IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(A) 2

Appellate Division / Civil Appeal No 98 of 2023

Between

DDN

… *Appellant*

And

DDO

… *Respondent*

In the matter of Divorce (Transferred) No 2566 of 2021 (Summons No 1745 of 2023)

Between

DDO

… *Applicant*

And

DDN

… *Respondent*

JUDGMENT

[Family Law — Custody — Access — Variation — Material change in circumstances]
[Family Law — Custody — Access — Variation — Therapeutic justice]

DDN
v
DDO

[2024] SGHC(A) 2

Appellate Division of the High Court — Civil Appeal No 98 of 2023
Debbie Ong Siew Ling JAD and Audrey Lim J
9 November 2023

17 January 2024

Debbie Ong Siew Ling JAD (delivering the judgment of the court):

1 AD/CA 98/2023 ("AD 98") is an appeal against the decision of a Judge of the Family Division of the High Court (the "Judge") in FC/SUM 1745/2023 ("SUM 1745") to vary the parties' by-consent access orders due to a material change in circumstances. In this judgment, we will refer to the appellant as "the Father" and the respondent as "the Mother".

2 Only the Father filed submissions for AD 98. Having considered his submissions, the Judge's decision and the available evidence before us, we dismiss AD 98 in its entirety. In giving our grounds, we also elaborate on the applicable legal principles for a variation of access orders on the basis of a material change in circumstances, as well as how the notion of "Therapeutic Justice" ("TJ") applies in the present context.

Background

The parties

3 The Father works as a doctor while the Mother is a teacher. The parties were married in 2006 and have two children: a daughter who is presently 15 years old and a son who is presently 12 years old.

4 After the Mother commenced divorce proceedings on 1 June 2021, the parties subsequently underwent mediation sessions at the Family Justice Courts and agreed that the divorce would proceed on an uncontested basis. The parties also reached an agreement on the issues of custody, care and control of and access to the children. Amongst other orders, the following access orders were made by consent of the parties (the "Access Orders") on 13 October 2021:

> b. The [Father] shall have access to both children as follows: -
>
> > i. Thursdays (after school) to Sundays before noon;
> >
> > ii. Liberty to place calls to children on days where he has no access;
> >
> > iii. Parties to share June and November/December school holidays equally. If parties are unable to agree, the default arrangement would be the [Mother] having the second half from 2021 and on odd years while the [Father] to have the first half in 2021 and on each odd year. From 2022, the [Mother] to have the first half and the [Father] to have the second half and this shall be the arrangement on the even years;
> >
> > iv. Both parties are at liberty to travel overseas during their respective half share of the June and November/December holidays;
> >
> > v. The [Father] to give reasonable notice of at least one month before each trip together with confirmed bookings and the passports shall be handed to him at least two days before departure and to be returned to the [Mother] within two days after each trip with the children;
> >
> > vi. Both parties to have telephone access when the children are overseas with the other parent; and

> vii. That any additional time, ad hoc arrangements, or changes to the times agreed, dates or pickup places for access shall be discussed and mutually agreed between parties.

The proceedings in SUM 1745

5 About two years later on 1 June 2023, the Mother commenced SUM 1745 to vary the Access Orders on the basis that material developments had occurred since the orders were made. Specifically, the Mother sought the variation of the Access Orders in the following terms:

(a) that there would be reasonable access to the Father in the form of weekly outings on weekends to be arranged directly with the children; and

(b) that there would be no more overseas and overnight access to the Father.

6 SUM 1745 was heard by the Judge on 30 August 2023.

7 Before the Judge, counsel for the Mother argued that the variation of the Access Orders ought to be granted for two main reasons:

(a) First, the Father had not utilised any of the overnight or overseas access and was spending very little time with the children.

(b) Second, the liberal access given in the Access Orders placed the children at risk of negative influences by virtue of the Father's promiscuous lifestyle. In this regard, the Mother cited alleged instances of the Father's obsession with pornography, his procurement of sexual services from employees of a local public hospital, his act of considering placing the children in the care of his friends who were sexually

promiscuous and his leaving of various sexual objects around the house where they could be seen by the children.

8 On the other hand, and in resisting SUM 1745, counsel for the Father made the following arguments in response:

(a) First, the Mother had not adduced any evidence to support her allegations of there being a material change in circumstances to justify a reduction of his access even though the burden was on her to prove such a material change in circumstances.

(b) Second, even if such evidence was present, the Father maintained that the Access Orders should remain as it would still be in the children's best interests for the Father to continue spending as much time as possible with them.

9 The Judge held that the Father's access ought to be reduced as there was a material change in circumstances such that it would be in the children's welfare to remove the Father's overseas and overnight access to the children. Pertinently, the Judge held that the Father's consistent failure to utilise his overnight and overseas access would not be in the interests of the children and was an important consideration operating against any claim by the Father that his overnight and overseas access rights should be retained.

10 The Judge also considered the other allegations raised by the Mother to support her case for reduced access. In relation to the Mother's allegations about the Father's sexual promiscuity, the Judge found as follows:

(a) *The Father's nonchalant attitude towards the leaving of sexual objects around the house*: the Judge considered the Father's denial of

leaving "condoms, sexual stimulation pills and lubricants lying around the house" and was ultimately not persuaded that the Mother had discharged her burden of proving this allegation based on the evidence, particularly the email produced in her affidavit.

(b) *The Father's unhealthy obsession with sex with underage girls and pornography:* The Judge considered the transcripts of audio recordings of conversations involving the Father to be highly probative and noted that the Father did not dispute the authenticity of these recordings. The Judge was of the view that the Father's "appetite for pornography was plain to see" from the transcripts and the Judge further observed that the Father's "consumption of pornography could reasonably be said to border on an obsession and to be reflective of his lustful nature". While the Judge acknowledged that the Father's pornographic tendencies fell within his private life and that the law would not go so far as to expect him to "live up to saintly standards", there was still an expectation that the Father would not place his children in harm's way.

(c) *The Father's act of leaving the children in the care of sexually promiscuous friends, thereby putting them at risk of being in harm's way:* The Judge was particularly concerned about this allegation as it disclosed a risk that the children's safety would be imperilled by the Father's promiscuous ways. The Judge found that this risk was borne out by the transcripts, which disclosed the Father being open to the possibility of placing the care of his children in the hands of the same friends that had previously suggested that he engage in sexual activities with underaged girls. In this regard, the Judge was of the view that it would be "a dereliction of this court's duty to turn a blind eye to the

> potential risk that this arrangement being explored of placing the children under the care of [the Father's friends] would pose to the safety of the children".

11 After having regard to the totality of the evidence of the Father's failure to utilise the overseas and overnight access, his sexual promiscuity and sexual disposition towards sex with underage girls, his negative influence and the discussion on possibly having his children looked after by his friend that had introduced underaged girls to the Father, the Judge determined that "a *targeted* variation to the Access Orders was appropriate to reduce the risk to the children's safety and in the overall interest of the children's welfare" [emphasis in original]. The Access Orders were thus varied as follows:

> (a) Reasonable access to the [Father] as follows (subject to the children's agreement to the schedule below):
>
> (i) Every Tuesday and Thursday from 6pm to 9pm;
>
> (ii) Every Sunday from 10am to 9pm;
>
> (iii) On public holidays, from 10am to 9pm; and
>
> (iv) On the eve of the children's birthdays and the Father's birthday from 6pm to 9pm.
>
> (b) Liberty to the Father to place calls to the children on the days without access.

The Father's case in this appeal and the issues that arise for determination

12 As mentioned at [2] above, only the Father filed submissions for AD 98. The Father's overarching case in AD 98 is that there is "no evidence of real / imminent risk to the children's welfare and safety to justify the Court's intervention" and that there is also no material change in circumstances justifying the variation to the Access Orders. The Father argues that:

(a) First, aside from the transcripts of the audio recordings, the Mother has no evidence to corroborate her claims that the Father engages in promiscuous conduct. Moreover, the Father submits that the Mother has "cherrypicked the facts out of context and cunningly twisted the information". The Father maintains that he "had in fact never engaged in such conduct at the material time or at all and or that he is engaging in a promiscuous and deviant lifestyle".

(b) Second, the Father argues that the Mother had knowledge of this alleged behaviour in 2021 and was "willing and able" to put aside her reservations and agree to the Access Orders in spite of these "horrific and shocking truths". The Father states that the Mother's willingness to consent to the Access Orders is further proof that she "has no real belief, fear or concern as the Father never engaged in such acts" and that she knew the children's welfare and safety was not at risk in anyway.

(c) Third, the Father submits that there is no clear evidence of a real and imminent danger to the children to justify the Court's intervention.

13 As identified in the Father's written submissions for AD 98, the main issue in AD 98 is "whether for the purposes of Section 128 of the Women's Charter the Mother has made out a case of material change in circumstances". We are of the view that there has been a material change in circumstances that justifies a variation of the orders.

Applicable legal principles

14 We begin with a summary of the principles governing an application for variation of orders relating to children. The starting point is in s 128 of the Women's Charter 1961 (2020 Rev Ed) ("WC"), which provides as follows:

> The court may at any time vary or rescind any order for the custody, or the care and control, of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any *material change in the circumstances*.
>
> [emphasis added]

15 In *AZB v AZC* [2016] SGHCF 1 ("*AZB*"), the court held that in respect of orders relating to the child, the determination of any material change in circumstances requires "a principled and pragmatic approach" that considers the welfare of a child and that s 128 of the WC should not be read too narrowly (at [32]):

> Relationships are dynamic. A parent who is not emotionally close to a child at the time an access order is made may, through time, build a much closer relationship with the child subsequently. For example, a young three-year old child may have been clingy to his mother at the time the court orders care and control to the mother and limited access to the father. As the child grows older and builds a closer relationship with his father, it may be in his welfare to encourage increased access when he is, say, five years old. The child may have outgrown the phase of high dependence on and clinginess to his mother. *There may not have been any one particular identifiable event that marks a material change in circumstances* between the time he was three and five years old, *but because relationships are dynamic, circumstances may have sufficiently changed such that a variation is warranted for his welfare. Hence, the court* ***ought not*** *to read s 128 of the Women's Charter* ***too narrowly****, but should take both a* ***principled and pragmatic approach*** *to the determination of a material change in circumstances.*
>
> [emphasis added in italics and bold italics]

16 We hasten to add that in determining whether a material change in circumstances exists for the purposes of s 128 of the WC, the court is required to balance several interests. This includes on the one hand, the need for stability in carrying out orders and establishing the post-divorce routine for the child over a reasonable period of time, and on the other, the need to be responsive to new developments. As to the former consideration, we recognise that it is not

desirable for the parties and their children to be "in limbo", where constant applications for variation result in uncertainty for the children and keeps the family in the "litigation box" even before there has been sufficient time for the new arrangements to be carried out or for routines to be set up. As to the latter consideration, we are cognisant that the parent-child relationship is dynamic, especially since children have new needs and preferences as they grow older. Thus, the court must also ensure that there is sufficient flexibility to adjust orders relating to the child's arrangements to suit the current circumstances facing the child.

17 The upshot of these competing interests is that while the court will take a wider and more holistic approach to assess what constitutes a material change in circumstances for issues involving a child, this should *not* encourage parties to pursue a variation of orders at the earliest opportunity. Instead, the court expects parties to do their utmost to make the ordered arrangements work. This perspective is crucial to ensuring that "the child's interests are not side-lined while his or her parents litigate over what they subjectively perceive to be their respective rights and entitlements": *TAU v TAT* [2018] 5 SLR 1089 ("*TAU*") (at [10]).

18 Parents should, in considering their children's changing needs, exercise grace and flexibility in co-parenting and make arrangements in the best interests of their children. Applications for custody, care and control and access should not be weaponised as tools to control or hurt the other spouse. In this regard, the observations by the Family Division of the High Court in *VJM v VJL* [2021] 5 SLR 1233 (at [22]) bear repeating:

> … It might well be that the future holds new needs for that child, and further adjustments in living arrangements will be required to meet those needs. Should that come to pass, the appropriate way forward would be for the parents, who know

> their child best and love her most deeply, to work out these parenting matters. They can reach out for therapeutic support or mediation services if they would like assistance.

19 Instead of litigating in the courts for the variation of orders, parents should endeavour to make adjustments by agreement to the care and access orders where necessary. This is the essence of TJ, which seeks to support parents in their journey of healing and moving forward by adopting a problem-solving approach instead of an adversarial one: *VVB v VVA* [2022] 4 SLR 1181 ("*VVB*") (at [24]). We stress that TJ involves a measure of sacrifice and compromise – it requires each party to take responsibility where required, refrain from inflaming the situation, let go of what has hurt them deeply, and recast the future: *VVB* at [27]. A kind act begets a kind response while a nasty act inflames the hurt and sets back the healing. While the court remains accessible to parties who require a resolution to disputes that they are unable to resolve despite their best efforts, we stress that this course of action should be the last resort and reiterate the remarks by the Family Division of the High Court in *WBU v WBT* [2023] SGHCF 3 (at [47]):

> … if parents file court proceedings for variation each time there is a change, there is something precious that we will have lost in our society made up of family units, for parenting is to be carried out cooperatively by parents themselves. Parents must *find the resolve* to overcome the difficulties in co-parenting by a strong *commitment to discharging their parental responsibility*. Litigation has harmful effects on the child – materially, because the family loses in incurring litigation expenses, and psychologically, because conflict affects the whole family in ways not easily visible. [italics in original]

Our Decision

20 At the outset, we reiterate that in respect of orders concerning the child, an appellate court is typically "slow to intervene and plays only a limited role, in recognition of the fact that the decisions in such cases [involving the welfare

of children] often involve choices between less-than-perfect solutions": see *TSF v TSE* [2018] 2 SLR 833 (at [49]).

21 We are of the view that the Judge was not plainly wrong, and that his conclusions were not against the weight of the evidence that is before us. In our view, the Judge's overall assessment of the evidence is commensurate with the orders he has made – while access was reduced, the Father still retained reasonable access to the children during the daytime of stipulated days of the week on Tuesdays, Thursdays and Sundays, and on special occasions such as public holidays, the eve of the children's birthdays and the Father's birthday. We also note that it remains open to the parties to make arrangements for additional access and for the children to have overseas travel access with the Father by consent, and we would remind the Mother to be reasonable and supportive where such arrangements are suitable.

22 We agree with the Judge that the Father's failure to exercise his access rights for almost two years is a relevant circumstance to take into account. We note that the Father admitted in his affidavit in SUM 1745 that he had not utilised his overnight access since moving out in December 2021. While the Father had given the explanation that this was due to the Mother obstructing the access, we do not see sufficient evidence of such obstruction. We are also not persuaded by the Father's vague assertions of spending time with the children on an "almost daily basis". While the Father says that he engages with the children in the form of fetching them for classes and sending them messages to remind them about certain matters, such general interaction is not the same as utilising access by spending time with his children during the relevant access period.

23 Where a party does not exercise access regularly and shows no intention to do so, there is little reason for the court to keep such access in the orders as a "paper" structure. It is not desirable that the children are placed in a position where there is uncertainty. Instead, it is in their welfare to know with certainty and regularity their own routines of which days the father or mother will be caring for them.

24 The reasons expressed thus far are sufficient for us to dismiss AD 98. Nevertheless, we address the remainder of the Father's submissions below for completeness and closure for the parties.

25 First, in relation to the Father's argument that the Mother cherry-picked facts in order to paint him in a bad light and that he had never engaged in any of the alleged conduct at the material time (see [12(a)] above), we agree with the Judge that there is sufficient evidence to show that the conversations as recorded in the transcripts were not just jokes or "locker room talk" with no truth in them. The evidential burden is on the Father to produce the other parts of the transcripts to demonstrate the "context" upon which he relies. It is telling that the Father has been unable to do so. We note his submission that he would adduce fresh evidence "in due course" to refute the Mother's claims and show that she had "blown out of proportion the Father's nonsensical casual conversation with his friends". He has not done so. In any event, it is of note that despite the Judge's assessment of the evidence, the Judge did not remove unsupervised access entirely. He balanced the risk of the Father's sexual promiscuity and sexual disposition and the risk that the children's safety would be imperilled by his promiscuous ways against the children's interest for the Father "to be granted some opportunity to fulfil his fatherly role" and reduced the access.

26 Next, we address the Father's submission that there is no material change in circumstances as the evidence of the transcripts showing his behaviour was known to the Mother in 2021 when the consent order was made (see [12(b)] above). We are of the view that even if the Mother was aware of these conversations in 2021 when she agreed to the generous access rights, whether there is a material change of circumstances since then is not to be approached merely from examining the circumstances of the Father but of the children and of the family dynamics. Further, we think that the Mother's approach of taking a step to recast the future in the hope for a more positive outcome for the children (when agreeing to the generous access rights in 2021) should be commended.

27 Family relationships are dynamic and where new developments occur such that the orders are no longer working well for the children, the new needs of the children ought to be considered. On the present facts, we note that the daughter who was 13 years old at the time of the consent order is now 15 years old and the son who was previously 10 years old is now 12. The children are now at important and formative years of their lives where they are gaining a more mature understanding of their family relationships and of their parents' conduct and behaviour which may impact them (either positively or negatively). They are also discovering who they are as well as the values they will hold. We must thus be sensitive to how children at their stage of development may be affected by the various circumstances surrounding their relationships with their parents. Having said this, we must reiterate the principles espoused at [17]–[19] above and emphasise that this is not to be perceived as an encouragement to parties to keep going to court to vary orders. On the contrary, this is discouraged.

28 Finally, in relation to the Father's submission that there is no danger to the children which justifies the Court's intervention (see [12(c)] above), we

repeat the Judge's findings at [10], and our observations at [27], above. In any event, we point out that the Judge did not order the Father's access to be removed entirely or for his access to be supervised. Instead, the Father continues to have access to the children, albeit on a reduced basis – this is in keeping with the Judge's approach of assessing the evidence in totality. We agree that the circumstances surrounding the Father's failure to exercise access and the evidence on his promiscuous behaviour taken in totality give cause for the reduction of access. The reduced access arrangements are not unreasonable; they provide frequent contact between the Father and the children three times in a week and is a better of reflection of how much time the Father will spend meaningfully with the children.

Conclusion and Costs

29 For the reasons we have articulated, we dismiss AD 98 in its entirety.

30 In respect of costs, we note that the Mother is not legally represented in AD 98 and in any event, has not filed any written submissions or supporting documents. We therefore order that there be no order as to costs and that the usual consequential orders be made.

31 Building a strong and loving relationship with one's child involves spending meaningful time with the child, creating positive memories which endure even into adulthood. We conclude with a quote from *TAU* (at [22]):

> Time with a child is always precious. Such time with a child is even more limited for parents who are separated. Parents must thus commit to giving their best as a parent during the time allotted; they can indeed create loving, positive memories for the child.

32 Parental responsibility is not just a personal responsibility which involves the parents' time and personal sacrifices; it is a *legal* responsibility, and a very meaningful one.

Debbie Ong Siew Ling
Judge of the Appellate Division

Audrey Lim
Judge of the High Court

Geralyn Danker and Isabel Ho (Titanium Law Chambers LLC) for the appellant;
the respondent in person.