

HONG KONG / JUDGMENT

RK v. YS

COURT

Family Court

DECIDED

8 May 2012

CASE / FILE NUMBER

FCMP151/2008

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bjbj FCMP 151 / 2008 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION FAMILY COURT MISCELLANEOUS PROCEEDING NO.151 OF 2008

IN THE MATTER of AK, a girl born on the 7th March 2002, and KK, a boy born on the 14th January 2004; the Minors and IN THE MATTER OF Section 3(1)(a) & (b), Section 10(1) and Section 23 of the Guardianship of Minors Ordinance, Cap 13 and Order 90, rule 5(3) of the Rules of the District Court, Cap 226 BETWEEN RK Applicant and YS Respondent

Coram: Deputy District Judge S. Lo in Chambers (Not Open to Public) Dates of Hearing: 5 9, 12 16 and 20 December 2011 Date of parties written closing submissions: 12 March 2012 Date of Applicant s reply submission: 27 March 2012 Date of Judgment: 8 May 2012

J U D G M E N T (Variation of Custody)

The Father s Summonses AUTONUMOUT This is an application taken out by the Applicant (the Father) for variation of an Order made by the Court of Appeal on 22 October 2010 (the Joint Custody Order), pursuant to which joint custody of the 2 children namely, AK and KK was granted with care and control to the Respondent (the Mother) and defined access to the Father. AUTONUMOUT The Father considers that joint custody is not working. He is hopeful that if he is granted care and control, the Mother may become more willing to co-parent. Whilst joint custody of AK remains unchanged, the Father now applies for care and control of both his children and sole custody of KK. AUTONUMOUT By Summons dated 19th May 2011, the Father seeks an Order that:

1. The Applicant Father be granted care and control of the children of the family namely AK, a girl born on the 7th March 2002 and KK, a boy born on the 14th January 2004; and

2. The Applicant Father do have interim care and control of the child of the family, namely KK, a boy born on 14th January 2004, with defined access to the Respondent Mother; and
3. Dr. Levy, the child psychologist previously appointed by the Court do make a further assessment and if necessary provide therapy to the child of the family namely AK, a girl born on the 7th March 2002 and submit a report to assess whether there has been continued alienation by the Respondent and the effect this is having on AK s relationship with the Applicant Father; and
4. The Applicant to have leave to remove the children of the family temporarily from the jurisdiction of Hong Kong for the purpose of their annual medical consultations in the United States with Dr. O Hara and associate doctors and thereafter for a holiday in the United States in July / August 2011. AUTONUMOUT 3 and 4 of the above Summons had been dealt with by HH Judge KW Wong at the hearing on 15 July 2011. 1 and 2 thereof were adjourned for trial with some directions. Subsequently, the case was transferred to this Court for trial. AUTONUMOUT By another Summons dated 28th November 2011, the Father seeks an Order that:
 1. The Applicant be granted sole custody of the minor, KK, a boy born on 14th January 2004; 2. Background to the present applications AUTONUMOUT The fight between the parties regarding custody of the 2 children started in 2008. After 21 days trial from October 2009 to February 2011, the Decision was handed down by HH Judge KW Wong on 8th June 2010 (the DC Decision . The learned Judge ordered that the sole custody, care and control of the 2 children were granted to the Father with defined access to the Mother. AUTONUMOUT The Mother appealed. The Court of Appeal overturned the DC Decision and granted the Joint Custody Order. The Judgment of the Court of Appeal was handed down on 22 October 2010 (the CA Judgment AUTONUMOUT The Father now applies to vary the Joint Custody Order and asks for care and control of both his 2 children and sole custody of KK. AUTONUMOUT Most of the important background of this case has been set out in 11 to 39 of the DC Decision. Save and except for those matters I consider significant, I will not repeat the background here again. AUTONUMOUT In brief, the Father is an American born Chinese who works as a stock broker in Hong Kong. The Mother is Japanese and a full-time housewife looking after the 2 children. AK is now 10 years old, a healthy girl and is attending Hong Kong Japanese School. KK is now 8 years old. He was diagnosed with autism in July 2006. The Law AUTONUMOUT Mr Clough, Counsel for the Mother, submitted that unless the Father establishes some significant change of circumstances, it would be wrong to change the present care arrangement. AUTONUMOUT However, Ms Cruden, Counsel for the Father, submitted that the proper approach is to start with the statutory jurisdiction but not the CA Judgment. She said that there are many difficulties in the application of the doctrine of res judicata, whether cause of action estoppel or issue estoppel, to custody proceedings because the paramount duty of the court is the welfare of a growing child and not the niceties of res judicata or other procedural or substantive principles. As the Mother refuses to abide by the Custody Order made by the Court of Appeal, Ms Cruden for the Father submitted that this

Court must necessarily consider evidence of events that have occurred both before and after the Custody Order. She cited *Frost v Frost*. In this English Court of Appeal case, Salmon LJ said as follows: Since the character of the parties is always an important matter in deciding issues of custody, and care and control, it would be quite wrong, in my view, for the judge to be forced to approach this case, as my brother Fenton Atkinson L.J. said in the course of argument, in blinkers. at 1228D I wish to reserve the question whether the doctrine of res judicata can apply in any circumstances in custody proceedings. At 1228G The paramount duty of the court in custody proceedings is to consider what is in the best interests of the child. Of course, in a sense it is a fight between the father and the mother, but the court does not decide it on the basis of whether the mother ought to win or the father ought to win, but chiefly on the basis of what is best for the child. If in such cases the court is precluded by the somewhat artificial doctrine of estoppels from considering all the relevant evidence, I think it is a great pity. I do not think that the child's interests should be sacrificed on the altar of an estoppels existing between the father and mother, nor am I persuaded that the law calls for any such sacrifice. At 1229 A-E (emphasis added) AUTONUMOUT Another Court of Appeal case relied on by Ms Cruden is *Rowe v Rowe*, in which Sir Stanley Rees considered the relevant authorities and held: There are plainly a number of areas in matrimonial law in which the doctrine of estoppel has been eroded or excluded at 110A There are impressive dicta to the effect that the principle of res judicata may not apply at all in relation to custody proceedings at 110C Accordingly, the case for holding that the doctrine of estoppel per rem judicatam should not be permitted to apply in the instant case and any similar cases may be summarized thus: public policy on which the doctrine is founded does not require that it should apply because no benefit to the public would be achieved, since litigation is at least as likely to be increased as it is to be diminished and a grave injustice would be inflicted in certain cases on one party. In matrimonial cases, and particularly those relating to the custody of children, estoppels have a limited and diminishing role to play. The courts exercising this highly personal jurisdiction should only be bound by estoppels in clear cases where public policy is seen to demand that they should. at 111A-C (emphasis added) AUTONUMOUT In *Re B* (case proceedings: issue estoppels), Hale J. held that there is no strict rule of issue estoppels binding any of the parties in cases concerning children: This case raises important questions as to the scope and application of the doctrine of issue estoppels, and as to the power of the court to limit the scope of evidence called, in cases concerning children. at 286F The question is one of great practical importance in the work of the family jurisdiction. This case happens to involve a finding of sexual abuse, but in principle this is no different from a finding of physical abuse, or indeed any other finding of fact which is relevant to a person's suitability to care for children. Again, this case happens to involve a positive finding against the father, but in principle the same should apply in relation to negative findings, unless a different burden of proof was applied. at 286H-287A It seems to me that the weight of Court of Appeal authority is against the existence of any strict rule of issue estoppels which is binding upon any of the parties in children's cases. At the same time, the court undoubtedly has a discretion as to how the inquiry before it is to be conducted. at 295D Hence, if the applicant in one set of proceedings wishes to rely on

findings made in previous proceedings in order to prove a case, the court will have to consider how this should be done. Frequently, although such findings are not necessarily accepted by the party concerned, that party will accept that a challenge to them in later proceedings will be futile. The court may then simply rely upon the findings made earlier. Sometimes, the party concerned or some other party will wish to challenge them. In such an event, it seems to me, the court may wish to be made aware, not only of the findings themselves, but also of the evidence upon which they were based. It is then for the court to decide whether or not to allow any issue of fact to be tried afresh. at 295F (emphasis added) AUTONUMOUT In the light of the above authorities, I accept that the doctrine of res judicata or issue estoppel is generally not applicable to the custody proceedings which are not static but continuing. AUTONUMOUT However, for the events happened before the DC Decision, I will rely on those findings of facts in the DC Decision unless they are overturned by the Court of Appeal. I will further rely on those findings of facts by the Court of Appeal in the CA Judgment. I see no reason why I have to disturb them or re-try them afresh. In my view, I shall approach this case based on those findings of facts together with my own findings of the facts of the events which happened after the DC Decision. AUTONUMOUT It is also noteworthy that the Father took out the Summons to vary the Joint Custody Order not more than 7 months from the date of the CA Judgment and that it is only about another 7 months from the date of the Father s Summons up to the date of trial. Therefore, the events which I have to consider are those happened in these 14 months. AUTONUMOUT I also set out below the relevant statutes and legal principles which I shall bear in mind. Section 19 of the Matrimonial Proceedings and Property Ordinance, Cap.192 states that:

- (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18- In any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree; AUTONUMOUT The general principles to be applied by the court in determining any question with respect to the upbringing of a minor child of the family are set out in section 3(1)(a) of the Guardianship of Minors Ordinance, Cap.13 () which is amended and comes into operation on 13 April 2012. The word welfare in Section 3(1)(a)(i) is repealed and substituted by best interests and the word wishes in Section 3(1)(a)(i)(A) is repealed and substituted by views . The new section 3 now provides that the court:
 - (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and any material information including any report of the Director of Social Welfare available to the court at the hearing; and (ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father (emphasis added) AUTONUMOUT Section 48C of the Matrimonial Causes Ordinance, Cap.179 provides that: section 3 of the Guardianship of Minors Ordinance (Cap.13) (which provides that the welfare of the minor shall be the first

and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap.192). AUTONUMOUT There is no corresponding legislative amendment to the said Section 48C. According to Rayden and Jackson on Divorce and Family Matters , the word welfare has similar meaning with best interests , which is interpreted as follows: The word welfare must be taken in its widest sense. It has been said that the welfare of the child is not to be measured by money only or by physical comfort only; the moral and religious welfare of the child must be considered as well as his physical well-being; nor can the ties of affection be disregarded. Welfare and best interests are synonymous. AUTONUMOUT In England where the same welfare principles apply to children matters and from which the Hong Kong section 3(1)(a) of GMO were derived, the courts are required to have regard to the matters specified in the Children Act 1989 which have come to be known as the welfare checklist . Such checklist is also proposed in section 9.29 of the Report on Child Custody And Access published by the Law Reform Commission of Hong Kong in March 2005. I will not repeat the checklist here as it has been set out in 247 of the DC Decision. Some of the matters will be discussed below but some not since not all of them are applicable in this case. Father s case AUTONUMOUT The Father says that he has all along gone to great lengths to research all aspects of KK s condition and treatment options. He is in the hope that KK may one day be able to be main streamed and even have some degree of independence. AUTONUMOUT Shortly after KK s diagnosis the Father learned that early intervention and intensive Applied Behavioral Analysis () therapy was the most proven therapy for the treatment of autism. The Father was referred to Dina Trakakis, director of Autism Recovery Network (). ARN is a home based ABA therapy program. KK started out with 15 hours per week one-on-one ABA which was increased to 33 hours per week. The Father is of the view that ABA must play a paramount part. The Father s research has shown the benefits of the eclectic approach , which is to combine many disciplines such as ABA, occupational therapy and speech therapy. KK also began sessions with occupational therapist Liesbeth Krebbers and subsequently speech therapy. The Father believes that ABA should take priority but the best approach is to augment KK s intensive ABA with other therapies. AUTONUMOUT The Father also believes that after school ABA should be moved to APS so KK was under one program with one Individual Education Program () as it would be most beneficial to receive consistent treatment and less confusing for KK. AUTONUMOUT The Father tried to implement the single regime. Eventually, the Father had to seek the assistance of the Court. Despite the Court making Orders on two separate occasions, the Mother refused and obstructed KK s attendance. 3 of the Order dated 23rd February 2011 provided that KK do start ABA therapy sessions every Monday and Wednesday after school. AUTONUMOUT The Father says that the Mother refused to comply with the Order dated 23rd February 2011 and did not consent to the said APS ABA. APS could not commence the ABA without the Mother s consent. Once again the Father had to resort to seeking the Court s assistance. The Order dated 14th April 2011 provided the Order dated 23rd February 2011, that KK do start ABA therapy every Monday and Wednesday after school at APS, be enforced and carried into effect immediately without any delay and that the requirement for the

Mother to provide written confirmation to the APS that KK can commence and continue the said ABA be dispensed with. AUTONUMOUT The Father further says that by May 2011, the Mother's action had deprived KK of at least 8 months of ABA therapy. KK has still not started ABA after school at APS. KK's treatment has been jeopardized by the Mother's behaviour, contrary to his best interest. AUTONUMOUT Since March 2007 KK has been a patient of Dr. O'hara a pediatrician in Connecticut, USA. The Father's research leads them to Dr. O'hara, who is also one of the leaders for clinical training on biomedical treatment protocol for autism. In Connecticut they also consult with an occupational therapist Rae Suba to address KK's sensory issue. AUTONUMOUT The Father purchased a hyperbaric chamber. This provides treatment with anti-inflammatory properties and to repair any brain damage which could be caused by KK's mercury toxicity. The Father said that KK needs to go into the hyperbaric chamber for several hours a few times a week. When the Father lived with the family at Parkview, he would go into the chamber with KK, assisted by the domestic helper Rosa. AUTONUMOUT The Father also sets out other acts and neglect of the Mother in his 18th Affidavit that, he considers, have been detrimental to KK's interests and have resulted in his hospitalization and otherwise endangered his health. The Father cites the following instances: Delaying and obstructing KK getting a 24 hour EEG and MRI as recommended by the Queen Mary Hospital neurologist after KK's seizure. When KK was discharged from QMH following his seizure, he was given a suppository valium to stop future potential seizures were they to occur. The Father said that the Mother should have ensured it was in KK's school bag every day. The APS supervisor revealed it was not in KK's bag. So the Father had to arrange another prescription for the school to be left there. The Mother delayed KK being properly prescribed anti-convulsant medication thereby putting KK's health at risk for each day he went without. The Mother prioritized PTA meetings and swim meets over the Kai's care and health. Failing to seek any medical or other assistance while KK vomited over a 15 hour period and became so dehydrated that KK had to be hospitalized for 2 days and placed on an IV drip. The Father discovered objects or gauze embedded up KK's nose. The Mother failed to communicate with the Father and when she did, but only made unfounded allegations against Rosa. The Mother's failure to update the Father on KK's supplements and medications and generally ignoring the Father in terms of KK's concerns. The Mother has accepted medication for KK without informing the Father or checking with KK's other doctors whether it is harmful to KK and compatible with the medication he is already on, despite the Father imploring her to communicate with him in KK's best interest on all medical matters. The Father recites many examples of the Mother failing to communicate, refusing to answer questions or respond to emails on important matters in relation to KK's health, safety, therapies and general well being. The Father exhibits numerous examples of his emails pertaining to KK's care that the Mother did not answered. AUTONUMOUT The Father says that the Mother has bad history with domestic helpers and that the Mother cannot care for the children without assistance. However, the Mother is unable to maintain a domestic helper for a sustained period. Her treatment of the helpers and inability to establish a good working relationship with a helper has been and continues to be to the detriment of the children's interests. AUTONUMOUT The Father also considers that KK,

being autistic, needs as much consistency as possible. It is unfair to KK to be subject to ever changing helpers. And it is impossible for a helper to learn how properly to assist with KK's special needs in the limited time any helper is employed by the Mother. AUTONUMOUT The Mother has been uncooperative, refused to communicate and been dishonest with regard to her situation and helpers. The Father as joint custodian is entitled to know who is living in the same household as and taking care of his children. At the hearing on 30th September 2011, the Mother agreed to provide a copy of the contract of her then current helper within 7 days. This Court then made an order that the Mother do within 7 days provide a copy of her current Domestic Helper's contract to the Father. The Mother wilfully breached the Court Order dated 30th September 2011 and failed to disclose the contract of her alleged helper. AUTONUMOUT The Father's relationship with AK has been damaged by the Mother as he believes that the Mother has continued to actively alienate AK from the Father. AUTONUMOUT The Father's new firm is an American firm with different entertainment policies and is more family orientated than his previous company. The Father often leaves work at 5pm-5.15pm. AUTONUMOUT The Mother's unwillingness to communicate and co-parent makes joint custody unworkable under the current circumstances when the Mother has care and control. AUTONUMOUT The Mother refused to tell the Father the home telephone number of his children. The Mother gave AK a Blackberry without prior consultation. The Father considers this was inappropriate for a 9 years old girl (as she then was). The Mother refused to give the Father the phone number for AK's Blackberry. At the hearing on 30th September 2011 the Mother agreed to provide the number and the Father undertook to pay the costs until trial. The Court Ordered that the Mother do within 7 days provide the Father with the home phone number and upon the Father's undertaking to settle the costs of the mobile telephone calls made by AK, excluding long distance calls, for the period from today until the trial, within 7 days following the production of the relevant receipts from directly to the Father, the Mother do provide the Father with AK's mobile telephone number. AUTONUMOUT However, AK's number was not provided with 7 days or at all. The Mother also breached the Order to provide the home phone number within 7 days, so by 7th October 2011. The Mother's solicitors on 25th November 2011 have now finally provided the home number. AUTONUMOUT The Mother gave a Blackberry to AK who used the same to spy on the Father for the Mother. The Father noted AK sent the Mother a text the fat guy has returned which she was keen to hide from the Father. AUTONUMOUT The Father said that the Mother reinforces negative perceptions of the Father by using the word kidnapping by him. On one occasion the Mother said AK did not want the Father to drive her home because she was afraid he would kidnap her. AUTONUMOUT The Mother has not kept the Father informed of parent-teacher meetings or included or updated him in any matters with regard AK's school, not even her HKJS reports. AUTONUMOUT The Mother's failure to co-parent and communicate with the Father extends to decisions on AK's extra curricula activities. This includes the Mother's unilateral decision to enrol AK in EPIS. The Mother's failure to inform much less consult the Father includes details of her arrangements for AK attending EPIS. It appears that EPIS is a crammer school or a Japanese speaking tutorial centre to further children's studies in Japanese schools. AUTONUMOUT The Father

relies on various reports prepared by Dr Levy. One of the major concerns for Dr Levy is that AK is so negative about the Father and how badly polarized AK became. The Father says that if he is granted care and control of the children, the children's paternal grandparents have agreed to come to Hong Kong for an interim period and would also help at any other time if required. The paternal grandfather is an anaesthesiologist registered medical practitioner. The paternal grandmother was a school teacher. AUTONUMOUT The Father considers himself being more than capable of looking after the children with the help and back-up from Rosa. The grandparents assistance will ensure 24 hours of family care for the children and they could provide some counsel to the Father caring for the children. Mother's case AUTONUMOUT The Mother initially represented herself in the children matters because she could not afford substantial sum of legal costs. The Mother instructed her former solicitors, Messrs Chaine Chow & Barbara Hung (CCBH) sending the letter dated 4th November 2010 to the Father's solicitors, Messrs. Hampton, Winter & Glynn () informing them that she did not want CCBH to make any reply on children matters unless specifically instructed by her to do so. The Mother filed the Notice to Act in Person on 10 December 2010 and is only subsequently represented in the children matters by Messrs Massie & Clement until 21 October 2011. AUTONUMOUT Mr Clough, Counsel for the Mother, submitted that the Father has never accepted the CA Judgment. He was aggrieved at the decision and intended to seek leave to appeal to the Court of Final Appeal. He blames lack of finance for the reason that he did not pursue this but has spent far more seeking the same result by this different route. AUTONUMOUT The Father has relied on allegations that were conclusively determined by the Court of Appeal in the CA Judgment. AUTONUMOUT This Court should discourage re-litigation of the same matter under the guise of new circumstances having arisen and that the new circumstances have to amount to such a significant change as to require the Court to intervene. AUTONUMOUT The Mother says that she stopped working before the birth of AK. KK slept with her from his birth until 8th June 2010. She has been the children's primary caretaker since their birth apart from the brief period from 8th June 2010 until 2nd September 2010 when she was given leave to appeal and there was a stay granted pursuant to the Order dated 8th June 2010. AUTONUMOUT Mr Clough submitted that AK has constantly stated her preference to be with the Mother. A full-time mother is to be preferred to a working father. The Father's child care plan depends heavily on third party caregivers, such as his own aged parents and the domestic helper, Rosa. Obviously, a natural parent is to be preferred over a third party caregiver, however good the third party caregiver may be. Analysis and Discussion AK AUTONUMOUT For the purpose of the present application, I consider it will not be necessary for this Court to resolve each and every issue in dispute, especially some of which are insignificant. I would first deal with the issue of alienation in respect of AK. AUTONUMOUT The Order dated 31st May 2011 provides, inter alia, that: Dr. Levy, the child psychologist previously appointed by the Court do make a further assessment and if necessary provide therapy to the child of the family namely AK, a girl born on the 7th March 2002 and submit a report to assess whether there has been continued alienation by the Respondent and the effect this is having on AK's relationship with the Applicant Father, and AUTONUMOUT The Order dated 15th July 2011 required Dr. Levy to lodge her report on

continued alienation within 21 days prior to the trial. However due to the Mother s failure to attend interviews as scheduled, an extension of time had to be sought from the Court. The Mother failed to make an appointment with Dr. Levy. Ultimately the Father took out a Summons for an order that the Mother do forthwith make an appointment with Dr. Levy and attend a consultation in order to assist Dr. Levy prepare the report ordered by the Court on 31st May 2011 and which pursuant to the Order dated 15th July 2011 was due to be filed by 14th November 2011. AUTONUMOUT The Mother eventually made appointments but only on a provisional basis that she may cancel them. The Mother cancelled two appointments. Thereafter Dr. Levy s office tried to schedule appointments but the Mother declined the dates offered. AUTONUMOUT By an Order dated 7th November 2011, an extension of time was granted so that Dr. Levy could lodge her report on alienation within 14 days prior to the trial. The Report was eventually filed on 21st November 2011. AUTONUMOUT Dr. Levy has provided the following reports in respect of AK pursuant to the Court Orders: Psychological Report 11th May 2009 ; Education Assessment (Evaluation 21st, 22nd September and 10th November 2009) ; Psychological Report 4th October 2010 ; Memorandum 6th October 2009 ; Psychological Report 21st November 2011 (the 2011 Report); Psychological Report 21st February 2012 (the 2012 Report). AUTONUMOUT In the 2011 Report Dr. Levy says, inter alia, that: In essence, alienation occurs when the behavior of one parent causes damage to or undermines the relationship between the child and the other parent. They are often unable to clearly explain why they are rejecting or angry with their parent, and their behavior when with the rejected parent can be inconsistent with their stated negative feelings. This alienation often extends to the friends and family of the rejected parent, and the child may speak negatively about these relatives without providing tangible reasons for their negative feelings. Behavior that leads to alienation of a child from a parent can be active and purposeful, or it can be inadvertent. EVIDENCE OF ALIENATING BEHAVIOR In light of the above noted behaviors that cause children to be alienated, significant concerns are raised with regard to reports of the Mother s behavior with AK. Documents and interviews with both parties suggest that she had repeatedly and consistently engaged in many of these behaviors (3) Characteristics of alienated children While children can be alienated to different degrees of severity, they do tend to share some common behaviors. Interviews with AK suggest that she exhibits many of the above listed characteristics. She clearly and repeatedly noted only negative points about her father, grandparents, and the helper, and was notably unable to name even one positive attribute of any of those individuals. However, AK was unable to provide clear reasons for her negative beliefs. She makes only positive comments about her mother and maternal grandparents, and her views are very polarized. AUTONUMOUT Dr. Levy particularizes the Mother s behaviors which she considers are alienating under the following headings: Creating a situation where the child must be rescued The Mother called the police when the Father was to return the children. She has repeatedly used the word kidnap . The Mother stated AK admitted being afraid of police. The Mother repeatedly said AK and KK return from the Father s access feeling unwell. The Mother accused helpers of feeding KK poisoned food and improperly caring for the children. The Mother s 8th Affirmation admits that because of her concerns about KK s

safety during the Father's access, she has told AK to watch KK particularly when KK is only with Rosa. Secrecy and Spying The Mother gave AK a Blackberry but refused to give the Father number. AK also refused. The Father noted AK sent the Mother a text the fat guy has returned which AK was keen to hide from the Father. Dr Levy considers that such actions place AK in position of spying on the Father and reporting to the Mother, causing AK to choose loyalties. The Mother's 8th Affirmation admits that she did not talk to AK about the Father often but she had never told AK to spy on the Father or report back to her. The Mother said that she had asked AK to keep an eye on KK but that was not spying on the Father. The Mother accepted that when the Father was late, AK will tell her or when he is not there during the access periods, AK will also tell her but the Mother did not ask AK to tell her these things. The Mother seems to concede that she does not stop AK from doing so.

Criticism of Father by Mother The Mother's email to the Father raised AK's complaint against him going out to drink and not return until 1am. Dr Levy said that child at AK's age unlikely makes such comment independently even if she was aware of the Father's outside activities. Dr Levy was of the view that instead of attempting to correct any negative impact on father and child relationship, the Mother just took AK's word and criticized the Father. The Mother's 8th Affirmation admits that she knew AK often calls him Debu which means fat man and that it is not polite, but it is not a cuss word and she do not encourage AK to use it. The Mother again seems to concede that she does not stop AK from doing so.

Obstructing access Dr. Levy considers that the Mother has not denied access but is consistently late for pick-up or drop-off. The Mother repeatedly made last-minute changes to meeting point causing confusion and stress. Scheduling activities during access The Mother unilaterally enrolled AK in tutorial and extracurricular activities that coincide with the Father's access. The Mother refused requests to rotate access so the Father has free time with AK.

Inappropriate discussions with AK The Mother's emails to the Father show the Mother has discussed with AK a variety of issues that, Dr Levy considers, are not appropriate to a child at her age. The Mother discounted the Father's views on long term educational planning, stating instead that AK will choose the type of school she will attend (Japanese or American). Dr Levy takes the view that inappropriate decision for child undermines the Father's influence in her life. The Mother's emails to the Father show the Mother discussed access arrangements with AK in terms of whether she wishes to attend, activities to be planned during access and which days to attend access. Dr Levy considers that this is inappropriate and creates illusion for child that she actually has a choice in access, therefore placing the burden of choosing between the parents on the child. Other emails show that the Mother has discussed financial arrangements between the Mother and the Father with AK as she is aware of the Father not paying for tutorial lessons. Lack of communication regarding significant issue concerning the children Emails show the Mother has repeatedly failed to alert the Father of medical issues of children. The Mother has attended appointments with doctors without the Father and cancelled the Father's appointments. The Father receives no information regarding AK's school progress or meeting with teachers. The Mother refused to consider the Father's views on long term schooling for AK. The Mother approached the Immigration Department for AK's visa without informing the Father. AK's behavior during

observation AK consistently spoke negatively of the Father. She was unwilling to make positive comments on the Father's family, friends and helper but does not provide clear or consistent reasons for negativity. Dr. Levy's observations of AK with the Father suggest that there is a positive bond between them and that AK was very responsive to the Father, seeking him out to play games with her. She laughed and joked with him and was physically affectionate with him, belying her earlier comments to Dr. Levy that she does not like the Father. Dr. Levy opines that very unusual for children who historically had a good relationship with one parent to be unable to identify any positive characteristics following divorce and that this is a hallmark of alienation. The bond between parent and child does not dissolve over time. AUTONUMOUT Dr. Levy summarises her opinion that: There is clear evidence that the mother's behavior has led to damage in the father/child relationship. Therefore, intervention must be undertaken immediately to repair that bond and to prevent further deterioration of that relationship. While engaging in the ongoing debate about use of the exact terminology and semantics we must not lose sight of the primary focus a young child's relationship with her father has been significantly impacted by the behavior of her mother to the point where she has become alienated from (and rejecting of) her father. Regardless of which terminology we use, the primary responsibility continues to be ensuring the emotional well being of that child. AUTONUMOUT Dr. Levy's views and opinion include: Taken separately, some of these incidents may not be deemed emotionally detrimental, although when taken together, this pattern of behavior serves to have an active and ongoing alienating effect on AK's relationship with her father. Regardless of whether this alienation is purposeful or not, it will have a detrimental effect on the father/child bond if permitted to continue over time. Experts believe that children have the right to a strong relationship with both parents following divorce, and it is each parent's responsibility to promote the bond between their child and the other party. Behavior that leads to alienation in a parent/child relationship is a form of emotional abuse. In its mildest form, this behavior fails to promote in AK a healthy adjustment to the divorce and continually polarizes her against her father. At its most damaging, this behavior will result in ongoing instability in the bond between them and can have detrimental effects to her long-term psychological wellbeing, impacting her well into adulthood and coloring future relationships she may have with partners as well as her own children. One additional point to consider is that some of the current concerns regarding the Mother's inappropriate and alienating behavior with AK were previously raised in earlier evaluations conducted by this examiner in 2009 and 2010. These behaviors demonstrate that the Mother exhibits a lack of insight regarding the impact of her own behavior on AK's emotional well-being and regarding any need to modify her own behavior. This suggests that prognosis for development of the level of insight necessary for her to promote a healthy relationship between the Father and AK in the future is poor. AUTONUMOUT Dr. Levy offers 15 recommendations as follows: Experts recommend effects of alienated relationship best reversed by additional time with parent. She therefore recommends that this be taken into account in determining contact between AK and the Father in future; AK benefits from spending blocks of time with the Father, particularly over holidays; She considers that the Mother's alienating behaviors are ongoing and intensified

and it is unlikely that the Mother will modify her actions of her own accord. Therefore steps must be taken to ensure AK is protected from the impact of this behavior in the future. Clear expectations to the Mother by Court or AK's therapist so that she can be fully aware of the damaging effect this behavior has on AK's emotional adjustment; Make clear to the Mother police presence frightening the children which creates handovers distressing. If she truly concerns the Father's kidnap, legal channels are suggested rather than calling police at handover as very damaging for the children; The Mother shall not use word kidnap where AK may overhear or access (via email). Word significant negative connotations, frightening for children to hear, communicated the Father is a danger to her and will undermine her security; Any adjustment to access arrangements be made only by the adults with no input from the children; Pick-up and drop-off time, place consistent. Formal contingency plan if one parent more than 30 minutes late the children be returned to the Father's home for later pick-up; Regardless of which parent has care and control, both spend time with AK that is free of scheduled extra-curricular activities and rotate free days; Contact with the Father should not be presented to AK as a choice. Unfair burden on her and responsibility of trying to please both parents; Significant life decisions not to be discussed with AK and she shall not be given a choice at such a young age; Although they cannot co-parent, it is still essential both have input in decisions including at least education and medical, also extra-curricular activities and other matters; Both not to make negative comments about the other in children's presence. When child makes inappropriate comments, steps must be taken to correct them or they will perceive inaction as a tacit approval; The Mother must be careful of asking AK questions that put AK in a compromising situation. AK may either censor her comments or provide response she feels the Mother wants to hear, both of which can be damaging to her emotionally; It is not AK's responsibility to ensure KK's safety and it is imperative that the Mother communicate this to AK to correct any misperceptions; AK continues therapy with psychologist. Therapist should be well aware concerns so can monitor and address. Reversing alienation should be a target for future therapeutic intervention. AUTONUMOUT Ms Cruden for the Father submitted that the Mother's behavior has significantly impacted on the father and daughter relationship such that AK has become alienated from and rejecting of the Father. AUTONUMOUT I consider that the issue of alienation has been discussed and analysed in great detail in 99 to 121, 136, 137, 201 to 206 of the DC Decision. In short, Judge KW Wong took the view that there had been active and going on alienation by the Mother and that if care and control were granted to the Mother, she would unlikely promote AK's relationship with the Father and there is a risk that the relationship between the Father and AK continuing to deteriorate. These are the main reasons for Judge KW Wong to order sole custody to the Father. AUTONUMOUT Ms Cruden appearing for the Father further submitted that the CA Judgment did not deal with alienation at great length and that Hon Rogers VP postulated other possible reasons for AK's behavior as follows: 35. In coming to the conclusion that the children AK's distinct preference for being with her mother and her reluctance to be with her father was the result of the respondent's deliberate attempt to alienate her daughter from the father, the judge failed to consider that was in all likelihood partly the inevitable effect of AK being with her

mother who was at home for her, whilst her father's working and socialising habits left little time for him to be at home and partly that this was natural for any child and, in particular, a girl. In any event, as pointed out earlier, Dr Levy recommended therapy to repair the bond of daughter and father. Levy did not recommend AK should be separated from the respondent. In fact she accepted that AK would suffer if separated from the mother.

AUTONUMOUT In my view, Hon Rogers VP has implicitly (though not expressly) overturned or reversed the finding of the Mother's alienation made by Judge KW Wong in the DC Decision. That is to say, the Court of Appeal found no alienation by the Mother based on the evidence given at the trial before Judge KW Wong. I must accept that is the finding by the Court of Appeal based on the evidence given at the trial before Judge KW Wong and I have no reason to disturb such finding of facts or retry them afresh. I think that if the Father is dissatisfied with such finding by the Court of Appeal, he has to appeal to the Court of Final Appeal.

AUTONUMOUT Concerning the Order made by Judge KW Wong on 31st May 2011 which provides, inter alia, that Dr. Levy do make a further assessment and if necessary provide therapy to AK and submit a report to assess whether there has been continued alienation by the Mother and the effect on AK's relationship with the Father, I observe that it was made at the hearing when the Mother was acting in person. I must emphasize the improper use of the words continued alienation in the Order which means and is based on the assumption that there has been alienation by the Mother on AK's relationship with the Father. I am of the view that it is obviously contrary to the finding of no alienation in the CA Judgment. If there is no alienation, how it can be continued. It is understandable that according to the DC Decision, Judge KW Wong entirely accepted Dr Levy's opinion regarding alienation. Therefore, it is logical for Judge KW Wong to re-appoint Dr Levy. If Dr Levy is appointed again as expert to prepare the report, she will highly likely find alienation or continued alienation. In my judgment, to be fair to the Mother, another single joint expert shall be appointed rather than re-appointing Dr Levy.

AUTONUMOUT Nevertheless, as custody proceedings are not static but continuing, I shall not stop here and still have to consider what had happened afterwards to see if there is sufficient evidence for me to find alienation of AK from the Father by the Mother. I need to consider the 2011 Report prepared by Dr Levy but with great caution.

AUTONUMOUT It is not disputed that AK who is now 10 years old has shown and still shows strong attachment to the Mother. Based on the evidence before me, I have no doubt to find that her attachment to the Mother is much stronger than that in 2010 when AK was only 8 years old. The fact that AK shows stronger attachment and preference to the Mother than the Father, in my judgment, can hardly be disputed. Hence, the issue is whether the reason for AK's stronger preference for being with the Mother was the result of the Mother's subsequent behaviours, which happened after the DC Decision.

AUTONUMOUT I now consider the incidents which Dr Levy regards as the Mother's alienating behaviors. First is AK's use of Blackberry for the alleged spying. I accept the explanation of the Mother that she has never told AK to spy on the Father with the Blackberry but just asked AK to keep an eye on KK. It is understandable that the Mother concerns KK's safety very much during the Father's access, especially if the Father left AK and KK with the helper Rosa. The Father is well aware of the fact that the Mother does not

trust nor has good relationship with Rosa. Hon Rogers VP clearly said in the CA Judgment as follows: The next observation that can be made is that the judge clearly overlooked the way in which the respondent [the Mother] was treated by the applicant [the Father], the applicant's parents and, indeed, at least Rosa as well. In this respect, it would appear that Rosa was not merely protected by the applicant but actively encouraged to be confrontational towards the respondent. The applicant was quite clear in his evidence that he preferred Rosa to his wife and he trusted Rosa and not his wife. 37 39. It is quite clear that the applicant has been provocative, to say the least towards the respondent. When Rosa was cross-examined she was asked about an e-mail that the applicant had sent to the respondent in November 2008. That read: So from today, you can expect that any time you are with the helpers that you will be recorded until further notice. 40. Rosa confirmed that she had been given a tape recorder and told to record anything that she thought was necessary. It has to be said that Rosa was given quite unusual treatment by the applicant in other respects. Not only was she paid \$8500 per month, which was well above the normal wage for a Filipina maid, which the applicant acknowledged but put down to Rosa being able to drive a car, but she was given a Blackberry and also had the use of a supplementary Platinum American Express card. Whilst Rosa denied that that card had ever been used for anything other than paying for petrol, the applicant confirmed in his evidence that it had been used for other things. Clearly taking all these matters together, the picture emerges of the applicant enlisting the wholehearted support of Rosa to assist him, as far as possible, in his dispute with the respondent. 41. Should there be any doubt that Rosa had clearly taken sides a long time ago, in an antagonistic way, against the respondent, reference only has to be made to an e-mail which Rosa sent to the respondent on 18 September 2009. The contents and tone of that are such that in any household in which the employer, namely in this case is the applicant, had any respect for his wife, even if in the throes of divorce, the maid would be dismissed on the spot. (emphasis added) AUTONUMOUT Despite the above clear indication by Hon Rogers VP for dismissal of Rosa, the Father still chooses to retain her to take care of AK and KK up to now and does not explain why he has to insist to hire Rosa. I must say that it certainly makes his relationship with the Mother even worse than before. In my view, the Father has himself to be blamed. AUTONUMOUT With regard to the incident of AK's sending a text message to the Mother that the Father had gone out for drink and did not return until 1am, the Father did not expressly deny such incident or made explanation in his affirmations. Although it is difficult to tell how a 9 years old girl can know whether the Father was going out for drink, I am sure that AK is capable enough to tell the time the Father went out and returned. If that is the case, I doubt very much as to why the Father had to go out and left the children with Rosa during the access period since he is supposed to treasure the access time. AUTONUMOUT I share with the view of Dr Levy that it may be improper for the Mother not to stop AK from the so-called spying. Nevertheless, I do not consider that the Mother's motive of doing so is to alienate AK from the Father. In this kind of highly conflicted relationship between the parents, one can hardly expect that the parent who has care and control would be very eager to promote the bondage between the other parent and the children. For instance, after the DC Decision, the Father then applied to seek a court order

to exclude the Mother from access to the children. Hon Roger VP had the following comments on the Father in CA Judgment: 9. Furthermore, the judge appears to have ignored the obvious indications that the applicant [the Father] was at pains to exclude the respondent [the Mother] from contact with the children. Very importantly, the judge dismissed AK's clear wish to be with her mother, as something that she would get over. The judge seemed to have taken the view that by giving custody, care and control to the father, AK will eventually be forced to change her affections. It is difficult to understand how the judge could say in paragraph 237 of the judgment: I believe that the Father is a person who is more willing to make compromise and facilitate a relationship between the children and the Mother. The applicant [the Father] has not shown any indication of wishing to be conciliatory to the respondent [the Mother] or of trying to include the respondent in the lives of the children. Indeed, after the judgment on 8 June 2010 he then sought a court order to exclude the respondent from access to the children. In paragraph 13 of his affidavit sworn on 8 July 2010 the applicant said: I believe that I need a prolonged period of time with the children, away from the Respondent, to establish a comfortable, stable and trusting home. I believe that Rosa will be acquitted of what I consider to be a false accusation and that, as soon as she is able to have contact again with [AK], we will be able to get on our lives without the Respondent interfering with us. 38. It has to be borne in mind that an affidavit is not made in the heat of cross-examination in a court, but is made in the comparative calm of an office with legal advice. I do not consider it necessary to examine the details of the incident which the applicant considered justified the application to exclude the respondent from contact with the children, suffice it to say, it is by no means clear that the fault lay with the respondent, who had been trying to take AK to the hospital when she had a fever but was physically prevented from doing so by the applicant's mother. (emphasis added)

AUTONUMOUT Concerning the incident of calling of police when picking up the children and use of the word kidnap by the Mother in her emails, I am of the view that it is inappropriate conduct on the part of the Mother, which shall be avoided in the future. In view of the long history of the extremely acrimonious relationship of the parties, the aforesaid conducts of the Mother though improper are expected. The Mother admits that AK calls the Father Debu which means fat man. I agree that it is not polite but I accept the Mother's explanation that she does not encourage it. AUTONUMOUT The Father also complains that the Mother has continually obstructed access and also scheduled activities for AK during his access so the Father and AK cannot enjoy that time together. I consider that one of the way to resolve this problem is that the Father shall seek an Order to restrict the activities for AK during his access unless with the consent of the parties or approval of the court. AUTONUMOUT I do not think that I have to go through all the other incidents particularised by Dr Levy. Taken all of them together, I agree that the Mother did not do anything actively to alienate the relationship between AK and the Father. Rather she simply did nothing to repair the damage between them or to maintain their bondage. I do not consider that it shall be a good reason to vary the Joint Custody Order. In fact, it is quite a common phenomenon in the divorced couple whose relationship is high conflicted and acrimonious. I disagree that the Mother's behaviors have an active and ongoing alienating

effect on AK's relationship with the Father. AUTONUMOUT Even if I order to grant care and control of AK to the Father, I do not think AK will eventually be forced to change her affections as said by Hon Rogers VP earlier. Ms Cruden for the Father submitted that according to Dr Levy's expert opinion if care and control of both children went to the Father and the Mother had access, including staying access, it would not be damaging to AK as long as AK is able to spend a good amount of time with the Mother and continue that relationship. I note that nowhere in the 2011 Report suggests that Dr Levy is fully aware of the earlier application of the Father to exclude the Mother from access to the children.

Accordingly, I do have great reservation with Dr Levy's opinion in this regard.

AUTONUMOUT Dr Levy further opines that the pattern of the Mother's behavior will have a detrimental effect on the father and child bond. She said that the research is very clear that children who do not have strong relationship with both parents following a divorce tend to have a lot more psychological issues as they grow up. On one hand, I agree that it will certainly have some negative effect on AK. On the other hand, it seems to me that Dr Levy fails to tell the Court exactly what these psychological issues are and how detrimental they are. Her opinion in this regard is too general. Indeed, it is understandable that it may be very difficult to answer these queries. AUTONUMOUT One of the 15 recommendations of Dr Levy is that the effects of alienated relationship can be best reversed by additional time with the Father. Therefore, in my view, apart from making application for variation of custody or care and control, the Father can simply ask for more defined access with AK so as to strengthen their relationship. In any event, Dr Levy's opinion is only one of the matters which I have to consider and I am not bound to accept all her opinion. I need to consider all other relevant matters, in particular the reports made by the Social Work Officer.

AUTONUMOUT The Social Work Officer, Ms Chow Hau-wan, has given 5 reports on this family, namely: Social Investigation Report 19th January 2009; Further Social Investigation Report 23rd September 2009; Progress Report 28th September 2010; Social Investigation Report 12th May 2011; Updated Social Investigation Report 14th November 2011 (the Updated SI Report). AUTONUMOUT The main remarks and observations concerning AK made by Ms Chow in the Updated SI Report are set out as follows: .The parenting style, pattern of communication and interaction as well as the quality time with the children are the main factors affecting the parent child's relationship. The difficult parent child relationship or interaction may not be attributed mainly to alienation. Since the parents have high conflicted relationship that have dissatisfaction towards each other. AK used to be taken care of by the mother since birth and she had more topics to share with the mother. It was inevitable for her to side with the mother .The Investigating Officer views that it would be more suitable to keep the present status quo of AK to be under the care and control of the mother, so as to minimize the impact of further changing of her care arrangement. ...As the father has already shared AK's time with the mother on a considerable level for maintaining the father-daughter relationship and AK has been well adjusted to the present access schedule with the father, it would be better to maintain the present access arrangement. Unlike AK who had shown strong preference to stay with the mother, KK may stay at the father's home until next school day in weekdays. AUTONUMOUT Ms Cruden for

the Father submitted that Dr Levy's Report was not available when Ms Chow completed her Report. She knew that Dr Levy would be reporting on alienation. Regardless, she decided to give her lay person opinions on alienation. Despite ignorance of the content of the Report and this significant information in respect of AK, she nevertheless proceeded to give her personal opinion and recommendation that the Mother shall retain care and control of AK. AUTONUMOUT I accept the submission of Ms Cruden for the Father that the role of Ms Chow is to assist the court by informing the court of factors which the court would otherwise not know and as the eyes and ears of the judge outside the courtroom to report back on factors observed. Hence, I shall mainly focus on the investigations and observations made by Ms Chow rather than her recommendations in the Updated SI Report which are for the court's reference only. AUTONUMOUT Ms Chow confirmed AK continued to receive psychological service from Dr Iris Chau on Saturday mornings as arranged by the Father for her emotional and psychological well-being. Dr Iris Chau is AK's psychologist and therapist. I certainly accept that in the best interest of AK, she shall keep on receiving professional service from Dr Chau with a view to repairing the bond with the Father and to monitoring the psychological change of AK, if any. In my judgment, the continuous therapy provided by Dr Chau to AK is helpful and will have positive effect on repairing their relationship. I would further suggest not just AK to receive psychological service from Dr Chau but also both of the Father and the Mother to attend some co-parent counseling from suitable counsellor without further delay for the best interest of the children. AUTONUMOUT I accept the observation of Ms Chow that both the Mother and the Father are capable parents but AK has better attachment to the Mother. Ms Chow also makes a very important point, namely the present status quo of AK under the care and control of the Mother shall be maintained. Ms Chow went on to say that AK used to be taken care of by the Mother since birth and she had more topics to share with the Mother. Hence, she took the view that it was inevitable for AK to side with the Mother. I consider that it is a very logical and sensible observation because AK is all along residing with the Mother except for a short period of time after the DC Decision which ordered the sole custody of AK to the Father. Besides, the Mother is a full time house-wife whereas the Father is busy at work with not much time at home as found by Hon Rogers VP in the CA Judgment. The Father said that he has subsequently changed job and is now often able to leave work at 5 to 5:15pm. I consider that change of job which only occurs recently would not have much significance. AUTONUMOUT Ms Chow also opines that the Father needs a helper to assist him to take care of the children and that the Mother also needs a helper to help her taking care of the children and household chores. Ms Cruden for the Father submitted that the Mother is incapable of maintaining a good working relationship with a helper and has a history of being unable to keep helpers. I consider that such submission has very little weight as it has been discussed in the DC Decision and though she hires a driver, I accept that it is not a must for her to employ a helper. Although nowadays in Hong Kong, it seems hiring a foreign domestic helper is very common, I am of the view that heavy reliance on the helper by the parents may not be in the best interests of the children. AUTONUMOUT In my judgment, the Father is loving parent. However, he is heavily dependent upon the helper Rosa when he is working. Although the Father trusts Rosa very

much and satisfies with her performance, she remains a hired foreign domestic helper who may suddenly resign for whatever reason in the future by giving 1 month notice or even no notice. She cannot substitute for a mother. AUTONUMOUT The Father concedes that although his parents have previously offered assistance and are willing to come back to Hong Kong, the Father cannot afford large enough accommodation to accommodate them all comfortably with separate bedrooms long term due to his financial constraints.

Accordingly, should the Father be granted care and control of the children, they will be looked after by Rosa most of the time. In the best interests of the children, I cannot see how a helper is better than a full-time mother. Furthermore, if I am going to allow very generous access to the Mother every day due to the strong attachment of AK to her and the Mother being a non-working woman, it seems to me that her conflict with Rosa will be unavoidable and likely be increasing. It is obviously not in the best interest of the children if a lot of confrontations between the Mother and Rosa happen in front of the children.

AUTONUMOUT The Father complains that the Mother has not abided by the Joint Custody Order and the other Orders of the Court which she does not agree with and she will continue to disregard these Orders. I accept that the Mother has been in breach of some of these Orders. In my view, instead of applying for variation of custody, care and control of the children, the Father shall take out committal proceedings against the Mother for contempt of Court. The Mother will learn the serious consequence of non-compliance with the Court Orders if the Court is satisfied that she is in willful breach. AUTONUMOUT Regarding parenting coordinator, the parties have tried one called Ms Becky Tang. But the Father decided not to continue to use her services and would prefer an alternative coordinator. The letter of 2nd November 2010 from HWG states that the Father will only agree to use the services of a parent coordinator if it is understood by all concerned that those sessions are entirely confidential. Ms Cruden for the Father submitted that he in the meantime proposed that the parties shall communicate directly and if necessary through their solicitors.

AUTONUMOUT I disagree with the present proposal of the Father. It is totally unworkable if the parties are required to communicate directly due to their highly emotional and conflicted relationship. If they shall communicate through their solicitors for each and every children issue no matter how trivial it may be, it will be not only extremely expensive but also very inefficient and ineffective due to the time taken by the solicitors from their own clients for instruction. I entirely accept the early suggestion of the Father for an alternative coordinator with full understanding of confidentiality. I agree that a new parenting coordinator could not be a panacea as submitted by Ms Cruden but certainly, it is a sensible and reasonable course to alleviate their highly conflicted relationship. Such a parenting coordinator shall in ideal case have expertise in providing service of co-parent counselling to the parties. In the long term, I believe that the parties will be benefited and somehow they will learn in the future how to co-operate in relation to the children issues.

AUTONUMOUT I consider that the Court shall not just grant a joint custody order and hope that the parties will then know how to co-operate themselves. The Court may have to direct the parties to attend certain minimum hours of co-parenting within a specified period of time provided by a qualified counsellor. I understand that there will be a forthcoming new

Practice Direction concerning Children's Dispute Resolution, in which the Court may give such a direction that the parties do attend counseling, a parenting course and/or mediation and that a parent coordinator be appointed. AUTONUMOUT In the meantime before the implementation of this new Practice Direction, I invite the parties to give the Court mutual undertaking to attend co-parenting course and counseling service provided by the Social Welfare Department or any qualified counsellor they consider suitable. AUTONUMOUT To sum up, I am not satisfied that the incidents particularised by Dr Levy are sufficiently to prove alienation of AK from the Father by the Mother. Even if there are some improper behaviours of the Mother can be regarded as alienation, I still consider that in the best interests of AK, her care and control shall be granted to the Mother. Granting of AK's care and control to the Father may not necessarily repair their relationship or remedy the issue of AK's rejecting the Father. In my view, there are some other constructive ways to tackle the said problem. For the 15 recommendations made by Dr Levy, I entirely accept that they are all very helpful for the purpose of repairing the damage between the Father and AK and maintaining their bondage. I hope that with the benefit of the proper legal advice by her solicitors and Counsel, the Mother would be more co-operative so that they can be implemented without delay. If necessary, this Court will consider making orders for implementation of the said recommendations. KK AUTONUMOUT The brief present condition and observations of KK can found in following paragraphs of the Updated SI Report, in which Ms. Chow said: s needs are beyond the parental care and company. He needs special training, personal and medical care. The mother, the father and his stable helper are able to provide suitable care for KK. The parents have given adequate attention to the health condition of KK and arranged him to receive medical consultation appropriately despite the father does not agree on the mother's pace and handling of KK's medical condition. The parents are also very concerned about the training needs of KK and they have put him in the APS for over two years. Yet, the custody disputes have hindered the progress of KK as revealed from the conditions faced by the APS. It is noted that the APS has spent much time to be familiar with KK's health, his medical condition, the parents care arrangement and the parental cooperation matters. Unless the new school can provide the training package which is more suitable for KK and carry out the important training needed by KK for the time being, i.e. toilet training, immediately after his admission, it would be desirable for KK to be trained by the same training provider in a stable and suitable environments continuously. If the parents are unable to work together and draw strengths of each other to work for the best interest of KK, it would be better to have one custodial parent to be responsible for making the major decision on KK's medical, education or training matters so as to minimize future arguments in working with the school and to speed up the training arrangement. The father has advantages on the matter as he has timely response and better communication with the medical and training professionals and personnel. It would be an ideal arrangement for AK and KK to be under the care of the same parent at one time for the maintenance of sibling relationship and their social development. However, it is noted that the developmental distance between AK and KK became great when AK grew up. AK and KK need different care, training and parenting. There are signs that AK has

voluntarily tried to take up the carer role when she has staying access with the father. It poses pressure on her and is not desirable for her age. As such, the custody and access of AK and KK can be considered separately. ... 38 KK's access will depend on the decision of his coming training arrangement. The present access arrangement can be continued pending particular training for KK. Unlike AK who had shown strong preference to stay with the mother, KK may stay at the father's home until next school day in weekdays. AUTONUMOUT Ms Chow recommends split care and control of the children, namely care and control of AK to the Mother and that of KK to the Father. However, both the Father and the Mother oppose such recommendation. In my view, Ms. Chow should have realized that she had discharged her duty by providing all the information available to her to assist the Court but she should have refrained from making any recommendation where she clearly should not have done. Before she considers such recommendation, she shall at least seek the views from both the Father and the Mother or even AK although not necessary from KK. She obviously fails to do so. Her recommendation must, in those circumstances, be highly suspect. AUTONUMOUT Ms Chow realised that it would be an ideal arrangement for AK and KK to be under the care of the same parent at one time for the maintenance of sibling relationship and their social development. However, she said that AK has not voluntarily tried to take up the carer role for KK but just the Mother has told her to do so. Ms Chow reports that this poses pressure on AK and is not desirable for her age. Therefore Ms Chow says the custody and access of AK and KK can be considered separately. I disagree that is a basis to split siblings. In my judgment, all children have different development due to age, personality and abilities and each child benefits from those differences in the other. Sometimes, a mature elder sister is willing to assist the parents to look after the younger brother. More importantly, Ms Chow simply ignores the wishes of all the parties. AUTONUMOUT Dr Levy is of the view that siblings shall be kept together. Her opinion is that: the message that it would send to AK if her sibling went to dad and she had to stay with mum, given that the relationship between the father and child is already somewhat strained, I worry that that would just solidify it further because she would feel perhaps some issue of abandonment or rejection. Why would why in her little 9-year-old mind, it would be very difficult to understand perhaps that it was not dad's decision, but also that why would my brother go and not me and why wasn't it the other way around? All of these things are very difficult for a child to grasp. AUTONUMOUT Dr Levy explained that: the message it would send for her[AK] to be separated from KK, if KK was the one with dad, if it was reversed and KK was with mum and AK was with dad, I wouldn't be so worried about the impact because it's the relationship with dad that's strained, not the relationship with mum. AUTONUMOUT I accept the opinion of Dr Levy in this regard. Accordingly, I consider that split care and control is not appropriate in the circumstances. AUTONUMOUT Concerning KK's medical issues, the Father takes the view that the Mother was discourteous to and unable to properly deal with the medical professionals and acted against KK's best interests. For instance, the Mother had failed to provide KK's school with his valium suppository following his seizure and delayed to take KK to see a doctor when he had vomited for a long period and dehydrated. AUTONUMOUT I accept that the Mother has still a lot of room to improve herself with

regards to taking care of KK. Nonetheless, I am of the view that she is a loving and devoted mother though not perfect. AUTONUMOUT As regards the parties different opinions to the medical treatment of KK, Ms Cruden for the Father rightly pointed out that this application is not to determine which doctor KK should be consulting and what medication should be prescribed or therapy should be undertaken. Nor is it to determine which school is best for KK. If the parties were not agreeable to KK's treatment, medication, therapy or education, any of them may make an application to the Court for determination. AUTONUMOUT The Father further complains about the Mother's breach of the Order dated 23rd February 2011 for KK to receive ABA therapy after school at APS on Monday and Wednesday. KK could not receive the ABA because the Mother refused to consent. As mentioned above, the Father shall consider taking out committal proceedings against her for contempt of court. Changing custody may not be the best course to deal with the problem. AUTONUMOUT The Father says that the Mother's unilateral unreasonable decision to withdraw KK from Autism Partnership School () without the Father's consent. The Mother says she made it clear to Ms. Man, Principal of APS and the Father that she was exploring other options and minded to select Hong Kong Junior School (HKJS). KK was not able to start HKJS immediately and may only have a secured place to start attending by March 2012. AUTONUMOUT Although I agree with the Father that the Mother should keep KK's place at APS until she and the Father agreed and secured an alternative school for KK to transfer to, I can see some miscommunication with Ms. Man, Principal of APS from the email correspondence between them, which leads to this undesirable result. Welfare checklist AUTONUMOUT Now, I will go through the welfare checklist which I have mentioned earlier. It is a very helpful reference to check if particular matters have been considered. It is also said in Rayden that while there is a duty to have regard to the checklist, judges are entitled to have it assumed in their favour that they will do so, without subjecting them to the laborious necessity of expressly relating their findings in every case to its specific provisions one by one, and that the factors in the checklist are not exhaustive of the matters to which the court may have regard. The ascertainable wishes and feelings of the child AUTONUMOUT The Court has regard to the ascertainable wishes and feelings of the child in light of her age and understanding. How far the wishes and feelings of the child should be a determinative factor varies depending on the circumstance of the particular case. I have to assess whether the child is of an age and understanding sufficient for their opinions and wishes to be given any weight at all. Although AK is not a teenager, I take the view that she is able to understand sufficient her wish to be with the Mother. As KK is an autistic boy, he is unable to express his wish. Physical, emotional and educational needs AUTONUMOUT The Court must have regard to the physical, emotional and educational needs of the child. In my view, both parties are capable parents and able to look after these needs of the children. For the emotional needs of the children, I consider AK has such need to reside with KK. Unless there are strong features indicating a contrary arrangement, siblings should wherever possible, be brought up together. Where there is an available and satisfactory home together with one parent, the Court should endeavour to allow the children to be together in that primary home. I consider the fact that the Mother may unduly request AK to take up the carer role when they

have staying access with the Father shall not be a reason to separate the children in this case. AUTONUMOUT That is the reason why I have already determined split care and control inappropriate earlier. Likely effect on the child of any change in his circumstances AUTONUMOUT Unless the present status quo is very unsatisfactory, the Court is usually reluctant to change it. I do not think that the present status quo is not satisfactory. Especially for AK, if her care and control are changed from the Mother to the Father, there must be some adverse effect on AK due to her strong attachment to the Mother. Age, sex, background and any characteristics of the child which the court considers relevant AUTONUMOUT While I accept that there is no presumption or principle that a mother should have the care of young children, the advantage to a very young child of being with his mother is an important consideration which must be taken into account by the Court. AUTONUMOUT The age, sex and characteristics of AK and KK should be taken into account. KK's delayed development and vulnerability by reason of his autism are in fact a consideration too. As they are all so young, I am of the view that advantage of a mother over a father should prevail, especially in this case where the Father heavily relies on the helper Rosa. Upbringing by the parents AUTONUMOUT I am of the view that as both parties have very high educational background, they possess the necessary skills and ability to discipline and guide the children. Racial origin and cultural and linguistic background AUTONUMOUT The racial origin and cultural and linguistic background of the child are relevant considerations to which weight should be given in assessing the welfare of the child. AUTONUMOUT The Father complains that the Mother has promoted AK's Japanese linguistic background at the expense of her English (American) and Chinese linguistic background. In addition to receiving a Japanese education in the Japanese language, the Mother makes AK go to the Japanese EPIS after school and on Saturdays rather than English and Chinese lessons. The Father considers that the Mother has exhibited racism and cultural intolerance. With respect, I disagree. In my view, it is quite natural for a Japanese mother to do so especially when AK is strongly attaching to the Mother. Any harm the child has suffered or is at risk of suffering AUTONUMOUT The Court must have regard to any harm the child has suffered or is at risk of suffering. I do not think that there is sufficient evidence to establish any harm and risk of harm which the children have and will continue to suffer with the Mother. How capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs AUTONUMOUT I am of the view that both parties are undoubtedly capable of meeting all of both children's needs. Although the Mother cannot keep a domestic helper, she has employed a driver addressing the transportation issue. The Father on the other hand depends too much on the helper Rosa in respect of the daily care of the children when he is at work. The helper is not a substitute for a parent and cannot meet all of the children's needs. AUTONUMOUT Ms Cruden for the Father submitted that the evidence shows that a joint custody order in respect of KK is unworkable since he is extremely vulnerable and there are many third parties who are critical in providing for his medical, educational and treatment needs. The doctors, teachers and therapists need fast and clear instructions so that they can meet KK's needs. In my judgment, in case there is urgent medical issue to be decided upon KK, the parties shall first

have a very serious discussion with all relevant experts or seek second opinion, if necessary. Failing which, the Father may make urgent application to the Court for determination. I think that joint custody order of the children is still workable which is in their best interests and the adverse consequences do not far outweigh the benefits that it may bring.

CONCLUSION

AUTONUMOUT Having carefully considered all the relevant circumstances, I see no reason to vary the Joint Custody Order. Given the nature of this dispute, I make an order nisi that there should be no order as to costs . To sum up, I make an order as follows: Paragraphs 1 and 2 of the Summons dated 19th May 2011 and the Summons dated 28th November 2011 be dismissed; Order nisi that no order as to costs in respect of these Summonses which shall become absolute unless any of the parties apply to vary the same within 14 days. AUTONUMOUT Last but not least, I would like to take this opportunity to thank Counsel of both parties for their helpful submissions and assistance in this case. (S. Lo) Deputy District Judge Ms Liza Jane Cruden instructed by Messrs Hampton, Winter & Glynn for the Applicant Mr Neal Clough instructed by Messrs Massie & Clement for the Respondent See CACV193/2010, Date of Judgment: 22 October 2010 FCMP151/2008 Date of Decision: 8th June 2010 supra

[1968] 1 WLR 1221 at 1228-1229

[1979] 3 WLR 101

[1997] 1 FLR 285 18th edition, Chap 36.14, 36/11 Naziya Aslam v Rafaqat Ali CACV 114/2002, 19 March 2004, 25-32 of the Judgment by Hon Rogers VP Rayden and Jackson on Divorce and Family Matters, 18th edition, Chap 36.17 see London Borough of Suttons v Davis (Costs) No. 2 [1994] 2 FLR 569 PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J wqmw gd<Pm |x|sj hvtf hvtf vogcg h<Pm h<Pm h<Pm |x|s gdHA hb0A hb0A hb0A gdq| gdy& h"A4 hZ-U gd: gdq| hHP hHP {tlhlc h61' gdU9n h61' hSh hpuq hU9n hU9n hU9n h8od h8od gd7W gdd. gd}>` gdd. hSh h}>` h}>` h}>` hSh h}>` h}>` h}>` h}>` hSh hSh h _ h}>` h8od h]FR hjG' hjG' h]FR gd]X gd _ gdBI gdBI gd;X gdI+Y h]FR h _ gdHm gdHm ~tkakWkWkWkW gdpuq h _ h _ huR2 huR2 h _ gd{7 gd<AC gd<AC huR2 huR2 h _ gd.) gd.) gd.) gd>d gd>d hNP= h\$@U xtxo h\$@U gdZ' [h\$@U hZ' [hZ' [hK*o hK*o hK*o hZ' [hZ' [gddi. gddi. gdm{ gdP0 gdir hX0, hF.B h8od hF.B gd3O h7WA hK*o h7WA h03* gd3O h?xl gd.o` gd,[S h?xl h?xl xtxokaYtxokP h?xl hNO^ h.o` h.o` h.o` hg/- hb0A hb0A h%;0 h%;0 h%;0 hg/- h7@` gd] h7@` h7@` h7@` gd` Wm gdv\_ gd` Wm gd` Wm gd` Wm gd] f[S[S[hb0A hb0A h_3G h_3G h_3G h_3G h_3G h_3G &`#\$ K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V gd` Wm :pCA [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I' n 3Vq%'#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K&=al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://

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