

HONG KONG / JUDGMENT

HYK v. WLS

[2023] HKFC 104**COURT**

Family Court

DECIDED

31 May 2023

CASE / FILE NUMBER

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**[2023] HKFC 104 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION JOINT APPLICATION NO. 59 OF 2021**

BETWEEN HYK 1st Applicant and WLS 2nd Applicant

Coram: Deputy District Judge Enzo CHOW in Chambers (Not open to public) Date of Trial: 19th to
22nd October 2021 and 26th November 2021 Date of Judgment: 31 May 2023**JUDGMENT**

(care and control, and access issues)

For the ease of reference, I shall in this Judgment call the 1st Applicant as the Father whereas the 2nd Applicant as the Mother . The trial relating to care and control as well as access issues were held on 19th to 22nd October 2021 and 26th November 2021. At the trial, the Father was represented by Mr. Alvin Cheng (Mr. Cheng), Solicitor, whereas the Mother was represented by Mr. Ken Chan (Mr. Chan), Counsel. The Witnesses In this five-day trial, the following witnesses had in turn testified: - Mr. Lai (the), the Social Work Officer preparing the relevant Social Investigation Reports (SIRs); The Father himself; Madam WSH, the mother of the Father (the Paternal Grandmother); The Mother herself; Madam SKC, the stepmother of the Mother (Madam SKC); Mr. WKS, younger brother of the Mother (); and Mr. WKF, younger brother of the Mother (.) The Background of the Family The trial concerns the following children of the family (hereinafter collective called the Children): - HLL, girl, born on 3rd October 2011; HTY, boy, born on 31st July 2013; and HTC, boy, born on 13th September 2015. The Children have their respective

special needs and suffer from different illnesses respectively, namely: - For HLL: - Problems and disabilities: tx[g 0|T8TgQ lBv }ba k|^RQ lBv ntly in 1981 and started his education here until he got his Diploma in Computer Studies. After graduation, the Father started working in computer related jobs in Hong Kong. According to the available information, the Father was the time of the trial still working on a full time basis. He worked from Monday to Friday from 8:30 am to 6:00 pm where he will be off duty on Saturday and Sunday. The Mother came to Hong Kong in 2000 from the Mainland. She previously worked as a private tutor in Putonghua and Chinese. She said she quitted all her jobs in July 2019 (i.e. shortly after the Father had filed the Petition for divorce in FCMC 6334 of 2019 on the basis of the Mother s behaviors) but this is not accepted by the Father. The parties were married on 23rd July 2010 in Hong Kong and separated on 1st January 2019. In 2021, the parties reached agreement to file a fresh joint application in these proceedings on the basis that they have already lived apart for not less than 1 year. Since the marriage and until around September 2019, the family was residing at the matrimonial home in Wong Tai Sin (the). In around September 2019, the Mother attempted to bring the Children away from the FMH, which resulted the Father s ex-parte (with notice) application for order prohibiting the Mother from doing so. On 13th September 2019, HHJ C.K. Chan granted interim custody care and control of the Children to the Father and prohibited the Mother from removing the Children from the FMH. Afterwards, for a period of time, the Mother moved to a rented flat in To Kwa Wan (the TKW Flat). Subsequently, the Mother moved back to the FMH. It is the Father s complaint that since the Mother s return to the FMH, she always brought the Children outside the FMH and only returned them late during the day. The Father has produced 2 schedules setting out the dates and times that the Mother had brought the Children away. The Father complained that, by doing so, the Mother had effectively deprived him of the opportunities to take care of the Children. The Father criticized that the Mother s such moves are tactical. General Principles Relating to Children of Family At the Children Dispute Resolution hearing before DDJ T. Kwan, as she then was, the parties had already agreed that the parties should have joint custody of the Children. In relation to the meaning of care and control and how it is different from custody , the Hon Hartmann JA (as his Lordship then was) in PD v KWW (Child: Joint Custody) [2010] 4 HKLRD 191 at [31-32] had very detailed elaborations: -

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. As regards the concept access, the Hon Hartmann JA had also elaborated its co-relation with care and control in *PD v KWW* (Child: Joint Custody) at [43] as follows: -

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 interests of the child to ensure continued bonding between parent and child. As regards how the issues of custody, care and control as well as access should be determined by the Court, section 3 of the Guardianship of Minors Ordinance (Cap.13, Laws of Hong Kong) () (as amended and came into operation on 13th April 2012) 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 section 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 (Amended 1 of 2012 s. 4) (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 (Amended 1 of 2012 s. 4) (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; (Replaced 69 of 1982 s. 2) Section 48C of the Matrimonial Causes Ordinance (Cap, 179, Laws of Hong Kong) () provides: - section 3 of the Guardianship of Minors Ordinance (Cap.13) (which provides that the welfare of the minor shall be the first and paramount consideration) shall apply in relation to any order for custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap.192). As Mr. Cheng for the Father rightly pointed out in his Opening Submissions, while welfare under section 3 of GMO had long been amended and replaced by best interests, there is no corresponding amendment to section 48C MCO. In any event, it seems that nowadays, the welfare concerning minor/child in divorce proceedings in courts in Hong Kong shall also be understood as the best interests of the minor/child concerned. As Mr. Cheng submitted, according to Rayden and Jackson on Divorce and Family Matters, the word welfare has similar meaning with best interests, which is interpreted as follows: - The

word welfare must be taken in its widest sense. It has been said that the welfare of the child is not to be measured by money only or by physical comfort only, the moral and religious welfare of the child must be considered as well as his physical well-being, nor can the ties of affection be discharged. Welfare and best interests are synonymous. In England where the same welfare principles apply to children matters and from which section 3(1)(a) GMO in Hong Kong were derived, the courts are required to have regard to the matters specified in the Children Act 1989 which have come to be known as the Welfare Checklist. Such Checklist is also proposed in section 9.29 of the Report on Child Custody and Access published by the Law Reform Commission of Hong Kong in March 2005. Both Mr. Cheng for the Father and Mr. Chan for the Mother referred to the checklist adopted by Jeremy Poon J (as Poon CJHC then was) in *H v N (Children: Variation of Interim Order)* [2012] 5 HKLRD 498 is set out as follows: - the ascertainable wishes and feelings of the child concerned (considered in the light of the age and understanding); the child's physical, emotional and educational needs; the nature of the relationship of the child with each of the child's parents and with other persons; the likely effect on the child of any change in the child's circumstances; the child's age, maturity, sex, social and cultural background and any other characteristics which the court considers relevant; the attitude of the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; any harm which the child has suffered or is at risk of suffering; any family violence involving the child or a member of the child's family; how capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; the range of powers available to the court under this Ordinance in the proceedings in question; and any other fact or circumstance that the court thinks is relevant. However, as also expressed in *H v N*, although Jeremy Poon J (as Poon CJHC then was) endorsed the practice of making use of the welfare checklist, there were three caveats, in particular it is not compulsory for our courts to have regard to the welfare checklist and that it is an aide-memoire (endorsed by the Court of Appeal (Lam VP (as Lam PJ then was) and B Chu J) in *ZJ v XWN* [2018] 3 HKLRD 644 at [25]). Further, as expressed by the Court of Appeal in *ZJ v XWN* (at [28]), it is not mandatory for a judge in Hong Kong to set out the welfare checklist mechanically item by item to demonstrate that he/she has considered the same. There is suggestion that the Court shall not mechanically fit into these brackets when determining what are in the best interests of the child concerned. The Social Investigation Reports As mentioned hereinabove, section 3 GMO requires the Court to have regards to, amongst others, any report of the Director of Social Welfare. Moreover, it has repeatedly been said that social investigation reports generally provide the court with much needed background information on cases related to children. Social Welfare Officers are said therefore to be the eyes and ears of the court. They make recommendations for the court's consideration, but the court is not bound by those decisions. However, if a court decides not to adopt those recommendations then reasons should be given (see for example *HHJ Melloy*

in *MT v HYC* [2020] HKFC 55 at [8] and *Her Honour in NKM nee SKM v NGR* (unreported, FCMC 14652/2007) at [16]). By the time of the trial, two social investigation reports (both of which were prepared by the SWO) had been submitted to the Court, namely: - The social investigation report dated 22nd November 2019 (the 1st SIR); and The updated social investigation report dated 3rd December 2020 (the Updated SIR). The SWO had also given oral evidence during the trial. In the present case, the parties have agreed that they should have joint custody of the Children. I have also seen evidence that the parties have attended consultations and courses for co-parenting. The Court does appreciate that the Father and the Mother are willing to co-operate with the each other for the best interests of the Children. Nonetheless, despite that the parties had gone through mediation and Children Dispute Resolution hearing (before DDJ T. Kwan, as she then was), the parties were still unable to come to an agreement on the arrangements regarding the care and control as well as access concerning the Children. By the time of the commencement of the trial, what the parties were able to agree were (1) joint custody of the Children; and (2) long holidays of the Children should be shared by the parties equally. In the Updated SIR (at [26]), the SWO made the recommendation that interim care and control of the Children be granted to the Mother on a trial basis for 9 months and where the Father should have defined access to the Children as the parties had agreed in the Mediation Agreement. At the trial, the Court had tested the validity of his recommendations and desirability of the test run of his recommendation. The Court had also specifically asked the SWO what would the alternatives be if his recommendation does not work out. The SWO acknowledged that one of the possibilities is that the Children returning to the FMH and be placed under the care and control of the Father. The Father now sought to convince the Court not to adopt from the recommendations of the Social Work Officer. It is the Father s position that the Court should depart from the recommendations made in the Updated SIR and grant care and control of the Children to him. On other than hand, the Mother maintained that the Court should adopt the recommendations and grant care and control of the Children to her. The Mother stresses that the views of the Children should be respected. The Mother also places emphasis on the past history of the caring of the Children. The Father submits that the status quo should be maintained in order to create less disturbance to the Children and in particular in the light of the Children s physical problems. The Father further submits that the best arrangement for the family and that the Father should have care and control of the Children for the following specified reasons (as stated by Mr. Cheng in the Father s Opening Submissions): - The Father and his family have a good relationship with the Children and have been taking good care of them compared with the Mother. The Father is a more caring and patient parent and good role model than the Mother. The Mother had the previous record of unilaterally bringing the Children away from the FMH, causing the Father to take out the ex-parte application. Furthermore, after the Order of 13th September 2019, the Mother suddenly and tactically moved back to FMH and occupying almost all the times with the Children. The Father also says that the Mother has tried very means to keep the Children with her and tried to handle and deal with all matters of the Children on her own without informing the Father or his family. She is trying to exclude the Father from involving in

taking care and development of the Children. The Mother also purposely not agreeing to any access arrangement in the Mediation Agreement in the event that the Father shall have care and control of the Children. The Father has a supporting family who is willing to help and assist the Father to take care of the Children. The Father's living environment is more stable and suitable for the upbringing of the Children. It is not even known where the Mother intends to move to live with the Children if care and control is granted to her. The Father has a more stable job and financial condition. He has no debt or liabilities. The Mother claims that she is not working and is relying on borrowings and government subsidy and she has debts to repay. At this juncture, it should be noted from the SIRs that HLL was not in good relationship with the Father but there are indications that their relationship is in the course of improving since the commencement of these proceedings. In the 1st SIR, the SWO could not make any recommendation because he said he needed more time to investigate after the parties had finished the co-parenting course. In his 2nd SIR, the SWO then made the recommendation that interim care and control of the 3 Children be granted to the Mother for 9 months for her to try whether she could take care of the 3 Children after they moved out of the FMH. However, both the Father and the Mother did not accept his recommendation. The Father refused to accept for the obvious reason that he was of the view that the 3 Children should be allowed to continue to reside in the FMH under his and his family's care and control but not to run the risk of a trial period of 9 months by the Mother as recommended by the SWO. On the other hand, the Mother refused to accept the recommendation solely because of the fact that if she accepted the recommendation, she would not be able to apply for CCSA and public housing unit. Honestly, while I cannot say that the Mother's reason for unaccepting the SWO's recommendation entirely unreasonable since she would also have to provide accommodation for the Children insofar as she might have staying access to the Children, I do have doubts as to whether the Mother's reason is given in view of what is the best interest and welfare for the Children. In the meantime, some of the oral evidence of the SWO as follows should have bearings on the Court's decision in the matters: - The SWO agreed that he made the recommendation when the Mother was not even telling him her proposed residence if interim care and control was granted to her for 9 months. The HLL's relationship with the Father had improved a lot between the 1st and 2nd SIRs and it was also confirmed by the SWO when being asked in the box that HLL was listening and obeying the Father's instructions. In relation to the Children's preferences, while HLL wanted to live with the Mother, HTY wanted to live with the Father and the SWO said HTY was so attached to the Father as he liked the Father so much (Ic_ Nk^Kb OO:r:r ted that he was wrong when being cross examined by the Mother's Counsel and that he did not try to argue with the Mother's Counsel. I find that the Father is in general an honest person. However, his admissions made in oral evidence also reflected his inadequacy in appreciating the nature of the problems facing the Children and the actual needs they have. The Father gave the Court the impression that he always put the emphasis on the manpower (including hiring private tutor(s) for the Children) that he could mobilize for daily care of the Children. In this regard, the Court should have no doubt that the Children could be ordinarily cared for in relation to their daily routines while they are in the

care of the Father with the assistance of others. However, the Court was not impressed by the Father's answers in relation to how the Children's special needs could be specifically catered for. The Father confirmed that throughout the marriage and before the Mother quitted her job in July 2019, the parties, the Paternal Grandparents and helper (when there was/is one employed) have all been the carer of the 3 Children but definitely not just the Mother as the primary carer. The Father also claimed that the Mother was busy in working and studying and she always needed to go out after school to work during weekdays and in weekend. The Court was again referred to the exhibit produced by the Father of a WhatsApp message written by the Mother herself on 2nd November 2018 (6 months before the issue of the divorce petition) telling the Father her schedule. The Mother needed to go out every Monday from 4-8:30pm; Wednesday 5-6:30pm; Friday 3:45-6pm; Saturday 9:00 11:30 am and 3:30-5:30 pm and Sunday 5:30 pm. The Court has taken heed of that all these periods as mentioned hereinabove were not school time and the Children should be at home. In the meantime, the said WhatsApp message (including the truthfulness of what the Mother had said therein was not disputed by the Mother). On behalf of the Father, Mr. Cheng also produced 3 tables showing the Mother's movements from 11th July 2020 to 10th February 2021; 11th February 2021 to 10th June 2021 and 11th June 2021 to 17th October 2021 (last one of which was only produced at the trial as exhibit F3 and the admissibility of the same was not disputed by the Mother) (the Mother's Movement Tables) and also individual and consolidated table of the 3 Children's medical appointment records as downloaded from the Government app's Movement Tables as Produced by the Father Mr. Cheng accepted on behalf of the Father that the movement records of the Mother submitted by her are not 100% correct and complete as explained by the Father and the Paternal Grandmother who were the main persons making this record as some of the days, they forgot to record. On the other hand, neither did Mr. Chan put a case against the Father nor the Paternal Grandmother that the Mother's Movement Tables are not accurate. In the meantime, the Court accepts that the Mother's Movement Tables were largely accurate as that when the Mother was cross examined by Mr. Cheng about her failure to bring the Children to the medical appointments by using the Mother's Movement Tables to confirm her movements on some particular dates, she started to agree to the entries stated in the Mother's Movement Tables to be true and accurate. Indeed, when the Mother testified on those tables, the Court had also warned her that she had to think carefully when she continued to agree to the Mother's Movement Tables about her movement records. It was later on when the Mother said as she needed to move flat so she had to cancel the physiotherapy appointment for HLL, Mr. Chan then stood up again and objected Mr. Cheng's questions. The Mother started not to agree with the record of her movement as stated in the Mother's Movement Tables. The Court also asked the Mother whether she was aware that the Father had been recording the Mother's movements as early as in mid-February 2021 when the 1st table was produced in the Father's 3rd Affirmation and then the 2nd table in the Father's 4th affirmation filed in June 2021; and whether she chose not to make any record of her own in order to rebut the Father's record if she thinks that the records are not accurate. The Mother simply could not provide any answer to that question asked by the Court: - The Court : bTvQ

[8r8rKNMR VbTrU O8r8r O \`OvQ-N Oyr{v T#jte Oyr{v T#jte T`O g ~ZPbTrU ZP0R`O N pbk bTrU egqg SrU"V Q}Yck8^ 0ck8^ c>ex[ Rx[!hrU"V x[!h !h g tx[!hrU"V \_ck8^ O}Yck8^ `bOq_ ZP\N"V medical appointments either when she was just at home or she left home alone. Also it can be shown that the Mother started to leave home more often leaving the Children at home to be taken care of by the Father, his family and helper. The Medical Appointments Tables In relation to the Medical Appointments Tables from 20th March 2020 to 6th October 2021, these are not being challenged as to the accuracy as they were downloaded from the government app eHealth and developmental problems and disabilities and that the medical treatments were important to the 3 Children but she did not inform the Father, his family or helper about any of these medical appointments. She said for some appointments, she forgot to attend or had other things to do so (like moving flat) and therefore had to cancel. For those appointments she knew, she either cancelled or changed but did not ask for help of the Father, Paternal Grandparents or the helper or even her own family members to help to bring the Children to attend any of these medical appointments despite she knew she could not attend. As a result, the Children s different medical appointments had either to be cancelled or delayed. Mr. Cheng then further highlighted the following cancelled or delayed medical appointments:- For HLL All ENT appointments on 2nd April 2020, 29th April 2020, 14th October 2020 were all been cancelled by the Mother without any good or valid reasons despite she said in her affirmation dated 28th February 2021 that she arranged ENT treatments for the Children and brought them to attend. On the other hand, the Mother during cross-examination only said there was no need to attend any ENT appointments which cannot be right as this contradicts her own affirmation. For physiotherapy, the Mother changed HLL appointment from 28th July 2020 to 7th September 2020. The Mother said with the consent of the physiotherapist, the appointment was changed. The Court then questioned the Mother s evidence by asking whether there was such an irresponsible physiotherapist. The Court further questioned the Mother that whether or not to attend the medical appointments was decided by the Mother but not by the professional. For nutritionist appointment for HLL, the Mother changed the appointment and was late for one month. For psychiatric appointment of HLL, it was late and delayed for 2 months because the Mother could not bring 2 different children to 2 different appointments at the same time. For HTY The occupational therapist appointment was delayed for more than 2 months from 22nd April 2021 until 2nd July 2021 when the Mother cancelled the appointment on 15th June 2021 and not attending on 24th June 2021. In the course of her cross-examination, the Mother gave the reason that because the therapist asked HTY to cut hair before coming to the next appointment but he did not have hair cut so the Mother decided not to bring him to the medical appointment. Mr. Cheng submitted that this is simply unbelievable for the Mother to put the blame on the therapist to have asked HTY to cut hair before coming to the next appointment. When the Court heard what the Mother said about the Mother s explanation not to attend the occupation therapy appointment because of no haircut, the Court asked the Mother : `OsS jR N0R- 1\ N N!k}Yck8^ g\N"V lBv+^bO I{bOSb TbO g S O)R S NN T@T? ,g-^ g g`O@T Abs^ POUL gmQ`O1\q 8r8r6^ g NbT `OGw u\N"V b}Y<O*g5d0R`O- P"V UHr 8r8r NfU uHQb OOGw UrU TbO@T THQ@T x[Bf ObTiQ OO>e Tx[HQ >ex]JU x[Bf

{fU>ex[Bf UrUa x[Bf OZP\N"VkU fU1\ OiQ N bKNMR VkU, WAbs^ Abs^ bOAbs^ pqUqUx[!h Abs^ OAbs^ wb_ OAbs^ iQ#j eiQ#j NGwRf O@T OO`O1\ S0R1 0RfU T@T I{mQ Abs^ UrU FOI{mQ Z`O g bpSa }Y<O1\ b g& ubO<w }Y<O T}Yi_ <w}Y Q\N"V QiR? N@T ren, the Court is equally bewildered by the answers given by the Mother in her oral evidence and has doubts as to whether she was able to accord proper priorities to the needs of the Children. The Paternal Grandmother Again, Mr. Cheng sought to convince the Court that the Paternal Grandmother is also a honest and reliable witness and she was also willing to accept and tell the Court things which may not in favour to the Father s case like when she talked about the time when the Mother swore at the Paternal Grandfather, the Paternal Grandmother said the Paternal Grandfather swore back. Hands on heart, the Court is not interested in the grudges between the Mother and the Paternal Grandmother Mother unless such grudges would adversely the interests of the Children. Indeed, the parties hereto as well as their proposed helpers are all adults, if they really care about the Children s welfare as they so claim before the Court, there is simply no reason why they shall not and cannot put aside the hatreds (if any) they harbor and focus their times and efforts on catering for the needs of the Children. The Mother tried to attack the Paternal Grandmother health saying that she had cancer before and a lot of the organs had been removed and hence she is not able to take care of the 3 Children. The Paternal Grandmother confirmed Stage 1 cancer in 2012 and had total gastrectomy done and also involved spleen, and 1/3 pancreas. Now she is attending regular check-up yearly with no sign of relapse. Uterus had hysterectomy long time ago. The Paternal Grandmother also confirmed how busy the Mother was before she quitted her job in July 2019. She also fairly confirms and agrees that the Mother, the Father, the Paternal Grandfather, the helper and herself are all carers of the 3 Children but not just the Mother as primary carer. The Paternal Grandmother also confirmed that she and the Paternal Grandfather are willing to continue to help the Father to take care of the 3 Children together with the helper. The Paternal Grandmother also confirmed and accepted fairly that she might not be able to help with the Children school works but they can hire private tutors to help which they have been doing that now. The Court does accept that the Paternal Grandmother is an honest witness. The Court also accepts that there is no evidence that the Paternal Grandmother is not able to take daily care of the Children (including bring them to attend medical appointments) despite the Paternal Grandmother had previously suffered from cancer. On the other hand, the Court equally observes from the Paternal Grandmother s oral evidence that (just like what the Court observes on the Father) while she loves the Children and is able to help take care of the Children on a daily basis, the Paternal Grandmother equally has inadequate insight of the special needs of the Children and it does not appear to have cross her in mind in depth as to measures and steps could be taken to accommodate the Children s special needs and to improve their problems, apart from hiring private tutors. The Paternal Grandfather The Paternal Grandfather had not given evidence in Court. Indeed, even in the two SIRs, the descriptions of the Paternal Grandfather s involvements in the daily care of the Children were also limited. However, from the available information, the Court is satisfied that, despite he may only play a relatively auxiliary role, Paternal Grandfather is one of the manpower that the Father can mobilize for

taking care of the Children and at least, the Paternal Grandparent will not serve a burden which requires that Paternal Grandmother and the domestic helper to take care of. The Mother and Her witnesses After hearing the oral evidence of the Mother and her witnesses, there shall be no doubt that the Mother is a loving and care mother and she had tried her best to devote her time and efforts on the Children. In particular, the Mother had attended a number of training courses on how to take care of children with special needs. The Court accepts that such efforts are out of the Mother's genuine concerns of the Children's needs and not litigation tactics adopted by her. The Mother's aforementioned efforts are simply unmatched by the Father and should be appreciated by him. Equally, the Mother's witnesses, namely, Madam SKC, WKS and WKF are people who are sincere and truthful. All of them had indicated their willingness to help take care of the Children for the Mother. However, for the reasons set out hereinbelow, the Court regrets to say that their evidence has to be rejected. First of all, from the evidence available to the Court (including the Mother's oral evidence of she being cross-examined on the Mother's Movement Tables and the Children's Medical Appointment Tables), the Court believes Mr. Cheng's comments on the Mother's work situation before she suddenly quitted working in July 2019 are fair. The Mother was a private tutor giving private tuitions which requires her to work mostly after her students finished school during weekdays and all day during weekends (even on Sunday). Not only she was busy in giving private tuitions, she was also busy in taking different courses in order to enhance herself as shown in the trial of her previous courses taken including those not relating to help the disabilities of the Children. While the Court appreciates that the Mother has genuine desires to understand the needs of the Children, she seemed to have lost sight that the most important thing was still to accord sufficient time and attention to the Children's the actual daily needs. As already set out above, the Mother sought professional assistance and made a number of appointments for the Children but she later on took the decisions in her own hands and solely decided whether the medical appointments should be deferred or not, while she saw it proper not to seek other's help (including the help of Madam SKC, WKS and WKF) in bringing the Children to those medical appointments and simply let the appointments missed. In her examination-in-chief, she explained the reason why she suddenly quitted her job in July 2019, she said it was because she wanted to take care of the Children more as they have special needs. Then the Court asked her the 3 Children have special needs before she received the divorce petition and why she suddenly needed to quit her job, she then answered saying that because the Father and his family asked questions about where did the Mother go and also recorded them, so she decided to quit the job. The relevant exchanges are quoted as follows: - Mr. T1\SS;R1\SS;Rq bOZPhQw ^;NfZ OO N`O g QrU\N"V b N2[ ^ggg O6e0RHT WbO6r O \OO T\N"V, T}Y'Y |!|D Rggg S gyr FO,g-^ g POUL ZZHT QKNMR`O w`O N S gyr ZP}Y O`OvQ ZZHT NKNMR`O O\N"V S gyr fKNMRZP 8r8r:r: q_bO OUbO TrU\N"V SZfZf T}Y'Y le the Court does not accept entirely Mr. Cheng's criticism made on behalf of the Father that the Mother's quitting of her job is a tactic, the Court finds that motive of the Mother doing so doubtful and whether she quitted her job was purely for properly taking care of the Children. Indeed, even after she had quitted her job, there are also other indications that the Mother was unable to properly

take care of the Children herself. One of the examples is that not only did the Mother not help or guide HTC to complete his home works, she dared to sign the home works as parent when the home works were not even completed. In the homework sheets, the school requires the parent to sign after checking the completed home works. No explanation was given by the Mother as to why she signed the home works even before they were completed. The Mother simply has no insight of how to supervise, guide or teach her own children home works and blindly signed even before the home works had been completed. In this regard, the Q`O9h,g S\*gZP`O1\ [RfrU T }Y(W`OGw 0\N"V b=| T b=| T T#j ;Nx[id not do well. It is the Mother s case that she has been teaching HLL her school works but her academic result was not satisfactory at all and she always in the lower end of the class. When the Father complained about this, the Mother said HLL had always been mediocre in academic performance s^s^!qGY s^s^!qGY) after the Father realised the problem, he was the person who proposed and hired a private tutor to help HLL in her school works. At trial, there was a discussion about HLL enuresis problem at night when she was already 10 years old. HLL had been sleeping with the Mother all along at night. The Father complained that it was because of the Mother s refusal to teach and ask HLL to wake up from bed to go to toilet, this has caused the problem. However, the Mother denied it was her problem and she said it wa S|v` ce on how this problem could be solved. The Court has no doubt that the Mother has the heart to take good care of the Child. However, the Court finds it proven that her executionary ability is not as high as she thinks or claims to be. Mr. Cheng in his submissions criticized that the Mother had hogged the Children in her care (VJn) cook. She further arranged her other brother WKS to accompany her 2 times to attend the medical appointments of the Children also in November 2021. These moves were only done after the last hearing date of the 1st part of this trial on 22nd October 2021 and were so obvious for this litigation. On the other hand, as will be further mentioned hereinbelow, WKS and WKF indeed rarely took part in helping the Mother care of the Children. The Mother s case is that she could ask for the help of her family, namely, Madam SKC, WKF and WKS, who testified at the trial. In the Mother s evidence-in-chief, she suddenly said she could also ask her father, 2 sisters, brother-in-law and niece and social worker to help her to take care of the Children. The Mother had not said so in any of her previous affirmations. Nor had this ever been raised to the SWO and no information about the further proposed helpers had ever been mentioned by the SWO in his SIRs or oral evidence at all. While the Court has not criticism on Mr Chan for the Mother, the suggestion of the aforementioned additional helpers was not even put to the SWO when Mr. Chan asked the SWO questions. The Court also had not received any information of the additionally proposed people and is in no position to assess what role they may play in the caring of the Children. Therefore, the Court can only accord no weigh to the Mother s aforementioned beefed-up oral evidence. Moreover, the Mother also accepted in her Form J and in trial that if the Children need to be taken care of not by natural parents, she prefers the Paternal Grandparents but not her own family. Regarding the evidence of the Mother s three witnesses. While the Court does not accept Mr. Cheng s criticism that their evidence were collaborated and colluded, the Court does find that their evidence not reliable in the quantity of the evidence. Indeed,

information provided in Madam SKC's affirmation as to how she could provide assistance in caring the Children is sparse. There is simply no details of how and in what aspect that she had helped and could help the Mother take care of the Children. Even in her oral evidence, Madam SKC's only claimed that she was generally willing to help the Mother and the Court finds her evidence has no substance at all. When WKF (who is a Police officer) was asked whether Madam SKC and his father were actually living with the family of WKS including his wife and child, he first said no but when Mr. Cheng put the Father's case that they are in fact living together, he suddenly was not living with WKS and his family and when she was asked who was looking after WKS's daughter, she said WKS has a helper. However, when Mr. Cheng asked WKS whether he has a helper, he said no. One point to note is that when Mr. Cheng asked WKS whether he and his family was living with Madam SKC and his father, he said no. He then suddenly took out a letter from his trousers pocket saying that this was his bank statement and could prove that he is not living at the same address as Madam SKC. The motive and the reason why this letter was prepared and suddenly produced looks dubious to the Court. However, since the Court is going to reject the evidence of the Mother's witnesses, there shall be no need to spend time on further exploring the reason(s). Furthermore, WFS (being a health care assistant) (the Court that before coming to the Court to testify, WFS did not have any idea as to how the Mother had been taking care of the Children and this is also doubtful as to how much WFS had been involved in helping take care of the Children for the Mother in the past. In the meantime, both WKS and WKS are persons with their own families. While they claimed in their evidence that there were prepared to offer their assistance to the Mother, it is doubtful how much time and efforts they can actually provide in the event that the Mother has care and control of the Children and call for their assistance. Indeed, there were also occasions on which the Mother simply had not (while she could have done so) sought the assistance of her brothers while the need for doing so were so obvious so that the Children had to miss their medical appointments which the Mother acknowledged to be important. The Views of the Children As referred to in the 1st SIR (at [25]), HLL indicated her preference to live with the Mother. She also indicated that she wished to live with her younger brothers. HTY, on the other hand, expressed that he wished to live with the family in the FMH. When the 1st SIR was submitted, it was reported that HTT indicated that he preferred to sleep with the Mother in the TKW Flat. Roughly one year later, it is reported in the Updated SIR (at [21]) that HLL wishes to live with the Mother. In the meantime, HTY indicated his preference to live with the Father as he had accustomed to sleep with the Father. But HTY also expressed that it would be ideal for him to live with HLL and HTC together. HTC expressed that he has no preference as to whether living with the Father or the Mother. However, HTC told the SWO that he wanted to live with HTY for the reason that HLL comparatively played with him less frequently than HTY did. As to the weight of the wishes of the child concerned in proceedings of this sort, Mr. Chan had specifically drawn this Court's attention to the Court of Appeal's comments in *YSYM v LHB* [2020] HKCA 586. In [71] of the said judgment, the Hon Kwan VP (giving the Reasons for Judgment of the Court) referred to the English Court of Appeal's judgment in *Re R* (Residence Order) [2010] 1 FLR 509 and expressed as below: -

71. Rix LJ had this to say in *Re R (Residence Order)* [2010] 1 FLR 509 at 57 and 58:
- [57] The importance of listening to a child once he or she has reached the age of 10 has been stressed in the authorities. Thus in *Re L (A Child) (Contact: Domestic Violence)* [2001] Fam 260, [2001] 2 WLR 339, [2000] 2 FLR 334 at 271-271, 347 and 340 respectively, Dame Elizabeth Butler-Sloss P sitting in this court cited with approval *Contact and Domestic Violence The Experts Court Report* [2000] Fam Law 615 at 624 on the subject of a child's wishes: while this needs to be assessed within the whole context of such wishes, the older the child the more seriously they should be viewed and the more insulting and discrediting to the child to have them ignored. As a rough rule we would see these as needing to be taken account of at any age; above 10 we see these as carrying considerable weight with 6-10 as an intermediate stage and at under 6 as often indistinguishable in many ways from the wishes of the main carer (assuming normal development). In domestic violence, where the child has memories of that violence we would see their wishes as warranting much more weight than in situations where no real reason for the child's resistance appears to exist. See also *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961 per Baroness Hale at para [57]: But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else who will have to live with what the court decides.
- [58] I respectfully conclude that the judge has erred in not giving any real effect to the child's wishes expressed in this case. He has referred to them, accepted them, but thereafter essentially ignored them. He has attempted to reason against, and reject, the child's (partial) rationalisation of them. He has in effect wholly discounted them. And yet, the child was a mature and thoughtful child close to the age of 10, who expressed his wishes rationally and, in my judgment, with considerable emotional understanding. Moreover, those wishes, in part natural given his love for his mother and his successful upbringing to date and therefore to be given all the more attention rather than discounted ... I do not understand why these well-evidenced concerns were overborne by a call for greater sophistication: in reality this was little more than a way to reinforce the judge's conclusion that he would not disturb the boy's settled status. The Court is of course bound by the decision of the Court of Appeal. However, it still leaves a question of how the Court should apply the abovementioned principle to the present situation, in particular, in the light of the question of whether the Children are of sufficient maturity and ability to validly express their views. The Special Needs of the Children As now evidenced from the Medical Appointments Tables, what the Mother did in terms of taking care of the Children by bringing each of them to attend different medical appointments is far from satisfactory if not worrying or alarming. The Mother had for no good and valid reasons or excuses failed to bring the Children to attend different treatments of their physical, mental and developmental problems and disabilities when she and her brother WKS both agreed that these appointments are all important for the treatments of the physical, mental and developmental problems and disabilities of all the three Children. The Mother tried to explain that she had on one occasion called the Paternal Grandfather asking him to help to

bring HLL to attend a medical appointment because she had to stay in the hospital with HTC. However, the Mother did not put this important allegation that the Paternal Grandfather did not want to help to bring the Children to attend medical appointment in any of her affirmations and it was the Mother's evidence that she has never contacted the Paternal Grandparents directly. Also during cross examination, Mr. Cheng had asked the Mother whether she expected the Paternal Grandfather would listen to her when she once complained that the Paternal Grandfather had indecently assaulted her. Also during cross examination of the Mother about the cancellation of 4 medical appointments for HTC on 10th April 2021, the Mother said she had asked the Father to bring HTC to attend the medical appointment but the Father refused. However, she said previously that there was only one occasion when she needed to ask the help from the Father or his family to bring the Children to medical appointments. For HLL, all ENT treatments were cancelled by the Mother without any reasons. For HTY, the occupational therapist appointment was delayed for 2 months because she did not cut the hair of HTY before the original scheduled appointment.

The Court is concerned with whether the Mother has a real insight of in what appropriate circumstances she should seek the assistance of others, but from the Mother's past conducts and her oral evidence in Court, it seems that the Mother still had not acquired the sensitivity, which is beyond the question of what financial and human resources that the Mother had/has for the caring of the Children.

While one of the reasons the Mother said she did all these to the Children's medical appointments was because of money and that the Father's side did not give her sufficient money, but the Father confirmed the Mother had never written any letter from her lawyer asking for interim maintenance nor issuing any formal application for MPS for herself and the Children. In comparison, while, as said above, the Father and the Paternal Grandmother equally have their problems of failing to have adequate insight of what precise measures and steps that they can adopt to help the Children to further improve from their special needs and illnesses, there are at least daily routine arrangements in place for the Children and they can take steps to implement these arrangements. Undesirable to Order Split Care and Control In the meantime, it is also noted that the Children has a tight sibling bondage. In general, it is undesirable for split care and control unless there are very good reason(s). At trial, I had ascertained the respective positions of the parties in relation to split care and control. The Father through Mr. Cheng indicated to the Court that he does not favour the idea of split care and control but if the Court so makes a decision, he would accept. The

Mother through Mr. Chan expressed to the Court that she would not accept split care and control. The Court had also ascertained the view of the SWO on split care and control. The SWO expressed that he did not find split care and control desirable as the Children are close to each other. The Intended Accommodation of the Mother Upon the Conclusion of the Divorce Proceedings The Father criticizes that it is not even known where the Mother intends to move to live with the Children upon the conclusion of the divorce proceedings. In a way, I do see some forces in this argument. The SWO also confirmed that when he conducted the investigation, the Mother had no concrete idea as to where she should live if she eventually moved out of the FMH with the Children. The SWO said that if the Mother got the care and control of the Children, she would be able to apply for public housing unit but obviously, this will mean to be a significant changes of the Children s living environments. In her Open Proposal, the Mother also included the possibility that the FMH would be transferred to her or the same be sold and the she will have a share in the sale proceeds. I am given to understand that the paternal grandparents has now lodged a claim for beneficial interests in the FMH pursuant to the procedure set out in the English case *TL v ML* (Ancillary Relief: Claim Against Assets of Extended Family) [2006] 1 FLR 1236 (and adopted on numerous occasions by the Courts in Hong Kong). By the time of the trial, the *TL v ML* procedure was still preliminary and parties had not even filed and served their respectively pleadings. I am given to understand further that there was a Financial Dispute Resolution hearing to be held on 18th May 2022 (in the light of the Court of Appeal s decision in *LLC v. LMWA & Anor* [2019] 2 HKLRD 529) with a view to settling all the financial disputes (including the ancillary relief issues, the Mother s section 17 application as well as the paternal grandparents claim against the FMH). The argument that the Father cannot presume that he will continue to live in the FMH with the Children has some forces but in my respectful view, it will cut both ways. Even if the paternal grandparents lost their preliminary issue claim against the FMH, there is no guarantee that at the ancillary relief trial, the Court will order the transfer of the FMH to the Mother. Therefore, the Mother shall not be complacent that she would be able to live with the Children at the FMH. As to whether the Mother has any alternative plan for accommodation when she has to move out of the FMH, the Mother answered that she would apply for public housing unit upon obtaining care and control. The Trial Nature of the Recommendation of the SWO in the Updated SIR In the Updated SIR, the SWO recommended a trial period of 9 months for the Mother to have care and control of the Children. The Court asked the SWO the fallback position if after 9 months that the arrangement did not work out. The SWO answered that the Children returning to the household of the FMH would be one of the possibility. It appears that it would be too risky. The Court had also tried to explore the possible assistance that the Mother might obtain in the event the Father and the paternal grandparents would not agree to provide assistance to the Mother. The SWO in the course of oral evidence also said that the Father and the paternal grandparents had never promised and in this regard, for obvious reasons, the Court finds it very disappointing although the Court cannot force the Father and the paternal grandparents in the event that the Mother really had care and control of the Children. Overall the years, the Courts in Hong Kong have constantly

encouraged parents to continue to cooperate in the matters relating to their own children, which should be for the best interests of their children, but many of the parents just turn deaf ears to it. The SWO said that he had not asked for HLL's view if the Father had long term care and control. He explained that he did not ask because HLL harbored hatreds against the Father and he was worried that such a question would touch HLL's nerve and she would lose her temper. The SWO also described that HLL is a relatively stubborn girl and the decision made by the SWO is understandable. Disposal of the Issues Relating to the Children Just like many other cases involving the welfare of the Children, this is not a clear cut one. First of all, the Children need both of their parents. Secondly, as mentioned hereinabove, each of the parties have his/her respective merits and demerits. None of the parents here is as perfect as they had been trying extremely hard to convince the Court. . In the present case, both of the Father and the Mother find it very easy to the point their fingers against each other, but they have somehow forgotten that what will be in the best interests of their own children is their co-operations instead of accusations. After all, a call must be made no matter how tough it might be. Having considered all the relevant circumstances, I take the view that, on balance, the Children will benefit more if they remain living in the household of the FMH and be in the care and control of the Father so that they can continue to live in a familiar and stable living environment. In the meantime, the Mother could also be relieved from the pressure of caring the Children. Having said so, I remind myself that I shall not lose sight of the importance of the Mother's continuous contributions in the lives of the Children in future and adequate time and opportunities should be provided to the Children for them to spend with the Mother. In particular, I believe that that the Mother's efforts in exploring how children with special needs can better taken care of should be appreciated and this factor will continue to add value of the upbringing of the Children. Having said the abovementioned, while I have to strike a balance with the time that the Children will have to spending on travelling (in particularly, in the event that the Mother has moved out of the FMH), I make the following orders: - By consent, joint custody be granted to the Father and the Mother; Care and control of the Children be granted to the Father; The Mother shall have access to the Children during their school terms as follows: -

- (i) On an alternate week basis, the Mother has staying access to the Children: - (A) from Friday after school to Sunday at 1 pm; (B) from Friday after school to Saturday at 6 pm; (ii) On top of the abovementioned, the Mother has day access to the Children every Wednesday after school until 8 pm. (iii) Unless otherwise agreed by the parties, the return point should be the ground floor of the building where the FMH situate. (iv) Apart from the abovementioned accesses, the Mother do have telephone access to the Children on Monday, Tuesday, Thursday and Sunday (if the Sunday falls on a week which the Mother does not have access) between 7 pm and 9 pm.
- (v) The Mother may also have access to the Children through WhatsApp or other electronic means on the condition that it would not affect the Children's studies and other daily routines. Each of the parties shall have one-half of the Children's long holidays (namely, Summer Holiday, Christmas and New Year, Chinese New Year and Easter) in accordance

with the Children's school calendars. The details of the arrangement should be further agreed between the Father and the Mother. The parties may jointly celebrate the birthdays of the Children. The Father can spend the Father's Day with the Children (even if the Father's Day falls on the Mother's staying access till Sunday and in such case, the Mother's staying access should end at 6 pm on Saturday). The Mother can spend the Mother's Day with the Children (in such case, the Mother's staying access for that week should commence on Friday after school until 6 pm on Sunday). I must say that the above arrangement is not satisfactory nor is it ideal. However, having considered all the factors and in light of all the circumstances (in particular, the constraints on the parties and the possible impacts on the Children resulting from the changes that I have mentioned hereinabove), I believe the abovementioned arrangement shall be one of the least harmful or risky for the Children. In this light, I do believe that there is a real need for progress report to review whether this arrangement really works upon the expiry of one year from the date of the order made herein. I make this order accordingly.

Costs Issue The general principle in children's cases is that there should be no order as to costs save when one party has been unreasonable in the conduct of the litigation, as parents should not be deterred from putting cases concerning children before the courts (*R v R (Costs and Child Case)* [1997] 2 FLR 95, and *Re G (costs: Child Case)* [1999] 2 FLR 250). In the present case, I do not see any reason why the Court should depart from the application of the general principle. Therefore, I accordingly make an order nisi that there be no order as to costs in relation to children issues (including all costs previously reserved) with Counsels certificate and the said order shall become absolute 14 days thereafter. I also make an order that the parties own costs be taxed in accordance with the Legal Aid Regulations. Having said all the above, there is no doubt to me, as transpired from the evidence, that both of the parents are loving parents and had devoted to the Children a lot. They had fought not for their own interests but for the Children's instead. As can be seen from the evidence, they are able to set aside their differences and make attempts to cooperate with each other. I do hereby encourage both of the parties to continue to make their best endeavours to cooperate with each other and make their respective continuous contributions towards the healthy growths and developments of the Children. In the meantime, I wish to thank the Paternal Grandmother, Madam SKC and the maternal uncles for they attending the trial to help the Court resolve the children issues. They are truthful although I do find that their thoughts are to certain extents wishful and may not be realistic. Nonetheless, I do wish that they can continue to provide their assistance in the caring of the Children whenever the Father or the Mother needs their helping hands. Last but not least, I shall take this opportunity to express my most sincere gratitude to both Mr. Cheng and Mr. Chan for their assistance to the Court.

Enzo Chow Deputy District Judge Mr. Alvin Cheng of Messrs. Alvin Cheng & Rosaline Choy, the former Solicitors (assigned by the Director of Legal Aid) for the 1st Applicant Mr. Ken Chan, instructed by Messrs. Rodget Young & Co., the former Solicitors (assigned by the Director of Legal Aid) for the 2nd Applicant

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