

HONG KONG / JUDGMENT

S v. Z

COURT

Family Court

DECIDED

10 September 2007

CASE / FILE NUMBER

FCMC14535/2005

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bjbj FCMC 14535 / 2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 14535 OF 2005

BETWEEN S Petitioner and Z Respondent

Coram : Her Honour Judge Sharon D. Melloy in Chambers (Not Open to Public) Dates of Hearing :
11, 12, 13, 16 & 17 July 2007 Written closing arguments submitted : 3 August 2007 Oral argument
on the law: 17 August 2007 Date of Judgment : 10 September 2007

J U D G M E N T

Introduction

1. This application concerns a dispute over the arrangements for the two children of the family, a boy born on the 22nd February 1994, who is therefore now 13 years of age, whom I will call E and his brother a boy born on the 6th December 1995 who is now 11 years of age, whom I will call A. The mother seeks (and for convenience sake I will refer to the parties as father and mother in this judgment) either no order at all, or in the alternative joint custody and joint care and control, whereas the father seeks sole custody with defined access to the mother. During the hearing the parties agreed to share care and control.

Background

2. The parties met in Mainland China in October 1991 and married on the 4th January 1993. The father is American and the mother is from mainland China. The mother is in her early 40 s and is a pianist. Shortly after their marriage the parties returned to the father s home so that he could attend Law School. The father, who is now in his late 30 s, is an American lawyer with a U.S law firm in Hong Kong.
3. As I have set out above, shortly after the marriage the first child was born and 20 months after that the second followed. In November 2000 the parties separated for the first time while they were living in New York. They reconciled in January 2001. In 2002 the husband came to Hong Kong to take up a position with an American law firm here. The mother and the children followed. In March 2003, following the outbreak of SARS, the mother and the children went to California and stayed with the father s family. They returned in August / September 2003. In December 2003 the father moved out of the matrimonial home and the separation became permanent. In December 2005 he petitioned for divorce based on two years separation and on the 29th March 2006 a decree nisi was pronounced. In the divorce petition the father sought an order for joint custody with care and control to the mother and defined access to himself. Background to the present application
4. The father has filed a total of fifteen affidavits and the mother nine. The father made five applications for committal for non-compliance of orders.
5. The father repeatedly complained of harassing behaviour on behalf of the mother and as early on in the proceedings as March issued an inter partes non molestation summons for injunctive relief. The following applications / events are of particular note and provide a backdrop to the present proceedings.
 - 1) 20th May 2006 a without prejudice meeting was held at the husband s solicitors office. A consent summons was agreed and signed. This includes an agreement that the husband would have care and control of the boys. It was not filed. The wife says that she believed that this was a pre requisite to reconciliation.
 - 2) 13th June 2006 father filed an affidavit in support of his application for a non-molestation injunction. The father complains of
 - a) being denied access or of being offered access to the boys which was conditional
 - b) receiving harassing phone calls made sometimes more than 20 times a day to either his office or to his mobile phone
 - c) harassing / stalking behaviour by the mother at his office or at his home
 - d) the mother breaking into his office and stealing his passport
 - e) repeated threats by the mother that she would kill the father and / or kill herself

- f) a pattern of behaviour whereby the mother would behave badly and then apologise for her actions
- g) refusal by the mother to go to counselling
- h) a history of violent behaviour evidenced by a temporary order of protection dated the 24th November 2000 against the mother and a letter dated the 26th December 2000 from the NYS Office of Children and Family Services where the mother is the subject of a report of suspected child abuse / maltreatment. 16th June 2006 - the court made an order in which the wife undertakes not to harass the father or to attend his work place or home. July/August 2006 the father goes to Palo Alto with the boys and his fianc
- e. The mother also goes independently. The mother s father dies. The fianc e gives birth to a baby girl who is two months premature. The wife is allegedly robbed. The father says the wife s harassing behaviour continues.
- 5) 15th August 2006 father applies to commit the mother for a fourth time. In his affidavit in support the father complains of the following :
 - a) being denied access
 - b) of the mother refusing to allow him to see the children unless he agreed that they could attend the C School
 - c) of the children being made to phone the father on the mother s behalf
 - d) of a constant stream of harassing phone calls.
- 6) 10th September 2006 The Incident there was incident involving both parties and the boys, during which the father states that the wife was completely out of control, that she physically assaulted him, threatened to kill him and further that the boys suffered minor injuries during the ensuing altercation. This led to the matter being reported to the police and the boys and the father making police statements. The police were allegedly of the view that the children were not safe to live with the mother. The mother was subsequently bound over. From that time on the boys began living with the father.
- 7) Further difficulties followed, with similar complaints being levelled against the wife. Consequently on the 19th September 2006 the father was granted interim custody and care and control of the boys with supervised access to the mother.
- 8) On the 28th September 2006 the mother files her first affidavit. She puts her case for the first time, which includes the following :
 - a) she has not acted irrationally or unreasonably. She says that she has been provoked by the father
 - b) she sought a reconciliation, even after the divorce proceedings were issued, for the sake of the children

- c) she had not known about the father s fianc e or about his baby daughter
- d) she went to the United States to try to make up with the father and to see the boys, because she missed them
- e) She did not fully understand the effect of the order regarding supervised access
- f) She gives her version of events leading up to the incident on the 10th September 2006
- g) She acknowledges the difficulties over agreeing to schools for the boys
- h) She denies many of the father s allegations
- 9) On the 19th October 2006, the mother files an affirmation in which she continues to put her case. She
 - a) acknowledges that she has not behaved in the most reasonable and rational manner and she says that she deeply regrets this
 - b) accepts responsibility for her actions and points to her immense stress that she has been under and distress that she has been suffering from
 - c) says there will be no repetition of any of the conduct that has caused concern in the past on my part
 - d) Despite the divorce proceedings she says that she had still been deeply in love with the father e) I accept that my behaviour caused people to believe that I must be either mad or wicked. I am neither, I was just very distressed.
 - f) She points to the fact that she has been receiving support from members of the congregation at the Church g) I am prepared to seek psychological help to ensure that I have all the coping mechanisms available to ensure that I am not thrown into irrational behaviour by the conduct of the petitioner
 - h) she says that she is back on track
- 10) Subsequently the Father applies for the children to be separately represented by a guardian ad litem. The application is granted. On the 16th May 2007, I interview the boys in Chambers, in the presence of their legal representatives. It is then in these circumstances that the matter comes before the court for adjudication. The law in Hong Kong
- 6. It is necessary before turning to the evidence to look at the law governing applications concerning children in Hong Kong.
- 7. Section 19 Matrimonial Proceedings and Property Ordinance, Cap. 192 states that
 - (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18- (Amended 69 of 1997 s. 28)

- (a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;
- 8. The general principles governing such applications are set out in s. 3 of the Guardianship of Minors Ordinance, Cap. 13, which says that : GENERAL PRINCIPLES
 - (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-
- (a) in any proceedings before any court (whether or not a court as defined in section 2) the court -
 - (i) shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to - (A) the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing;
- 9. For the avoidance of doubt s. 48 C Matrimonial Causes Ordinance, Cap. 179 adds that section 3 of the Guardianship of Minors Ordinance (Cap 13) (which provides that the welfare of the minor shall be the first and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192). What is meant by the terms custody, care and control and access ?
- 10. A great deal was said at the beginning of the trial about the terminology still used in our legislation and in particular what is actually meant by the terms custody, care and control and access. Mr. Egerton, Counsel for the boys, helpfully referred me to the extracts from the Law Reform Commission s last report dealing with issues pertaining to children, entitled Child Custody and Access . This was published on the 7th March 2005. There was a great deal of enthusiasm within the profession at the time about potential reforms to our legislative framework. Unfortunately nothing has happened since.
- 11. The report however, is a useful tool, as it sets out the present state of the law on children in Hong Kong and makes recommendations for change. On custody it says : 2.16 Custody comprises the bundle of rights that parents have over their children. This includes the right to care and control and the right to make all important decisions affecting the child, such as decisions regarding his education, religion and medical treatment .
- 12. In other words the term custody means making the important decisions about a child s life. If a parent has sole custody the implication is that ultimately the decision-making power vests in that parent. The difficulty is that the other non-custodial parent may feel excluded. This point was dealt with in the case of Dipper v Dipper [1980] 2 ALL ER 722, which was referred to by Mr. Egerton, in his opening address : It is wrong to suggest that the parent with custody has the right to control the children s education, religion or other major matter

in their lives. Neither parent has any pre-emptive right over the other, each being entitled to be consulted and disagreements between them must be resolved by the court .

13. In other words the non-custodial parent still has the right to be consulted on all matters affecting the children. If the non-custodial parent feels strongly about a particular issue then the appropriate application may be made to the court in order to clarify matters. Ultimately it is for the court to decide. But it would be true to say, in the words of E and A that whoever has custody has the go . Ms Irving pointed out in her closing, and I would agree with her however, that returning to court on a frequent basis is never the answer.
14. Joint custody means that the parents should be able to make the major decisions concerning their children s life together. Although there have been cases where joint custody has been ordered where the parties find it difficult or indeed impossible to co-operate with each other, the general rule of thumb is that joint custody should only be ordered where the parents are able to work together effectively. The report describes it thus 2.32 Joint custody is where the court grants custody to both parents, although physical care and control is usually granted to only one of them. Liu explains the rationale behind the joint custody order: that instead of one party being given the right to decide important matters affecting the upbringing of the child, both parties are given that right. Such order symbolizes divorced or separated parents playing a joint role in the upbringing of the child and neither is excluded .
15. Sometimes orders for joint custody are aspirational. They are made in the hope that the parties will be able to work towards co-operating with each other in the future.
16. The term care and control is not referred to anywhere in our legislation. It is generally said to mean the day-to-day looking after of the child i.e. getting the child up for school, making sure that he is fed and watered, that he does his homework and that he has an appropriate structure to his day.
17. Access is the right of the child to see the non-custodial parent, or in the case of joint custody, the right of the child to see the parent without care and control. The normal order is for reasonable access and the details are left for the parents to work out between them. Alternatively access can be defined. 2.21 Access is the right to have contact with the child, such as through letters, e-mails, telephone calls, visiting the child, taking him out or having him to stay from time to time .
18. It is open to the court to ask for arrangements to be supervised by the social welfare department. This can be very intrusive, for example where access takes place within the confines of a Social Welfare Department office. Or it can simply be that the social welfare office provides back up from time to time and intervenes as appropriate. The court may ask for a progress report. This means that the court is kept in the picture regarding any particular arrangements and can ascertain whether they are working effectively, with a view to bringing the parties back if necessary.

19. Before I leave the issue of terminology I should perhaps also address the no order principle. The possibility of no order has been raised by counsel for the mother, Ms Yip, who raised the possibility of no order in her closing argument. There is under the English Children Act 1989, a no order principle. This is however based on the premise, also set out under the act, that both parties on a divorce retain joint parental responsibility. This is not the case in Hong Kong. Consequently in the vast majority of cases the courts in England and Wales will not intervene in the parties own arrangements in relation to their children. It is left to them to continue to parent and to make decisions for their children as they deem appropriate post divorce. This includes access arrangements. The court only intervenes if there is a problem. The remedies include contact (or what we might term access) and residence (i.e. care and control).
20. The Law Reform Commission has referred to the no order principle in recommendation 30 of its report where it said as follows : We recommend that the option of no order should be available where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child .
21. This provision does not exist in Hong Kong legislation at present. Ms Yip has suggested that there is no jurisdictional basis for saying that the court cannot make such an order.
22. There are, it is true, certain circumstances where the court is unable to make an order in relation to children. For example where the petitioner does not know where the child of the family is and there has been no contact for a number of years. In those circumstances the court makes no order and the s. 18 declaration reads as follows : I am satisfied that it is impractical for the petitioner appearing before the court to make any arrangements for the child / children of the family and I accordingly make a declaration in accordance with section 18 of Cap 192 to this effect .
23. Otherwise, it seems to me that the court is rightly or wrongly duty bound to make an order. The issues
24. The present issues before the court are :
 - 1) Should the court make any order at all ?
 - 2) In the event that an order is made, should custody vest in the sole name of the father, or should the parties have joint custody of the boys ?
 - 3) Should care and control vest in the father or should the parties have joint care and control or should care and control be shared depending on who has the care of the boys at any particular time ?
 - 4) Once the above has been decided, should there be an order for access or for shared care and control ? If so how should those arrangements be defined ?

- 5) Once determined, should any conditions be imposed on the above arrangements ? The father s case
25. The father s case has changed as circumstances have changed, and I do not in any way criticize him for that. Initially it is clear that the father assumed that the boys would stay with the mother. He wanted frequent access. He says that he did not believe that he had a strong case for custody and although, even at the time of the final separation, he had concerns about the mother s ability to parent and her allegedly violent outbursts, he felt comfortable as long as he was able to see the boys often to ensure that all was well. In addition he had a good relationship with the maid who he said would contact him in the event of any difficulties.
26. As time progressed the father s position has altered. Following the events of the 10th September 2006, the father now asks that the new status quo be continued. The father s case is that he seeks this, not because of any ill intent on his part, but because he simply does not believe that it is in the boys best interests to live with their mother permanently at this time. He also believes that it is imperative that decisions are made concerning the boys future and that those decisions are made appropriately and in a timely manner. The issue of schooling being a case in point and one that the parties have been unable to agree until very recently. He accepts that if he is granted sole custody that he will have a duty to consult the mother. He says that he hopes that in the future they will be able to parent jointly. He also hopes that the boys will be able to go between the two households frequently. But, he says that unfortunately that time is not now. The father says joint custody is simply not feasible as the parties are unable to communicate at any level. He has tried, but it has not worked. He says that the present situation has been shown to work and to work well and that in the circumstances of this case that it would be dangerous to upset this arrangement. He also points out that as the father of two adolescent boys that he will be able to guide them more appropriately through puberty than the mother. He expects that E will start going out in the evening and will possibly start dating soon. He is fearful of being marginalized, as he has been in the past, if the mother resumes a primary care taking role.
27. The father accepts that the mother should spend time with the boys, but wants to ensure that that is done in a safe environment. He wants the present situation to continue, whereby the boys see their mother on Wednesday afternoons / evenings from 5:00 pm to 9:00. At present they see their mother either from Saturday evening at 6:00 pm overnight to 5:30 pm on Sunday for the 1st week of every month and from Saturday evening at 6:00 pm overnight to 9:30 pm on Sunday for the 3rd week of every month. This is alternated with all day access on Sundays for the remaining weekends, from 10:30 am to 5:30 pm.

28. During the trial the father suggested that the weekend access be extended to include Friday s, so that the boys go to their mother s on alternate weekends from Friday at 5:00 pm to Sundays at 5:30 pm. In so far as the school holidays are concerned he asks that the holidays be split 50 : 50. The suggestion is that the boys spend every Christmas and New Year with him and every Chinese New Year with the mother. He asks that all other holidays including the Easter and summer breaks be split 50 : 50.
29. He was also keen that there should be some finality and opposed the suggestion that there might be a progress report and the involvement of the social welfare department going forward. The mother s case
30. During the trial the mother framed her case as being a request for joint custody and joint care and control. In counsel s closing arguments it was further submitted that there might simply be no order at all. Ms Yip said In view of the fact that the parties have agreed to shared care and control which in practical terms means whoever has the physical presence of the children with him / her shall decide for their daily routine matters, I venture to suggest that there is no real need for any order on custody
31. In essence the mother s case is that she was a full time mother and housewife up until September 2006 and that she should now be allowed to resume the role of the boy s primary care giver. She says that she has been the primary care giver of the boys throughout their lives. In the words of Ms Yip s written closing argument she says : It is my respectful submission that the most important factor which should weigh with the court s decision in this case is the indisputable fact that the Mother has established herself to be a satisfactory full-time carer of the children through 12 years of devotion to the job .
32. The mother says that it is obvious that she should resume this role, as the father s work commitments mean that he is simply unable to fulfil the role of a full time parent. She as a natural parent, has an advantage over either a domestic helper or, in this case the father s fianc
- e. Ms Yip also urged the court to start from the point of equal division of the boy s time between the parents, although it is interesting to note that the mother s proposals did not suggest an equal division. The mother says that the best arrangement is as follows : Monday to Saturday evening the boys to live with her Wednesday evening boys to have contact with their father from 5 9 pm Weekend access boys to have contact with their Father from 6 pm on Saturday to Sunday at 10 : 30 am when they are to attend Church with the mother. The father to have further contact from 2 pm on Sunday afternoon to Sunday evening.
33. In so far as holidays are concerned the mother seems to accept that the holidays should be split, although she is not willing to accept that the boys should spend every Christmas with the father. She is willing however, to alternate the Christmas holidays.

34. Referring to the events leading up to the order of September 2006 Ms Yip that the mother has insight of her wrongdoings ; she sought help and now has a support system in place. Ms Yip said that I should not ignore history, nor should I exaggerate the mother s short comings and There should be no doubt that the Mother is back on track now.
35. Initially the mother had supervised access to the boys, which then graduated to unsupervised access, until by the time of the hearing she had unsupervised staying access over the weekends and during the boys school holidays. The evidence
36. I must now turn to consider the issues, the law and the parties evidence as set out in the parties affirmations and as given orally during the hearing. For the avoidance of doubt, in so far as the matters set out in this judgment differ from the evidence of the father or mother, or from one of the other witnesses, that is because I have preferred the evidence of the other party or because I do not find the evidence given credible, or because I consider that the documents produced confirmed my findings of fact. In addition I have had the opportunity to observe the demeanor of the parties and the other deponents while they gave evidence in court. I heard evidence from the father and the mother, Ms T the social welfare officer, Dr L and Mrs K. Ms B filed an affidavit on behalf of the husband, but was not available for the hearing. The Character and Personality of the Parties The Mother
- a) The mother s behaviour prior to the commencement of the proceedings
38. The father maintains that the wife was at times violent during the marriage and that she had poor anger management skills. He identified an incident in November 2000 in support of this contention, where he obtained a restraining order following an incident when he initially left the marriage. Subsequently the mother was reported to the NY Child and Family Services by A s Kindergarten for alleged child abuse. The father exhibited copies of letters to that effect. When challenged on this in the witness box the mother said that she did not remember anything about the restraining order. In relation to the allegation of abuse she denied ever seeing the letter addressed to her and said A Social Welfare Officer came to my place. I do not remember that it was in relation to A. The woman came in, looked around the house, they said it was very safe and very clean .
39. I did not find the mother s evidence believable in this respect. I accept the father s evidence that the mother is at best volatile and has difficulties controlling her emotions.
- b) The mother s behaviour during the course of these proceedings
40. The parties case in relation to the mother s inappropriate behaviour, once the divorce petition was issued has been summarized above. The father has identified repeated examples of harassment, including repeated phone calls to his office and on his mobile, verbally abusive calls and texts, death threats, and stalking type behaviour. The mother s case is that this extreme behaviour was triggered by the outstanding discovery that the father had fathered a daughter , that she could not come to terms with this and hence her irrational behaviour. I am asked to put this behaviour into perspective . The mother said that

she found out about the father's new relationship and his baby daughter in July or August 2006. It is clear however, that the wife's inappropriate behaviour did not start then. It started even before the divorce petition was issued and became worse as time progressed culminating in the incident of September 2006. When asked during cross examination if she thought she was behaving rationally before August 2006, she said . When reference was made to the summons for a non-molestation order as early as the 20th March 2006, the mother responded with he [the father] had so many traps . This was to be a constant theme, namely that the father had trapped her . That it was his fault. At best the mother's answers were confused. For the avoidance of doubt I do not accept her explanations. Her behaviour was not simply triggered by the realisation that the father had a girlfriend, although it could be said to have become worse after the discovery. The mother's behaviour was reprehensible before she found out and continued in the same vein, although spiralling still further out of control until the police intervened in September 2006.

c) The Consent Summons 20th May 2006

41. The mother's evidence in relation to the consent summons is equally hard to follow. In it the parties agreed that the father would buy the mother a property in Shanghai. They agreed joint custody of the boys with care and control to the father and generous access to the mother. The mother's assertion that this was a pre requisite to reconciliation is simply beyond belief. Equally her assertion during her oral testimony that the father had tricked her has no foundation in fact. Following the signing of the document the mother broke into the father's office and stole his passport. When it was put to the mother that at that time she had not known about the father's new relationship, she said that she had wanted to save her marriage for the children and that she had just wanted to speak to him. She was unable to offer any other explanation.
42. It was put to the husband that he had behaved uncharacteristically in signing the consent summons and that there was no guarantee at that time that he would have been able to pay for the down payment of HK\$1.5 million for the Shanghai apartment. When Ms Yip tried to draw a parallel between that and the mother's behaviour, he said that it was not unusual for the mother to have dramatic changes over short periods of time. I accept the husband's evidence in this respect.

d) Undertaking

43. On the 29th May the mother entered into a non-molestation undertaking. Notwithstanding that in July 2006, she travelled to California at the same time as the father. He had taken the boys to visit his family in California. The mother says on the one hand that she went to visit friends and on the other that she was trying to save her marriage. In her affidavit she says that she went because she missed the boys. The father's evidence is that she made harassing phone calls to both his parents and friends home. The mother said that she called him because her father was ill. She did not accept that she harassed him. Her father died on 4 July. She later turned up at the family home after she was allegedly robbed. Again the

mother's evidence is contradictory and hard to determine. During the same trip the father's fiancée gave birth to a baby girl prematurely. It is safe to say that emotions must have been running high on both sides during this time.

- e) The Incident 10th September 2006
44. Likewise the mother was unable to provide any real explanation for the incident on the 10th September 2006, or to events leading up to it. She denied the father's version of events, which is that because he would not agree to the boys going to the C school she refused to pick the boys up from school and sent them to an Academy in dirty and torn school uniform. Problems over access followed and on the 9th September the mother struck the husband whilst waiting for him outside his home with the boys. A report was made to the Police. The boys stayed with the father overnight. He returned them to the mother the next day. In his 7th affidavit he says, Shortly after the children were returned to the Respondent, she again attended my residence with the children. The Respondent was screaming, pounding on the door of my apartment building, cursing myself, my fiancée and our baby. The Respondent even physically and orally assaulted and abused the children and said that she no longer wanted them .
45. The mother denied everything. She also denied the boy's version of events as set out in the police statements. She denied pushing and scratching A, who on this occasion called the Police himself. In court she said that she had fallen into the father's trap again . I do not find the mother's evidence credible at any level.
46. Ms Yip says that I should put these incidences into their correct perspective. I think that I have done so and I find that they are a considerable cause for concern going forward.
47. The mother saw Dr. L on ten occasions between October 2006 and January 2007. Dr. L described the mother's reaction to the incident in September as follows : Initially in the first session she was quite focused on feeling that it was unfair that the children had been taken from her but in subsequent sessions she slowly started to understand what her role in that was and how her behaviour precipitated that, and she demonstrated a lot more insight in regard to that .while she was still upset, that they were not in her custody, she certainly felt sorry for what she had done and she was interested in finding out how she could prevent something from happening like that again in the future . Unfortunately the mother did not present that level of insight during the hearing.
48. Her counsel said that her previous behaviour was understandable. She was living in a strange city, without friends and family for support; she was desperately trying to save her marriage and believed that it was salvageable and when faced with the reality that not only had the father left her but had formed a relationship with another woman and had formed a new family, she lost it . This was a temporary phenomenon says the mother's counsel caused by extreme circumstances. I am now asked to believe that she is better and able to cope .

49. As I have said, this is not how she presented herself in the witness box. It was pointed out during the hearing that the level of stress related to the present proceedings is unlikely to diminish. I agree. The custody hearing is only the beginning. Negotiations and possibly a hearing on ancillary relief may follow. I saw no evidence that the mother had moved forward or that she was now able to cope. Clearly at best she was not coping during the hearing. Having seen the mother over a number of days in the witness box I am convinced that it would be wholly wrong to put her in a position of overall responsibility for the boys at the present time. The father said that he hoped that joint custody was something that they could work towards. That may be so. Clearly, whatever the circumstances the mother is going to need a high level of support going forward. I do not accept that the mother has completely recovered. Or that the chance of her repeating the irrational behaviour of the past are almost nil .
50. The mother has not seen Dr. L for therapy since January 2007. There was a dispute concerning the father s offer to pay for ongoing counselling sessions. In any event at first the wife said that she did not need to see Dr. L and then seems to have reconsidered her position. I do not intend to go into the reasons for the dispute over payment here. My concern is that the mother should be able to avail herself of an appropriate support system going forward. In the witness box the father offered to pay for counselling sessions because he believes that the mother needs psychological help . I will hold the father to that offer. By the same token the wife in her solicitor s letters of the 14th and 16th May 2007 says that she would like to see Dr. L in order to develop stress-coping skills . I will hold the mother to this also. This is so notwithstanding the fact that in the witness box she said that she did not intend to resume therapy and that she was fine. I do not share the same view. I am also mindful of the fact that the mother has formed a close supportive relationship with members of the Church. At present she meets for bible study at a ladies Group every Wednesday, as well as attending services on Sunday. I very much hope that this will be continue. Taipei Trip April 2007
51. Ms Yip says that the father always falls back on the mother and that this is evidenced by the fact that the father left the boys with her after a planned trip with them to Taipei did not take place. There is a dispute over why the boys did not go on that trip. The father issued a summons for leave to take them out of the jurisdiction to Taipei from the 4th 10th April. The mother subsequently gave her consent. Problems then ensued over A s passport. Each blames the other for the fact that the passport was not renewed on time. In any event the father then left the boys with the mother. Ms Yip says that this shows that the father is ultimately happy for the boys to be in her care. If he did not believe that they were safe he would not have done so. I am of the view that this simply indicates that the father is happy for the boys to now spend time with their mother and to stay overnight with her. He is not opposing that. Rather he wants, in the words of his counsel to remove the children from the consequences of her not making proper decisions . The Father

52. Ms Yip has accused the father of being very argumentative, arrogant, defensive of himself and aggressive towards the mother, applying double standard and skilful in fudging issues . Further she says that, amongst other things, he is complimentary of himself , he did not attempt to be fair, she says he is litigious and pretentious and in many ways adopted a very unfair and high minded attitude in these proceedings . For the avoidance of doubt I do not accept most of the accusations levelled against the father. I have had the opportunity to observe him in the witness box. He is clearly an articulate and intelligent man. He is a lawyer and I would accept that at times as the proceedings progressed he was litigious in his approach. He described this in the witness box as a tough love approach. He came across as someone who when faced with a very difficult situation has done the very best he can to try to resolve it as sensibly as possible. In retrospect his tough love approach may not have worked, but I do not believe that he deserves the criticism made of him by the wife s counsel. What was he to do when faced with a situation where the mother was so completely out of control ?
53. It is clear that both parents love the boys and that the boys love them. That is not in issue. Rather the issue is who will best be able to parent the boys going forward ? Who is best placed to provide for their welfare, bearing in mind that that is of paramount importance to the court ? And by that phrase I have in mind the definition referred to by Ms Irving in her closing argument : it seems to me that they must mean more than that the child s welfare is to be treated as the top item in a list of items relevant to the matter in question, I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child s welfare as the term has to be understood . (Ref J v C AC 688 at 710 per Lord MacDermott)
54. It is clear that in the past the mother was a full time parent. But that is just one of the things that I have to consider when looking at the boy s welfare. I am also mindful of the fact that just because someone has been a full time parent, does not mean that they are necessarily the better parent. Dr L s report
55. Dr L filed two reports on behalf of the mother and gave evidence during the trial, some of which will be referred to below. She based her initial report on ten sessions that she had had with the mother. In the summary of her first report dated the 5th May 2007, she said It is the psychologists opinion that Ms Z does not suffer from an acute mental health disorder, although recent life events served to cause a temporary deterioration in her functioning. Furthermore, her admittedly inappropriate behaviour in the past likely stems from poor long term coping skills and a tendency to engage in dysfunctional reactions to increased stress. As such, the primary goal is to help Ms Z recognize the maladaptive coping strategies, and help her develop more appropriate and suitable ones. Over the course of treatment Ms Z made great improvement in this regard, and this led to marked improvement in her overall functioning. However, it is important that Ms Z continue to seek support and guidance from a professional, as the acquisition of good coping is a process. This will be particularly

pertinent during times of increased stress, when she is most vulnerable.

56. In her second report of the 15th June 2007 she said that the mother appeared to be stable and that significant progress had been made over the past months. Unfortunately during the trial the mother had clearly reverted to her previous mode of coping. She blamed the father for everything. She did not appear to accept responsibility for much that had happened to date. Clearly the mother does not cope well when presented with stressful situations. When it was put to Dr. L that if the mother started to behave as she had done previously would that suggest that she had reverted to her old coping mechanism Dr. L said I think this is a process. She has been exhibiting some long term strategies for dealing with stress and I think that what we saw on that day was an extreme example of that. So in times of stress it is likely that we revert to our old strategies, which is why ongoing help prevents that from happening. So I would expect that she would revert occasionally to that but progress should be measured in how often and whether the incidences are quite as extreme
57. Given the mother's behaviour as outlined above I have very grave concerns about the mother's ability to cope going forward and to the likelihood of her reverting to old strategies when faced with stressful situations. The Social Welfare Report
58. Recommendations made to the court in social welfare reports although not binding are generally considered to be persuasive. In this instance the social welfare officers have clearly been very influential in ensuring that suitable access arrangements have developed, so that the mother now has regular unsupervised access to the boys. The reports have made different recommendations at different times.
59. On the 26th August 2006, the first Social Investigation Report was filed recommending sole custody to the mother with defined access to the father. On the 19th January 2007, a second Social Investigation Report was filed suggesting various different options including joint custody and shared care and control, or sole custody to the father and generous and defined access to the mother.
61. On the 26th March 2007, a third updated Social Investigation Report was filed. This concentrates on access and recommends that the mother have staying access to the children on alternate weekends from 9:30 am to 5:30 pm and that the children's holidays be shared equally.
62. On the 22nd June 2007, a fourth Social Investigation Report was filed, recommending sole custody to the father and generous defined access to the mother. In so far as the boys are concerned, she reported their views as follows : E aged 13, expressed he preferred to remain the present condition regarding the custody and care arrangement upon the parent's divorce. He highlighted that he was neutral in position and did not want to choose between the parents. However, he reiterated that he rejected the parents to have joint custody on him and believed that joint custody might lead to disputes once and again. He told that he pretty enjoyed the present condition in which the father had the interim custody while the mother had reasonable access and defined schedules. A, aged 11, shared the similar views with E.

He expressed that he enjoyed the present arrangement while staying with the father during the weekdays and had access with the mother on every Wednesday and Sunday as well as staying access on alternate weekends. He told that he wished the father could get his sole custody and care and control after the divorce, but he did not reject that if the parents had joint care and control of him. However he reiterated that the Father should get his sole custody since he did not want to be involved in the parent s conflicts again. For holiday access, he preferred to have equal time-share with the parents .

63. Two different social welfare officers have been involved in the case. When asked, Ms T agreed that she did not think that supervision was necessary going forward. She had met with the father s fianc e on two occasions on the 15th December 2006 and on the 9th June 2007. She said that she had had three concerns
- 1) whether the father s fianc e could get along with the boys
 - 2) whether she was able to care for the boys and a new born baby and
 - 3) whether the fianc e was supportive of the father s claim for the son s custody.
64. Ms T said that by the time of the second home visit, it was clear that the father s fianc e understood the daily routines and feelings of the boys and that the boys considered her to be a friend. E said that she gave him a lot of space.
65. When the mother s proposals were put to Ms T she said that she had some reservations due to the fact that the boys had strongly expressed a preference for maintaining the present living arrangement. She recommended splitting the school holidays equally and did not mind how that should be done.
66. Although I accept that the court is not bound by the recommendations made, I am mindful of the fact that the social welfare department have been actively involved with this family and that they are the ears and eyes of the court. The social welfare officers have had an opportunity to observe the parties in a way that the court cannot. They have also had the opportunity to meet the father s fianc e. The Views of the Boys
67. The boys are of an age where their views must be given serious consideration and weight. See *Mabon v Mabon* [2005] EW CA Civ 634 and *Re S (A Minor) (Abduction)* [1993] 2All ER 683.
68. On the 3rd May the husband issued an inter partes summons asking that a guardian ad litem be appointed with authority to take part in the proceedings on the boys behalf. The request was granted on the 11th May 2007 and Mr. Dennis Ho of Ho & Ip and Mr Robin Egerton of Counsel were instructed to act on the boy s behalf. On the 16th May I saw the boys in chambers, in the presence of both Mr Ho and Mr Egerton. The conversation was taped and a transcript given to both sides. The boys used this as an opportunity to tell me what arrangements they thought would work best. I explained to them that their views would be taken into account by me when making my decision, but by the same token I could not promise them that my decision would necessarily mirror their view, as there were a lot of

different factors to be taken into account.

69. I have to say that I was impressed by both of them. They are personable and mature young people. They have given the present situation considerable thought and it is fair to say that their views have changed from time to time as the matter has progressed. Their solutions are sensible ones, grounded on their notions of what they think is fair and what they think would work.
70. By the time that I saw the boys there had been three Social welfare reports and two social welfare officers had been involved in the case. The boys had been interviewed on a number of occasions. Initially, prior to the September incident, they had suggested that they split their time between the parents, spending one week at each parent's house on an alternate week basis. Apparently E had a friend who did this and it worked well. By the time that they saw me, they had come to the conclusion that that might be too difficult to arrange with homework and the like.
71. A said that he would like to stay with one parent and then see the other one on Wednesday afternoon / evening. They both liked splitting the weekend so that they saw both parents over the weekend as opposed to alternating the weekends. E liked to spend time with the father on Saturday nights, whereas A was happier to spend Saturday nights with the mother. They both liked to go to Church with their mother on Sundays. In so far as the holidays were concerned E said that they were splitting each school holiday 50 : 50 which is not what I planned on .
72. He suggested that they have Christmas / New Year holiday with the father and Chinese New Year with the mother and that they split Easter and the summer holidays.
73. During the trial the boys, through Mr Egerton said that they wanted clarity and certainty . They felt that flexibility led to friction and that, in their words friction is the danger zone . For them certainty, at the moment, appears to be essential. They were comfortable with the father being the person who gives the go , but had no wish to exclude the mother. They no longer wished to be placed in the middle and they did not wish to be the messengers in their parent's disputes. Mr Egerton said that they deeply loved both parents and had established a special relationship with each.
74. At the hearing on the 17th August, which was after the trial, Mr Egerton said that the boys had contacted him and Mr Ho and that he had seen them in conference on the 14th August. Ms Irving pointed out that the boys had by that time spent nearly a month with the mother. Ms Yip opposed the suggestion that the mother had put pressure on the boys and said that there was no evidence to suggest that was indeed the case.
75. In any event as I have said the boys have changed their views from time to time. I am sure that they have been influenced by both parents on occasion and that in part that may have been due to the fact that they had spent a long period of time with one or other of them.

76. The boys told Mr Egerton that they do not wish to express a view as to which parent they live with during the week in term time . They ask that I decide.
77. If they were to live with the father during the week, then they would like to see their mother on Tuesday evenings. If they were to live with their mother during the week, then they would like to see their father on Wednesday evenings.
78. In so far as the weekends are concerned they made a different suggestion. If they are to live with the father during the week then they suggested that they have access to their mother from 5:30 pm on Friday until 5:30 pm on Sunday. If they are to live with the mother during the week, then they suggested that they see their father from 5:30 pm on Friday to 10 am on Sunday.
79. In so far as the holidays are concerned they suggested alternating Christmas and Chinese New Year and Easter and the autumn break. The summer should still be split on an equal basis. Further the boys are comfortable with joint custody on the basis that the parent they are with decides everything and that they want to avoid situations where the parents have to talk or discuss things as their parents are not very good at that. As these comments were made post trial, the parents have not had an opportunity to comment on them.
80. Although I do not intend to follow what the boys have proposed in its entirety, I have tried to ensure that my order satisfies their need for clarity and certainty. The father s fianc e
81. Ms Yip makes the point that the court should have had an opportunity to see the father s fianc e in court. She points to the case law referred to below in support of this contention. In the normal course of events I would agree. The father says that he did not do so because he wished to protect his fianc e and that he had been right in this. He points to the mother s behaviour and his ongoing concerns. I accept that given the situation at the time and the fact that his fianc e was pregnant that these concerns must have been very pressing. Although it would have been helpful, I accept that this is not a case like those below. In this instance the boys are older. E is a young adult. The father says that the fianc e is not involved in parenting the boys. She is not a full time caregiver. During his oral testimony he said She is not going to be a step-mother. She is not going to be involved in parenting decisions. That s my job
82. This is not a case where a natural parent is being overlooked in preference to a third party who is infact caring for a child full time. Here, the boys are of an age where they do not require full time care. They require guidance and support through puberty into adulthood. Given that I accept that although the fianc e runs the home, that it is the father who is in fact presently responsible for parenting the boys on a day-to-day basis. In so doing I have also relied on the observations made by the Social Welfare officers and the fact that she saw the fianc e twice. Ms Yip says she saw her only briefly. That may be so, but she was satisfied with what she observed in those meetings and her perception of the fianc e were favourable. The father s employment and travel schedule

83. During the trial the father told the court that he had been offered partnership with two other law firms. At present he is required to undertake some business travel, but this is generally for short trips which are undertaken within the region e.g. to Shenzhen or Taiwan. He and his fianc e are never away at the same time. He anticipates that he may need to travel in the future but anticipates that this will be at the beginning of deals as he will have more responsibility for bringing in new work. The mother says that this simply does not compare with what she is able to offer i.e. a full time Mother who is always ready to help, to listen, to share, and to care . This may be so if the mother is able to cope. As I have already indicated I have very grave concerns that this is the case here. During the course of his evidence the father said that he thought it was appropriate for the boys to stay with the mother if he was going to be away for three or four nights, although he did not believe that that would happen very often. He said that he was prepared to give an undertaking to let the mother know in advance if he was going to be away and that in that event the boys should stay with her.
- History the mother s position
84. The mother says that I must not ignore history i.e. the fact that she has been the caretaking parent for most of the boy s life. I accept that. By the same token I must not ignore the events that led up to the change in the present living arrangements for the boys. The present arrangements for the boys i.e. their status quo
85. E and A have both just started at an ESF school. They were previously at a different academic institution. In so far as the daily routine is concerned, the father has a system in place. He has breakfast with the boys in the morning and generally speaking supper with them at 7: 00 pm in the evening. He monitors their homework. He is particularly concerned about A who seems to have been slacking off . Extra curricular activities are in place. The boys both enjoy acting being keen members of Faust and they are both musical. E is a very good pianist and A is learning to play the guitar. They also enjoy a number of sports. The boys see their mother on a regular basis. They attend Church regularly with her. The father, while querying some of the teachings of the Church, nevertheless did not oppose the boys attending services there. Case law
87. Both parties have referred me to a number of cases. Of particular interest, in the context of this case, is the analysis of the issue of joint custody versus sole custody set out in the recent unreported decision of Recorder Rimsky Yuen SC on the 23rd May 2007 in ML and YJ HCMC 13 of 2006. In it Mr Yuen SC analyses both English and Hong Kong authorities and says that the position can be stated as follows :
- (1) In considering whether to grant joint custody to both parents or sole custody to one of them, the first and paramount consideration is the welfare of the child.

- (2) Whether or not a joint custody is workable depends very much on whether the parents can co-operate. A court may refuse to grant joint custody if there is no reasonable prospect that the parties will co-operate. Whether or not there is such reasonable prospect is a question of facts. If there is no reasonable prospect of co-operation between the parties, an order of joint custody can be a recipe for disaster and contrary to the best interest of the child.
- (3) A joint custody order may in appropriate cases be made for the purpose of encouraging parents to overcome their differences and co-operate for the benefit of their children. Joint custody in such circumstances can serve the purpose of recognizing the role of both parents in the children's upbringing. However, if it is clear that a joint custody order is not workable, it seems unlikely that the Court will nevertheless make such a joint custody order solely for the purpose of encouraging the parties to overcome their differences or to recognize the continuing role of the parties. As stated above, a joint custody order which is unlikely to be workable cannot be in the best interests of the children as the adverse consequences will far outweigh the benefits that it may bring.
- (4) A custody parent does not have the right to make all the decisions about the children in spite of disagreements of the other parent. Should there be any disagreements over major matters affecting the children, the party who does not have custody can bring the matter to the Court for determination. Other case law
88. Counsel for both sides have also referred me to other useful cases. In *L v C* CACV 333 of 2007, the Judge at first instance ordered that the child, who was only 5 years old, remain in the custody of the Father. On appeal the child was returned to its mother. Referring first to the Social Welfare Report, The Hon Rogers VP said, The report acknowledges that, at the time it was written, the child was living with the father and that was regarded as the status quo. It went on, however, to make the point that it could be considered in the long term interest of the child that he should be looked after by his natural parent
89. In so far as the role of the natural parent is concerned the Hon Rogers VP, said What seems to me to have been overlooked in this case was the importance of one of the natural parents being the primary carer of the child. In this case it is quite clear that, albeit both parents work and have similar working patterns, that if the father were to be given custody, the paternal aunt would fulfil that role. Without in any way suggesting that the paternal Aunt does not devote full care and attention to the child, the importance of the natural parent being the primary carer must not be lost sight of. Coupled with that if the parent proposed to be the primary carer is the mother, this too is highly significant because of the natural role of the mother in the rearing of very young children. In this respect I would add that the judge does not appear to have considered the role of the mother in the child's life in comparison to that of a paternal aunt, however devoted she may be
90. Likewise, in *Aslam v Ali* CACV 144 of 2003 and *P v P*, CA 256 of 1996, the court at first instance made orders in favour of the father, relying in part on status quo arguments, and in each case the Court of Appeal reversed the decision of the court below and returned the

children to the mother. In each case there were also accompanying arguments concerning the role of the natural parent as opposed to other caregivers and also arguments concerning the work life balance of the parents. In *Aslam v Ali*, the father worked very long hours and the children, who were quite young, were cared for by his two sisters. The sisters did not give evidence in court or file affidavit evidence, although it was clear that they were the main caregivers. In contrast, the mother was not working, although there was some suggestion that she might need to work in the future. In *P v P* there were arguments concerning the role of the father's cohabitee. Of her, Bokhary JA said But the judge was not in a position to examine her role. He had no evidence from her : neither on affidavit nor from the witness box. Nor was he told by Mr P whether or not he and Miss T intended to marry after he obtains a decree absolute. What is Miss T's position in regard to T and E (the children) : that of surrogate mother, nanny, homemaker or what ? The judge was not in a position to say .

91. From an analysis of these three cases it is clear that :
 - a) the role of third party caregivers is important and should be examined carefully by the court.
 - b) a natural parent is to be preferred over a third party caregiver, however caring the third party caregiver might be.
 - c) A non-working parent is generally to be preferred to that of a working parent, especially where young children are concerned.
 - d) although it is clear that the issue of status quo is important, it will nevertheless need to be assessed on a case-by-case basis, depending on the individual circumstances of the case in question. Status quo will be more important in some cases than in others.
92. Referring to all three cases in *N v L FCMC* No 3038 of 2003 unreported, Her Honour Judge Chu said Ms Yip submitted that all things being equal, a mother and particularly a full time mother is to be preferred to a working parent
93. Ms Irving submitted that all things were not equal in this case. Ms Yip also agreed that all of these cases were distinguishable on the facts, from the case presently before me.
94. In the context of this case I accept that it would have been helpful to have heard from the husband's fiancée, although I also accept the husband's reasons for not producing her as a witness. He believed that she was at risk from the mother. Having read some of the threats made by the mother and having seen her in court I do not discount that as a possibility. I have also relied on the social welfare report in respect of the fiancée
- e. The father has said that they wish to marry as soon as they are able.

95. Although it has been said that natural parent is always to be preferred to a third party caregiver, this is in the context of much smaller children, who require constant care and attention. In this instance the father is able to provide the boys with the appropriate structure, care and guidance they need. This is not a role adopted by either his fianc e or their domestic helpers.
96. Although again a non-working parent is generally preferred to a working parent, in all of the cases cited above young children were involved. That is not the case here. It seems to me that the situation is very different where young children are concerned. I should also like to point out that it should not necessarily be presumed that the mother will be a non-working going forward.
97. In addition I was referred to T v S FCMC 6549 of 2002. In that case, which concerned the custody of twin girls, Judge Geiser said In my judgment there is no normal order with regard to custody. Each case must depend upon its own particular facts having regard always to the interests of the children, those interests being paramount . With respect I agree.
98. One other case is of particular interest. Mr Egerton for the boys produced H v H CACV No 42 of 2002. In the preamble, the Hon Rogers VP repeats the order made by Hartmann J as follows : The expression care , however it is used in these orders shall mean care and control and shall mean that the child shall stay with the parent into whose care and control she has been given . And later As to custody, care and control :
- (1) Custody of the child shall be vested in the father. The mother shall have no rights of custody.
 - (2) Care of the child shall be shared between the father and the mother. This shall be done in the following manner:
99. The Judge then set out in detail how that care was to be shared. There was no order for access per se. The parties were effectively splitting the child s time as opposed to one party being the main caregiver and the other having rights of access. Should the court make any order at all ?
100. As indicated above I think it is incumbent upon me to make an order under the present legislation. I should add that even if that were not the case I would be minded to make an order here in any event. The Law Reform Commission s recommendations, if implemented, make it clear that no order would only be available where a) both parties consented to it and b) it was in the best interests of the child. In this case the father, quite rightly in my view, has not consented to such a request from the mother. Secondly given the high degree of conflict that exists between the parties and the boys expressed wish for clarity and certainty , simply making no order does not appear to me to be a sensible solution. It certainly does not provide any clarity or certainty. In my view it would likely set the scene for ongoing conflict and confusion and would not be in the best interests of the boys. In the event that an order is made, should custody vest in the sole name of the father, or should the parties have joint custody of the children ?

101. It seems to me that Recorder Rimsky Yuen SC has correctly stated the test to be adopted when determining the issue of joint versus sole custody. Clearly here the parents have not historically been able to co-operate at any level. Schooling was a particular bone of contention. As Rimsky Yuen pointed out If there is no reasonable prospect of co-operation between the parties, an order for joint custody can be a recipe for disaster and contrary to the best interests of the child . I agree. I accept that a joint custody order may be appropriate in some cases, where it provides a suitable framework for future co-operation. Unfortunately I agree with the father s counsel that this is not one of those cases. The time is not now . It may however be a possibility in the future. I will grant the father sole custody of the boys. Should care and control vest in the father or should the parties have joint care and control or should care and control vest in each parent depending on who has the care of the children at any particular time ?
102. In the vast majority of cases that come before the family court care and control will be given to the parent who has daily control of the children. So at present the father has interim sole custody and care and control of the boys. Given the description of care and control given above, is it really feasible for care and control to be vested in the parties jointly or for it to be vested in each parent depending on who has care of the boys at any given time ? H v H CACV No 42 of 2002 provide valuable assistance in that respect. As referred to above, it would appear that care can be shared in certain circumstances. In this instance the parties have been able to agree that care should vest in whichever parent is looking after the boys at any given point in time. This is notwithstanding the fact that the boys time will not be shared in the same way as in H v H. The boys have also indicated that they are comfortable with this. Consequently I intend to follow the format of that order in this judgment. Whoever the boys are with at any given time shall have care and control of them and in that way their care shall be shared between the parents. This means that whomever the boys are with, makes the ordinary every day decisions about their day-to-day life. In other words whomever the boys are with has the go . Unfortunately it is not possible for the parent they are with [to] decide(s) everything . The custodial father will ultimately be responsible for custodial decisions in consultation with the mother. Once the above has been decided, should there be an order for access or for shared care and control ? If so how should those arrangements be defined ?
104. Given the above, I will not make an order for access per se I will, again following the format of the order in H v H, make an order that the care of the boys be shared between the parents. In so doing I am mindful of the fact that there needs to be certainty and clarity . I will order that their time be structured as follows : School terms :
- a. the boys shall be in the care of the mother from the end of school on Tuesday afternoon to 9:00 pm;
 - b. the boys shall be in the care of their mother every alternate weekend from 5 : 30 pm on Friday to 5 : 30 pm on Sunday

- c. the boys shall be in the care of their mother for the intervening weekend from 10 : 30 am on Sunday to 5 : 30 pm on Sunday.
 - d. The boys will be in the care of the father at other times apart from when the father is away on business for three days or longer whereupon the mother shall have the care of the boys for that period of time, The pick up and drop off for a)
 - d) above is at PPS taxi stand. School holidays :
 - a) the boys shall spend one half of the school holidays in the care of the father and one half of the school holidays in the care of the mother as follows :
 - (i) the parties shall alternate the Christmas school holiday. This year Christmas / New Year 2007, the mother shall have the care of the boys. The following year, Christmas / New Year 2008, the father shall have the care of the boys and so on and so forth (ii) the parties shall alternate the Chinese New Year school holiday. This year Chinese New Year 2008, the father shall have the care of the boys. The following year, Chinese New Year 2009, the mother shall have the care of the boys and so on and so forth (iii) the parties shall alternate the boys school Autumn half term break. This year Autumn 2007, the father shall have the care of the boys. The following year, Autumn 2008, the mother shall have the care of the boys and so on and so forth. (iv) The Easter school holiday will be split equally. The father and the mother shall agree how best the holiday is to be split. In the absence of any agreement, the father shall have the care of the boys in the first half of the holidays and the mother in the second half.
 - (v) The summer school holidays will be split equally. The father and the mother shall agree how best the holidays are to be split. In the absence of any agreement, the father shall have the care of the boys in the first half of the holidays and the mother in the second half. Public holidays
 - a) When public holidays occur during school holidays they shall be considered part of the boys school holidays and shall be subject to the provisions referred to above;
 - b) When public holidays occur during term time, the parties shall care for the boys alternatively. For the avoidance of doubt the mother shall care for the boys over the first public holiday and thereafter the public holidays will be alternated. Once determined, should any conditions be imposed on the above arrangements ?
105. Although the Social welfare Officer was not of the view that the arrangements need to be supervised, given the high level of conflict in this case I will order that the arrangements be supervised for a year and that a progress report be submitted accordingly. Costs
106. Given the nature of this dispute I will make an order nisi to be made absolute at the expiration of 14 days that there shall be no order as to costs (see London Borough of Suttons v Davis (Costs) No. 2 [1994] 2 FLR 569. The Respondent mother is legally aided and therefore her costs will be taxed in accordance with Legal Aid Regulations.

107. Consequently having read the parties affirmations and having heard the parties give oral evidence. Also having heard the social welfare officer give her evidence and having read all of the social welfare reports. Further having heard from Dr L and Mrs K, I will make an order in the following terms : UPON the father s agreement to provide the funding necessary for the mother to continue to have therapeutic counselling with Dr L for the next twelve months and upon the mother agreeing to attend such therapeutic counselling once a week, AND UPON the father s undertaking to inform the mother in the event that he is going to be away on business for three days or longer IT IS ORDERED THAT :
- 1) Sole custody of E and A shall be granted to the father with shared care and control to both the mother and the father when the children are in their care.
 - 2) Care and control shall be shared as follows : School terms :
 - a) the boys shall be in the care of the mother from the end of school on Tuesday afternoon to 9:00 pm;
 - b) the boys shall be in the care of their mother every alternate weekend from 5 : 30 pm on Friday to 5 : 30 pm on Sunday
 - c) the boys shall be in the care of their mother for the intervening weekend from 10 : 30 am on Sunday to 5 : 30 pm on Sunday. The boys will be in the care of the father at other times apart from when the father is away on business for three days or longer, whereupon the mother shall have the care of the boys for that period of time. The pick up and drop off for a)
 - d) above is at PPS taxi stand. School holidays :
 - a) the boys shall spend one half of the school holidays in the care of the father and one half of the school holidays in the care of the mother as follows :
 - (i) the parties shall alternate the Christmas school holiday. This year Christmas / New Year 2007, the mother shall have the care of the boys. The following year, Christmas / New Year 2008, the father shall have the care of the boys and so on and so forth (ii) the parties shall alternate the Chinese New Year school holiday. This year Chinese New Year 2008, the father shall have the care of the boys. The following year, Chinese New Year 2009, the mother shall have the care of the boys and so on and so forth (iii) the parties shall alternate the boys school Autumn half term break. This year Autumn 2007, the father shall have the care of the boys. The following year, Autumn 2008, the mother shall have the care of the boys and so on and so forth. (iv) The Easter school holiday will be split equally. The father and the mother shall agree how best the holiday is to be split. In the absence of any agreement, the father shall have the care of the boys in the first half of the holidays and the mother in the second half.

- (v) The summer school holidays will be split equally. The father and the mother shall agree how best the holidays are to be split. In the absence of any agreement, the father shall have the care of the boys in the first half of the holidays and the mother in the second half. Public holidays
- a) When public holidays occur during school holidays they shall be considered part of the boys school holidays and shall be subject to the provisions referred to above; When public holidays occur during term time, the parties shall care for the boys alternatively. For the avoidance of doubt the mother shall care for the boys over the first public holiday and thereafter the public holidays will be alternated. These arrangements shall be supervised by the Social Welfare Department for the next twelve months, as required. A progress report to be filed in twelve months time. There shall be an order nisi that there be no order as to costs. Such order to be made absolute in 14 days time. The Respondent's own costs to be taxed in accordance with Legal Aid Regulations. (Sharon D MELLOY) District Judge Ms Frances Irving instructed by Messrs Stevenson, Wong & Co. for the Petitioner Ms Anita Yip, instructed by Or, Ng & Chan, for the Respondent Mr Egerton, instructed by Ho & Ip for the children PAGE - PAGE - PAGE |oga cScSc m\m\m\m\m\m\m\ B* tgXF veveveve zozo zozoz rararararar B* fYfYfYfYfYfYf &`#\$ &`#\$ "m\$Z7 %&N* 0zi& S8_5 y!Y7 D)U"Iv nm{V]fM|; EUhp}6c lmZ"D o8'q Epxfa` + o8'q nm{V y!Y7 S8_5 %&N* ry@_ :}ry @\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool \\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 \\\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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