interests of the minor, the Court must have regard to all the relevant factors. Section 3(1)(a) has only prescribed two specific factors that the Court must have regard to: (a) the minor's views, if having regard to his age and understanding and to the circumstances of the case, it is practicable to do so; and (b) any material information including any report of the Director of Social Welfare. I will return to the minor's views and the social welfare report in a moment. 27. In recent years, when applying the welfare principle under s.3(1) of the GMO, judges in the Family Court⁵ have consistently adopted, with minor modifications to suit the local circumstances, the matters specified in s.1(3) of the English Children Act 1989, which have now come to be known as "the welfare checklist". Those factors are: (a) the ascertainable wishes and feeling of the child concerned (considered in the light of his age and understanding) (b) his physical, emotional and educational needs (c) the likely effect on him of any change in his circumstances (d) his age, sex, background and any characteristics of his which the court considers relevant (e) any harm he has suffered or is at risk of suffering (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs (g) the range of powers available to the court under the 1989 Act in the proceedings in question. It has more or less become a standard practice in the Family Court in cases involving children to make use of "the welfare checklist". 28. I endorse this practice, but with three caveats. 29. First, absent any statutory underpinning in the GMO, our courts are under no duty to have regard to "the welfare checklist". In other words, it is not compulsory to do so. Whether a judge may wish to make use of it and if so how is entirely a matter for him. For example, he may cherry-pick, as it were, only those factors on the checklist which are relevant to the case before him. As long as the Judge's decision, supported by reasons, is demonstrably in the best interests of the minor, he cannot be criticised for not expressly applying the checklist or not going through all the factors one by one. 30. Second, when applying the checklist, judges are not subject to the laborious necessity of expressly relating their findings in every case to its specific provisions one by one. Otherwise the task will become too onerous unnecessarily. 31. Third, "the welfare checklist" is an aide-memoire

designed to ensure that none of the factors potentially relevant for a court considering a child's welfare generally in the circumstances of each particular case is left out of account: *Southwark London Borough v B* [1993] 2 FLR 559, 573B-C (Waite LJ). It is not meant to be exhaustive. Judges are entitled to and indeed should have regard to all other relevant factors even if they are not on the list. 32. Subject to these caveats, I think judges are at liberty to make use of "the welfare checklist" in the way that best suits the need of the case before the court for the purpose of assessing the best interests of a minor. D3.6. Social welfare report: 35. This is another specific factor mentioned in s.3(1). 36. In *WSM v FSJ (A Minor: Custody Appeal)* [2005] 3 HKC 319, Cheung JA dealt with the approach to a social welfare report in the context of a s.3(1) inquiry thus: [22] As we understand the position, the social welfare report, is, like all other material information, one of matters that the court should pay due regard in determining what is in the best interest of the child. No doubt because the social workers have carried out the background investigation, they are able to provide details of the family situation which are not otherwise available to the court. And to that extent the courts have said in the past that if the recommendation of the welfare officers are not followed then it is highly desirable that the judge should say why he has not done so: see *W v W (A minor: custody appeal)* [1988] 2 FLR 505. [23] This is a matter of commonsense but as more recent cases show, the judge's reasons for reaching his own decision instead of relying on the recommendation are normally the very reasons for his declining to follow the recommendation. Unless his reasons are manifestly wrong he is not under any further duty to spell out the reasons for departing from the recommendation: see *Re V (residence: review)* [1996] 3 FCL 101 and *Naziya Aslam v Rafaqat Ali (Custody and Removal)* [2009] HKFLR 294. This is an approach we will also adopt. Otherwise the matter will be enmeshed in technicalities. [24] We will further add that a social welfare report is not a special category of material information, nor should the recommendation assume a status somewhat akin to a legal presumption which needs to be rebutted. Ultimately the decision making lies with the judge based on the available evidence and guided by the relevant principles. See also *Z and Y* [2001] 1 HKLRD 261." Both Leading Counsel referred me to the concepts of joint care and control and shared care and control / parallel parenting as set out by Her Honour Judge Melloy in *PJM and GPN* [2018] HKFL 65: "14. Given that the parties are agreed that they shall have joint custody I intend in this judgment to concentrate on the terms care and control and shared care. I touched upon this in *SEB v ZX (Custody)* [2007] HKFLR 165 and in *SKP v Y, ITT (Legal Terminology to be Used in Relation to Children's Arrangements)* [2012] HKFLR 422. In the latter I said as follows when discussing the concept of joint care and control and shared care: Joint care and control 21. Consequently, joint care and control denotes a situation where the parties are sharing the day to day practicalities of raising a child. It will normally mean that the child is spending significant periods of time with both parents in each of their homes, but not necessarily on a 50:50 basis. However, the time shared is likely to be more significant than in a standard custody/access type order and will probably mean that the child is spending at least 35% of his time based with each of his parents. One would expect that both parents are involved in the schooling and extracurricular activity schedule and it normally denotes a high level of co-operation between the parents. Consequently, one would normally expect an order for joint custody and joint care and control to be made by consent. In the language of the social scientists an order for joint custody and joint care and

control would probably be reflective of a cooperative co-parenting scenario. So how does this compare with the concept of shared care? 22. The concept of shared care as an alternative to joint care and control has developed over time. I referred to this recently in a case that may be going on appeal and is presently unreported namely TAC v VDC nee VDM FCMC 16497 2010. In that case I referred to H v H (unreported, 6 September 2002, CACV 42 of 2002, where the Court of Appeal first upheld an order for shared care. This judgment has been referred to by counsel for the father in this hearing. What is interesting is that in that case an order was made for sole custody and shared care. This approach was then followed by myself in SEB v ZX (Custody) [2007] HKFLR 165 referred to above and more recently in RWS v KCC, FCMC 9661 of 2010 unreported. In each of these cases and for a variety of different reasons it was felt appropriate for the ultimate decision making power to vest in only one parent. Thus orders were made for sole custody. However, the court was anxious to ensure that the children involved should continue to spend significant amounts of time with both parents in a way that was more reminiscent of a joint care and control order. In order to recognise this and the fact that the non-custodial parent continues to have a great deal of practical control in the child's day to day life, the phrase shared care was coined. Again in social science terms this is perhaps more reflective of a parallel parenting regime i.e. where there is a very high level of conflict between the parents which makes cooperative co-parenting virtually impossible, but where it is in the children best interests to spend significant periods of time with both parents. It would be normal in a situation like that to set out very clearly how the children's time is to be split between both parents. There is no order for access per se. I made such an order in RWS v KCC, FCMC 9661 of 2010 commenting as I did that: "I have given a great deal of thought to the appropriate order to be made in this case. As I have said it is not possible for me to make a "parallel parenting" order as such. However, I would like to make an order that supports the concept of parallel parenting. Consequently, it seems to me that it would be more appropriate to make an order for shared care as opposed to a traditional order for care and control and access. This will make no difference at all to the practical arrangements that I intend to put in place. They would have been the same in either event. However, the concept of shared care seems to me to echo that of parallel parenting and I would urge the parties to adopt that approach. ... I will therefore make an order for shared care, following the format of the order in H v H i.e. that the care of the children shall be shared between the parents as follows: Detailed arrangements were then set out accordingly"" It is with the above principles and guidance in mind that I approach the determination of the future arrangements for the Children. I have been provided with very detailed Opening and Closing Submissions in addition to which I have had the opportunity to hear from the Parents themselves as well as the other witnesses. At the outset I would like to say that there is no doubt in my mind that both Parents are loving and responsible parents in their own particular ways. They are however, as is often the case, different in manner and inclination; in happier times I anticipate they might well have complimented each other as parents. During the Trial reference was made to the Parents competing with each other as parents. This is understandable upon the breakdown of marriage when the arrangements for the Children have yet to be agreed or determined. However it is important for both Parents to recognise that going forward it is in the Children's best interests to have the benefit of both Parents' respective parenting skills and styles devoid of

competition. The Parents' respective Open Proposals In broad terms the Mother's proposal of 6 August 2020 is as follows: Sole custody to her Care and control to her Defined access to the Father during term time Generous staying access to the Father during school holidays depending on the availability of the Father The Mother's further proposal of 24 August 2020 Sole custody to her with an undertaking to "inform and consult the Father upon any changes of the Son's schooling and residence as well as significant health care matters" Additional access The Father's proposal of 18 August 2020 Joint Custody Shared care and control on an equal basis Reports There are three Social Welfare Reports all prepared by the same Social Welfare Officer and one Psychological Report prepared by a Clinical Psychologist ("CP"). The 1st SWR dated 18 April 2019 As referred to above, it recommended joint custody and shared care and control. The 2nd SWR dated 6 September 2019 This was prepared for the purposes of the CDR listed for 12 December 2019. This report also recommended joint custody with shared care and control. The 3rd SWR dated 6 April 2020 This was prepared for the purposes of the Trial. This report also recommended joint custody with shared care and control. I found all three Reports helpful and informative in the context where the Reports cover the period from early 2019 to early 2020 (the 1st Report is dated 18 April 2019, the 3rd is dated 6 April 2020). The SWO spoke to the Children's teachers and reported as follows: 1st Report "17. B was attending reception class at School. According to Ms P, the reception class teacher, B behaved well at school. He met age-related expectations in all areas of learning, and he was above age-related expectations in some areas such as Literacy and Mathematics. His emotion was stable at school and he was very sociable. He always initiated interactions with his peers and had a close group of friends. His parents were concerned about his condition. They were very supportive and were actively engaged in the school community." "19. D was attending pre-nursery class at Y Nursery, According to Ms Y, the pre-nursery class head teacher, D's academic performance was at the expected level of pre-nursery. Her emotion was settled at school. Her parents were concerned about her condition and they had actively participated in the school activities with D." 2nd Report "4. B completed reception class and was promoted to Year 1 for the academic year 2019 to 2020 at School. According to his school annual report to parents June 2019, B either met or exceeded the age-related expectations in the prime and specific areas of learning. His Year 1 class teacher, Ms M reported that he was working a high level across all areas of the curriculum. He was a polite child and he behaved well at school. He had meaningful social interactions with his peers and made good friends at school. He came to school happily and made the transition from home to school with confidence. Both his parents were engaged that he was dropped off and picked up on time, brought to school with all necessary equipment and home learning was evident. To ensure about B's schedule, the school were working closely with the parents. 5. D completed pre-nursery class and was promoted to K.1 (p.m. session) for the academic year 2019 to 2020 at Y Nursery. According to her development report for the academic year 2018-2019 second term, D was assessed to be well developed in all learning areas. Her K.1 class teachers, ... Reported that she had settled in school nicely. She was independent in class and would take her time to inquire in the different centres around the classroom without prompting from the teacher. She enjoyed participating in most activities and was confident when interacting with her peers. She liked to talk about her family, home life and what she had done over the weekend or during a long holiday. Her parents were very actively

involved in her school life. They would discuss upcoming events with the teachers and participate in activities that parents were invited to join. To accommodate both parents, the teachers had made double copies of letters, homework books and other important documents to them.” 3rd Report “8. B was attending Year 1. His class teacher, Ms M reported that B was engaged and well behaved at school. He was working at a high level across all areas of the curriculum. He was polite to his friends and staff working with him. He had meaningful social interactions with his peers and had good friends at school. He enjoyed school and was happy whilst there. He also made the transition from home to school with confidences. Both parents were engaged that B was dropped off and picked up on time. He was brought to school with all necessary equipment and home learning was evident. The school had worked well with the parents to ensure all parties were aware of B’s schedule. 9. D was attending Y Nursery Her class teachers, ... reported that D had a positive attitude towards learning and would often make connections about study to her home life. She was happy to share her thoughts and ideas with others and could do so with confidence. She was very independent in class and was able to complete work and activities with minimal assistance from her teachers. She was a happy student and enjoyed being around other students. She rarely go emotional in school. She was confident in her abilities and was not easily affected by things. She had a large vocabulary and was able to express herself clearly and effectively, often sharing her home life with teachers. She was fond of her brother and would share what activities they had done with their parents over a holiday or weekend. During school suspension due to COVID-19, she had been very active with the home learning. Both her parents communicated effectively with the school to share her progress through photos and videos. They had also been in regular contacts with the teachers, updating them who D would be staying with each week.” I consider the above remarks by the SWO important as very often a child’s performance at school and their social skills are reflective of the child’s general welfare and contentment at home. The Psychological Report dated 22 October 2019 It was prepared for the CDR hearing on 12 December 2019; prior to the conclusions and recommendations it inter alia states as follows: §1. “The present assessment is going to evaluate the present condition of the parties following the divorce before coming up with a conclusion and recommendation on the children’s custody and access arrangement” §13 “In the interviews, both of the parents tell that the children have been adjusting well in the new living arrangement after the divorce”. §19 “Both parents were asked to fill out the Child Behaviour Checklist for their children. Analysis of the results do not indicate the children are suffering from significant signs of emotional or behavioural problems. The reports of the parents are largely consistent, there are no report of particular emotional issues or problem behaviours found on the children, except that the mother reports that the son is easily feeling hurt and being upset.” §20 “In this September, the schools were asked through email about the children’s condition at the school in the last and new school term. Both of the schools do not have concerns about the children’s academic, social or emotional behaviours. The schools view both parents are supportive and engaged in the learning of the children. They would communicate with the school through emails, phone calls or in person when the parents come to school pick up/drop off the children. Their response to school communication are timely and positive.” §30 “Their interactions with mother were natural and they did not display any avoidance or negative

emotion towards the mother” §32 “The father was observed with the children both in the interview room and playroom. He displayed impressive ability to engage and motivate both of the children in different interactive play activities.” In her conclusions and recommendations the Clinical Psychologist stated as follows: “48. Given the present moderate level of conflict of the parents and their difficulty in communication and reaching agreement peacefully about their children, it is inevitable that the children would be put in the middle of the conflicts and it is not good for their psychological development and they are more likely to suffer from health and emotional issues. For the well-being of the children and helping them to adjust to the divorce easier, the parents shall learn to separate their parental roles from their unresolved conflicts in the marriage, try to reduce conflicts and focus on their own parental roles, doing the best job each of the parent can do over the time when children are staying with them without criticising the parenting of the other parent. 49. The present week-on-week-off parenting plan could allow the parents taking care of the children separately and independently, it could minimize conflicts of the parents as they could work independently with the children’s teachers, doctors, coaches and friends. They would communicate on the important issues like the health and education of the children through email or text message. 50. Unless, the parents could resolve their issues and put aside their own emotion, cooperative parenting would be very difficult for them at this stage. Sustaining conflicts and fights between the parents would only impact the children, as they are growing up and getting more involved in the conflicts. 51. Given the considerations above, I would support the recommendation of the Social Welfare Officer as presented in her latest report, including a joint custody be granted to the parents with shared care and control on equal basis of the children in a seven to seven days routine on a bi-weekly basis.” I consider the above remarks by the Clinical Psychologist as important in the context of the Children’s current circumstances and their future arrangements. The Mother’s case In her Opening Submissions it was the Mother’s case that she sought sole custody care and control because: “16 a. Due to the complete breakdown of trust, it has been proven that the parties were unable to communicate and cooperate on the simplest of matters concerning the children. Such failure and lack of communication prevent the parties from working together to ensure the interest of the Children is best served. b. F’s work commitment means F lacks capacity (and ability) to cater comprehensively for the meticulous care the children require at this very young age. c. F’s alternative solution of heavily involving the helpers and his own mother are unideal and inferior to having the Children taken care of by M. d. M’s unquestioned parenting capability and capacity render her the ideal candidate to take care of the children. and that “18. Unfortunately, since the separation (February 2019), conflicts have worsened to the point where there is a complete breakdown of trust and communications. This is what prompts M’s application for sole custody, care and control of the children. 19. The conflict manifested itself in all corners, covering a diverse range of matters, whether major or minor, short or long term, including but not limited to:- Drop off and pick up locations; ECA of the children; Health conditions of the children; Father’s day arrangement; Children’s schoolbags and course kits; Choice of schools; Autumn break arrangement; and Parties’ financial arrangements.” In her Closing Submissions the Mother inter alia stated: “21. M strongly opposes to the continuation of the week-on week-off arrangement. The evidence at the trial supports M’s main reasons for her oppositions: The

implementation will cause inconsistencies in the Children's lives in the two households from character building and value to more practical arrangements such as ECA and timing for homework; The inconsistency is further intensified by the absence of F, over-reliance on F's secondary carer, and the non-communication between M on one part and F and F's party of helpers on the other." "61 The deep-seated mistrust is rarely seen even in high conflict cases. The whatsapp messages are clear manifestation of the high degree of intensity in the parties' relationship. If these whatsapps are insufficient, then F's affirmations should bring home the point. It is an understatement to say they are emotional. F's affirmations show a diatribe against the character and personality of M and reveal he genuinely thinks M is not and cannot be a co-parent" The Mother's Closing was critical of the Social Welfare Officer : "8. Upon realising that her recommendation on joint custody was unsound, SWO blurted out during cross-examination that the parties may engage upon a parallel parenting system. We note the concept of parallel parent is essentially recorded in the CPS report at §§49 -50 of the CP Report." But yet earlier in the Closing the Mother did not oppose parallel parenting in principle: "3 In respect of parallel care / parenting, it is M's stance that: M does not oppose to parallel care in principle. However, she opposes parallel care together with the week-on week-off arrangement. M proposes shared care be imposed in line with the amended open proposal of M. It gives F significant time to the Children after F gets off from work and over the weekends and it allows F to have the opportunity to have the morning routine with the Children on Monday. Effective parallel parenting which strikes a fine balance between all factors is facilitated through M's revised proposal." "40 We particularly emphasise three points that undermines the value of the SWO's recommendations SWO made her recommendations on joint custody and shared care and control in the 3 SIRs on the false basis that the parties are able to communicate and cooperate with each other. This basis is proven to be invalid. After learning the reality that the parties cannot work with each other, SWO insisted to recommend joint custody on an aspirational basis and parallel care and control. SWO fails to provide a valid basis as to how this would be conducive to the best interest of the Children. SWO's evidence is unreliable and defensive. Her views on various matters are objectively unpersuasive." The Mother's Closing was also critical of the Clinical Psychologist: "89. We particularly emphasise two points that undermines the value of the CP's recommendations. CP wrongly understood the law on joint custody and sole custody. CP wrongly holds that there has to be "abuse" to support sole custody. Hence, despite CP rightly identified this is a high conflict case with immense difficulties for parties to work together, CP incorrectly recommended joint custody. CP failed to appreciate that the Children are of very young age and it is against their interest to make shifts between two homes on a week-on week-off basis. Under such arrangement, the Children's interest of having a consistent living arrangement is wrongly sacrificed. The Children are essentially made to parent the parents for their failure to keep the conflicts between themselves." So far as the CP's reference to abuse this arose in cross-examination: "96. One of the probable causes is that the CP has applied a wrong test on joint custody or sole custody unsupported by the authorities. Abuse is never the prerequisite for an order of sole custody. Q. Ms Wong, I'm afraid I'm not following you in how -- on what circumstances -- or would there be a case whereby there would be no joint custody or, according to you, every case should be joint custody? A. In cases where there would be abuse -- if we know

that cases where children would be abused, either psychologically, emotionally or physically, then -- yes, then that will affect us when considering whether joint custody is appropriate. [930-R of 21.8.2020 Examination by M]” From the above exchange I do not consider the Clinical Psychologist misunderstood the law on joint custody as clearly in cases where there is abuse of children this may well affect the consideration of joint custody. The Mother complains that the SWO and CP were at a disadvantage in that they were not provided with all the Parents’ affirmations and exhibits prior to the Reports. I do not find this unusual and in any event the primary task of the SWO and CP is to provide recommendations after interviewing the Parents and significantly the Children rather than an analysis of the Parents’ evidence. Ms Yip SC points out that during cross examination the CP described the dissatisfaction level between the Parents as “high level conflict”, whereas in her Report Miss Yip states the CP was more “neutral about the Parties co-operation”. I do not consider this detracts from the CP’s overall observations of the Children and her recommendations and conclusions in relation to the Children. In addition to the points set out in her Opening; in her Closing the Mother identified a number of other issues which illustrated why she should have sole custody and care and control and why the recommendations of the SWO and CP were wrong. In this Judgment I do not propose to address each and every one of the Mother’s complaints detailed in the Opening of 39 pages and Closing of 92 pages. I propose to stand back and consider the evidence both written and oral having, having in mind, the authorities which both Leading Counsel have helpfully drawn to my attention. I propose to refer to certain of the Mother’s complaints; however where I do not specifically mention a complaint it does not mean I have not considered it in my overall review of the relevant evidence of substance. Many of the Mother’s complaints arise from her contention that she and the Father cannot communicate and/or co-operate. According to the SWO, in May 2019, the Parents jointly approached a respected registered child psychologist to assist in preparing a Joint Script to explain their divorce and proposed new child care arrangements to the Children. The Mother complains in her Closing that : “49 The Court would be very alive to this past incident, as set out clearly in the correspondence on the matter. F refuses to commence the week-on week-off arrangement despite M has successfully obtained an order” I have re-read the relevant inter-solicitor correspondence. In the context of the case I consider it was appropriate for the Parents to have jointly instructed a child psychologist to give guidance on a Joint Script. As a matter of common sense it would seem sensible for the guidance to be obtained prior to the new arrangements being implemented. I note the order was made on 6 May 2019, the Joint Instruction was dated 8 May 2019; according to the 2nd SWR after contacting the clinical psychologist the Parents then told the Children of the new arrangements on 11 May 2019 which were then implemented on 12 May 2019. I see no basis for the Mother’s criticism of the Father in this regard. The Mother is critical of the Father’s initial reaction to her request to vary the interim arrangements to take account of the Children’s autumn break in October 2019. I have re-read the solicitor correspondence which ultimately led to an agreement being reached as reflected in the Consent Order of 18 October 2019; the Parents therefore reached agreement without the Court having to determine the issue. I do not accept the Mother’s criticism of the Father in this regard. Much voluminous WhatsApp messages were exhibited to the Parents’ written evidence; in the Trial both Parents and indeed the SWO were cross-examined on such messages. The WhatsApp

messages featured large in the Parents' Closing and Reply; for the Father 44 pages of analysis, for the Mother 89 pages in Reply commenting on the Father's 44 pages of analysis. I have taken some time in again re-reading the Whatsapp messages in particular those I was taken to in the Trial. They illustrate inter alia sarcasm, point scoring, impolite criticism and comment but they also illustrate exchanges of information and search for consensus. I am also conscious that during the period of an interim order parties sometimes find it very difficult to communicate pending the determination of the future arrangements. I accept that the Parents currently would most probably find it difficult to communicate in a traditional shared care arrangement however I am of the opinion they have sufficient communication skills to communicate sufficiently for a parallel parenting arrangement as currently reflected in the interim order of 6 May 2019. It is the Mother's case that in the event the Parties are unable to agree ECAs the Children will have the potential of participation in different ECAs each week depending upon with which Parent they are residing. Whereas I accept ECAs can be relevant to the question of custody I do not think in the context of this case it is a reason for not ordering joint custody. I further anticipate with the assistance of a Parental Co-ordinator, the Parents will be able to resolve any impasse as to ECAs. The Mother was critical of the Father's parenting arrangements. The Father, like indeed the Mother, is doing his very best to parent the Children in a loving, responsible and supportive manner; both have organised their working lives to spend as much time as they can with the Children. I further note that the Father's parenting skills and application of time was acknowledged and respected by the SWO and CP. In the circumstances I am satisfied that the arrangements the Father has organised for the Children when they are in his care are satisfactory. The Mother raised her concerns as to one of the Father's domestic helpers praying with one of the Children; the Father addressed this in his oral evidence and I was satisfied as to the veracity and integrity of his answer. I also consider it is relevant when considering and assessing the Mother's case and complaints to have in mind the document Mr Pang SC drew to my attention in his oral Opening Submissions namely the Mother's Court Note of 3 May 2019 which was lodged for the purposes of the hearing on 6 May 2019. The Mother's Court Note inter alia stated as follows: "19. In the present case, the court is ably assisted by the SIR. The recommendation is soundly made and is fully welcomed by the Wife. 22. The Wife welcomes the recommendations made by the SIR, save and except the part about overseas trips at this stage of the proceedings. The Wife opines that an interim order to the effect should be made, such arrangement to be revisited when the Husband resume full-time employment or when the Husband shows that he is incapable of performing the role. 24. Both the Wife and the Husband were agreeable to Joint Custody. 36. From an objective stand point, despite the parties had made numerous complaints and accusations against each other, the accusations are inter-personal binary relationship between Husband and Wife. They do not really doubt and discredit each other's ability to care and to act in the interest of the Children 60. The Wife asks for the following directions / order: a. Joint Custody be granted; b. Interim Share Care and Control and Access be granted in accordance to the recommendation of the SIR; c. The parties shall file and exchange their Form Es 28 days herein; d. The 1st Appointment Hearing and the Children Hearing be adjourned to [date] for a 15-minute hearing; e. The hearing fixed on 12.12.2019 be used for CDR on the Children's care and control; f. Costs be reserved." I further note

the Mother stated at paragraph 15 of her affirmation of 3 May 2019: “15. It has been my stance all along that the Father and I should share the care and control of the Children at the very least for the interim period. I believe it is in the interest of the children that we each pick up the responsibility as early as possible. I believe it would be in the interest of the Children for us to split the time living with them so they can enjoy the time with me and the Father equally and respectively. I do reserve my rights to apply for sole care and control if, after the implementation of an interim shared care and control, the Father resumes fulltime employment, the Father is/ becomes incapable of providing the care the Children deserve and/or fails to fulfill the responsibility of his.” As a matter of objective analysis it is therefore quite clear that the Mother’s opinion of the SWO in the preparation of her 1st report in April 2019 was favourable to the extent that the Mother invited the Court to make interim orders as to Joint Custody and Shared Care and Control. However as referred to above the Mother specifically reserved her position as follows: “after the implementation of an interim shared care and control, the Father resumes fulltime employment.” “the Father is/becomes incapable of providing the care the Children deserve and/or fails to fulfill the responsibility of his.” For the avoidance of doubt I have reflected and carefully considered the Mother’s reservations in the conclusions that I have reached as set out later in this Judgement. The Father’s case In summary, the Father maintains his position that there should be joint custody, and shared care and control on a week on-week off basis for the following reasons: - i) The arrangement is recommended and supported by the Social Welfare Officer to be in the best interests of the Children; ii) The arrangement is recommended and supported by the Clinical Psychologist as in the best interests of the Children; The Mother’s criticisms of the experts are entirely unwarranted; The Father has demonstrably shown that he is a loving, committed and responsible father capable of caring for the Children during his week; The Children have shown to have ably adapted to and are doing well under the arrangement which has been in place since May 2019, and B has expressed that he wants the arrangement to continue; The Mother’s allegations of past physical altercations are denied, and in any event, even if substantiated has not real or practical effect on the Court’s consideration on the issue of custody, care and control; The Parents been able to communicate and co-operate with each other in relation to the Children’s decisions and arrangements; and The Mother herself is too busy with her consultancy business to be a full-time carer with sole custody, care, and control of the Children. In light of the remarks I have made earlier in this Judgment I agree with the general tenor of the Father’s case. Conclusions Sole custody or joint custody As referred to above, at different times both Parents have sought sole and joint custody. Having considered the written and oral evidence of the Parents, the detailed written submissions, the 4 Reports and the relevant case law I have come to the conclusion that it is in the best interests of the Children for there to be an order for joint custody. In coming to such a conclusion I have in mind the following: Both Parents themselves have at various times in the proceedings proposed joint custody; There has been an order for interim shared care in place since May 2019; In the four reports the SWO and the CP recommended joint custody. I am conscious of the appropriate caution provided by the authorities in relation to aspirational orders. However in the context of this case I am firmly of the opinion that to give either parent sole custody would create an imbalance in the dynamics of the Parents’ inter-relationship as parents which I consider would lead to an increase in

disagreements and “power play” which I do not consider would be in the best interests of the Children. I consider that in the circumstances of this case it will be a benefit to the Children if the Parents stand as “equals” in the context of custody with neither parent being a supplicant to the other. Care and control I have referred in the body of this Judgment to the assistance and relevance that I have derived from the Social Welfare Reports and Clinical Psychologist Report. I do not accept the Mother’s challenge to their recommendations and I propose to follow such recommendations. The significant and happy fact in this case is that both Children are doing well and both Parents are to be commended for this achievement notwithstanding the current tension in their own relationship. The present arrangements reflect parallel parenting which is within the interim order of shared care and control; I propose to continue such order. To change the current arrangements which are working well from the Children’s perspective would not be in their best interests. Costs The legal costs are approximately HK\$11 million which I understand to be HK\$7 million for the Mother and HK\$4 million for the Father. It became apparent at the beginning of the Trial that the Parents had not exchanged their Forms H prior to the Trial and not even prior to the CDR in December 2019. This is unfortunate and could be described as not entirely satisfactory as Practice Direction 15.13 is quite clear as to the requirement of filing and exchanging Forms H to enable parties to “family litigation” to be fully aware of not only their own costs but equally and as importantly the cost incurred and to be incurred by the other party. The approach to costs is succinctly summarised by Chu J in LCH and JMC [2019] HKCFI 251: “10. It has been long recognised that in children matters, the general practice is that there be no order as to costs. In TPL and WYY, CACV 47/2014 and CACV 61/2014, unreported, 15.12.14, the Court of Appeal has set out the relevant principles that should be taken into account when considering if a cost order is appropriate in applications to do with children. As pointed out by the Court of Appeal, the approach that in applications to do with children, the usual order should be no order as to costs stems from the aspiration that in these applications, the court is seeking to find an arrangement which is best for the children, and that the rationale is that when a court considers custody and care and control of the children, the proceedings are inquisitorial rather than adversarial.” Understandably prior to this Judgment I have not been addressed on costs therefore I propose to make an order nisi that there be no order as to costs which will become absolute 21 days after the delivery of this Judgment. The orders flowing from this Judgment are therefore as follows: Custody of the Children be granted jointly to the Mother and the Father. Shared Care and Control of the Children on equal basis be granted to the Mother and the Father in a seven to seven days routine on a bi-weekly basis as follows:- Week 1: Mother shall have Sunday 7:30 p.m. to next Sunday 7:30 p.m. Week 2: Father shall have Sunday 7:30 p.m. to next Sunday 7:30 p.m.; Pick-up and drop-off point of the Children shall be at the Lobby of the Mother’s home when the Children were placed under the care and control of the Mother and at the Lobby of the Father’s home when the Children were placed under the care and control of the Father; Day access be granted to both the Mother and Father after the Children finish school to 8:00 p.m. on Wednesdays during the week when the Children are not placed under their care and control. Daily video call access conducted between 6:00 p.m. to 8:00 p.m. be granted to both the Mother and the Father during the week when the Children are not placed under their care and control; School holidays be split equally or alternatively to be agreed by both Parents; Overseas trips with

either Mother or Father to be agreed by both Parents. An order nisi that there be no order as to costs which will become absolute 21 days after the delivery of this Judgment. (Robin Egerton) Deputy District Court Judge Petitioner represented by Miss Anita Yip, SC leading Mr. Ken SH Chan, Counsel instructed by Messrs ONC Lawyers. Respondent represented by Mr. Robert Pang, SC leading Mr. Eric Leung, Counsel instructed by Messrs Alvin Cheng & Rosaline Choy.

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