

HONG KONG / JUDGMENT

NAV v. JTMW

COURT

Family Court

DECIDED

23 February 2017

CASE / FILE NUMBER

FCMC4191/2012

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bjbj FCMC 4191 / 2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 4191 OF 2012

BETWEEN NAV Petitioner and JTMW Respondent

Coram: His Honour Judge I. Wong in Chambers (Not open to Public) Dates of Hearing: 1, 8, 15, 22
and 29 November 2016 Date of Judgment: 23 February 2017

J U D G M E N T (Custody, Care and Control and Access)

AUTONUMOUT This judgment deals with the arrangement for two children upon the divorce of their parents. AUTONUMOUT This case bears all the hallmarks of a high conflict case a total breakdown of trust and communication between the parties, no reasonable or sensible compromises in regard to the welfare of the children have been possible and all disagreements, big or small, have ended in court. Thus, notwithstanding that the petition for divorce was taken out in March 2012, the parties so far have not obtained their decree nisi. Instead, they have spent essentially all their times and costs in fighting over their children. Over the course of nearly 5 years or so, I have given numerous rulings and decisions including 5 written judgments. This judgment is the 6th one but is certainly not the last one. Yet to come would be those on the determination of their financial matters. AUTONUMOUT For convenience, I shall refer the petitioner wife as and the respondent husband in this Judgment.

Background

AUTONUMOUT The petitioner is from Country A and the respondent from Country D. After having cohabited in Country D since June, 2002, they married in February, 2008 and moved to Hong Kong in June, 2008 when R obtained a job as a pilot here. AUTONUMOUT There are two children of the family, both boys. The first, referred to in this Judgment as , was born in April 2007, now aged 9 and the second, , was born in Hong Kong in February 2010. He is now 7 years old. AUTONUMOUT It is unfortunate that marital discord developed; that led to their separation in November, 2011. On 26 March 2012, P petitioned for divorce on the ground of R s unreasonable behaviour. AUTONUMOUT At the beginning, the parties were able to come to terms through mediation by entering into an agreement dated 28 April 2012 dealing with all the ancillary relief and children matters. Apart from the matrimonial assets which are not relevant here, insofar as the two children of the family are concerned, the parties agreed that both of them would have the custody of the children and they would share the care and control on approximately equal basis. The 1st social investigation report () of 20 December 2012 also recommended that the joint custody, care and control were to be granted to the parties. AUTONUMOUT Conflicts, however, soon developed. It is fair to say that at that time their conflicts centred much on the care and control arrangement of the children. In brief, P was complaining about the situation where, whether or not R would be able to take care of the children would have to be dependent upon whether he had any flying duties and these in turn were governed by his monthly duties roster issued by his employer. This arrangement was seen by P to have been dictated by the monthly roster which she found it difficult to cope with. She felt it unfair that even after the dissolution of her marriage with R her lives should continue to have been manipulated by the other side. Sadly, it turned out that starting from early 2014 the parties relationship had deteriorated to a point where they would argue on essentially all issues arising from the present proceedings, be they big or small. AUTONUMOUT It is necessary to set out the chequered history of the present proceedings in order to understand how the case has come to this stage and the issues that are required to be determined by the court. AUTONUMOUT To begin with, the first application was taken out by R on 2 July 2013. He sought the joint custody, care and control of the children and for directions from the court on the working out of the joint care arrangement, including the sharing of overseas trips and holidays. AUTONUMOUT As a response, P also took out her own summons on 4 September 2013 for a joint custody order and a shared care arrangement. AUTONUMOUT The 2nd SIR, which was released on 14 January 2014, continued to recommend joint custody, care and control. AUTONUMOUT The trial of the parties summonses was originally set down to be held on 2 July 2014. Up to that point, the major discrepancy between the parties was merely on how the shared care arrangement could be worked out for the benefit of the children. It appeared that it was merely a run-of-the mill case that the Family Court would have to deal with day-in and day-out. AUTONUMOUT However, the proceedings took a turn when R, fearful that P might remove the children to Country A permanently, took out an ex parte application on 5 May 2014 for an order prohibiting the children from leaving Hong Kong without the leave of the court. Consequently, an interim stop order was granted on 7 May 2014 AUTONUMOUT It transpired that R s worry was not without some substance. A few days later, on 19 May 2014, P took out 4

summons. AUTONUMOUT The first was an application for the permanent relocation of the children to Country A, her home-country. She also sought joint custody with care and control of the children to her and reasonable access to R. AUTONUMOUT The second was for the interim care and control of the children. AUTONUMOUT The third was an application for a non-molestation order against R for P and the two children. P alleged that R was spying and stalking her via some spywares installed in her computer. AUTONUMOUT The fourth was for maintenance pending suit payable by R. AUTONUMOUT On 20 May 2014, the court gave the following directions. AUTONUMOUT As regards P's application for permanent removal, a further SIR and an international social investigation report (ISIR) were to be obtained. Her application for interim care and control was adjourned to be dealt with together with her application for permanent removal. AUTONUMOUT The interim stop order was to continue until further order of the court. AUTONUMOUT As for P's application for a non-molestation order, it was originally set down for argument on 4 July 2014 but the parties were able to compromise on 2 July 2014 as a result of which, upon the undertakings by both parties to each other that they would not hack or spy on the other party's computer, P's application was dismissed by way of a consent order. The consent order also provided that the issue of costs be adjourned for arguments at the trial of permanent removal. I need to re-visit this application in later part of this Judgment when I come to deal with the issue of costs. AUTONUMOUT On 2 July 2014, the court set P's application for permanent removal down for trial in November 2014, with 5 days reserved. Meanwhile, the court also tried to ease out the parties' differences by way of a CDR, which was fixed to be heard on 17 September 2014. AUTONUMOUT By a Judgment dated 8 July 2014 the court dismissed P's application for maintenance pending suit, with costs to R. AUTONUMOUT The SIR on relocation came out on 3 September 2014. In her report, Ms Lo, the Social Welfare Officer (SWO) did not recommend relocation. She further recommended that the care and control of the children be given to R, with free access and visitations to the children in Hong Kong be given to P. On the other hand, although usually it is not the responsibility of an ISIR to give any recommendation, the ISIR was favourable to P's application. AUTONUMOUT Regrettably, the CDR hearing failed to narrow down any differences. Shortly after that on 23 September 2014, P took out an application for the appointment of two single joint experts. P argued that for the proper disposal of her application for permanent removal, a clinical psychologist, in the capacity as a single joint expert, was required to be retained for the family. Further, since she was allowed to stay in Hong Kong on the strength of a dependant visa (as the spouse of R) only, the court would be greatly assisted by a single joint expert on Hong Kong immigration law as to whether or not P would continue to be allowed to remain in Hong Kong. AUTONUMOUT By a judgment handed down on 23 October 2014, P's application for single joint experts was dismissed with a costs order that P is to bear 2/3 of R's costs. AUTONUMOUT It is to be remembered that up to that stage, both P and R were still taking care of the children on essentially an equal-split basis, referred to as the 5 day/5 day system. One would have thought that with these preliminaries being cleared, the parties should have been well on their way to have the issues resolved by way of trial but it turned out that the parties never reached there. Instead, it took them another 2 years before they finally came to trial when by then the issues that the court would have to determine had radically changed. AUTONUMOUT The proceedings took another turn when on 27 October 2014, the court

received a letter from the children's school (both were attending the same school) raising serious concerns over suspected abuse that the children were subject to when they were under the care of P. What followed was an ex parte application by R with notice to P on 29 October 2014 for a non-molestation order. The background to this application was set out in 7 to 11 of my subsequent Judgment of 3 December 2014:

7. What triggered the application was that when R collected the children on 14 October 2014 for his care and control, L told him that he did not want to return to P as he was very scared that P would hit him more. He learned from L that the night before P had hit him 10 times with a closed fist on his head, 5 times on each side of his head around the temple area. This was the punishment for L writing to his father on his iPad while under P's care. At the same time, B also claimed that he had also been hit many times on his throat. Both children told their father that it was the worst week ever as they were being hit many times. Both did not want to go back to their mother. They had to say to the relocation, otherwise P would hit them more. When R helped the children shower he noticed bruises and a scratch on L's right arm. L said the injury was caused when P grabbed and pinched his right arm after she had hit his head the previous night.
8. R said the children continued to receive corporal punishment between 19 October 2014 and 23 October 2014 when they were under the care of P. Two scratches on L's right lower arm were found, and according to L, the injuries were inflicted when P squeezed his arm with her hand whilst pushing her thumbnail into his skin. Both children said P hit them again many times during their time with the mother.
9. There was also an allegation that according to B, P told him that she might be killed if she stayed in Hong Kong. R suggested that it was an attempt on the part of P to try to poison the children's minds so that she would be able to indoctrinate and sway them so that they would agree to relocate with her.
10. R also referred to some incidents of abuse back in June 2013. He said the situation was escalating while P was pressing on her application for relocation. The situation had come to an alarming one where the children were no longer safe in the care of P without supervision.
11. R also found out from the children that P had taken them to see a lady whom he believed was a psychologist or a psychiatrist. This happened before the Ruling on her application for Single Joint Experts were handed down on 23 October 2014. AUTONUMOUT On the same day (ie 29 October 2014), the court granted the following interim orders: P be restrained from assaulting or molesting the children and be restrained from taking the children to see any psychologist or psychiatrist or any form of medical consultation without a court order; the 5 day/5 day system be suspended until further order; the interim care and control of the children be granted to R; the interim access to the children twice a week for not more than 3 hours each be granted to P; such access to be supervised by a social worker until further order; and the children's passports and all other travelling documents be delivered by P to

her solicitors. AUTONUMOUT At the same time, the court called for a clinical psychologist's report and an updated SIR. AUTONUMOUT The interim access did not go well. Ms Lo, the SWO, took the unusual course of writing a Memo to court on 18 November 2014 seeking directions as to how the interim access was to be arranged. As a result, the court gave further directions in this regard. AUTONUMOUT's application was strenuously contested; by a Judgment handed down on 3 December 2014, the non-molestation order, the interim care and control arrangement in favour of R and the supervised access for P remained to be in force until further order. AUTONUMOUT Meanwhile, R made complaints to the Social Welfare Department () against P about the suspected abuse that the children had suffered. The Multi-disciplinary Case Conference (MDCC) for Suspected Child Abuse Case concluded that there was not an established case of physical abuse. Rather, the MDCC concluded that it was a high risk of physical and psychological abuse case, which meant there would be risk of occurrence of abusive behaviour on the children and the case required closed monitoring. The children were put in the Child Protection Registry of the SWD. Significantly, P was charged by the police on 19 March 2015 for the offence of ill treatment or neglect by those in charge of child or young person under section 27(1) of the Offences Against the Person Ordinance (Cap 212). She was granted bail on the condition that she was not allowed to have direct or indirect contact with the children unless under the supervision of the SWD. AUTONUMOUT At this juncture, I digress to deal with what happened to the criminal proceedings. AUTONUMOUT According to the Particulars of Offence and the trial magistrate's Statement of Findings, P was said to have assaulted L on two occasions between September and October 2014. It is not necessary to refer to these two incidents in any detail. I only need to point out that these 2 incidents were amongst the various incidents that R relied upon in support of his application for the non-molestation order. Since P denied the charge, R and L had to give evidence and subject to cross-examination by P's counsel. P was convicted of the offence on 24 November 2015 in respect of one of the incidents and was fined \$3,000. Specifically, she was found to have deliberately hit L on the head for several times and as a result the boy cried. Her appeal to the Court of First Instance against conviction was dismissed on 2 September 2016. AUTONUMOUT The SIR, which was submitted as a result of the alleged child abuse, reported on 30 April 2015 that during access P asked L to tell the police that he had told lie to the police. The SIR also made the following observations: the children had positive development and becoming emotional stable at school and in home; the caring arrangement of R was satisfactory; the children had strong views to live continuously with their father and they did not wish to return to the 5-day/5-day system; the children maintained close bonding, secure and supportive relationship with R while L repeatedly expressed his scare arising from staying with his mother; and Ms Yau, the government clinical psychologist, also gave her opinion that the caring arrangement seemed to be conducive to meet the best interest and developmental needs of the children. AUTONUMOUT Ms Lo therefore recommended that R was to be given the sole custody, care and control of the children with supervised access for the first 2 months followed by defined access be given to P, such access to be subject to supervision for a period of 12 months. AUTONUMOUT On 11 May 2015 leave was granted for P to withdraw her application for

relocation and for interim care and control. At the same time, R was given leave to amend his application of 2 July 2013 so that he might be granted the sole custody, care and control of the children, with supervised access to P. AUTONUMOUT On 26 June 2015 the court received a 2nd letter from the boys school. It was reported in the letter that on any particular access day, L was withdrawn, reluctant to participate in class room activities and began crying as pick-up time was drawing near. L openly stated that he did not want to attend access and complained of stomach ache or of feeling unwell. The school observed that L did not enjoy access and participated only under duress. AUTONUMOUT What followed was Ms Lo's 2nd Memo dated 13 July 2015 reporting to court that the supervised access seemed getting more intense when L expressed in a few sessions that he did not want to continue and wished to leave immediately. The rejecting attitude of L was observed to have been related to P's perennial questioning on L about the criminal case. That irritated the boy greatly. It was also reported that during the access of 3 July 2015 Ms Lo tried to stop the questioning but in vain. Plainly, Ms Lo encountered difficulties in working with P on how access could be effectively carried out. In my view, Ms Lo was correct in trying to stop the questioning. First of all, that should not have been the purpose of access; and secondly, L was a prosecution witness. AUTONUMOUT As regards B, by and large, his access was still observed to be smooth. AUTONUMOUT At about the same time, probably because of what had happened during access, P took out an application on 20 July 2015 for an order that Ms Yau should attend the access sessions or in the alternative, P should be allowed to have a child psychologist to attend the same. P's application, insofar as it related to the attendance of Ms Yau, was dismissed on 30 July 2015 for the reason that the court simply had no power to give such an order. As for the attendance of a child psychologist, it was adjourned to be dealt with in the trial. AUTONUMOUT In light of L's reaction during access as reported by Ms Lo, P's access to L was suspended for one month from 1 August 2015. AUTONUMOUT On 11 September 2015 P took out a further summons for the court's directions for (1) ensuring the children are reliably delivered to supervised access sessions; (2) vesting the control of setting the access sessions on herself to eliminate interference; and (3) requesting the court to address the repeated breaches of the order regarding supervised access. Clearly, she took the view that R had been manipulating and interfering with her access by not delivering L to access sessions. AUTONUMOUT On 12 October 2015 the Official Solicitor was appointed to represent the children. AUTONUMOUT Ms Yau, in her report of 7 December 2015, recommended a family-oriented phased therapy as a way forward. She pointed out that the first and primary person who needs to undergo therapy is P. In order to make the therapy work, the first important step is for P to acknowledge her problems and to own up responsibility. Only when P is willing to commit to therapy and then manages to make genuine and positive changes will it be appropriate for therapy to move on for working with and involving L with a view of rebuilding trust and mending the relationship. Of particular note is that Ms Yau warned that the clock is ticking. Estrangement is serious in the mother-child relationship and remedial actions need to be carried out fast. AUTONUMOUT Upon the recommendation of Ms Yau, P started to receive therapy from Dr Poon, another government clinical psychologist. However, the therapy has proven to be futile. I will elaborate this in

more detail below. AUTONUMOUT The Official Solicitor's 1st report, submitted on 14 December 2015, stated that the replies or responses of the children as to the mother-child relationship are spontaneous and natural; and no signs of manipulation or coaching can be observed. AUTONUMOUT On 21 December 2015, the interim sole custody and sole care and control of the children were granted to R with defined supervised access to P. Upon the recommendation of the Official Solicitor, it was expressly provided in the order that neither of the children should be compelled to attend any access session if either or both of them do not want to attend it on a particular day. The interim stop order preventing the children from leaving Hong Kong was varied to the extent that there would be no prohibition or restriction for the children to leave Hong Kong with R temporarily for holiday purpose and/or family visit provided that each trip shall not be more than 14 days and there shall not be more than 4 trips per year, commencing from 1 January 2016. AUTONUMOUT On 30 March 2016, with a view of trying to improve the relationship between P and the children, FaceTime access for 10 minutes each in the presence of R was granted. AUTONUMOUT However, it is unfortunate that the FaceTime access too failed to achieve the intended purpose. The adverse development following the implementation of the FaceTime access prompted the Official Solicitor to investigate into the matter and produced his 2nd report on 21 April 2016. His enquiry with Ms Lo revealed that P might have put undue pressure on B during the access by: repeatedly requesting B to bring the i-Pad to L so as to join L in the FaceTime access; repeatedly asking B questions in a critical manner which B found it difficult to answer; and repeatedly asking B to hold the i-Pad in a proper position which made B feel impatient and upset. AUTONUMOUT The Official Solicitors recommended that the children should not be compelled to attend access sessions, either in the form of supervised access or FaceTime, against their will and that taking a non-coercive and more space approach would be more effective and productive to mend the relationship between P and her children. AUTONUMOUT These events also made Ms Lo see the need to write her 3rd Memo to court on 8 June, 2016. The court was informed that B did not want to have FaceTime with P in May and June 2016 while P insisted that this was not acceptable. B was reported to have shown some signs of being overwhelmed and distress, causing him repeated bedwetting since April 2016. B was asked by P frequently to get L participating in either the physical or FaceTime access. The situation further deteriorated. There were reports of B getting more aggressive, upset and tempered sometimes, both at home and in school. Ms Lo realised that B was being pressured when he did not want to either attend the physical access or having FaceTime with the mother. AUTONUMOUT Meanwhile, in response to the court's concern over whether L would require any counselling arising from his refusal to attend access sessions, the Official Solicitor, after having consulted Ms Yau and Ms Lo, reported on 25 May 2016 (the 3rd report) that: L does not require any counselling as his refusal to see his mother is not a psychological problem; L may be encouraged / persuaded to see his mother only when there is cogent evidence showing that P has made genuine and positive changes; and the current access arrangement (both supervised access and FaceTime access) for B should be closely monitored to ensure that B is free from undue pressure. AUTONUMOUT Consequently, by an order of 13 June 2016, the FaceTime access

was suspended and her interim access could continue only if the children are willing to participate. The Present Situation of the Parties and their Children AUTONUMOUT The children have been living with R since October 2014. When R is having his flying duties, the daily care would have to be given by the domestic helper who has been working for them before the divorce proceedings. The boys are attending the same school as before. L is in Year 5 and B is in Year 2. AUTONUMOUT P is living alone and continues to work as a free-lance face-painter and fitting model. I was told that she also works as a part-time nanny. I was not told she has further plan of returning to Country A now. AUTONUMOUT The children have gradually shown their resistance to attend access, whether supervised or through FaceTime. B attended most of the access up to June 2016. By that time, B was reported to have bedwetting. Since then, he has refused to attend. As for L, he has ceased attending access since September 2015. Both L and B have clearly expressed their wish to stay away from their mother. The Reports AUTONUMOUT As can be seen from the brief narration above, over this period of time the relationship between P and her children have turned from bad to worst. There were: 6 Social Investigation Reports; 3 substantial memoranda from Ms Lo raising significant issues on access arrangement and seeking court's directions; 1 International Social Investigation Report; 2 clinical psychologist reports prepared by Ms Yau; 1 clinical psychologist report prepared by Dr Poon; and 4 Official Solicitor's Reports. Ms Lo's Up-dated (6th) SIR dated 5 October 2016 for the purpose of Trial AUTONUMOUT It is reported that both L and B unequivocally expressed that they are happy to live with their father and refuse to attend access with P. AUTONUMOUT L expressed to Ms Lo that he does not want to go to access because he does not want to meet his mother. He further shared that he refuses to have access in the home vicinity because there would not be anyone watching over P. He mentioned that P had hit his head for 5 to 10 times and had splashed cold water to him and B. AUTONUMOUT B also mentioned to Ms Lo that P had hit and pushed him when the children were under the 5-day/5-day system. He also mentioned that P had hit him for about 2 times during the supervised access in Ms Lo's office. P hit him with her fist at the back of the door where it was beyond the reach of the CCTV. AUTONUMOUT Ms Lo noted that both L and B expressed their consistent negative views towards P. She considered the children are age appropriate and are consistent in their views regarding access. As such, their views should be seriously taken into consideration. They should not be compelled to attend access. AUTONUMOUT Ms Lo saw that P could hardly regain the trust of the children if she continues to externalize her blame and does not address her own difficulties in parenting. Therefore, P's wishes for immediate care and control and direct access to the children are totally unrealistic and impractical, which would only further increase the resentment of the children towards her. AUTONUMOUT Ms Lo also considered that communications in the parental system have broken down; the parties would not be able to make any decisions for the children without going back to court repeatedly, which would only make the children more vulnerable. She recommended that the sole custody of the children be given to R. In light of the children's consistent negative views towards their mother, Ms Lo considered it impractical and infeasible to continue with access if P refuses to acknowledge her problems. She proposed that no defined access order

should be made and access could only be arranged when the children are ready to see their mother. The Clinical Psychologist's Reports AUTONUMOUT Ms Yau has submitted two reports, dated 24 April 2015 and 7 December 2015 respectively. AUTONUMOUT In her 1st report, she stated: I am also concerned that P seems to have little ability of self-reflection. She is either unaware of or have (sic) very little reflection on the possible impacts of her actions on the children, e.g. her recording of all the access meetings which is quite an intrusion into the children's personal and psychological boundary, her act of drawing (L) into a conflict she had with Ms Lo which could be better handled just between her and Ms Lo, her telling (L) that she would go to prison and he could help her by telling the police that he lied in the VRI, etc. It seems to me that P has confused the need of the children for her to love them with her need for the children to love her. The actions she engages in towards her children suggest to me that she is getting her own needs met at the expense of the children's in particular (L)'s needs. 34(j) AUTONUMOUT Ms Yau urged P to take her observation as a wake-up call and as an opportunity to work for and change for a better self, so that she can have authentically close and loving relationships with her children. If P does not make any positive changes, Ms Yau had the concern that when the boys grow older, they would very likely rebel, fight back or disengage emotionally to cut the pain. The relationship would then be really estranged or lost: 36. AUTONUMOUT In her 2nd report, Ms Yau repeated her advice and recommended a family-oriented phased therapy to be given by her, starting with P being the primary client before involving the children: 26. AUTONUMOUT The latest report is by Dr Poon, the government clinical psychologist who gave P therapy upon the recommendation of Ms Yau. Dr Poon reported on 27 September 2016 that P does not have any significant signs and symptoms of emotional disorders which warrant clinical attention. However, P exhibits personality pattern of anger, resentment, distrustful of people, irritability, sensitive to criticism and projection of blame onto others. She perceives her attendance for psychological service as a compliance with the court order. Her goal is to get back her children, rather than to look into her own difficulties in parenting. She does not think she has any personal issues that warrant therapeutic intervention. She regards her stress was solely caused by R, the court system and other professionals. Dr Poon further said that without a genuine reflective and honest attitude, she does not think psychotherapy is going to help P and thus, she recommended the discontinuation of the service. The Official Solicitor's Stance in his 4th Report for the purpose of Trial AUTONUMOUT The Official Solicitor has always taken the view that the children should not be compelled to attend the access sessions against their will. Any coercive element would end up pushing the children farther away. AUTONUMOUT It is reported that L still does not want to see his mother, whether physical or by FaceTime. He likes the present living arrangement and does not want any change. Significantly, L does not think P could improve and be good again. He does not want to give her a chance at all. AUTONUMOUT As for B, he gave similar answers that he does not want to have FaceTime access. He does not want to attend access sessions either because P hit his arms during access. It happened when Ms Lo was in another room and she did not notice it. B felt painful and hence does not want to go to access anymore. Like L, B does not think P would be good again. That said, he indicated that perhaps he could see his

mother once each year, but there should not be any FaceTime access. AUTONUMOUT The Official Solicitor is too of the view that the parties can hardly co-operate with each other on matters of importance in the upbringing of the children. He recommended that the sole custody, care and control of the children be given to R. As far as access is concerned, the Official Solicitor maintained his stance that the children should not be forced to attend access against their will. It may take the children considerable time to overcome their fear and resentment. The Official Solicitor urged the mother to demonstrate unconditional love for the children by showing her patience and understanding. He noted that according to Ms Yau, there are personal issues P needs to work on in order to mend her relationship with the children but unfortunately P is still unable to acknowledge this fact. Given the children's strong rejection of their mother, any immediate direct access is unrealistic and infeasible. It is therefore proposed by the Official Solicitor that P may have indirect email access to the children. This can be implemented by a designated email account. The question of direct access can be re-visited when P has shown progress in re-building her relationship with the children and when the children are willing and ready to see their mother. The Applications that the court has to deal with AUTONUMOUT The following applications, all concerned with the arrangement of the children, are required to be formally disposed of: R's summons dated 2 July 2013 and amended on 11 May 2015 for the sole custody, care and control of the boys with supervised access to P; P's summons dated 4 September 2013 for joint custody and shared care arrangement; R's summons dated 19 June 2015 insofar as it relates to the delivery up of the boys' Country A passports and other travel documents. R seeks to have the documents to be delivered to him for safe custody; P's summons dated 20 June 2015 seeking leave to have a child psychologist to attend access; and P's summons dated 11 September 2015 seeking directions from the court to ensure that access be carried out without interference. The Witnesses AUTONUMOUT In trial, apart from P and R, P's mother (who flew in from Country A), Ms Lo and Ms Yau also gave evidence in court. Parties Position AUTONUMOUT At the beginning of the trial, the parties were, in their usual fashion, poles apart. AUTONUMOUT P asked for the custody of the children to be shared between the parties. While she agreed that the care and control of the children be remained with R for the time being, she said a clear path towards returning to shared care and control should be implemented. Before this is realized, in the meantime, she sought regular and defined accesses. AUTONUMOUT On the other hand, R sought the sole custody, care and control of the children, with access to be continued upon the willingness of the children. He also sought (1) to remove all restrictions on removal so that he may take the children out of Hong Kong for holiday purpose or family visit and (2) the possession of the children's Country A passports which are being held by P's former solicitors. AUTONUMOUT After having heard Ms Yau and Ms Lo's evidence, when it came to the 4th day of the trial it is clear that P did not seek to argue seriously for the custody, care and control of the children. She was realistic in that she nailed down her focus on access in order to rebuild her relationship with the children. Specifically, she asked for email and FaceTime accesses and family therapy. AUTONUMOUT At the same time, R's position has also softened somewhat. He agreed to let P to have indirect electronic access, limited to one email per week but the children should not

be compelled to read or respond to P's emails. Legal Principles AUTONUMOUT In matters in relation to the custody or upbringing of the child, the court is guided by the principles set out in section 3 of the Guardianship of Minors Ordinance (Cap 13), Section 3 In relation to the custody or upbringing of a minor, or 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 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 any material information including any report of the Director of Social Welfare available to the court at the hearing; and (ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father; (b) , a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other; (emphasis added)

AUTONUMOUT In short, the court shall regard the best interests of the child as the first and paramount consideration. The court shall give due consideration to the views of the child and any material information including any SIRs; and there shall not be any discrimination against the father or vice versa. Custody, Care and Control AUTONUMOUT With the concessions from both parties, the issues which call for determination by the court have been simplified. I have no doubt that P has taken the correct approach by focusing on ways to improve her relationship with the children rather than labouring on custody, care and control issues. AUTONUMOUT R has always been commended by all professionals involved in this case as a stable and a secure-base attachment figure for the children. AUTONUMOUT P asserted that the children have been subject to alienation manipulated by R. This has not been supported by Ms Lo, Ms Yau and Mr Lee, who appeared for the Official Solicitor. Quite to the contrary, Ms Yau takes the view it is a case of estrangement rather than parental alienation. Information from different sources all pointing to P's own acts which have negatively affected her relationship with the children. It was reported in the 1st psychologist report that L and B had consistently told different people at different times in different contexts that their mother hit them and yelled at them many times. According to her professional judgment, Ms Yau believed the children were telling the truth, in light of the ways they disclosed and talked, as well as the complex feelings of fear, hate and wanting to love which L expressed towards his mother. These were not how children who had been alienated or coached would have responded. Ms Yau even concluded, in her 1st report, that P is the primary architect of the estranged relationship. AUTONUMOUT It is significant to note that R arranged 2 meal gatherings for the children to meet P's mother in April and May 2016 when she visited Hong Kong. He also invited P's sisters to have dinner with the children

at home. It is evident that the boys have no resistance to see their maternal grandmother and aunts. AUTONUMOUT It is extremely fortunate that having undergone all these turmoil, Ms Yau does not think the boys, especially L who was at the centre of the criminal proceedings, have any significant psychological problems that need therapy. Ms Yau assessed that L is resilient and has risen to the difficulties and the challenges of a family situation that many children may be traumatized. AUTONUMOUT According to Ms Lo's enquiry with the children's teachers, the children have been doing well in school. L has done very well academically, especially in reading and Mathematics as well as improvement in focus and concentration. He is well-behaved at school and respectful towards both adults and peers. He is described as always being gentle and calm and has been able to express his feelings in appropriate way. B is commended to have made good progress in all areas of the curriculum. He was the Star of the week in September 2016 because he was in a group above his year level for Literacy and Numeracy and he worked incredibly hard to produce some impressive work. He is seemed to be emotionally stable now. AUTONUMOUT Of course, I have not lost sight of P's complaints that under the care of R the children have been displaying traits of arrogance, entitlement and indifference. She has objections to various decisions made by R such as (1) the children being given unsupervised access to the internet and violent games, (2) B was given a switchblade knife as a gift, (3) the children being driven in R's car by their maid who, in P's eyes, is an unsafe driver, and (4) the children being exposed to racist and bigoted opinion from the maid's husband who had been with the family briefly. AUTONUMOUT It seems to me that Ms Lo was aware of these complaints but she did not find them justified. All the evidence points to the fact that both children have remained under the good care of their father and have been leading a stable life in the past 2 years. It has to be appreciated that R has been juggling between his flying duties and giving care to the children. I have no doubt that R could have been in an easier position if the caring responsibility could be shared by P, but the reality forbids this to happen. P said the children could have travelled by public transportation instead of being driven by their maid. She even added that no driver with less than 5 years experience should drive the boys. I do not know how she came up with the figure of 5 years. As I see it, regardless of whether she is correct, I wonder whether it is too much a demand on the children if there is an alternative by which they could travel faster and more comfortably. Again, this may not be an issue at all if their care and control could be shared by their parents. Anyway, R has agreed to give the undertakings that (1) he will not leave the children or any one of them in the car alone and (2) when the children or any one of them are travelling in his car, he will use the safety device as set out in the Road Users Guide issued by the Transport Department. It is either a child harness made of a lap strap and two shoulder straps; or a booster together with the ordinary seat belt, which also has an extra strap running behind the child that acts as a guide to change the lie of the diagonal belt. AUTONUMOUT I will hold R onto these undertakings. The undertakings will form part of the order made by the court in this Judgment. AUTONUMOUT I am not saying that R, as a father, is impeccable. There is some merit for P to have pointed out that R posted a picture of his and the children on a dating website for a brief period of time but that happened quite a while ago. AUTONUMOUT On

the evidence before me, I am satisfied that the children have been doing significantly better both at home and in school for the last 2 years under the care of R. For the above reasons, I grant the sole custody, care and control of the children to R. AUTONUMOUT It is glaringly apparent that P has not been able to work smoothly with Ms Lo. To name only just one example, Ms Lo mentioned that she had reminded P for several times since 2016 not to have the partner yoga poses with B during access because the access room was not safe enough to carry out such exercise. P usually disagreed with her friendly reminders and argued each time in front of B. AUTONUMOUT In evidence, P said it was fantastic that when she was having FaceTime access with B on 17 or 24 April 2016, L joined them for a while voluntarily, said Hi, Ma Ma and exchanged some nonsense chit-chat. However, P did not mention this incident in the hearing of 27 April 2016 and 13 June 2016 when the FaceTime access was suspended, nor did she mention this in any of her affirmations. P also testified that she last saw L in the street two months ago before the trial. L waved at her and she waved back. I have great doubt over whether these incidents really happened.

AUTONUMOUT In evidence, both Ms Yau and Ms Lo agreed to the Official Solicitor's proposal that in the meantime, there should not be any physical access but indirect email access to the children only. Further, the children should not be felt being compelled to read the emails or to respond to them. This is also agreed to by R. AUTONUMOUT Throughout P has been denying what the children said about the hitting and the yelling and what happened during supervised access sessions. To her, all these are lies engineered by R, told to deceive the world including the court. However, there is not a hint of evidence from Ms Lo, Ms Yau or the Official Solicitor in support of her contention. They have not found any sign of coaching on the part of R. AUTONUMOUT In her very 1st report, Ms Yau observed that P has a strong tendency to blame others for problems and also has little ability of self-reflection. She would also take actions for getting her needs met at the expense of the children's needs. Ms Yau advised that only when P is willing to go for therapy, to acknowledge and face her problems and to work for positive changes, could she then salvage her relationship with the children. If P does not make positive changes of herself and of the way she relates with the children, the boys would in the future disengage themselves emotionally to cut the pain. The mother and children relationship would then be really estranged or lost. As can be seen from the history of the proceedings, it is regrettable that she did not give any heed to the advice; consequently, defined access failed to serve as a catalyst to mend the relationship. AUTONUMOUT Dr Poon also assessed that the problem has its root at P. P has to acknowledge that this is the case. Without a genuine reflective and honest attitude to her problem, any effort would be futile. AUTONUMOUT Ms Yau testified that at the beginning L felt sad for not being able to love his mother, but now he has come to terms. As for B, it is evident that he was willing to see her mother. He was able to enjoy access though B told her that P had yelled and hit him. But the situation has gradually deteriorated to a point where B is not willing to see his mother anymore. She added that she is not surprised to see this happened. She confirmed her view that P is the major contributing factor. AUTONUMOUT Ms Yau did not think the boys have any psychological or emotional disturbance that they need to go to therapy. Unless there are positive signs from

P, she is not even sure what she can tell the boys. This must come from the real experience of the boys. She agreed with the Official Solicitor that for the present moment, there should only be gentle and indirect contacts by way of emails between the mother and the boys. The boys should not be under any pressure to respond. AUTONUMOUT The boys are now physically safe but, as I see it, psychologically speaking, they are still very feeble. They are still harbouring strong resistance to see their mother; especially for L who went through the tormenting experience as a prosecution witness against his mother. According to Ms Yau, the thought that he may have to see his mother would cause him a lot of anxiety. It is clear in my mind that one needs to be extremely careful when considering how a step further is to be taken in mending the mother and child relationship. I agree with Ms Yau that the situation, as it stands, is to give priority to the children's sense of security and well-being. AUTONUMOUT All the professionals involved in this case have given their views that the children's views have to be respected. Any attempt to force them to see their mother would only cause backfire and deteriorate the situation further. AUTONUMOUT Both Ms Yau and Ms Lo said P has not changed. In trial, P reiterated that she should be given a chance to show her new skill. With respect, she has missed the point. It is not a matter of skill. The long and short of it is that there must be a change in her attitude. She has to recognise her problem deep from her heart and seeks therapy. Regrettably, I have not seen this yet. P still maintains that she never abused the children, notwithstanding she was convicted of the relevant offence. She should realize that she is the one who holds the key. Without any positive sign, it is too risky to give P the opportunity to demonstrate her skill. AUTONUMOUT The options open to me are extremely limited. Supervised access and FaceTime access are foiled attempts. I do not think they are appropriate for the time being. I also accept that the children should not be forced to see their mother. AUTONUMOUT It is clear to me that the best and the only option, as recommended by all professionals, is indirect access by way of emails from P. I agree with R that email access is a slow burner. This can be a safe, pressure-free way for the children to maintain contacts with their mother. AUTONUMOUT P asked for 10 emails over a period of one month rather than one email each week. This is to even out over a period of time. AUTONUMOUT Mr Lee, in his closing submissions, agreed to increase the frequency of email access to two emails per week. AUTONUMOUT As said, bearing in mind that the children are very feeble psychologically, one has to be very careful in not overburdening the children with too many emails within a short span of time. Thus, I prefer Mr Lee's suggestion. AUTONUMOUT I think P should be informed of the progress of the children so that she may have something to write to or to encourage the children. AUTONUMOUT I accept the grandmother's evidence that the boys enjoyed good times with her. I would like to see this happens again when the grandmother visits Hong Kong. Even though R's relationship with P had been extremely poor, he was commended by Ms Lo to have been fully supportive in the previous supervised access. I believe it is better to leave some flexibly here; so I do not think it is necessary to give an order for this. I am sure the progress report will keep the court updated of this matter if there are aspects in this regard which need to draw my attention to. Supervision AUTONUMOUT R repeatedly made the point that he does not want the children

to be exposed to psychologist, social worker and solicitor anymore. They are entitled to have a closure of the matter and should have their childhood and normal lives back.

AUTONUMOUT However, Ms Lo agreed that supervision is appropriate given the circumstances of this case. Mr Lee also considered that supervision is inevitable.

AUTONUMOUT I listened with care and empathy to what R said. Yet, I feel duty bound that the court has to continue to monitor the situation and to render whatever assistance as may be required for the benefit of the children. I have taken Ms Yau s professional view on board. If the indirect access is going well, and there are signs that P has changed in her attitude, then consideration can be given to get the children and R involved with a view to extend the access as the next phrase. I will give an order that the access is to be supervised by the SWD for 24 months. Temporary Removal for Vacation / Family Visits AUTONUMOUT R seeks to remove all the restrictions on removal so that he may take the children out of Hong Kong for holiday purpose or family visit. There is already an order given by the court on 21 December 2015 that R may take the children out of Hong Kong temporarily for holiday purpose and/or family visit provided that each trip shall not be more than 14 days and there shall not be more than 4 trips per year. AUTONUMOUT This arrangement has been in place since January 2016 and no complaint or problem has been heard of. I have determined that this arrangement should be continued. Passports AUTONUMOUT As said, R seeks the custody of the children s Country A passports and other travel documents. It seems to me clear that apart from the Country A passports which are being kept by P s former solicitor pursuant to a previous order of the court, no other travel documents are involved. The Country D s passports must always have been with R otherwise he would not have been able to travel with the children. I was told (and this was not disputed) that the Country A passports have long expired. It is a matter of commonsense that renewal of the passport must be subject to the consent of the other parent. Thus, on any view, there is little point for R to have the expired passports being placed in his custody. For this reason, I will give an order that the expired Country A passports of the children be released to P. Non-molestation Order AUTONUMOUT The non-molestation order was granted on 29 October 2014. The 24-month period of validity of such an order has already expired pursuant to section 6 of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189). On the evidence before me, I do not see any need to give such an order afresh.

Orders

AUTONUMOUT For the reasons aforesaid, I give the following orders: P may have access to the children of the family by way of emails, limited to 2 emails per week from her. P may also send an electronic card during Christmas and on the occasion of the children s birthdays. The children are not obliged to give any reply; R is to provide a designated email account for each of the children within 7 days; R is to provide the children s school hand-books, notices and reports, if any, on a monthly basis; and The access is to be supervised by the Social Welfare Department for a period of 24 months. A progress report is to be submitted to court upon the expiry of the first 9 months. AUTONUMOUT Further, upon the undertakings given by R to the court and contained in

the order dated 21 December 2015, I give an order that paragraph 2 of the Order dated 21 December 2015 be continued until further order of the court. The Country A passports are to be released to P. AUTONUMOUT The above orders should have disposed all the children s matters in the present proceedings. Specifically, the orders in paragraph 122 dispose of R s summons dated 2 July 2013 and amended on 11 May 2015, and P s summonses dated 4 September 2013, 20 July 2015 and 11 September 2015. The order in paragraph 123 above disposes of the remaining matters that required to be dealt with in R s summons dated 19 June 2015. Costs AUTONUMOUT R asks for the costs, on indemnity basis, of all the applications on children s matter. They include the summonses set out in paragraph 77 above and the following summonses together with all costs reserved: R s ex parte summons for non-removal dated 5 May 2014; P s application for permanent relocation dated 19 May 2014; P s application for interim care and control dated 19 May 2014; P s ex parte application for a non-molestation order against R dated 19 May 2014; Consent summons dated 17 June 2014 for moving the trial dates for relocation; Consent summons dated 2 July 2014 (on P s application for a non-molestation order); R s summonses for a non-molestation order against P dated 27 October 2014 and 30 October 2014; Consent summons dated 8 May 2015 (for amendment of R s summons and P s withdrawal of application for permanent relocation); R s summons for release of funds for litigation and for variation of non-removal order dated 19 June 2015; and P s summons dated 19 August 2016 (for extension of time to file her affirmation on children matters). AUTONUMOUT As I have not had the opportunity to hear any serious arguments on costs, I indicated to the parties that the costs order given in this Judgment would be by way of orders nisi. P s Application for Non-molestation Order dated 19 May 2014 AUTONUMOUT As said in paragraph 23 above, at the same time when P took out her application for relocation, she also sought a non-molestation order against R. That application was compromised by way of a mutual undertaking from each other not to hack or spy on the other s computer. It was also agreed that the issue of costs be adjourned for arguments at the trial of relocation. As things turned out, there was no trial on relocation but this does not prevent the court from dealing with the issue of costs at this stage of the proceedings. AUTONUMOUT In Famous Marvel Company Limited & Ors v Conversant Group Limited & Ors, (unreported, HCA 2153/2009, 29 October, 2012) Hon Au-Yeung J summarized the relevant principles for determining costs where the dispute has been compromised by the parties:

22. There is no dispute that even if a case is settled except as to costs, the Court still has power to determine which party should be liable for costs. There is no tradition for there to be no order as to costs in such a scenario. I am guided by the following principles in deciding costs:
 - (i) The Court is to decide if the party seeking costs has substantially obtained the reliefs sought in the litigation: *Re Chinese United Establishment Ltd*, HCCW 291/1994, 5 October 1995, Rogers J (as he then was), approved in CACV 214/1995; *Lai Yuet Chun v Super Deluxe International Limited & ors*, HCCW 186/2001, 3 June 2003 Kwan J (as she then was). (ii) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the Court will be prepared to look into the

previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties. *Brawley v Marcynski (No.1)* [2003] 1 WLR 813. (iii) The Court will first consider if it is in a position to say what the likely outcome after trial would have been. If it is not in a position to do so, the order may well be no order as to costs: *Brawley v Marcynski (No.1)*, at para 18, Longmore LJ; followed in *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2004] FSR 150. (iv) The Court may permit parties to adduce evidence on the question of costs: *Ta Tung China & Arts Ltd v Fontana Restaurant Ltd* [1999] 1 HKLRD 404; *Lai Yuet Chun v Super Deluxe International Limited & ors*, at para 12. However, to say that the parties must go to trial in order to resolve any outstanding questions of costs would be contrary to the underlying objectives enshrined in RHC Order 1A rules 1 and 2: *Graham M Morley v Kwan Wo Wan & others*, HCA 4366/2003, 30 December 2009, Recorder Jat SC.

- (v) A broad brush can be taken by referring to all matters already laid before the Court, eg pleadings, correspondence, witness statements, transcripts of evidence and the terms of the settlement order: c.f. *BCT Software Solutions Ltd v C Brewer & Sons Ltd*, at para 9; *Graham M Morley v Kwan Wo Wan & others*. (vi) The objective is to do justice between the parties without incurring unnecessary Court time and consequently additional cost: *Brawley v Marcynski (No.1)*. AUTONUMOUT Both parties had exchanged their affirmations but were able to settle the application before the substantive hearing. The court did not have the opportunity to assess the merits of P s application. With the mutual undertaking given in favour of the other party, each has obtained the same reliefs or benefits. There is an acknowledgment set out in the recital of the consent order that the undertaking by the parties should not be construed as an admission. R s affirmation in opposition is more than bare denials. Hence, even if a board brush approach is adopted, the court is not in a position to say what the likely outcome after arguments would have been. In the circumstances, I consider it is fair that each party is to bear his or her own costs in respect of this application, including the costs of the consent summons dated 2 July 2014 and all costs reserved and I so order. R s Application for Non-molestation Order AUTONUMOUT The events that I have alluded to plainly show that R s application is fully justified in preventing the children from being physically and psychologically abused. There is simply no merit for P to have repeatedly said that the MDCC had concluded that there was not an established case of physical abuse. I think it is fair and just that P is to bear R s costs of and in the application, including all costs reserved and with counsel certificate and I so order. The Other Summonses AUTONUMOUT While costs are in the discretion of the court the general principles as regards costs in children cases are that there should be no order as to costs save when one party has been unreasonable or reprehensible 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, *H v H*, CACV 42/2002 (date of judgment: 6 September 2002). AUTONUMOUT Behaviour beyond the band of what is reasonable may result in an order for costs against that party. In *Keller v Keller and Legal Aid Board* [1995] 1 FLR 259 Wilson J (as he then was)

said at 265: No one suggests that the court's discretion in respect of costs under s 51(1) of the HYPERLINK "[\t "_parent" Supreme Court Act 1981](https://www.lexisnexis.com:443/in/legal/search/runRemoteLink.do?A=0.16500419489562257&bct=A&service=citation&risb=21_T25006710637&langcountry=GB&linkInfo=F%23GB%23UK_ACTS%23num%251981_54a_Title%25) has become emasculated in children cases. The position is only that in most such cases, indeed in ordinary cases, the proper weighing of the factors in the exercise of the discretion is likely to lead to the choice of no order inter partes. Where, for example, the conduct of a party has been reprehensible or his stance in the litigation has been beyond the band of what is reasonable, an order for costs might well be made against him. Equally a marked disparity in wealth, such that, for example, the wife's costs would bear harshly upon her economy but could be discharged by the husband without significant impact upon his economy, might give rise to an order against him. AUTONUMOUT When assessing whether a party's conduct has been unreasonable, what should be considered is unreasonableness in the attitude to the litigation. Hale J (as she then was) made the celebrated remark in *R v R (Costs: Child Case)* [1997] 2 FLR 95 at 98B that parents are expected to be unreasonable: It is urged on his behalf that he was not totally unreasonable. The judge does indeed point to the good features about him and his relationship with R. He made some complaints about the mother's care of R to which the judge gave some credence, although it is right to say that in comparison with his criticisms of the father these are very limited indeed. It is further argued that it is not right to penalise the father for defects in his character which cause the apparent unreasonableness of his attitude. The fair point is made that in children cases one must not confuse unreasonableness in relation to the child because one might say that we are all expected to be unreasonable in our attitudes to our children and unreasonableness in the attitude to the litigation. However, it is quite clear that the judge took the view that the father had indeed been unreasonable in relation to the litigation. Of course, the parties should not be deterred, by the prospect of having to pay costs, from putting before the court that which they genuinely think to be in the best interests of the child, but there have to be limits. Children should not be put through the strain of being subject to claims that have very little real prospect of success, still less should they be put through a quite unreasonable involvement in their parents' disputes, to the extent that R was in this case. He was taken to see a psychologist, whom the judge described as totally unqualified to give an opinion on the case. We learn that this was done without the leave of the court. The judge made various criticisms of the psychologist's methods and described him as a 'paid hack'. He was also taken to see a solicitor between the end of the evidence and the judge's giving judgment. In other words, there was conduct in relation to the litigation which goes way beyond the usual sort of attitude which a concerned parent shows in relation to the future of his child. (emphasis added) AUTONUMOUT There are two recent UK Supreme Court judgments. AUTONUMOUT In *Re T (Care Proceedings: Costs)* [2012] UKSC 36, [2012] 1 WLR 2281, Lord Phillips PSC restated that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice 44. AUTONUMOUT In *Re S (A Child)* [2015] UKSC 20, [2015] 1 WLR 1631, Lady Hale DPSC explained the rationale for the general

practice: 18 As long ago as [HYPERLINK "https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IB229EB00E42711DA8FC2A0F0355337E9"](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IB229EB00E42711DA8FC2A0F0355337E9) Gojkovic v Gojkovic [1992] Fam 40, 57, the Court of Appeal observed that it was unusual to make an order for costs in children's cases. In [HYPERLINK "https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I6C323E90E43611DA8FC2A0F0355337E9"](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I6C323E90E43611DA8FC2A0F0355337E9) Keller v Keller and Legal Aid Board [1995] 1 FLR 259, 267-268, Neill LJ went further: In the last decade, however, it has become the general practice in proceedings relating to the custody and care and control of children to make no order as to the costs of the proceedings except in exceptional circumstances. He did, however, go on to say that it was unnecessary and undesirable to try to limit or place into rigid categories the cases which a court might regard as suitable for such an award. 19 Nevertheless, the cases which might be regarded as suitable may be deduced from the reasons why the courts have adopted the no costs approach. The classic explanation is that given by Wilson J in [HYPERLINK "https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IC6C90AE0E42811DA8FC2A0F0355337E9"](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IC6C90AE0E42811DA8FC2A0F0355337E9) Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317, 1319: Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in [the welfare of] the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties. 20 Whenever a court has to determine a question relating to the upbringing of a child, the welfare of the child is the court's paramount consideration: [HYPERLINK "https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IB7ED8E10E44B11DA8D70A0E70A78ED65"](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IB7ED8E10E44B11DA8D70A0E70A78ED65) section 1(1) of the Children Act 1989. This applies just as much to care proceedings brought to protect a child from harm as it does to disputes between parents or other family members about the child's future. Although the proceedings are adversarial in form, they have many inquisitorial features. An application cannot be withdrawn without the court's consent: FPR r 29.4. The court is not bound by the cases put forward by the parties, but may adopt an alternative solution of its own. The court is not bound by the choice of evidence put forward by the parties, but can decide for itself what evidence it wishes to hear. The court is very often assisted by the independent investigations and reports of the family court reporter (in private law cases) or the children's guardian (in care and adoption proceedings) and other experts. Even in care proceedings, there are many possible outcomes available to the court.

Thus, for example, in a case such as this, the available outcomes ranged from a closed adoption with no contact (other than letterbox contact) with the birth family to the child going to live with her father with no further intervention by the local authority. In between could be, for example, an open adoption, a special guardianship order, long term fostering under a care order with only limited contact with the birth family, medium term fostering with increasing contact with a view to restoring the child to her birth family in due course, placement with the birth family under a care order, placement with the birth family under a supervision order together with a child arrangements order, a child arrangements order or even no order at all. It can readily be seen, therefore, why in such proceedings there are no adult winners and losers the only winner should be the child. 21 Furthermore, it can generally be taken for granted that each of the persons appearing before the court has a role to play in helping the court to achieve the best outcome for the child. It would be difficult indeed for a court to decide how to secure that the child has a meaningful relationship with each parent without hearing from them both. It would be difficult indeed for a court to decide the best way of protecting a child from the risk of harm without hearing from her parents and those whose task it is to protect her. That is why parents are compellable witnesses in care proceedings, even when it is alleged that they have committed criminal offences. No one should be deterred by the risk of having to pay the other side's costs from playing their part in helping the court achieve the right solution. AUTONUMOUT There are other considerations justifying the no costs approach. Lady Hale pointed out that generally parents are assumed to have been motivated by concern for their child's welfare and want the best for their child as they see it:

22. Parents need to be able to co-operate with one another after the case is over. Stigmatising one party as the loser and adding to that the burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operating in the future:
23. There is also the consideration that having to pay the other side's costs, or even having to bear one's own costs, will reduce the resources available to look after the children: 24. AUTONUMOUT That said, Her Ladyship remarked that one consideration that the court could not legitimately take into account was whether a party was, or was not, legally aided: 25. AUTONUMOUT Her Ladyship concluded in 26 that costs order should only be made in unusual circumstances: 26 They lead to the conclusion that costs orders should only be made in unusual circumstances. Two of them were identified by Wilson J in <https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IC6C90AE0E42811DA8FC2A0F0355337E9> Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317, 1319: where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable: <https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I64FEFB90E43611DA8FC2A0F0355337E9> Havering London Borough Council v S [1986] 1 FLR 489 and <https://login.westlawasia.com/maf/>

app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IB229EB00E42711DA8FC2A0F0355337E9" Gojkovic v Gojkovic [1992] Fam 40, 60C. Those were also the two circumstances identified in *In re T*, at para 44. AUTONUMOUT Significantly, Lady Hale further said that the exceptional categories recognised in *Re T* are not closed. The possible exceptions are not confined to reprehensible behaviour or unreasonable stance. There may be other reasons why an award of costs might be justified; financial hardship might be one of the other reasons. Her Ladyship said the following in 33: The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, if otherwise the child's welfare would be put at risk AUTONUMOUT *Re S (A Child)* is in respect of public law proceedings but the principles enunciated there are equally applicable to private law proceedings. Guided by these authorities, I now deal with R's application. P's Application for Permanent Relocation AUTONUMOUT P was an expatriate who came to Hong Kong because of her connection with R. Her application for relocation, put in the proper context at that time, cannot be said to have been an unreasonable or a hopeless application, though the same was overtaken by subsequent events. There are no unusual features that warrant a departure from the normal costs order. I consider that the proper costs order should be no order as to costs in respect of this application and also the relating applications including the consent summonses dated 17 June 2014 and 8 May 2015 (insofar as the latter summons relates to the withdrawal of her application for permanent relocation and interim care and control) and all costs reserved. Parties Custody, Care and Control and Access Applications AUTONUMOUT R argued that P has abused the litigation process and has not been transparent with her financial position. P should have accepted the objective facts and the recommendations from the reports. Instead she continues with her unreasonable litigation conduct without regard to the family situation. As a result, there has been irreparable damage to the children and him emotionally and financially. He also said that P has financial impunity and this would explain her litigation conduct. AUTONUMOUT On the other hand, P submitted that there should not be any costs order against her. Further, her income is far less than that of R who is working as a pilot. AUTONUMOUT I do not think I need to be lengthy on this issue. As said, the parties have not advanced any substantive arguments in this regard yet. AUTONUMOUT The crucial question is whether (1) the conduct of P has been reprehensible or (2) P's stance has been beyond the band of what is reasonable. AUTONUMOUT In respect of whether the conduct of P has been reprehensible in the proceedings, she has already met with the adverse costs order in R's non-molestation order proceedings. I accept the problems arising from the supervised and FaceTime access have generated some applications but these cannot be regarded as P's reprehensible conduct in the proceedings. Rather, these problems were evidently due to P's failure to reflect upon her own problems

and to deal with her relationship with the children. AUTONUMOUT As for whether P stance has been beyond the band of what is reasonable, in my view, in the context of the present case, one has to consider whether P's case is a hopeless one. AUTONUMOUT More than 2 years have gone by since the interim care and control was placed with R and with all the reports produced by different professionals during this time, it is apparent that her case of asking for shared custody and regular and defined accesses were entirely unrealistic and beyond the band of reasonableness. Yet, her agreement that the care and control be granted to R for the time being, with a clear path towards returning to shared care and control cannot be said to be unreasonable. Further, as said above, when it came to the 4th day of the trial it is clear that P did not seek to argue seriously for the custody, care and control of the children. AUTONUMOUT Speaking of hopeless application, Butler-Sloss LJ in *Re G (Costs: Child Case)* [1999] 2 FLR 250 said at 252G: If this judge in this case had found that this father had behaved unreasonably in the litigation and had gone beyond what many fathers do, seeking orders which are hopeless, the point will come at which pursuing a hopeless application becomes unreasonable. But hopelessness and unreasonableness are not necessarily the same thing. Indeed, particularly where there is a litigant in person, a degree of generosity towards a litigant may be more appropriate than to a litigant who is on legal aid generally advised by counsel and solicitors as to the extent to which they should continue to litigate. AUTONUMOUT Her Ladyship then added at 253D: It seems to me that the case of *R v R* does not change the normal situation that it is unusual to order costs, although it will be appropriate to order costs when a parent, even a litigant in person, goes beyond the limit of what is reasonable to pursue the application before the court. I would not like this judgment to be seen in any way as suggesting that judges do not have the jurisdiction and ought not in the appropriate case to make an order that one parent should pay the costs of the other parent in children cases. But because it is an unusual order, it ought to be clear on the face of the transcript, either in the judgment or preferably in the order for costs, as to why it is that the normal situation is not being followed in this case. It is obvious that the judge did not put his mind to this point as to whether or not this was an unusual case. (emphasis added) AUTONUMOUT P has been litigating in person since 30 July 2015. I consider that she should be given a degree of generosity. AUTONUMOUT As for R, at the beginning, his case was to suspend all forms of access; that was so even in light of the Official Solicitor's recommendation of giving indirect email access to P. Further, R has not been successful on some minor issues such as the temporary removal and the Country A passports. AUTONUMOUT Considering all in a round, I do not find any unusual circumstances that warrant a departure from the usual no order as to costs. Costs Orders Nisi AUTONUMOUT I therefore give an order nisi that there be no order as to costs in respect of the custody, care and control and access of the children, including all costs reserved. For the avoidance of doubt, this order covers (but not limited to) the following summons: R's summons dated 2 July 2013 and amended on 11 May 2015 for custody, care and control; P's summons dated 4 September 2013 for Joint custody and shared care arrangement; R's ex parte summons for non-removal dated 5 May 2014; P's application for interim care and control dated 19 May 2014; R's summons for release of funds for litigation

and for variation of non-removal order dated 19 June 2015; P s summons dated 20 June 2015 seeking leave to have a child psychologist to attend access for so long as considered necessary; P s summons dated 11 September 2015 seeking directions from the court so as to ensure that access be carried out without interference; and P s summons dated 19 August 2016 (for extension of time to file her affirmation on children s matters). AUTONUMOUT The Official Solicitor is not seeking costs, so there is an order that there be order as to costs between the Official Solicitor and the parties in the proceedings. Case Management AUTONUMOUT I have no doubt that the parties need to have a closure of their divorce proceedings as soon as possible. A hearing is fixed to be heard on Tuesday, 21 March 2017 at 10:30 am, at Court no. 9 (with 30 minutes reserved) for the purpose of 1st Appointment and for directions on the main suit. Both parties do attend the hearing personally. Penal notice be endorsed on the order. AUTONUMOUT Finally, I would like to thank Mr Lee of the Official Solicitor for his assistance. (I. Wong) District Judge Ms NAV, the petitioner, appeared in person Mr JTMW, the respondent, appeared in person Mr Lee Tak-lei, Ted, solicitor, appeared for the Official Solicitor 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 h>L4 hF'T hF'T gdF'T gdF'T hF'T hF'T hF'T gdh) gdh) gdh) gdh) h]1~ gdXE gdXE gdXE gdXE gdXE gdXE hg?v hg?v hg?v pdpd hRG\ hg?v hg?v hg?v hg?v ynyn ynyn hg?v hg?v hg?v hg?v hg?v {q{g{g{^I hg?v hwA` hwA` hwA` hg?v hg?v hg?v hg?v }t}t hg?v hg?v hwA` hwA` hg?v hwA` hwA` hwA` hwA` hwA` gwA` gwA` gwA` vh[R[R hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hg?v hwA` hg?v hg?v hg?v hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` gwA` gwA` gwA` gwA` |iT| hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hwA` hRG\ hwA` hwA` gwA` gwA` gwA` gwA` hRG\ hwA` h\$}5 hwA` hwA` gd3` gdUD gwA` |rlr|l hwA` hwA` hwA` h\$}5 &`#\$ hwA` gd3` [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r \*~P(5 .}x E /EE`} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 9D (5j~O: 5j~O <j? XO & 6" CACV Judiciary English.dot Windows User Microsoft Office Word Judiciary hong Kong CACV Title_PID_HLINKS <?xml version="1.0" encoding="UTF-8" standalone="no"? ><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http:// schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{9F71F27B-C9BB-46AE-950E-00B9B6DAC9DE}" xmlns:ds="http://schemas.openxmlformats.org/ officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://

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