

HONG KONG / JUDGMENT

SLH (nee N) v. GAH

[2020] HKFC 29

COURT

Family Court

DECIDED

20 January 2020

CASE / FILE NUMBER

FCMC16058/2016

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FCMC 16058/2016

[2020]HKFC29

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 16058 OF 2016

BETWEEN

SLH (nee N)

Petitioner

and

GAH

Respondent

Coram: Deputy Judge Peter Barnes in Chambers (Not open to public)

Dates of Hearing: 8 – 10, 14, 28, 29 October, 11, 12, 19, 21 November, and 13, 16 – 20 December 2019

Date of Closing Submissions/Replies: 27 December 2019 & 31st December 2019

Date of Judgment: 20th January 2020

J U D G M E N T

(Child arrangement, schooling, relocation)

Introduction

This Judgment follows a contested trial lasting 16 days to determine the appropriate arrangements to be put in place for the four children of the marriage between the Petitioner (Mother) and the Respondent (Father): C, a boy aged 15; E, a boy aged 14; Ch, a girl aged 8 and F, a boy aged 5 (“the Children”). The Children live with the Mother, the Mother’s new husband Mr. P, and their young son who is still in his infancy. They live in a three-storey village house in Sai Kung Country Park. The Children attend private schools, C and E attend Year 11 and 9 respectively, and Ch and F are in P3 and P1. The school fees are paid for under a scholarship/bursary and have been for a number of years.

The Father is not presently living in Hong Kong, and has lately been spending much time in the Philippines, with his fiancé, M. He is not presently having any direct access with the Children.

The Applications

Several applications have been filed by the parties dealing with the issues of custody and access:

Filed

Application

11 May 2017

Mother’s Summons for suspension of Father’s access

8 Aug 2017

Father’s Summons for restoration of access

13 Dec 2017

Mother’s Summons for sole custody

17 Dec 2018

Mother’s Summons for access to be supervised

18 Jan 2019

Father’s Summons for appointment of parenting coordinator and variation of access including for staying access and school holiday access

The Mother's seeks to continue a non-molestation order granted under the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189) restraining the Father from molesting or otherwise interfering with the Mother, the Children, her husband and their child, and further prohibiting him from coming within 100 metres of the Mother, or the Sai Kung property or the Children's schools. The original order was granted on 3rd May 2019 on the Mother's Ex-Parte Summons (On Notice) and continued upon her Inter-Partes Summons filed 24th May 2019 ("the DVO Summons"). An authorization of arrest was attached to the initial Order and this has been further extended at various junctures including during the Trial. The most recent Order was made on the last day of the Trial for the authorization of arrest to be extended to 31st January 2020 pending this Judgment. The Court is also asked to continue this authorization.

Separately, the Mother seeks leave by Summons dated 25th May 2019 for the older children C and E to attend boarding school in New Zealand, from the start of the school year on 4th February 2020 ("the Boarding School Summons").

By further Summons filed 28th August 2019 the Mother asks for leave to relocate permanently with all four Children to New Zealand on or before 28th February 2021 or so soon thereafter as the Court may direct ("the Relocation Summons"). In her 23rd Affidavit specifically addressing the issue of relocation, the Mother said that she was now seeking to relocate earlier, in July 2020. The Summons itself has not been amended, and, as a matter of formality, I grant leave for the Mother to file an Amended Summons within 14 days of the date of this Judgment.

The Relocation Summons was not, originally, among the applications to be determined during the Trial. During the course of the Trial, and in light of additional dates having been made available beyond those originally scheduled, the Court acceded to the Mother's request for all matters, including relocation, to be decided by the Court in the one Judgment.

The Father, who was represented by solicitors and counsel at the commencement of the Trial but became unrepresented during it when his Legal Aid Certificate was revoked, has maintained his opposition to all of the Mother's applications, including her application for sole custody, and has continued to pursue his own applications in respect of access. His detailed proposals were obtained from him during the Trial including when he gave his evidence and will be set out below. In short, he seeks a resumption of access to the Children, including for staying access, whether here or, if they relocate, in New Zealand.

The reasons for the Father's opposition to C and E attending boarding school and to the Mother's application for leave to relocate have been difficult to follow at times, given that he is presently not living in Hong Kong and has not lived here for some time. I accept, of course, that the Philippines is much closer geographically to Hong Kong than it is to New Zealand and would involve much less travel for him to fly to see the Children or vice versa.

In his written evidence, the Father gave a number of reasons why he did not support the older children attending boarding school. He said that, as he had not seen either C or E since the application was made, he was unsure whether it expressed their true desire or was simply the Mother's wish imposed upon them. He also doubted whether the proposed destination – New

Plymouth, a relatively small city on the North Island of New Zealand – was suitable. He said in his oral evidence that there is a feminist movement in New Zealand, akin to a matriarchal society dominated by women. It was also apparent from his evidence and his statements during the Trial that one of the principal reasons for his opposition was that the Father felt that the Mother's father, who lives in New Zealand, relatively close to New Plymouth, would be a negative influence on the boys. The Father believes that the Mother's father is responsible for him losing a teaching position with a prestigious school in Hong Kong by libelling him and resents him for becoming involved in what he views as a systematic campaign to restrict his access to the Children, particularly the older two boys. His dislike of the maternal grandfather is long-standing. The Father's concern, in short, is that if C and E are allowed to attend boarding school in New Plymouth and if the Mother is granted leave to relocate there with the Children, the Mother's father would have a bad influence on them and his chances of reconciling and forging a healthier relationship with them would further diminish.

The Father's counter-proposal was that if the family was to return to New Zealand, it should be to Auckland, a larger city, with greater opportunities and better, private, schools.

The Father's position on the Boarding School Summons and Relocation Summons appeared to shift somewhat in his written closing submissions, which included the following passage:

Although in the past I was able to provide for my kids what my position originally stated, I now can clearly see, as I believe the court does as well, that now I must only play a supportive role in what the Petitioner has proposed. I had firmly believed we could "split in half" our kids and execute co-parenting in an edifying and God-honouring way, but I see (and also after hearing the boys views as expressed to the judge in their meeting) this is no longer possible, given the Petitioner's stance and given their beliefs now that I am entirely responsible for the negative aspects from our case. I am happy they will escape the civil unrest, Communist anti-God attitude, pollution, noise, crowds, stress, competition, and expensive living in Hong Kong. The world does seem to be becoming more dangerous and unsettled, and that is why I asked [the Mother] to move our family to NZ in 2013 (which we did) and then also again in 2015 and 2017 during our separation and legal proceeding. We are both competent at living in NZ, it is quiet, safe, and natural. Many Kiwi expat families relocate their families back home before children reach secondary education level.

Although I still do not agree with the process that was used or the spirit in which it was executed, I am most concerned that the Petitioner's refusal to co-parent peacefully is currently doing more damage than if I would just agree with her proposal. There are many reasons for this decision, but I feel it is of little worth to the Court for them to be recorded again here, since they have been verbalised in numerous documents of this proceeding and have not aided the children in restoring both mother and father to their weekly lives. I believe I could have arrived at this position much earlier (Aug 2017) if I had remained close enough to the children to be intimate with their genuine desire and development and also if I had understood the Petitioner's end objective earlier. As such, one could surmise that the emotionally disturbing incidents and associated reduction of access with their father most definitely would not have eventuated.

Therefore, I withdraw my proposal/application for relocation and education. I request to be given, if any, the information regarding exact dates of travel, residential addresses, and contact people in both Hong Kong and New Zealand, so that I can stay as close as possible to the kids and resume healthy equitable access as soon as possible (after I gain stability again and learn how to better and more peacefully protect my access with the children, given the issues and tactics of this case).

His submissions also make specific proposals for access and other arrangements to take effect in New Zealand, further suggesting that he now accepts that the boys will be attending school there and relocation will take place.

The Mother's written Reply was terse:

2.

It is simply incredulous that the Respondent should now, after a 16 day Children's Trial, resile and seek to abandon his application for relocation of the Children to Auckland New Zealand and for the Children to be educated in Auckland in private schooling. Yet at the same time he does not consent to the Petitioner's application for boarding school nor to their relocation. His actions are a further example of how he continues to play "games" and attempt to manipulate the system and warp the lives of the Children.

3.

The Respondent was asked repeatedly during the course of the Children's Trial whether he would now consent to the Children's Relocation to New Zealand and for the two older boys to attend boarding school. But he simply refused to make any commitment and avoided answering.

4.

The Respondent's position is confusing and unclear. The Petitioner Mother seeks a determination by the Court of her various applications including the application for boarding school and relocation. She remains concerned that the Respondent may yet change his mind again as he has stated emphatically in Court that he intends to appeal and used words & manner to indicate that this was a "war" it was a "battlefield" with "bodies" and that no effort would be spared by him to get what he wants.

5.

The Court should therefore proceed to determine this matter with very little weight, if any, to be given to the Respondent's withdrawal of his applications.

With all due respect to the Father, and acknowledging that he has been without representation during most of this difficult Trial, the Court is unable to assume from this that he is now formally withdrawing his opposition to the Mother's Boarding School Summons and Relocation Summons. The Father is a perceptive man, and if what he had intended to say in his closing submissions was that he was no longer opposing the Mother's application for the older boys to attend boarding school and/or for the Mother to relocate with the Children, he could have said so, unambiguously.

The Court must therefore consider and rule upon both the Boarding School Summons and Relocation Summons, as well as the various other Summonses, in this Judgment.

The Issues

The multiple applications give rise to four main questions for the Court's determination which I will deal with in this sequence:

(1)

What orders should the Court make in respect of custody, care and control and access? In particular, should the Court vary the current order for joint custody to one of sole custody and vary the current, limited, access?

(2)

Should the Court continue the non-molestation Order against the Father, and if so on what terms?

(3)

Should the Court grant leave for C and E, the two older children, to attend school overseas, in New Zealand?

(4)

Should the Court should grant leave to the Mother to relocate permanently with the Children to New Zealand?

The parties' respective cases, summarised

This is a high conflict case, in which the parties' positions have become progressively entrenched as the proceedings have developed. This was not always the case, and in the early stages there was a level of agreement on the arrangements to be put in place. This is reflected in the email exchanges concerning access and arrangements for the Children. An example of the cooperation is the agreement on custody which led to the Consent Order dated 5th January 2017 for joint custody of the Children to be to the Mother and Father. This came after the Court, and the parties, had the benefit of several reports, including an extensive analysis from a clinical psychologist, Dr. S. Chu.

On 13th December 2017 the Mother applied by Summons (“the Custody Summons”) to vary this Order to one of sole custody in her favour. Her reasons for doing so are set out below.

The Mother has interim care and control of the Children pursuant to a previous order dated 6th July 2016 and she asks the Court to award her sole care and control.

In the event that her application for relocation is granted, the Mother asks the Court to make a formal request that the Orders be registered in New Zealand.

The Mother has repeatedly expressed grave concerns about the Father’s ability to control his temper, his behaviour towards her new partner, Mr. P, and with the Children. Her concern is that as the proceedings have continued, and the inevitability of the separation and her re-marriage has become apparent to the Father, he has become increasingly agitated and that this has, at times, become unbearable. She points to messages sent to her since the non-molestation order was made which are distressing and threatening to her and to Mr. P.

The Father does not dispute the suggestion that he has struggled with his behaviour in the past, particularly when he has consumed alcohol to excess. These admissions feature in much of his written evidence and were confirmed at the trial. The Father says that he has not consumed any alcohol since 13th October 2014, a date which is tattooed on one of his arms. He has provided an undertaking to the Court to continue to abstain and to seek support from Alcoholics Anonymous and in counselling.

Notwithstanding this undertaking and the Father’s efforts, and as already noted, the Father’s access to the Children has progressively diminished over the past few years, to the present situation where the Father is subject to a non-molestation order granted in May 2019 preventing direct contact with the Mother and the Children, and is only permitted to contact the Children by non-direct means such as letters, cards etc. His last direct contact with any of the Children was when he saw E, the second eldest child, briefly, in Dec 2018.

The Mother’s case that, due to the erratic and emotionally manipulative behaviour of the Father, including the incidents which occurred during the marriage and those which have succeeded it, the Father’s access to the Children should be limited, conditional on him obtaining psychiatric treatment, and supervised.

The Mother cites several instances of the Father’s alleged misbehaviour, in her several affidavits addressed in oral and written submissions and in the evidence she, and Mr. P, gave at the Trial. She says that the Father poses an ongoing danger to herself, her new husband, and the Children and a genuine threat to their continued well-being, including to their emotional and mental health. She maintains that the Father is psychological unwell and is in desperate need of appropriately managed counselling and psychiatric treatment. She goes so far as to make the Father’s commitment to this treatment a condition of her considering any unsupervised access to the younger children. She says the two older children, C and E, want nothing to do with the Father and do not want to have any contact with him.

The Mother says that her previous agreement that there be an Order for joint custody was on the basis of recommendations made by Dr. S Chu and in the earlier Social Investigation Reports, but that at the time she had “strong reservations and misgivings” in agreeing to such an order. She points to what she refers to as the “steady deterioration” in the Father’s behaviour towards the Children, his job instability and his unstable personality. She says that even when the Father makes a decision or there is agreement, he reneges on it and she is “left to pick up the pieces” and that his inability to take care of himself including seeking appropriate psychiatric treatment has led her to the application for sole custody and sole care and control. In her Closing, the Mother argued that the Father had “taken no part in making decisions regarding the Children’s education”, had “refused mediation with Dr. Bierman to discuss C and E’s progress and their request for attending boarding school in New Plymouth on the ground that he would rather spend \$1,000 on setting up his new household with M than on mediation”, was “unable to care for his own health, let alone making decisions regarding the health of the Children”, an example of which was his refusal to give permission to fully vaccinate the Children based on “unscientific beliefs regarding healthcare and strong distrust towards medical doctors”.

Her position is reinforced, she says, by the events which led to the non-molestation order and the threatening Skype communications made subsequently which have resulted in the Court extending the authorisation of arrest.

On questions of access, the Mother points to the practical difficulty with the Father’s proposals for renewed access given that he does not live in Hong Kong, and that, when he is here, it is only for a short period of time, and in short-term hotel or serviced accommodation. It is in these circumstances that the Mother submits the Father’s application for an order granting him access including staying access is simply not feasible.

As already noted, the Father accepts some of the Mother’s allegations concerning his past behaviour, but explains that many of them stemmed from his past problems with alcohol abuse and are “isolated incidents”. He points to the psychotherapy treatment he underwent in 2018, and the counselling he has been willing to seek. He says that it was the Mother’s choice to curtail access during the earlier part of 2017 and that this was in conflict with the Court Order which was in place at that time, and without justification.

In his closing written submissions, the Father asks that

(1)

For the order for Joint Custody to be maintained, as “there were large blocks of time when the father was fully engaged with the children in a healthy way during this proceeding and before”;

(2)

For dissolution of the non-molestation order.

(3)

For daytime access to the younger children Ch and F, when he is in Hong Kong, his fiancé to act as supervisor.

(4)

For staying access with the older boys in New Plymouth, New Zealand when he is there, on Friday/Saturday or Saturday/Sunday.

(5)

Alternatively, if the proposed access is not granted, then “I request unfettered significant staying time with the Father to be gradually restored with guidelines/goalposts/criteria which are achievable and clear, which will cut down on future disagreements or need for litigation.”

(6)

An order appointing a Parenting Coordinator and for the parties to attend a Co-parenting Course “once the Petitioner arrives in NZ after July 2020.

The Father denied that he has any ongoing psychological problems. In his view, it is the lack of access to which is causing the rift between him and the older children.

The Father’s case is that if there is a schism between him and the older children, C and E, this is primarily due to what he says is the Mother’s systematic attempts to drive a wedge between him and them. He says the Mother has “intentionally and vengefully employed various means to exclude the father from the children’s lives” and that “[m]y flaws and the mistakes I have made in the past have been exaggerated by the Petitioner and used as excuses for her to alienate me from the children, who used to have a strong and healthy bond with me during the marriage and the proceedings until 2017.”

The Trial

The resolution of these important matters has been somewhat delayed due to a number of reasons. A previous trial in August 2017 dealing with the matters of child arrangements was adjourned, part-heard. Directions were given for the filing of additional evidence and the obtaining of further reports including the appointment of a Single Joint Expert to undertake a full psychiatric evaluation of the Father. Dr. B Connell was selected to be the SJE and provided his report on 14th January 2018 recommending that the Father undergo a course of treatment. The re-fixing of the trial was postponed until after this treatment was completed, in July 2018. Meanwhile the parties discussed financial matters leading to a consent Order made 18th October 2018.

On 29th January 2019 the Court fixed new trial dates for October 2019 and gave directions for the filing of comprehensive affidavits and for updated reports. In May 2019, after discovering messages sent by the Father to a friend of his on WhatsApp – which had been disclosed by the friend out of concern that the Father might self-harm – the Mother applied for the restraining/non-molestation orders. The disclosed WhatsApp messages including a statement directed at the

Judge previously dealing with this matter, which caused the Judge to consider whether she should continue in the case or recuse herself. On 12th June 2019, for reasons set out in a Ruling of that date, the Judge recused herself from any further involvement in this matter. As a result of this, directions were given for the matter to be heard de-novo before a new Judge.

The Trial itself encountered a number of difficulties which extended its length. They included the temporary indisposition due to illness of the Father's counsel resulting in a loss of four of the allocated days in October 2019. Additional dates were then fixed by the Court for November and December 2019. On Friday 8th November 2019, just prior to the scheduled resumption of the trial on Monday 11th November 2019, the Father's Legal Aid Certificate was revoked. At the hearing on 11th November 2019, the solicitors and counsel for the Father attended out of courtesy to explain the situation: that it was the decision of the Director of Legal Aid to revoke the certificate. The Father informed the Court that he had appealed against the revocation, but that this appeal would not be heard until February 2020. He informed the Court that he was prepared to represent himself and that he was making no application for the Trial to be adjourned. The Court explored with the Father all options, including whether the Father would need some further days to prepare his case before the Trial resumed. The Father confirmed to the Court that he was in a position to continue with the matter without representation and he explicitly acknowledged that it was in the best interests of the Children that the matter proceed without further delay to a conclusion.

This is consistent with the principle which has been emphasised by the Courts on a number of occasions, that delays in resolving disputed children's issues are particularly undesirable.

The Father has, therefore, conducted his own case for the bulk of the Trial including cross-examination of key witnesses. The Court recognises that this was very challenging for him, so too for the Mother and her new husband. At several points, voices were raised and the Court was required to give firm directions on the appropriate behaviour to be adopted, and in respect of conduct when questioning witnesses.

The Court has taken appropriate steps to assist and guide the Father, as an unrepresented litigant, towards the exploration of all of the relevant evidence and issues relating to the various applications.

At the Trial, in addition to the parties and Mr. P who gave evidence for the Petitioner, I heard from:

(1)

Two Social Work Officers, Ms. Lo and Ms. Chow. A third SWO, who authored the initial SIR dated August 2015, was not called.

(2)

Dr. S Chu, a Clinical Psychologist, on the parenting abilities of the Mother and Father.

(3)

Dr. B Connell, a Psychiatrist, on the Father's psychological state.

Another potential witness, a Mr. Cronje, was to give evidence by video-link from New Zealand relating to certain explicit images and videos allegedly found on a computer belonging to the Father. The Court indicated several times that his evidence did not appear to be of central importance to the contested issues, particularly in light of certain admissions made with respect to the material by the Father in his written evidence. As it transpired, Mr. Cronje was not available to be called in the time allocated for the Trial, including the additional days fixed in November and December 2019. Ultimately, both parties accepted that Mr. Cronje did not need to be called.

Affidavits were produced during the proceedings from the Mother's father, Mr. N, and from the Father's sister, Ms. O and a friend of the Father's. None of these witnesses were called and their affidavits have been given no weight.

On 20th December 2019 the Trial was concluded with directions given for the filing of written closings and replies.

Meeting with older children

At the PTR on 2nd October 2019, the Mother raised the possibility that the trial Judge would meet with the two older children, C and E. On 4th October 2019 the Mother filed an affidavit (her 21st) to expand upon this and to explain that the children were keen to share their views directly with the Judge before he decides matters of considerable importance for their future. I directed that the Mother should formalise her application by Summons, which was filed on 8th October 2019. The Father opposed the Summons, pointing out in his Affidavit (his 13th) that he had been "totally ostracised and side-lined from the children's lives", that they had been manipulated by the Mother into taking her viewpoint, implying that the boys' views, as relayed by her, were not reliable. This seemed to me to be a reason in favour of the application, not against it. The Father added that in any event they had had an opportunity to provide the Court with their views through multiple Social Investigation Reports. The Mother replied by her 22nd Affidavit that there was no question of her manipulating the boys and that they were old enough to make up their own minds (C is 15 and at the time of the application E was about to turn 14).

I directed a further SIR to be obtained specifically addressing the issue of whether I should meet with the older children. This was supplied on 29th October 2019 and confirmed both C's and E's wishes that they meet with me. I decided that I would hear from each of the parties in the witness box before determining whether or not to accede to the Mother's application. This may seem to have been an excessively cautious approach to take, but I was very mindful of the circumstances in which the application was made, and the fact that for a lengthy period the Father has not been able to see the Children, including the two older boys.

Ultimately, on 19th December 2019, the Father withdrew his objection, and on the afternoon of 20th December 2019, after the Trial proper had concluded, I met briefly with C and E, together, in the presence of the Court clerk. A recording of the meeting was supplied to the parties in time for any comments they wished to make about the meeting to be incorporated in their respective submissions. In preparing this Judgment I have listened to the recording to refresh my memory of the meeting and of the boys' views as expressed by them.

Background

The Mother was born in Belgium, in 1979 and is now 40 years of age. She was raised in Belgium, and later in New Zealand after her family emigrated there. She is one of four siblings. She attended university in New Zealand with a degree in Performing Arts specialising in dance. She is currently running a dance business in Hong Kong.

The Father was born in Ohio, US in 1974 and is 45 years of age. He is one of three siblings. He obtained a Bachelor of Arts degree in 1998 and thereafter worked as a teacher in the US and then in Colombia, where he and the Mother met, when he was 25 and the Mother was 21. He has also worked as a teacher in private schools in New Zealand and in Hong Kong and produced a number of references dating back to 2002 testifying as to his professionalism in these positions. In addition to his bachelor's degree the Father holds a Masters of Arts degree in Education from the University of Phoenix. The Father is no longer working as a schoolteacher. He has, for a number of years, been involved in online foreign exchange trading which he operates through a company OTB Limited of which he is the majority shareholder. Like the Mother, he is a citizen of New Zealand and entitled to live and work there.

The marriage took place in New Zealand in January 2003.

During their marriage the parties relocated multiple times. After their marriage they lived in New Zealand, where C and E were born. They first came to Hong Kong in 2006. In July 2010 they went to Colombia and lived there with the two older children for about 6 months, before returning to Hong Kong in early 2011. In 2013 they returned to New Zealand.

In addition to these international moves, the parties have moved from one house to another several times. The Mother said these amounted to "16 house moves in our 11-year marriage" and described how, in her view, this was very disrupting to herself and the Children.

By contrast, the Father described these moves as beneficial, and that he and the Mother had "actually viewed [them] as a growth opportunity that stood as a testimony to the fortitude of our faith in our relationship. We both agreed with the 16 houses and the added new excitement to our experience."

One consequence of the parties not remaining in Hong Kong for a continuous period of 7 years has been that neither has permanent residency in Hong Kong. The Mother is presently on a business/investment visa. The Father's visa which entitled him to live and work in Hong Kong expired in October 2017, and whenever he now visits Hong Kong it is on a visitor's visa only.

As already noted, the Mother has provided detailed descriptions of the more difficult aspects of the marriage in her several Affidavits, beginning with her first Affidavit sworn 10th June 2015 and summarised in her all-encompassing 20th Affidavit sworn 20th September 2019. The Court is mindful that its focus must be on the future arrangements for the Children, and that it is not the Court's role to revisit past events unnecessarily, nor to assign blame for the breakdown of a relationship.

The Mother says that the events are relevant to the present situation and to the orders the Court should make, as they speak to the Father's character, and the extent of his ongoing psychological and behavioural problems. At this point of the Judgment I will refer to two matters she has particularly highlighted.

The Mother has referred to a number of instances where the Father lost control of his temper, sometimes after drinking. Perhaps the most serious incident connected with this took place in March 2012 when the Father, who had been drinking heavily, and had been engaged in a heated argument with his father (who was visiting from the US), locked the Mother and Ch out of their apartment. Concerned for the safety of the two older children, the Mother called the police and upon their arrival the Father resisted all attempts at resolving the situation, and forced the two older children, C and E to yell obscenities including some directed to the police. With assistance from fire brigade officers, the police were eventually able to break down the front door and enter the apartment. The Mother and the three children went to stay at a women's refuge for 2 weeks.

The second matter, which was not – on the Mother's case – a temporary loss of control on the part of the Father but something much more calculated, was the Father's surreptitious creation of a Facebook/Tumblr profile under a pseudonym, using sexually provocative pictures of the Mother, including semi-clad pictures of her while pregnant and the encouragement of other Facebook/Tumblr users to express their sexual gratification from these postings and to reciprocate with explicit pictures of their enjoyment of them. The Mother discovered these sites in 2013 and confronted the Father, who denied all knowledge of them at the time, instead blaming them on his Pastor, alleging that the Pastor had stolen the images from his computer, and had created the profile. This deception did not last, and eventually, a year later, the Mother confronted the Father with the truth, who accepted that he was the one responsible.

In his narrative Affidavit (his 6th) for the August 2017 trial, the Father accepted that he had experienced problems with alcohol in 2012, and said they were caused or exacerbated by difficulties in the marriage and with finances. He accepted further that he was foolish to have posted the compromising photographs of the Mother online – an action he said was “fuelled by drink” and “that I tremendously regret, am ashamed of, and that I am determined not to repeat.” In a further Affidavit for the August 2017 trial he repeated this acknowledgment and said that he had taken steps in December 2013 after the Mother had confronted him to contact the men who had received the Mother's photograph by asking them to remove and delete them. He said that one of the men he had contacted had refused to do so and in fact had re-posted the pictures on his Facebook page.

In her all-encompassing 20th Affidavit, the Mother described at length the conduct of the Father connected with the creation of this online identity and the impact, psychologically, on her. She affirmed how, in 2017, she sought the assistance of a forensic laboratory in New Zealand to whom she had sent two of the Father's computers, resulting in the discovery of a number of explicit videos of her on one of the computers which had been posted or sent by the Father to other Facebook/Tumblr users, suggesting that the Father's activities had been far more extensive than she had first thought. She submitted that this, to say the least, reflected poorly on the Father's character. At §116 of her all-encompassing Affidavit, the Mother said this:

I will not downplay the impact on me psychologically nor the possible impact long term. I face a very real risk of Greg repeating the same behaviour again seeing as he underestimates and pays very little regard to the consequences of his actions.

In response, in his own all-encompassing Affidavit (his 12th) the Father denied that this raised questions about his character. He referred to his previous admissions that his conduct was reprehensible and wrong, and that he had not denied this. The Father had earlier asserted that the Pastor whom he attempted to blame for the online posting had forgiven him and they had renewed their friendship. He repeated this assertion during the trial, including when he gave evidence in the witness box. In her earlier written evidence the Mother had produced an email from the Pastor dated November 2017 in which the Pastor referred to the damage caused by the attempt of the Father to shift the blame for the Facebook/Tumblr profile on to him, including loss of support within his church and damage to his marriage. The Pastor said that he had repeatedly rebuffed attempts by the Father to contact him and to apologise for what he had done. In the absence of any subsequent written communication from the Pastor, it is difficult to accept the Father's assertion that he and the Pastor have become reacquainted, let alone that he and the Pastor are now, once again, friends.

Matters came to a head in late 2013/early 2014 and in July 2014, the Mother left New Zealand with the 2 younger children for Hong Kong, "in an attempt to start a new life". The Father put to her in cross-examination that they had in fact agreed to reunite once the Father also relocated to Hong Kong. In response to this, the Mother told the Court that for the previous year and a half the Father had been "trying to break me", that he had suggested an "open relationship", and that the period leading up to her move to Hong Kong was "an intense period of brainwashing and torture". She described herself as being "torn with leaving [the two older boys] behind" with the Father but that she had no choice and had to leave. In Hong Kong, the Mother consulted a psychologist in October 2014, and said she had experienced panic attacks from around November 2014.

In October 2014 the Father came to Hong Kong with the older children for a short period and returned to New Zealand with them. In December 2014 the Mother returned to New Zealand and in January 2015 came back to Hong Kong with C and E.

The Mother says separation took place on 13th October 2014. The Father accepts that this was a significant date, and he has a tattoo on his left forearm with the words “whatever it takes” and “love never fails” with the date “13th October 2014”. As I have noted, this was when – on his evidence – he gave up drinking and has remained sober for the past 5 years.

In his written evidence, the Father says he did not want to separate, and that what in fact occurred was a “mutual agreement” that the Mother would set up residence in HK and pursue her dance business, with the intention that he would relocate with the older children to Hong Kong after arrangements could be made. He says that he remained in New Zealand long enough to pack up the house and arrange for shipment of belongings to Hong Kong.

The Father moved to Hong Kong in Feb 2015. During this time the Father says he was the primary carer for the Children with the Mother focussing on other matters including her business and a new relationship. In April 2015 the Mother visited New Zealand with F, the youngest of the Children, for about 10 days, and the Father says this passed without any problem, during which he cared for the three older children. He also affirmed that during the 6 months after the Mother left New Zealand in July 2014 he was caring for the two older children and produced references in support.

In April 2015 the Mother moved into a rental apartment and the Father remained in the Sai Kung House the Mother had leased when she came in July 2014.

Subsequently, both parties formed relationships with other people. In or about 2017 the Mother became romantically involved with her now husband, Mr. P, and as noted, married him in 2019. Further, and as noted, the Father is engaged to M, a Filipina lady.

It is apparent from the papers that the Father has found the reality of the Mother’s re-partnering and now re-marriage difficult to accept and reconcile with his beliefs in the permanence of marriage and his religious belief. Dr. Connell documented in his first report the Father’s “distress in trying to avoid what he experiences as abandonment”, referencing the loss of a previous relationship, and now the ending of the relationship with the Mother and, to an extent, the Children. This distress has been manifested in a number of incidents, two of them just before the August 2017 trial and a later incident outside the Sai Kung Starbucks. Two of these incidents involved the Father confronting Mr. P. All of them were audio or video recorded and USBs of the recordings were provided to the Court.

Relatedly, the later Social Investigation Reports refer to the older children’s annoyance at the Father’s repeated statements to them, in 2017, that he and the Mother would be re-united and the family would be together again. This obviously is no longer a possibility – the Mother says it never was – and both parties have moved on to other relationships.

There is at least some potential that the Father will find strength and stability with his new relationship and future wife. M, his fiancé, knows the Children having worked as the Father's domestic helper including when the Father had ongoing access. I was told towards the end of the hearing that the Father had planned to move to New Zealand with M in the event that leave was given to the Mother to relocate.

The Proceedings

The divorce proceedings were commenced by the Mother's Petition filed 26th February 2015 alleging mild unreasonable behaviour on the part of the Father. On 24th April 2015, the Father, who was not represented at the time, filed a Form 4 Acknowledgment of Service which stated that he did not intend to defend the case or make any application of his own either in relation to the Children or finances. On 20th May 2015 he filed a further Form 4 (received by Mother's solicitors on 8th June 2015) in which he said he would be defending the suit, attaching an Answer disputing the allegations in the Petition, and suggesting that the parties should seek counselling towards a possible reconciliation.

The suit was compromised by Consent Order dated 29th November 2015 providing for a fresh Petition to be filed based on 2 years separation. These proceedings were then commenced. The Decree Nisi was granted on 9th May 2017 and on 23rd April 2018 this was made Absolute, enabling the Mother to re-marry, which she did on 20th July 2019.

The parties' respective applications for ancillary relief were settled by order made by Consent on 18th October 2018, providing for a clean break, with no ongoing payments due by either party to the other. The Order records the Petitioner's undertaking (Recital K) to continue to pay for all of the expenses of the Children until they each turn 18 years of age or cease full time education whichever is later. It also records the Father's undertaking to provide financially for the children when he is in a position to do so:

L.

AND UPON the Respondent acknowledging, agreeing and undertaking to the Petitioner and to the Court that he acknowledges his legal obligation to contribute to the children's expenses and that he fully intends to start paying maintenance for the children as and when he is financially able to do so.

The Law

(a)

General principles

Section 19 of the Matrimonial Proceedings or Property Ordinance (Cap 192) ("MPPPO") provides that the court may, in any proceedings for divorce, nullity or judicial separation, make such orders as it thinks fit for "the custody and education" of any child.

Section 3 of the Guardianship of Minors Ordinance (Cap 13) requires the Court to have regard to the best interests of the child as the paramount consideration:

3

General principles

(1)

In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-

(a)

in any proceedings before any court (whether or not a court as defined in section 2) the court -

(i)

shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to -

(A)

the 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;

The paramountcy principle equally applies to any consideration of potential orders the court may make under the Matrimonial Causes Ordinance, (Cap 179) (MCO) or the MPPO: see s 48C, MCO.

The Court is required to consider each parent's position without discrimination based on their role or gender, and that, general speaking, it is accepted that the long-term best interests of a child are best protected if both of the parents contribute to the important decisions determining the upbringing of the child.

In considering the appropriate orders to make, the Court may seek additional guidance from the “welfare checklist”. This stemmed from the Children Act 1989 (UK), and now forms part of Hong Kong's Children's Proceedings (Parental Responsibility) Bill. The Court is not strictly speaking required to have regard to the checklist, at least until it becomes part of the law of Hong Kong. Nor is it necessary for the Court to set out each listed factor mechanically in order to demonstrate that each of them have been considered. The checklist is, rather, an “aide-memoire designed to ensure that none of the factors potentially relevant for a court considering a child's welfare generally in the circumstances of each particular case is left out of account”.

As set out in the proposed Bill, the checklist gives the following matters as those the Court should consider in determining the appropriate order(s) to make:

(a)

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

the child's physical, emotional and educational needs;

the nature of the relationship of the child with each of the child's parents and with other persons;

the likely effect on the child of any change in the child's circumstances;

the child's age, maturity, sex, social and cultural background and any other characteristics of the child that the court considers relevant;

any harm that the child has suffered or is at risk of suffering;

any family violence involving the child or a member of the child's family;

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

the practical difficulty and expense of a child having contact with a parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

the range of powers available to the court under this Ordinance in the proceedings in question.

any other fact or circumstance that the court thinks is relevant.

I have considered each of the matters set out in the checklist, many of which arise on the facts of the case. In doing so I have had regard to all of the evidence presented, and have additionally had the benefit of seeing the two older children, C and E, during the brief meeting mentioned above.

(b)

"Custody"

It is important to set out in some detail the case law as it relates to the terminology used in children's cases in Hong Kong, including the concepts of sole and joint custody. This is so that there is no doubt as to the meaning of those terms and others referred to in this judgment, and for an additional reason that the Mother has asked that, in the event her application for relocation is granted, the orders made upon this judgment may be registered in the destination country, where courts in that other jurisdiction may be assisted by the explanation of the statutory terminology in child cases as it applies in Hong Kong, in the event that there are further proceedings concerning the Children.

The leading authority in Hong Kong explaining the distinction between joint and sole custody is *PD v KWW*. There, the Court of Appeal dealt with an appeal by a mother against an order granting joint custody of the child of the marriage to both parents. The mother argued that the degree of animosity and arguments between her and the father were such that it was not in the child's best interests for joint custody to be awarded. The father countered that it was very important for him to be recognised in law as remaining the child's father in the sense that he continued to play a role in the child's life including in respect of the decisions of significant impact on the child's future.

It is a common misconception of parties in matrimonial litigation involving disputes over the arrangements for children that an order for "sole custody" granted to one parent means that the other parent "loses" and is no longer a significant element in the child's life. In *PD v KWW*, the Court of Appeal was at pains to dispel this misunderstanding:

28.

As our law has developed and now presently stands, when a marriage breaks down and the court must ensure the best interests of any child of the union, it will invariably do so by bringing into play the dual concepts of 'custody' – whether it be sole or joint custody – and 'care and control'. Neither concept, however, is defined in our statute books.

29.

Regrettably, empirical evidence suggests that there is a large measure of misunderstanding as to the nature and extent of these two concepts, certainly among law persons.

30.

At a practical level, a convenient way of understanding the two concepts is to compare the nature of the decision-making that is required to put them into practice.

31.

The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child's legal representative.

32.

By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. They include decisions as to what

the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline.

33.

We have spoken of the misunderstanding that exists as to the nature and extent of the two concepts. That is most often manifested in the misperception that, if sole custody is given to one parent, that parent thereby ‘wins’ the right to determine all matters big and small in the upbringing of the child while the parent who is not given custody ‘loses’ the right to have any say in the child’s upbringing. The present case is a prime example.

34.

The mother seeks sole custody because, to use her words, she wants to leave behind the conflict that has marked her relationship with the father since the breakdown of the marriage and wants to be left in peace to be able to raise the child as she thinks best, that is, to be able to determine such matters as the child’s education, religious upbringing and choice of activities free of any disturbance from the father. She is happy to let the child spend time with the father and is happy to keep the father informed of matters relevant to the child’s well-being but she wishes to reserve absolutely to herself the manner of the child’s upbringing.

35.

Equally, the father fears being deprived of joint custody because it is his view that society will perceive that he has thereby forfeited the rights and responsibilities of a father, being left only with the residual right to spend time with his daughter and the residual responsibilities of making a financial contribution to the cost of her upbringing.

36.

It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent. Any such potential misunderstanding was quashed in *Dipper v Dipper* [1980] 3 WLR 626 in which Ormrod LJ said:

“It used to be considered that the parent having custody had the right to control their children’s education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement has to be decided by the court.”

37.

In the same case, Cumming-Bruce LJ, another experienced family judge, said:

“... it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. This is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court.”

38.

A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.

39.

While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent to make a final decisions, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter.

40.

Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent.

41.

For this reason, it is often said that there is a thin line between sole custody and joint custody.

42.

In the present case, therefore, even if the mother is given sole custody of L, she will not be able to determine such matters as L's education, religious upbringing and choice of extracurricular studies free of any involvement by the father. She will remain obliged to discuss such matters with the father and to weigh in the balance all rational advice that he gives.

43.

Before leaving a consideration of the dual concepts of custody and care and control, it needs to be emphasised that, when a court awards care and control to one parent but rights of access to the other, as in the present case, the court is effectively awarding a form of shared care and control. This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent's physical custody. Rights of access, it is to be remembered, are given – in the interests of the child – to ensure continued bonding between parent and child.

The judgment of Hartmann JA continues with an explanation of the correct approach to be taken by the Courts where the question of joint or sole custody is in issue:

52.

Today, although there has been no change in our law similar to many other common law jurisdictions, orders of joint custody are in no way exceptional. This is because it is accepted that, in principle, such orders are in the interests of children.

53.

In all but the most exceptional circumstances, the effect of divorce on the children of the marriage, especially children of tender years, is deeply felt. In all but the most exceptional circumstances, such children desire that they should continue to be protected and guided by both parents. The case before us is an example.

54.

In the result, in the best interests of the child, the fact that, as a result of the breakdown of the marriage, relations between the parents are strained is not of itself a reason to refuse to make a joint order of custody. Nor is the fact that the parent to be given care and control does not agree. Such orders look to the future. They will govern a limited area of exchange between the parents, albeit one of the greatest importance.

55.

Accordingly, the issue for the judge is whether, with the court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on the questions of importance that will determine the upbringing of their child, both recognising that, as difficult as it may be for them, this process of co-operation is in the best interests of the child.

56.

In determining this issue, the judge is entitled to proceed on the presumption that competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child will be able to co-operate with each [other] concerning matters of importance in the interests in the upbringing of the child.

57.

At all times, of course, the welfare of the child remains the first and paramount consideration. As this Court has recognised (see, for example, *Y v P* [2009] HKFLR 308), there may be occasions when the ability of the parents to reach any rational accord in respect of important matters concerning the upbringing of their child is so deeply undermined that to compel attempts at cooperation will not protect the interests of the child but only leave the child more vulnerable.

Counsel for the Mother also referred in the written Closing to the judgment of Recorder Rimsky Yuen SC, in *ML v YJ* (HCMC 13/2006, 23 May 2007) which stressed the decision on whether or not joint custody is workable is very much whether the parents can co-operate for the benefit of the children.

(c)

Removal/relocation

The law in Hong Kong relating to applications by one or other party to relocate permanently from Hong Kong to another country is well-settled. The primary consideration to be applied by the Court faced such an application is whether or not that relocation is in the best interests of the child or children concerned. In considering the application, the feasibility and practicality of the proposal is plainly relevant, as is the motive behind it. The impact on the relationship between the “left-behind” parent and the children must be considered, as must the impact of a refusal on the parent asking for permission to leave.

The fact that the application is made by the primary carer does not give rise to any presumption in favour of that parent, or, conversely, where the parent is not the primary carer, against him or her. The guidance of Thorpe LJ in *Payne v Payne* is to be considered on such applications as identifying some of the factors which may be relevant to the issues at hand. These factors do not dictate or drive the outcome but operate as a guide as to what the Court should take into account as part of its consideration of what is best for the child or children concerned.

These factors, as summarised recently by the Court of Appeal are:

(1)

Is the Mother’s proposal genuine and realistic?

(2)

Is the Father’s opposition genuine? What is the extent of the detriment to him if leave is granted and how far may this be offset by the child’s relationship with the maternal family and homeland?

(3)

What is the impact on the Mother of a refusal of her proposal?

(4)

The outcome of the second and third appraisals must be considered in the overriding review of the child's welfare as the paramount consideration.

The Mother's proposal

The elements of the Mother's proposal on relocation are these:

(1)

Location. The Mother proposed New Plymouth as a place with which she and the Children are familiar, having spent a substantial amount of time there during holidays in the New Zealand winter and summer months. She said she had a large network of friends and in particular where her closest family friends, who used to live in Hong Kong, now live. The Mother stressed the healthy lifestyle the location would provide.

(2)

Finance. The intention of the Mother is that she would continue for the time to run her dance studio business from a distance, to provide continued financial support. She affirmed that she had set it up to be "fully functional without me by January of 2020." Provision has been made for the staff to continue and for renewal of the lease of the studio. She plans to establish a similar business in New Zealand upon relocation, and to sell the Hong Kong business at the appropriate time. Mr. P, who is a teacher in HK, would complete his current contract and then look for a suitable position in New Zealand, and pending a permanent position would take up relief teaching. The Mother has researched the government benefits provided in New Zealand.

(2)

Education. The Mother has researched schools for the Children. The intention is that the older boys C and E will attend the city's High School (see below) from February 2020 as boarders and then, if leave to relocate is granted, switch to day school after the completion of the second term. Details of the primary school for the younger children, Ch and F, were supplied by the Mother. Both of the schools are state schools, providing free tuition.

(3)

The Mother and Mr. P will secure appropriate accommodation in New Plymouth in advance of the relocation. She supplied with her 23rd Affidavit examples of suitable properties at a rental of between HK\$10,000-\$12,000 per month, and also supplied an estimate of her monthly expenses.

The Mother argues that New Zealand offers a better outdoor and general lifestyle for the future of the Children and that remaining in Hong Kong would presents them with numerous difficulties, including especially travel time to and from school and extra-curricular activities.

The Father's position

In his affidavit in response (his 14th), the Father explained the reason for opposing the Mother's Relocation Summons:

(1)

That it is a further attempt to increase the distance between him and the Children.

(2)

He is not opposed to relocation to New Zealand, but is opposed to relocating to New Plymouth, an unfamiliar place. His preference was for them to return to Auckland, a city of 1.6m inhabitants, as opposed to 58,000 in New Plymouth.

(3)

If there is to be a move to New Zealand, it should be “as a family”.

(4)

There will be a negative influence from the Mother’s father, who will ensure the Father has no access to the Children.

(5)

The Children had only recently identified as New Zealanders, and that previously they never did.

(6)

The Mother had exaggerated or “dressed up” the financial opportunities in New Zealand, in particular for Mr. P, who will have difficulties in finding work in New Plymouth. Further, that the Mother will not be able to establish a business there.

(7)

Hong Kong provides a continuing, and better opportunity for the Children, who will be able to complete their education in their current schools, in which they are well-settled.

(8)

That if leave to relocate is granted, the alienation of the Children from their father will increase and he will have no reasonable prospect of being a part of their lives in the future.

The Trial Evidence

(a)

The Clinical Psychologist

On 11th June 2015 the Court directed that a clinical psychologist’s report be prepared in respect of both the Children and the parents, for the purposes of assessing and comparing the parents’ respective parenting capacity.

Dr. Chu of the Social Welfare Department was engaged and supplied provided 2 reports, an initial report dated December 2015 and an updated report a year later, December 2016. Both reports followed extensive time meeting with the parents and the children, the first over a period of approximately 3 months. Her first report noted that the parents had worked out a parenting plan for the Children through mediation conducted in September 2015. Dr. Chu concluded her first report with recommendations for access, to include staying access, and added that the Father should continue to seek professional help for his alcohol and anger management issues, and further suggested that the parties might benefit from counselling or a co-parenting course. The updated report confirmed these recommendations including for the Father to obtain psychological treatment “to better separate his feelings and needs from his children’s, so as to enhance his functioning as a parent”. She suggested that C and E might also benefit from counselling to deal with their feelings about their parents’ separation. Dr. Chu recommended the Court to award Joint Custody.

In Court, Dr. Chu confirmed that she had had no involvement or contact with the parties or the children after the date of her second report. Nor was any direction provided for her to supply an updated report for the purpose of the 2019 Trial.

In questioning by the Mother’s counsel, Dr. Chu confirmed some uncontroversial matters including the importance to Children of a stable and happy home; the need for parents to co-operate and follow set times and conditions for access. She spoke of how the Father, as she could recall, was capable of being objective and making good decisions when it came to the Children, but was less capable of this objectivity when dealing with the breakdown of the marriage and the divorce, and that sometimes this did lead to him not being objective about the needs and feelings of the Children, so that in some situations his ability to make decisions was compromised.

In response to the Father’s questioning, Dr. Chu acknowledged that, to her, he had been honest about his inadequacies and that he had made efforts towards seeking help including help groups and reading articles and books but that finding suitable counselling in Hong Kong was difficult. She noted there was a degree of cooperation and co-parenting but that this had not always been successful and that mediation had not been successful in achieving a resolution of the outstanding issues. She acknowledged that ongoing conflict had a potential to have a significantly negative impact on the children, including because they would feel under pressure to side with one or other parent. Overall, Dr. Chu felt that both parties were experiencing anger and hurt from the divorce, but that the Mother was more focussed on the children. She repeated her written suggestion that the appointment of a parenting coordinator might be of assistance.

Dr. Chu was asked by the Father about relocation and boarding school. As her last contact with the parents and Children was 3 years before the Trial, it was difficult for her to comment, let alone make any recommendations. However, she suggested that if there was ongoing conflict between the parents, sending the children to boarding school might be “a lesser evil”.

One of the understandable concerns of the Father in this Trial is his anxious need to re-establish contact with the Children. Again, Dr. Chu's involvement ended in December 2016, at which time there was at least some access to the Children, including the summer access to the older children, C and E. Dr. Chu suggested that the first step would be to consider how to re-establish that relationship, and she stressed the importance of the children not feeling uncomfortable or threatened.

Dr. Chu confirmed that there was nothing in what she had observed to suggest that the Mother had been alienating the Children from their relationship with the Father.

Dr. Chu's evidence and her reports provided a valuable, but dated picture. Three main points can be taken from the evidence and her reports. First, that she assessed the Mother as being more focussed than the Father on the needs of the Children, and their welfare moving forward. This is consistent with other assessments made in this case. Second, that the Father was in need of ongoing professional assistance to manage the issues he faced, including his temper and ability to control his emotional response to stressful situations. Third, that there was no suggestion that there had been any attempt by the Mother to improperly influence or alienate the Children from having an ongoing relationship with their father.

(b)

The Social Work Officers

As noted, there have been three Social Work Officers involved with this family, two of which, Ms. YL Lo and Ms. M Chow were called to give evidence. Ms. Lo took over the matter in July 2016 and continued to be involved until March 2018 when she handed over the matter to Ms. Chow.

One of the starker features of the SIRs is the sharp contrast between Ms. Lo's two reports, from December 2016 and July 2017 (the latter for the August 2017 Trial) and those of Ms. Chow in their record of the older children's views towards the Father. To Ms. Lo, the older children expressed their clear preference for more time with the Father, their dislike of Mr. P, and the hope that their parents would reconcile. They supported their Father's request for fairness and, as he put it "equal power" when it came to time with and responsibilities for the Children.

Ms. Lo commented on the natural and happy interaction both parents had with the Children, including the younger children Ch and F. As had Dr. Chu, Ms. Lo's recommended that there be Joint Custody, including so as to reflect the Father's wish for equal share of parental rights and responsibilities in respect of the Children.

To Ms. Chow, whose first report was provided in October 2018, C told her he was very comfortable living with the Mother, siblings and with Mr. P, who by then had become engaged to the Mother. He said he did not have a single favourite time with the Father and referred to the 2012 incident. In a later report he is recorded as hoping his Father would respect his wish for no contact and that he was scared of his Father. He said he contacted his Father by text message during 2018 but had now ceased this because he felt "uncomfortable". E, the second eldest child,

expressed his hope that that both parents would “stop fighting in court”, so that he could put the dispute behind him and have lesser worries in the future.

I note that at the time of Ms. Chow’s second report in March 2019, both parties confirmed that the Father maintained Skype access to the younger children, Ch and F. I also note Ms. Chow’s recommendation supporting interim supervised access for the two younger children at the Parent-Child Contact Centre, to be held once a week on a weekday with duration of one hour during the opening hours of the Centre, with indirect Skype access on Saturdays to be maintained.

In Court, Ms. Lo confirmed that, despite the obvious stress of the breakdown of their parent’s relationship, the Children were coping reasonably well. The younger children, Ch and F, particularly, were progressing in their growth with happiness and enthusiasm. She also confirmed that, at least when she was involved, both of the older boys wanted to maintain a close relationship with both of their parents. She agreed with counsel for the Father that it was important for the Children to maintain a close relationship with both parents, and that the Court should ideally proceed to orders which encouraged this.

Ms. Chow was required to attend three times during the Trial, on 10th October, 12th November and 21st November 2019.

Questioning from the Father occupied most of her evidence. A number of points arise from it:

(1)

She confirmed that the older children spontaneously shared their views with her, without prompting.

(2)

She was at pains to emphasise that her focus was on the needs and expectations of the Children.

(3)

She did not oppose the involvement of a Parenting Coordinator, if such a person could be engaged.

(4)

A significant difficulty was the fact the Father did not have a fixed abode in Hong Kong, or a plan to establish one.

(5)

She described C as a “very mature and self-confident” teenager, troubled by his parents’ divorce but moving towards adulthood, with a need to make a “fresh start” in a new environment. She rejected the suggestion of the Father that the grandfather (the Mother’s father) would have a negative influence on him.

(6)

Ms. Chow said that there was no indication that either C or E had been “poisoned” by the Mother to think negatively about their Father or to resist contact with him. To the contrary, she said she had observed the Mother “putting great effort” into trying to ensure the Children maintained contact with the Father.

(7)

Ms. Chow confirmed, in her view, that attendance of the older children at boarding school in New Zealand was a positive step and that it was best that they start at the beginning of the NZ school year, in Jan/Feb 2020.

Ms. Chow was asked by the Father to explain the rift between him and the two older children. She said she was not able to explain the shift from the position as described by Ms. Lo in her reports, to the later position as set out in her reports. She described (when she returned to give evidence on 21st November 2019) the difficulties posed by the Father’s departure from Hong Kong in February 2018, his later return in August 2018 and the uncertainties of his living accommodation. In October 2019, leading up to her later reports requested by the Court for the Trial, he was still not supplying information on the plan he had for accommodation in Hong Kong.

It was suggested to Ms. Chow by the Father that her views were compromised because she had had no opportunity to view his interaction with the Children, and that this was the Mother’s fault in not facilitating access. In response, Ms. Chow noted that she very much wanted to observe the interaction between the Father and at least the younger children, but that this was not possible, including because of the Father’s itinerant lifestyle.

At this point it is important to note that Ms. Chow made arrangements for the Father to see the Children, in her presence, at the Parent and Child Contact Centre, on 28th December 2018, but the Father declined this offer, on the grounds that he felt it was not suitable. In the words of the Father, the centre “felt like a hospital”.

Ms. Chow was asked what could be put in place towards a better relationship between the Children and their Father. She emphasised the need for the Father to establish a stable environment, a stable daily life, and to undergo psychiatric/psychological treatment/assistance.

At the request of the Court, Ms. Chow supplied further reports specifically dealing with the issues of schooling and relocation. Her report on the former issue recorded the firm views of C and E that they wanted to attend the boarding school. Her report records the Father’s dissatisfaction with being excluded from the boys’ lives and not being able to talk to them about the issue of schooling. It also records that he did not object to them attending boarding school (the Father’s disputed the accuracy of this at the Trial). Ms. Chow’s report concluded with a recommendation that C and E be allowed to attend the chosen boarding school from the start of the 2020 school year in New Zealand.

Ms. Chow's final report dated 11th December 2019 concerned the issue of relocation. Although several attempts were made to arrange a time for her to meet with the Father, this did not occur. Ms. Chow met with the Mother and with the Children. Her report ends with the following recommendation:

Remarks and Recommendation

18.

From the gathered information, the Investigating Social Work Officer found [the Mother's] application was genuine facing the recent unstable political and economic environment of Hong Kong as well as the root and heritage finding of C and E who found Hong Kong not their long term home. Both C and E could not speak Cantonese or Mandarin nor writing any Chinese and they firmly shared their identity as New Zealanders. Viewing [the Mother's] report on her preparations, her relocation plan was realistic, practical and feasible as she had sufficient information and knowledge and with solid social support in New Zealand. [The Father] himself confirmed his wish to follow the children moving to New Zealand, too and thus the upmost concern was the access. Viewing the growing maturity of C and E and their decisive manner refusing access to the father, there was little room we could suggest but looking for changes arising from [the Father] when he was settled with stability and he had stable place of living, stable job and finance and no longer making potential threat, embarrassing them or making them feeling uncomfortable/unease. Regarding the two younger children, Ch and F, I do recommend supervised access and preferably conducted with the assistance of a parent-child contact centres in New Zealand if with both parents' consent as physical safety and psychological health of the children were our paramount concern. Last but not the least, [the Father] should commit to lasting counselling or in-depth psychotherapy so as to allow himself moving forward and have chance to rehabilitating his relationship with the elder sons.

This report was provided after Ms. Chow had completed her evidence on 21st November 2019. Neither party asked her to return to Court to elaborate on it. The Mother noted that, despite the Father's continued opposition to the application, and knowing that Ms. Chow had been asked to provide a further report on the important matter of relocation, the Father did not attend the appointment arranged with her to discuss the matter. Ms. Chow's report records that he could not attend because he was "sick". When he gave his evidence, the Father said this was not true and he did not attend inter alia, because it was "too far". This does not demonstrate a helpful attitude to aid Ms. Chow's further investigation and recommendations and to assist the Court in the task in deciding on the matter.

(c)

Mr. P

Mr. P is 48. He is from Australia and is a Hong Kong resident. He has a Masters Degree in Education from Deakin University and works, currently, as a schoolteacher, for a school in Hong Kong. He has 25 years of teaching experience in both primary and secondary levels of education. He also coaches and plays rugby.

Mr. P referred in his 2nd Affidavit to his relationships with each of the Children, and the increasing closeness to each of them as the Mother's new partner. Particularly he mentioned that in his relationship with the older children which had developed towards mutual respect and understanding.

Looking to the future, Mr. P said he was confident that he would find work in New Plymouth as a teacher at either a primary or secondary school in the event he and the Mother were able to relocate with the Children in 2020. He informed the Court that his qualifications would be recognised in New Zealand. He had, in fact, handed in his notice to his present employer with his leaving date being 20th December 2019. He clarified this in the witness box by saying that the Principal of the school had been supportive and had suggested that he reflect upon it. He said that he would be able to remain with the School, despite having handed in his notice, until the end of the HK school year 2019/2020 on 28th June 2020.

Mr. P spoke about the incidents with the Father, including the confrontations in 2017 and 2018. In the first incident – where the Father attend the Sai Kung property to where the Mother and Mr. P and the Children had moved in earlier 2017 – he spoke of feeling threatened by the Father; of his concern that “I was the focus of that anger” and of his fear that the Father's might be carrying a knife.

The second incident he spoke of was later in 2017 when Mr. P was attending a rugby tournament with E. He said that the Father, who was attending the same tournament, “actively pursued me around the field yelling at the top of his voice that I was destroying his family, that I should keep out of family matters and that I was undermining his rights as a father. On the journey home Greg tailed gated me, accelerating right beside the car in the Cross-harbour tunnel and harassed me. He relented his pursuit after I pulled into a petrol station. This was reported to the police the following day. E was present the entire time and witness to his father's bad behaviour.”

The last encounter was in December 2018 outside a Starbucks in Sai Kung, where Mr. P described how the Father again confronted him and “vented his anger”. Again, Mr. P said he was fearful of an attack.

In questioning from the Father, Mr. P was asked about a “utopia” situation for the Children. Mr. P's response was

I can see you being involved, as the father. Paying maintenance. Sharing the kids' lives growing up. The kids having overnight access. The children getting to know, growing up with their biological father.

But that he was not optimistic, given what he had seen of the Father's behaviour towards him, the Mother and the older children:

I wish that you were a reasonable, healthy, responsible, caring father. But I don't believe you are any of those things. I believe he is a bully, aggressive, that his desire to be the father of these children is groundless. I fear that if he ever had contact with these children that it would only be detrimental. But I wish that [the Father] could be a good man and that we could invite him into our house and he could have a great relationship with the children. It is saddening. I have to deal with it. I don't see him improving.

Mr. P was asked by the Father what he had said to the Children about why they were not seeing the Father any more.

I haven't spoken to them at length. That is [the Mother's] responsibility. If anything, I have said to the children I am disappointed that they are not being supported financially, but otherwise I don't really talk about that stuff in any great detail. I feel that it is not my place. It is complicated and for the little children, they can't really understand.

The older boys have made their own decision. I question it by myself, but I have never asked them why. I find it incredible that they want to have nothing to do with their biological father, but I don't know their minds. It just flabbergasts me that there is such a gap, a distain, a fear for their father.

The Father's questioning of Mr. P was at times emotional (he twice asked for a break to calm himself) and at other times bordered on threatening and bullying of the witness. More than once he raised his voice and began gesticulating and had to be reminded by the Court to modify his tone. Although his cross-examination of Mr. P lasted a full day, very few of his questions were directed to the practicalities or difficulties of the proposed place of relocation. That is not to say that the evidence given was not of any use – including the passages set out above.

The Father's focus was made more difficult by the fact that, remarkably, during part of his questioning he was engaged in online Forex trading, using his computer and the Court's WiFi. The Court was first informed of this by the Mother's lawyers who were able to observe his activity from their side of the Court. The Father did not deny that this is what he was doing. He was directed by the Court to stop and focus again on his questions.

This did not, however, seem to improve matters, and nor did the Father always keep to a civil tone of voice. Towards the end of the day, the Father became more and more angry and distressed and repeated his misconduct towards the witness. He refused to follow the Court's admonitions, repeatedly badgering the witness and interrupting his answers to the Father's questions. Ultimately, the Mother's counsel applied for a direction that the cross-examination should stop, and this was granted. The Court is satisfied that had it not done so this manner of questioning would have been repeated and possible would have escalated. The Court is also satisfied that the Father had had sufficient time to put his case to the witness, and was merely repeating matters which had already been put to Mr. P, or matters which were of no assistance to

the Court in its determination of the case.

(d)

Dr. Connell

As noted, Dr. B Connell was appointed as SJE to provide a psychiatric assessment of the Father. He provided 3 reports in all, a primary report dated 14th January 2018 and two updating reports of 6th May 2019 and 7th October 2019 each based on a consideration of the Court bundles and interviews with the Father.

Dr. Connell expressed the following views in first report:

35.

... GAH was clearly still emotionally caught up in the continuing process and drama of the current proceedings as is understandable. I found him personally engaging as others (professional and non professional alike) have previously. I noted that at times when F was recounting his perspective on matters before the Court he became very upset and almost distraught. In psychiatric terms I did not detect evidence of him currently suffering from an anxiety disorder, a depressive disorder or a psychotic disorder. GAH related that he continues to be sober in terms of past alcohol use and therefore he did not demonstrate any evidence consistent with an active diagnosis of alcohol dependence (now known as Alcohol Use Disorder).

36.

However I note that during the interviews GAH had great difficulty in seeing himself, in terms of the current proceedings, as anything more than the wronged party. GAH clearly struggled to appreciate or empathise with the position of SLH as detailed in the various documents before the Court. During the interviews GAH demonstrated a lability of emotional response to matters discussed beyond even what might ordinarily be expected in the admittedly stressful context of such a psychiatric examination.

37.

In my respectful opinion I consider GAH's past problematic behaviour (before, during and since the breakup of the marriage) is best explained and understood in terms of GAH suffering from a Personality Disorder that has, as is common, fluctuated in intensity in relation to the degree of stress present in his life at any one particular time or period.

As for treatment, Dr. Connell said:

48.

It is in my respectful opinion in GAH's best interests that if at all possible he develops a treatment plan under the direction of an experienced Specialist in Psychiatry. This would clarify and confirm my diagnostic conclusions and allow GAH to be prescribed some combination of medication (not always necessary but may involve medicine to alleviate mood lability and

reactivity as well as possible ADHD) and specific psychological treatment (most likely if available DBT or dialectical behavioural therapy) as well as support his continuing abstinence and attendance with AA.

49.

If for reasons of non availability of such expertise in Hong Kong accessible to GAH in the short term, or because he has to temporarily relocate I would suggest that despite his expected upset at having to be far from his children to presumably see them for whatever period less frequently, such a relocation may be beneficial to him in that it removes him from the current context and stress. I expect in Vietnam it's unlikely he will be able to access the ideal psychiatric care I propose but at least a time away may allow him to heal. GAH may also wish to give consideration to seeking more expert help in either the US or New Zealand. It may be in these countries shorter term more intensive treatment courses are available that would allow him to stabilise and strengthen sooner rather than later to when in due course more effectively and less stressfully reengage with his life and context. I note that SLH wishes GAH to continue to play his important role as father to their children and I would respectfully suggest that it is in all their interests that GAH receives the expert help he has needed for a very long time and deserves now. Whatever treatment GAH receives here or elsewhere in the near term I think it is in his best interest that it also focuses on helping him accept and adjust to the decisions of the Court. If GAH can be helped to do this it will be better for his personal mental health and this in turn will allow him to focus his energies on the quality of his relationship with their children, with he and they hopefully benefiting over the many years to come.

Between Dr. Connell's first and second reports the Father undertook an intensive 15-session short course of DBT in May and July 2018 in the US, had continued to attend AA and a "men's group" at a local church, as well as re-connecting with Mr. Merrifield, his counsellor who he had previously seen in the months after the parties separated. Dr. Connell noted, in his second report, that the Father was "noticeably calmer and more able to discuss the matters before the Court without becoming emotionally distressed or aggrieved." The report also states that "Unlike when we met in late 2017 I was struck in discussing these matters how he seemed to be more able to understand the perspective and emotional needs of his children" and further, that the Father's statement that he wanted to be assisted in the conflict by trained counsellor experienced in high conflict cases indicated "a willingness to be guided by an independent professional working with his children's best interests as primary." Dr. Connell recommended that the Father "continue to build on his DBT foundations with a suitably qualified clinical psychologist" and for him to seek the opinion of a Specialist in Psychiatry for a professional opinion on whether medication might complement the DBT.

Dr. Connell's final report confirmed these views, as did his evidence to the Court. This was not, in his view, to disparage the spiritually-based therapy the Father had been seeking out, and indeed he said that this was likely to be not substantially different to that offered by the average counsellor or psychologist.

Dr. Connell was asked by the Mother's counsel to comment on the Father's courtroom behaviour, as relayed to him. His response was to note that the Father was "not trained to be doing this" and that it was difficult for him to make any comment. He confirmed his view that the Father was not, in fact, psychotic, but that there was in his behaviour "a degree of emotional dysregulation, and lack of an ability to control in some circumstances" and that it was a matter of him "being overwhelmed by feelings in the moment." It was put to him that the Father demonstrated a "complete and total lack of objectivity". His response was that there was, in his conduct, a lack of empathy, not a total absence thereof, but a deficit in terms of considering the position of the person in conflict with him and his own needs.

In response to the Father's questions, Dr. Connell was at pains to point out that he acknowledged that the Courtroom was not a pleasant environment, and that it might aggravate the emotional destabilisation. He accepted that the Father did not relish the prospect of having to take medication (including because of the Father's own experience with the effects it had on his mother). Nevertheless, Dr. Connell did not resile from his view that the Father would benefit from the recommended treatment, including medication if prescribed.

At various points in these proceedings it has been suggested by the Mother that the Father has been on his "best behaviour" to the therapists and counsellors he has consulted, leading to positive statements in their reports which are not truly reflective of who he is. This proposition was put to Dr. Connell by the Father. Dr. Connell responded that "I didn't think you were faking" and "I judged you as being genuine."

Dr. Connell ended his evidence with reaffirming that treatment might be more affordable in New Zealand, another possible future destination for the Father.

(e)

The Mother

The Mother gave evidence over 2 days on 17th and 18th December 2019. In her examination in chief, the Mother provided an updated picture of the four Children including their activities, schooling and their views towards access.

She said that both C and E had experienced difficulties with their situation in Hong Kong including the recent disturbances. She said that E had been playing basketball in Tseung Kwan O recently when police in riot gear "lined up" the children and asked for IDs for "gathering". Additionally, the opportunity for sports was limited as their school, NA, did not provide for any organised sports for over 12 year olds. The school's facilities were also quite limited.

The Mother spoke of how E is a very empathetic child, and did not want his Father to feel hurt or upset and so took on much responsibility to make sure that his Father was OK, however that he became less and less enthusiastic to attend access with the Father as time progressed, and related back to her some of the difficult and what she described as "hurtful" conversations with the Father.

Ch, the Mother described as a “very loving child” who would like to see her father, but was confused and upset by the last incident in Sai Kung (at Starbucks) as she did not understand why her father was yelling at them. F, the youngest child, is still only 5 but is also a happy child and progressing well.

The Mother’s written evidence exhibited documents relevant to the school in New Plymouth, a boy’s only state school, including its Prospectus for 2019. In the witness box she described enthusiastically the facilities and opportunities the school would present for the boys, including for sport – as one of the “top three” schools for rugby in New Zealand – arts and other academic pursuits. She viewed it as “150%” better for the older boys, socially and sporting wise.

When asked to comment on the Father’s concern that her father would be a “toxic” influence, the Mother denied that he was, or would be, that the Father’s allegations against her father were “delusional”, and that part of the reason for the animosity was that her father was not a Christian. She added that the older boys had no awareness that there was any bad blood between her father and the Respondent, and pointed out that in the past he had not objected to the boys spending time in New Zealand, “only now”.

As for the suggestion that they relocate instead to Auckland, the Mother said this was not feasible, financially. She referred to the housing bubble there as “ludicrous”. More importantly, in her view was the lifestyle afforded by the smaller town, the easier commutes, the opportunity for beach and hiking activities, the safeness.

She confirmed that neither C nor E wished to have contact with the Father. For C, she said that he had told her something “insightful”: that if the Father “wanted to be respected then he had to be respectful”. In her view, their present situation was consistent with the Father having deliberately tried to coach the children in the past, and how they were now frightened of him.

The Mother was cross-examined by the Father for more than a day from the afternoon of 17th to 4:40pm on 18th December.

The Court accepts that this was not an easy experience for either the Mother or Father, and that ideally, in such emotionally charged cases, it is far preferable for such cross-questioning to be presented through an experienced solicitor or counsel.

At times, as had been the case with Mr. P, the Father struggled at times to contain his emotions, and the Court repeatedly asked him to lower his tone and to adopt a more respectful attitude both to the witness and to the Court.

At the beginning of his questioning, the Father asked the Mother what she would like for her family and how he would fit in. Her response was unambiguous:

It is very, very clear to me that you need to get help before I can let you near the kids in any kind of unsupervised manner.

She confirmed, when asked by him, that in her view the treatment he had already received was not enough:

No, I don't agree due to what Dr. Connell said. Your condition flares up, according to him, due to stress, unstable conditions. When you did your DBT you were comfortably living in your mother's house, there was no financial pressure. No rent, no groceries. No maintenance order. Not paying medical bills. No life stressful situations, so you have not practiced anything from that training in real life. You did 13 sessions while living under mum's roof, without any court situation; children. It is not enough. The psychiatrist said you need to be under psychiatric care.

The Father asked how the Mother encouraged C to have a better relationship with him. She said she had suggested that C consider meeting up for coffee, in a non-stressful situation where he has the power to "walk away" if voices are raised. At the same time, she said that C had "very valid reasons for not continuing a relationship with [the Father]", that

"even now, you don't believe it is your responsibility" for the schism in the relationship. She went into detail about the incident on his birthday in 2017, which she agreed was the "last straw" for C and that thereafter he became resistant to access.

As he had with Mr. P, the Father took the Mother to some of the pictures from his time with the older children in the US where they attended a Christian camp. He suggested this was a happy time and that when they are with him the children are happy. It was painfully apparent that the Father remembers this as the last time he felt that he had experienced quality time with the older boys.

The Mother responded that the Father could be "very many different people" and that when things were good during the marriage, "we were all on cloud nine". She accepted that the children had a few lovely moments with him, and a great time with their US cousins and uncle and aunt.

The Father also suggested to the Mother that he should be giving an opportunity to show that he was a changed man. The Mother's response was this:

I believe you know I have given you multiple opportunities. Brought them to you on their birthdays. Ensured that you had as stress free an access as possible. I have tried to ask you to stop contacting me when you have the children with you, so that you can focus and have fun with them. [In relation to 2016 access] I was as flexible as I could be. ... The number of times the children were on a bus back early, was nearly every Sunday, because you would just leave. I understand if you were telling the truth, wouldn't a father want as much time as possible? Your words and actions are completely contradictory. [On C and E] you have not read their emails, listened to them, or had any self-reflection over the last two years to understand what kind of impact you have had on them with your behaviour. You were advised 2 years ago of your condition, and you have not sought out a psychiatrist so that you can be a dad to them in a way which is healthy for them. That's what they want. What everyone wants.

The Father put several questions about the feasibility of the proposed relocation, including that Auckland offered better opportunities for the Mother to establish a dance studio. The Mother rejected this and said she knew of 7 dance studios in the area in which the parties used to live, “none of which are profitable”.

The difficulty the Court has with much of the questioning by the Father of the Mother on this point was that little, if any, of the details of his alternative proposal – that Auckland presented a better opportunity – had been fleshed out in the Father’s written evidence. Nor did the Father at this time (or later, when he made his opening remarks or came into the witness box) supply further particulars of his counter-proposal. The Mother said that she had been trying to discuss boarding school with the Father “for over a year”, that the Father did not look at the specific school suggested or make any comments on her proposal.

Towards the end of the questioning, which had, as I say, lasted for more than a day, the Father increasingly interrupted the Mother’s answers, and repeated questions already put. He began an argument about the Mother’s alleged interference with and undermining of his relationship with various pastors he had known in the past, and those he now knows. He raised his voice, despite previous requests and directions from the bench. The witness was visibly very upset. At or about 4:30pm, a formal application was made by her counsel to bring her evidence to an end, and after hearing from the Father as to what further matters he wished to put to her, and being satisfied that these matters had already been covered, I directed that the cross-examination be brought to an end. I was satisfied that further questioning would not be of any assistance to the Court in addressing relevant matters relating to the issues to be determined in this case, and that the extension of the questioning would only serve to retrace the ground already covered. Further, I was concerned that the kind of behaviour and defiance of requests and directions of the Court to conduct the questioning respectfully and in a calm manner would continue, and/ or increase in intensity.

(f)

The Father

The Court had heard openings from both parties earlier in the Trial. The Court afforded a further opportunity for the Father to outline the main points of his case, on the morning of the second to last day of the Trial.

In his brief oral opening, the Father stressed two points:

(1)

That he firmly wanted to pursue other opportunities to resolve the dispute between him and the Mother. He considered there might be such facilities in New Zealand.

(2)

That he wanted all – including the Children – to grow from the difficult experiences e.g. the incident at Starbucks, to emphasise the positive and put these matters behind them.

At the outset of his evidence, the Court asked the Father for his specific proposals, addressing the alternative scenarios if the Children remained in Hong Kong, and if they relocated to New Zealand. Although these were not specifically put to the Mother during his questioning of her I take from the Mother's responses to his questions she would object to any unsupervised access whether in HK or New Zealand and the supervised access would be conditional on the Father seeking psychotherapy as recommended by Dr. Connell.

The Father's specific proposals, were, in summary, these. First, he was asked by the Court where he would be living. He said that in the event that the Children remain in Hong Kong, he would stay "as close to Hong Kong as possible" but that there was an element of uncertainty about this. He proposed that, when in Hong Kong, he have access to the Children on Saturdays, and for a substantial part of the day, i.e. the whole day. He requested indirect contact by Facetime or Skype or telephone, "just as before". For the older children, he suggested that he could do a "ten-minute video" and send that to them each week, and they could respond in kind. He suggested that they could use social media, including "tagging" each other on Instagram. If the older boys attended boarding school, he would spend more time in the Philippines with his fiancé, M.

The Father was asked by the Court what arrangements he would suggest for access in the event leave to relocate was granted. He responded, frankly, "I don't believe this will be in this Court's hands". He did, however, and as set out above, provide further particulars of his proposals in his written closing.

The Father confirmed that he rejected any supervision of his access. He said that the two younger children were very fond of – "loved" – his fiancé (his former domestic helper) and that it would be in their best interests to have "normal" access and that a restriction, such as third party supervision, would have a negative impact. In any event, the Father was of the view this would have to be sorted out in New Zealand.

The Father confirmed his wish for the order for Joint Custody to remain in place.

The Father said that he would be seeking to save up as much "liquid cash" as possible during the immediate future. He did not say whether he would be making a contribution to the Children's expenses.

During cross-examination, the Father was asked about his financial position. Despite requests for him to give an approximation of what he was worth, he declined to inform the Court or the Mother's counsel of this. He did supply some broad indication of the amount he was making with OTB Limited, being US\$8,000 during his most successful week.

The Father acknowledged that he had stayed at the Peninsula hotel including with his now fiancé, and said that in fact he stayed there so often he had been granted a corporate account and a ‘volume-based’ reduced rate by the hotel. He praised the hotel’s facilities, particularly its spa and pool and fitness centre, that this was great value at “\$3,400” per night, for his mental and physical well-being. On one occasion he was provided with airport to hotel transportation in one of the Peninsula’s Rolls Royce motor cars.

Two points can be made here. First, this evidence jars with the fact that the Father, on his own case, has not made any or any substantial payments towards the Children’s expenses in compliance with the consent order dated 18th October 2018. Second, and more directly relevant to the present issues, it is remarkable that the Father would rather prefer to spend money on a luxury hotel, apparently not infrequently, than commit to treatment which might eventually need to a healing of his relationship with the Children, particularly the older boys.

The Father was asked about what he had done about such treatment. He said this had amounted to him conducting his own research, including “hundreds or thousands of hours of You Tube videos... it’s all I can do given I need to save resources.”

The Father accepted that he attended DBT in 2018 because he thought that if he did not do so he would not be able to resume access to the Children and that he was “unpleasantly surprized” that he did not get access in return for his commitment. He confirmed that his present plan was to remain in AA, obtain the support of his pastor when he needed it, and otherwise save enough money for the future, including a potential move to New Zealand with his fiancé and future wife.

Counsel for the Mother asked him why he had not followed up on the recommended treatment:

Since I have been travelling back and forth between countries, to try to get someone to believe I can be with my kids, this is what I am talking about. I don’t really know what people are looking for. I am frustrated by these proceedings. My family sees it. Anyone in my circumstances would be frustrated. That isn’t a condition. That is not a disorder. Once this proceeding goes away, let’s see whether I suffer from a condition. ADHD cannot be cured.

The Father repeatedly referred to his past behaviour as akin to a ‘puppy dog’ who had complied with what others wanted of him, in the hopes of being rewarded.

This, and the Father’s response to questions about the therapeutic treatment, chimes with Dr. Connell’s observation of the Father as someone who feels he has been wronged, indeed, deeply so. There is a distinct refusal by him to accept the potential benefit of proper treatment as recommend by not only Dr. Connell, but supported by others who have assisted the Court. I should note that at another point in his evidence the Father did say that if, and when, he had the funds, he would put in place a program of treatment, and would not “link” that to any resumption of access. Yet, he hastened to add, that, “the last 4 ½ years has not let to it. I would like to see if you could stand up to that scrutiny”.

Regretably, his evidence does not suggest he has any real intention of re-engaging in the treatment that Dr. Connell has specifically recommended and which did result in the improvement in his mood and ability to control his emotions which are documented in Dr. Connell's second and third reports. The Court's earnest hope is that this is not the case, and that the Father will seek out appropriate treatment, for his own sake, and more importantly, for the sake of the Children.

The Father referred, in his evidence to the fact that he had been strengthened by his Christian faith, and that he would keep his focus on this and the power of God to "heal our hearts". When questioned about the letter from the pastor he blamed for the Facebook/Tumblr profile, he mentioned the need for people to forgive each other and to do so "70 times 7 times" and expected the Pastor's forgiveness, as this was his duty. He acknowledged that there are consequences which flow from sin, but that past misconduct is not held over a person "like the sword of Damocles".

A substantial part of the Father's grievance is because he considers that there has been no forgiveness flowing to him from the Mother, or from the older children. This is, apparently, inconsistent with his belief of how one person should behave towards another.

It is not for this Court to make any pronouncement on whether such forgiveness should be forthcoming. The Father feels, apparently, a righteousness that he is deserving of and is able to expect such forgiveness and that this could lead to a reconnection with his older children.

The Father is an intelligent man. He is also, in the view of the Court, manipulative, very ready to judge others and what he perceives as their failings, including if in his assessment they are not complying with his own principles of how a person should behave in forgiving the faults and sins of another. Conversely, he seems reluctant to admit his own flaws, and to face up to them, even when he has been professionally advised, and repeatedly so, of the steps he should take towards a more mature and reflective life.

Decisions

(a)

Custody, care and control, access

Having considered all of the evidence and the submissions advanced, it is my conclusion that the best interests of the Children would not be advanced by maintaining the present order for Joint Custody. In my view, and despite the Father's earnest plea for "cooperation" and "co-parenting", there is no reasonable prospect of this, even with the assistance of a Parenting Coordinator, unless and until the Father seeks out appropriate psychiatric treatment as he did in 2018. I accept the Mother's evidence that she has repeatedly tried, in the latter years leading up to the Trial, to seek the Father's cooperation on matters of importance, without success.

I acknowledge that the Father feels, deeply, that his position as the responsible parent has been undermined, but I would ask him to recognise that the legal position, as set out above, is that there is a fine line between the concepts of joint and sole custody, and that it does not mean that his position is somehow denuded.

I grant the Mother sole care and control of the Children.

As to access, I am not prepared to make any order varying access to the older children, C and E. I will maintain the existing Order which permits the Father to write to the children, by means of letters, written cards, and other non-electronic communications. If he wishes to send videos to the children with such letters, he may do so, using, for example, a USB stick. There is no obligation on either C and E, or on the Mother, to respond.

I acknowledge the recommendation that the Father be able to see the younger two children, supervised. I recognise that there is a danger, given the age of the younger children, that if contact is prevented for another substantial period, the damage to the relationship with the younger children may become more lasting.

I am not, however, prepared to make specific directions for access, in light of the other Orders made upon this Judgment, the uncertainty of where the Father will be over the next few months, and his failure to make any commitment of when he will be in Hong Kong. Further, I note the Father has been reluctant to have access at the Parent and Child Contact Centre and even if the Court were to make such an order, it seems unlikely to be complied with by him. Lastly, and as already noted, the Father is apparently unable to recognise that he is in need of treatment as recommended. Not without some hesitation, I direct that access will continue in the limited form as previously ordered.

In the event that the Father is prepared to reconsider and commit to appropriate treatment, then he may apply to this Court for further directions with respect to access for the forthcoming months.

(b)

DVO Summons

On 14th October 2019 the Court was addressed as to the need for continuation of the authorization of arrest. Counsel for both parties made submissions on certain messages from the Father after the non-molestation Order was made and the restricted non-electronic communication was set in place. The Court then gave an ex-tempore ruling extending the authorization.

I said in that ruling:

Both parties have filed their respective all-encompassing affidavits the Mother's 20th and the Father's 12th. The Mother's affidavit includes a second devoted to the DCRVO Orders and alleged breaches of these Orders by the Father in the period leading up to the present hearing.

Mr. Surman took me to the affidavit and some of the relevant exhibits. These exhibits include a letter from the Mother's solicitors dated 4 April 2019 attaching a typed version of numerous messages the Mother claims were sent to her Skype account together with an earlier message to the same account which is undated, but asserted to be after the original DCRVO Order (Exhibit SH-20-50). The solicitor's letter advised that the matter had been reported to the police, and the Mother had blocked the Father "on all social media". The letter warned that "if there are any further breaches of the above Orders, your client may well be arrested and in that event, we also have instructions to apply for contempt proceedings against your client."

Mr. Surman pointed to the number of messages and the period over which they were sent: approximately 130 in the space of an hour and a half, and to their content. He also pointed to the time of day they were sent and received: between 8:40pm and 10:01pm.

The messages contain repeated abusive language and, direct threats against the Mother and her husband/partner, [Mr. P]. They include statements that the Father had "liver disease", that "I don't care anymore", that "you will now feel the wrath of God." They conclude with these six message received in the space of 2 minutes from 9:59 – 10:01:

F**k your agenda, S

F**k it

You want to believe in WHAT?

You can have a new life?

That you can be happy?

That's where you might be wrong.

Exhibit SH-20-51 shows the Mother made a statement to the HK Police on 2 September 2019.

Mr. Clough for the Father suggested that insofar as the messages sent had a religious element – referring the "wrath of God" – this did not constitute a threat. With respect, in the context of the entire series of messages, I disagree. However, this single reference to God is but one of many other messages which are of a more secular nature and cannot be read as anything but threats. In the context of this high conflict case, they are, to say the least, troubling and distressing, as the Mother has said they were when she received them.

I was also taken to text messages allegedly sent by the Father to C and E, the two older children, in July and August 2019, attached to a further letter from SW and Co, dated 28th August 2019 (SH-20-52). They are not abusive and indeed are affectionate. However, it is concerning that although in one of them the Father acknowledges that he is under a restraining order, they may well amount to a breach of the strict terms of the order dated 12 June 2019 which prohibits anything but a limited form of communication.

Mr. Clough made the point that these messages were sent after the Father had not been provided by the Mother with details of the children's itinerary and addresses and dates as he had been promised by the Mother's undertaking: see email 18th July 2019 attached to letter from BCC dated 26th July 2019 (GAH-12-11). He added that the Father's decision to communicate by email was to be seen in light of the fact that the Mother and C had been sending him emails including about the possibility that C and E would attend boarding school.

In order for an authorization of arrest to be attached to an Order the Court must be satisfied that the respondent to an application for a non-molestation order (or other restraining order under the Ordinance) has caused actual bodily harm to the person protected by the Order or the court reasonably believes that the respondent will likely cause actual bodily harm to the person protected: s. 5(1A)(a), (b). I consider that the same test is applicable to the power to extend the authorization under s. 7.

Threats of violence can be sufficient to form a reasonable belief: *YLS v TL* (FCMC 8396/2007, 30 May 2008).

It does without saying that the Mother's affidavit (and indeed her other affidavits) are as yet untested, and nor (for the reasons given earlier) will it be likely the Court will hear from the Father until later in the year. However, it is notable that the Father in his 12th Affidavit, which was filed on 4 October 2019, did not directly address the matter, nor did he deny sending the Skype messages. If there is an explanation, it will have to wait until he gives evidence in the witness box. I further note that there has been no repeat of the abusive Skype messages, however this is to be seen in light of the fact that the Mother has blocked Skype contact and all social media contact with the Father. Neither she nor the children have received any postcards, letters or other what might be termed "old-fashioned" methods of communication as was permitted by the 12 June 2019 Order.

Having heard from both counsel, I am satisfied that there are good grounds for extending the authorization of arrest to the completion of the evidence.

The Court thereupon made an order extending the authorization of arrest to the then ending date of the Trial, 31st October 2019. It was, as stated, further extended and currently expires on 31st January 2020.

I referred in the ruling to a few of the messages. The Father was asked about these and others of the messages – many of them equally concerning – by the Mother's counsel. He said that they were "poetic", that they had "rhyme and metre". He suggested that his reference to the "wrath of God" was indicative of the need to seek forgiveness. He referred to the 'purifying fire' of God.

The Father's explanation is, plainly, far from acceptable. Whether these messages were sent at a time when the Father was distressed, under the influence of some substance, or simply venting his anger, is not the point. They are full of venom, and calculated to frighten. Anything less than a fulsome retraction of them, expression of regret and promise of non-repetition is, quite simply, unacceptable.

I am satisfied that the Order of the Court should continue, with the modifications to take into account the other Orders the Court will make.

I am also satisfied that it is necessary for the authorization of arrest to be extended. As I said in my ruling of 14th October 2019, I am aware that the attachment of an authorization of arrest is not to be made without careful consideration. Nor is it a direction to be made as a matter of routine. It is only to be used in exceptional circumstances. Nonetheless, disobedience of an injunction and continued misconduct may justify its continuation.

The Order now made need to be modified in the event that the Father returns to Court to seek further directions on access to the younger children Ch and F.

(c)

Boarding school

I am further satisfied that it is in the best interests of C and E that they attend boarding school at NPBHS, New Plymouth, from the start of the 2020 school year. For the avoidance of doubt, my Order will permit C and E to leave Hong Kong so as to make all necessary preparations for the start of the school year.

The granting of leave is consistent with the recommendations of the Social Work Officer Ms. Chow. It is clear to me that this is in accord with the earnest wishes of both C and E, whom I had the advantage of seeing on 20th December 2019. They are excited about the prospect of attending the school. It seems to me that this change will be very much to their benefit, and will lead to them developing to their full potential. I am satisfied that the Father's objections are not valid reasons for me to withhold leave. I reject his complaint about the Mother's father. I also consider that both boys will be able to cope with being separated from the Mother and their siblings, with whom they will be able to keep in contact over the next 5 months or so, including during half-term or term breaks and holidays.

(d)

Relocation

I am satisfied that the Mother's proposal to relocate with the Children to Hong Kong in the middle of this year is practical and is not motivated by any desire to harm the relationship between the Children and the Father.

The Father's opposition to the Mother's application is, on the other hand, very difficult to understand. In one sense he is driven by a perfectly understandable, and deep-seated, desire to see his Children, and a fear that they are becoming permanently estranged from him. On the other hand, it must be questioned what he will achieve by resisting the Mother's application. He has long since ceased living in Hong Kong. He makes no commitment to return here or to give the Court a schedule of when he plans to visit in the future. His statements during the trial were non-committal. The most he could say is that his intention was to remain "close by", i.e. in the

Philippines, but even then he said at the end of the hearing that he had plans of spending time in the US, then the Philippines and then to move to New Zealand and perhaps buy a property there. He explained to the Court that his parents – who hitherto have lived in separate houses – are now reconciling and they have agreed to sell one house and give the proceeds to the Respondent. I find that his objection is not genuine.

Further, it seems clear that the Father has an intention of relocating himself to New Zealand, with his fiancé. In these circumstances, I cannot see that the relocation will impact negatively on his relationship with the Children going forward. Inter alia, it may well be, as Dr. Connell suggested, that the treatment the Father requires may be more accessible and affordable in New Zealand than it is here. That will benefit him, and again, potentially, the Children.

The next factor to be considered, per Payne, is the impact on the Mother of a refusal of her application. I find this to be substantial. She will be required to remain in Hong Kong, and for what reason? She has a well-structured, and well considered plan for the Children to live in New Zealand in a city in which she will have substantial support from relatives and friends. By all accounts, and as noted, the Father has his own plans to re-settle there.

I do not discount that the Father harbours ill-feelings towards the Mother's father, the Children's maternal grandfather. However, I cannot accept that these feelings of resentment are any justification to refuse the Mother's application to relocate.

The timing of the proposed relocation is logical, and well-planned. It will coincide with the completion of the older boy's second term of the NZ school year. I therefore grant leave to the Mother to permanently remove the Children from Hong Kong to New Zealand on or after 1 July 2020.

Orders

I therefore make the following orders.

Upon the Petitioner's Inter-Partes Summons dated 13th December 2007, paragraph 1 of the Order dated 5th January 2017 be varied so that the Petitioner do have sole custody of the Children. The Petitioner to have the sole care and control of the Children. Paragraph 1 of the Court's Order dated 12th June 2019 is to continue until further Order.

Upon the Petitioner's Inter-Partes Summons dated 24th May 2019 (DVO Summons), the Orders of this Court dated 31st May 2019 do continue up to and including 1st July 2020, with the following modification, namely that the exclusion of the Respondent from coming within 100 metres of the older children's school namely NA School be maintained up to and including 31st January 2020. The authorization of arrest do continue up to and including 1st July 2020.

The Court's intention is that these Orders be registered in New Zealand pursuant to section 81 of the Care of Children Act 2004. If the Mother considers it necessary for further restraining orders to be obtained, that is a matter she will have to take up in New Zealand.

Upon the Petitioner's Inter-Partes Summons dated 24th May 2019 (Boarding School Summons), leave be granted for the two elder children of the family, C and E, to attend NPBHS from the start of the New Zealand school year 2020. The travel restriction in place pursuant to the Orders dated 11th June 2015 and 5th January 2017 be uplifted to enable her to travel with all four children to New Zealand for the Chinese New Year holidays on 22nd January 2020, on the basis that she will return with the younger children Ch and F to Hong Kong at the completion of that holiday and after C and E are settled in to their new school.

Upon the Petitioner's Inter-Partes Summons filed 28th August 2019, leave be granted to the Petitioner to relocate with the Children to New Zealand, permanently, from 1 July 2020. I remind the Petitioner to file an Amended Summons within 14 days of this Judgment.

There be a section 18 declaration.

Costs

I make an order nisi that there be no order as to costs, given the nature of these proceedings. Such order is to be made absolute at the expiration of 28 days from the date hereof.

The Petitioner is legally aided, and I order upon each Summons that her costs be taxed in accordance with Legal Aid Regulations. I grant a certificate for counsel.

The Respondent was legally aided in these Proceedings, but on 8th November 2019 his legal aid certificate was revoked. Regulation 9(3) of the Legal Aid Regulations provides that "Upon determination of proceedings under this regulation (a) the costs of the proceedings to which the certificate related, incurred by or on behalf of the person to whom it was issued, shall, as soon as practicable thereafter, be taxed or, as the case may be, assessed in accordance with the provisions of these regulations...". I therefore, and likewise, make an order that the Respondent's own costs be taxed in accordance with Legal Aid Regulations and that there be certificate for counsel.

Peter Barnes

Deputy District Court Judge

Mr. Giles Surman, instructed by Stevenson, Wong & Co, for the Petitioner

Mr. Neil Clough, instructed by Boase, Cohen & Collins, for the Respondent, to 11th November 2019. Thereafter, the Respondent in Person.

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