

## THE HIGH COURT

2008 85 &amp; 97 CA

BETWEEN

P. C.

APPLICANT/APPELLANT

AND  
P. W.

RESPONDENT

**Judgment of Mr. Justice Henry Abbott delivered on the 11th day of July, 2008**

1. These appeals relate to an application by the applicant/appellant father to remove the two children of the applicant/appellant and the respondent to Hong Kong from this jurisdiction. The children are N. and E., N. a boy aged sixteen and E. a girl aged fourteen.

2. Both the boy and the girl are and have been habitually resident in Ireland within the jurisdiction of this Court for the last number of years.

**The Background Facts**

3. The applicant/appellant and the respondent (hereinafter referred to respectively as the father and mother) were married in 1991 and resided in Hong Kong (now the Hong Kong Special Administrative Region (HKSAR) of the Peoples Republic of China). The children N. and E. are children of the marriage. Both the father and mother are highly qualified in business related subjects, but on her marriage the mother ceased employment while the father remained in employment in a high management position and was in a position to retire early in life. The mother is aged 41 and the father is aged about 50. Although the father never filed an affidavit of means in any proceedings in this jurisdiction, evidence has shown in these proceedings that he is a very wealthy man. The wife has investments of her own, producing a modest income, and resides in modest rented accommodation in a city in Ireland. The father owns a dwelling house some distance from the city which he values at a sum in the region of €5m "if the market had not fallen".

4. The family lived in comparative opulence in Hong Kong and at times the mother had the assistance of two maids in the household. The mother is of Hong Kong Chinese extraction and the father is British having been born and educated in England. The mother has Hong Kong British citizenship having been educated in Hong Kong and in an English university following English boarding school. She speaks Cantonese but not Mandarin. In or about 1996, the father and the mother had unhappy differences in their marriage which eventually led to their divorce. It is instructive and very relevant to this case that on the 30th November, 1996, at the request of the father, the mother signed a statutory declaration acknowledging the difficulties that had arisen and indicating a willingness to save the marriage.

5. Paragraphs 15 and 16 of this statutory declaration highlight a difficulty which persists in relation to the father's attitude towards medical treatment, checkups and screening procedures in certain situations. These paragraphs are as follows:-

"15. I also acknowledge that my husband needs my help in overcoming his difficulty with seeking certain medical services. I fully understand the background to this difficulty and know it to be extremely personal. I also understand that it is not his intention to prevent me from obtaining medical help when it is required or necessary for reasons of my ill health.

16. Although there are circumstances in which it will certainly be embarrassing for me, which I am absolutely prepared to accept and with the only exception of genuine emergencies, I undertake always to consult my husband concerning my medical needs and to allow him to accompany me on any occasion on which I intend or need to seek medical services. I regard this as a reasonable undertaking on my part and consistent with professional advice I have previously obtained."

This statutory declaration was prepared by or on the instructions of the father. The difficulty of the father in seeking certain medical advices referred to in para. 15 of the statutory declaration arose from a phobia of the father which developed after he experienced the trauma of an alleged assault, not directly on him, but on a person close to him, during his college days. While this is quite an extraordinary phobia, insofar as it is not associated with any medical treatment being obtained by the father, it has nevertheless been accepted by all the parties and professional witness Dr. Dalton that the phobia is nonetheless real. I am satisfied that the phobia remains, and while it does not prevent the father from seeking and obtaining medical treatment or those near to him receiving medical treatment for serious complaints, it does force him to seek to control and monitor the medical treatment of those near and dear to him and in particular, to be positively against checkups or prophylactic type precautions such as cervical smear tests. I am satisfied that his attitude has left both children in the position where they have not had their MMR vaccine by reason of his failure to consent as a parent to same, although he has stated in evidence that the children are free to attend their family GP and it is their choice as to whether they accept immunisation. His evidence was that the danger for the girl from lack of MMR in a pregnancy may be catered for by an instruction to her that she would know at all times before becoming pregnant that her non immunisation status was an issue. The boy and the girl have been lucky throughout their lives insofar as they have enjoyed good health, apart from the usual colds, flu, infantile infections, and the like, but the father's reluctance to seek medical help has resulted in occasional self treatment of minor complaints (such as a scald on the girl's leg) which has caused considerable apprehension on the part of the mother, where it could be argued that, with the benefit of hindsight, a call to a medical practitioner might have produced better treatment and a more cautious insight into the implications of the injury. Of greater import in relation to the manifestation of the phobia against medical treatment was manifested when the mother's mastitis was left untreated for a number of days while in Hong Kong and where she was discouraged/prevented for a long time from participation in cervical smear testing in Hong Kong as a precaution against the untreated on-setting of cancer, as a result of technical but specious arguments of the father against participating in same. More importantly again, although the eventual break up of the marriage may have been caused by other significant unhappy differences between the father and mother, there is no doubt that a significant contributory cause of such break up was the difficulties and lack of trust between the father and the mother arising from the practical application of the father of his phobic attitude towards the medical treatment of the mother as described above.

6. In May 2000, the father retired from his senior management position with his employer in Hong Kong. In 2001, the unhappy differences between the father and mother came to the fore again, and in 2002 they were divorced by order of the Hong Kong Court. The terms of the divorce were, *inter alia*, that the father was to have custody of the children and no maintenance was payable to the mother. Following the divorce, the father and mother agreed to keep the divorce a secret from the children, and also from the extended family, in order to allow the children to have a stable family life and also in deference to certain family or cultural sensitivities in relation to divorce in Hong Kong. In June 2002, the father, mother and two children moved to Ireland (for all appearances) as a family, and rented a house or houses in E., a town which may be best and functionally described as an outer suburb of the city and, the mother spent most of the week, apart from holidays, up to Thursday in university in the city. She had a modest apartment in the city centre to facilitate her time in university, but spent weekends with the father and the two children in E.

Both father, mother and the two children holidayed together as a family. From 2003 to 2005, the mother's time at the family home diminished.

7. In 2005, the mother consulted a solicitor regarding joint custody of the children and in January 2006, the mother issued proceedings against the father in Ireland claiming judicial separation. In August 2006, K. moved into the family home with the father and the two children as an au pair. In November 2006, the father and two children moved from the estate in E. to their present large rural home. Around December 2006, the children became aware that the father and K. were in a relationship. The mother's claim in this jurisdiction for judicial separation did not meet with success insofar as the Supreme Court held that in view of the necessity for a preliminary issue regarding the Hong Kong divorce it was not necessary for the father to file an affidavit of means in the Irish proceedings. Finally, the Irish proceedings were terminated by judgment of Sheehan J. holding that the Hong Kong divorce could not be set aside in this jurisdiction and hence judicial separation between the parties was not available in this jurisdiction.

#### **Relevant Litigation History**

8. By order made in the District Court of the Hong Kong Special Administrative Region (HKSAR) on a divorce petition of the father against the mother dated the 30th May, 2002, the Court upon making the Decree Nisi by consent ordered that:-

"1. The petitioner (father) to have the custody and care and control of the two children of the family namely, N... and E.... ("the children") and the mother shall have generous access to the children whenever she is able to visit the children, either in Hong Kong or elsewhere. The mother's generous access to the children will include regular and frequent contact with the children in person and by telephone, fax, email or otherwise as technology develops and that the mother will accompany the father and the children on family holidays to enable the children to maintain their relationship with their mother after the father and the children leave Hong Kong in the summer of 2002.

2. (The father's claims for ancillary relief dismissed.)

3. (The mother's claims for ancillary relief, except periodical payments dismissed.)

4. Leave for the father to remove the children permanently from Hong Kong in the summer of 2002."

9. On the 23rd July, 2002, the Decree Nisi was made absolute and the marriage was thereby dissolved.

10. Outline details have already been given in the résumé of background facts above in relation to the failed judicial separation proceedings commenced by the mother in this jurisdiction.

11. On the 25th September, 2007, the father issued a special summons in Ireland claiming an order pursuant to s. 11 of the Guardianship of Infants Act 1964, as amended, permitting the permanent removal of the children N. and E. from the jurisdiction and directions as to their welfare. This special summons was remitted for hearing to the Circuit Court and this Court ordered that the father be restrained from removing the children N. and E. from the jurisdiction until further order. The children's passports were delivered to the County Registrar for the County of Dublin, and retained until the conclusion of the proceedings in the remitted action, subject to the liberty to the County Registrar to release the passports to enable them to travel to the father's wedding, to K., in Eastern Europe in March of 2008.

12. By order dated the 25th February, 2008, Judge McDonnell of the Circuit Court ordered that a s. 47 report be prepared by Antoinette Dalton by the 31st March, 2008.

13. The application in the special summons for an order pursuant to s. 11 of the Guardianship of Infants Act came on for hearing before Judge McDonnell in the Circuit Court under Record No. 00273/2008. It appears that by then the mother had, also pending, maintenance proceedings in the Circuit Court for the children, but these proceedings have been adjourned pending the matters at issue in the remitted special summons. Having heard the matters at issue in the remitted special summons, Judge McDonnell made the following order on the 2nd May, 2008:-

"1. That the child of the marriage N. reside with the applicant or father in Hong Kong in accordance with access orders as stated further in this order.

2. That the child of the marriage E. reside with the respondent or mother in Ireland in accordance with access orders as stated further in this order.

3. That both parties have joint custody of the child E. that primary custody be exercised by the respondent while E. resides in Ireland.

4. That the applicant (father) pay for E. school fees and expenses together with extra curricular activities.

5. That the applicant (father) be informed of E's schooling issues and reports by email.

6. That E. spend half her school summer holidays in Hong Kong with the applicant (father) together with the February and October half terms.

7. That E. spend half her school Easter holidays with N. and the respondent (mother) at a location to be agreed between the parties.

8. That E. spend half her Christmas holidays with N. and the applicant (father) at a location decided by the applicant (father).

9. That N. spend three weeks of the summer holidays with the respondent (mother).

10. That the injunction in respect of N. leaving the jurisdiction be lifted forthwith.

11. That N's passport be returned to the legal representatives of the father as and from the 6th May, 2008.

12. That the applicant pays all costs in respect of Dr. Dalton.

13. That both sides pay their own legal costs.

14. Refuse a stay in all matters.”

14. By Notice of Appeal dated the 7th May, 2008, the applicant/appellant father appealed the order of the Circuit Court made on the 2nd May, 2008, insofar as it:-

“1. Refused the applicant/appellant permission to remove the infant E. permanently from the jurisdiction.

2. Refused the applicant/appellant (father) the costs of the proceedings and appealed all consequential and ancillary orders. This appeal bears Record No. 2008/97 CA as above.

15. By way of cross appeal dated the 9th May, 2008, the respondent mother appealed the order of the Circuit Court dated the 2nd May, 2008 as related to:-

“(a) The order permitting the applicant to remove the minor N. from the jurisdiction and/or to move the said minor to reside in Hong Kong.

(b) The failure and/or refusal to fix an amount for maintenance in respect of either of the minor children the subject of the within proceedings.

(c) The failure and/or refusal to give specific directions in relation to the future accommodation of the said minor children or either of them.

(d) The failure and/or refusal to give specific directions in relation to access as between the applicant and/or the respondent and the said minor children or either of them.

(e) The failure and/or refusal to give such further directions in relation to the welfare of the said minor children as are required in their best interests.

(f) The refusal to award costs of the action to the respondent.”

It should be noted that the appeal in relation to the failure and/or refusal to fix an amount for maintenance in respect of either minor children relates to an order made in parallel maintenance proceedings commenced by the applicant mother in the Circuit Court which were adjourned generally by the Circuit Court. The adjourned maintenance proceedings bear Record No. 273/2008.

16. Contemporaneously with the service of the Notice of Appeal and cross appeal, the applicant/appellant father through his counsel, Mr. Durcan, made an application to this Court for an early date for the hearing of the Circuit Court appeals herein, in view of the expected birth of his child by his new wife K. in August, 2008 and, by reason of the necessity of having the children resident in Hong Kong in good time prior to the commencement of their school year at the end of August. The applicant/appellant father also indicated that the children were seeking arrangements to be provided by the Court to enable them to be separately legally represented. It should be noted that the Circuit Court was asked to hear the children but refused to do so. At the conclusion of the proceedings, however, after the order was made, Judge McDonnell met the children and spoke with them.

17. On the 28th May, 2008, the applicant/appellant (father) issued a notice of motion returnable for the 6th June, 2008, seeking the following orders in respect of the representation of the children:-

“1. An order pursuant to the provisions of s. 11 of the Guardianship of Infants Act 1964, granting liberty to the infants, the subject of the within proceedings, to participate in those proceedings and in particular providing that they be joined as parties to the proceedings and granted the right to be represented therein and to make such representations to the court concerning their welfare as they may wish to do.

2. Such further or other consequential orders including directions as to further pleadings in the matter as the court may meet in the circumstances.

3. Further and other relief.

4. Costs.”

18. This Notice of Motion came in for mention with the appeals on a frequent basis with a view to obtaining an early date for the hearing, and the parties agreed to exchange and deliver to the Court outline legal submissions and authorities in relation to the issues raised in the notice of motion relating to the participation of the children, which it was stated would be at the expense of the applicant/appellant father.

19. Initially, the issue was whether this Court on a Circuit Court appeal could appoint a *guardian ad litem* to represent the children or otherwise add them as parties and to have them separately represented by a solicitor, who by that time, had agreed to represent them. Ms. Brown, senior counsel for the respondent mother, submitted that neither of these courses were appropriate insofar as the High Court in an appeal from the Circuit Court had no greater jurisdiction than the Circuit Court, and that the Circuit Court had no jurisdiction to appoint a *guardian ad litem* in private law proceedings. She also submitted that if the children were to be joined as parties, or to be granted representation of a solicitor that, it was inappropriate that they would be represented by the same solicitor insofar as their interests were different. On the 23rd June, 2008, the appeals came on for hearing before this Court together with the Notice of Motion seeking joinder of the children, the respondent mother having indicated during the course of case management in the previous week that she was now consenting to both children going to Hong Kong subject to appropriate conditions as to their welfare.

20. It is noteworthy that during the course of case management, this Court ordered an updated s. 47 report to be prepared by Dr. Dalton and, on the 16th May, 2008, Dr. Dalton received a letter from the applicant/appellant's solicitor indicating the Court's direction and accordingly, offered an appointment to the parties and the children on the 26th May, 2008. However, the solicitor acting on behalf of the applicant/appellant father indicated to Dr. Dalton, his client's intention to pursue legal proceedings against her on the grounds of alleged professional negligence in relation to her original s. 47 report dated the 23rd March, 2008, prepared for the Circuit Court, and, communicated to her his client's intention to record her assessment review interviews. Dr. Dalton sought the directions of the Court in relation to these matters and, the Court summoned the parties to attend before it to deal with the issues arising. The

father then gave an undertaking to this Court not to proceed with legal proceedings and not to record assessment interviews. Dr. Dalton was then able to proceed with interviews on the 18th June, 2008, and on the 19th June, 2008, as a result whereof she prepared a supplemental s. 47 report dated the 20th June, 2008.

## **The Law**

21. Section 3 of the Guardianship of Infants Act 1964 ("hereinafter referred to as the Act of 1964") provides as follows:-

"3.—Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

22. Section 5 of the 1964 Act provides as follows:-

"5.—(1) The jurisdiction conferred on a court by this Part may be exercised by the High Court or, subject to section 22 of the Courts (Supplemental Provisions) Act, 1961, by the Circuit Court.

(2) Accordingly, a reference to this Part shall be substituted at reference number 45 in the Fourth Schedule to the said Act for the reference to the Guardianship of Infants Act, 1886 (repealed by this Act).

(3) The jurisdiction conferred by this Part is in addition to any other jurisdiction to appoint or remove guardians or as to the wardship of infants or the care of infants' estates."

23. Section 11 of the Act of 1964 provides as follows:-

"11.—(1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.

(2) The court may by an order under this section—

(a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother;

(b) order the father or mother to pay towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the father or mother, the court considers reasonable.

(3) An order under this section may be made on the application of either parent notwithstanding that the parents are then residing together but an order made under subsection (2) shall not be enforceable and no liability there under shall accrue while they reside together, and the order shall cease to have effect if for a period of three months after it is made they continue to reside together.

(4) ....

24. Section 25 of the Act of 1964 as inserted by s. 11 of the Children Act 1997 ("the Act of 1997"), dealing with the wishes of the child, provides as follows:-

"25.—In any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter."

25. Section 27 of the Act of 1964 as inserted, dealing with the power to proceed in the absence of child provides as follows:-

"27.—(1) It shall not be necessary in proceedings under section 6A, 11 or 11B for the child to whom the proceedings relate to be brought before the court or to be present for all or any part of the hearing unless the court, either of its own motion or at the request of any of the parties to the proceedings, is satisfied that it is necessary for the proper disposal of the proceedings.

(2) Where the child requests to be present during the hearing or a particular part of the hearing of the proceedings, the court shall grant the request unless it appears to it that, having regard to the age of the child or the nature of the proceedings, it would not be in the child's best interests to accede to the request."

26. Section 28 of the Act of 1964 as inserted, dealing with the appointment of *guardian ad litem* for a child and provision for separate representation (which has not yet been brought into force by the requisite ministerial order) provides as follows:

"28.—(1) If in proceedings under section 6A, 11 or 11B the child to whom the proceedings relate is not a party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so, appoint a *guardian ad litem* for the child.

(2) Without prejudice to the generality of subsection (1), in deciding whether to appoint a *guardian ad litem*, the court shall, in particular, have regard to

(a) the age and understanding of the child,

(b) any report on any question affecting the welfare of the child that is furnished to the court under section 47 of the Act of 1995,

(c) the welfare of the child,

(d) whether and to what extent the child should be given the opportunity to express the child's wishes in the proceedings, taking into account any statement in relation to those matters in any report under section 47 of the Act of 1995, and

(e) any submission made in relation to the matter of the appointment as a *guardian ad litem* that is

made to the court by or on behalf of a party to the proceedings or any other person to whom they relate.

(3) For the purposes of this section, the court may appoint as a *guardian ad litem* the person from whom, under section 47 (1) of the Act of 1995, a report on any question affecting the welfare of the child was procured, or such other person as it thinks fit.

(4) If having regard to the gravity of the matters that may be in issue or any other special circumstances relating to the particular case, it appears to the court that it is necessary in the best interests of the child that the *guardian ad litem* ought to be legally represented, the court may order that the *guardian ad litem*, be so represented in the proceedings.

(5) The fees and expenses of a *guardian ad litem* appointed pursuant to subsection (1) and the costs of obtaining legal representation pursuant to an order under subsection (4) shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party to the proceedings, as the court may determine."

27. Section 30 of the Act of 1964 as so inserted, dealing with jurisdiction provides in ss. 1 as follows:-

"30.—(1) Subject to subsection (2), the jurisdiction conferred on a court by this Part may be exercised by the Circuit Court or the District Court."

28. In *Y. (M.) v. Y. (A.)* [1997] 3 F.L.J. the High Court in the judgment of Budd J., 11th December 1995, Family Law Reports, held in relation to s. 11 of the Act of 1964:-

"I accept that this court has wide powers under s. 11 of the Guardianship of Infants Act 1964, and in particular this empowers the court to make orders with regard to the payment of maintenance to provide for the son, G. and also for his mother who looks after him and in whose custody he is. In my view the section is also wide enough to empower the court to make the orders in respect of lump sum provision for the provision of a suitable house, which both parties agreed would be beneficial to the son, G."

29. Article 8 of Council Regulation (EC) No. 2201/2003 of the 27th November, 2003, concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Repealing Regulations (EC) No. 1347/2000 ("Brussels II bis Regulation") provides:-

"1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

This was the legal situation prior to the commencement of Brussels II bis Regulation, as may be seen in the judgment of Finlay Geoghegan J. in *F.N. and E.B. v. C.O., H.O. and E.K.* [2004] 4 I.R. 311.

30. Recital No. 19 of Brussels II bis Regulation provides, in relation to hearing the child, as follows:-

"19. The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable."

31. Article 23 of Brussels II bis Regulation relating to grounds of non recognition for judgments relating to parental responsibility provides as follows:-

"A judgment relating to parental responsibility shall not be recognised:

(a) ...

(b) If it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought."

32. Article 41 of Brussels II bis Regulation provides in para. 2(c) as follows:-

"The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if" : (*inter alia*):

"(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity."

33. In the case of *Sahin v. Germany* (2003) 36 E.H.R.R. 765 (GC), the European Court of Human Rights sitting as a Grand Chamber held that it was a matter for the national authorities to decide the manner in which the voice of the child was to be heard in proceedings.

34. In a recent judgment, *S.J.O'D v. P.C.O'D* (Unreported, High Court, Abbott J., 26th May, 2008), I set out the considerations guiding decisions I have made to speak with children in chambers in the presence of a stenographer and the court registrar without the presence of the parties as follows:-

"1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.

2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judges own experience.

3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.

4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the

case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all) determinative of the ultimate decision of the court.

5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.

6. The court should, at an early stage, ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.

7. The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case."

For the sake of convenience I shall refer to this method of speaking with the children as the informal method.

35. An important case showing the constitutional provenance of the obligation of the courts to hear the voice of the child is the High Court case of *F. N and E. B. applicants v. C. O. and H. O. and E. K.* [2004] 4 I.R. 311, where at p. 322 Finlay Geoghegan J states:-

"It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964, applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. Hence s. 25 should be construed as enacted for the purpose of, *inter alia*, giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child."

36. It should be noted that elsewhere in the Act of 1964, the provisions of s. 17(2) (now repealed by s. 10 of the Children Act 1997) provided that:-

"Nothing in this Act shall interfere with or affect the power of the court to consult the wishes of the infant in considering what order ought to be made or diminish the right which any infant now possesses to the exercise of its own free choice."

37. It is to be noted that in *F. N. and E. B. v. C. O. and H.O. and E. K.* [2004] 4 I.R. 311, Finlay Geoghegan J., ordered a s. 47 report to be prepared for the court and did not speak with the children directly. Generally, it can be said that the use of the s. 47 report is a satisfactory and efficient manner of dealing with cases involving the rights of children to be heard in issues of custody and access of the more adversarial nature.

38. The clearest statement of the relationship between guardianship and custody in Irish Law is to be obtained in the judgment of Finlay Geoghegan in *F. N. and E. B. v. C. O. and H. O. and E. K.* on p. 318 as follows:-

#### "Guardianship

Guardianship and custody are two different concepts under Irish law. In *R. C. v. I. S.* [2003] 4 I.R. 431, I approved at p. 439 the following passages from Shatters *Family Law* (4th Ed.) at pp. 531 and 532 as an accurate general statement of the law. At p. 531 he states:-

'Guardianship describes the group of rights and responsibilities automatically vested in the parents of a child born within marriage and in the mother of a child born outside marriage in relation to the upbringing of the child... Guardianship encompasses the duty to maintain and properly care for a child and the right to make decisions about a child's religious and secular education, health requirements and general welfare. The right to custody of a child is one of the rights that arise under the guardianship relationship.'

At p. 532 he states:-

"Custody essentially means the right to physical care and control. Married parents residing together are the joint guardians and custodians of their children. If they separate, custody vests in the parent with whom the child primarily resides. The parent deprived of custody as a result of marital breakdown still remains a guardian and is entitled to continue to be involved in making decision about the upbringing, welfare and development of the child."

However, this general legal proposition is altered by statute where a court order intervenes; s. 11(a) of the Act of 1964 as inserted by s. 9 of the Children Act 1997, provides:-

"For the avoidance of doubt, it is hereby declared that the court, in making an order under section 11, may, if it thinks it appropriate, grant custody of a child to the child's father and mother jointly."

### Hearing of the Appeal

39. The appeals and preliminary issue in relation to hearing the children and having them present in court, commenced on the 23rd June, 2008.

40. Mr. Rogers S.C. opened the preliminary issue in relation to the application of the children to be present in court. The application was not based on any request to have the children represented nor was it based on a request to have a *guardian ad litem* appointed to represent them. Mr. Rogers referred to the terms of s. 25 of the Act of 1964, and submitted that the Court had a discretion. Ms.

Browne S.C., on behalf of the mother stated that there had been two s. 47 reports and that they adequately set forward the views of the children for the purpose of s. 25. She stated that the reason the mother had withdrawn her objection to the children going to Hong Kong, subject to such conditions as would protect their welfare, was that they had been damaged enough by the court process, and submitted that further damage would result from them being involved in the court proceedings.

41. Dr. Dalton, who had carried out the two s. 47 reports, was called to give evidence to assist the Court in determining how the Court should exercise its discretion in involving the children in the proceedings. Dr. Dalton, who is an experienced child psychiatrist in public and private practice and in giving evidence in relation to issues arising in court for many years, gave evidence in relation to the issue as to whether having regard to the circumstances of the case she was able to say whether it would be or would not be in their best interests to be present in court or give evidence in the hearing of the appeal. Dr. Dalton stated that she thought it was a difficult question because she thought court in general is not a place for children or teenagers. She considered they might be exposed to further conflict between their parents in court. The children concerned in this appeal were clever children, they understood the facts of the case very thoroughly; as well as most adults would. So in terms of their academic understanding of the issues, Dr. Dalton had no doubt but that they would understand what was going on in the court. However, she supposed it might be emotionally traumatic for them to witness the events that might take place in court, but it was difficult to say. At that stage I intervened and suggested that, as a precaution against the children being damaged or being emotionally upset by an unrestrained forensic tussle between the parents, the children could be introduced to give their views, once the issues had been clarified, and the sometimes irrelevant, but damaging, details sorted out. In the light of this guidance, Dr. Dalton's evidence was that, given the very fraught circumstances of this case, it might be useful for the children's voice to be directly heard in court. She considered that the guidance offered by me in relation to staging the hearing, was a significant safeguard. They were intelligent, sophisticated children insofar as that goes and the structure would help them manage the situation in court. The effect of this structuring would be that the parents would not be cross-examined in the presence of the children, but the remaining question was whether Dr. Dalton would give evidence and be cross examined before the children. Dr. Dalton expressed some reluctance to accede to this approach saying that she supposed the difficulty with cross examination is that, one never knows in what direction one can end up, and she said that it was impossible to foresee. The Court gave an extempore ruling in relation to the hearing of the voice of the children in Court and the procedure to be adopted and I repeat, verbatim this ruling as it appears in the transcript as follows:-

"The hearing will now commence in relation to the substantive issues between the parties and the parties will give evidence and they should give that evidence in the presence of Dr. Dalton who will then give evidence after they have given evidence, and she will have the benefit of hearing an elucidation of the various issues which may be of relevance to the eventual opinion she will give to court.

And then, after the parties give evidence, Dr. Dalton should give evidence and whoever leads her is not of particular concern in this ruling and whatever other witness's parties wish to have called should be called then...

On hearing that evidence and the submissions relating to it, the court will give, what I have described as, an indicative ruling of a framework of decisions, which will be based on that evidence. Then the children may be introduced to the court. If there is still a dispute about whether they have requested to be present in court and/or give evidence, they can be called to give evidence on oath, if that is their wish that, is if Ms. W is still disputing whether it is their actual wish.

Then as soon as that formality is removed, Dr. Dalton should give evidence in relation to her recommendations in relation to access and in relation to the benefit of access to these children and for children generally, in relation to the professional background and, to her own professional background and in relation to the desirability of access in the general situation. This should be done without visiting, except in very broad outline the particular personal history of either father or mother or the history of the conflict between them. I make that ruling because, in my experience, children do not want to hear, particularly the details of the conflict between their father and mother. They certainly do not want it rehearsed in their presence again, but they are very interested in going forward into the future and progressing their own lives. I base that view not only on my experience of other cases but also on the basis of the two s. 47 reports before the court where the children have expressed an interest to be out of frame in relation to the conflict between the father and mother, and wish to have the matters in dispute between them minimised as far as they are concerned. This is of course, subject to the very strongly expressed views that they would go to Hong Kong with their father. Then, having considered further submissions from counsel (if any) the court will give its final ruling in relation to the matters in issue."

42. Evidence was given by the father and the mother and Dr. Dalton in the absence of the children.

### **The Children**

43. The children were introduced to the Court on the 26th June, 2008. The Court asked the children if they had any introductory statements to make. N. stated that it was his wish that when they went to Hong Kong, he would like to have no fixed arrangements to come to Ireland to see his mum and that it would purely be up to himself to organise a visit to see her or go on holiday with her. He stated that he definitely would come to see her and he would definitely go on holiday with her, but it would probably be for no more than three weeks per year, which was probably only next year because after that he was eighteen and he stated that he would like to be able to cancel it and arrange it whenever he wanted, because he might have other things he wanted to do more in Hong Kong. E. invited the Court to proceed in the manner planned by the Court. The Court ruled as follows in its indicative framework ruling in accordance with the direction of the court:-

"1. The Court was satisfied that the parents had been very good parents of the children in the past and that there were difficulties arising currently which had to be resolved. I wish the children to understand this in the context of the arrangements to be made by the Court which would hopefully solve some of the issues arising from any move to Hong Kong.

2. After the removal to Hong Kong which is targeted to be within the timescale envisaged by Mr. C. to meet deadlines in August that Ms. W. would be entitled with the children to two weeks access from mid July onwards for the purpose of assisting in the bedding down process of the two children in Hong Kong, and giving some local knowledge and within that arrangement Ms. W. and the children could decide on holiday in some location which would get them to a better climate in the Hong Kong, South East Asia region.

3. During the initial bedding down period in Hong Kong, the mother would be free to provide for the children a Hong Kong mobile phone card to be used them to telephone or text her on a regular basis.

4. Access in Ireland would be for July for two weeks and then at Christmas and Easter for one week in every year from 2009 inclusive subject to N. getting older and having other interests.

5. In relation to education commencing immediately in Hong Kong that, N. would proceed as planned in the German/Swiss College to resume his mainline non transition year studies and, as discussed with Dr. Dalton and to ensure continuity that E. would start the two year course leading to her exam in the same college rather than trying to telescope the year, even though that might mean that E. might have to work up German at a very rapid rate.

6. There would be two access visits to Hong Kong for the mother for periods of two weeks from and including 2009.

7. For any of the access visits to Hong Kong mentioned, hotel accommodation or service department shall be provided by the father at his expense with the agreement of the mother.

8. Within the further success of two week holidays in Hong Kong in 2009 and 2010, the mother and children would be free to decide to go on holiday within the South East Asian area for the purpose of getting a better climate.

9. That before departure to Hong Kong and before final approval for removal to be given by the Court, that the children are to attend the family doctor in the company of the mother and abide by the advice of the family doctor in relation to all immunisation which is appropriate to their age and departure to Hong Kong.

10. The father is to observe all the normal degree of privacy which a teenager normally expects for telephone calls."

44. The children were then informed by the Court that they could react and give their views in Court on the basis of a free flowing meeting outside the normal run of court work, and if there was any dispute between anyone present in court, then at a later stage it could possibly be considered that the children could give evidence in the witness box subject to cross-examination.

45. E. stated that she did not want any fixed schedule providing that she had to come to Ireland for two weeks, like in the month of July or August because, she wanted to be able to decide when she wanted to come. If she had a weekend or a week where she wanted to go to Ireland to visit her mum and her friends, then she would want to come here. She said she did not want to be forced to come in the sense of being ordered to. She stated that if on the first occasion she came to Ireland, there was tension and argument and she was then forced to come back to Ireland again, it was not really going to work. For her schooling, E. stated that she wanted to go into the second year of the course because that meant that she would not have to do German. She stated that most people thought that she would be able for it and that if this plan did not work out then she would wish to go back a year and repeat.

46. E. expressed the view that she would be happy with her mother's stay in Hong Kong and received clarification that on these occasions she might well be at school. She agreed to visiting the doctor and stated that was fine and that she would listen to the doctor and see what he has to say about her getting vaccinated or whatever it was. She stated that she could do telephone text or email and that daily contact in this way was her wish.

47. In relation to Easter and Christmas she stated that she did not really want a fixed schedule saying she will have to go to mother if she wanted to go on holidays somewhere else or with her own friends. When asked by the Court if there was any minimum or maximum number of weeks she would see herself spending with her mother in Ireland she replied that she could see herself in Ireland three or four times a year, like long weekends or a week but not for two week blocks or anything like that to visit her mother and friends.

48. N. stated his view was that he had no problem with his mother coming to Hong Kong twice a year and two weeks at the end of the summer. He stated he would not be seeing her everyday; he might stay with her whenever she was staying in Hong Kong before he went to school and maybe go out to dinner with her afterwards. He stated that he definitely did not want to come to Ireland next Easter or December and did not want to spend two weeks in Ireland with his mother next summer either. He stated that he had six weeks summer holidays and he did not have a problem spending time with his mother, but he did not understand what the Court expected him to do when he was in Ireland. He stated he was sixteen now and would be seventeen next summer (2009) when he came. He stated that he did not have any particular interest he shared with his mother or father, so having two weeks allocated to spend time with them would be pretty aggravating to him. He stated that to do this would be just for the principle of it and there would not be any real value to him. He expressed the view that it would be too much of a challenge for E. to learn German in a year. He was happy to have the holidays, no more than two weeks in the year but that would depend on how much time he would spend in Ireland as well. He stated that unlike E., he did not have friends in Ireland that he particularly wanted to come back to see (in Ireland). There was no other reason to come back to Ireland other than to see his mother. If she were to come to Hong Kong twice a year for two weeks he thought that would be plenty, and he would see any visit to Ireland as an annoyance. When queried by the Court in relation to N. having the same interest as E. expressed in shorter but more frequent visits to Ireland to cater for her social need, N. said that he had not. N. said that he was happy to send a text to his mother every day or call her whenever she wants from Hong Kong. He did not see that as a big deal because he would happily do it.

49. He stated that the proposals of the Court in relation to the visit to the family doctor was "completely fine" and he did not see that as an issue; he would happily go anyway with his mother. The Court then explained to both children that the indicative order was a framework to ensure that the discussion would focus on the issues which the Court had to deal with in board terms.

50. N. stated that he considered it unnecessary to provide separate accommodation in Hong Kong for his mother as it would be better for himself and E. to see their Chinese grandmother when seeing the mother. Hence the reasons for not staying at the grandmother's place, such as the place being cramped and problems with their grandmother's health, did not seem to cause problems in the past. E. confirmed that she did not have any further reaction.

51. The children then withdrew and after some submissions, Mr. Rogers suggested that the children should be given time to reflect and be invited back into Court again. The children came back after a period of reflection and E. emphasised her need for flexibility in access and discussed, in detail, with the Court her views in relation to "working up" a year in her school in Hong Kong rather than commence the two year course with the burden of commencing German from a fresh start. When asked by the Court what their wishes were about bad days in their lives, like not wanting to go to school or to work, or to do anything or feeling dissatisfied with life, N. replied that he usually kept it to himself and that he had gotten along fine, so he was happy to continue doing that. E. replied that she did to have too many bad days, but probably would turn to her friends. N. expanded on his reply clarifying that because he did not think there was much going on in transition year he did not go to school, but things would be different in Hong Kong and that he would not want to skive off school like that, as it would be irresponsible considering he had exams. He added that he did not see his parents as a resource available to him if he had such a bad day, or he was in trouble. He also did not see the need for a little bit of parental nagging to "keep him on his game", as his view was that the only nagging he could think of was nagging for exams, when he was supposed to study, and that would not really affect him, as he knew he would have to study. His parents would continue to



nag him but he would just ignore it, and he did not really see anything like that coming into play. E. agreed. She stated that she did not really turn to her parents for that kind of thing anymore; she turned to her friends more. She stated that she was more independent from her parents than most people were, including most of her friends. Both children requested that the Court submit the final draft of its judgment to them for their comments before finally delivering. Having heard counsel for both parties, neither of whom approved of the proposition, the Court rejected the request.

52. Dr. Dalton was further examined by Mr. Rogers in relation to any views she had on aspects of access and she stated that both N. and E. were very clear in their statements and that she had no further comments to make. As both N. and E. had been present, the Court asked them if they had anything further to say and N. queried the lack of activities planned while in Ireland with his mother. He characterised the access in the following fashion:-

"I think flying twelve hours from Hong Kong to Ireland to see mum and just watching t.v. for two weeks in the summer, as I suggested would be a bit ridiculous."

Then N. said that if his two weeks in Ireland were written in stone and that he had been told to do that, he would not get on the plane if he did not want to come, and that he did not want that to happen. He said that a couple of phone calls and texts would be enough to organise for himself and E. to come to Ireland. E. confirmed that she just wanted to come to Ireland whenever she decided she wanted to come on visits, and that a fortnight was a bit too long, because she wanted to see all her friends and visit them and that she had been invited to go to visit them wherever they happened to live, in Clare, Cork, Meath, Wexford, Wicklow and Dublin. She did not really know how much time she would end up spending with her mother, shopping one day probably, but that would be it. She said that she had no interests that she shared with her mother except for one day shopping probably. N. added that he did not enjoy shopping with his mother, as he was a bit too old for that now. The children did not give evidence nor were they requested by any party to give evidence. They then withdrew. The Court then heard submissions of counsel.

### **Issues**

53. The parties have agreed and the Court accepts that the children may be removed by the father to Hong Kong subject to conditions. These conditions should protect their welfare relating to:-

1. Guardianship;
2. Custody;
3. Access arrangements for the mother;
4. Immediate educational decisions;
5. Accommodation for the children in Hong Kong and Ireland;
6. Special arrangements for the medical welfare and independence of the children;
7. Appropriate methods enforceable by undertakings for the parties to ensure compliance with the order of the Court outside the jurisdiction and to leave open as far as is possible enforcement of same in the event of breach or breakdown in the arrangements by further court proceedings; and
8. Suitable arrangements by way of reasonable short term undertakings by both parties to ensure that litigation and/or enforcement of strict rights, if any, shall not be the cause of frustrating access arrangements in Hong Kong in particular.

### **Findings of Fact**

54. The following are the findings of fact which I have made relevant to the issues which I have to determine:-

1. The parties lived as a family with their two children N. and E., from the time of their divorce in Hong Kong and taking up residence in Ireland from 2002 to 2005, and to a lesser extent up to January, 2006, insofar as the mother had regular telephone contact and access on an informal basis, centred around the schooling and activities of the children while not residing with the children after January, 2006.
2. Both parents have shown good parenting skills and are excellent role models for their children.
3. The divorce of the parents remained a secret to the children until in or about 2005, and after it became known to them, the father and N. began discussing the possibility of the family moving back to Hong Kong, with N. being enthusiastic about the idea and E. less so. N. informed the father that he would endeavour to convince E. that she should go to Hong Kong, but as E. had equestrian activities and more attachment to school, mother, and friends, she continued to be reluctant to do so, but this reluctance has gradually worn off E. and this process appears to have been accelerated as time went on.

55. While the children have had an obvious enthusiasm for going to Hong Kong they have, on the evidence of Dr. Dalton, been "primed" for their departure by the father.

56. The father, in his interview with Dr. Dalton for the purpose of the s. 47 report, and in his evidence, has incorrectly minimised the role of the mother in the past and the potential importance of the mother for the children in their future lives. In this regard, he has demonstrated a lack of insight which makes the Court apprehensive that access and other arrangements should be put in place in the interests of the welfare of the children as otherwise, they may not be adhered to by the father unless they are secured by very strong safeguards.

57. Both children are extremely bright academically and while their educational interests would probably be better served by staying in Ireland and thus having comparatively easy access to the very best universities in Ireland, Europe and the USA, they may well, on a good educational result in Hong Kong, achieve high university results and good positions later on in life. If access and contact with the mother works as planned, a situation may evolve where the children, on their own initiative, may secure sufficient educational and residence contact with Ireland or the UK to rectify any handicaps from education in Hong Kong. Any disadvantages in the university sphere feared by the mother are far outweighed by the disruption to the children's lives from residence in Ireland, characterised by

their disappointment and uncertain co-operation and the almost inevitable continued stress of litigation.

58. It is important, in the interest of reducing the risks of immediate and further discord and litigation in relation to education, that the Court decide the immediate schooling arrangements for the children. There is no dispute about N. attending the German/Swiss school in Hong Kong to complete his A levels and notwithstanding his undisciplined transitional year, his past school record and the strong views expressed by him to the Court, leave me confident that he can resume his studies successfully. E. is a prodigious student, and continues to be exceptionally successful. In the views expressed to the Court, she has made a case which makes good sense for commencing her GCSE course half way through it and the Court has the comfort of knowing that she has a confident and mature attitude in relation to having a fall back position if the effort is too much for her and she has to fall back a year.

59. The evidence of the father and the views of the children, as expressed in the s. 47 report, and the views of the children expressed to the Court, are based on the most optimistic of normal scenarios and are predicated on the good health of all concerned and, indeed, the new wife of the husband, K., and her new baby arriving in August. It is essential, in the interests of the welfare of the children, having regard to the dramatic change of culture and the opening of the dangers of a bustling new city to them, that contact and access with the mother would be available as a back up and insurance against failure of the plans of the father and children to ensure a healthy rotation of roles between father and mother.

60. Both father and mother have the capacity to assist and lead the children if required to do so in relation to the choice and pursuit of undergraduate and even graduate studies in university and in particular, this order should facilitate an option for the mother to introduce the children while at secondary school to some of the better universities in Ireland, the UK and America. A mandatory trip to one of these universities would cater for the views of the children, especially N. relating to the lack of a plan for activities appropriate to their age for holidays with their mother or father.

61. The father has threatened litigation against the mother in respect of alleged breaches of the Hong Kong divorce order and settlement and has threatened applications for attachment for contempt and other execution processes in respect of same. He also alleges that the mother has converted and detains some of a collection of valuables which he owns, and threatens legal action in respect of same. The Court is strongly of the view that such threatened litigation would effectively prohibit the developing access arrangements, especially in Hong Kong, unless restrained for a reasonable period of time by suitable undertakings.

62. The father's phobia about medical treatment has fortunately so far not seriously or adversely affected the children's health, except insofar as they are probably now the observers of a taboo in relation to medical treatment in what otherwise might be described as quite a liberal household. It is important, having regard to the welfare needs of the children, that they would be protected from the worst effects of this taboo, and from any more active, undesired, prohibitions by the father on medical treatment. This is an important consideration for both children, but more so in the case of E. who, as a girl of her age, may have the possibility of gynaecological needs and checkups. The immunisation issue will have to be dealt with in the order for attention before departure.

63. The children have a loving relationship with their father and mother and with their English paternal grandmother and their Chinese maternal grandmother. The contact and lines of communication and ease of relationship with the mother have deteriorated significantly since the Circuit Court hearing in May and this may be due to the pressure and/or alienation of the father of the children, notwithstanding his evidence that, he has left all decisions up to the children themselves in view of their liberal upbringing. I agree with the opinion of Dr. Dalton that the father could be more directive to the children in relation to ensuring equality of esteem for both parents in the eyes of both children.

64. It is manifestly in the interests of the welfare of the children that both parents be appointed joint guardians and have joint custody of the children as has been the *de facto* position of the children, certainly since they moved to Ireland regardless of any arguments pertaining to the *de jure* position.

65. The Court accepts that the holiday access arrangements proposed in the indicative framework order should be relaxed, so as to provide more flexibility for the children, in view of their maturity, and views expressed by them to the Court, and in the case of E. especially, to cater for the fact that it is very important that she would retain contact with her friends in Ireland.

66. Having regard to the foregoing, and all the evidence, the views of the children, the s. 47 reports and all the circumstances of the case, the Court makes the following order on the appeals, by setting aside the order of the Circuit Court for the purpose of varying same and also, for the purpose of having a self-contained order to avoid any interpretative comparisons arising from the synthesis of unvaried versions and parts of the Circuit Court order, whether by way of order of this Court or by way of non appeal thereof by the parties. The composite and positive order of this Court on that basis shall be as follows:-

1. Both the father and the mother are appointed joint guardians of the children N. and E., and shall have joint custody of N. and E.
2. The father shall be at liberty to remove the children from the jurisdiction of this Court temporarily for one year upon his furnishing the undertakings hereinafter appearing in this order and, furnishing to the Court and to the mother a fully and properly notarised agreement in the same terms as the said undertakings. Upon furnishing to the Court the said undertakings and notarised agreements incorporating same, the passports for the children N. and E. shall be forthwith released from the Circuit Court to the father.
3. Upon compliance by the father with the said undertakings hereinafter one year from the date hereof, the father shall be at liberty to permanently remove the children N. and E. from this jurisdiction and reside with them in Hong Kong (which description shall mean Hong Kong Special Administrative Region of the Peoples Republic of China).
4. Permission to remove the children temporarily from the jurisdiction of this Court and the release of the passports in respect of the children N. and E. to the father shall be subject and conditional to the following prior undertakings being given to the Court and further evidenced by notarised agreement as follows:-

A. Neither the father nor the mother shall make any claim against the other, save for the enforcement and administration of this order in respect of any matter whatsoever and in particular, in relation to any claim of the father in respect of the alleged conversion and/or detention by the mother of any of the father's collection of valuables or in respect of any claim by the father for attachment and/or committal or process of execution against the mother in respect of the Hong Kong divorce order herein. Upon giving the said undertakings the father and the mother shall undertake not to plead the Statute of Limitations in this or similar limitations legislation in any other

jurisdiction in respect of the period specified in this order for forbearance from legal action.

B. Within the period of six calendar months from the date of this order, the father shall at his own expense apply for a mirror order of the appropriate court in Hong Kong; such mirror order having the like effect as this order.

C. The father shall deposit with the solicitor for the mother a sum of €200,000 as a floating fund to defray the costs of access of the mother, costs such as travel and accommodation associated therewith and such apportioned costs, where the costs may not be wholly attributable to access, shall be notified in writing by fax, email or letter as appropriate by the solicitor for the mother to the father. In the event of any sum being left unexpended out of the floating fund of €200,000 when E. has reached 18 years of age, the balance of the said floating fund will be paid, with such interest as may have accrued thereon, to the father. In the event of the father being unable to provide cash for such floating fund, his liability to provide same shall be discharged by charging the sum of €400,000 on the family home and the proceeds of such charge or mortgage. In the event of same having to be realised, it shall be used and paid in the same manner as is specified herein in relation to the floating fund and the mother shall be entitled to register a *lis pendens* against the family home and any other property of the father in the jurisdiction of this Court in respect of the said charge, if it is necessary to execute and register same.

D. The father shall undertake to consent in writing that the mother may make all appropriate medical appointments for the children and seek all appropriate medical treatment, immunisation, checkups and medical screening as shall be necessary in Ireland or Hong Kong or in any part of the world. In particular, the father undertakes to consent to the mother taking the children to the family doctor, Dr. Matthews, prior to their departure for Hong Kong for immunisation and advice on further medical precautions which are required for departure and stay in Hong Kong.

E. The father undertakes to enable his wife K. to obtain all appropriate medical treatment, checkups and scanning for herself and for any of her children so that the children N. and E. are not exposed to any disputes between K. and the father in relation to medical matters. This is so as to ensure that any such disputes are not used intentionally or unintentionally as a "cats paw" to reinforce any unhealthy taboos in the eyes of the children N. and E. about medical matters or otherwise undermine the order of this Court.

F. For the purpose of securing payment of costs in this action, the father undertakes not to reduce his assets within the jurisdiction to a level below \$500,000.00.

5. School reports and all educational information for the children N. and E. shall be furnished to both parents on receipt of some to the other by fax and email.

6. The father shall provide accommodation for himself and the children for the first three to four weeks after arrival in Hong Kong in a hotel and thereafter in a serviced apartment, followed by such further more permanent or suitable accommodation as may be decided by the father within practicable reach, at least by public transport, to the maternal grandmother in Hong Kong.

7. Both the father and mother shall support and encourage contact of the children N. and E. with their grandmothers and their families, whether by way of direct personal contact where possible and by telephone, text and email and letter.

8. Both the father and mother shall support the children N. and E. in maintaining informal contact with their friends in Ireland, England and Hong Kong.

9. There shall be two weeks of access for the children to their mother in Hong Kong from the 18th July, 2008 to the 2nd August, 2008, inclusive, in a suitable hotel or a short term let serviced apartment of the mother's choosing, and at the expense of the father. During this period of access, the mother shall be facilitated by the father and the children to ensure the proper establishment and easing-in of the children to Hong Kong life and the mother shall, at her own expense, provide the children on a continuing basis with an appropriate paid Hong Kong phone card to enable them to conveniently telephone, text and/or email the mother at a time and frequency of their choosing into the future. The father shall respect the continuity and appropriate privacy of this arrangement into the future. As a minimum, this contact with the mother should be at least once per week, but the Court notes that the children have no difficulty with daily contact. There shall be access to the mother in Dublin for both children from the 10th June to the 25th June, 2009, to facilitate an educational trip to universities such as Cambridge (UK) and/or Harvard for the two children N. and E. and the father shall consent to such travel as may be necessitated thereto outside the jurisdiction of this Court during that period. The date for such access shall be substituted in consultation between the parties if it does not suit such purpose and by the court in default of agreement.

10. There shall be access to the mother for the children N. and E. from the 1st July, 2010 to the 15th July, 2010, in Ireland with the expense of additional accommodation in Ireland, i.e. a guesthouse for N. to be borne by the father with liberty to the mother and children to go abroad with the support of the father as shall be decided by the mother in consultation with the children at that time. The children shall be entitled to four days access to their mother, excluding travelling time, in Ireland at Christmas and Easter and if the school break at Christmas does not facilitate same, the Chinese new year holiday may be substituted for same, on the same terms as the expense of additional accommodation for N., if he attends, being paid by the father. This arrangement should continue for each of the children until they are 18, but the father shall pay travel expenses for N., if he wishes to join in, after reaching 18.

11. Apart from the two weeks access period in 2009, the periods of access specified for N. outside Hong Kong with the mother shall be at the option of N., having regard to the views expressed by him to the Court. The access to the mother outside Hong Kong for E. shall be compulsory, but in order to facilitate the wishes expressed by E. in her views communicated to the Court, E., at her option, shall be entitled to substitute up to two short trips for the Easter or Christmas/Chinese New Year trips on three short trips for one week of the summer access, in each case exclusive of travelling time, to facilitate visits to friends, shopping trips and the like, provided however, that the children and the father shall give notice two weeks in advance to the mother and to the father of such intention to travel and substitute access periods in this way.

12. The children shall have access to the mother in Hong Kong in appropriate hotel accommodation chosen by the mother, at the expense of the father for two weeks in February and September of each year, from and including 2009, until E. has

reached the age of eighteen when the children may attend school from such accommodation, or, at their option, call in for visits, or make such arrangements with the mother as shall be agreed between them to have family entertainment and visit the maternal grandmother or other friends and relations in Hong Kong. To facilitate the reality of such activities, the father shall be obliged to encourage active contact between the children and the Hong Kong grandmother and other family and social contacts in Hong Kong. This Hong Kong access is intended by the Court to be substantially natural and child-driven. Under-use of the access by the children shall not cancel same as it is intended to be a back up facility at the very least.

13. E. shall start the second year of the GCSE course (without German) in the German/Swiss International School in Hong Kong, but with the option to drop down a year with the support of her father, mother and N. if the course proves too burdensome.

14. N. shall start his A level course in the German/Swiss International School in August.

15. The father shall pay the costs of the Circuit Court proceedings, to be taxed in default of agreement, and the parties are at liberty to address the Court in relation to the costs of the appeal. The costs of the Circuit Court shall include a certificate for senior counsel, if any, engaged in the Circuit Court.

16. Either the father or the mother shall be at liberty to apply to the court in Ireland retaining seisen of the matter for one year so that further applications shall be made to the Circuit Court.

17. Upon compliance with the undertakings to be made by and given by the father as a precondition to the removal of the children, and set out in this order, the passports of the children N. and E. shall be released by this Court to the father. To facilitate the contingency of such release, the passports shall forthwith be furnished by the Circuit Court to this Court, and upon such compliance with the undertakings, the injunction restraining the father from removing the children from the jurisdiction shall be discharged.

18. The interlocutory order made by this Court, that the mother do not remove any documents, cash or valuables from her safe deposit box in her bank in Hong Kong, shall continue until the details of the contents thereof are notified by the bank in which it is held to the father within one month of the date of this order.

19. That the father pays all costs of Dr. Dalton in respect of the preparation of reports and attendance at court.