

HONG KONG / JUDGMENT

LCH v. JMC

[2021] HKFC 88**COURT**

Family Court

DECIDED

30 April 2021

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**[2021] HKFC 88 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FAMILY COURT MISCELLANEOUS PROCEEDINGS NO. 179 OF 2019**

IN THE MATTER OF CJH, a girl born on the XX April 2016 (the Minor) And IN THE MATTER OF Section 26 of the High Court Ordinance (Cap 4) and Order 90 of the Rules of the High Court (Cap 4A) And IN THE MATTER OF the Guardianship of Minors Ordinance. (Cap. 13) And IN THE MATTER OF the Child Abduction and Child Custody Ordinance (Cap 512) BETWEEN LCH Applicant and JMC Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Trial: 4 and 5, 10 and 11, 13, 25 (am), 26 November and 1 and 3 December 2020 Date of written closing submissions: 11 January 2021 Date of written replies: 25 January 2021 Date of Judgment: 30 April 2021

J U D G M E N T (Relocation, shared care/care and control and access)

Introduction

There are two applications currently before the court that now require adjudication, namely the Respondent mother s relocation summons dated the 10 October 2019, in which she seeks leave to permanently remove the minor child, C, out of the jurisdiction of Hong Kong in order to relocate with her to Toronto, Canada. She also seeks sole care and control of C with reasonable access to the Applicant father. C was 5 years old on the XX April 2021. The father opposes the mother s

application. He wishes C to remain in Hong Kong and for her care to be shared between the parties on a more or less equal basis. Thus he originally sought an order for joint custody and shared care as set out in his Originating Summons, issued in the High Court and dated the 7 May 2019. The mother conceded joint custody in her summons dated the 10 October 2019 and an order to that effect was made following the Children Dispute Resolution (CDR) hearing on the 5 June 2020. On the 18 June 2020, following that hearing, a further interim order was made as follows: Having reviewed the documents, and the updated Social Investigation Report, I shall therefore further order and direct as follows: Order 6 (a) contained in the High Court order from the Hon Madam Justice Chu dated the 1 August 2019 (i.e. the High Court order) shall be varied in that the Applicant father shall provide the Respondent mother with a copy of his roster for the subsequent month within 3 days of the same being provided to him and the parties shall agree on the access arrangement within 5 days thereafter. A Parental Co ordinator (PC) shall be jointly appointed by the parties and in the event that the parties are unable to reach agreement on the monthly arrangement, the PC shall be authorized to make decisions concerning access, subject to the following parameters as set out below: Order 6 (b) contained in the High Court order shall be discharged. In the event that the father is in Hong Kong during the access period, he shall have overnight staying access to C for 2 blocks of 4 consecutive days (i.e. 3 consecutive overnights) each month. Such overnights shall commence at 11:45 am on a school day and at 10:00 am on a non-school day. C shall be returned to the mother by 7:00 pm on the last day of each block of access. In the event that the father is in Hong Kong he shall have additional day access for a further 4 days per month. The access shall be from after school until 7:00 pm on a school day and from 10:00 am until 7:00 pm on a non-school day. In the event that the father is unable to have the overnight staying access as set out in sub paragraph b) above, he shall have additional day access, up to a maximum number of 8 days to replace the 2 blocks of 4 consecutive days referred to in sub paragraph b) above. In total the father shall have 12 days of access each month. Each parent shall have daily indirect access to C either by FaceTime, or by phone, or by other electronic means, when she is in the care of the other parent. Costs be reserved. This remains the governing order to date. I am told that no Parental Co-ordinator has been appointed.

Background

This case once again brings into sharp focus the difficulties faced by so called international parents living overseas, where one of them wishes to relocate, either to their country of origin or elsewhere. It also has a long and highly conflicted history, beginning as it did in the High Court on the 7 May 2019 when the father applied to have C made a ward of court. The background to the case has been set out by the Hon Justice Bebe Chu in her judgment dated the 1 August 2019, which I have taken the liberty of repeating as follows:

Background

5. The Father was born and raised in Sydney in Australia and started living in Hong Kong in July 2013 after joining an airline company as a pilot. His parents and relatives all reside in Australia. The Father is now 33 years old.
6. The Mother was born in Hong Kong but emigrated to Toronto when she was about 4 years old. One of her brothers resides in Hong Kong, but the rest of her family all reside in Canada. The Mother is now 30 years old.
7. The Mother came to Hong Kong in around March 2014 to explore her career as an actress and model. The parties met in the summer of 2014 in Hong Kong and they later entered into a romantic relationship. The Mother moved into the Father's then apartment in November 2014. In December 2014, the Mother's parents purchased an apartment in Hong Kong in the Mother's name on Hollywood Road (Hollywood Road Property).
8. It would appear that the parties first started to have difficulties in their relationship over allegedly the Father's drinking problems in January 2015 when the Mother was asked to leave the Father's apartment although she was asked to return the following day.
9. In August 2015, the Mother became pregnant.
10. Later that year in October 2015, there was an incident when the Father had assaulted the Mother and on 27 October 2015, the Mother returned to Toronto. The Father was later charged with assault occasioning actual bodily harm and was bound over.
11. In late November 2015, the parties made up again and the Mother returned to Hong Kong and in January 2016, the Father proposed to the Mother. In February 2016, the Mother returned to Canada to prepare for her birth of CJH.
12. CJH was born in Canada in April 2016. On her birth certificate, the Father was named as her father and about 4 weeks after her birth, on XX May 2016, the Father and the Mother brought her to Hong Kong. In June 2016, the Father bought a house in the Mother's name in Pui O, Mui Wo, Lantau Island (Pui O House), as their new home.
13. The relationship had its ups and downs and eventually in May 2018, the Mother broke off her engagement to the Father. She started working in June 2018 at a health food restaurant and in about late July/August 2018, she moved out of the Pui O House with CJH to a separate rented apartment in Mui Wo.
14. The parties had a flexible arrangement in relation to the Father's access to CJH when they first separated and essentially whenever the Father was in Hong Kong, he would ask to spend time with CJH. The Mother said this had caused much disruption to CJH's and her lives and later she insisted on a scheduled access arrangement with reference to the Father's flight roster (Scheduled Arrangement). The Mother said according to her records of the Scheduled Arrangement, the number of nights CJH slept over at the Father's place was 11 in December 2018 eeping overnight and did not reflect the time he spent with CJH during the

day. The Father also claimed that he did not agree to some of the arrangements as they did not allow him enough overnights with CJH. He then produced some 70 pages of his own records of his flight roster and time spent with CJH.

16. Anyway, there were no complaints at the time by the Father, nor did he take the matter to the Court. Even though there was the Scheduled Arrangement, the parties were clearly not able to reach agreement over the financial provision for CJH. The Mother said the Father knew she was in a dire financial situation but he did not provide any financial support, nor allow her and CJH to relocate to Canada.
17. On 22 January 2019, while the Mother's parents were in Hong Kong, they had a meeting with the Mother and the Father to try and help the parties to resolve the financial matters (Joint Meeting). The Joint Meeting was recorded by the Mother in the presence of the Father. A transcript of the recording was produced by the Father in his 3rd affidavit (Transcript). It was the Mother's case that during the discussion she had told the Father no less than 8 times that it was not financially viable for her and CJH to remain in Hong Kong and that she would have to return to Toronto with CJH but the Father's response to her plea to relocate to Canada was that he would not agree and threatened to take legal action.
18. On 5 March 2019, the Mother sent the Father WhatsApp messages that she would be going to Hawaii with CJH after 26 March to visit her friend and when the Father asked whether she was going to be away for CJH's birthday, the Mother's response was only going for a week .
19. In the Mother's 1st affirmation, she had produced a copy of her original itinerary with CJH as of 3 April 2019. It would appear that she and CJH were scheduled to leave Hong Kong on 4 April 2019 for Honolulu via Tokyo and they were to leave Honolulu on 11 April 2019 arriving back in Hong Kong on 13 April 2019 12:25.
20. On 11 April 2019, the Father sent a WhatsApp message and asked when they would be home and the Mother responded we leave Friday afternoon . This would be 12 April 2019 and the Father said he guessed that meant they would be back on Sunday afternoon, to which the Mother responded I think so . Sunday was 14 April 2019 and CJH's 3rd birthday was on 15 April.
21. On Saturday 13 April 2019 the Father sent a WhatsApp asking the Mother whether they were flying. Then at 21:05 on 13 April 2019, the Mother responded by informing the Father that she and CJH had just landed in Toronto with CJH and that she intended to live there so that her family could support them as per her lawyers advice since she could not afford to live in Hong Kong financially and mentally.
22. According to what the Mother said in her 1st affirmation, she booked tickets to fly to Toronto together with CJH from Hawaii.

23. The trip to Hawaii was consensual. However, there was no agreement for the Mother to take CJH to Toronto to live there. Since 13 April 2019, the Mother has retained CJH in Toronto unilaterally without the Father's consent.
24. The Father flew to Toronto on 19 April 2019. The Father did have access to CJH while he was there but he said most of the times, the Mother was present. The Father stayed in Toronto until 26 April 2019.
25. Whilst the Father was in Toronto, he contacted a Canadian lawyer and issued an application under the Hague Convention on the Civil Aspects of International Child Abduction (Convention) on 25 April 2016 (Hague Application). On the same day, by an ex parte order, the Mother was restrained from removing CJH from the City of Toronto pending the hearing of the Father's Hague Application and the Mother was ordered to deliver up her passport and CJH's passport and CJH's birth certificates and all other travel identification documents to the Father's lawyers. The return date of the ex parte order was 7 May 2019 when the ex parte order was varied and, amongst other things, CHJ's travel documents were to be held by the Mother's lawyers, and the substantive hearing of the Hague Application was set down for 13 June 2019.
26. Thereafter, the Father said he received advice that he was not exercising rights of custody under Article 3 of the Convention at the time of that Hague Application. He then issued the originating summons in the present proceedings in Hong Kong on 7 May 2019 making CJH a ward and seeking various orders including an order pursuant to section 3(1)(d) of the Guardianship of Minors Ordinance (GMO) that he has all the rights and authority that the law will allow him as a father if CJH were legitimate (Section 3(1))(d) Order), an order under GMO for joint custody and shared care and control of CJH (Custody/Care Order), and an order under the Court's inherent jurisdiction for forthwith return of CJH to Hong Kong (Return Order). Ex parte leave was granted to the Father on 16 May 2019 for the originating summons to be served on the Mother out of jurisdiction.
27. The Father was also advised to issue an application under the Ontario Children's Law Reform Act on 22 May 2019 (CLRA Application) seeking various orders including (i) a declaratory order that CJH was wrongfully removed from her place of habitual residence of Hong Kong, (ii) an order for forthwith return of CJH to her place of habitual residence, (iii) a declaratory order that the Ontario Superior Court of Justice has no jurisdiction to determine the custody and/or access issues pertaining to the child or in the alternative a declaratory order that the Superior Court decline jurisdiction in favour of the forum conveniens, namely Hong Kong, (iv) an order staying any claim for custody and/or access in Canada.
28. The Father's CLRA Application was also fixed for hearing on 13 June 2019. In light of the advice he received, the Father decided not to proceed with his Hague Application and he applied for an adjournment of his CLRA Application pending the Hong Kong Court's determination of his application for the Section 3(1)(d) Order. The adjournment was granted by Justice E L Nakonechny who was of the view that it was relevant for the Ontario Court to

know what position the Hong Kong Court would take regarding CJH and the Father's rights to CJH.

29. On 24 June 2019, with no opposition from the Mother, this Court granted the Section 3(1)(d) Order to the Father. The Mother's then Counsel indicated at the hearing that the Mother intended to issue a summons for stay of the Hong Kong proceedings on the ground that Hong Kong is *forum non conveniens* (Stay Application). The Court then directed the Mother's Stay Application and the Father's application for the Return Order (Return Application) be fixed on for substantive arguments on 22 July 2019. The updated position
- These basic facts have not changed. The parties are now a little older, the father being about 35 years of age and the mother being 31. They have both remained in Hong Kong, although following the outbreak of COVID 19 the Mother did return to Canada with C for several months initially by agreement. She left the territory on the 29 January 2020 and returned on the 5 May 2020. The father continues to be employed by a well-known airline in Hong Kong, although his pay has been cut, along with everyone else in that industry. As far as the court is aware the mother is not employed, nor is she currently studying, although she has tried to develop an online business selling medical grade water ionizers. Historically the mother has also relied on her family for financial support from time to time and I am told that they have also been responsible for her legal fees both in Hong Kong and Canada. In her judgment of the 1 August, the Hon Justice Chu found, *inter alia* that, C's habitual residence as at the 13 April 2019, when she landed in Toronto initially, was clearly Hong Kong and that it remained in Hong Kong both as at the 7 May 2019, when the father issued his Originating summons and since. The mother's application to stay the proceedings in favour of those in Canada was denied and a formal order was made that C be returned to Hong Kong forthwith. Shortly thereafter, on the 10 August 2019, the mother and C returned to Hong Kong. Initially the parties did, as suggested by Judge Chu, and the father moved out of the property on Lantau and the mother moved back in with C. However, on the 27 September 2019 the mother sold the Lantau property. It seems that she initially placed the property, which was held in her sole name, on the market without consulting the father. This is important because both parties had contributed financially and it was not a decision that in normal circumstances could be made by only one party. In any event the father eventually agreed and the sale proceeded without further incident. Shortly thereafter the mother moved to live on Hong Kong island with C, without seeking the father's express agreement to the same. Notwithstanding that the father followed suit and they now live within relatively close proximity of each other. Where COVID conditions have allowed, C has attended an international pre-school also on Hong Kong island. Following the judgment of the 1 August 2019, in which orders were also made for interim financial support for C and interim access, the Hon Madam Justice Chu made a further order on the 6 September 2019, in which C was de-warded and the case transferred to the Family Court. The case returned to the Family Court substantively in June 2020, following the mother's return to Hong Kong with C for the second time; the Children's Dispute Resolution took place on the 5 June 2020 and the governing order dated the 18 June 2020 is set out in paragraph 2 above. An overview

Although all relocation cases are difficult, this case is, perhaps more difficult than most. This is primarily because it is very finely balanced, with each party being able to put forward a credible case for either C relocating to Toronto or staying in Hong Kong. In addition, both sides have also behaved badly on occasion. For example, there were a number of violent incidences, both instigated by the father against the mother (the most important of which occurred in October 2015, when the mother was pregnant) and vice versa. For example, there was one occasion when the mother hit the father when he came home late, in a totally unprovoked manner. To their credit both parties acknowledge that they have each acted on occasions in ways which, in hindsight, appears to have been totally unacceptable. I agree. The Father says that their relationship was volcanic. The mother says that it was simply based on sex. To summarize, I would accept that theirs was a highly toxic and explosive relationship, during which, on occasion, both behaved very badly. There are also some other significant credibility issues and the litigation conduct of each party has also been open to question. For example, and putting this as neutrally as possible, it became clear during the second tranche of the trial that both parties had presented their case somewhat differently in Canada. It is then against this background that I am asked to consider the outstanding applications before the court. The main issues then are these: Should permission be given for C to relocate to Toronto with her Mother? What order should be made for C's care i.e. should there be an order for either shared care/joint care and control or care and control to one parent and reasonable/defined access to the other? What is in the best interests of C overall? The Law Relocation In Hong Kong we still continue to follow the guidance provided by the English authorities and in particular by both *Poel v Poel* [1970] and *Payne v Payne* [2001] 1 FLR 1053. This was originally confirmed by the Court of Appeal in Hong Kong in *SMM v TWM* CACV 209 of 2009. The correct approach to be taken was also reviewed by the Court of Appeal when handing down a leave to appeal judgment in *ZJ and XWN*, [2018] 3 HKLRD 644, 25 July 2018. In that judgment J Lam, JA reiterated that the comments made by Cheung JA in *SMM v TWM*, should be read in the light of the recent developments in the United Kingdom, namely that the best interests of the child are paramount and any other protocols designed to assist in coming to a decision in that respect are to be regarded as guidance only. It is also accepted, in that context, that there can be no presumption in favour of the so called primary carer. This was again reiterated in the most recent Court of Appeal decision in Hong Kong on this subject namely *BA v BL* [2019] 4 HKLRD 23. Reference was also made in that judgment to the welfare centric approach as set out by Mr Egerton in his opening when he stated as follows: The welfare-centric approach in *BA v BL* corresponds with the English Court of Appeal decision in *Re F* [2017] 1 FLR 979, in which Ryder LJ said in 30: Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary... Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or left behind parent) from being side-lined in a linear analysis. Not only is it necessary to consider both parents proposal on their own merits and by reference to what the child has to say but it is also necessary to consider the

options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse. Where care of the Child is shared between the parents, the Payne test and the welfare-centric approach above remain applicable. (*K v K* [2012] Fam 134, 144-145 per Black LJ, as she then was; passage referred to with approval in *BA v BL* supra at 4.14-4.15). It is accepted that a welfare analysis will also be necessary in this case. However, before we get to that stage, it might be helpful to start by repeating the actual and most often quoted passage from Lord Justice Thorpe who said in *Payne* that in order (40). To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion: Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean, founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow. If, however the application passes these tests then there must be a careful appraisal of the father's opposition; is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland? What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate. In suggesting such a discipline, I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological wellbeing of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor. In addition, reference may be made to the English Court of Appeal decision namely *K v K* [2011] EWCA Civ 793. In that case, Lady Justice Black, as she then was, said as follows:

141. The first point that is quite clear is that, as I have said already, the principle the only authentic principle that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child. In *ZJ and XWN*, Johnson JA added that It is clear from *K v K* that the only principle of law enunciated in *Payne* is that the welfare of the child (or presently in Hong Kong, best interests of the child) is paramount; the rest is guidance. This is how the comments of Cheung JA in *SMM v TWM* (based on *Payne*) should be read. With respect I agree. This is also reiterated by the Hon Mr Justice Mostyn in *Re TC and JC (Children Relocation)* [2013] 2 FLR 484, and as referred to by Ms Irving in her opening submission: Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such

guidance should not be applied rigidly as if it contains principles from which no departure is permitted. vi) There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour a label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements

12. Factor (c) of the guidance always looms large and is particularly problematic, both in principle and in practice. It is a significant feature in this case, as will be seen. Discussing this factor in *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 (at para 12) I stated: The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocater is always how would you react if leave were refused? The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward. I do not resile from these views but the paradox does not make the problem any easier to solve. The impact on the mother if her realistic proposal is rejected is a fact which has to be recognised whatever its psychological origin. I have to take the parents as I find them and if one finds himself as a result of my judgment to be a victim of his virtues then that is a cross which he will have to bear in the interests of his children. Further Ms Irving pointed out as follows: The commitment of a relocating parent to contact with the other parent following relocation, as evidenced by her conduct in relation to contact in the past, is an important consideration in the Court's analysis. In *Re L (Relocation: Shared Residence)* [2013] 1 FLR 777, the Mother's application to relocate was refused, the learned judge having recorded: What I find she has not thought through accurately and honestly are her proposals for contact and their practicability. Her proposals changed during the hearing but were characterised as I have found by a maternal lack of commitment to contact, an impaired insight into the importance of F's relationship with his father, a need to control it, and the obstacles she has placed in the father's path of contact in the past. Over time I do not believe this mother would sustain the contact between F and his father and she would easily tire of it. To reiterate then, the one and only authentic legal principle that I need be concerned with, when considering whether or not C should relocate with her mother to Toronto, is that the best interests of C remain the court's paramount concern. I will though largely rely on the guidance provided by Payne in coming to a decision on that issue. I will also undertake a welfare analysis of the proposals advanced by each party, within that guidance. Care and control/ joint care and control/ shared care/access General provisions The law governing applications concerning children in Hong Kong can mainly be found in the Matrimonial Proceedings and Property Ordinance, Cap 192 and the Guardianship of Minors Ordinance, Cap 13. Section 19 Matrimonial Proceedings and Property Ordinance, Cap. 192 states that

- (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18- (Amended 69 of 1997 s. 28) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree; The general principles governing such applications are set out in s.3 of the Guardianship of Minors Ordinance, Cap. 13, which says that: GENERAL PRINCIPLES
- (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 - (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; For the avoidance of doubt s. 48C Matrimonial Causes Ordinance, Cap. 179 adds that 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 the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192). Care and control/shared care Reference may also be made to the case of *PJM v GPN FCMC* 4999 of 2014 [2018] HKFC 65 (2 May 2018). In that case I made an order for shared care, and in doing so I stated as follows: 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 child/ren 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 child/ren's 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 child/ren'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. List of factors to be taken into account In addition, reference can also be made to the list of factors found in the Children's Proceedings (Parental Responsibility) Bill. Although this list of factors has yet to find its way into our statute books, I have nevertheless reproduced the same below. I should say at the outset that it is not meant to be an exhaustive list, but is simply a useful guide when considering issues relating inter alia to care and control, access, joint care and control/ shared care and the best interests of children generally. It may also be referred to when considering a welfare analysis, as referred to above. The checklist states that the following matters should be taken into account by the court when determining matters of this nature:

- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his 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 to 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. Any other fact or circumstance that the court thinks is relevant. For the avoidance of doubt it is not the court's intention to go through this list mechanically when considering what is in C's best interests overall, although consideration will be given, in particular to sub paragraphs a), c), d) and i) at the end of this judgment. The proposals from each party I asked each side to put forward open proposals in the alternative. These are set out below: Mother's proposals Mother's proposals if the relocation is allowed Part A - If Relocation to Toronto is Granted The Mother be granted leave to permanently relocate with C from Hong Kong to Toronto, Canada as soon as practicable and in any event, no later than 31 December 2020. C to be enrolled at C's Early Learning School (CELS); or alternatively O Public School if relocation is allowed before September 2021. Term Time
5. The Mother proposes the following if Father visits C in Toronto: 5.1 He shall be at liberty to spend his entire stay with C. Arrangements to be subject to C's day-to-day routine and schedules 5.2. Daily indirect access when the Father and C are not spending time together. 5.3. The Father is at liberty to reside at the maternal grandfather's studio during his stay, subject to availability.
6. The Father shall provide 14 days notice to the Mother prior to his intended visit. School Holidays
7. Parties shall share all holidays equally in the following manner: - Christmas and New Year Holiday - Parties shall share equal time with C during these periods, to be alternated on a yearly basis. The Father shall spend the 2020 Christmas and 2021 New Year with C; the Mother shall spend the 2021 Christmas and 2022 New Year with C, so on and so forth. Easter Holiday - The Father shall have the even years and the Mother shall have the odd years. Summer Holiday - The Father shall have majority of the Summer holidays if his roster allows. Such access may take place in Hong Kong or Canada, to be discussed and agreed by parties. Special Occasions

8. Parties shall spend time with C on special occasions in the following manner: - C's Birthday - the parties shall spend time with C on her birthday, to be alternated each year. Father's Birthday - the Father shall have overnight access with C on his birthday. Mother's Birthday - the Mother is to spend time with C overnight on her birthday. Father's Day - the Father is to spend the day with C. Mother's Day - the Mother is to spend the day with C. The Mother also proposes a mirror order be made in Toronto, Canada regarding C's arrangements there. Mother's proposals if the relocation is refused Part B - In the event of No Relocation If C is not to be relocated, the Mother shall have sole care and control of C with reasonable access to the Father as follows:-
- Term Time The Father shall have access with C in the following manner:-
- (i) Overnight access: 2 blocks of 4 consecutive days (i.e. 3 consecutive overnights) per month.
 - (ii) Day access: if the Father's roster allows, 4 additional day access per month.
 - (iii) Daily indirect access to C when she is in the care of the other parent for no more than 2 times each day. Parties shall discuss and agree on the Father's access dates within 7 days upon the Father providing to the Mother his roster for the subsequent month. Holiday Times Access as per paragraph 7 above. ? Occasions Access as per paragraph 8 above, in so far as applicable.
 - Financial Contribution The Mother will require the Father's contribution towards C's financial needs. There is currently no application to vary the interim interim maintenance pursuant to the Order dated 1 August 2019. Proper application will be made upon determination of the relocation application. Pending the Mother's formal application, she proposes that the interim interim maintenance be varied in the following manner. While C is in Hong Kong The Mother proposes that the Father contributes towards C's financial needs as follows:-
 - (i) The Father shall pay C's school fees in full, inclusive of debentures / capital levies, tuition fees and other mandatory expenses required by the school;
 - (ii) The Father shall pay to the Mother HK\$2,500 per month, being C's extra-curricular and/or extra tuition expenses;
 - (iii) The Father shall at his costs maintain the current medical insurance for C, either through his employer or privately funded;
 - (iv) In addition to (i), (ii) and (iii) above, the Father shall pay to the Mother HK\$23,000 per month, being C's portion of the general expenses and C's personal expenses. While C is in Toronto Parties shall discuss and agree on their respective contribution towards C's financial needs in Toronto, failing agreement, the Mother intends to make a formal application as soon as possible. Father's proposals
30. Father's proposals if the relocation i Toronto due to work) and for leisure. Such access shall be for the entire duration of his time in Toronto inclusive of overnight access. During the time he has access, the Father will make sure C could continue her day-to-day routine and schedules as far as possible (e.g. attending schools and ECAs).
- (2) Holiday arrangements.
 - (a) Generally, the Father shall have access to C during school holidays.

- (b) Except when there are mandatory quarantine measures in place in Hong Kong and/or Toronto, C shall return to Hong Kong for school holidays of 7 days or more for the Father's access.
- (c) In particular, for the summer holidays, the Father shall have at least one month of uninterrupted access to C.
- (d) Parties are to discuss and agree between themselves on arrangements (including overseas handovers) when the applicable school calendar is available.
- (3) The proposals at paragraphs 6(3) - 6(4) shall apply insofar as applicable.
- 31. Father's proposals if the relocation is refused
- 5. Care and control Mother and Father are to share the day-to-day care of C with the aim of achieving a shared care arrangement for C to spend half of her time with the Mother and half with the Father.
- 6. Care Arrangement (should Chloe continue to reside in Hong Kong) The Father shall provide to the Mother his roster for the subsequent month within 3 days of it being provided to him by CP (usually provided on 15th of the month) after which parties shall agree on access to C within 5 days based on the following:
 - (1) Term time arrangements.
 - (a) The Father shall have overnight care of C for 3 blocks of up to 4 consecutive days each month. Such overnights shall commence after school on a school day and at 10:00am on a non-school day. C shall be returned to the Mother by 7:00pm on the last day of each block of time.
 - (b) The Father shall have additional day access for a further 4 days per month. The access shall be from after school until 7:00pm on a school day and from 10:00am until 7:00pm on a non-school day.
 - (c) In the event the Father is unable to have the overnight staying care of C as set out in paragraph (a) above, he shall have additional day access, up to a maximum number of 12 days to replace the 3 blocks of 4 consecutive days referred to in paragraph (a) above.
 - (d) In the event the Mother is unable to care for C during the day due to work, and in the absence of a domestic helper to care for C, the Father shall have access to C during the time the Mother is unavailable. If the Father is not in Hong Kong on such occasion(s), his domestic helper shall care for C at the Father's residence.
 - (e) In the event the Mother is unable to return home from work by 7:00pm to care for C on a day falling on Mother's access, and in the absence of a domestic helper to care for C, she shall inform the Father by 6:00pm and the Father shall have overnight access to C starting at 7:00pm until C attends school the next day. If the Father is not in Hong Kong on such occasion(s), his domestic helper shall care for C at the Mother's residence and the Mother

shall facilitate entry into and access to her residence for this purpose. While the Father agrees for his domestic helper to care for C at the Mother's residence under this specified situation, his domestic helper shall not be treated as a domestic helper for the Mother and shall take the specific role as a babysitter caring for C only.

- (f) Parents are to discuss and agree on handover location. In the event parents cannot come to agreement, the handover location shall be the place of residence of the parent who had care of C before the handover.
- (g) Parents are to enable FaceTime calls between C and the other parent at least twice a day when the C is not in the other parent's care.
- (2) Holiday arrangements.
 - (a) Holidays to be shared equally on a 50/50 basis, according to C's school calendar.
 - (b) In particular, (a) Christmas Eve and Christmas Day, (b) New Year's, and (c) Easter break including C's birthday are to be alternated on a yearly basis. Christmas eve and Christmas day to be to the Father in 2020 since the Mother had C for Christmas in 2019.
 - (c) Parents are to discuss and agree on arrangements, including overseas handovers. In the event parents cannot come to agreement, the handover location shall be in Hong Kong.
- (3) Special occasions.
 - (a) Father's birthday C is to spend the day with the Father, if it is a school holiday and falls on the Mother's access. Access period shall begin at 10:00am until 9pm or an hour before C's routine bedtime, whichever is the earlier. ii. C is to have dinner with the Father, if it is a school day and falls on the Mother's access. Access period shall begin when C finishes school that day and until 9pm or an hour before C's routine bedtime, whichever is the earlier.
 - (b) Mother's birthday C is to spend the day with the Mother, if it is a school holiday and falls on the Father's access. Access period shall begin at 10:00am until 9pm or an hour before C's routine bedtime, whichever is the earlier. ii. C is to have dinner with the Mother, if it is a school day and falls on the Father's access. Access period shall begin when C finishes school that day and until 9pm or an hour before C's routine bedtime, whichever is the earlier.
 - (c) Father's day - C is to spend the day with the Father, if it falls on the Mother's access. Access period shall begin at 10:00 am until 9pm or an hour before C's routine bedtime, whichever is the earlier.
 - (d) Mother's day - C is to spend the day with the Mother, if it falls on the Father's access. Access period shall begin at 10:00 am until 9 pm or an hour before C's routine bedtime, whichever is the earlier.

- (e) School events, sporting events and performances where parents are invited - both parents are at liberty to attend.
- (4) In addition:
 - (a) Both parents are to consult each other on the suitability of a domestic helper, should either decide to hire one.
 - (b) Both parties also agree that should there be a new partner for either party, C should be properly and gradually introduced to the new partner after 4 months into the relationship.
 - (c) Both parents are to consult each other before C is left in the care of a third party who is not the domestic helper, for instance, any relative or friend.
 - (d) In the event either parent will be travelling for leisure and would not be available to care for C, reasonable notice should be given to the non-care taking parent who should be given first preference to care for ~ in the absence of the other parent.
- 8. Maintenance for C (if she continues to live in Hong Kong) shall continue in the sum of HK\$11,500 per month. In particular, due to changes/adjustments to the employment benefits package enjoyed by the Father, the Father shall continue to pay for C s education in Hong Kong up until December 2022. Thereafter, the Father and the Mother shall both contribute to C s education on a two-thirds to one-third ratio respectively.
- 9. There shall be a further review by the Court in 6 months. Discussion
- 32. I must now turn to consider the issues, the law and the parties evidence as set out in their affidavits and as given orally by them during the hearing. I have also heard from the Social Welfare Officer, Ms L. In addition, the mother s mother, i.e. the maternal Grandmother also gave evidence. The Social Welfare Report
- 33. Recommendations made to the court in social welfare reports, although not binding are considered persuasive. In the event that the recommendations are not followed then reasons should be given for that in the judgment. As will be seen, in this instance, I tend to accept both Ms L s insights and her concerns. In her Remarks and Recommendations, she states inter alia as follows:
- 40. C now enjoys the direct care from both her parents given to her. If she stays in Toronto, the father s direct caring that also supportive to C s formative building is inevitably reduced though the father can still have access in Toronto. While C s chance to be with her father should be encouraged, the stable living provided to her with sufficient financial resources in Hong Kong is also needed to be considered. With Ms C s comparatively lower earning capacity, the possibility of securing a financially sufficient job with desirable working hour in Hong Kong is uncertain. Subject to Ms C s gainful employment in Hong Kong and commitment from Mr H to support the living of Ms C and C, I tend to support C and Ms C staying in Hong Kong to let C enjoy the direct care and love from both the parents at her tender age to meet her developmental need at this stage.

41. If Ms C and C stay in Hong Kong, Ms C wishes to keep the present access arrangement that she finds working well. The father wishes to increase the staying access to no less than 12 days monthly according to his flight schedule. Both parents have been actively involved in the child caring. C has adapt to be under the care of Mr H for a block of time during her last holiday and access with her father. Mr H usually has around five consecutive day-offs each between three long haul flights every month. If C stays in Hong Kong, it is recommended that C to stay overnight at her father s home for two four consecutive days every month. C can stay with Mr H till 7 p.m. on last day of the access if Mr H has to work on that night. C to have day access in Mr H s another four or five consecutive day-offs every month. Both parents share the common 'goat to provide the best interest for C and shoulder the responsibility in rearing her. It is hoped that the parents can appoint a parental coordinator to manage the access and different routine of two homes. With respect I agree with much that is said here. Relocation Should permission be given for C to relocate to Toronto with her Mother? The Payne guidance and the welfare analysis Generally
34. The biggest difficulty in this case is that the proposed relocation cannot be tempered by frequent access. Toronto is a long way away from Hong Kong and C is only 5 years old. Although the father is a pilot he will not be able to travel to Toronto frequently to see C. Historically his job did not generally take him to Toronto and even if that changes he would not currently be able to see C because of the existing Covid restrictions. Even once those restrictions lift he will still not be able to see C for very long, if he is travelling to Toronto for work. To ask him to frequently undertake travel of this magnitude on his days off would be very difficult. He has said that as he is relatively junior it is unlikely that he would be able to take his annual leave during the school holidays and that this has not happened to date. It was also suggested that he might be able to obtain a basing in Toronto. The father said that this would not be possible and this has since been confirmed in a letter from his employer dated the 11 November 2020 where it was stated inter alia as follows: Re: Inquiry on CP s policy on obtaining work visas for pilots Your Refs: XX I refer to your 9 November 2020 letter to CPAL (CPA) addressed for the attention of my colleague Ms SL. In response to your query: whether, as a matter of policy, [CPA] would not obtain work/employment visa for pilot(s) who wished to be based in a country where they do not already hold the right to live and work there_ our response is that CPA s policy is that a pilot must have the right to live and work in the country if he/she would like to take up an outport base. Further, CPA does not sponsor work visas for pilots for any other country other than Hong Kong. To further assist the Court, we further advise that based on CPA s operational needs, CPA has no plans at present of having any further base openings anywhere in Canada. Thus, all things considered, it seems likely that if the relocation is permitted that the C will only be able to see her father for fairly limited periods of time.
35. Ultimately the offer of the use of a studio flat by the mother s family in Toronto, where it was said that the father could stay, did little to assist, given that the Grandmother confirmed in the witness box that she would need to continue to rent the property out with AirBnB as she and her husband needed the income. Further it seemed unlikely that the father would be

able to give sufficient notice of his intended trips in order to take advantage of this offer. It is of note that the father had not stayed in that property on any of his other trips to Toronto to date, nor was the studio flat ever offered to him previously. Parenting to date

36. Both parties have sought to paint themselves as the primary caretaking parent . However, when pushed it became clear during the father s cross examination that he was not saying that he was historically able to care for C for 50% of the time, but that he was only able to care for her during the day, when he was not working and that this amounted to him caring for her for about 50% of the time when he was IN Hong Kong. He added that he was in Hong Kong when he was not working for about 50% of the time.
37. It is clear that originally, following the birth of C, that the mother was a full time caretaking parent. C was born on the XX April 2016 and the parties lived together on Lantau from May 2016, when the parties returned to Hong Kong with C, until their separation in or about May 2018. The mother was mainly responsible for C for the first two years of her life. I accept that the father was also a hands on parent when he was not flying and he was in Hong Kong.
38. In June 2018, following the parties separation the mother began to work full time. In August/ September 2018 she also entered into a new relationship. The court was taken to a series of WhatsApp messages in July and September 2018 between the father and the maternal grandmother, where the father expressed concern about the mother s parenting. In particular, he was concerned that she was simply not available for C and that C was being left in the care of the domestic helper overnight and during periods of time when the mother was not working. This seems to have been acknowledged by the maternal grandmother at the time, although she tried to down play this perception in the witness box. For example, the following exchange took place in September 2018: 1 Sep 2018 L (the father) : Hi G and R (the maternal grandparents) L: Can you help me please, L: J (the mother) now thinks it appropriate to stay at her new boyfriends house, and leave C at home with the helper, L: I think it s an absolute disgrace, C: OMG will let G and C talk to her, she is upset with me, she told G I m so negative about my thought of her, Did T (the helper) tell you about J she is staying out for overnight neglecting C at home with her? L: Yes L told me. L: She didn t see C Wednesday / Thursday because she was at her boyfriends house and now she s going out today at 2pm. She s only sees C on Sunday. It s terrible. C: It s very hard to think that how J neglects C s feeling like that L, please spend more time to see and cuddle C, father s love is most important to C in her early age, she needs the feels of safety provided by her own father . how sad G & I couldn t get back HK right now L: I send every free moment with her. I pick her up from school every day and she stays at my house till it s bed time then I take her home. I spend all day with her everyday that I m not working.
39. Whilst I accept that the mother was perhaps caught between a rock and a hard place i.e. she needed to work and to parent C at the same time, which can sometimes be very difficult, I also accept that the father was very hands on and that he did look after C during the day when he was not flying. The arrangement was that C would be returned to the mother s home to sleep. From this time onwards I accept that the parties began to share C s care. This

was only interrupted by the mother's wrongful removal of C to Canada. Further arguments have ensued about the mother's allegedly restrictive approach to access in Canada and since. I am told that the situation has calmed down considerably since then and that the parties have largely been able to follow the order of the 18 June 2020, as set out in paragraph 2 above.

40. All in all I agree with the observation made by Ms L in the Social Welfare Report as follows:
Remark and Recommendation
33. Mr H and Ms C agree to have joint custody. The joint custody to both parents is considered desirable to let them continue their active involvements in the upbringing of the child.
34. Ms C was a full time mother except for the period from June 2018 to March 2019. She has been taken care of Chloe after her birth with the assistance of domestic helper. Mr H spends his time with C when he is off. Both Mr H and Ms C say that they are the primary carers of C. Mr H mentions that Ms C stayed out a lot since December 2017 while Ms C says the time she was out was exaggerated by Mr H. No matter who carries the name of primary carer, both Mr H and Ms C spends a lot of time with C and give hands-on parenting. They pay effort and give their unconditional love to Chloe and are mindful of her emotion. They show genuine concern and care for C and are committed in taking up the parental responsibility. C develops loving and close bonding with both parents. For the access, Mr H and Ms C managed to set the access by themselves before April 2019 although Ms C considered the unannounced show up of the father caused "confusion to C. The interim access was granted by High Court in August 2019. They reach the agreement of the access, holidays and travelling to Toronto during the outbreak of COVID-19 through their legal team. C enjoys her time with either parents.
41. I accept that both parents have actively parented C to date, although at times one has been more involved than at others. It is also clear that longer term, whether in Hong Kong or Canada, both parents will need to work. Ms Irving said in her opening that in such circumstances the choice is whether or not C's care should be shared in Hong Kong between both parents, with the assistance of a Domestic Helper (or Domestic helpers), or whether C's care should be divided primarily between her mother and the paternal grandparents. In both instances it is clear that neither parent is likely to have the ability to care for C on a full time basis going forward. Is the mother's case genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
42. Although the Social Welfare Officer has accepted this to be the case, I find myself less able to do so. In part this is because of the clear differences in approach between the Canadian proceedings and the Hong Kong proceedings. For the avoidance of doubt it seems to me obvious that the mother's move to Toronto was pre-meditated. I do not accept that she suddenly decided to leave Hong Kong when she was in Hawaii. I am also of the view that she was bolstered in this approach because at that time she had sole custody and care and control of C, by virtue of the fact that the parties were not married. She repeated this several

times in the witness box. The father made it very clear, at the family meeting on the 22 January 2019, between the parties and the maternal grandparents, that he would not consent to C's move to Canada. The mother knew this. The fact that the father did not issue proceedings, in part because of the assurances given to him by the maternal grandfather at that meeting, does not excuse her actions. I do not accept the proposition that the father did not do this because he had not wanted to pay the mother maintenance for C. Ms Irving put it thus in her closing submission: The Mother had told the Hong Kong Court that she had gone for a holiday to Hawaii intending to return, but when in Hawaii, she realized how happy C was that her mother was not working, and she made the decision at that time to go to Toronto instead of returning to Hong Kong; I noticed C was apparently happier and her emotions stabilized during the trip. I then realised how much impact my absence as a full-time mother had had on C and C needed me by her side to thrive. That was the point when I decided that I no longer desired to be trapped in Hong Kong. In the circumstance, I booked tickets to return to Toronto together with C from Hawaii. [B/28 77]

15. When put to her in cross examination that it had been her intention when she left not to return, she denied it; absolutely not. That was not honest.
43. With respect I agree. Ms Irving continues:
16. In the Canadian litigation, when trying to resist return to Hong Kong, she explained specifically that she wanted to escape from the Father. He held C's passport and refused to give it to her, so she told him she was going to visit a friend in Hawaii for a week, then would return. She said she had done this with the settled plan of not returning, but going on to Toronto; I felt I had no other choice but to ask for C's passport for another trip, and then continue to Toronto from there. As soon as we landed in Toronto I asked for the passport to go to Hawaii so that you could then go to Toronto. Ans I asked for the passport to go to Hawaii and it was in Hawaii that I decided to go to Toronto. To my knowledge at that point, I had sole custody. My intention was never to exclude L from C's life. Judge Don't be tempted to make a submission, just answer the question. Q. It is clear from what you told Canadian courts, you planned to escape from HK and from L's ability to stop you from leaving HK by saying you were going to Hawaii, but continuing on. Ans If I planned it, I would have told work. I never told work. It was a last-minute decision. Q They both cannot be correct. Ans In the end, that is what happened. Q They both cannot be correct. One, you had a kneejerk reaction when you were in Hawaii. Two, you deceived L. Ans If I had to choose one, the HK one was correct. I misworded it. Q Let me suggest why you misworded In Canada for a different court. Isn't that right. Ans That's what it looks like.
20. She was asked in evidence-in-chief for the second tranche of the hearing about her evidence having been that she preferred the Hong Kong version over the other, and she gave evidence of never having planned to move to Toronto. This does not rescue the situation of her evidence clearly having been dishonest, as litigants do not have the right to give two entirely contrasting stories, then decide later which one to run with. 44. mulated the plan not to do so. This plan would have been formulated in the secure knowledge that, as is apparent from

the transcript of the family meeting on 22 January 2019, the Father would not consent to the permanent removal of C, as he had said so expressly; that she had told him that she knew she could not leave without his consent or the approval of the Court; and that she and her parents had lulled him into a false sense of security by telling him not to go to lawyers, to save money, as if they started litigation, the process would be expensive. They had said that there would be a second meeting for them all to try to work matters out.

24. For the Mother then to do what she had expressly said she was not going to do is litigation conduct of the worst kind. And then to blame the Father for not having taken steps to prevent her from leaving, saying that he did not do so as an Order may be made for him to financially support C is simply appalling.
25. Yet that is exactly the argument that she used in Canada, while cherry picking parts of the transcript in her Affidavit that appeared to support her stance, while omitting to refer to the parts that clearly show her saying she could not leave without consent, and him saying he would never consent. While she is entitled to run her case, what she did in both jurisdictions was to entirely misrepresent the truth of the matter in the hope of achieving what she wanted.
26. All of the Mother's evidence must be seen in light of her clear willingness to give dishonest evidence to further her case and apparently have no compunction about doing so. Again this is accepted.
45. In such circumstances I have a very real concern, that the original move to Toronto was done in part to put as much distance as possible between the father and C and that the mother did this in order to limit the father's involvement in C's life at that time. In coming to that conclusion, I accept, and as indicated above, that the relationship between the parties was not based on a firm foundation. However, although I do have some concerns about the mother's original intent. I also accept that she no longer wishes to exclude C from the father's life, although this may be somewhat inevitable if the relocation is permitted. Is the mother's plan realistic, i.e. founded on practical proposals both well researched and investigated?
47. Notwithstanding that I accept that the mother's plan is both well researched and investigated. When considering her proposals, I will also compare them with the father's proposals if C were to remain in Hong Kong as part of the so called welfare analysis .
Housing
48. The mother complains that she is currently living in a shoe box and that her living conditions would be far superior in Canada. Her parents have offered for her and C to live with them in Toronto, in a sizeable family home where the mother herself grew up. I have no doubt that this would provide a very comfortable living space for the mother and C. The maternal Grandmother has said that the mother could remain there for as long as she would like and certainly until she gets herself back on her feet.

49. It is of note that the mother's choice of housing, i.e. to live in a small flat on Hong Kong island, is largely of her own making and that it would have been possible for her to remain living in the country, Hong Kong style, where properties are often cheaper and larger, had she not moved out of the parties' Lantau home, which was then subsequently sold, ultimately by agreement. She could choose to live elsewhere, as could the father, although going forward it is strongly suggested that the parties discuss any potential moves first, as this is likely to have a significant impact on C. It is of note that regardless of whether or not the relocation is permitted, the mother has confirmed that she will consult with the father on all major decisions concerning C going forward. Likewise, the father should do the same.
50. In comparison, the father says that they can make their living conditions work if they both remain living on Hong Kong side, but that they could both enjoy a better standard of living if they moved back to Lantau. I tend to agree with this, although it is also acknowledged that the time needed to commute will also need to be taken into account. Finances
51. One of the biggest issues remains the financial viability of the mother and C remaining in Hong Kong. Put simply the mother says that she cannot afford to remain living here. She says that the father has not been able to fully provide for her and C from a financial perspective and that she has been unable to find work, which would also enable her to parent C appropriately. There is no doubt that finances are currently tight, due in part to the fact that the father's salary has been reduced. Longer term, as I have said, it is clear that both parties will need to work.
52. It is not possible for the court to make financial orders as part of the current application, but it is important to put this issue in its proper context. According to the mother's open proposal, if she and C remain in Hong Kong she would seek HK\$23,500 per month, i.e. HK\$2,500 as a contribution towards some of C's direct expenses and a further HK\$23,000 as a contribution towards the shared general expenses. In contrast the father offers HK\$11,500 per month, although during the trial he acknowledged that this would need to increase, and he suggested the sum of HK\$15,000 per month. With respect this figure still seems to be very much on the low side, even when looked at in the context of the father's current reduced income of approximately HK\$80,000 per month. During the father's cross examination, it was put to him that he had outgoings of over HK\$153,000 per month and an income, including rental income of just over HK\$112,000 per month. If this is the case, then clearly he is going to be stretched paying the mother what she seeks. But as an indication, it should be noted that the court is of the view that the mother's request is reasonable. This judgment is not made on the premise that the father's financial offer is accepted.
53. Further, the mother does have an earning capacity of her own, although clearly this is much lower than that of the father's. She was previously earning in the region of HK\$23,700 per month. I accept however, that she should be able to maintain herself. Realistically the father will need to pay for the majority of C's expenses if the relocation application is refused, including the educational costs.

54. The maternal grandmother said that she could support the mother and C financially if they were living in Canada, but was reluctant to commit to THE SAME LEVEL of financial support if they remained in Hong Kong. I found this difficult to fathom and the following exchange ensued between the bench and the maternal grandmother during the trial, leading eventually to an acknowledgment by the maternal Grandmother that some financial support would be forthcoming if the mother and C remained in Hong Kong: Q. You would be able to pay the equivalent amount to J if she were in HK. Ans Rent in HK is expensive [Judge repeated the question] Ans No I can t. Judge Are you using money as a means to persuade me that this is a reason for J go back to Canada? Ans No. Judge So what are you saying then? Ans Apart from financial support... Judge Answer the question, not the answer you want. [Repeats the question] Ans It is not the case I cannot pay that amount, I mean I cannot help her out. Judge So you are not prepared to help her out if I order J stays. But you are prepared to pay \$3m in litigation costs. Ans I don t know how to say, it is not the case I m not willing to do so. Q. Are you prepared to pay the same amount, I not asking if you re prepared to pay her more to support her. Ans It can be done.
55. The mother also wishes to increase her earning capacity by undertaking a Diploma program in Applied Holistic Nutrition provided by the Institute of X in Toronto. She explained that she now wishes to work in the holistic health industry and that a friend can also offer her some work in the same field in Toronto. It is of note that this is not a full time course whether in Toronto or in Hong Kong. In Toronto she would be required to attend college twice per week from 10:00 am 2:00 pm. Previously the mother had dropped out of university although she only had a few months to go, in order to explore other opportunities in Hong Kong.
56. It is the father s case that the mother could do exactly the same course in Hong Kong, online, with the same number of contact hours. However, this was not countenanced by the mother who said inter alia that this would be difficult to do and that in any event this would not allow her to immerse herself fully in the program. With respect this is not accepted. It seems to me that it should be possible for the mother to undertake this course in Hong Kong, or indeed something similar, and that her objections in this regard are not substantive. Although it is accepted that the holistic health care profession may be more developed in Canada than in Hong Kong, it is not accepted that there would be no job opportunities for the mother in Hong Kong, either in this field or otherwise. It is of note that the mother holds a Hong Kong permanent ID card. Is the Father s opposition motivated by genuine concern for the future of C s welfare or is it driven by some ulterior motive?
57. I accept that the father s opposition is motivated by a genuine concern for C s welfare. He is also concerned about his ability to maintain a relationship with her given the current constraints caused by COVID-19 and beyond. Although it is clear that the father found the breakdown of his relationship with the mother very difficult, there is no sense that his application is currently driven by any ulterior motive. This is seemingly accepted by the mother. What would be the extent of the detriment to the father and his future relationship

with C, were the application granted?

58. Ms Irving reiterated her client's position thus: The Father explained the difficulties he would face in access if C were in Canada, on B/179 60-66. He would expect no more than a very short visit every 2 months if flying for duty. He has certain requirements to fulfil while on a work trip; For a normal long-haul flight, I get to work 1.5 before flight, spend 24- 48 hours somewhere, then come home. There is a legal requirement stipulated how many days off I need before I can work again, depends on how many time zones I cross and how long I am there for. Toronto is the furthest, crosses a lot of time zones. Normally 24-48 hours in Toronto on ground, in the hotel. He was asked how much time he would see C if he was working the aircraft to Toronto: There was a business trip I did, I was there for 24 hours and saw Chloe for 3 hours. I was absolutely exhausted. He was asked about staff travel and how easy it was to get a seat: It changes on any given day. Services to Toronto are limited, once a day, or two a day every few days, and also full. That's why there is the 777 aircraft flying to Toronto. Usually in economy, occasionally a cockpit seat (cannot sit there anymore because rules have changed due to security risks). He was asked about the Financial cost and the use of the grandfather's studio apartment: I've been to Canada about 5 times since C was abducted. I was never offered the apartment. Usually, travel is on a last-minute basis Airbnb. Issue for accommodation, I need to find somewhere suitable for C, always booking last-minute, only things available are 250CAD a night. Staff travel is standby in nature, only know hours in advance. He was asked about health and long-term fatigue, having said in his affidavit that long haul travel takes a toll on the body, such that to fly for work then go between flights to see C would have an unquantifiable toll on my body [B/181 65]: Same with new conditions. Toronto would subject me more to it. As to the availability of the studio apartment, the Mother's evidence had been that the apartment would be left available for the Father's use, whereas the grandmother said she would continue to rent it on Airbnb when the Father was not using it, which brings us back to square one, in that by the time he had confirmed last minute flights, the property would no longer be available. . Holidays
80. The Father confirmed that his annual leave is 35 days. This is decided in March, based on seniority, a point system. This year he did not get any of the school holidays off, and he said: Unfortunately, it is unlikely my leave will coincide with school holiday. Never has so far.
81. The stark reality is that C will go from seeing her daddy for 12 days every month, to seeing him very seldom at all. The claim that as he is a pilot it will be a lot easier and cheaper, is erroneous. He is not even able to arrange to have holidays when C has holidays. Their relationship will be unsustainable, regardless of how hard the father might try.
59. This is also accepted. In other words, I accept that the father's opposition is motivated by a genuine concern for C's welfare and in particular that he believes that the relocation would severely undermine his ability to have a proper parenting relationship with her, especially as it could not be tempered by frequent access. To what extent would any possible detriment be offset by extension of C's relationship with the maternal family and homeland?

60. C has a close relationship with her maternal grandparents who have frequently travelled to see her in Hong Kong and who she has seen in Canada. In the grandmother's affirmations she exhibits a table in which she sets out the frequency of her visits to Hong Kong as follows:
- | Period when R was in Hong Kong | Duration |
|--------------------------------|---------------------------|
| 2016 - March 2019 | 13 June - 24 August |
| 2016/2017 | About 2 months |
| 2017 | 15 November - 8 February |
| 2017/2018 | About 3 months |
| 2018 | 10 June - 12 July |
| 2018 | 1 month |
| 2018 | 20 September - 25 January |
| 2018/2019 | About 4 months |
| 2019 | 5 April - 1 June |
| 2019 | About 2 months |
| 2019 | 22 October - 27 March |
| 2019 | About 5 months |
- Total visits to Hong Kong: 6 times
Average duration per visit: about 3 months. There would be no reason why these visits should not resume once the COVID restrictions lift.
61. I understand that the maternal Grandfather is part of a big Chinese family in Toronto and I accept that C might benefit from being part of that. But given the circumstances in this particular case I am not convinced that this is sufficient to offset the fact that she would only get to see her father infrequently if the relocation was permitted. What would be the impact on the mother of a refusal of her realistic proposal?
62. The Social Welfare officer put it thus:
38. If the proposal is refused, Ms. C will be upset. Nevertheless, Ms. C mentions that she makes progress on her emotion and she learns to think positively. I tend to agree. In addition, the mother was born in Hong Kong and she lived here until she was 4 years old. She has roots in Hong Kong also. She returned in March 2014, so she has been based in Hong Kong more or less on a full time basis for a further 7 years. Although I accept that losing this application will be a blow to the mother, it seems to me that C's needs must take precedence. The parties in the witness box The mother
63. As I have said, one of the difficulties here is that neither party came across particularly well in the witness box. The mother's lawyers have tried to paint her as being submissive, gullible and overly optimistic about the relationship and also somewhat vulnerable. For the avoidance of doubt this portrayal is not fully accepted. I have no doubt however, that the mother loves her daughter very much and that she is a good enough parent. The father
64. Similarly, I agree that the father has been a committed and a hands on father and that he is very concerned, and with some obvious justification it seems to me, that his relationship with C will be severely undermined if the relocation is permitted. He presented as being very sure of his own position and of being somewhat detailed orientated. There was also a controlling aspect to his personality and to his approach. Conclusion on relocation
65. Having considered all of the above and having weighed up the pros and cons in the welfare analysis, it seems to me that at present it would not be in C's best interests to relocate to Canada.
66. With particular reference to the list of factors in paragraph 26 above, I should add that C had clearly expressed that she had missed her father following her removal from Hong Kong in April 2019 and although this could be countered by a more sensible approach going forward,

including the possibility of a shared script etc., it does not detract from the fact that C clearly has a close relationship with her father and one that will be undermined significantly by the relocation proposed. It seems that the effect on C could be considerable. What order should be made for C's care i.e. should there be an order for either shared care/joint care and control or care and control to one parent and reasonable/defined access to the other?

67. Joint custody is agreed. The mother wishes the current arrangement to continue, whereas the father wishes to have increased time with C leading to a 50:50 shared care regime. He also makes proposals with respect, inter alia to the employment of a domestic helper and her role in caring for C going forward.
68. The difficulty, in part with the father's proposal, is that in reality he seems to be seeking more than a 50% share of C's time. He asks for 3 blocks of up to 4 consecutive days each month. This means that the maximum amount of staying access would be for up to 9 nights/12 days. If this was over a weekend, he would be seeking access from after school on a Friday until 7:00 pm on the Monday, three times per month. In addition, he is seeking a further 4 days access visits per month, either from after school until 7:00 pm or from 10:00 am 7:00 pm on a non-school day. Thus in total he is seeking up to 16 days access per month, which is potentially more than 50% of C's time. Whilst I would agree that C has a close relationship with her father, that should not be to the detriment of her relationship with her mother. I acknowledge that she also has a very close relationship with her mother and with her mother's side of the family. I also do not necessarily agree that in the event that both the mother and the father are unavailable to care for C, that the father's domestic helper should step in. This is one option. The mother may have other ideas. In any event when C is under the mother's care, then it is a matter for the mother to make suitable arrangements for her.
69. Ms L has suggested that the current arrangement should continue save that she suggests that the father could have 4 or 5 single days access per month. The mother proposes that there should be no changes at all to the current regime.
70. If this was a regular access schedule, then one might expect the weekends to be alternated and for the father to have additional access during the week, especially during the weeks that he does not have weekend staying access. Thus it seems to me that the access schedule should allow for say 6 further days per month, making a total of a potential 14 days per month access.
71. Thus the order dated the 18 June shall be varied to read as follows: In the event that the father is in Hong Kong during the access period, he shall have overnight staying access to C for 2 blocks of 4 consecutive days (i.e. 3 consecutive overnights) each month. Such overnights shall commence after school on a school day and at 10:00 am on a non-school day. C shall be returned to the mother by 7:00 pm on the last day of each block of access. In the event that the father is in Hong Kong he shall have additional day access for a further 6 days per month. The access shall be from after school until 7:00 pm on a school day and from 10:00 am until 7:00 pm on a non-school day. In the event that the father is unable to

have the overnight staying access as set out in sub paragraph a) above, he shall have additional day access, up to a maximum number of 8 days to replace the 2 blocks of 4 consecutive days referred to in sub paragraph b) above. In total the father shall have 14 days of access each month. Each parent shall have daily indirect access to C either by FaceTime, or by phone, or by other electronic means, when she is in the care of the other parent.

Holiday access

72. The parties agree in principle that the school holidays shall be split equally }me]e]UM hM(< h_<a h_<a hM(< gd_<a gdD{ gdwE gdC~ gdC~ gdx!x gdx!x gdx!x gd<K gdC~ hx!x gd<K gdx!x gdx!x hx!x h_O4 hM(< hS'T h:M| gdC~ gdC~ gdLV sgsgs {tpti h-& h,ed e^eVeVe gdC~ gdH0 gdC~ \$ a\$ gdC~ gdC~ gdC~ gdC~ gdm/ gdC~ gdC~ gdH0 gdH0 gdH0 gdH0 gdH0 gdm/ uiuiu` PiPi }oicjW] gdpH gdm] yql\QD gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ gdjmW g_WPID hjmW hjmW gdC~ hjmW hjmW hjmW hc>I gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ gdC~ hjmW hjmW hjmW hjmW hjmW gdC~ gdC~ gdC~ gdC~ gdC~ gdm] gdC~ gdC~ gdC~ hjmW jV]N hiMm hjmW hjmW hjmW hjmW hjmW gdC~ gdC~ gdCO& uduWuP hiMm gdC~ gdC~ hjmW hjmW hjmW hJ^H hjmW gdP: gd+B gdC~ gdC~ gdC~ hJ^H zhZwzD gdP: gdP: gdP: gdP: gdP: q_O_O_?_q._ gdP: gdP: gdP: hJ^H wswswsowhshososohwa gdP: gdj[gd{ gdP: hz<I hjkX gdP: gdP: hz<I gdP: gdP: gdP: h{ix dqWq hL-X h{ix gdP: gdP: gdP: gdP: gdP: gdP: gdP: h{ix gdax gdP: gdP: gdP: h{ix gdax gdax ytax gdax gdax ytax ytax gdax ytax gdax ytax gdax gdax gdax ytax ytax gdax ytax gdax ytax gdax ytax ytax gdax ytax gdP: gdP: gdP: hL-X h+Zv h+Zv gd,ed gdp4n gdm] and by reference to C s school calendar. They further agree that C shall spend time with each of them on their birthdays and on Mother s day and Father s day. This is sensible. I do not intend to make further orders in this regard. However, if the parties have any difficulties in this respect, then they may return to court under the liberty to apply provision. Costs
73. Finally, on the issue of costs, given that this is a child related matter I will make an order nisi that there shall be no order as to costs, to be made absolute at the expiration of 14 days. There shall be certificate for counsel and I thank them for their assistance in this matter. Order UPON HEARING Counsel for the Applicant and Counsel for the Respondent. IT IS ORDERED THAT Paragraph 2 of the Respondent s summons dated the 10 October 2019 shall be dismissed. For the avoidance of doubt, order 1 as contained in the court order dated the 5 June 2020 do stand namely that there shall be joint custody of the minor child, namely CJH, a girl born on the XX April 2016. There shall be shared care of the minor child with the arrangements as specified in paragraph 71 above. The child s school holidays shall be split equally between the parties. There shall be liberty to apply in that regard. There shall be an order nisi to be made absolute in 14 days time that there be no order as to costs. There shall be certificate for both counsel. (Sharon D. MELLOY) District Judge Ms. Frances Irving instructed by Patricia Ho & Associates for the Applicant Mr. Robin Egerton instructed by Tanner De Witt for the Respondent PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk h,ed h,ed &`#\$ ytax ytax ytax ytax ytax ytax ytax ytax ytax ytax ytax ytax [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/

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