HONG KONG / JUDGMENT

P v. P

COURT
Family Court

DECIDED
20 October 2004

CASE / FILE NUMBER
FCMC13264/2002

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IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

SUIT NO. 13264 OF 2002

BETWEEN

P Petitioner

and

P Respondent

Coram : H.H. Judge Bruno Chan in Chambers

Date of Hearing : 12, 13, 16

20, 23

25 June 2003, 27

31 October 2003,

3

7, 18, 19, 21 November 2003, 18, 19, 22, 23, 25, 26,

29

31 March 2004, 1 April 2004 & 27 August 2004

Date of Judgment : 20 October 2004

J U D G M E N T

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1. This is the parties

contested application for custody care and control of their 6 children following the dissolution of their marriage, although both parties accept that the 2 older children, who are already 18 and 17 respectively, should not be of such concern to the Court, and in the event that the Petitioner Mother is granted custody, her application for leave to remove the children out of Hong Kong permanently to reside in Canada. The Petitioner Mother is a 41 years old housewife and was once a part-time volunteer worker for some charitable organization, whilst the Respondent Father is 42 and an airline pilot.

2. At the commencement of the proceedings, the parties appeared to agreeable to have joint custody but each would seek the care and control of the children. By the time of the conclusion of her evidence the Mother

s position on joint custody has changed and she now seeks sole custody care and control of the 4 younger children, with defined access to the Father, and that she be allowed to remove the children from the jurisdiction in or about summer of 2005 to reside and be educated in Canada, after the hearing of ancillary relief and the finalisation of the divorce proceedings.

3. The Father is strongly opposed to the children leaving Hong Kong, being of the view that fiscal restraints require him to remain in Hong Kong for the benefit of the family as a whole, and that he cannot effectively fulfil his commitments to the children if they were to live abroad. He prefers that the parenting of the children should be shared between the Mother and him with the children remaining in Hong Kong, relying on the concept of a shared residence order which he believes is becoming more common in the UK and that Hong Kong law would encompass an order for joint custody and joint care and control in this case. If however such a concept is rejected by the Mother and / or the Court or if the Mother is adamant that she wishes to live in Canada, he would then seek an order that the children be vested in his sole custody, care and control.

Background

4. Both parties were born and raised in Canada and are Canadian citizens. The Father

s father was an immigrant from the Czech Republic who had died recently, while his mother still lives in Montreal, Canada. He has a younger brother who is also an airline pilot working for Air Canada. The Father was a

star student

at school and had become deeply immersed in the Christian religion and its beliefs and teachings while he was in college.

5. The Mother

s father had died many years ago and her mother had subsequently remarried and now lives in Ontario, Canada. She has a sister some 4 or 5 years her senior but their relationships had not been good. She was socially active while in her teens and was involved in several relationships.

6. Unlike the Father, the Mother did not do well at school at all and only got by in college when she met the Father. After a short courtship the parties were married on 10th December 1983 in Quebec, Canada whereupon the Mother dropped out of college to become a housewife, working initially on a part-time job at a flower shop, while the Father joined the Canadian Air Force to become a pilot, during which the parties had lived in quarters provided by the Canadian Air Force in Saskatchewan and Nova Scotia, Canada as well as in Germany.

7. From the outset of the marriage the Father had wanted to have a large family of 6 children. Whilst in Canada, 3 of the children were born

C (boy) on 16th March 1986 (now 18), Y (girl) on 20th September 1987 (17), and N (girl) on 16th January 1989 (15). In 1991 the Father joined Cathay Pacific Airways as a airline pilot and moved his family to Hong Kong, where the 3 remaining children were born

A (girl) on 13th April 993 (11), B (boy) on 10th August 1996 (8) and S (boy) on 18th October 1997 (7).

8. The eldest son C, who was born in 1986, was found to have attention problems when he entered kindergarten. He was subsequently withdrawn from the kindergarten and was homeschooled from 1992 to 1997, at first by his parents and later by a hired teacher. He was eventually diagnosed to have Attention Deficit Hyperactivity Disorder (ADHD), and was sent to a boarding school in the U.S. in 1998 where he exhibited social problems and was transferred to Grenville Christian College in Canada. Unfortunately he was expelled from school a year later for various behavioural problems including stealing at a shopping mall. In 2000 he was sent by his father to a military school in Ontario when he seemed to have improved. In September 2003 he was accepted back to Grenville Christian College in Canada where he is finishing his secondary school.

9. Like C, all the other children were also homeschooled for several years first before they started formal schooling. Y and N have since September 2003 joined their elder brother in Grenville Christian College in Canada to continue with their secondary education, while the 3 younger children have remained in Hong Kong attending Christian Alliance International School (

CAIS

) in Kowloon City, a school which follows the Canadian School curriculum.

10. Perhaps due to the parties

difference in their up-bringing, academic achievement and personal ambition and expectation, life was far from harmonious with this family, and almost from the beginning of their marriage there were conflicts and differences between the parties. It is apparent that the Father, who was ambitions and intelligent, was living a disciplined life with a strong Christian ethic, and had set himself high standards and expected the Mother and children to follow his example. Their lifestyle and social activities to a great extent would revolve around the Father

s religion and the parties became embroiled in various church activities. This lifestyle must have been in great contrast to the Mother

s experiences prior to the marriage, but she appeared to have accepted it and adjusted hers accordingly.

11. It is against this background that perhaps it is not surprising that conflicts arose as from the 2nd year of the marriage when the Father felt that he was being deceived by the Mother when he learnt of her past sexual relationships through his mother, and had had to squeeze piece-meal information from the Mother when confronted her on separate occasions which he found it difficult to put the matter to rest, whilst a visit to the then matrimonial home by the Mother

s former boyfriend and her later acceptance of his invitation to an evening of jazz in Montreal no doubt added to the tension. As a result the Father concluded that the Mother was unable to confront the truth and incapable of the responsible management of the household, which he felt must be placed firmly within his grasp. The Mother, on the other hand, resented the Father

s mistrust and believed that he was being domineering and controlling but, with the quick succession of the birth of the children and the responsibilities that came with them, decided to

flow with the tide

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12. Over the years there had been numerous other disputes between the parties about their sexual relationship, their handling of the family

s finance and household expenditure, and the upbringing and disciplining of the children. In about 2000 the Mother became involved in various charitable organizations working as a volunteer which the Father later felt had become too extensive that she started to neglect her care of the family, which had further fuelled the parties

conflicts.

13. Furthermore, since the early 1990s the Mother

s health appeared to have been adversely affected, starting with her birth of the 3 younger children in Hong Kong, all of which were necessitated by Caesarean section, some with complications, and there had since been an increasing and later unusually high utilization of medical treatments and hospitalizations by her, and to lesser degree, by some of the children as

well, with N being hospitalized when she was only 18 months old with bacteria infection, and that the 2 younger boys had also been hospitalized for lengthly periods for various infections between 1999 and 2002.

14. Despite various attempts by the parties to seek counselling and make adjustments to save the marriage, matters finally came to head in November 2002 when the Mother moved out of the matrimonial home at Clearwater Bay with the children after accusing the Father of using physical violence on her, and shortly thereafter she withdrew $2 million from the parties

joint account for her living expenses and those of the children.

15. On 14th November 2002 the Mother came to this Court and on ex-parte basis obtained a non-molestation injunction against the Father, and 2 days later she issued a petition for divorce based on the Father

s unreasonable behaviour, and prayed for custody care and control of the children and generally ancillary relief for herself and the children. On 18th November 2002 the Mother also launched an application for an ouster order against the Father, i.e. that he be restrained from entering their former matrimonial home.

16. A temporary truce, however, was achieved on 22nd November 2002 when the Father agreed to move out of the matrimonial home to allow the Mother and children to return to live there to his exclusion for one month until 21st December 2002, presumably to enable the parties to calm things down, and that the Mother

s applications were dismissed by consent. Unfortunately this was just the beginning of what turned out to be a long, particularly bitter and expensive litigation as, and I do not think it is an exaggeration to say so, almost every point, in particularly those in relation to the children, was bitterly contested, about which I will no doubt have more to say later.

17. Not surprisingly, the divorce became contested when the Father filed an Answer and Cross-Petition on 13th December 2003, alleging unreasonable behaviour on the part of the Mother, and seeking ancillary relief by way of lump sum or sums, and naturally custody of all the children as well. Applications soon came fast and furious, first by the Mother for interim maintenance for herself and the children, following almost immediately by the Father

s for interim custody care and control of the children. Meanwhile the Father had also withdrawn what was left in the parties

joint account in the sum of about $2 million.

18. In the Father

s supportive affidavit for interim custody of 5th February 2003, amongst his many allegations against the Mother which included violent temper, low moral character, preference for charity work over the care of her children, too lax with their discipline, one stood out in particularly and which has since become the most controversial and contentious issue between the parties : the Mother

s psychological problems which the Father fears would cause her to be unable to take proper care of the children. He alleged that the psychological strain suffered by the Mother over the years, with the deterioration in their relationship being a contributory factor, has caused her to resort to seeking the assistance of psychologists and hence he wanted reports from all psychiatrists or psychologists that she might have seen in the last 4 years to be produced to Court, a process which he had vigorously pursued throughout the proceedings.

19. The Father

s application was naturally strenuously opposed by the Mother who insisted that she sought the help of a psychologist to help her through the abusive relationship which the Father had subjected her, and not because she had any psychological problem. In her 6th affidavit of 13th February 2003 in reply, the Mother countered by accusing the Father of violent temperament, using bullying tactics at home, lack of time for the children due to his flight schedule, his frequent away from home, as well as subjecting the children in particularly their eldest son to harsh discipline and severe corporal punishment.

20. As is common in contested custody matters, the Social Welfare Department was involved and the hearing was adjourned pending a social investigation report. In the meantime the children remained under the interim care of the Mother in the former matrimonial home with the assistance of the family

s Indonesian maid Sondang, while the Father was to have interim access to the children when he was not flying.

21. Meanwhile the parties, in one of the rare occasions in these proceedings, were able to agree to settle their divorce by amending their respective petition and cross-petition to water down their allegations against each other and on 27th May 2003 a cross-decree of divorce was granted to each party.

22. Going back slightly in time, on 31st March 2003 Miss Ma of the Social Welfare Department submitted the 1st of her investigation reports in which she recommended that the Mother

s psychological fitness in child care be assessed by a clinical psychologist after she was shown by the Father records of the Mother

s high frequency of medical attention and hospitalisation during the past 2 years which the Father suspected was psychologically caused and which might affect her child care ability, before she could complete her investigation of the custody issue.

23. Following up on this recommendation the Father issued a summons on 8th April 2003 for an order that a psychological assessment report on the Mother be obtained. In the summons he also sought further directions for the implementation of the interim access order. This application was in fact preceded by the Mother

s summons of 7th April 2003 for leave to remove the children out of Hong Kong to Canada for a month after their schools had been closed down due to the outbreak of SARS.

24. By another summons issued on 8th April 2003, the Mother also sought an order for a psychological assessment report on the Father, apparently for no particular reason other than perhaps simply in response to the Father

s summons.

25. The Wife

s application for removal of the children to Canada was, as expected, opposed by the Father as he did not think it was necessary, that some parts of Canada had also been exposed to SARS, that the Mother would not be able to take care of the children in Canada by herself, and that it would deprive him of seeing the children in the meantime.

26. The matter was forcefully argued before me on 9th April 2003 by Counsel for both sides and at the end I allowed the Mother

s application but also granted the Father staying access to the children for half of the period. The parties were eventually able to agree to be assessed by a clinical psychologist as suggested by the Social Worker and that the report was to be made available as soon as possible for the custody hearing scheduled in June 2003.

27. The fact that the children were enjoying a break in Canada during this period of course did not stop the parties from carry on their litigation in Hong Kong, when on 29th April 2003 the Father issued a summons for an order that the Mother to provide all reports and record notes of her attendance for medical advice, be they in or out patient attendance at hospitals, medical practitioners, psychologists, psychiatrists or other therapeutic consultants and physiotherapists during the last 5 years, i.e. dating back to April 1998, as he believed that such past records would be important to the clinical psychologist for a thorough assessment of the Mother

s psychological condition.

28. This application was again strenuously opposed by the Mother who argued that the Father was struggling to find reasons to persuade the Court to grant him custody of the children and hence he was merely seeking to obtain her medical records to see if there was anything that he might make use of.

29. The matter came before me on 2nd May 2003 and I refused the Father

s application on the grounds that it was too wide in scope and oppressive in nature.

30. It was of course not to be the end of the matter, and on 27th May 2003 the Father filed his Affidavit for the forthcoming custody hearing scheduled in June 2003, in which he exhibited notes which he had prepared concerning the Mother

s unusually high utilization of medical consultation and hospitalization over the past several years which caused him to believe that she may be suffering from some form of factitious disorders, conditions which are characterized by physical or psychological symptoms that are intentionally produced or feigned in order to assume the sick role which, he feared, would affect the Mother

s parenting ability, and he wished the clinical psychologist appointed by the Court to investigate such fears of his.

31. The clinical psychologist appointed back in April 2003 to carry out psychological assessment of the parties, Ms Janet Tso submitted her report in early June 2003 in which she stated that her assessment did not indicate that either parent has psychotic features or mood disorders that warranted clinical attention, although she did notice that the Mother indeed had a lot of medical treatments, and that the medical doctors who treated her should be in a better position to give their professional comments about the past medical illness of the Mother.

32. In her further Social Investigation Report which was submitted together with the clinical psychologist report, the Social Work Officer Ms Ma relied on the clinical psychologist

s assessment that the Mother was not suffering from any psychotic or mood disorder and with her sound physical health, the worry on her impaired psychological and physical conditions that may affect childcare could be ruled out, she therefore supported the parties

agreement to have joint custody of the 6 children, but recommended that their care and control be granted to the Mother. Ms Ma also supported the Mother

s proposal that the children be allowed to leave Hong Kong with her after the divorce to live in Vancouver, Canada, provided that the Father be given access to the children.

33. This recommendation of Ms Ma in giving care and control of the children to the Mother with the right to remove them to Canada was of course not acceptable to the Father and so the hearing went ahead on 12th June 2003, during which both parties gave lengthly oral evidence and were extensively cross-examined. By that time the parties

allegations made against each other and the number of issues had unfortunately grown to such an extent that it was no surprise that their oral evidence were to utilize most of the 10 days originally allocated for the trial, and with a number of witnesses still waiting in line to be called, the hearing had to go part-heard for a further 2 weeks in October 2003.

34. This summer break of the trial of course did not mean that the parties were going to be idle, and on 4th August 2003 the Father took out a summons for an order that the 2 youngest children B and S do attend the Christian Alliance International School (

CAIS

) in the forthcoming academic year in September 2003 instead of American International School (

) where they had been enrolled by the Mother earlier, on the grounds that CAIS is a Christian school which is adapted to the Canadian curriculum, that all the elder girls used to attend the same school with A still attending, that it is cheaper than AIS and is a more suitable school for the 2 boys.

35. The Father

s summons was naturally opposed by the Mother who argued that he was at fault for not enrolling the boys into CAIS earlier until it was too late for their registrations, and hence she had to take matter into her own hands by enrolling them into AIS which offered them a place in the middle of the last school terms, and that since the boys had settled satisfactorily in AIS, it would not be in their interests to change them to a new school again.

36. Accepting the Father

s argument that it was all along the parties

intention to send the 2 boys, like their other children, to CAIS, that it would be a more appropriate school for them in the long term and in view of the background of this family, I allowed the Father

s application and directed that B and S should attend CAIS in September 2003.

37. The fact that the trial was not to resume until late October 2003 unfortunately gave the parties more time to find things to fight about, and they did. On 7th October 2003 the Father took out a summons for an order requiring the Mother to provide her authorization to Dr Christopher Dickson, who was employed by Cathay Pacific as their Medical Services Manager to monitor the medical reimbursement claims of the employees and their dependents, to provide a statement setting out his view on the Mother

s psychological condition on the basis of her past medical claims. Apparently the Mother

s authorization was not forthcoming after an earlier request by the Father, and so he felt obliged to take out this summons.

38. At the same time the Mother also restored her earlier application for interim maintenance for hearing, apparently having nearly exhausted all the $2 million which she had withdrawn from the parties

joint account at the start of the proceedings on living expenses and legal costs.

39. I refused the Father

s application as it was clear that I have no power to order the Mother to give her authorization when she was not willing. As regard her application for interim maintenance, I accepted that the Mother in the meantime required $123,000 per month for her household expenses as well as her legal costs which I so ordered in her favour upon accepting the Father

s undertaking that he would be directly responsible for some of her expenses such as her rent, the household utilities, the children

s school fees and their air fares for their holidays.

40. The 2nd part of the custody trial resumed on 27th October 2003 during which evidence were taken from the Indonesian maid Sondang who had by then left the Mother

s household to work for the Father, the clinical psychologist Ms Janet Tao, the Mother

s previous psychologist Ms Nia Pryde, and 2 witnesses of the Father secured by a writ of subpoena duces tecum, namely Dr Lucy Lord, a gynaecologist whom the Mother used to regularly consult, and Dr Rose Ong, the present Medical Services Manager of Cathay Pacific who was called to produce the records of the parties

utilization of medical expenditure.

41. Whilst the clinical psychologist Ms Tao maintained in her evidence that she was in no position to give her professional view about the Mother

s many past medical treatments, both Dr Lord and Dr Ong had expressed concerns over her unusually high utilization of medical treatments which they suspected the possibility of Munchausen Syndrome, a factitious disorder with deliberate production or feigning of physical or psychological symptoms. As neither doctors are psychiatrists, they agreed that a psychiatric evaluation of the Mother was warranted to determine this particular issue. At my suggestion the Mother agreed to do so by a psychiatrist to be jointly instructed by the parties. Unfortunately this meant that the trial would have to be adjourned, again, this time to March 2004 to give the psychiatrist time to carry out the evaluation.

42. In the meantime of course the parties would continue to find things to fight about, when on 19th December 2003 the Mother applied, on ex parte with notice to the Father, for an order to restrain him from removing the children from her without prior agreed arrangements, with costs to be paid to her on an indemnity basis. Apparently the parties had had some heated arguments over some of the Father

s access to the children, and with the Christmas and New Year holidays just around the corner, the Mother felt that the Father

s access should be defined by the Court during this period.

43. The matter came before me the next morning on urgent basis and after hearing argument from Counsel for both sides, it was resolved with certain defined access order made in favour of the Father.

44. The next fight between the parties came on 16th January 2004 over the extent of documents filed in these proceedings to be released to their jointly appointed psychiatrist for the assessment of the Mother, as although they were able to agree to instruct Dr Lo Chun Wai, they had serious argument over what pleadings and documents that Dr Lo should be allowed to see for the assessment.

45. As a result an exercise of going through the long list of documents in dispute had to be undertaken by the Court at the hearing and it was decided that all the parties

relevant affirmations and the Mother

s past medical reports were to be provided to Dr Lo.

46. This was of course not the end of the parties

squabbling over matters leading to Dr Lo

s assessment, and there were numerous arguments over the wordings of their joint instruction to Dr Lo, with endless accusations from each side of the other of trying to influence the good doctor in his evaluation of the Mother.

47. On 2nd March 2004, merely 2 weeks before the resumption of the custody trial, the parties came back before me for directions that each be allowed to file a further affidavit to comment, if they so wish, on Dr Lo

s report which was soon to be submitted to Court. An order was accordingly made but in addition to their comments on the psychiatric report, both parties had chosen to include numerous new allegations against each other, notwithstanding that they had already concluded their evidence in June last year, which should not really come as any surprise in view of the fact that some 9 months had since passed and new events and developments had occurred in particularly in relation with the children, one of which was indeed shocking when the Mother in early March 2004 suspected that the Father

s Indonesian helper Sondang might have sexually abused the youngest child S. The matter immediately triggered off investigations by both the police and the Social Welfare Department and up to the time of the conclusion of evidence, the outcome of the investigation was not yet known but the Father had in the meantime undertaken not to allow Sondang to come into contact with any of the children during his access to them.

48. On 6th March 2004 Dr Lo submitted his psychiatric report on the Mother in which he was of the opinion that she had suffered from Somatoform Disorder, rather than Factitious Disorder, which is a psychiatric condition in which she exhibited a variety of illness and a myriad of symptoms which were not intentionally feigned, but which he believed was

manifested because she was constantly under emotional stress due to marital problems during the marriage, causing her to resort to somatize her problems in the form of physical symptoms and present herself to doctors for treatment and possible solution.

49. Dr Lo was however also of the view that such somatization behaviour of the Mother and her repeated medical consultations would not revert after the divorce case is over, and that as long as she is living a happy life without much stress and strain, her resistance to both physical and psychological illness would improve and the chance of having major illness would be low. Unfortunately this apparent optimistic view of Dr Lo was not shared by the Father who was not satisfied that he had done a full and complete assessment of the Mother whom he believed to still be suffering from Factitious Disorder, specifically Munchausen Syndrome.

50. At the 3rd and final session of the trial which was resumed on 18th March 2003, both parties were recalled back to the stand to give further evidence in respect of their latest affidavit, during which the Father revealed that he had recently moved into the Mother

s neighbourhood which he claimed was to facilitate his access to the children, and proposed to share parenting with the Mother, which was however refused by her as she did not believe that share parenting with the Father would work and that it was just his way to continue to control and manipulate her life even after the divorce. The Mother also indicated at the hearing that she would no longer agree to have joint custody of the 4 younger children with the Father, whilst the 2 eldest children C and Y are already 18 and 17 respectively and so in reality the question of their custody is no longer an issue. And so the custody battle for the 4 younger children proceeded to its bitter end.

General Principles

51. In deciding on the custody or upbringing of minor children, section 3 of Guardianship of Minors Ordinance, Cap. 13, makes general provision for the Court to have regard to the welfare of the minor as the first and paramount consideration and in having such regard, the Court shall give due consideration to : -

the wishes of the minor, 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.

52. The section also provides that the Court 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. These are fundamental principles to be applied in any such case unless expressly or impliedly excluded by statute, and are substantially the same as those set out in section 1 of the English

s Children Act 1989 where the welfare of the child is no longer expressed to be

the first and paramount consideration

, but is to be the Court

paramount consideration

. Section 8 of the 1989 Act also provides that where the Court is considering whether to make, vary or discharge such an order, it must have regard in particular to the matters specified in section 1 (3) of the 1989 Act, which has come to be known as

the welfare checklist

, of which Waite LJ said in Re DB and CB (minors) : Southwank London Borough v B [1993] 2 FCR 607, CA as follows : -

The Act does not envisage two potentially conflicting views of

welfare

: one to be reached by adopting an unspecific approach under s 1 (1) and the other to be reached by applying the factors to which mandatory regard is enjoined by s 1 (3) (a) to (g). The colloquial description

checklist

describes the function of s 1 (3) with complete accuracy. It is an aide-memoire designed to ensure that none of the factors potentially relevant for a court considering a child

s welfare generally in the circumstances of each particular case is left out of account. In most cases the use of the s 1 (3) checklist is compulsory. In others, where the court

s assessment of the requirements of a child

s welfare is left to be reached at large without any statutory guidance as to the basis for its exercise, the checklist is still available for the assistance of the court; the only difference being that the court is under no mandatory duty to make use of it

.

53. Although we do not have the equivalence of section 1 (3) or 8 in our statue, I agree that most of the matters referred in the checklist, which are as follows, would be of helpful guidance and assistance to the Court in the assessment of the requirement of the children

s welfare : -

the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

his physical, emotional and educational needs;

the likely effect on him of any change in his circumstances;

his age, sex, background and any characteristics of his which the court considers relevant;

any harm which he has suffered or is at risk of suffering;

how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.

54. It is with these principles in mind that I shall now move to consider the evidence.

The Father

s Case

55. The Father believes it would be in the interest of the children that he be granted their care and control, although he is not averse to the Mother having joint or shared custody with him, he does not agree that she should be given the sole custody care or control of the children for the following reasons :-

he suspects that she is suffering from the factitious disorder of Munchausen Syndrome and possibly Munchausen Syndrome by Proxy as well, which will seriously affect her parenting ability and the well-being of the children;

she has resorted to violence by hitting him and 2 of the elder children, and has also used verbal abuse and swearing during arguments or when she lost her temper over trivial matters, thereby not setting a good example to the children;

(iii) she is a compulsive liar and it is part of her character to deceive, hide the truth and to intentionally lie to others, and that her lies appear to become a truth in her mind which will affect her parenting ability;

(iv) she also suffers from lack of self-confidence to make decision on her own, and that her insecurity may stem from her poor academic achievement which prevents her from helping the older children in many of their school projects;

he has strong reservations about her judgment in managing the children under difficult situations, and that she has recently become more lax with their discipline, which is worrying in view of her low sense of moral and her past numerous sexual relationship with other men;

he is also concerned about the lack of time which she spends with the children since she started her voluntary work with the charitable organizations, and that she appears to be abandoning the children in pursuit of her own interests, including her latest relationship with her new boyfriend who is spending a lot of time with her at her home hence causing confusion to the children.

The Mother

s case

56. Although the Mother was initially amendable to share custody of the children with the Father as long as she had their care and control, she now insists that joint or shared custody with him will not work and insists that she should be given the sole custody care and control of the children, in particularly the 4 younger ones for the following reasons : -

she has always been the one who looks after the children since their birth, and as she has done a good job doing so, she should be allowed to continue to do so;

as the Father is in full time employment as a long-haul airline pilot with Cathay Pacific, he has long, irregular and erratic working hours which regularly take him away from home and make it difficult for him to plan anything especially the day-to-day needs of the children;

very often when he was at home from work, he would either be resting from jet lag or hiding in his study room from the noise and activities of the children. He had also regularly checked into a hotel in Hong Kong or undertaken vacations on his own in order to escape from the stresses of the children;

he has never taken part in the routine elements of looking after the children and does not have the skills, experience or practical doing so, in particularly with small children;

he does not have proper understanding and insight of the needs of the children, and can be harsh and rigid with their discipline;

due to his job the Father will have to rely on a domestic helper to assist him in looking after the children, but as the parties

former helper Songdang is no longer available, whoever is going to be employed by him will be a total stranger to the children, and in any event she will never be able to do a better job than the Mother.

The Social Investigation Reports

57. The initial report was unable to form any view or recommendation on the question of custody due to the Social Work Officer

s concern of the Mother

s possible psychological problems raised by the Father, but based upon the subsequent assessment of the Mother by the clinical psychologist Ms Janet Tso that she does not suffer from any psychotic or mood disorder that warrants attention, the Social Work Officer Ms Alice Ma in her Further Social Investigation Report of 10th June 2003 recommended that joint custody would be a best option for the parties and that it would be in the best interest of the children that their care and control be granted to the Mother.

The Evidence

58. The amount of evidence presented in this case is indeed tremendous, given the facts that the trial had lasted more than 6 weeks, with oral testimony from 8 witnesses plus the parties who were recalled again at the final session, and that the trial bundles almost exceeded 2,700 pages, although not all the documents in them were relevant, it does speak for itself about the size of the evidence and the number of issues that have to be examined and resolved. As in the words of Thorpe L J in Re F (Shared Residence Order) [2003] EWCA Civ 592, one of the functions of the judge is of course to make express finding, another function is to be selective and to make findings that are relevant and necessary for the disposal of the issue. It is not incumbent on the judge to elaborate or extend judgments by making findings on every area or every issue, and it is open to a judge to confine him or herself to those matters which he or she selects as significant and necessary. This is what I propose to do, and since it is the Father who argues that the recommendations of the Social Investigation Report should not be followed by the Court, I shall consider his case first, and shall start with the most central and contentious issue : whether the Mother has suffered from Factitious Disorder.

Factitious Disorders

59. A number of psychiatric diagnoses have been extensively referred to in the evidence, much of which are technical and are set out in details in Exhibit P

13 from the Diagnostic and Statistical Manuel of Mental Disorders

4th Edition (DSM

IV) published by the American Psychiatric Association, the main diagnostic reference of Mental Health Professionals, but for the purpose herein, it would suffice to simply refer to Dr Lo

s report as follows : -

24. Factitious disorder : The diagnostic criteria for factitious disorder (DSM IV page 474) are as follows :

Intentional production or feigning of physical or psychological signs or symptoms;

The motivation for the behaviour is to assume the sick role;

External incentives for the behaviour (such as economic gain, avoiding legal responsibility, or improving physical well-being, as in Malingering) are absent;

25. Munchausen Syndrome : Munchausen syndrome is a factitious disorder with mostly physical symptoms.

26. Munchausen syndrome by proxy : The essential feature is the deliberate production or feigning of physical or psychological signs or symptoms in another person who is under the individual

s care. (DSM IV page 725).

27. Somatoform Disorder : (DSM IV page 445)

a. The common feature of the somatoform disorders is the presence of physical symptoms that suggest a general medical condition and are not fully explained by a general medical condition. The symptoms must cause clinically significant distress or impairment in social, occupational, or other areas of functioning. In contrast to Factitious Disorder or malingering, the physical symptoms are not intentional.

b. The most common form of the Somatoform Disorders is the Somatization disorder, which is a poly-symptomatic disorder that begins before the age of thirty, extends over a period of years, and is characterized by a combination of pain, gastrointestinal, sexual, and pseudo-neurological symptoms

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60. The Father first raised the issue about the Mother

s health problems in his Answer to the Petition in December 2002 when he claimed that she was prone to accidents which were mainly caused by her carelessness and as a result she constantly sought medical attention and had one of the highest medical claims for dependents in the medical scheme available from his employer.

61. He repeated his concern about the Mother

s carelessness and prone to accidents in his affidavit of 5th February 2003, citing examples of her injuring her shoulder while lifting weights at the gym, falling off the trail while jogging on rugged terrain when she had to be rescued by helicopter to hospital, and injuring her shoulder again in a careless car accident. There was however not any suggestion that these health problems were in any way related to psychological disorder of the Mother.

62. It was not until the 1st Social Investigation Report of 31st March 2003 when it was revealed that the Father had shown to the Social Worker medical records of the Mother of her frequent medical attendances and hospitalizations, suspecting that they might be psychologically caused and worrying about their effects on her parenting ability.

63. In his 4th Affidavit of 8th April 2003 the Father repeated that the Mother

s seeking of medical attention had caused him to believe that she was psychologically and / or mentally incapable of looking after the children by herself, and that she should undergo psychological assessment. In the same affidavit the Father had exhibited more medical records of the Mother.

64. It was however in his 7th Affidavit filed on 27th May 2003 that the Father asserted, for the first time, that the Mother might be suffering from a Factitious Disorder, specifically Munchausen Syndrome in that she had feigned her illness, and Munchausen Syndrome by Proxy in that she might have deliberately produced or feigned illness in some of the children.

65. In his notes exhibited to his said affidavit marked

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(P.1636 of the bundle), the Father said this : -

There is no doubt that the Petitioner seeks attention through medical means. As far as I can remember, this has always been a characteristic of hers which has become worse with the passage of time. I have already stated that it is characteristic for her to deceive others, misrepresent herself and hide the truth. Among our family and friends it is well known that she has sought extensive medical care through the years by repeatedly visiting doctors, physiotherapists, being referred to specialists, second and their opinions, extensive tests and procedures and frequent hospitalisations involving surgery in many instances. I have observed instances when a Doctor is satisfied that he has done as much as possible to treat her and not being satisfied, the Petitioner began seeing another Doctor. Some of our friends have stopped visiting her in the hospital as they have perceived that she is seeking attention through these measures. She has reacted with anger to anyone who does not fully sympathise with her during her ongoing problems. This was the same reaction that I was subjected to when I tried to gently confront the problem with her. For the last few years, I thought that the extent of her medical problems must be at the threshold of ending, but they just continued unabated.

I believe that she is suffering from a Factitious Disorder in which she feigns illness or seeks to injure herself in order to gain attention. This conclusion has also been reached by one of my closest friends who genuinely cares for her. I am investigating the matter of her suffering from Munchausen Syndrome and the effect that it has had on the family and am hopeful to have further information soon. I have already in previous affidavits made mention of a number of her more serious injuries and medical problems, some of which have been quite serious and spectacular.

Her rescue by government helicopter from a hillside is a classic example of such poor judgment in supposedly jogging on some of the roughest terrain in Hong Kong with an established shoulder injury. Once she fell, she feigned such a degree of pain that it was believed by the people that found her that she fractured her neck or spine, neither of which was the case. That she was rescued by helicopter signifies the perceived severity. This event brought widespread attention to the Petitioner from the many people who heard the details. The Petitioner

s unilateral decision to involve the South China Morning Post in covering our, at the time 18 month old, son during his hospitalisation seemed to bring much attention to her. Her reaction was one in which she seemed to derive a sense of worthiness. There was a photograph in the SCMP of her standing beside the crib in the hospital. I can confirm that the reaction was widespread and intensive.

I have through the years observed her behaviour in this regard and have seen strong evidence in support. She does not hesitate to visit the doctor for most any discomfort or pain. She often seeks a referral to a specialist and even then on many instances goes for a second opinion. In the enclosed letter written by her to Dr. Henderson, she complaints that she had to wait in another doctor

s office for an extended period of time and without offering any reason, requests his opinion whether there may be someone better to see. The anger that she bears against Dr. Lord is also evident. In her letter to Dr. Barnett, after seeing a specialist who remarked that he would do no more investigations, the Petitioner seeks another door through which she may continue the process of medical attention, while believing that her

layman

s expository

may be a more qualified viewpoint than that of the specialist

s. I have been present in a doctor

s office after she has sought a second opinion from another doctor and then went back to the first door. The doctor in this case, Dr. J. D. Greig, was visibly annoyed at her for doing so when it was not required.

She seems to have a very low threshold of pain tolerance. Following a colonoscopy, which was not the sole example of this procedure being performed, she complained of severe pain, believing that she needed to be hospitalised and at her request this was done. It is uncommon for this to take place. When I accompanied her to the office of this same doctor afterwards, Dr. Robert Middleton stated that he has never in the last few years witnessed a patient that seemed to experience this level of pain notwithstanding that he performs this procedure on a near daily basis

or other family members around her and supporting her. She has significant problems forming healthy relationships even with those closest to her, like her only sister and brother in law with whom she has barely spoken to in the last 10 years over disagreements which she largely contributed to. Her relationships with the personnel of ICM, the first volunteer work that she gave herself to, was also poor. Clearly, there are those within the medical profession whom she also harbours anger towards.

I believe that she has the second type of factitious disorder, namely with mostly physical symptoms. The fact that many of her diagnosis is for pain in some part of her body makes it difficult for the doctor to accept otherwise as this sort of diagnosis relies heavily on the patient

s feedback and if it is not the truth it is hard to prove otherwise. Many of her diagnosis were of this nature and therefore the patient

s viewpoint is heavily relied upon.

I am also concerned that there may be an element of Munchausen Syndrome by proxy. Many of our children have been hospitalised when they were young. Statistically speaking, I believe they have been exposed to above to average hospitalisations. I will state that 3 of our children were admitted to hospital when they were less than 4 years old with various intestinal problems. The exact means whereby they became ill in each case remains largely unexplained

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66. There is no question that the Mother had an unusually high utilization of medication consultations and hospitalization throughout the years during the marriage, and, to a lesser degree, as had some of the children. According to the records produced by Dr Rose Ong of Cathay Pacific, whilst the average annual medical expenditure for their cockpit crews and dependents is $3,800 for outpatient and $2,200 for inpatient, those for the Mother from June 1997 to May 2003 were $41,494 per year for outpatient, and $229,959 per year for inpatient, some 11/ 104 times respectively of the company

s average for the 2 type of expenditures.

67. In terms of the number of medical visits by the Mother during the said period, the figures provided by Dr Ong

s records are no less staggering :

Clinical Hospital

Visits Admissions

June 1997

May 1998 37 1

June 1998

May 1999 46 4

June 1999

May 2000 62 6

June 2000

May 2001 70 4

June 2001

May 2002 56 5

June 2002

May 2003 35 7

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Total : 306 27

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68. This represents an average of 56 consultations at the clinics and more than 4 admissions into hospital each year, which is like visiting the doctor more than once every week and hospitalization every 3 months, for the past 6 years. These figures have consistently placed the Mother amongst the top 10 most expensive enrolees of Cathay Pacific every year during that period, and that her family was also ranked the most expensive families for the years 2000/2001 and 2001/2002.

69. Furthermore, the Mother

s attendance history report compiled by Cathay Pacific and produced by Dr Ong shows a wide variety of illness suffered by her with a myriad of symptoms from 2000 to 2002, including, to name some more common examples, back pain/other disorders of back, spondylosis and allied disorders, respiratory infection, gastroenteritis and colitis, sprains and strains of shoulder and upper arm, neuralgia/musculoskeletal pain/chest pain, disorders of cervical region, haemorrhoids, disorders of eyelids, diseases of thymus gland, contact dermatitis/eczema, inflammation of ovary, fallopian tube, pelvic area, peptic ulcer/abdominal pain, disorders of intestine, functional digestic disorders, uti/cystitis, pleurisy, tendonitis, urinary infection etc. Granted that the Mother is an exercise/fitness enthusiast who regularly jogs and takes martial art lessons and hence may be more prone to muscle strains and other sport-related injuries, the unusually wide varieties of her illness is indeed alarming.

70. In fact Dr Ong in her evidence at the hearing expressed her following concerns over the possibility of Munchausen Syndrome when answering questions raised by Counsel for the Father over the Mother

s illness : -

Q :

You have knowledge of Cathay

s information about the number of doctors had been seen by P and variety of diagnosis. Can you comment ?

A : It raises questions. It is a very unusual pattern in someone because there is multiple organ involvement. Every single organ system is involve. It is quite concerned. It is possible to have multiple organ involvement. In general, it will only happen where there is some kind of catastrophic diagnosis, e.g. cancer, or serious medical diagnosis where other organs are involved. But not this case. There is not one single diagnosis which can explain this multiple organ involvement.

Q : Is it a matter of concern to Cathay ?

A : Very definitely.

Q : When you took over from Dr Dickson, did he brief you ?

A : I was provided with a 2-day transition orientation in the summer of 2001. There was notification information of family which required special attention, newly diagnosed cancer, one involved childhood congenital problem. Specifically he raised R

s family. P was suspected of having Munchausen Syndrome in his professional opinion by reviewing the pattern of utilisation.

Q : With comments of Dr Dickson, did you review the situation ?

A : I have. I agree with Dr Dickson. I believe there is sufficient evidence as reviewed for both P and the family that I think I must look at whether it is Munchausen Syndrome or Munchausen Syndrome by proxy at play. There is sufficient evidence that it should be of concern.

Q : [36] Attendance History report with diagnosis. 7.8.00, 8.8.00, 22.8.00, 23.8.00, 24.8.00. If one look through it, variety within limited period of time. Does it go to the basis of your concern ?

A. Yes. Munchausen Syndrome is a condition which someone present variety of symptoms, physical or psychological, which can be greatly varied. It is left to the imagination of the patient. It may be fabricated, self-inflicted, greatly exaggerated. They are to be sick individual. The variety of symptoms may vary tremendously. They may be better in a problem and get worse later. P

s utilisation, her number of out-patient visits amount to 50 visits per year in the last 6 years. It means caregiver is seen by P every week for over the last 6 years. It signifies someone who is very sick or has a chronic medical problem that is invading a body. But it is not the case here. Vary diagnosis, different hospitalization with different diseases and specialists. It is highly suspicious of Munchausen Syndrome.

Q : Is there a possibility of Munchausen Syndrome by proxy which involves children ?

A : Or elderly people.

Q : After you studied records of the children, is there anything specific to bring to your mind a particular conclusion ?

A: R vaguely discussed with Dr Dickson regarding the case of his child. There was dramatic fear that the child was infected by contaminated water system resulting prolonged hospitalization. One of the features of Munchausen Syndrome is medical events accompanied by dramatic events.

Q : Is it relevant ?

A : The pattern of behaviour is consistent with someone suffers from Munchausen Syndrome, attention seeking.

Q : If Munchausen Syndrome by proxy, is there any particular infliction which show commonly incurred by dependents ?

A : It is unlimited by imagination. Any organ system could be involved

.

71. Dr Ong

s concern was shared by Dr Lucy Lord, who had been the Mother

s gynaecologist during the marriage, in her following evidence at the hearing :

Q : In your experience, P needed many drugs to try to assist her with her problems.

A : If you ask me was her attendance more than other people, the answer is yes. Many times Dr. Pugh treated her. It is enough to raise my concern that operation is no longer best suited her. She needed psychological evaluation.

Q : P. 3, you speak to Chris Dickson. Did you speak to him ?

A : I rang him about the concern that further operation is not in her best interest. The best option is to get her to see a psychiatrist. There was conversation with Dr. Wells at the hospital. He thought that Munchausen Syndrome is a possibility.

Q : P. 17, attitude of P took at that time (16.2.01).

A : No. Initially I think P was quite resistant with the idea. After I talked to her about the consequence of having physical care to her problem. It would be for me, I would consider unethical to continue to operate on her without having her psychologically evaluated, to look for psychological component to her problem. It is almost negligent not to do so. P agreed that it was the proper way to do it.

Q : Negligent not to do it, psychological evaluation. Is there anything to do with Factitious Disorder ?

A : Sommatisation Disorder. Someone with psychological problem will present with physical problem. It is not uncommon that when women have pelvic pain, 50% of the women who have pelvic pain have psychological component. If someone got pelvic pain, when being investigated in the past, it is not to have physical cause. It is fit to see what effect psychological problem is causing physical problem.

Q : P did see Dr Wells. Do you know she had seen Dr. Wells ?

A : I asked Dr. Wells to see her in Matilda. I did not know.

Q : This is in 2.01.

A : I think after the letter in which P was not happy with my comment. I then lost touch with what was happening. I did not know what had happened thereafter.

Q : Did you talk to Dr. Wells after he had seen P ?

A : After Dr. Wells had seen her in the hospital, I had a long talk with him.

Q : What did Dr. Wells said ?

A : When he saw P in the hospital, he had a conversation with her. He said the likely diagnosis was Munchausen Syndrome. That

s not written in his letter

Q : You had not thought of Munchausen Syndrome.

A : No. I had actually thought of Munchausen Syndrome was a possibility. But I was not a psychiatrist. It is a difficult diagnosis to make.

Q : Reasons why there is possibility of Munchausen Syndrome.

A : My understanding of Munchausen Syndrome issue is the repeated request of medical attention. They are often multi-system diseases. E.g. problem if headache, cardiac, back pain. It is typical of Munchausen Syndrome that it is not related to a single problem. It cannot be explained by an underlying physical problem which is a multi-system disease. P did not have multi-system disease. She had multi-system problems which did not have a multi-system disease. It is proper course to look for psychological reason. Munchausen Syndrome is one of the possibilities

.

72. As neither doctors were psychiatrist and admittedly not qualified to make any psychiatric assessment of the Wife

s condition, Dr Lo Chun Wai was therefore brought in for this purpose. He was qualified as a psychiatrist in the early 70s and has since been practising in that field and has held various chairs and important positions in the profession, including being the current president of the Hong Kong College of Psychiatrists.

73. Dr Lo was jointly appointed by the parties in January 2004 for an independent assessment and psychiatric report on the Mother. He had been supplied with a large bundle of documents including many of the parties

affidavits and other relevant information, all of which had either been agreed between the parties, or directed by this Court. He had also met and interviewed the parties for about equal amount of time.

74. In his report dated 6th March 2004, Dr Lo found that the Mother had suffered from Somatoform Disorder in his psychiatric opinion as follows : -

28. I am of the opinion that (the Mother) had suffered from a psychiatric condition called

Somatoform Disorder

. Although she did suffer from a variety of illnesses and present with a myriad of symptoms, some of which cannot be fully explained by objective findings and laboratory investigation, I do not have the view that these illnesses and symptoms were intentionally feigned.

Medical certificates produced by the doctors (page 216

228) all share the opinion that (the Mother) symptoms were physiologically based, have organic origins and that (the Mother) was not suffering from malingering or Munchausen syndrome.

A close study of the chronology of events shows that (the Mother)

s health was not all along that poor as described by (the Father). It only worsened after 1999. A summary of the Medical Expenditure for Ingrid illustrates this point : (from the bundle of documents produced by Dr Rose Ong, page 006)

We do not have the figures before 1997 for comparison, but presumably the amount would not be high, otherwise it would have caused concern. It can be seen that the medical expenditure was low in 97 / 98, but increased dramatically from 98 / 99 onwards, probably related more to the significant life events (see paragraph14 above) than to any attention seeking behaviour. The impatient cost dropped in 00 / 01 but rose again in 02 / 03. The expenditure was particularly high in the latter half of 2002 as both parties agreed that (the Mother)

s health improved significantly after she petitioned for divorce in November 2002. Hence the three hundred sixty thousand dollars spent in 02 / 03 was consumed mostly in the months June 2002 to October 2002. That shows how the strain of family problems was damaging her health and a decision to end the marriage produced such a relief.

It can be seen that all of their children (except Y) had their problems. C was diagnosed to suffer from Attention Deficit Disorder and S is a slow learner with features suggestive of dyspraxia (although unconfirmed). A is tomboyish. Three of the children had suffered from gastrointestinal diseases when they were small. N at the age of 18 months, S at the age of 17 months, and B at the age of four. There is no doubt that the intellectual, behavioural and physical problems of the children had repeatedly troubled and put heavy pressure on the parents. I do not believe that their illnesses were intentionally caused (and impossible in the cases of attention deficit and dyspraxia), and the diagnosis of Munchausen Syndrome by proxy cannot be established.

In his own words, (the Father) is a man of high standard and strict with himself and others. I have the impression that he has sense of self importance and mistrustful towards others. He tended to look down upon his wife who appeared to him intellectually backward and hereditary disadvantaged. Since the second year of marriage, he started to become jealous and suspicions and doubted his wife

s fidelity and honesty. When the children were not up to this expectation he was disappointed. He blamed his wife for causing the problems because of her own attention deficit (which is what he believed), bad influence on the children and lack of discipline. He tried to rectify the problem by home schooling them, disciplining them and preaching to them. He put pressure on his wife in order to train her and control her.

(the Mother), on the other hand, seems to be a carefree person who likes to keep herself look pretty and would not mind having sex with brief encounters. She is not smart enough to verbalize her problems and to fight against her husband. As the marriage went on she sensed the changing attitude of her husband, the underachievement of the boys and the physical problems of her children. All these made her worried. Her own health also deteriorated after several pregnancies and deliveries with complications. She had no friends to speak to and she resorted to somatize her problems in the form of physical symptoms and present herself to the doctors for treatment and possible solution. It is known that when a person is constantly under emotional stress, the immunological system is weaken and physical illness more prone to occur.

Prognosis : I do not have the view that (the Mother)

s somatization behaviour and repeated medical and surgical consultations would revert after the divorce case is over. As long as she is living a happy life without much stress and strain, her resistance to illness (both physical and psychological) would improve and the change of having major illness would be low. Moreover, when there is no medical cover and she has to pay for her won, the wish to somatize her discomfort in the form of physical complaints would be reduced

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75. The Father is however doubtful of Dr Lo

s opinion that the Mother had suffered from Somatoform Disorder instead of Munchausen Syndrome, or that her repeated medical consultations would not revert after the divorce case is over. He was critical of his failure to ascertain directly from those doctors who had treated the Mother in the past about her medical problems, instead of just relying on their reports which he argues was insufficient or inconclusive, in particularly that many of the Mother

s diagnosis was for pain in some part of her body which is difficult to prove otherwise and since diagnosing factitious disorders is well known to be very difficult because of the dishonesty that is involved, doctors must rule out other possible physical and mental illness before a diagnosis of factitious disorder can be considered, and to do so, the Father argues, Dr Lo should have approached these doctors directly for discussion about the Mother

s past medical problems before arriving at his present diagnosis, and in failing to do so, he does not accept that such diagnosis is conclusive.

76. In defence of his decision not to approach these doctors directly, Dr Lo explained that there was simply not enough time for him to do so in view of the number of doctors involved and the time constrain on his report. With the medical reports available to him, Dr Lo was also of the opinion that it was not necessary to approach these doctors who could not be expected to be able to reveal anything unusual about the Mother

s conditions which were not already reported. He also relied on those medical certificates produced by some of these doctors (216

228 CB 2) which he said all share the opinion that the Mother

s symptoms were physiologically based, had organic origins and that she was not suffering from malingering or Munchausen Syndrome.

77. After being satisfied that the diagnosis of Munchausen Syndrome and Munchausen Syndrome by Proxy cannot be established, Dr Lo went on to deduce in his report the reasons for the Mother

s many health problems and the basis of his diagnosis that she had suffered from Somatoform Disorder caused by the pressure from rearing 6 children and from the Father

s desire to control her during the marriage, as set out in details in Paragraphs 32 and 33 of the report.

78. In any psychiatric evaluation or assessment it is inevitable that diagnosis must to a large extent be based on information provided by the parties rather than by objective findings or laboratory investigations, and in this case Dr Lo had relied heavily on his various meetings with the parties and on documents including their affidavits provided by their lawyers. As it is the Father

s case that he had not put pressure on the Mother or controlled or abused her as alleged, the question must therefore be : Is there proper basis for Dr Lo to arrive at his diagnosis ?

79. The Mother has made numerous allegations against the Father of how he tried to dominate and control her over everything in particularly financial matter, and how his relationship had become abusive to her during the marriage. It is not necessary to repeat them here in details, but it would be useful to refer to some of the particulars in her petition as follows : -

11. Throughout their marriage the Respondent has insisted on being in dominant control. In 1984

5, when the Petitioner had a part-time job in a shop with a small income the Respondent insisted on taking it and controlling it. In late 1984 the Respondent took a legacy from the father

s estate of the Petitioner.

In the second year of their marriage, the Respondent

s mother discovered that the Petitioner had several partners before she met the Respondent. The Respondent

s mother delved deeper into the past of the Petitioner as she felt it was her

duty

to her son to inform him of the kind of wife he had. The Respondent as a result interrogated the Petitioner and admitted the extent of her relationships. This was a terrible time and the relationship got worse in a small matter of time. To this day these events are brought up on divers occasions and the Respondent the Petitioner of being an immoral slut, all of which she stated are untrue.

..

Since the start of the marriage, the Respondent has stated that it is the Petitioner

s duty to accommodate the sexual demands of the Respondent otherwise his treatment to the Petitioner and his attitude would be unbearable. As a young mother of three children, the Petitioner

s health declined in1990. The Petitioner was frequently tired but was still ready for the Respondent and her children. The family attended church, but this only reinforced the Respondent

s views that he was the dominant force in the family and that women were the weaker ones needing the guidance of men in all areas and that their place was in the home and not at work. Between 1984 and 2002 the Petitioner could only flow with the tide and was supported by the unconditional love of her children. During these years there were many words from the Respondent that made the Petitioner feel useless and helpless.

In 1991, the Respondent completed his commission in the Canadian Royal Airforce and joined Cathay Pacific as a pilot. His career was his first priority and the family were put in an inferior position. The Petitioner continued to bury herself in her motherhood and had three more children. The stress and strain was having a huge impact on her health, including the physical load, household duties and a poor relationship resulting in hospitalization. The Petitioner got no support, instead the Respondent would be bitter and sarcastic and offer no help or kindness, just resenting a wife that was unable to go through life without coping. This attitude exacerbated the Petitioner

s illness.

The Petitioner and the Respondent have lived in Hong Kong since the Petitioner joined Cathay Pacific in 1991 but their relationship has deteriorated over the years despite attempts to seek counselling and make adjustments to save the marriage. These years have been the worst for the Petitioner who has succumbed easily to infections, kidney ailments etc. Many times the Petitioner has had to rely on her domestic helper and this is just more ammunition for the Respondent. Again, there has been no love or pity from the Respondent, just bitterness and an expression of the Petitioner being a distasteful burden to the Respondent.

There were numerous disagreements and arguments between the Petitioner and Respondent even on trivial matters. The Respondent has on more than one occasion during 1988 to 1999 offered the Petitioner a one-way airline ticket to leave Hong Kong and the family permanently.

The Petitioner has tried to talk to the Respondent to fix the situation on several occasions, but they have all ended in failure. The Respondent has demonstrated many attitudes and practices that his father before him had

being hard, violent, unyielding, mentally abusive and aggressive. The Petitioner believes her

failings

give the Respondent the excuses he needs to practice these attitudes. As a result the Petitioner herself has sought psychological counselling in 1999 and the Petitioner and the Respondent also sought pastoral counselling in October 2001.

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19. The Respondent is very controlling and dominant over the Petitioner and the children of the family. To this day, the Petitioner has no financial independence or financial management or involvement to the extent that it is only on rare occasions that the Petitioner is aware of the Respondent

s earnings when she has caught sight of an earnings statement inadvertently. The Petitioner and the children of the family are obliged to submit to the Respondent

s control and decision making for the entire family and are required to follow his instructions and obey his demands. He controls every, and all aspects of their lives including how the Respondent takes care of the children.

20. The Petitioner has not had any financial control whatsoever since the date of marriage and this has always been a problem. Although there are joint bank accounts, the Petitioner does not have the freedom to spend. The Respondent fanatically and meticulously examines and scrutinises all receipts, credit cards and ETC withdrawals. Even the food bills are evaluated as wasteful and unjustified although they are basic commodities for the family. The Respondent constantly interrogates the Petitioner and criticises her on her spending. As the Petitioner takes more risk in spending the issue has developed into antagonism and the Petitioner has been receiving more frequent and increasing verbal abuse from the Respondent. On some occasions when the Petitioner was unable to account for a receipt, the Respondent will lose his temper and launch himself into a tantrum that lasts for many days. The Respondent firmly regards all the monies he earns as

his money

to which the children of the family and the Petitioner have no rights. Spending is now allowed without his censorship and approval. The Petitioner finds this intolerable to accept.

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27. The Petitioner has also been accused of low moral character by the Respondent

s standards based on the knowledge that she had other boyfriends prior to her relationship with the Respondent. Although this was more than twenty years ago the Respondent does not pass any opportunity not only to privately accuse her of having a

sordid past

, but more recently is making reference to it in front of the children. This in turn has caused their teenage children to question the Petitioner

s morals when she was a teenager. The Petitioner believes that this is all done in an attempt to discredit her in front of their children. The Respondent

s motivation to dig up the Petitioner

s past is to humiliate her and put her down, whilst elevating himself as being the

moral fibre of the family

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29. The Petitioner is afraid of the Respondent and the anger he has for her. He has an aggressive and snarling attitude and will find fault even when there is none. Some of their children likewise, have the same fear. The Petitioner is not comfortable in his presence and does not trust him. When the Respondent is at home, the Petitioner cannot function normally as a mother and fears the accusations and the irrational control and interrogation. The older four children become quiet and lose their personality when the Respondent is around. The Petitioner now fears for her physical safety and well-being. The Petitioner has to constantly justify everything for the family including contact lenses, dentists, cosmetics everything they require is obtained through a great reluctance because of the punishment that the Petitioner will suffer as a result and the mental abuse that he inflicts upon on her. She does not therefore wish to remain in this relationship of continual mental, emotional and physical abuse

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80. Although these allegations were subsequently deleted from the Mother

s petition after the parties agreed to settle their divorce dispute, they were repeated again in details in her evidence at this hearing. All these allegations were of course denied by the Father in his Answer and subsequently in his evidence.

81. Many of these disputes are of course simply

She Said / He Said

over matters which occurred over the years and it is certainly not easy to tell from the parties

testimony that who has been telling the truth. There are however enough circumstantial and other evidence which may shed light on what really happened to the Mother during the marriage.

82. Firstly, the Father had admitted in his Answer that : -

there were numerous disagreements and arguments throughout the period of the parties

stay in Hong Kong;

he found the on-going relationship between the Mother and her previous boyfriend on the 2nd year of the marriage uncomfortable and that this subject was brought up during arguments over the years until 3 years ago when no further reference was made;

he did question the Mother about her sexual relationship with her many boyfriends prior to meeting him, and that he only ceased making reference to them 3 years ago;

he had accused the Mother of low moral character because of the nature of her relationships with men and her decision to conceal her activities, although he said such accusations has diminished through time and has not occurred the last 3 years;

he had found it difficult to bury the past and to forgive the Mother as a result of her selectively disclosing her past activities to him thereby affecting the trust between them immensely;

he had required that the family finance be managed in a precise manner and had been checking the family expenses regularly to ensure that entries to the bank and credit card statements were correct;

he had considered her as being an unfit mother when she was said to have resorted to inappropriate corporal punishment on some of the children on 2 occasions.

83. These behaviour of the Father could, in my judgment, be perceived, rightly or wrongly, by the Mother as domineering, controlling and abusive to her during the marriage.

84. Secondly, the statement by Ms Melissa Pitonyiak, a teacher hired by the Father to home-school the children between 1996 and 1997 and annexed to the Mother

s 9th Affidavit (P. 1517 B4), does lend support to the Mother

s case about the Father

s controlling nature, in which Ms Pitonyiak described him as follows : -

Prior to my flat being ready for occupancy, I lived with the P family. At this time, I got to know both parents as well as the children. I observed that life at the P home was very much on a schedule and that the children were to live up to high expectations. As an educator, I felt as though the children had little room to be children. The behaviours they were expected to display at home were those that should be portrayed when in a public place. They were not relaxed and enjoying themselves nearly as much when (the Father) was home as they were when he was not.

As I spent more time with the P

s, it seemed as though the family was under a dictatorship. When I went into town with (the Mother) to shop, she had to keep track of every cent that was spent. She held on to receipts for anything that she purchased and was adamant that we save the receipts if we purchased anything to be used in the classroom. (The Father) often spoke to (the Mother) or the maid in a demanding or demeaning voice for something that was not done to his satisfaction. He treated them as though they were not an equal to him. The children often witnessed this and in turn would speak to each other in the same voice and body language.

The children and (the Mother) seemed to be in fear when (the Father) was around. I noticed this in simple everyday activities as in visiting the video store. They were nervous about renting a movie appropriate for the entire family to watch or getting a special snack on a Friday night. At the table during meals, the children

s body language was much more tense when (the Father) was home. It was when he was away that the adults in the home, (myself included), and the children were relaxed, talking and laughing

85. Whilst it is true that in response to this statement, the Father was able to produce a statement from another home teacher Mrs Renata Morton annexed to his 8th Affidavit (P. 1767 B4) which described him in a much more positive light, Mrs Morton did nevertheless notice obvious tension between the parties and at home as follows : -

I will start by describing (the Father)

s personality traits, which were evident to me in everyday dealings with him during that time. (The Father) was a very responsible and stable person. He was a very predictable, practical, factual, orderly, dependable and scheduled person. He was usually quite reserved and had good relations with his family. (The Father) was a person who had confidence to take charge in any situation. He demonstrated strong leadership skills in his role as head of the household. He was assertive and resourceful in reaching goals for himself and his family. (The Father) had deep convictions as to what he felt was best for his family and demonstrated determination and persistence in seeing those visions become reality. As the financial provider for the family, he devoted time to maintaining excellence in his profession, which required time for studying and practising skills in simulation exercises. In his role as my employer, he maintained a professional relationship; one of respect and honour. His communication with me was always in a considerate manner and any problems or changes that needed to be conveyed were done in a careful and professional tone. He was encouraging and supportive of my accomplishments with the children in their schooling. He was also interested in his children

s achievements and made sure to stress and encourage them in their academic achievement and in their exercising positive behaviour in the classroom. He was keen on detail, whether it was in keeping informed of the children

s academic progress or in providing detailed pay stubs for employees. He held very high expectations for both himself and every member of the household (including his spouse, children, and two employees), and demonstrated good communication skills in conveying those expectations clearly to each person. (The Father) was very firm and consistent in his dealings with his children. There were clear expectations as to acceptable behaviour and consistent consequences for disobedience. He scheduled family time on a daily basis to ensure time spent with his children. Every evening that he was home, they would spend time doing devotions in which he would focus on positive character development learning aids and stories.

During my stay, there was an obvious tension between (the Father) and (the Mother), the details of which I will not attempt to assume. Therefore when (the Father) was home there was generally a tension in the air, and when he left for periods of time for work purposes, there was a general relief of the tension

86. Dr Lo in his report wrote that the Father tended to look down upon his wife who appeared to him intellectually backward and hereditary disadvantaged. This attitude of the Father can be found in his various affidavit, such as his 2nd when he said these : -

The Petitioner is also I have found a compulsive liar and this has been a characteristic of hers throughout the marriage. I learned of her deceit very early in our marriage. Through time, it became apparent to me that it is part of her character to deceive, hide the truth and to intentionally lie to others

I believe part of the reason for the Petitioner

s apparent lack of security may stem from her poor academic achievement. Apart from having to repeat a year of schooling, I am aware that the Petitioner was also transferred to a school for children with special needs for a period of time. She passed less than half of the courses that she undertook at college. At the time we married, the Petitioner had significant difficulty in English spelling and to a lesser degree grammar. She was not proficient at maths

As with the family finances, I soon discovered during the marriage that the Petitioner lacked the self-coincidence to make decisions on her own. She relied on my support and help in addition to others, even to the extent of asking assistance with the drafting of letter or simple calculations

many of the Petitioner

s health related problems were caused I believe by her carelessness or else she is very prone to accidents

87. And in his 7th Affidavit, he also said this about her work in charity organizations : -

I do not however agree that the Petitioner has natural abilities in marketing since she approached large organizations under the auspices of a charity and solicited funds from the. It is hardly a difficult task as these organisations are willing to give to charity for reasons of public relations or simply for tax write offs

88. Whether or not there is any truth in these statements by the Father, I believe they must have an impact on Dr Lo

s impression of his attitude towards the Mother during the marriage.

89. Above all, there is the evidence of Ms Nia Pryde, a clinical psychologist to whom the Mother was referred by her doctor in November 1999 for counselling due to stress and anxiety from marital problems. In her affidavit of 9th June 2003 Ms Pryde made the following observations of the Mother : -

3. I first saw (the Mother) on 19th November 1999 when she told me about her personal problems and the breakdown of her marriage to her husband. She provided me with a history of the marriage, both verbally and subsequently by means of a typed summary and a letter she was writing to her husband. (The Mother) described in detail the problems she was going through at the time, for example the demands that her husband made upon her, his constant criticisms and demeaning of her, his wish to control every aspect of their lives, also the difficulties resulting from his mother

s negative statements and opinions about her. (The Mother) felt that she had lost her self-esteem, her positive personality and her sense of security. She expressed her concern about her husband

s drinking problem and about his relationship with their eldest son. She was also upset about the holidays he took alone once or twice a year when, most times, she did not know his exact location and was unable to contact him. (The Mother) was obviously greatly distressed and unhappy about her marriage and she needed help with this. There is now produced and shown to me, marked

NP-3

, copies of my consultation notes at the time together with the marital history marked

NP-4

and a draft letter to her husband marked

NP-5

that were provided me by Ingrid.

4. Subsequent to our first meeting, (The Mother) called me on 22nd November 1999 to say that her husband had indicated that he would be willing to attend counselling, provided that she attended first to diagnose her problems and disorders. (The Mother) did not think that anything would be achieved, especially on his terms.

5. At our second meeting on 28th November 1999 it was evident that (the Mother) was still trying to make a decision about the marriage and whether or not to separate. She felt that his offer to attend counselling had come too late. Also, he continued to take the view that it was all her fault. It was apparent to me that, although she was primarily seeking help to resolve her own unhappiness, she was also very aware of and concerned about her children, especially in regard to the impact of separation on them. Subsequent to this meeting, (the Mother) called me to say that she would delay a further appointment until the children were back at school. My impression was that discussion about the marriage was continuing between the couple.

6. My third meeting with (the Mother) was on 29th September 2000 when she arrived in a distressed condition. She had told her husband that she wanted to separate from him. Since our last meeting there had been a better period, but the marital situation had once again deteriorated. Subsequently, Ingrid informed me that her husband would be willing to attend a meeting with her. However, there was no further contact, and I assumed that they were still trying to deal with the marital issues on their own.

7. Altogether, I met with (the Mother) on three occasions. Based on her accounts, both verbal and written, I believe that she was in an emotionally abusive situation and that this was the cause of her unhappiness.

90. In her affidavit Ms Pryde has also exhibited copies of her consultation notes as well as a written history of the marriage by the Mother to her as well as a letter (P. 1805

1813 B5) that the Mother was writing to the Father but never actually gave him which, I believe, reveal as close to the truth as one can get to her frame of mind and as to what was really happening in her relationship with the Father during the marriage, in particularly her letter to him with the relevant paragraphs as follows : -

Communication without getting upset or angry seems impossible. As much as you dislike letters to convey what is on ones mind, I have no alternative but to write this. I tried to explain to you how I feel about things, and what it has done to me. I also have searched to find the explanation for my feelings. All I can do now is to write it down and let you read it. Trying to understand what and why I have done things may be easier for you to grasp after reading this. I have three main objectives I have put much core into analyzing : What I feel I have LOST, the RESULT & what I feel is the CAUSE I have not yet figured out how to get those things back or how to resolve these issues which have determined my happiness for more years than I can remember.

1. I have LOST my personality, that is my joy : smiling & laughter and wanting to make others laugh or smile. My enthusiastic motivation and positive thinking. My Christian drive : I don

t want to be involved in church other than sitting. The RESULT is this deep sadness like someone I used to love died. I am not motivated to do anything these days and I

ve become a negative thinker. Nothing really makes me happy, I find fault in almost everything. I am withdrawn from my friends and don

t feel comfortable around anyone I get easily upset, angry and bitter towards you, I cry in the most embarrassing places for small reasons. I think the CAUSE is all the harsh things you have been saying to me for so long. When I get excited or happy about anything you harp on it saying that I am going to

crash

. Surely when ever someone casts such a hurtful statement it will affect him or her. You are sure to squash my enthusiasm, scorn most

ideas and belittle my usual cheerful personality. I feel like I have had to guard my freedom of emotion because of your disapproval.

2. I have LOST my self-esteem : that is, how I feel. Whenever I look in a mirror I see fat ! I see ugly curly hair, big shoulders, etc. I feel stupid, uneducated. I

m terrible at my mothering skills regarding my example at my decision making on their behalf. I feel like how can God love a loser like me.

The RESULT is that I am never happy about how I look, most times I feel very ignorant about anything financial as scientific, all the things I did not learn in school or have tried my hand at in the present. I feel like a bad example. I have felt worthless and generally unusable for God.

The CAUSE for these feelings is; being told regularly that I have lost reality, I seem to live in a dream world (as you would put it) I am treated like a child most times, ordered, instructed, as if you need to reshape my childhoold. You always scorn my poor performance in school, you resent that I had home-school in the higher grades and have scoffed about it everytime you would be looking for a new teacher. Or if some type of tutoring was required. You hold in contempt my past & my parents. You criticize most decision making I do down to the smallest detail such as grocery shopping. You tell me I am an unfit mother. You must always accuse me of being the root problem of things that go wrong or just the problem in general. You would have me to believe that I was the

lucky

one to marry you, as you should have never married me anyway, I fooled you, I tricked you, and I am the

bad one

. You seem to tolerate me out of little choice.

3. I have LOST my self-respect. I have allowed myself to pretend contentment with what I see as abused. I have allowed it to continue for years. I have allowed physical contact when I know that feelings have been hurt along with unresolved differences between us. This has not only been wrong but is also against what the bible teaches about the physical relationship. I have let you make decisions about this family when I felt they were very wrong. I have never been able to maintain the feeling of purity in God

s sight in light of my past.

The RESULT has had me unmotivated to take good care of myself, I have felt may times that if I was ill unto death, and it just would not matter to me. I have felt like I should not bother put much effort into things because it will just fail anyway.

The CAUSE I see to fit the loss is all the enforcement of your will over mine. The

head of the house

issue you insist upon. The disregard for my feeling on things. Your accusation about forcing you into sexual temptation if you

re needs are not met regularly. Your dredging up my past to make me feel like something dirty, and as you have put it :

all used up

. Your rules, regulations and dictatorial control of even the smallest issues like buying a toaster or new glasses even a hair cut.

4. I have LOST my security : that is, financial, ability to parent, make sound decisions, emotional and Gods.

The RESULT insecurity about the future and my place on it. I question when you will throw me out and how can I support myself. Fear my place as a mother; will he take the children away from me ? I feel utterly unloved by you. I question if I am an unstable person as you would have me think. I feel like I have failed God

s plan for my life if there has ever been one.

I believe the CAUSE, for this all is because you do not allow me any financial power, you claim that all money is yours. You question all my expenditures and many times make me feel like I have to sneak to buy some things because you regularly criticize what I do buy. You demand all receipts in a way, which would suggest that you could barely keep your tolerance of my spending. You have many times now told me to leave without the children; it is regarded as a threat. You have no problem with going away on holidays alone, with minimal or even no contact. Your over control has left me feeling like I need someone to control my life. You have accused me of being the sole reason for your drinking problem, as with your ability to attend church. A guilt trip. In illness you have failed me time and time again.

This all has left me very much confused at times and wounded beyond easy repair, if at all. I have had very few people to turn to for encouragement over these past 16 years

91. I am of course not suggesting that everything the Mother said in this letter about the Father must necessarily be true, but I believe it truly and accurately reflects her state of mind and feeling at that time and over the years of the marriage, as it is devoid of any lawyer

s input or gloss and cannot be said to be designed to obtain any tactical advantage or legal object, as there is no evidence to indicate that she was then contemplating any court proceedings. It represents, in my judgement, the confidential and innermost thoughts of a wife experiencing terrible stress and anxiety from serious marital difficulties.

92. Ms Pryde has said in both her affidavit and evidence that she believes, based on the Mother

s verbal and written accounts, that she was in an emotionally abusive situation which was the cause of her unhappiness. In her evidence Ms Pryde referred to Marti Tamm Loring

s book on

Emotional Abuse

(Exhibit P

10) which described emotional abuse as follows : -

Emotional abuse is an ongoing process in which one individual systematically diminishes and destroys the inner self of another. The essential ideas, feelings, perceptions, and personality characteristics of the victim are constantly belittled. Eventually the victim begins to experience these aspects of the self as seriously eroded or absent. Ginny, an emotionally abused thirty-two-year old attorney, describes this phenomenon :

After my husband has called me

utterly worthless

and

boring

, and ignored me for a few days, I begin to feel very small and unimportant. Sometimes I can

t remember who I am. I

ve lost myself somewhere. What are my real characteristics ? Who is the neat person I once thought I was ? It

s like losing your dog. Once I even fantasized advertising in the newspaper for someone to find me, as if I were a lost dog.

Although emotional abuse is a widespread form of violence, it is rarely recognized by its victims. Many are convinced that they are at fault and thus do not perceive themselves as abused. When they week out a therapist it is usually to deal with symptoms like suicidal ideation, intrusive thoughts, terrified clinging behaviour, and pervasive feelings of confusion and unreality. Even when victims acknowledge the undermining insults and name-calling that occur in their intimate relationships, the depth of the inner bruises, emotional pain, and eroded sense of self often remain hidden from conscious awareness. In many cases, somatic symptoms such as headaches or stomach problems mask despair and profound loneliness.

Some writers have described emotional abuse as an adjunct of physical abuse (Walker, 1984a). Tolman sees it as an integral part of the humiliation inherent in physical battering. Because

physical abuse has aspects of psychological maltreatment

, he questions whether it is possible to separate emotional and physical abuse :

In addition to the physical pain and intimidation a woman may feel when her husband slaps her in front of her child, she may also feel humiliated, embarrassed, and demeaned. The latter feelings may even be the more harmful and debilitating effects of his physically abusive behavior

(Tolman, 1992, p. 293).

Emotional abuse may occur without physical abuse, however, and its effects are just as powerful (J. B. Miller, personal communication, June 1993). Many women have described the devastating effects of their partners

repeated put-downs and insulting labelling. Being called whore, bitch, crazy, stupid, unfaithful, and ugly can take a heavy toll one one

s self-esteem, as Ginny affirms :

How can I explain to people the terrible misery I feel when he laughs at my ideas and tells me I

silly

and have no understanding of others

motivations ? I

m a good lawyer ! I

m even being considered for a federal appointment. That

s how my judgment is viewed in the community. Yet he rolls his eyes and shakes his head in disgust, and I feel pain inside.

The most salient identifying characteristic of emotional abuse is its patterned aspect. Couples in most relationships exchange isolated insults over time, but emotional abuse is not an occasional cutting remark made in the heat of argument. It is the clear and consistent pattern of these remarks, the ongoing effort to demean and control, that constitutes emotional abuse. Tolman (1992) describes a continuum ranging from

withdrawing momentarily, listening unempathically, [and] speaking sharply in anger [to]

pervasive, one-sided, severe psychological torture paralleling intentional brainwashing and mistreatment of prisoners of war

. (p. 292)

The pattern of emotional abuse occurs on two levels

overt and covert

and utilizes several mechanisms of abuse. Overt abuse is opening demeaning. Janie, a twenty-eight-year old high school teacher, described how her husband, Peter, a business manager, frequently announced ruing family gatherings that she was incompetent and ineffective. He criticised her for burning toast, keeping a

dirty house

, and being a

lousy sex partner

. When they attended a social event together, he accused her of flirting with one of the guests and insisted she was having an affair. Although Peter described Janie as

ugly

and

, he was intensely jealous and convinced that other men were pursuing her. He carefully monitored her expenditures, discouraged her from attending social functions at school or with colleagues, and limited her visits to family members. He ever restricted her telephone calls to her mother.

This overt pattern of isolation, jealousy, and / or control of finances is common in emotionally abusive relationships. Other overt forms include abusing the children in the presence of an adult victim, mistreating the victim

s pets, and threatening violence toward her parents. The list of overt abusive behaviours (as shown in Exhibit 1) ranges from sulking and silence to verbal insults, control of schedule and activities, mild physical behaviour (like slamming doors), and threatened and actual attacks against the spouse and others.

The second level of violence (Exhibit 2), covert emotional abuse, is more subtle but no less devastating to victims. Because they are often unaware of its essential violence, victims commonly react to covert abuse with feelings of despair and confusion.

93. It is Ms Pryde

s evidence, based on the Mother

s account, that most of the overt and covert mechanisms of abuse referred therein did exist in the Father

s behaviour towards the Mother in their marriage. Ms Pryde also agrees, as mentioned in the Loring

s book, victims of emotional abuse frequently suffer from physical problems such as headaches, stomachaches, and upper respiratory illness that are metaphors for the pain of emotional abuse, and that because its symptoms are so varied and so well disguised emotional abuse is difficult to recognize.

94. I accept that Ms Pryde had not seen or talked to the Father during her psychological assessment of the Mother

s condition, but given her own observation of the Mother and with the information provided by her, I believe Ms Pryde is entitled to come to her own conclusion that the Mother was in an emotionally abusive situation, and I have not been shown any evidence to suggest that Ms Pryde

s conclusion is erroneous. Regardless whether the Father had been abusive, I believe he had at least been controlling and domineering of the Mother throughout the marriage.

95. For all the reasons aforesaid I am satisfied that Dr Lo has good and proper basis to arrive at his conclusion about the Mother

s condition, and in the absence of any direct evidence to challenge his expert findings, I see no reason why his psychiatric opinion on the Mother should not be accepted. In fact his prognosis that her somatization behaviour and repeated medical consultations would not revert after the divorce seems to be borne out by the fact that the frequency of her medical consultation has since these proceedings dropped significantly. Having arriving at my conclusion that the Mother is not suffering from any psychological problem which may affect her parenting ability, I shall next consider the Father

s other allegations against her.

Use of Violence

96. The Father

s case that the Mother resorts to violence is basically based on 2 incidents in 2000 in which he claims to have been hit by her by slapping during arguments, 2 other incidents in 2002 when she slapped the 2 eldest children respectively in separate incident, and her throwing objects around and using abusive or obscene language during quarrels between the parties in other incidents, which the Father believes by her such actions, the Mother has not set a good example to the younger children who had witnessed some of the incidents.

97. The Mother denies that she has a violent temper or has resorted to violence, and has given her side of the story about those incidents. The evidence reveals that the incidents involving the Father were, in my opinion, minor, insignificant and inconsequential, and certainly do not show any inclination or tendency on the Mother

s part to use violence.

98. As regard the incidents involving the 2 eldest children, the Mother has admitted slapping them for using inappropriate language, and has explained that in both situations the children had subsequently apologized, that they were able to discuss the situation mutually, and that she was also able to learn as a parent from the incidents and was determined not to allow it to happen again.

99. It is not uncommon that when married couples quarrel and fight during marriage, things may sometime get out of hands with angry words being said, objects thrown and furnitures knocked over, but it does not necessarily follow that they are violent in nature or show a

> violent temperament on the part of one of the parties. It depends on the nature and severity of the acts and the frequency of the occurrence. The evidence before me show that such incidents of so-called violent acts have occurred far and few in between the 20 years of this marriage, and appear to be isolated incidents which occurred during the most difficult and stressful period of the Mother

s life, and having heard and observed her for days in evidence in court, I do not find any evidence that will support the Father

s allegation that the Mother has resorted to violence or that such behaviour of hers has any negative impact on the children.

Compulsive Liar and Deceitful

100. The Father has accused the Mother of being a compulsive liar which has been a characteristic of hers throughout the marriage, dating back to the early stage of the marriage when she failed to disclose to him her relationship with her boyfriends both before and after the marriage, and that she would only later reveal it on a piece meal basis, as being the main basis for his allegation.

101. There is no dispute that the Mother had not disclosed all her previous relationships with her former boyfriends to the Father prior to their marriage, which include several relationships with older men, in particularly one who was her elder sister

s boyfriend who seduced her when she was merely 12, something which she was probably ashamed of and naturally did not wish to disclose to her future husband, which is not at all unusual in human nature, and is in my opinion quite understandable in the circumstances, as explained by her in her written marital history to her psychologist Nia Pryde in 1999 (P. 1806

1809 B 5) when she wrote :-

When I got involved with my husband I had told him that I had had several sexual relationships. I did not truthfully tell him how many. As I thought that counting was not important and I also did not want to hurt his feeling. I felt that the future was the most important thing. When we were married less than 1 year his mother informed my husband that I was very promiscuous before we met. She even had names. She had fished for the information through a friend of hers who was a parent of a guy in the group of friends I had hung with. She felt it her

duty

to inform her son about what

kind

of wife he married. I might add here that she was not pleased with her beloved son

s choice of wife. Not being of Eastern European decent was just one of my failings. He interrogated me in no time; I then told him that indeed I had many relationships and my reasoning behind not telling him exact fact and figures. This was a terrible time and things rapidly got worse although he said we could forget about it. After this he would often imply that I was an immoral slut. That my parents were to blame for allowing this kind of behaviour. He was and still is very bitter about my past and my parents

.

102. This and the fact that the Mother had in the same document readily disclosed her other shortcomings such as her poor academic performance do not seem to support the Father

s case that the Mother is a compulsive liar.

Lack of Security and Self-Esteem

103. The Father accuses the Mother of lack of self-confidence to make decisions on her own and had during the marriage relied on his support and help in addition to others, even to the extent of asking assistance with the drafting of letters or simple calculations. He believes that the Mother

s apparent lack of self-esteem and security, which is admitted by her in her petition, may stem from her poor academic achievement, as she had had to repeat a year in high school, and had passed less than half of the courses that she undertook at college. Even at the time of their marriage, the Father alleges, the Mother had significant difficulty in English spelling and grammar, and was not proficient at maths. Although she may have improved in these areas over the year, he does not believe she would be able to help the older children in many of the subjects that they are taking in high school, and that he has been the one helping them.

104. I do not think there is any dispute that the Mother had never done well at school, as she had readily admitted in her said marital history to Ms Pryde, but she insists that the Father was all along pleased to trust the full time education of the children to her, as he obviously felt that she was fully competent to fulfil this obligation for many years during the marriage, and that her ability to learn is also evidenced by the acclaims she had received from the 2 charitable organizations which she had worked for the past several years.

105. While I believe that the Mother was not the only one entrusted with the full time education of the children who were at one time or another home schooled by both parents and private tutors, and that the Father did from time to time, when he was around, assist the elder children with their maths and science subjects, I agree with the Mother that despite her poor educational background, she had been trusted by the Father with the children

s education during the marriage, and that there is no evidence to suggest that she is incapable of helping the 3 younger children with their studies, as the 3 elder children are already in boarding school.

Lax with Discipline

106. The Father accuses the Mother of becoming more lax with the children

s discipline, and that since his departure from the matrimonial home, he has noticed a marked change both in the attitude and behaviour of the children living at home in that they are less respectful and wilder in their play, with temper tantrums in some of them that he has not seen before. He also accuses the Mother of allowing the children to do things which previously would not have been allowed, such as taking Y and N to a movie entitled

8 Mile

featuring a American rap singer called Eminem whose songs often contain language and contents

which the Father considers to be depraved, and that the movie was rated

and contains scenes of violence, sex and drug abuse which render it wholly unsuitable for the children.

107. The Father also believes that since he has left, the children

s access to the internet is unsupervised and no child filter software has been installed in the computer, as a result the children have been visiting sites and downloading material which he consider to be unsuitable, that they now also have almost unlimited access to TV, and that the 2 elder girls had on some weekends been allowed to come home late after 11 p.m. All of these, the Father says, have caused him deep concern that the Mother is showing signs of her inability to support and guide the children.

108. The Mother has replied to these allegations in her 6th Affidavit (P. 1034

1037 B3) in which she explained that the children are not under the extreme conditions of behaviour when she is looking after them compared to when the Father does. She is also of the view that the recent events of their divorce have unsettled the children, and that they appear to live in 2 different lives in that whilst the Father is away, they would be

full of life, bubbly, argumentative, talkative, mischievous and all of the other things that children normally are

, but when they are with their Father,

they find it difficult to be so Victorian and it is inevitable that they occasionally break free from the emotional straight-jackets that he keeps them in whilst he is around

.

109. Whilst I am no expert to say whether children are supposed to react and behave in the circumstances as alleged by the Mother, I agree that it is consistent with what the home-school teachers, in particularly Ms Pitonyiak had said in her statement which I have referred to earlier, and that such behaviour of the children may be their natural reaction to the apparent differences in discipline between their 2 parents. The Father is no doubt more strict with the children

s discipline, but is the Mother too lax ?

110. The Father has cited the example of her taking Y and N to the movie

8 Mile

which I have to admit I have not seen, and for that matter nor has the Father, and that although I know who Eminem is, I have not heard any of his songs. I do however agree with the Father that the titles of some of his songs are obscene, and that their contents, judging from their titles, may well contain obscene language and undesirable subjects. Is it however improper for the Mother to take her daughters to see the movie ? To answer this question, one needs of course to find out what this movie is all about, and hence some research on the internet was necessary.

111. According to Amazon.com, the editorial review of this movie is as follows :

Rap star Eminem makes a strong movie debut in 8 Mile, an urban drama that makes a fairly standard plot fly through its gritty attention to details. Jimmy Smith (Eminem), nicknamed B. Rabbit, cannot pull himself together to take the next step with his career or with his life. Angry about his alcoholic mother (Kim Basinger) and worried about his little sister, Rabbit lets out his feelings with twisting, clever raps admired by his friends, who keep pushing him to enter a weekly rap face-off. But Rabbit resists

until he meets a girl (Brittany Murphy) who might offer him support and a little hope that his life could get better. Under the smart and ambitious direction of Curtis Hanson (L.A. Confidential, Wonder Boys) and ably supported by the excellent cast and the burnt-out environment of Detroit Slums, Eminem reveals a surprising vulnerability that makes 8 Mile vivid and compelling

.

112. The movie was generally well received by audiences and critics alike, and according to popular movie website such as Yahoo.com, and major newspapers like New York Times, Chicago Tribune and Los Angeles Times all gave it a good review with an average grade of B+.

113. The Father however argues that good movie or not, it is rated

and that although he has not seen it, he has been told that the film contains scenes of violence, sex and drug abuse that it cannot be said to be a suitable movie for N who was then only 14.

114. The Mother denies that it is rated

, and that it is in fact a category

II-B

which allows teenagers to attend. She however shares the views of the Father on the nature of Eminem

s music and 8 Mile, but that the Father acts like such things do not exist in the real world and buries his head to the possible influence the lyrics of the music may have on the teenagers if left without the proper parental dialogue about the merits or failures.

115. The Mother explained that in her 6th Affidavit that her daughters had said they wanted to see the movie, as they had done previously with other movies which the Father had considered inappropriate and forbidden them to watch, although he had not seen them himself. She therefore decided in a mature fashion to take them to see the movie with her, and afterwards they discussed the movie in an intelligent manner so that they would fully understand what was good and bad with the movie, whereas the Father has historically forbidden viewing most movies and music he feels is unacceptable without any regard for people

s personal choices, and that he makes no effort in respecting the curiosities and motivations of others and their tastes, as the contents of the movie 8 Mile reflect the pressure teenagers are faced with today.

116. According to Motion Picture Association of America (MPAA) which rates all movies shown in America,

8 Miles

is indeed rated

in the U.S., meaning it is restricted in the sense that any person under the age of 17 requires accompanying parent or adult guardian. This R-rating, which is one category before the X-rating which allows admission to adults only, is given further guideline by MPAA as follows :-

This rating declares that the Rating Board believes that this is a film that most parents will consider patently too adult for their youngsters under 17. No children will be admitted. NC-17 does not necessarily mean

obscene or pornographic

in the oft-accepted or legal meaning of those words. The Board does not and cannot mark films with those words. These are legal terms and for Courts to decide. The reasons for the application of an NC-17 rating can be violence or sex or aberrational behaviour or drug abuse or any other elements which, when present, most parents would consider too strong and therefore off-limits for viewing by their children

.

117. In Hong Kong we do not have the

rating in our theatres, but its equivalence is

II-B

, which is one category above the

rating, so in this sense both parents are correct as to the rating for

8 Mile

, and that although he has not seen the movie, the Father is probably also correct in saying that, because of its rating, the movie may well contain scenes of violence, sex and drug abuse and language in line with the themes of Eminem

s songs which he considers to be depraved.

118. The question therefore is : is it improper for the Mother to take Y and N, who were then 16 and 14 respectively, to see this category II-B movie ?

119. First of all, despite its rating, the theme and subject of the movie cannot be said to be unsuitable for teenagers : the story of a young man working and struggling in life against heavy odds for his dream.

120. Secondly, as explained by the Mother, instead of just saying no to her daughters, as the Father would have done, I do not see anything wrong or improper in the Mother taking an alternative, and what she regards a mature decision, to take them to see the movie with her, following with an discussion in an intelligent manner afterwards so that they would understand what was good and bad with the movie. I agree with the Mother that shutting the children out of all inappropriate movies or music, or for that matter, any improper material on the internet, may not be the best way to protect them, and that proper teaching and guiding them about the good and bad of such materials is in fact a better and more effective way to teach and discipline them. After all, teenagers these days will always find ways to gain access to such materials or information from friends or at school if they are unable to do so at home. I am not saying that the Mother

s method must necessarily be correct and that the Father

s is wrong, but I believe that there are very often more than one way to discipline children and parents must try to be more sensitive and less rigid to their children

s needs.

121. As regards the Father

s accusation that the Mother has allowed the children unlimited access to TV and that the 2 elder girls, Y and N, had come home late after 11 p.m. during some weekends, the Mother has given her explanation in her 6th Affidavit (P. 1036 B3). I accept her explanation that the children only

get to watch TV during their free time in the evening, and that there were only 2 isolated incidents with the girls returning home somewhat late after attending a Saturday night Christian Youth Group meeting administered by the Evangelical Community Church at Tsimshatsui and the long journey home to Clear Water Bay, and that one of which was after celebrating a birthday party of their eldest brother C who happened to be visiting Hong Kong at that time.

122. I also accept that compared with the Father, the Mother is more lax with the children

s discipline and tends to allow the children more freedom in doing their own things, in particularly with the elder children, which is not a bad thing at all as when children grow older and more mature, it is only natural that they seek more independence and the right to make their own decisions. Too much independence and insufficient discipline may of course lead to under performance at school and even delinquency. The question therefore must be : if the Mother has been less strict than the Father with the children

s discipline, is it too lax for the good of the children ?

123. The Father says it is, as both girls had to miss school the following day after they had stayed out late, and that N had also failed her midterm maths exam in January 2003.

124. The Mother believes that N failed her midterm maths exam was due more to the fact that she was experiencing some emotional turmoil due to her parents

divorce proceedings and that she had in fact arrange for her to see a psychologist.

125. Although both girls are now in boarding school and far away from their parents

battle field, and that Y is already 17 and no longer the subject of the parties

dispute, it is clear that the Father

s concern that the effect of the Mother

s lax discipline on the elder children has extended to the younger children who are living with her and whom he says are already exhibiting more temper tantrums. To determine whether the Father

s concern is justified, it beholds me to look to the social investigation reports and other reports for assistance.

126. I shall start with the Social Investigation Reports, the first one of which dated 31st March 2003 did in fact record the Father

s said concern. It also recorded the view of Sondang, the parties

housemaid at that time, who said as follows : -

Comparatively speaking, the Petitioner was rather

in child discipline. As revealed, she would spend quite a lot of time engaging in telephone calls and computer writing relating to her voluntary work. Sometimes, the younger kids could cry for mother

s attention. However, as from the prospective of the children, they could prefer the Petitioner to the Respondent because the kids could have more personal freedom and space

.

127. The Social Work Officer Ms Ma however did not specifically address this issue of lax discipline in her report, other than her observation of the interaction between the parties and the children when she reported that

the mother did discipline the 2 younger kids when they misbehaved like throwing hard objects around the room, using a stick playing during car ride and the mother could ask them stop and tell them patiently why their behaviours were unacceptable

.

128. Although Ms Ma did further comment that some of the children could have done better at school and that N

s school performance seemed to have fallen backward somewhat, she did not observe any particular behavioural problem amongst the children, which, if I may venture to speculate, may be the reason why she did not find it necessary to address the issue of discipline.

129. It was of course still early days when this report was filed, but I am again unable to find any concern over any discipline problem of the children in Ms Ma

s later report of June 2003 either. In fact, both B and S were observed to be doing well at school without any problem, which Ms Ma had attributed partly to the effective guidance from both parents, in particularly the Mother whom Ms Ma said should be given more credit for the boys

progress.

130. This 2nd report is of course quite outdated by now and it would perhaps be more useful to refer to the more recent school assessments of the 3 younger children at CAIS by Dr Caleb Knight in March 2004 (p 2674

2683 B7).

131. Dr Knight was the educational psychologist requested by CAIS to prepare assessment reports on the 3 children, presumably after the Father had raised his concern with the school over their education.

132. For A and B, Dr Knight reported no behavioural problem which may be linked to any lax in discipline. With S, Dr Knight

s report did reveal the Mother

s concern about his behavioural difficulties including tantruming and problems in controlling his emotions. Dr Knight however did not find such problems to have anything to do with discipline. These are his findings from his report : -

S presents as a 6 years old boy of at least average overall cognitive ability. Relative strengths were noted in his verbal skills and relative weaknesses note din certain areas of non-verbal performance particularly spatial visualization. His academic skills are below what would be expected given his chronological age and school experiences. He has received some specialist intervention from teachers at CAIS in the form of small group and one-to-one teaching time and has made some progress but is still below expectations given his chronological age and overall cognitive ability. Certainly, the family situation and ensuing emotional behavioural difficulties have had some impact on his learning. However, I am of the opinion that he shows a number of signs of a child with a specific learning difficulty (Dyslexia) and would offer a provisional diagnosis at the present time. Some attentional difficulties under a broad category of inattention have also been noted particularly by teachers. Again, some of these difficulties are likely due to the family

s situation and emotional trauma. Young children with learning difficulties will often have associated attention problems. I think there is a combination of factors here but I would hesitate to assign an additional diagnosis of Attention Deficit Hyperactivity Disorder (Primarily Inattentive Type) at the present time. I think this should be watched very closely and I will offer recommendations to address this area of S

s development and if there is not some improvement after things settle in the family I would suggest a re-evaluation to address this area of his development. Regarding, S

s emotional behavioural functioning, again, considering the family situation and the possibility that this boy has undergone some mistreatment and possible sexual abuse it is most likely that this is a major contributing factor to his behavioural difficulties. He seems to be able to control himself when he is with more unfamiliar persons and has displayed no major externalizing or aggressive tantruming behaviour at school. All diagnostic issues aside, what is most important is the interventions continue to address S

s needs and the following recommendations are offered

.

133. I will no doubt return to this report later in this judgment of mine over other issues, but for present purpose I am unable to find any evidence to support the Father

s allegation that there is a problem with the Mother

s disciplinary method. As I have already pointed out, based on all the evidence before me, I agree that the Mother is comparatively less strict with the children than the Father, but there is simply no evidence to suggest that it has led to behavioral or school performance problems of the children. An isolated incident or two of the 2 girls returning home later than usual is simply not enough for the Father

s accusation to stand, and that the problems or difficulties some of the children have exhibited are more to do with their parents

divorce and their relentless fighting, or those other reasons as set out in Dr Knight

s and other reports, rather than the Mother

s way of discipline.

Poor Judgment under Difficult Situations

134. The Father has strong reservations on the Mother

s judgment in managing the children under difficult situations, as she has at times in the past refused to accept that a child has done something wrong, and he has cited 2 incidents. The first one involving their eldest son C years ago when he was accused by credible witnesses at school of spitting at other students, but the Mother openly opposed the accusation and even went to the extent of writing back to the school in what the Father says to be a very inappropriate fashion without consulting him.

135. I agree that the Mother

s letter to the school was both rude and inappropriate on that occasion, however it also appears to me just an over reaction of a protective mother who should have handled the matter better, but not a serious flaw in her judgment as alleged by the Father.

136. The 2nd incident occurred when S was about 18 months old and became very ill with severe diarrhoea and was hospitalized. It was probably caused by him drinking some contaminated bath water in their village house, but the Father accused the Mother of contacting the South China Morning Post without prior discussion with him for the purpose of exposing this incident to the public, as a result of which S

s situation was in the headlines on the front page of the newspaper, and the whole family was thereafter harassed and disturbed by a flurry of reporters from the local newspapers for days at home. The Father believes that it was a poor decision on the part of the Mother to involve the media when their concentration should have been on the welfare of their son.

137. The Mother denies having contacted the media for the purpose of exposing the incident, but merely to enquire about a recent publication concerning a similar incident in the New Territories. She says that the Father knew about her action and had in fact prepared a statement himself with the intention of bringing the matter to the authority. With the Father

s controlling character in the family, I do not believe that the Mother would have acted by herself in such important matter without the Father

s knowledge or approval. I think the parties had intended to bring the matter to the authority, perhaps even with a view to claim compensation, and went to the media for assistance without realising the consequences, for which the Father now blames the Mother. The whole thing was an unfortunate incident but I cannot say that it goes so far as to show the Mother

s poor judgment.

Lack of Time for the Children

138. The Father

s concern about the lack of time which the Mother spent with the children is based on her voluntary work with charitable organisation several years ago to the extent that she appeared to be abandoning the children in pursuit of her own interests even when she was working at home. He says there were many incidents that she had been so taken up with her work-related enquiries on the phone that she ignored the children who in turn had become restless and started to seek her attention, which had affected her relationship with the younger children that they had become more attached to their former maid Sondang.

139. The Mother naturally denies that the children had been affected as a result of her voluntary work which she says was deliberately arranged in that most of it was done at home so that she could be near the children.

140. Whilst most of the Father

s allegation on this issue appears to be hearsay, it has now become merely academic as the Mother has subsequent to these proceedings quitted her voluntary work and has returned to her role as a full-time mother. There is no evidence to suggest that she will return to voluntary work any time soon after these proceedings or in future. With the children becoming more independent as they grow older, and will be spending substantial time at school each day, I do not see anything wrong even with the Mother returning to voluntary work or a part-time paid job in future as long as it does not interfere with her time for the children.

141. It is not denied that the children had a good relationship with the former maid Sondang, in particularly the 2 boys who were quite attached to her, which is only normal as she had after all served in this household for more than 5 years, but there is simply no independence evidence such as from any of the social investigation reports to suggest that the Mother

s relationship with the younger children had been affected by her voluntary work or that it had been replaced by Sondang

s. In fact the evidence that the younger children in particularly the 2 boys are so attached to the Mother is simply unchallengable.

142. Having considered all the evidence before me including the various reports, I am satisfied that the Mother has been a caring and loving parent to her children, and that she has in fact done a quite remarkable job in taking proper care of her 6 children given the difficult circumstances of this case and the numerous problems that she had had with her health and her failing marriage. With the diagnosis of Dr Lo that she has not suffered from Munchausen Syndrome, which is the cornerstone of the Father

s case, and with his remaining allegations against the Mother unable to stand on firm ground and with her improved health and newly gained confidence and determination which were readily apparent in her oral evidence in Court, I find that there is simply no proper reason or basis to suggest that the Mother is not fit to have the care and control of the children.

143. She is of course not a perfect parent, if ever there is one, and that throughout the marriage she did rely on the assistance of others such as Sondang and in particularly the Father who has no doubt, and which is not denied, made important and significant contributions towards the care and upbringing of the children, but it is the Mother

s case that there are also serious shortcomings of the Father that it would not be in the best interest of the children that he be given their custody care or control, whether jointly with her or otherwise, which is what I now turn to.

Full Time Employment

144. One of the main obstacles to the Father

s case for the children

s care and control is his full time job as an airline pilot. Although he claims that he has been able to arrange with his employer to fly mainly in Asia instead of long haul to Europe, thereby reducing the time that he will be flying during his work, there will always be days when he will be out of Hong Kong, albeit for only 1

2 days at a time, during which he will have to rely exclusively on his maid if he is to have the care and control of the children, and with the departure of Sondang and that a new domestic servant taking her place who will no doubt have to take time to build up a relationship with the children, even assuming that she will be as capable as Sondang in taking care of the children. With all these uncertainties, I find it very difficult to agree with the Father that he would be able to handle the children

s day-to-day care and control. It is simply not practical for him to do so, and it is not the only problem or shortcoming that he has with his case.

Lack of Time After Work

145. The evidence before me indicates that in the past the Father would very often be resting at home from jet lag after long flight, and that while he denies having been hiding in his study room from the noise and activities of the children, there is no question that he would spend a considerable amount of his time reading or listening to his music in his study room when he was at home not flying. There were also occasions when he would go off on an overseas trip by himself.

146. This is of course no criticism of him as he was certainly entitled to some quiet time on his own after a hard day at work, but it is again the reality that the Father, like everybody else who has a full-time job, and in particularly in his case as an airline pilot, simply needs to rest after work and hence has to rely all the more on his maid to take care of the children, which is simply not the most satisfactory arrangement as far as the children are concerned.

Lack of Proper Understanding or Insight

147. One of the most serious criticisms of the Father

s parental skill is that he is often too rigid and strict with the children

s discipline, and is lacking in proper understanding or insight of their needs.

148. There is no question of the Father

s strict discipline with the children. It is all evidenced from the statements of the private tutors to the social investigation reports, as well as the children

s own words, in particularly the elder ones. Strict discipline of course is not necessarily a bad thing. In fact discipline is essential for the proper and healthy growth and development of all children. But when it is too strict or rigid and to be applied across the board for all the children irregardless of their age, needs or level of maturity, it becomes improper, unhealthy and can be counter-productive.

149. His

grounding

of the 2 girls for months for their late coming home on the 2 occasions mentioned, for example, in my view appears too strict and rigid under the circumstances. The use of corporal punishment on the children and not allowing them to cry in the past, by both parents although the Mother says she was simply obliged to follow the Father, has been conceded by the Father to be inappropriate.

150. The destruction of C

s CD which the Father considered to be unsuitable for him, or the criticism of the Mother for bringing the 2 girls to watch the movie

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without knowing what that movie was about, and the strict prohibition of access to all TV, movies, music or books which he deemed to be unsuitable irregardless of the children

s age or maturity, without discussing with them the rights or wrongs of such materials, are further examples of the Father

s too rigid way of discipline, and, as pointed out by the Mother, his lack of understanding of the children

s needs, which is there for all to see in the ways he handled the 2 boys in particularly S in the

Sondang Incident

.

The Sondang Incident

151. It will be recalled that in early March this year the 3 younger children were assessed by Dr Caleb Knight at the request of their school after the Father had raised some concern about their education. It was during his interview of S that Dr Knight became suspicious that he might have been exposed to inappropriate touching from the Father

s domestic helper Sondang which might amount to child abuse, and suggested the Mother to talk to S and to record their conversation, which the Mother did on 8th March 2004, the transcript of which was exhibited to her 14th Affirmation (P 2655

2663 B 7).

152. After listening to the tape, and after speaking to the other siblings and the Father, Dr Knight submitted a report on 11th March 2004, which I find useful to produce here its contents : -

Re : S, birthdate : 18-10-1997

The above named 6 year old boy was referred to me for learning and behavioural difficulties on 3rd March 2004. Behavioural difficulties included tantrums, and general difficulty regulating emotional control. In the course of carrying out the assessment S

s mother reported to me that she felt her son may have been being mistreated by a domestic helper (Sondang) employed by S

s father. Mrs P felt that the mistreatment included inappropriate sexual touching. None of the other children in the family had reported any unusual treatment by (Sondang).

Samuel reported the following to me regarding Sondang :

s bad to me

She does rude things to me

She pushes me and yells

She licks my face

. S became upset and teary eyed when telling me the above.

Mrs P let me listen to an audiotape on 11th March 2004 on which she asked S questions about Sondang. It is my understanding that a transcript of the tape will be made available. The following are notes of the statements that S made based on what I heard : he made reference to Sondang kissing him by putting her tongue in his mouth. He also said,

She comes in the bathroom with me and locks the door and makes me do stuff

I don

t want her to kiss me and she does

. He talked about the

tickle game

and made reference to Sondang

touching my private parts

as well as asking S to

touch her private parts

and

bum and boobies

. He made reference to Sondang sleeping with him when he didn

t want her to. He also made a statement that he was

afraid to go there, because of what she does

.

I spoke with S

s 16 year old sister (Y) and his 15 year old sister (N). Y stated that in the past year and half she felt that S

knew too much about women

s body parts and such things as menstruation for a young boy. She felt that based on her observations the relationship between S and Sondang was

too kissy and touchy feely

. She said she felt it was unusual that miss Sondang would go into a bedroom with S for 3 hours at a time. She stated that she felt S had too much interest and knowledge of women

s body parts and had touched her breasts and bottom on several occasions. She stated that when she asked S where had learned these things he said it was from Sondang.

N stated that she felt S

knew too much about women and sex for a did his age

. This was based on his knowledge of body parts and the fact that at one time (she couldn

t recall exact date) that S had asked her if she

knew how to tongue kiss ?

. When N asked S where he had learned this he said it was from Sondang.

I met with Mr P on 9th March 2004 and spoke to him on the phone on 11th March 2004. I informed him of the above information. He stated to met hat he had no knowledge of any of the above events. Mr P said it was his view that S and the other children had been manipulated by their mother to tell lies about the above events.

Based on information gathered up to this date I am of the opinion that a full joint investigation for child abuse by the Social Welfare Department and the Police be carried out as soon as possible. I have submitted this report today. It is also my opinion that S should not have contact with Sondang under any circumstances (even in the presence of his father) until the investigation is completed as it could be emotionally damaging for S

.

153. While the matter was being investigated by the Social Welfare Department and the Police, the question of the Father

s access to S was raised at the resumed hearing on 18th March 2004, given Dr Knight

s opinion that S should not have any contact with Sondang under any circumstances even in the presence of the Father.

154. It is however clear from this report and from the subsequent correspondence between the parties and their solicitors, that it was the Father

s view that S and the other children had been manipulated by their mother to tell lies about these events, and that he was initially unwilling to follow Dr Knight

s recommendation that S have no contact with Sondang, when he indicated that he would ensure Sondang would not come into contact with S

in his absence

. It was only on 17th March when he finally agreed that there would be no contact between them, and on 18th March he gave his undertaking to the court accordingly.

155. At the hearing the Father however maintained his belief that the Mother had put S up to all these allegations against Sondang, and that he would like to put S and Sondang in the same room in his presence so that he could make his own assessment of whether S was telling the truth. He also said in his evidence that he had asked S if he was missing Sondang, as he had seen signs that he did.

156. On 31st March 2004 Dr Knight came to give his oral evidence about the matter during which he described the process of his consultations with S and what led him to his conclusion. It is his evidence that with his experience from practice for 20 years, of which 7 were with abused children, he was sure that S was telling the truth, as it would be highly unusual for a child of his age to be able to act and put on a performance like that, and, if I may add, within such a short time if he was indeed coached by the Mother, as alleged by the Father.

157. The Father had tried to suggest that the fact that S appeared to like Sondang showed that no abuse could have taken place, and that his crying and distress that Dr Knight had observed during his interview of him was because S knew he was lying against Sondang and that he felt bad about it as he knew it was not true. This was dismissed by Dr Knight as unlikely, and he also commented that it was an inappropriate thing for the Father to say that he would like to put Sondang and S in the same room for him to make his own assessment, as he said in his evidence :

Why would you expose a kid to the potential emotion and trauma ?

158. This is where I agree with the Mother that it demonstrates the Father

s lacks of proper understanding and insight of his children

s needs. It is true that we now know that the Social Welfare Department has concluded their investigation that S

s was only a suspicions case of child sexual abuse, and that the Police has decided not to charge Sondang who has since left Hong Kong to return home to Indonesia, but it does not necessarily follow that abuse had never taken place. The important point is, irregardless whether Sondang did abuse S or not, when the allegation of abuse was first raised in March 2004 by an expert such as Dr Knight, the only normal and natural reaction one would expect from the parents, in my view, would be to protect S from any further potential harm, including keeping him away from Sondang pending the investigation, and to keep things very calm, structured and consistent with him in view of his behavioural difficulties, as recommended by Dr Knight, both in his oral evidence in Court, and in his report.

159. Unfortunately, by insisting that S must have been put up by his mother to lie against Sondang, by suggesting that S and Sondang be brought together in the same room so that he might conduct his own assessment, and by preferring to trust Sondang, the Father had either failed to place the welfare of his son in the forefront of his mind, or at least allowed his better judgment of his son to be obscured by his distrust and animosity towards the Mother in these proceedings.

160. Such behaviour of the Father is further demonstrated by events in May 2004 which involved Dr Knight again. It started on the morning of 26th April 2004 when, after a weekend access with their father, B and S were fighting and shouting while on their way to school, with S appearing inconsolable, and the Mother therefore decided to take both boys to see Dr Knight that day.

161. In his pursuant report (P. 2828 B7) Dr Knight told of the boys being upset at their father

s place over the weekend when they were screamed at and threatened by their father with punishment, and that they were told not to listen to their mother. Both boys said they did not like to go to their father

s house again. Dr Knight recommended that in view of the recent events it was important in particularly S to have an emotionally nuturing setting, that the parents should try to find an atmosphere of co-operation and calmness between them, and to stabilize the children

s home life even if this involves supervised visits between the children and their father.

162. The Father, not surprisingly, denied the boys

story and dismissed it as another example of the Mother

s manipulation of the children against him or to obstruct his access to them. He also asked to meet with Dr Knight and the 2 boys together so as to clear up the matter. This request was rejected by Dr Knight who submitted a further report on 20th May regarding his view on supervised access with the following opinions and recommendations : -

Mr P has requested that he meet with myself, S and B together. As I stated earlier, all of my meetings with these children have been one-on-one with myself and the child. This is the only way to appropriately ask questions in cases like this as obviously the children

s answers are going to be influenced to some degree if either parent is present.

I stand by my previous recommendation that supervised visits between B and S and his father should be considered and if put in place continue for at least 4 to 6 months.

I feel that these children are uneasy about their relationship with their father and are not entirely comfortable when they are alone in his presence. I also feel that Mr P has made some bad judgments in his parenting. One thing that particularly stands out for me is that when I initially informed him that I felt S had been sexually abused by the domestic helper that he employed he continued to imply that the whole notion that S had been sexually abused was something that

was put into his head by Mrs P and that S was ordered by her to come up with this elaborate lie. I am of the opinion that S was sexually abused by the domestic helper. In my opinion, when a parent is informed by a professional that they suspect someone in their household has been sexually abusing their child they would take it upon themselves to see that that person is immediately removed from the household. I am also of the opinion that there is some degree of threats and / or actual physical punishment going on when the children are in the presence of their father.

If it has not already taken place I feel that Mr P should be required to attend some therapy sessions focussed on appropriate parenting skills and perhaps undergo a psychiatric and / or psychological evaluation.

I would emphasize that I feel that these children do have positive feelings towards their father and very much want to have a good relationship with him. However, I am concerned as to how effectively this could take place under the current circumstances. Adhering to some of the above recommendations may be helpful in this regard

.

163. At the resumed hearing on the Mother

s application for access to be supervised, instead of accepting Dr Knight

s opinion and tried to work out the access arrangement with the Mother, who by then was prepared to be more flexible with initial access to be merely in the presence of her helper or the Father

s family members rather than formal supervision by social worker, thereby providing the boys with the security they indicated would make them more comfortable, and at the same time making it easier for the Father

s access. Unfortunately the Father refused such option, and insisted that if his access had to be supervised, he preferred not to see the boys at all. Consequently for the following 4 months during the boys

summer holiday, they did not see their father at all, while some of the elder children did.

164. This, according to the Mother, was a disturbing state of affairs as it shows clearly that the Father will do things only one way, and that is his way. She submits, and I agree with her, that even if he disagreed totally with what had happened, the Father ought to have been able to put the interests of the children first, rather than the attitude that if he could not direct how things were to happen, then he wanted nothing to do with the process. This attitude was confirmed by Dr Knight who had offered to see the Father on his own, but was refused by him as he had insisted in meeting together with the children. This attitude of the Father, the Mother argues, was particularly troubling as it sent a message to the boys which was punitive : You have said something I do not like so now I will not see you.

165. The Father had of course maintained his view that it was part of the Mother

s ploys to deny him access to the boys. The fact is, except one incident on Christmas Eve of 2003 when access had to be defined by the Court, access has always been on the basis of reasonable access including staying access whenever the Father is not flying, and the Mother has never tried to prevent access, and in fact it was she who first wrote to the Father through her solicitors, after the summer holiday, on 19th August 2004 proposing for the Father to resume his access, unsupervised, to the boys (P. 1115 C 4), and on the next day, 20th August, the Mother

s solicitors followed up with a proposal for access to start in the coming weekend. This is clearly inconsistent with someone who was trying to be obstructive on access.

166. A further example of the Father

s lack of understanding of his children

s needs and his deficient parenting skills can be seen from the way he handled the Mother

s request to change A

s school from CAIS to KGV earlier this year. Like everything else about their children, the parents were unable to agree on this matter and had to bring it to the Court before me on 1st September 2004, during which the evidence revealed that A had been unhappy at CAIS and wished to changed to KGV starting September 2004. Her request was supported by Dr Knight who had interviewed her and concluded that it would be in her best interests to attend KGV. The Father however believed that A was doing fine at CAIS and that her unhappiness was again the result of the Mother

s manipulation of her.

167. I did not accept the Father

s accusation of the Mother

s manipulation, and although some of his other arguments were not without merits, I allowed the application for A to change her school to KGV for the reasons as set out in my ruling which I do not propose to go into here again, but the evidence did reveal the way the Father handled the situation that deserves criticism, when A reported that she was unable to discuss the matter with her father :

My dad never listens to me, he ignores me and will not discuss or talk about it, and when I asked him about it, he walks away from me and tells me it is not a good school

. The Father has admitted knowing about A

s unhappiness at CAIS and her wish to transfer to KGV, but surely even if he did have good reasons not to agree to her request, he should have properly discussed the matter with A, and to do something about her difficulties at CAIS, instead of just flatly rejecting her request or ignoring her problem.

168. These incidents, in my view, not only show up the Father

s parenting skills, to be at the very least questionable, if not deficient, but also that his relationship with some of his children appears to be less close as he would like us to believe, which takes me to the Social Welfare Reports.

The Social Welfare Reports

169. In the 1st report which was submitted in March 2003, at the relatively early stage of these proceedings, all the children were observed to have close physical and emotional bonding with both parents, but not surprisingly, the elder children found the Father to be a very strict parent and had used corporal punishment on them when they misbehaved in the past, as had the Mother, and whilst the elder children had expressed that they love both parents and would not want to express any view on their parents

dispute over their custody, there appeared to be more resentment towards the Father over the way he has disciplined them.

170. For example, in paragraph 61 of the report (P. 1143 B 3), Y considered her father as a very strict parent, requiring her to wear long skirt, forbidding her to have her ear pierced, and

grounding

her for 4 months by not being allowed to go out after she had come home late on a Saturday, whereas N, whilst agreeing that both were loving parents, thought of her father as a very strict person controlling her daily life, and that she preferred to live with her mother.

171. The 3 younger children, A, B and S were not reported to have expressed any views or preference for their parents, mainly because of their relatively young age, they were however observed to be more attached to their mother.

172. Due to the allegation of possible Factitious Disorder on the Mother, the Social Work Officer was unable to reach any conclusion on the custody issue in her 1st report. In her 2nd report submitted 3 months later on 11th June 2003, on the basis of the Clinical Psychologist

s assessment which ruled out Factitious Disorder on the Mother, the Social Work Officer was able to reach her recommendation on the issue of custody in that the parties be given joint custody of the children with care and control to the Mother. It would be useful to refer to her reasons and basis for reaching her recommendation as follows : -

12. I would say, in this case, it is a hard recommendation to make because both parents have been proved equally lovely and caring parents to their kids. Both the Petitioner and the Respondent have their own strengths and limitation in regards to childcare. However, after thoughtful consideration and taking into consideration of the children

s views and their welfare in a wider prospective, I would put forth the following recommendation, to your Worship

s consideration

13. For A, B and S, they are children of young age of 9, 6 and 5. For very small young kids, a constant carer with good emotional tie is needed to cater to their emotional and physical needs and development. Despite the fact that the Respondent has good faith trying to arrange post as training pilot mostly working with base in Hong Kong with more stable working hours, he still needs to be away from work during routine working hours. With his suggestion to giving the children under the care of Sondang, the existing domestic helper, with hiring of additional helper to gear to the household duties, it is still not the most optimal arrangement as in no place domestic helpers could in any way replace the important roles being as natural parents. Benjamin and Samuel, were both observed to have closer physical and emotional bonding with the Petitioner, I therefore, suggest the care and control of the younger 3 kids, namely, A, B and S to be under the Petitioner.

14. As reflected from the school, B and S are under good adjustment at school and their school work are satisfactory. This may attribute partly to the effective guidance from both the Petitioner and Respondent regarding the younger kinds

progress. Of which, the Petitioner has more time being with the two younger kids, should be given additional credits.

15. As regards to the elder 3 children, namely, C, Y and N, they are likely to continue their schooling in Ontario, Canada by September 2003. Y would go for university study overseas and probably would live on her own, it therefore, doesn

t really mean anything to her to whom the care and control is to be rest upon. Likewise, C is likely to receive boarding school in Ontario, Canada and he did not wish to express will on the care and control arrangement, but importantly, C has clearly stated that he did not want to have split custody and he very much hopes that all the siblings will remain together. For N, she expressed her wish to be under the care and control of the Petitioner.

16. Both the Petitioner and the Respondent have agreed that joint custody is the best option for them. I full support his alternative as it proves to be beneficial to all the children that both parents have equal right on the welfare and interest of the children. The Respondent, being strong in discipline and academic performance, would assist the children

s behaviours and academic pursuits, while the Petitioner, being mainly as a full-time housewife with part time voluntary work, is willing to spare more time taking care of the children while setting lower priority in her voluntary work. She considers to hire a domestic helper to assist in future childcare tasks. Additionally, the Petitioner was willing to grant the children staying access to the Respondent and trying to fit in his flying schedule to enable him see the children as far as possible. Under these circumstances, I think it is the best option, which I think best fit to the best interest to all the 6 children that the care and control of the 6 children be granted to the Petitioner.

17. With the clinical psychologist assessment, the Petitioner does not suffer from any psychotic or mood disorder that warrants attention. With the medical reports proving the Petitioner having sound physical health, the worry on the Petitioner

s impaired psychological and physical conditions that affect childcare can therefore be ruled out.

18. Regarding the Petitioner

s wish to move to live in Vancouver, Canada. Judging from her provision of all reasons in the 9th Affidavit and her efforts in locating community resources and accommodation in Vancouver, I have no objection to this provided that the access can be available to the Respondent in seeing the children

.

173. As submitted by Counsel for the Mother, in custody cases, the Social Welfare Officer is very often the only independent witness and that her evidence is of particular importance as

the eyes and ears of the Court

, while her report is required by statute to be given due consideration by the Court. Although both reports of the Social Welfare Officer Ms Ma, which were submitted in the first half of 2003, and that a lot has since changed when Y and N were still at school in Hong Kong, Ms Ma was able to comment both in her reports and in her oral evidence given in details in March 2004 on the relationship between the children and their parents, when she maintained her observations of the younger children

s close physical and emotional attachment to their mother, and despite strong challenge by the Father, stood by her opinion that it would be in the best interest of the younger children to remain in the care and control of the Mother.

174. Having heard her evidence I find Ms Ma to have properly discharged her duty in her investigation, and that her findings and observations in both her reports and testimony to be generally well supported by the evidence that have been presented before me, and that her opinion and recommendation on the issue of care and control of the children in favour of the Mother imminently sensible, practical and reasonable.

175. Ms Ma

s recommendation in her 2nd report that the parties be given joint custody, which was apparently based on their consensus at that time, but which the Mother has now retracted to be unworkable, however warrants discussion, in particularly in view of the Father

s submission that he should be given shared parenting and / or joint custody care and control of the children.

Shared Parenting / Joint Custody Care and Control

176. Mr Pilbrow for the Father submits that it is apparent from the observations of the Social Investigation Reports, that both parents love the children and that the Father has maintained a strong and loving bond with the children, and that although the younger children in particularly the 2 boys are more physically attached to their mother, which is only natural and understandable at their age, the Court must also look to the long term future of these boys and recognise the essential contribution that their father must make in their late years.

177. It is also submitted that overall, the recommendation of Ms Ma has been that the parents are both equally loving parents, both have their strengths, the Father, in particular, in areas of academia and discipline, and that modern psychological opinion confirms that children benefit from the contribution given by both parents, and indeed it appears that the Mother accepts that the children should keep close contact with the Father. In the circumstances, it is submitted that the Father

s proposal that there be an order for shared parenting, which represents an order for joint care and control, in addition to joint custody, would logically be the most beneficial for the children, as the nature of the Father

s employment makes it feasible for the children to stay with him during the periods when he is not flying, as it is apparent from the oral evidence given at the hearing on his rosters that he has ample time available to be at home with the children, who have been accustomed to seeing their father at such times as he is not flying and, given the rosters are available on or about the middle of the previous month, the children

s schedule can therefore be arranged between the parties.

178. These are no doubt attractive arguments and I don

t think there is any dispute that joint custody and / or shared parenting would be the most ideal arrangement for children when the marriage of their parents breaks down, that is, in normal situation where, as agreed by Mr Pilbrow, there is a modicum of understanding and co-operation between the parents. Sadly, Mr Pilbrow also concedes, these protracted proceedings have caused the rift between these 2 parents to widen, and I may add, to a state rarely seen in other cases, which has been further intensified by the occurrence of the recent events involving A and the 2 boys that I have just referred to.

179. Irregardless whether the Father

s stance in these events was correct or not, it is submitted on his behalf that, in any event, the Court should not be deflected from its primary obligation in this case, namely, to review where the future welfare of these children lies, in which case it is submitted that 2 important factors stand out. Firstly, it is of paramount importance that the relationship between the Father and the 2 boys is reinstated and allowed time to regenerate. Secondly, it would be foolhardy of this Court to consider the mother

s application to remove the children from Hong Kong until such time as the financial aspects of this divorce are sorted out, as the disastrous effects of these proceedings upon the liquid assets of the family are such that it is most probable the only financial support left will be the Father

s income from his present employment. It is argued that the material effects of this must be investigated before the court is on a position to reflect on the relevant factors required by the guidelines set down by the relevant authorities such as Payne v Payne on relocation of children.

180. Whilst the Father

s present income is adequate to support the family in Hong Kong, it is argued that a move to Canada would materially affect this, a matter which needs to be examined at the final ancillary relief hearing, and since the Mother has just taken a tenancy of a flat and admitted that she is happily in love with another man, it is submitted that her application to remove the children shall either be dismissed at this time, or adjourned sine die, in which case the Father asks that the children

s legal custody, which is submitted at present remains jointly vested in the Mother and the Father, should remain the same, as the Father has always been the motivator and the better qualified to administer the children

s lives and education.

181. Furthermore, it is submitted that the Father is a man of strong religious principles, which have been instilled in the older children and he wishes should be a guiding influence to all of them. With the history of the Mother

s medical problems and also those of the children, together with the possibility of a factitious disorder continuing or re-emerging, there remains a great number of question-marks about the ability of the Mother to properly look after the long-term welfare of the children, especially if without the Father

s supervision, it is submitted that, taking into consideration all the relevant factors pertaining to the immediate and long-term future welfare of the children, the Father

s proposal of joint custody, care and control is most sensible, which is supported by a trend which has emerged in recent UK authorities which considers that the retention of joint parenting rights is almost automatic.

182. The Mother believes what the Father actually wants from shared parenting is that he has the children half of the time on his off days. She does not think such an arrangement is workable, considering the problems over access the recent months, even before the involvement of Dr Knight, the Father

s approach was to demand 50% of time with the children but then made no other arrangements. While it is accepted that as a general principle shared parenting has a lot to command it, the Mother believes that this can only be in families where there is a genuine cooperation between the parties, a willingness to look ahead and leave the past behind, and a willingness to work together. It cannot work in circumstances such as where the Father one minute says he wants defined access, then asks why he should being the children home on time if they are having a good time with him.

183. This is simply unworkable, it is submitted on behalf of the Mother, when the Father has shown absolutely no willingness to consider anyone else

s perspective than his own. He has ignored professional advice from all corners. It appears that since such proceedings have began he has had at least 5 months off work on stress-related sick leave, yet he has not felt it was necessary to seek professional help in spite of the recommendations from Dr Lo, Dr Knight and the social worker when it has been said that he had no insight and had made bad judgments.

184. It is also submitted for the Mother that in additional to the major issues that were at the centre of her allegations against the Father in her petition, there have also been on-going low level frustrations that surely mitigate against any shared parenting arrangements, with many of these issues having ended up before the Court or have been aired during evidence which appear to be irritants deliberately employed by the Father to simply make life difficult for her, with numerous examples including : -

- the organisation of access

the refusal to give the Mother the children

s medical insurance cards even though they are with her most of the time and he is often overseas

his intransigence over supplying her with rosters at the earliest opportunity

his refusal to let her know of holiday dates and plans, and to let her know when he is going to Canada to see the older children

the demanding and impolite tone of his e-mails to her

the fact that he denigrates her to the children

the endless fuss over the supply of air tickets, in spite of the undertaking given to the Court, and putting his own conditions on the supply of tickets

his retaining of the family car and refusing to return it to her until he bought his own

the constant criticism of the Mother

his refusal to reimburse the Mother for items such as medical expenses

his rebuffs of the Mother

s every effort at mending bridges

185. While these can be described as annoyances, the Mother argues, they are never-ending and as such very much colour the relationship between the parties, and so the question has to be asked : what has the Father done to show that he can co-operate with shared parenting ? It is submitted that what he really wants is the children half the time and to do things his way, which is altogether a different prospect. Seeing the way he handled the recent question of supervised access to the 2 boys, and his refusal to see them at all if he could not see them on his terms, the Mother argues that it is quite clear that

sharing

is a concept alien to him, and his insistence on doing things his way and his way only make shared parenting an impossibility. The only working solution, the Mother submits, is that if care and control is granted to her, there has to be a defined access order to the Father.

186. It is for the same reasons, the Mother submits, that joint custody is not a realistic option, as while it is recognized that the modern approach is towards inclusion, not exclusion, this case is so extreme that joint custody is simply not workable, and that from the events of recent months, there has been nothing to cause her to change her position that she would seek sole custody.

187. An order for joint custody, where the Court grants custody to both parents, but physical care and control to only one of them, was until recent years rarely made in Hong Kong, whilst joint custody care and control was indeed almost unheard of. The most commonly made order is of course sole custody to one parent with a bundle of parental rights over the children, including their physical care and control and the right to make all important decisions on the children

s upbringing such as their education, religion and medical treatment, without consulting the non-custodial parent who is usually granted only rights of access, and generally must apply to the Court if he wants to be consulted on matters relating to the children

s welfare.

188. The effect of a sole custody order is therefore to transfer most, if not all, of the parental rights and authority, which both parents used to have, equally, during the marriage, to the custodial parent exclusively, with the non-custodial parent effectively excluded in the circumstances from having any decision-making role on matters affecting the welfare of the children, which may also have practical implications on a day-to-day basis as well, for example, in getting information from the children

s school or in urgent medical situation. This has no doubt caused difficulties and created conflicts between parents in some cases and has attracted criticisms of the law from practitioners.

189. Orders for custody and access are of course no longer made in England as a result of the sweeping reform brought by the Children Act 1989 which makes general provisions for the Court to have regard to the welfare of the child as its paramount consideration in determining any question with respect to his upbringing, with the abolition of orders for custody and access, which were replaced by new forms of order known respectively as residence and contact orders, as well as the abolition of the legal concept of parental rights, with the legal status of parenthood defined in terms of parental responsibility.

190. The philosophy of the 1989 Act was to promote the family so far as it was consistent with the welfare of the child, on the belief that children are generally best looked after within the family with both parents playing a full part in the children

s upbringing and without resort to legal proceedings. The Act therefore replaced the existing terminology of parental rights and authority by the phrase parental responsibility which is defined in the Act as

all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property

.

191. The 1989 Act does not produce a list of these rights, duties, powers, responsibilities or authority because it would be practically impossible to do so, as such a list would necessarily change from time to time to meet different needs and circumstances. The Act does provide that where a child

s mother and father were married to each other at the time of the birth, they shall each have parental responsibility for their child and that notwithstanding separation or divorce, each parent continues to have parental responsibility even if a residence order has been made in favour of one of them, as the English Law Commission considered that parents should not lose their ability to make decisions about their children simply because they were separated or divorced. The Act therefore supports the idea that

once a parent, always a parent

, and that the primary responsibility for deciding on the upbringing of the child should remain with the parents even after their separation or divorce.

192. The philosophy of the Act therefore is that a parent who does not have the child living with him should still be regarded as a parent so that he can be given information and an opportunity to take in the child

s upbringing. He cannot exercise a power of veto over the other parent, but can refer any dispute to the Court if necessary. It also encourages his involvement with the child and thus promotes the child

s welfare. The retention of parental responsibility to a parent who does not live with his child after divorce would therefore give him a voice in any major issue over the child, thereby hopefully minimising conflicts with the other parent.

193. With both parents having parental responsibilities after separation or divorce, the Act also provides that each of them may act independently in meeting that responsibility without the need to consult the other except where statute expressly requires the consent of the other. The right to act independently must of course be read with the duty not to act in a way that would be incompatible with the child

s welfare, or that a parent can ignore the need to consult the other parent on important issue.

194. We of course do not have our equivalence of the Children Act 1989, although the Law Reform Commission has recently recommended similar changes to our law relating to guardianship and custody of children. In the meantime our Court can still only make the usual orders for custody and access, or joint custody care and control as argued by the Father in this case.

195. The concept of shared parenting as I understand from the Father

s argument, is based on an order for joint custody care and control when the children will share their time and residence, not necessarily on equal basis, with their parents who still retain all parental responsibilities towards them, and at the same time to take the decisions that have to be taken when the parent is having their care and control. The English authorities which Mr Pilbrow for the Father has referred to are all about parental responsibilities and residence order, but I agree it would be helpful to refer to the leading case of D v D (Shared Residence Order) [2001] 1 FLR where Hale L J went though the basic principles upon which a first instance judge is to exercise his discretion in deciding what is best for the children, when she said : -

In considering these arguments it may be helpful to go back to basics. Before the Children Act 1989 there was a Court of Appeal authority in Riley v Riley [1986] 2 FLR 429, to the effect that a shared residence order, which had been made and worked comparatively well in that case for 5 years, should never have been made at all. It is clear, as the court appreciated in the later cases, that the intent of the Children Act 1989 was to change that decision.

The background to the Children Act 1989 provision lies in the Law Commission

s Working Paper No 96, published in 1986, on Custody, and the Law Commission

s Report, Law Com No 172, published in 1988, on Guardianship and Custody. If I may summarise the basic principles proposed, the first was that each parent with parental responsibility should retain their equal and independent right, and their responsibility, to have information and make appropriate decisions about their children. If, of course, the parents were not living together it might be necessary for the court to make orders about their future, but those orders should deal with the practical arrangements for where and how the children should be living rather than assigning rights as between the parents.

A cardinal feature was that when children are being looked after by either parent that parent needs to be in a position to take the decisions that have to be taken while the parent is having their care; that is part of care and part of responsibility. Parents should not be seeking to interfere with one another in matters which are taking place while they do not have the care of the children. They cannot, of course, take decisions which are incompatible with a court order about the children. But the object of the exercise should be to maintain flexible and practical arrangements wherever possible.

Then dealing with residence orders the Commission said this at para 4.12 of Law Com 172 :

Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children

s benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the view expressed in a recent case [Riley v Riley] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all

.

It is for those reasons that s 8 (1) of the Children Act 1989 defines

a residence order

as :

an order settling the arrangements to be made as to the person with whom a child is to live

.

Person

of course includes

persons

on ordinary principles of statutory construction. It is, therefore, an order about where the children are to live. Section 11 (4) of the 1989 Act specifically provides :

Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned

.

Not long after the Children Act 1989 came into force in October 1991 the matter came before the Court of Appeal, on 1st December 1992, in Re H (A Minor) (Shared Residence) [1994] 1 FLR 717, Purchas L J said at 728 :

That such an order [which he referred to as a joint residence order] is open to the court, as has been said in the judgment of Cazalet J, is clear from the provisions of s 11 (4) of the Children Act 1989, as was indicated during the debate on the Bill by the Lord Chancellor. But, at the same time, it must be an order which would rarely be made and would depend upon exceptional circumstances

.

He went on to refer to the case of Riley v Riley [1986] 2 FLR 429.

The matter next came before the Court of Appeal on 3rd February 1994, in A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669; Butler-Sloss L J (as she then was) at 677 said this :

Miss Moulder, representing the father, accepts that the conventional order still is that there would be residence to one parent with contact to the other parent. It must be demonstrated that there is positive benefit to the child concerned for a s 11 (4) order to be made, and such positive benefit must be demonstrated in the light of the s 1 checklist

The usual order that would be made in any case where it is necessary to make an order is that there will be residence to one parent and a contact order to the other parent. Consequently, it will be unusual to make a shared residence order. But the decision whether to make such a shared residence order is always in the discretion of the judge on the special facts of the individual case. [I suspect that when My Lady used the word

special

she meant

particular

]. It is for him alone to make that decision. However, a shared residence order would, in my view, be unlikely to be made if there were concrete issues still arising between the parties which had not been resolved, such as the amount of contact whether it should be staying or visiting contact or another issue such as education, which were muddying the waters and which were creating difficulties between the parties which reflected the way in which the children were moving from one parent to the other in the contact period

.

She went on to say (at 678) :

If a child, on the other hand, has a settled home with one parent and substantial staying contact with the other parent, which has been settled, long-standing and working well, or if there are future plans for sharing the time of the children between two parents where all the parties agree and where there is no possibility of confusion in the mind of the child as to where the child will be and the circumstances of the child at any time, this may be, bearing in mind all the other circumstances, a possible basis for a shared residence order, if it can be demonstrated that there is a positive benefit to the child

.

It is quite clear that in those words my Lady was moving matters on from any suggestion, which is not in the legislation, that these orders require exceptional circumstances. She was also recognising that it stands to reason that if it has not yet been determined where the children are to live, how much contact there is to be, or whether or not there is to be staying contact with the parent with whom they are not spending most of their time, then there could not be a residence order, because that would be an order that the children were to live with both parents.

If, on the other hand, it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents then, as both the Law commission and my Lady indicated in the passages that I have quoted it may be an entirely appropriate order to make. For my part, I would not add any gloss on the legislative provisions, which are always subject to the paramount consideration of what is best for the children concerned

.

196. Butler-Sloss P sitting in the same court, agreed and added as follows : -

The approach of the Court of Appeal in the decision of Re H (A Minor) (Shared Residence) [1994] 1 FLR 717 was made, as my Lady has already said, shortly after the implementation of the new Children Act 1989. It looked back at an earlier decision of the Court of Appeal in Riley v Riley [1986] 2 FLR 429 and, of course, a decision made under the old legislation. With hindsight that decision of the Court of Appeal was unduly restrictive. In A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669, decided 18 months later, this court had a more relaxed approach to the concepts of shared residence. Now 9 years later with far greater experience of the workings of the Children Act 1989 it is necessary to underline the importance of the flexibility of the Children Act 1989 in s 8 orders and, consequentially, that the Court of Appeal should not impose restrictions upon the wording of the statute not actually found within the words of the section.

Any application to change an existing order must be supported by good reasons. A shared residence order is not the standard order and it is Regulations, Vol 1, Court Orders (The Stationery Office Books, 1991), para 2.2(8) at p 10 and I am taking it for convenience from A v. A (Minors) (Shared Residence Order) [1994] 1 FLR 669, 674 in the judgment of Connell J. He set out there a passage from the Guidance, a very helpful passage and it says at 674 E :

it is not expected that it would become a common form of order partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all. However, a shared care order has the advantage of being more realistic in those cases where the child is to spend considerable amounts of time with those parents, beings with it certain other benefits (including the right to remove the child from accommodation provided by a local authority under s 20), and removes any impression that one parent is good and responsible whereas the other parent is not

.

I stand by what I said on 677 and 678, save to say, as my Lady quite correctly said, the word is not

special

facts, I meant on the

particular

facts of the individual case. I am not certain that one does have to demonstrate a positive benefit to make a shared residence order. One does have to demonstrate that a shared residence order is in the interest of a child in the accordance with the requirements of s 1 of the Children Act 1989.

The importance for a judge of first instance is that the guidance that comes from the Court of Appeal, setting out the principles to be followed, is, I hope, valuable for first instance judges but, at the end of the day, it should not inhibit the first instance judge from making the right decision. The right decision is dependant upon the individual facts of each case where the judge exercises his discretion and decides what is best for the children in that particular case

.

197. Applying these principles, it is quite clear that it is not necessary to show that exceptional circumstances exist before a joint custody care and control order may be granted. What is required is, as in all cases involving children, to demonstrate that the order is in the best interest of the children in the particular facts of the case.

198. The Mother does not agree that joint custody with the Father is workable, let alone joint custody care and control. She does accepts that the Father would continue to have a voice in important decisions affecting the children, such as education, health, religion, and matters of a serious nature, which is similar to the concept of parental responsibility under the 1989 Act, but the complete lack of co-operation from the Father, his insistence in doing things his way, his constant undermining of the Mother, his failure to put the children

s interests first, and his inability to see any fault in himself, which, if seen, could be rectified with help, the Mother argues, strongly mitigate against joint custody. The fact that he has never denied that he told the children not to listen to their mother, and that she was damaging them, she submits, are clearly no foundation for a joint custody order.

199. Sadly, with the evidence before me, I have to admit that the Mother does have some very valid points in her argument. In addition to the numerous examples that she has referred to in her submission, and from what I have seen and read throughout these proceedings, of the Father

s inability to co-operate with the Mother, one needs to go no further than to look into the 4 trial bundles of correspondences of the more than 400 letters, consisting of more than 1100 pages, written between the parties

solicitors which contain ample evidence of the parties

disagreements over anything concerning their children from major decisions such as change of school or overseas trips, down to the most trivial matters, not just at the beginning of their litigation when emotion was expectedly running high, but throughout the whole proceedings up to this very stage, with the animosity between the parties at such high level despite the time that has elapsed since their separation that I have to agree with Counsel for the Mother that it can only be described as extreme.

200. I accept that there does not have to be perfect harmony or total agreement between parents before the Court can consider making an order for joint custody. Even during the best of time in a happy marriage, parents do not always agree over the welfare of their children. It is simply not possible in human nature, and in this case, not every dispute between the parties was the Father

s fault, and although the fact that in the case of D v D the judge also found exceptionally high level of animosity between the parents but still went on to make an order for shared residence, and which the Court of Appeal did not disapprove, it should however not distract from the fact that in this case, the main difficulty lies with the Father.

201. As conceded by Mr Pilbrow for the Father, for joint custody to work, there must be understanding and co-operation, if not also mutual trust and respect, between the parents. But with the Father

s deep-rooted distrust of the Mother, his constant belittling of and undermining her ability, his labelling her as a compulsive liar and deceitful person, his insistence in things his way, his inability to see any fault in himself and that all the faults are in the Mother, his firm belief that the Mother is still suffering from Factitious Disorder and hence would not be able, or willing, to devote her time and care for the children, and the possibility that he may continue to want to be controlling of her after the divorce, how can one possibly expect that there will be co-operation from the Father once these proceedings are over ? He has so far failed to demonstrate that he is prepared to co-operate with the Mother, and it would be wholly irresponsible of me to simply accept his words and leave the children

s welfare to chance.

202. We all know how children can be affected by their parents

conflicts which have been particularly bitter in this case where some of the children have become pawns in a power struggle between their parents, who find themselves unable to distinguish between their personal bitterness about the breakdown of the relationship and the necessity of focusing on the future well being and interest of their children.

203. We have seen how the children, in particularly the 3 youngest ones, have been affected by the recent incidents. Although the elder ones have been in boarding school and have thus been kept out of their parents

conflicts most of the time, it does not mean that they have been able to escape unscathed. One simply needs to read the following harrowing statement of the eldest daughter Y (Exhibit P

10) to realise how badly they have been affected too : -

I decided to write my account of what happened on Saturday because I think it owe it to my younger siblings. I love both my parents equally for the same reasons. God gave them to me and told me to honour and love them. Although I have not always done that, I think now is a good time to. There were times where I wished I was deaf, for no amount of noise would cover up the sound of fighting. I remember as a kid, asking dad not to fight anymore with mom. I also remember when I was about 9, challenging my dad after he told me not to fight. He said he didn

t have an answer for me. Back then, I felt victorious. Now, I almost wish that he did have an answer for me. Back then, I felt victorious. Now, I almost wish that he did have an answer for me. There were times when he told me that mom was trying to break up the family, and after those times I would go up to my room and write a view that if mom and dad ever got a divorce, I would run away form home. I even wrote out a list of what I would have to bring with me. As bad as it sounds now, I would also wonder if killing myself would have brought them together. I was willing to do it too, if need be, so that the siblings after me would have it better then I did.

Just tonight, my overactive imagination was at work again. I imagined myself taking the stand in a courtroom. Mom and dad were fighting for custody of us kids. And they were making me choose which one I would rather stay with. I hate being caught in the middle. I hate having to choose.

I remember the first time I realized that dad loved to be in control of everything. I would listen to my friends and most everyone I knew talk about their parents. They didn

t have parents who fought all the time. They didn

t have a dad who cut off everything they loved doing when they didn

t make a grade. They didn

t have a dad who was a fanatic about having everything in order. They had parents who left them hang out with their friends. They had parents who let then listen to their choice of music. Sure, they had rules they had to follow, but their parents made it easy for them. And I wished, for the first time, that I could live in a normal family with normal parents. But now I realize that my family is the way it is because of what people in it had made it that way. Everyone looked for a person to blame their faults on.

People are not perfect and I will be the first one to say that. But I only write this as a teenager

basically one who doesn

t have a voice in a family, let alone the world. Looking at mom and dad, it makes me wonder if I

ll ever be like that. Will I be like dad

in control of everything Or will I be like mom

scared of the person in control of everything ? Or will I even get married in the first place ? Seeing the way things are now, I think

okay Y

make a note of that

and NEVER do that to your kids or husband. No one is perfect or even expected to be. But people get side tracked from the way life should be. They try to live their life without the one who is your life. Or they try to live in their own little bubble

the bubble that makes their life all happy and perfect. There are sometimes in my life where I wish I could retreat into one of those bubbles and forget about the stress of school and the hurt of parents.

Even though these are only about 1/6th of my thoughts, all I want to do now is curl up and go to sleep. God, fill this house with your presence and protect everyone here about to get hurt

.

204. Sadly, the parties apparently have failed to take heed of their children

s plight, and have allowed their relationship to deteriorate to such a state, which is most unfortunate, as I never for one moment have any doubt of the Father

s love and concern for his children, and with his strength in areas of academia and discipline, I am certain that the children would have benefited from his contribution, and a joint custody order would have been the ideal arrangement for the children, and would have been agreed by the Mother at the earlier stage of these proceedings. I can now only hope that given time, and perhaps with proper counselling, the parties especially the Father will one day be able to set aside their differences for the sake of their children, and to demonstrate better understanding and co-operation in parenting, and when that happens, the Father

s request for joint custody will no doubt be considered much more sympathetically by the Court.

205. For now, however, for all the reasons I have given, I am not convinced that it would be in the best interest of the children for the Father to be given joint custody or joint custody care and control with the Mother. I agree that she should be given sole custody care and control of the 4 younger children in order that the present arrangements for them can continue, so that things can be kept calm, structured and consistent for them as advised by Dr Knight, with defined access to the Father including staying access during his day off in Hong Kong, plus half of all the children

s major school holidays, the details of which no doubt the parties will want to address me later.

Removal / Relocation of Children

206. With custody care and control of the children given to the Mother, what remains to be dealt with is her application for removal of them out of Hong Kong to live in Canada, which is of course also strenuously opposed by the Father.

207. Both parents are from Canada, but came to Hong Kong because of the Father

s job. With their root in Canada and with most of their respective family members still living in Canada, and their elder children are also studying in Canada, one can safely assume that, had this marriage continued, the younger children would sooner or later follow the footsteps of their elder siblings to study abroad in Canada, and that the parties would also eventually return to live in Canada, probably upon the Father

s retirement from Cathay Pacific.

208. This assumption of the parties

future plan has now been interrupted by the breakdown of their marriage, so is it reasonable to maintain this assumption, or as in the words of Thorpe L J in the leading case on relocation, Payne v Payne [2001] 1 FLR 1052, when he asked : -

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

.

209. There is no evidence before me to suggest that the Mother

s application is motivated by any desire to exclude the Father from the children

s life or anything other than a genuine desire to return to Canada where she believes the children

s future lies. But is it realistic to do so soon after these proceedings in the summer of 2005 as proposed by the Mother, or that is it founded on practical proposals both well researched and investigated ? The Father argues that it is not, as the financial aspect of the divorce has yet been sorted out, before which it would be foolhardy for the Court to allow the Mother to remove the children from Hong Kong, as the disastrous effects of these proceedings upon the liquid assets of the family are such that it is financially impossible for him to just rely on his income from his present employment to maintain the Mother and the children in Canada.

210. Furthermore, the Father submits, as it is of paramount importance that his relationship with the 2 boys be reinstated and allowed time to regenerate, which I have agreed, the Mother

s removal of the children should therefore be postponed.

211. The disastrous effect of these proceedings upon the liquid assets of the family which the Father refers to is the legal costs that the parties have incurred which have exceeded $6 million in total and which the Father says have depleted almost all the liquid assets, save for his stock option which he says will not last up to early 2005 the way legal costs are incurring, and his small inheritance from his Father

s estate which he says he wants to preserve for the children

s future college expenses.

212. Exactly how much assets are left remains to be seen at the forthcoming ancillary relief hearing in January 2005, but legal costs of more than $6 million is a staggering sum for any family of any means, let alone one with 6 children to be maintained, some of whom will soon be entering university, and hence substantial provisions for their school fees and living expenses will have to be made.

213. All these will naturally have serious impact on the Father

s ability to maintain and support the Mother and the children in Canada at the same standard of living which they have so far been able to enjoy, in particularly of the fact that a not insubstantial sum of money will have to be provided up-front for setting up a new home for them in Canada, and all the ancillary expenses that come with it. I agree with the Father that with the question of final ancillary relief coming up soon in January 2005 for hearing when the Father

s assets and financial situation will be much clearer, it would be prudent for me to postpone my decision on the Mother

s application until then, which should not affect her proposed schedule for departure in the summer of 2005.

214. As to the question of costs, although the Mother is the successful party and deserves to get her costs, especially since she is without income and has all along been dependent on her husband, the fact that I have not heard any argument from the parties on this issue and with the ancillary relief matter coming up for hearing soon, it would be appropriate to also reserve the question of costs for the hearing in January 2005.

215. Regardless of the outcome then, the sad truth is that this case has taken almost 2 years and more than $6 million in legal costs, which illustrates all too uncomfortably that there is much wrong with our system when parental disputes over children are still mainly being handled in an adversarial manner with the litigating parties, often aided and abetted by their lawyers, dictating an oppressive style of litigation, instead of a more conciliatory or problems-solving manner, and which is way too expensive and exhaustive of family assets. The Law Reform Commission has made recommendations for sweeping reform to our law relating to the guardianship and custody of children. It is high time that such recommendations be accepted and implemented.

216. Finally I should not conclude without expressing my deep gratitude to all the expert witnesses including the Social Welfare Officer, and especially Counsel for both parties for their most valuable assistance rendered to this Court throughout the trial, whose ability to remain fair and courteous to each other while arguing their case for their client most forcefully and in such competent and skilful fashion in this most difficult and bitter case was indeed nothing short of exemplary.

(Bruno Chan)

District Judge

Representation :

Mrs Francis Irving instructed by M/S Weir & Associates for the Petitioner.

Mr David Pilbrow instructed by M/S Johnson Stokes & Master for the Respondent.

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