IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Matrimoniaal
Case No. 4 of 2013

BETWEEN: **YUKA NAKAMURA formerly YUKA DALLEY**
Applicant

AND: **PAUL DALLEY**
Respondent

Date of hearing: ***19th June, 2018***
Delivered: ***10th July, 2018***
Before: ***The Master Cybelle Cenac***
In Attendance: ***Parties unrepresented, Henzler Vira holding papers for Pauline Kalwatman guardian for the minor children C and S Dalley,*** **Yuka Nakamura, Toshida Yasuda, Paul Dalley via videolink from New Zealand Supreme Court**

JUDGMENT

Headnote
Custody hearing - jurisdiction of Master - best interests of child - whether fault of party to a divorce to be considered in assessment of best interests - criteria to be considered in best interests of the child - Convention on the Rights of the Child

INTRODUCTION

This matter has come up for hearing on an Application filed on the 8th February, 2018 for full legal custody of the children C and S Dalley by their mother, Yuka Nakamura, with sworn statements in support for herself and Toshida Yasuda, asking for the following orders from the court:

1. That full legal custody, inclusive of the right to make decisions on health, education and place of residence of the children be granted to her.

2. That consent of the Respondent to be dispensed with in all matters of the travel of the children outside of Vanuatu.

3. That if the Respondent is in Vanuatu access to be granted to him as follows:

(i) Visits with the children to be every two (2) weeks in Port Vila on Saturday from 10 a.m. to 4 p.m. excluding school holidays;
(ii) All visitation to be supervised;
(iii) Applicant to name the person responsible for said supervision, to be paid for by the Respondent.

4. That if the Respondent is living outside of Vanuatu then access to be granted as follows:

   (i) Visitation to take place in Japan during the children's school holidays, once a year for 10 days, during the day from 10 a.m. to 4 p.m.
   (ii) The Respondent to meet half the travel ticket for the children and for the Applicant to accompany the children from Vanuatu to Japan and back to Vanuatu.

5. That access will also include telephone calls every Monday, Tuesday and Wednesday at 5 p.m.

6. That all communication between the Applicant and the Respondent to be via email and only for the purpose of arranging visitations or notice of trips/relocations.

The grounds of the applicant's application are that the respondent is a negligent father, highlighting nine (9) incidents of neglect, and that the respondent is mentally disordered, and this disorder has and will affect the children if allowed to have continued, unsupervised access to him.

The respondent filed a reply to the application on the 16th February, 2018. This was followed by further sworn statements in support of application by the applicant of the 15th February, 2018, 2nd March, 2018, 21st May, 2018, 25th May, 2018 and 15th June, 2018.

The respondent filed his application for full custody of both children, via email, on the 12th June, 2018. There was no sworn statement in support. There was also submitted to the court by the respondent written responses of the 15th June, 2018 via email, to questions put by guardian for the children Pauline Kalwatman, and an email of the 18th June, 2018 submitting three (3) documents the respondent intended to rely on, previously produced to the court in hearings before Justice Aru and the Master: (1) sworn statement of Yvette Kasuga, (2) sworn statement of Dr. Calvert and (3) report of Laurina Liwuslili.

The grounds of the respondent's application are that he should be granted full custody instead of the applicant as:

1. He is the parent more willing to allow access of the children to the Applicant in keeping with their rights under the Convention on the Rights of the Child.

2. The children will be better protected in New Zealand by the courts under the Convention on the Rights of the Child and the Hague Convention than in Japan.

3. The children will be raised in a wholesome Christian home.

4. The children will receive an excellent education in New Zealand.

I will pause here to state that leave was granted to the respondent to file and serve his documents via email as he had been deported from Vanuatu which also accounted for his in-person appearance being accommodated via video link.

As these applications are merely a culmination of the preceding applications before this court, addressing many of the same or similar facts which have each tended to come down to custody and access, this court takes the whole of the information accumulated from these hearings, by way of sworn statements and supportive evidence, observations of the parties throughout and interviews conducted with the children and psychologist reports provided to the court, at the court's request, or submitted by the parties. In large part, my decision will be made based on my assessment of the parties throughout the whole of these proceedings and their actions with regard to the children.

JURISDICTION OF MASTER AND APPOINTMENT OF GUARDIAN AD LITEM

Before the court can proceed any further into the substance of this matter it must address its mind to its jurisdiction to hear applications for full custody of children.

The jurisdiction of the Master was raised by Ms. Kalwatman at the end of the proceedings. The question of jurisdiction should have been a matter brought to the court's immediate attention, prior to the commencement of the hearing as a point in limine on which the court could have immediately ruled, considering it could potentially affect the continuation of the proceedings.

Notwithstanding its late presentation, I will attend to the matter now.

Counsel stated that under Interim Practice Direction No. 1 of 2015 issued by the Chief Justice, the Master's Jurisdiction in custody matters was limited to the making of interim orders only, and that since the application by Ms. Nakamura appeared to be asking for permanent orders for legal and physical custody of the children, the Master could only make interim orders.

I accept and agree with counsel for the children that my power is limited to the grant of interim custody orders only. I will add though, that the nature of custody orders will always tend to be interim rather than permanent until the children reach the age of majority, as one or other of the parties will usually have liberty to apply to vary or amend orders or seek additional or other orders if deemed to be in the best interests of the children to do so.

Therefore, any orders made by this court will be interim in nature only. Having said this; this court hopes that its comprehensive analysis of the facts and its conclusions will give the parties pause, for the sake of the children before continuing or embarking on further litigation.

It was also drawn to the court's attention by an email from the applicant to Pauline Kalwatman, following the hearing, that her commission as guardian of the children had long expired and had not been renewed by the court.

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This court takes full responsibility for this lapse and states that the commission of the guardian had been extended and communicated to Ms. Kalwatman in person some months before, and it was a failing on the part of this court in not issuing an ex parte order to that effect. In any event, the fact that this court continued to summon Ms Kalwatman to appear as guardian at every hearing and solicited her assistance as guardian was sufficient to establish that she was recognized and appointed by this court as guardian to the children.

BACKGROUND

This case has seen much protracted litigation between the parties, first in relation to the dissolution of their marriage and then custody of the children. Before the court can render any proper decision on the facts presented in the applications, I think it would be important to understand the background to this case and the position from which each party is angling from so one can gain a fuller appreciation for the content of the applications presented to the court and their overall context.

Matrimonial cases which are often disputed, and in which custody battles are hotly contested, tend to be fraught with extremely high emotion, and there is a certain psyche that persists through applications on both sides which tend to affect perspective, perceptions and hoped for outcomes, no matter how extreme, and it is for the court to wade through this miasma of pain, betrayal and intolerance to find the truth, and what, in all the circumstances, would prove to be in the best interests of the children, the main victims in a tragedy, not of their own making.

The applicant is a Japanese woman from Japan and the respondent is a Caucasian man from New Zealand. The respondent is a confessed enthusiastic pilot who lived in Japan for 10 years as an English tutor and speaks the language fluently. The parties met in Japan and married there on the 23rd April, 2008. The applicant was the second wife of the respondent. His first wife was also Japanese.

The report of Laurina Liwuslili, though rejected in part for its bias[1] does contain factual information considered relevant to the background of the parties. In the said report of the 22nd December, 2017, the applicant divulged to Ms. Liwuslili, that prior to her marriage to the respondent there were arguments in relation to his communication with other women. They never had a fixed or stable place to live because the respondent was constantly moving them from place to place to facilitate his tutoring of private English lessons, and at one point they even lived in a car. She went on to add that she only found out about the ex-wife after the marriage, quite by accident. After the marriage they lived in Japan, then they moved to Australia and then Port Vila in Vanuatu and then Santo, Vanuatu. She said they moved constantly because the respondent could not seem to make a successful go of his career in any of the countries, and that by the time they moved to Vanuatu things became so hard financially that she could not even afford to buy S an ice-cream.

[1] SEE: Minute of Master of 2nd February, 2018, para. 8, 11 & 12

Petition for dissolution of marriage was filed by the applicant on 6th May, 2013, wherein she alleged that the respondent committed adultery with different women with whom he engaged in online pornographic relations, which extended to frequent occasions of masturbation in the home while engaging with these women. This behaviour, she contended, was witnessed by their 4 year old daughter S on many occasions. She also alleged physical abuse towards her through violent acts directed at her and inadequate financial means provided for her and the children. She further alleged that the respondent demanded submissive behaviour from her like *"traditional Japanese woman"* and made constant accusations of adultery and of kidnapping their children, which culminated in her being charged and remanded to prison for kidnapping which prevented her from breastfeeding their then 20 month old son C.

The respondent contested the petition, refuting all allegations that he had committed adultery, stating that he could not have engaged in online sexual relations with women as the matrimonial home had not had internet since January 2012, and therefore, there could have been no incidents for their daughter to have witnessed. The respondent presented the applicant as the violent spouse who was dissatisfied with the quality of their life in Vanuatu, and having taken up with Toshida Yasuda who was a wealthy Japanese man living in Vanuatu she was seduced by his money and promises of a better life and was fabricating facts to end the marriage. That she was accepting large amounts of money from Mr. Yasuda and had the intention of kidnapping their children and absconding to Japan with him. That it was in fact she who was committing adultery and not him.

On the 17th February, 2015 consent orders were entered into by the parties on the ground of the adultery of the respondent and approved by the court. The Decree Nisi was signed by Justice Aru on the 18th February, 2015, which Nisi gave liberty to the respondent to appeal, and if no appeal was filed[2] then decree absolute to be entered after the 23rd May, 2015. On the 18th May, 2015, 66 days after the statutory appeal period the respondent filed an appeal against the consent order to the decree nisi. A hearing on application for decree absolute was heard on the 21st May, 2015. Neither the respondent nor his Attorney was present and decree absolute was entered and the marriage dissolved on the 25th May, 2015.

This brief history provides a window from which one can properly see the genesis of the motives of the parties behind the plethora of applications filed before this court, and the animosity and distrust that have grown out of these facts and which exists on both sides, and which have provided the fuel to this continuing matter before the court and the ceaseless applications.

[2] Matrimonial Causes Act Section 18(1) Chp. 192 of the Laws of the Republic of Vanuatu consolidated edition 2006

FACTS AND EVIDENCE PRESENTED BY THE PARTIES

Of the seven (7) statements sworn by the applicant, none of them was subjected to cross-examination by the respondent, and of the 7, only the first sworn statement of the 8th February, 2018 was responded to by the respondent.

The evidence of the applicant being therefore uncontested, means that the facts put forward by the applicant is accepted wholly and entirely by the respondent. Nonetheless, it is left to the court, by its assessment of the facts presented, corroboration of those facts, and its in-court assessments of the applicant to determine her credibility as a witness and the veracity of the facts presented.

The sworn statement of the respondent, though not subjected to cross-examination was responded to by the applicant in her sworn statements of the 2nd March, 2018, 7th March, 2018, 21st May, 2018 and 25th May, 2018. The application of the respondent for full custody, unaccompanied by a sworn statement was, notwithstanding, contested in a sworn statement of the applicant of the 15th June, 2018.

In determining these two applications, the court will be looking at the sworn statements filed by the parties pursuant to their applications, their written and oral submissions, the courts general and specific impression of the parties as credible witnesses throughout its conduct of this matter from the 30th May, 2017 to date, the reports of Patricia Gavotto requested by the court and submitted by the applicant, the report of Laurina Liwuslili, the report of Dr. Calvert and the verbal report of the guardian for the children as to her findings regarding what would be in the best interests of the children.

REPORTS OF PSYCHOLOGISTS

Throughout the course of these proceedings there have been nine (9) reports prepared and presented to the court at different times, both before myself and the previous Judge sitting on this matter. Seven (7) of these reports were prepared by Patricia Gavotto at the behest of the applicant who deemed it prudent at the time to obtain psychological assessment of the children and herself. Six (6) of the reports were strictly in relation to the children. One (1) report was prepared by Laurina Liwuslili at the request of the court, to visit the homes of both parents to assess the provision made for the children and to make an assessment regarding certain incidents involving the respondent that the applicant had stated had affected the children. The court wanted to determine whether there was any or any significant impact on the children as a result. One (1) report was prepared by a Dr. Calvert at the request of the respondent.

Following hearing of the 2nd February, 2018, this court instructed Patricia Gavotto to prepare a report on the children for the use of the court. As she was unavailable to assess the children due to the shortness of time, she was instructed to submit all the reports previously prepared on the children. They were as follows.

1. Report of Gavotto of the 24th May, 2013 was of S who was then 3 years and 11 months old. The applicant had found that S was displaying behavioural changes such as separation anxiety from her, withdrawal from peers at school, excessive activeness, increase in frequency of crying, avoiding being with the father, change of facial expressions, showing anxiety before every visit with father and expressing a wish not to see him.

   Gavotto in her assessment found S to be excessively active when playing alone, anxious when separated from the mother, accepting and searching for close physical contact even with an adult she meets for the first time, excessive interest in washing her hands after urinating, unusual presence of phallic elements in 2 drawings of her family and home, unusual attention to the genitals of 2 baby dolls when showering them after they had been fed, precise attention to genitals of the 2 dolls.

   Her conclusion was that S *"had witnessed or has been involved in sexual activity with an adult who has shown her how to do these sexual behaviours."*

2. Report of Gavotto of 31st July, 2013 of S who was then 4 years and 1 month old for follow up visit. Gavotto found no further development of the symptoms of having been exposed to sexual adult practices.

3. Report of Gavotto of 29th June, 2015 of S who was then 6 years old to assess S as it related to her welfare since the applicant had recently moved in with her new partner Yasuda. The assessment included observations of interactions between Yasuda and S.

   Gavotto found that *"her development was consistent with the milestones expected of a child of her age, she displayed no signs of the earlier observed behaviours which were of concern, she exhibited no signs of post-traumatic stress or of abuse and she had developed positive and safe relations with the new partner of the applicant."*

4. Report of Gavotto of 29th June, 2015 of C who was then 3 years old to assess C as it related to his welfare since the applicant had recently moved in with her new partner Yasuda. The assessment included observations of interactions between Yasuda and C.

   Gavotto found that *"his development was consistent with the milestones expected of a child of his age and his recent change of residence had not resulted in any developmental issues. That he had developed appropriate, positive and safe relations with the applicant's new partner."*

5. Report of Gavotto of the 18th September, 2015 of S and C then both 6 and 3 years old respectively for a follow up assessment to the visit of the 29th June, 2015.

   Gavotto found that the children *"continued to maintain and develop further appropriate, positive and safe relations with the new partner of the applicant."*

6. Report of Gavotto of the 10th December, 2015 of C who was then 3 years old to assess sudden changes in mood – temporary irritability and isolated displays of aggressive behaviours directed at the partner of the applicant right after each visit with his father.

   Gavotto found that prior to the visit with his father *"C displayed appropriate, constructive behaviours in line with the emotional, social, language and cognitive developments of children his age. Immediately following his visit with his father C displayed separation anxiety from his mother which had not been previously observed."* C drew a picture which he was invited to describe. The scenario was of a monster killed with a gun by his father. The monster was Yasuda.

   Gavotto's findings were, that *"the aggressive behaviour represented in the drawing which resulted in the imagined death of Mr. Yasuda was perpetrated by the father and not a 3 year old boy as statements made by the father in his sworn statement of 30th November, 2015 that*

   - *"our son is pleading to be with his father and to get away from Yasuda"*
   - *"C has worked out (BY HIMSELF) that your love affC with Yasuda has cost him his father and happy Santo home"*
   - *"It is obvious by our sons actions and words that C is pleading to get away from Yasuda whose money and bribes may work with you, but who fail to work on our son who can see into Yasuda's lying heart"*

   are statements inconsistent with the intellectual abilities of a 3 year old child." She went on further to find that "there is a high risk of the father projecting his own conflict with his ex-wife on to his son. As it seems hard for the father not to involve his 3 year old son in the high conflict he has with his ex-wife since they separated almost 3 years ago his ability to provide support to his son's needs for future development needs to be assessed urgently. And as the father has never agreed to consult with a psychologist or a psychiatrist for himself and for assessing the quality and the safety of interactions developed with his son and his parenting abilities I strongly recommend a full custody to the mother."

7. Report of Gavotto of the 14th June, 2018 of S and C aged 9 and 6 years old respectfully. Made at the request of the applicant following their presence at the arrest of their father. Gavotto conducted 2 individual sessions with each of the children on the 6th June, 2017 to explore their personal experience of their father's arrest.

   As this is the most recent report on the children, I will set out almost her entire findings as they are applicable to recent events, which have some bearing on these proceedings and gives the court an insight into the psychological and other development of the children from 2013 to now, and their attitude to and relationship with their father.

Gavotto found S to be very articulate and that she *"expressed her high level of fear when a police officer took suddenly and with great surprise the seat of her father's driver seat."*

> **"I was shaky...I felt interrogated by that big police man the whole time. Dad told me to read the Bible when I am scared. I looked at him in the police car, I saw his neck, he was not reading the Bible."**

Gavotto went on to state that *"on top of having no memory of her biological father talking to her to soothe, comfort or protect her, S has noticed some inconsistency between her father's injunctions such as* **"Don't be scared---I am never scared...When you are scared, read the Bible"** *and the behaviours of her biological father during that stressful police intervention. This triggered the recall of other stressful situations when she was under his care."*

"S described a state of permanent anxiety when she was under the care of her biological father. She felt unsafe, isolated and forced to protect her younger brother from some of her father's behaviours that she perceived as risky or scary. Her level of anxiety was even reinforced, as she felt forced by her father not to disclose any of her scary or unpleasant experiences to anyone when she was under his care. ....She verbalized 2 examples during the session:"

- *During a flight on a small plane piloted by the father, she became highly stressed when her father invited his son C to catch the clouds. S felt she had to physically contain her younger brother to prevent him from falling out of the plane. Her fear was even reinforced by her perception that her father denied her experience of fear telling her that it was just a game.*

- *When watching a scary movie – Hacksaw Ridge*[3] *– selected by the father who fell asleep next to them she felt isolated in front of extreme violent and realistic scenes of war. She felt overwhelmed by the horrors of war between Japanese and American soldiers. Her level of distress became even higher when she mentioned it later to her father who denied the traumatic content of the movie for children under 15. S is still scared by the image of a man's head and brain being blown away*

Gavotto's conclusion was that *"S feels now relieved not to be under the care of her father, not being held responsible to look after her younger brother and not knowing when and if she will have to see him again in the future.*

During the session Gavotto did not find it necessary to invite C to speak directly about his father's police arrest. He was instead invited to choose a play interaction and he chose to draw a family of 4 and the family cat Hana

[3] Gavotto's note provided that the said movie, portraying the horrors of war, has a very clear and strong bias of promoting heroism behaviours from the American characters only while demonising Japanese characters.

going on vacation. *"All members of the family have a happy face. When asked to name the family members C named Daddy Toshi as a father parental figure. The other family members present in the drawing and named were mummy, S and himself. Upon my invite of thinking if anyone was missing in his story his response was a clear 'No'."*

Gavotto found that *"C remained calm throughout the session."* That he can *"now find his space in the family model he has drawn. He is even able to project himself in the future which includes a safe, positive and happy family life. This model today does not include his biological father."*

Her conclusion was, that until she could *"have access to a professional psychological assessment of the parenting capacity of Paul Dalley, the biological father that rules out any risk identified in this and previous reports and includes a clear confirmation that the biological father is able to separate from his hostility against a Japanese feature from the Japanese ethnic origin and physical appearance of his 2 children, I recommend again that the two children stay in the primary care of the mother and her current partner who has now become the paternal figure of both children.*

At this stage, only limited access to the biological father is recommended maintaining a connection. I am concerned about the biological father's focus on negative traits of Japanese people and I am wondering how he will react in the future when both children will be cognitively mature enough to challenge his values and beliefs."

8. Report of Laurina Liwuslili of the 22nd December, 2017 which came up for challenge on application of the 29th January, 2018 of the applicant on the grounds of bias. On the 2nd February, 2018 this court, finding for the applicant, found that Ms. Liwuslili;

"did not act in concert with Mr. Dalley to produce a report favourable to him, though the court believes that she did allow her personal feelings for the children and the parties, more particularly her sympathy for Paul Dalley and her personal value system to cloud her professional judgment." This court found that *"she did not account for differences of temperament, cultural and family background and nuances of language to inform her assessment of the parties. As a result.....her conclusions in relation to the Applicant and the First Respondent were flawed and out of sync with her findings and therefore the court [would] not give substantial weight to them."*

For the reason at 8 above, the court chose and has chosen to exclude all her findings, conclusions and recommendations.

The report of Dr. Calvert of the 11th May, 2015 when S and C were then 5 and 2 years old is largely based on extrinsic evidence provided by the respondent and a video taken by him of an alleged sexual and physical assault on S by Mr. Yasuda.

The court, while detailing the content of the 7 Gavotto reports pays particular attention to the reports of the 24th May, 2013, 10th December, 2015 and 14th June, 2018. The first two reports of the 24th and 10th were specifically referenced in sworn statements of the applicant of the 27th June, 2017 and 8th February, 2018

respectively and the report of the 14th is consistent with some of the court's own findings in relation to the children and the respondent.

Although referenced and relied on by the respondent, I cannot accept the report of Dr. Calvert of New Zealand as her report is based largely on conjecture and suppositions. Dr. Calvert at no time assessed either of the children, which gives her psychological assessment no weight before this court. On the contrary, the report of Liwuslili (though excluded) and reports of Gavotto were all based on actual physical assessments of the children although primarily initiated by the applicant.

Both the services of Gavotto and Liwuslili have been called upon from time to time by this court in other matters and the court is familiar with their respective skills. The Gavotto reports have established all parameters within which the assessments were conducted and her findings are consistent with her observations. Further, none of the three aforementioned reports has been challenged or successfully challenged by the respondent in this or other proceedings, and the court therefore finds no difficulty in accepting her conclusions. The Liwuslili report established no parameters, clearly went beyond the mandate ordered by this court and her conclusions were completely out of sync with her observations, coupled with her obvious bias for the respondent, gleaned, both from her report and under cross-examination. The court therefore could not accept her conclusions based on its findings of bias.

FACTS AND EVIDENCE PRESENTED BY THE APPLICANT

The applicant presented nine (9) incidents she deemed to be evidence of neglect on the part of the respondent throughout the period of the matrimonial and custody matter:

1. The tooth decay of C while in the personal care of the respondent after she had departed Santo and the court had awarded him custody of C. She attributes the decay to an over indulgence in sweets by the respondent and his house girl Lea and other persons to whom C was given over by the respondent to be cared for. She stated that she had made arrangements to take C to Japan for treatment.

   The court was presented with medical reports of Dr. Rhoda Bule of South Pacific Smiles, Vanuatu as proof of this fact in bundle of the applicant while seeking leave to travel with C to Japan for an arm recast. These reports were and remain uncontested by the respondent.

2. A broken arm suffered by C while in the care of the respondent in Santo who failed to inform her of the incident and C's subsequent medical care which left the arm, after a cast setting visibly crooked which had to be corrected by surgery in Japan last year.

   This evidence was presented to the court in 2017 under an application for leave to travel to Japan with C for the corrective surgery. The evidence then was uncontested and remains uncontested and the court accepted the facts as it related to C's broken arm.

3. That on one of the occasions when the applicant delivered the children to the respondent for their appointed visitation in Port Vila at the Bauerfield Cport, the base of employment of the respondent, she waited and observed the children from her vehicle in the parking lot and noticed S who appeared to be distressed. When she exited the vehicle and enquired of S what the matter was her daughter informed her that the respondent had left them with his work colleagues in the office but that C had left and was running around the Cport and she was trying to find him to look after him.

   While this was not contested under this application, it was addressed by the respondent in a previous application before the court, where he indicated that the children were never in harm's way and that they were under the care and supervision of work colleagues. He did not dispute that C was moving around the Cport without adult supervision or that S was distressed trying to supervise her brother.

   This incident was spoken of by S in a personal interview with her with the court.

4. The attempted abduction of S while in Santo and under the care and supervision of the respondent who had left her and her brother in the care of a friend. That the children were taken to the park to play and the friend of the respondent was, according to S, quite far away and chatting. That a Ni-Vanuatu man walked up to S, grabbed her hand and offered to buy her an ice-cream and take her to her mother. S resisted, knowing her mother was nowhere around and ran off.

   This incident was not contested in any response of the respondent, and in previous hearings his position had been that S was never in danger. The court had questioned S regarding the incident in its personal interview with her and she had given clear detail about what had happened and that she was scared, but that when she told her father he neither comforted her nor offered any words of solace but simply said *"ok"*. She informed the court that she was very hurt by this.

5. That while in the care of the respondent who had left the children under the care of a friend who took them to the beach in Santo, S was extremely worried about C and was very vigilant as she felt their carer was not properly watching C.

   While no direct evidence was produced, this fact remained uncontested by the respondent.

6. While in the care of the respondent he selected and allowed the children to watch a movie (Hacksaw Ridge) which was extremely violent and which the children reported to the applicant as being very scary and which gave them nightmares.

While this fact was again uncontested, the respondent, at a previous hearing, had admitted to the court that he had allowed the children to watch the movie, which was a true story, and which he thought carried a good moral, in that it was about a Seventh Day Adventist boy who was conscripted into the Army during the Second World War who refused to carry a weapon and became a hero by saving many of his platoon after a Japanese attack. He admitted to the violence in the movie and that it may not have, in hindsight, been the best type of movie to have introduced to children so young on account of the excessive violence.

This incident was also raised by S in her personal interview with the court. She stated that the movie was very violent and she remembers a lot of blood. She said the movie gave them both nightmares.

7. That the respondent took the children on a plane ride and allowed C to put his head and hand outside of the window in mid-flight. S was scared and tried to get C to sit down.

   This fact was uncontested, but when raised at an earlier hearing the respondent indicated that C was never in danger. He indicated that neither of the children was scared. They were very happy and excited and had expressed their pleasure after the flight.

   This incident was discussed by the court with S who re-laid it in detail and stated that she was scared when the respondent allowed C to put his hand and his head outside the window.

8. On another occasion while in the care of the respondent the children were left under the care of Lea who allowed them to play on the beach outside the home of the respondent while Lea was inside watching television. That a stranger walked up to C and grabbed his arm. C screamed but was able to get away.

   There was no direct evidence of this but it remains an uncontested fact before the court.

9. That S was constantly getting sick while under the care of the respondent.

   No direct evidence was provided of this and it was uncontested by the respondent. S addressed this fact in her personal interview with the court saying that she was always sick when with her father.

   Incidents 3, 4, 6 & 7 were referred to in the report of Laurina Liwuslili of the 22nd December, 2017, court appointed psychologist who had personally interviewed the children at the request of the court. Short shrift was made of the incidents by Ms. Liwuslili, with no clear assessments or conclusions as to their impact on the children. Incident 6 & 7 were referred to in the report of Patricia Gavotto of the 14th June, 2018 and its impact on S.

The applicant asserts in her application that these incidents, together with previous incidents of brainwashing by the applicant, as evidenced by psychologist report of Patricia Gavotto of the 10th December, 2015, the respondent more often than not being unable to provide a stable home for the children, that is, moving from Port Vila to Santo and back to Port Vila and taking up residence in several different homes in the past year, eg. the home of his employer, and the fact that he was not in any or any stable relationship with a woman who could offer care and love to the children and not paid care as with his house girl Lea, and his infrequent and reduced maintenance payments to the children, is sufficient to establish the respondent as a neglectful and irresponsible father, unable to provide for his children in the way of material comfort and emotional support.

The applicant sets the respondent up as a person who constantly lies and mispresents the facts, both to her and to the court, and this has led to her distrust of him. She feels it is therefore unsafe to place and leave the children in his unsupervised care.

She points to one telling example of his lies and misrepresentation when he failed to inform her, as the mother of the children and their primary caregiver, as well as the court, of the denial of his work permit in Vanuatu and the effect that this would have on his status in the country and his ability to continue to reside unmolested. She states that the information came to her via her partner, who was contacted by the immigration department who were attempting to locate the respondent. She states that she sought to question the respondent on the matter but he artfully avoided her questions till she was compelled to bring it to the attention of the court.

She went on to add that he misrepresented his status in the country to the court by indicating that he had lodged an appeal through his lawyer but provided no evidence; that he was the only one of nine pilots who was denied a work permit but again provided no evidence; that he was a VT10 million investor in the company for which he worked and that he had a student visa for which he again provided no proof of investment or student visa. She later discovered, after the hearing before the court that he had in fact not lodged the appeal he spoke of [she referred to the letter of the Minister of the 20th February, 2018, annexed to her sworn statement of the 2nd March, 2018] and that the facts he was relying on before the court to establish the strength of his appeal so that he would not be deported was challenged by the Minister. She attached the response of the Minister in reply to a Facebook post[4] of the respondent on the 5th May, 2018 in which specific details were given as to why he was being deported. She added further, that pictures of the children could be clearly seen on his page and this was in violation of their right to privacy and in breach of Ms. Kalwatman's previous clear instruction to him that he was not to post public photos of the children.

She referenced a second example of the respondent's lies by highlighting his constant reference to the court, without evidence, of her attempt to kidnap and flee with the children. She highlighted his constant reference to the fact that the Court of Appeal ruled in his favour as a father entitled to have access to his children, which

[4] Exhibit 2 of sworn statement of the 21st May, 2018, para. 8(b & f)

was a misrepresentation, as it was a consent order which was presented to the court for its approval, granting her custody and himself access.

On the other hand, she states that since 2015 she has been responsible for both children and there have been no recorded incidents of neglect. That she has provided the same home at Taziriki, Port Vila since 2015 which is comfortable and modern and she has been in a stable relationship with her partner Toshida Yasuda since 2015. She says that her partner is a stable father figure in the lives of the children[5] and by his own words[6] supports her and the children and is happy to be with them and feels lucky to be their step-dad.

The applicant believes that the respondent has a mental disorder and cannot be trusted with full custody of the children and that he is simply using the court to harass and intimidate her.

LAW PRESENTED BY THE APPLICANT

The applicant submits that any representation by the respondent to view her as unsuitable due to her alleged fault in bringing about the demise of her marriage is irrelevant to these present proceedings and cannot be recognized by the court as a ground to declare her an unfit mother. She put forward the case of **Yano v Yano**[7] which quoted several leading cases establishing the point:

> In earlier decisions, custodial law was used to punish and penalize spouses guilty of marital fault. The development of exceptions to the general rule evidenced a changing attitude. Generally, courts now consider the best interest rule, not marital fault, as the primary guide in custody determinations.[8]

She also set out other Articles of the **Convention on the Rights of the Child** deemed relevant and in addition to those raised by the respondent.

Convention on the Rights of the Child

Article 2(2) the right to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3(1) the best interest of the child shall be a primary consideration

Article 3(2) the right to undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents.

Article 6(1) & (2) every child has the inherent right to life and to ensure to the maximum extent possible the survival and development of the child.

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[5] Patricia Gavotto report of the 14th June, 2018

[6] Sworn statement of Toshida Yasuda of the 8th February, 2018

[7] [2013] PWSC 18, Civil Appeal 11-011(10 June 2013)

[8] Roberts v Roberts, 835 P.2d 193, 197 (Utah 1993); Carr v Carr, 480 So.2d at 1120, 1122 (Miss. 1985); Price v Price, 541 A.2d 79, 81 (1987)

Article 7(1) as far as possible, the right to know and be cared for by his or her parents.

Article 9(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

FACTS AND EVIDENCE PRESENTED BY THE RESPONDENT

None of the above facts presented to the court by the applicant was refuted by the respondent in sworn evidence, nor did he seek to cross examine the applicant on any of these statements.

The court notes, that in the respondent's statement of the 16th February, 2018, he indicated that because of the shortness of time given from date of service to the actual hearing he had not had sufficient time to produce a fuller statement which would have allowed him to submit five (5) witnesses in support of his contest to the application of the applicant.

The court notes further, that the respondent had been served with the application by the Clerk of Court via email at the request of the applicant, and that when short notice had been given to the parties to appear before the court on the 16th February, 2018, by Notice of Hearing, which erroneously listed the matter down as *"a hearing of custody for the children,"* this was verbally corrected by the Clerk of Court via telephone with the respondent prior to the hearing, informing him that the hearing was not in relation to the application filed, but for him to address the court on his visa/residency status on account of information received that his work permit had been denied and his status in the country was consequently in abeyance.

Therefore, at the time of filing his sworn statement of the 16th February, the respondent was aware that the hearing of the 16th was not in relation to the application of the applicant and that he therefore had sufficient time within which to file all the requisite evidence he wished.

Since the 16th February to the 12th June, 2018, (4 months), the respondent has filed no further response beyond the statement of the 16th February, nor produced statements from the promised 5 witnesses.

In reviewing the respondent's sworn evidence from previous applications in relation to the facts put forward by the applicant, the court could see little by way of real contest. That is, the respondent never denied the actual incidents raised having taken place, except to say that the children were never in any real or actual danger. The respondent failed to outline any facts, with evidence, that established the applicant as an unfit mother, except to say by way of submissions that he was the parent most willing to afford generous access. He failed to specifically address how he intended to provide for the children except when prompted to do so by email of Pauline Kalwatman.

LAW PRESENTED BY THE RESPONDENT

The respondent helpfully provided the following cases to the court along with Articles on the **Convention on the Rights of the Child**:

- **Child, Youth & Family v JFM**[9]
- **Fugle v Houlihan**[10]
- **Gill v Gill**[11]
- **Logan v Logan**[12]
- **Atkinson v Atkinson**[13]
- **Lynch v Cleene**[14]
- **Molu v Molu**[15]
- **Nowakowsky v Bolstad**[16]
- **Ross-Taylor & Carson v Seldon**[17]
- **W v C**[18]

Convention on the Rights of the Child (Ratification) Act [CAP 219]

Article 7.1 the right to know and be cared for by their parents
Article 8.1 the right to preserve their identity and family relations
Article 9.3 the right to maintain personal relations and direct contact with their parents on a regular basis
Article 10.2 the right to maintain on a regular basis personal relations and direct contact with both parents who reside in different States
Article 12.1 the right to express their views
Article 13 the right to freedom of expression and to receive information through any media of the child's choice
Article 14.1 the right to religion
Article 15.1 the right to freedom of association
Article 3.1 mandates States to take into account the rights and duties of parents
Article 5 mandates States to respect responsibilities, rights and duties of parents
Article 18.1 mandates States to ensure the principle that both parents have common responsibilities for the children's upbringing
Article 18.2 mandates States to provide assistance to parents to provide their child-rearing responsibilities

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[9] (2005) NZFLR 905
[10] Family Court, Fielding, NZ, 29 November 1991, FP 018/060/90, Judge Inglis QC
[11] Family Court, Bleinheim, NZ FP 006/032/88, 29 March, 1994, Judge Frater
[12] (1990) NZFLR 319
[13] Family Court, Wellington, NZ, 29 August 1989, Judge Keane
[14] Family Court, Palmerston North, NZ, FP 015/16/90, 17 November, 1992, Judge Von Dadelszen
[15] No. 2 (1998) VUSC 15; Civil Case 030 of 1996 & Matrimonial Case No. 130 of 1996 (15 May 1998)
[16] Family Court, Palmerston North, NZ, 26 June, 1991, FP 054/336/90, Judge Von Dadelszen
[17] Family Court, Wellington, NZ FP 085/286/95, 18 December 1995
[18] Family Court, Tauranga 14301337, Judge Inglis, 27 June 2000

CRITERIA TO BE CONSIDERED BY THE COURT

Children are no longer treated as second class citizens and are now accorded pride of place in the family, and this recognition has led to a number of States ratifying the Convention on the Rights of the Child, including the Republic of Vanuatu.[19]

The Convention provides, that in all matters concerning the child, the relevant agency, in this case, the court, must give primary consideration to the *"best interests of the child."*

The term *"best interests of the child"* can be fraught with difficulty as there are no established criteria within the Convention that a court must have recourse to in its determination. Therefore, it is a discretionary power exercised by the court, based on the particular set of facts put forward by the parties.

The parties to this application have highlighted a number of Articles of the Convention which they wish the court to take into account. I do not intend to enter into a disquisition on each of those Articles, except to say, that *"the best interests of the child"* is an overarching principle that is meant to encapsulate all of those rights which a child has been assigned under the Convention, and it is to be understood, that though each Article is not dealt with in specific detail, it in no way means it was not considered by this court.

In attending to the *"best interests of the child"* the court will look to relevant legislation applicable to Vanuatu, other relevant legislation within the South Pacific, case law in this jurisdiction and case law outside Vanuatu as persuasive authority. Legislation and case law looked at will be limited to jurisdictions that are signatories to the Convention on the Rights of the Child as they may be able to offer a wider definition of the applicable principle on which the court can best apply the facts of this case.

The starting point for any application as to custody would be the **Guardianship of Minors Act**[20] Section 1(a):

> Where in any proceedings before any court..... the custody or upbringing of a minor.....is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration.....the claim of the father.....in respect of custody as superior to that of the mother, or the claim of the mother as superior to that of the father.

In other words, each parent is equally regarded as joint guardians to the child and gender is no bar to an order for grant of custody.

The case of **Fugle v Houlihan**[21] supports the premise that;

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[19] Convention on the Rights of the Child (Ratification) Act Cap. 219 of the Laws of the Republic of Vanuatu Consolidated Edition 2006. This Act provided for the ratification of the aforementioned Convention signed on the 23rd September, 1990 in New York

[20] 1971 Cap. 3, Laws of the United Kingdom; http://www.paclii.org/vu/legis/vu-uk_act/gomc197103/

[21] Supra, n.10, p. 7

> The children have a right to be nurtured by both their parents, and both their parents have a responsibility to ensure that the children are not unnecessarily deprived of that.

The case of **W v C**[22] goes further in clarifying this point:

> The law as it stands is perfectly clear. Both parents (that is, those who are married to each other or who were living together at the date of the child's birth) have the legal status of guardians and in the absence of any order to the contrary are entitled equally to share in the possession and care of the child and in all features of the child's upbringing.

Notwithstanding this general principle, the courts have stated, in cases such as **W v C**[23] that this overarching principle of welfare of the child has to be investigated on a case by case basis:

> The expression "welfare of the child" embodies the most central and pervading principle in family law concerning children. It is not defined in the statute because case by case the elements of welfare to be taken into account will vary, depending on the circumstances of particular children within their family and of families themselves, circumstances which vary enormously across a wide range of factors which Family courts are asked to take into account.
>
> In the end however, the court must deal with the questions raised in a particular case. No two families fit the same mold or pattern.....the Court must look at the circumstances of "this child with this father, this mother...and these particular surrounding circumstances. The result necessarily has to be personalized to meet the welfare of each particular child.

Though the **Guardianship of Minors Act** of the UK continues to be part of the Laws of Vanuatu, and is therefore still considered good law, it has been repealed in the United Kingdom by the **Children Act of 1989**[24] which offers a wider perspective on the circumstances a court shall have regard to when considering matters related to the custody arrangements for a child. Inclusive in this consideration is the general principle that *"involvement* [defined as either direct or indirect, but not any particular division of a child's time] *of that parent in the life of the child concerned will further the child's welfare."*

Therefore, a court should have regard to the following:

(a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) His physical, emotional and educational needs;
(c) The likely effect on him of any change in his circumstances;
(d) His age, sex, background and any characteristics of his which the court considers relevant;
(e) Any harm which he has suffered or is at risk of suffering;

[22] Supra, n.18, p. 1063, para. 16
[23] Ibid, p. 1061 & 1062, para. 10
[24] Repeal of the Guardianship of Minors Act 1971 in the UK; http://www.legislation.gov.uk/ukpga/1971/3/section/1

(f) How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant is of meeting his needs.

The Lukautim Pikinini Act 2015[25] of Papua New Guinea provides that;

Where a person is directed under this Act, to make an order or determination in the best interests of a child, the person shall consider the following circumstances that are relevant:

(a) The importance of the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family; and
(b) The child's relationship with relatives; and
(c) The importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity; and
(d) The bonding that exists between the child and the child's parent or guardian; and
(e) The child's physical, psychological needs, and the appropriate care or treatment to meet those needs; and
(f) The child's physical, psychological and emotional level of development; and
(g) The child's cultural, racial and linguistic heritage; and
(h) The child's views and wishes, if they can be reasonably ascertained; and
(i) The effect on the child of delay in the disposition of the case; and
(j) The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian; and
(k) The degree of risk, if any, that justified that the child is in need of protective services; and
(l) Any other relevant circumstances.

The Act goes on to define what the duty of a parent or guardian with parental responsibility has to do to maintain that child, that is, to –

(a) Safeguard and promote the child's health, development and welfare; and
(b) Provide education and guidance to the child in a manner appropriate to the stage development of the child; and ensure that the child receives adequate nutrition, clothing, shelter, immunisation and medical attention; and
(c) Protect the child from discrimination, violence, abuse, neglect, exploitation and harmful social or customary practices; and
(d) Protect the child from engaging in employment or any activity that may be harmful to his health, education, physical, psychological or moral development; and
(e) Ensure that in the temporary absence of a parent, the child shall be cared for by a person known and trusted by the parents or guardians.

The Act goes further in setting out the primary considerations in determining the best interests of the child:

1. The importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family; and the need to protect the child from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence.

2. Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give

[25] http://www.paclii.org/cgi-bin/sinodisp/pg/legis/num_act/lpa2015204/lpa2015204.html?stem=&synonyms=&query=Lukautim%20Pikinini%20act%202015

to the child's views; and the nature of the relationship of the child with each of the biological parents and other persons (including relatives of the child).

3. The extent to which each of the parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child and to spend time with the child and to communicate with the child.

4. The extent to which each of the parents has fulfilled, or failed to fulfil the parents obligations to maintain the child; and the likely effect of any changes in the child's circumstances, including the effect on the child of any separation from either of the parents or any other child or other person (including relatives of the child) with whom he has been living, and

5. The practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; and the capacity of each of the child's parents and any other person (including relatives of the child) to provide for the needs of the child, including emotional and intellectual needs; and

6. The child's cultural, racial, linguistic and religious heritage.

The case of **VZ v JK**[26] is also instructive in addressing criteria to consider for welfare of the child.

Law for Pacific Women[27] sets out a brief criteria to which the court can turn:

- The age and sex of the child
- The child's feelings and wishes
- The financial means of the parties
- The conduct and behaviour of the parents
- The hostility of the parties

DISCUSSION

The distilled essence of these criteria which the court will consider are the following:

1. The ascertainable wishes and feelings of the children (considered in the light of their age and understanding) that the court thinks is relevant to the weight it shall give to their views.

2. How capable each of the parents is in meeting the needs of the children, that is:

   a) Health (medical and nutrition)
   b) Personal development
   c) Education
   d) Physical (clothing, shelter, a secure place as a member of a family)

[26] [1994] PGNC 17; N1667 (31 October 1994); http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/1994/17.html?stem=&synonyms=&query=title(VZ%20and%20JK%20)

[27] Law for Pacific Women, A legal rights handbook by P. Imrana Jalal, p. 306

e) Guidance appropriate to the stage of development
f) Psychological and appropriate care or treatment to meet those needs
g) Emotional needs

3. Which parent is most likely to encourage the development of a positive relationship with the other parent.

4. Which parent is most likely to develop a positive image in the children in the context of their cultural, racial, linguistic and religious heritage.

5. Which parent is most likely to provide continuity in the child's care.

6. The age, gender and background and other characteristics of the children which the court considers relevant.

7. Which parent is most likely to promote the children's relationship with relatives.

8. The relationship existing between the parents, e.g. any hostilities.

9. The conduct and behaviour of the parents.

10. Any harm which the children have suffered or are at risk of suffering.

And because a question has been raised by the respondent to remove the children from the custody of the applicant to be placed with the respondent or separating the children and placing one with each parent, the court will also take into consideration:

1. The likely effect on the children of any change in their circumstances or disruption to the continuity of their care.

2. The likely effect on the children of any separation from either parent or each other or other person with whom they have been living.

APPLICATION OF CRITERIA TO THE EVIDENCE

Criteria 1- The ascertainable wishes and feelings of the children (considered in the light of their age and understanding) that the court thinks is relevant to the weight it shall give to their views.

The children of the marriage are S who is a nine (9) year old girl and C who is a six (6) year old boy. During the course of the proceedings the court undertook to interview and/or observe the children on two separate occasions. The court wanted to observe their interaction with each of the parents and their parent's interaction with them. This was observed at the first scheduled interview. The children were then taken away from the court environment. Present was the Court, the Deputy Master and the guardian Pauline Kalwatman. The court spoke with and observed them for approximately 2 hours. Only the child S was directly questioned at the time, in the absence of her brother.

The second interview took place 9 days after the full hearing of these applications for custody in the office of the Master, in the presence of the Deputy Master. The guardian for the children was notified to be present but was absent. Both children were questioned at the second interview, but in the absence of each other and immediately following the other.

After interviewing the children, the courts' assessment of S is of a young child who is very intelligent, capable of assigning appropriate feelings to events happening to her and expressing them as accurately as she can remember without embellishment. Her responses to questions were clear and spontaneous, with specific detail and examples to allow the court to conclude that she was not coached in her responses. She is calm, respectful, well-behaved and well-mannered. She is independent minded but obedient, and the court could sense a strong will kept under moderate control. She is protective and watchful over her younger brother C. She is witty and fluent in English, French, Japanese and Bislama. She expresses herself clearly and freely and interacts and socializes well with persons outside her immediate family, though she does show a mature reserve in the company of new persons. She has the confidence that allows her to explore future career paths without any dedicated focus to any one in particular.

The court found her mature and sufficiently able to decide the parent she most preferred living with. The court did question her as to those specific incidents of neglect referred to by the applicant, as the court considered she was more than capable of recalling the facts which gave rise to the events and being able to explain to the court her reaction to those events to allow the court to assess the likely effect they had or would have had on her.

C is extremely friendly and sociable and has an abundance of confidence that allows him to easily interact with persons outside of his family and say what he wants. He is respectful, well-mannered, enthusiastic and curious. He is fluent in English and Japanese and proficient in French and Bislama. He had no difficulties with being separated from his mother. His level of comfort on both occasions was of a child who obviously feels safe and confident in the environment he comes from.

Though the court did not interview him at the first interview, after its initial interaction with C, the court thought him sufficiently able to make a decision as to which parent he preferred to live with, and the court therefore questioned him at the second interview. He was not questioned on either occasion as to any of the specific incidents of neglect referred to by the applicant as the court was of the opinion that a child of such young years would be unable to recall events with great clarity to assist the court to ascertain his feelings and reaction to those events.

While a child's wishes are not the most important factor, the court will certainly consider them, and in this case, the court will, in the balance, give due weight to the wishes of the children.

S's relationship with her father seems to be marred by her distrust of him and her belief that he does not care for her, but that if he does, it certainly is not in the same way that he cares for C. This appeared to be borne out by the court's own

observation of her interaction with the father who, at the first interview, clearly showed a preference for C and seemed almost oblivious to the fact that S had all but turned her back on him and did not spontaneously engage with him. Apart from a cursory question, he all but ignored her and spent the rest of the time focusing his attention on C. Part of her belief stems from the fact that she says he never answers her questions no matter how many times she might ask. He instead talks around the matter until she just gives up asking. She feels abandoned by him, in that when she tells him of things that make her afraid, such as when the male stranger in Santo tried to take her away he did not comfort her, either by holding her or saying anything comforting to her, or even acknowledging her feelings about the incident. She says that when she cries her father never seems to care as he does when C cries. She finds that C is very much molly-coddled by the father.

Two incidents spoken of by S demonstrated to the court the level of distrust she has in her father: (1) the incident where C was allowed to put his head and hand out of the window in the aeroplane which made her very anxious and she felt she had to pull C back, and (2) her effort to take a plate off a high shelf and her father telling her to trust him and jump down. She unhesitatingly expressed to the court that she did not trust her father to catch her even though he was assuring her he would. She is of the view that the father doesn't care for them as he should because when she is with him she always feels she has to watch out for C. She informed the court of an embarrassing incident when they attended the SDA School. She said that the father did not properly package their lunch so it would fall everywhere, and on one such occasion C went around asking the Ni-Vanuatu children for money to buy lunch. She used this as an example to demonstrate the respondent's lack of care and attention to their needs. She recognizes that even though they have fun when with the father she often gets sick when she is with him and something often goes awry with his plans. She says she feels safer with her mother than her father and considers her home to be with the mother.

C on the other hand seemed quite happy to see his father, immediately going to him and holding on to him and talking easily and spontaneously with him. In spite of this bond C did say that he feels safer with the mother than the father.

When retelling his perspective on the incident of the children's lunches at a previous hearing, the respondent seemed almost jubilantly proud of C, that he was able to successfully solicit funds from the Ni-Vanuatu children, referring the court to a picture of C displaying the monies he had collected. His response to all this was, that it showed how resourceful and friendly C was. He seemed to completely ignore or miss the point that C was compelled to act in this way out of a need to feed himself. He made no comment about S's obvious expressions of distress and embarrassment regarding the whole affC, except to say he would take better care in wrapping their lunches in the future.

Criteria 2 - How capable each of the parents is in meeting the needs of the children, that is:

(a) Health (medical and nutrition)
(b) Personal development
(c) Education

(d) Physical (clothing, shelter, a secure place as a member of a family)
(e) Guidance appropriate to the stage of development
(f) Psychological and appropriate care or treatment to meet those needs
(g) Emotional needs

(a) Health (medical and nutrition)
The applicant has spoken on more than one occasion before the court about the rotten teeth of C while in the custody of the respondent who sought medical care at the Santo hospital, without her knowledge or approval to remove the rotten teeth. This incident went unrefuted by the respondent and was even spontaneously referred to by S in her second interview with the court. The applicant has claimed that the rotten teeth were attributed to C being excessively indulged in sweets by the respondent and Lea while C was in the custody of the respondent. The applicant states that she had made arrangements to take C to Japan for medical treatment.

Medical report of South Pacific Smiles of the 30th September, 2013 stated that there was serious tooth decay and there may be need for treatment under general anesthesia which could not be undertaken in Vanuatu.

As pre-emptive care, and to stave off a worsening of the decay, the applicant requested, in note to the respondent of the 3rd December, 2013, attached to her sworn statement of the 27th June, 2017 that the respondent brush C's teeth 3 times a day and that he be given no lolies, biscuits, juice or sweets and only fruit for snacks. Without consideration of the medical report, the respondent, by the 17th January, 2014 had proceeded to remove C's teeth under local anesthesia in Vanuatu. Following the respondent's decision, the applicant again solicited his intervention in the health of C's teeth by requesting, in note of the 1st February, 2014, attached to her sworn statement of the 27th June, 2017 that he brush C's teeth 3 times a day and that he be given no lolies, no chocolate, no sweets or ice-cream and no sugar.

The applicant has referred to the broken arm of C, again while in the care of the respondent, who again sought medical care at Santo hospital without her knowledge or consent. On account of the inadequate treatment, she had to seek care in Japan to break and reset the arm.

This fact was unrefuted by the respondent. His only issue was that C should not be taken to Japan for treatment for fear that the applicant would abscond, though there had been no previous proven incidents. It seemed to the court that his fear outweighed what was in the best interest of the child which, by the expert evidence provided to the court was for C to have travelled to Japan. Even in the face of the overwhelming evidence of Dr. Cullwick, Head Surgeon at Port Vila, supported by Dr. Basil, General Surgeon at Santo Northern Provincial hospital, the respondent's own witness, the respondent was unwilling to give his consent unless a substantial payment was made into court by the partner of the applicant to assure their return, or at least his ability to use the said funds to pursue litigation in Japan if they did not return.

When all else had failed, he finally proposed, at the very last minute, fully funding the treatment in New Zealand, proposing difficult and uncomfortable living conditions for the applicant and her partner. This proposal was made without presenting

considered information that New Zealand offered superior or comparable care to Japan. His argument appeared to the court to be a last desperate attempt to grasp at straws simply to assure his own way as New Zealand had never been presented to the court as an alternative to Japan or Vanuatu.

Further, aware that the applicant has access to state of the art medical care in Japan, and that C would have the care and support of his maternal extended family, the respondent, quite unwittingly, showed himself to be a father who was willing to risk the health and well-being of his child on the basis of spurious allegations, designed more, it seemed to the court, to make life difficult for the applicant and her partner.

The court found the applicant to be a mother very much concerned with the medical and nutritional health of her children, opting to explore the best medical care for them. On the other hand, I believe that if placed in the custody of the respondent, he would not always do what was absolutely necessary for the best medical care of the children. I think he would do what was convenient and easiest.

(b) Personal development

The court is of the view that the applicant is the parent more in tune with the needs of the children. She seems the parent most concerned with providing an enjoyable, balanced and stable life for them, without the constant discord between her and the respondent. All her representations to the court have centred on these three conditions and proving their impact on the children when denied. The applicant has shown herself to be a person willing to expose the children to many aspects of life. Though her English is limited she has not shown a preference for the children to become more proficient in Japanese than English, and she has allowed both children to learn Bislama and shown no prejudice to them doing so. She believes that the children should be exposed to different experiences through travel and has attempted to facilitate this. S is involved in and enjoys sports. The applicant has shown no aversion to the respondent sharing his love of flying with C or dissuaded C from any interest in flying or aeroplanes. Though the applicant has not shown herself to be a religious person she has shown no resistance to allowing the children to engage in religious devotions with the respondent who is a Seventh Day Adventist.

The respondent on the other hand seems to be quite one dimensional. His gaze seems to be directed towards raising the children in a Ni-Vanuatu culture, in a Ni-Vanuatu way, when they are neither Ni-Vanuatu nor have any real connection to a Ni-Vanuatu culture, except that they live in Vanuatu and interact with Ni-Vanuatu at school and at church. There seems to be an overzealous focus on religious devotion which even the children have spoken of to the court, both finding their attendance at church to be much too long (2-4 hours at a time), and S particularly feeling, that entire weekends are lost with the father having them attend church events. The respondent has written in his documents and said to this court that he wishes C to be a missionary pilot. This shows a parent less focused on the organic maturation of the child, which would allow him the freedom to explore numerous career choices as he grows, and more as a parent willing to direct and heavily influence the career path of his son. The court is left to wonder what else in the child's life he would be willing to choreograph.

(c) Education

The respondent appears to have little connection to the children and their education. It is not to say that he does not recognize the importance of education, but it seems to the court that it fails to rank as highly as his attention to the children's religious devotions. Placing his children in a second school in Santo during their visits with him, without a mature understanding that children require a balanced approach to education and play, and that as their schooling is undertaken in Port Vila, that at times of holidays or with him the focus should have been on allowing them periods of rest and time with him.

In spite of complaints by the applicant, the respondent insists on calling the children during their set time for homework and study. His reason for continuing to do so is based on the ground, that by not allowing him to speak with the children when he calls the applicant is violating the children's human rights to be nurtured by their father. The respondent has again missed the mark in relation to a conciliatory approach to his children rather than an academic one. S spoke to the court about this, as one of the things she wishes her father would not do, as she finds it distracting to her when she is doing her homework and he calls. Further, nowhere in his applications or responses, save for this final application to gain custody of the children in New Zealand does he even allude to their education, providing specific detail only at the behest of the guardian for the children. While all his previous applications were focused on life in Vanuatu he never showed any enthusiasm for the current school attended by the children, except to say that it was too expensive and outside his financial capacity, proffering no comparable alternative. The court believes his answer to the guardian's question on education to have been merely an answer of convenience rather than an answer based on a deep seated value in the requirement for the best education for the children.

The applicant on the other hand clearly views the education of the children as a priority. She has maintained them in what is considered to be one of the best French schools in Port Vila with the assistance of her partner. She maintains a disciplined schedule and good routines for their study habits, and S, who expressed to the court that she enjoys sports more than school is still prepared to devote herself to her studies and performing well. Such an attitude could only be assisted by a parent who supports and instills the value of an education to the child.

Further, the partner of the applicant also shares her value for education as he has expressed his continued support for the applicant and her children, being happy to be their step-father and support them in any way he can. It is obvious from all the court has heard and read that the partner of the applicant has been substantially bearing the costs of the schooling and extra-curricular activities of the children, without complaint, while the respondent has responded by unilaterally, and without the leave of the court, reduced his maintenance contributions, a substantial portion of which would have gone towards education.

The court feels therefore, that the applicant is not only better placed to continue to maintain the standard of education to which the children have become accustomed,

but to be the parent who will promote and instill a worthwhile and balanced approach to education and study life.

(d) Physical (clothing, shelter, a secure place as a member of a family)

Whilst living in Vanuatu the respondent has been unable to establish to the satisfaction of the court, that for the most part, he is in stable living conditions, save for a brief stint in private rental accommodation about April, 2018, just prior to his deportation on the 5th May, 2018, a period of under one (1) month. For the last year the respondent appears to have been living with his employer. This is not indicative of the respondent either having the ability or interest in establishing a place the children can consider a home which they share with their father when they are with him. This place has seemed to the court to be merely a stop-off point for the children when visiting.

When in Vanuatu the respondent showed little inclination to finding a place of his own, which would have been appropriate and would have shown a commitment to creating a stable home for the children. He had consistently maintained that Vanuatu was his home and that of the children, and in email to the applicant of 7th June, 2017 he even went so far as to say *"he [had] no possessions in New Zealand or desire to ever live there again"*, and he *"wished to live and die in Vanuatu"*. This being his state of mind and direction for his future, one would most certainly expect a greater show of commitment to establish substantial roots by way of creating a comfortable home with his children in mind. He had not pleaded impecuniosity and had in fact informed the court of a VT10 million investment made into his employer's business. He also admitted to the court loaning the sum of approximately VT2 million to a friend, from an inheritance, while maintenance payments to his children were outstanding. This shows a man well within means to have afforded a home of his own.

Now that the respondent has been unceremoniously pushed out of Vanuatu and has been forced to take up residence in New Zealand, he is, in spite of his indications of employment, living with an aunt and uncle. While the court is willing to accept this as a temporary state of affCs considering his unplanned return to New Zealand, the respondent, while asking for custody of the children has given no indication as to his future plans to obtain separate accommodation for himself and the children. His sworn statement and responses to questions of the guardian seem to suggest that this will be his permanent and preferred abode. The children have been accustomed to living in a home in Port Vila with the applicant that is the same and where they enjoy their own space and which they consider and call home. The respondent would have to assure the court that he could provide the children with the same or similar accommodation in New Zealand.

The applicant on the other hand has lived in the same home with her children since 2015. The children have dedicated spaces for themselves and the home of the applicant is set up to accommodate them.
The respondent has hardly been able to show the court that he has his own home which is set up to accommodate the children. Rather, he seems to think that a set of two or three rooms in another person's home will suffice, which is demonstrative more of transitory living than building and creating a dedicated home for the children.

Since the application and his deportation the respondent's circumstances do not seem to have stabilized.

Further, the respondent appears to have no real ties to family in New Zealand, and the first proper mention of any family, beyond his deceased grandfather, has been since his return to New Zealand by way of an aunt and uncle and other relatives in close proximity. He has shown no roots to his former home or legitimate ties, unlike the applicant who has taken care to visit her home country of Japan at least once a year (consent of the respondent and/or leave of the court permitting) with the children who have themselves expressed a particular liking for Japan, their home, family and relatives there.

Prior to his deportation to New Zealand the respondent seemed more tied to the community of Vanuatu, but now that he is in New Zealand he seeks to establish what appears to be superficial ties to family. The respondent's propensity in this regard seems to be chiefly for what is passing at the time in his life; what is most convenient for him and in his own interest. In fact, when asked by the court if he would return to Vanuatu if permitted by the Vanuatu government, his answer was unhesitatingly yes. This is a clear indication that the respondent gives no considered thought to what is best for the children and only what best suits him. In other words, all his expressions of providing a stable home and environment for the children in New Zealand would hastily be upended if allowed to return to Vanuatu. The court cannot therefore think that he is genuine in his request to establish a stable home life for the children in New Zealand.

Since his separation and divorce the respondent has been unable to show any relationship except a supposed engagement with Lea which seems to have ended without explanation. The court file reveals a bare sworn statement by Lea informing of the engagement but with little else as to a real connection to or relationship to the children. Mention was made of the engagement in the report of Laurina Liwuslili and the court was left with the impression that the relationship was one of mere convenience than substance. This is not to suppose that a relationship is a prerequisite to establishing stability in the home in such applications but it does show a tendency on the part of the respondent to be more inclined to an itinerant and sporadic lifestyle, which the court would view as unsuited to children, particularly very young children.

More than just providing a home, the applicant and Mr. Yasuda have been in a stable relationship for the last 3-4 years. The court's observation is that the bond appears to be strong. He not only supports her and the children financially, but throughout the court process has been constantly at the side of the applicant, supporting her claims by his sworn evidence and by his presence. The children speak well of him, call him papa and S acknowledges that he is a very nice man and stands up for her to her mother in disagreements. It is clear that the children are emotionally bonded to Mr. Yasuda. This is supported by the reports of Ms. Gavotto who found that the children got on and related well to him and that both children recognized him as a positive father figure. In fact, the report went so far as to add that C, in drawing a picture of his family drew only himself, S, his mother and Yasuda, and when asked whether anyone was missing answered "no", showing that

he had accepted and found his place within the family, which did not now include the respondent.

The court therefore concludes, that if granted custody of the children, the respondent will be unable or disinclined to provide a real home for the children within a stable family environment.

(e) Guidance appropriate to the stage of development

The respondent seems quite out of step with his children as it relates to appropriateness of experiences to which they should be exposed at such an early age. The court had viewed with concern, at a previous hearing, the respondent's decision to allow his children to watch a movie (Hacksaw Ridge) to which the children had a very negative reaction. The children were greatly affected by the violent and bloody images in the movie and suffered nightmares for some time after.

The court incidentally is familiar with and has seen the aforementioned movie. While the court acknowledges that it carries a worthwhile and valuable moral lesson, the court determined that the content and graphics of the film were entirely too mature for children of that age. Not to mention, it showed the Japanese soldiers in an unflattering and unheroic light while it portrayed the white Americans and Seventh Day Adventist main character as the only heroes of the story.

The respondent is a Seventh Day Adventist, he thought the movie carried a good moral, he wished to pass that on to the children but failed to consider that his children were too young to appreciate the moral of the story and instead would be wounded, both by the extreme violence in the movie and the fact that persons who looked like them (Japanese) were the ones being demonized in the storyline. He showed a complete disregard and insensitivity to the age and sensibilities of his children, and even more than that, was insensitive to their ethnic heritage as mixed race Japanese children.

The respondent has also shown an over-zealous attention to his faith to the detriment of the well-being of his children. While the court brooks no objection to the respondent exposing his children to religious education and to his faith, the court would consider it an excess to subject the children to lengthy devotion at such a tender age. A balanced and moderate approach would be considered best. Even if the court were to consider such devotion to be appropriately balanced, his own children are of the opinion that it is entirely too much. This again shows a tendency to neither listen to or to observe his children's reactions to experiences and events, and shows a compulsion on the part of the respondent to act in his own interest rather than in the interests of the children.

Allowing C to think it is ever acceptable to engage in dangerous behaviours, even though dubbed "a game", such as putting his head and hand out of an aeroplane in flight, even when accompanied by an experienced adult is again demonstrative of an ineptitude to properly guide his children.

The respondent seems unable to match his children's development with age appropriate experiences and seems to believe, that because the experiences may

be good then that automatically translates into good for the children. Without that maturity to be able to offer suitable experiences to his children I cannot find that the respondent is a parent capable of offering guidance appropriate to their level of development.

(f) Psychological and appropriate care or treatment to meet those needs

Throughout the course of the proceedings before this court, the respondent showed a persistent tendency to divert attention to his role in the breakdown of his marriage, and the distance between himself and his daughter, when raised by the court, and place that attention solely on the partner of the applicant, and the applicant.

While the court is aware that a decree nisi and absolute was entered for the applicant for the dissolution of the marriage on the admitted adultery of the respondent, the respondent, throughout the proceedings, insisted that the breakdown was on account of the adultery of the applicant. This was neither proved nor accepted by the court at any point.

His explanation for the court's observation of the obvious distance between himself and his daughter, was that the applicant had accused him of inappropriate sexual behaviour towards the daughter and therefore he was gun shy. Nowhere in the documentation did the court find any direct accusation, except a report of Ms. Gavotto who found that S showed signs of having been exposed to sexual content. There was no accusation of direct sexual abuse by the respondent. Therefore, the court could not understand his explanation for his lack of a bond with his daughter.

On the contrary, Mr. Yasuda, who was openly accused of possibly sexually abusing S by the respondent, (accusations which were unproved), has shown no restraint in his relationship and interaction with S. The court therefore wonders how a parent, who is unable to accept any responsibility for the disharmony between himself and the applicant, and any responsibility for the breakdown of his marriage, who lays blame at all doors but his own, and makes wild accusations, without proof, can hope to establish with the court a soundness of mind that would lend itself to teaching his children how to respond appropriately to the vicissitudes of life.

The report of Patricia Gavotto of the 10th December, 2015 is instructive in that she suggests, without making accusations, and informing that she had not had an opportunity to assess the respondent, found, that being unable to deal with the separation, the respondent had transmitted or projected his feelings of conflict unto C and this would make it difficult for him to provide support to his son's future development. In her final report of the 14th June, 2018 Gavotto states that the respondent may not be able to separate from his hostility against a Japanese feature, from the Japanese origin and physical appearance of his two children, which, to the court would be potentially detrimental to his children in the long run. I accept the findings in those reports as they match with my own assessment of the respondent.

The applicant on the other hand, from the moment of separation with the respondent felt the need to undergo her own personal psychological treatment on account of the abuse she says she suffered at the hands of the respondent. She also subjected S

to psychological assessment to make sure she had not been unduly harmed by the separation, and even sought assessment of S and C regarding their adjustment to her new partner Yasuda. The applicant has shown herself to be a parent acutely aware of the psychological needs of her children and the potential for events to impact them, with the ability to determine how best to address them.

I do not believe that if the respondent was to be given custody of the children that he would have the wherewithal to seek all the care necessary to ensure the proper adjustment of his children to their new circumstances or other circumstances that might arise in the future. I believe that his response to such needs would be to either ignore them or to offer prayer as a sufficient crutch as he did when he was arrested by the police in the presence of his children. Since that incident, by his own daughter's account, he has offered no explanation, and in spite of her questions to him about what had happened he has avoided them and she has stopped asking.

I believe him to be less capable of taking the necessary and appropriate steps to resolve any problems which might arise for the benefit of the children, being himself lacking necessary insight into his own role and behaviours in bringing about and maintaining the conflict in this matter.

(g) Emotional needs

The court refers to that part of its interview with S in which she referred to the fact that she believes her father does not care for her as he does C and never offers her comfort when she cries or is afraid. She has said that she does not trust him and that he never answers her questions. This is not a parent who is able to offer emotional support to his children. It is either that he is incapable of recognizing that the support is needed or he does not care that it is needed. Either way, it does not cast the respondent in a favourable light in the eyes of the court and the court is therefore of the belief that the respondent is not a parent capable of offering emotional or appropriate emotional support to his children.

In spite of the deep distrust between the parties and the ongoing conflict, the court, in its observations of the children, bolstered by the reports of Gavotto, are of two children who have coped well and adjusted with the situation so far. This says much about the quality of the parenting skills of the applicant, their primary caregiver. I do not believe this could have happened but for the fact that the applicant has provided a safe and secure home for the children with her partner.

At the age which the children are now, they need to strengthen their developing personality and sense of self. The court does not see that as possible with the respondent. The inconsistency in parenting styles is too vast, the respondent's focus of directing the children towards a more religious path and C as a missionary pilot is more likely to be harmful to their development than helpful. Further to this, is the disparity between the respondent's words and his actions, already discerned by his daughter, who spoke to the court of the respondent *"not saying nice things about Toshi"* but to this court, will offer such platitudes as 'a Christian is called to love' in his tangential remarks to persuade the court of his desire to establish an amicable relationship with Mr. Yasuda and the applicant.

Criteria 3 - Which parent is most likely to encourage the development of a positive relationship with the other parent.

It is quite clear to the court that there is a substantial degree of animosity on both sides. On the respondent's, because he blames the partner of the applicant for the breakdown of his marriage, and the applicant for allowing herself to be seduced by the wealth of Mr. Yasuda; And on the applicant's side, because of the psychological, emotional and physical abuse she perceives she has suffered at the hands of the respondent, which she sees as now being transferred to the children.

In spite of this, the court observes that the applicant is more capable of disguising her obvious antipathy for the respondent, which the court believes would be moderated if she felt the respondent was being honest with her at all times, not projecting his passive aggressive anger at her on to the children, and was doing his duty as their father, focusing less on her relationship with Mr. Yasuda and focusing his attention only on what had to be done for the children.

The respondent on the other hand does not seem able to let go of the past 5 years and seems obsessed with the applicant's relationship with Mr. Yasuda. At every hearing conducted by this court the respondent, in spite of rulings by this court, that any fault of the applicant in the breakdown of the marriage cannot be entertained, except in so far as it affects the welfare of the children, the respondent insists in raising the alleged adultery of the applicant and 56 emails, which he has never provided to the court, as proof of the adultery and the intention of the applicant and her partner to kidnap the children to Japan. His hyper attention to these irrelevant facts and details in the proceedings, to the exclusion of discussing the best interests of the children, demonstrates to the court a parent who would be incapable, or at least greatly limited in his capacity to develop in the children a positive relationship with the other parent.

The report of Patricia Gavotto is again instructive, that the respondent may continue to project his feelings of conflict unto his children. His obvious scorn for Mr. Yasuda, in spite of his refutations to the contrary, and, what the court views, as the respondent's passive aggressive anger directed to the applicant, does not suggest a parent who will build that positive relationship. His daughter informed the court that he does not say nice things about Mr. Yasuda. The respondent has adopted a cast of mind that has led him to believe that Mr. Yasuda is his nemesis and must be culled.

The respondent has said that he is the most sharing parent, and while the court does not doubt that he would allow the children access to their mother if granted custody, the question the court is left to ask, is whether he is capable of exerting a positive influence on the children in their image of the applicant and her partner. The answer is no.

While I do not wholly absolve the applicant of blame for the lack of communication and cooperation between the parents, I accept that it is, from all that I have heard and seen, symptomatic of the deep distrust between the parties and of a woman who has suffered the ill-effects of an abusive relationship. My observations of the respondent is that his behaviour can sometimes be overbearing and this unavoidably

attracts a negative response from the applicant which manifests in her delaying communication with him.

In both my interactions with the children, neither of them showed any negative attitude toward the respondent based on things said or done by the applicant or her partner. Their impression of their father was based purely on their personal experience with him.

I therefore do not believe that the applicant would deliberately and maliciously instill any negative attitude in the children towards the father, because she recognizes the psychological impact that this would no doubt have on the children.

Criteria 4 - Which parent is most likely to develop a positive image in the children in the context of their cultural, racial, linguistic and religious heritage.

The applicant is Japanese as is her partner, and as such, exposes the children to the full spectrum of the Japanese culture, language and traditions. While the court has no direct evidence of her having exposed the children to a New Zealand culture, the court will say, that it believes that if presented with the opportunity the applicant would not deprive the children of knowing that side of their heritage, but, as she is Japanese, her leanings are obviously towards a more Japanese tradition as she can only teach and pass on what she knows best. The person best placed to pass a New Zealand culture on to the children is the respondent. So far, the court has seen no inclination on his part to have done so while in Vanuatu. His focus tended towards a more Ni-Vanuatu culture, traditions and way of life and only now brings in their New Zealand culture as he now finds himself, beyond his control, in New Zealand, and it is in keeping with the Convention on the Rights of the Child.

The applicant has allowed the children to learn and speak Bislama without objection, and to interact with Ni-Vanuatu and their culture; a culture quite removed from the mixed lineage of the children. It therefore stands to reason, that if she would expose the children to a Ni-Vanuatu culture how much more would she allow this for their New Zealand culture.

On the other hand, the respondent has openly denied, in the face of the court, that his children even look Japanese, preferring to refer to them as Caucasian, New Zealanders or mixed race. He found it difficult to acknowledge to the court, that in terms of physical appearance his children tended more towards Japanese features than Caucasian. In the report of Dr. Calvert at paragraph 5.4 and 5.5 on *"Background. (Provided by Mr. Dalley)"*, he referred to himself and his children as New Zealanders, but of the applicant and her partner as Japanese. In his documents before the court, at least 14 separate times, and in the presence of the court, on more than one occasion, referred to the applicant, the mother of the children and her partner as *"the Japanese"*. He had to be cautioned by the court to refrain from using this misnomer as the tone seemed more invidious than not. He has demonized the culture as demonstrated by his showing of Hackshaw Ridge to his children. He has also represented to the court, without proof, that Japan is a country with a track record for human rights abuses, with an abysmal record for separating mixed race families. When questioned by the court as to the fact that he had lived in the country for 10 years, spoke the language fluently and had been married to two Japanese

women and whether there was anything positive he could offer about the country, he prevaricated and cleverly avoided the question, referring the court instead to the uncorroborated evidence of Yvette Kasuga, previously rejected by this court.

It was clear to the court that the respondent was unable to offer any balanced view of Japan or Japanese people because of his experience with the applicant and her partner, and in lacking that balance the court could not believe that he could be capable of imparting any positive image to the children as it related to their Japanese culture, race, language or heritage. The negative messages he gave were very clear.

In the case of **Nowakowsky v Bolstad**[28] with a child of mixed parentage, the court found, that while both parents had a difficulty appreciating the others culture, it was the father who had the most difficulty in recognizing the importance of the mother's culture to the child than vice versa, and the court was of the view that the child would have a greater appreciation of his culture background with the mother.

This is my view of the present circumstances of the parties.

Criteria 5 - Which parent is most likely to provide continuity in the child's care.

The court refers to its previous discussion under criteria 2(d) and adds that the applicant provides a stable home life, supportive environment and a disciplined schedule for the children. The children have both told the court they feel safer with their mother than their father. Further, the fact that the respondent was deported from Vanuatu (though the reasons are still not yet clear) and his admission that he would return to Vanuatu if allowed, are both indications of the continued instability in the living arrangements of the respondent.

I refer to the case of **Nowakowsky v Bolstad**[29] wherein the court found that the child's upbringing had been troubled and disturbed and needed stability and that the child should have a clear idea of his home base and should be firmly rooted in the home with one parent rather than be carted between parents sharing care on an equal basis.

Children need stability, security and consistency to feel safe and the court finds that the respondent is incapable of providing that continuity of care most needed for children of tender years.

Criteria 6 - The age, gender and background and other characteristics of the children which the court considers relevant.

The children are still quite young. Their primary caregiver has been the applicant. All things being equal, in such circumstances, the courts have preferred that custody be retained by the mother. In the present circumstances, the balance is off-center, and

[28] Family Court, Palmerston North, NZ, 26 June 1991, FP054/336/90, Judge Von Dadelszen, p. 3
[29] Ibid, p. 4

therefore, unless compelling reasons are put forward by the respondent to alter the custody arrangements the court will prefer the mother over the father.

Further, the courts assessment of the children, is that they are extremely intelligent and require intellectual stimulation that would come from a commitment to educational values, exposure to a wide range of experiences and devoted parental attention, none of which I believe the respondent is capable of providing to his children.

Criteria 7 - Which parent is most likely to promote the children's relationship with relatives.

Not to belabor the point, the court refers to its discussion at criteria 2(d) as to the stark difference between the applicant and respondent as it relates to their family connections.

The applicant recognizes a need for familial bonds with extended family. She has introduced and maintained contact with her Japanese relations. The children are very familiar with their relatives and home there.

The respondent has not shown that propensity until recently. His children are unfamiliar with any family in New Zealand, save for their mention of a now deceased grandfather which had prompted their one visit to New Zealand when they were younger.

I strongly suspect that the respondent is not as close to or bonded with his New Zealand family as he would like this court to accept. There has been little significant contact between them. His email of 7th June, 2017 to the applicant, included in her bundle in opposition to her request to travel to Japan with the children for medical care of C, the respondent emphatically stated:

- *"I have no family connection outside of Vanuatu except an uncle and aunt in New Zealand.*
- *I have no possessions in New Zealand or desire to ever live there again.*
- *I wish to live and die in Vanuatu."*

He represents that provisions and accommodation have been made with his uncle and aunt and other relatives in close proximity, but there is no evidence by way of sworn statements from these relatives of their emotional and physical support of and intention to provide room and board and love and care for the children. Unlike the applicant, who continues to maintain that her home is and always will be Japan, and hopes to return there some day, and maintains direct contact with her relatives in Japan, and has, on numerous occasions, provided the sworn evidence of her partner as to, not only his financial support of her and the children but also his emotional support, being happy to co-parent with her.

Given the opportunity, I have seen nothing in the applicant, nor evidence to the contrary from the respondent that would suggest that the applicant would deny her children the chance to know and bond with their New Zealand relatives. On the contrary, for the scant regard which the respondent has shown, by his words and

actions as it relates to his relatives and home country, and his overall prejudice against Japan and Japanese, I do not foresee that he is the parent who would promote a relationship or a positive relationship with all the relations of his children.

Criteria 8 - The relationship existing between the parents, e.g. any hostilities.

As discussed earlier, the court recognizes the animosity and hostility on both sides. The respondent attempts to hide it behind religious cliché's and pedantic arguments focused on the human rights of the children. The applicant has neither respect nor trust in the respondent for all the reasons aforementioned. It is hard for the court to see how or when this relationship can ever be mended. It is obvious that the applicant wants to maintain distance between herself and the respondent, opting to communicate with him only via text or email.

The respondent on the other hand wants to retain verbal and physical communication with the applicant, though it is apparent to him that she does not. The court is of the belief that his desire to maintain this level of contact and importune the applicant is purely to insinuate himself upon her and keep her in a constant state of discomfort, under the guise that he wishes to build an amicable relationship with her and Mr. Yasuda. He is either oblivious too or does not care about the impact that this type of continued and forced interaction can have on the children, as any distress of the mother, the primary caregiver, is likely to be observed by the children if it is persistent.

The relationship appears almost beyond repC, and until it is, the case law seems to suggest that an equal division of the time of the children might not be the most useful solution for their welfare, as it would likely be more detrimental, as they would be too often exposed to their parents undercurrent of emotions.

Criteria 9 - The conduct and behaviour of the parents.

All of the above establishes a pattern and conduct of behaviour of both parties. The court is of the view that the applicant acts more in the interests of the children while the respondent seems bent more towards punishing the applicant and her partner. It appears to the court that the children are merely pawns in his power play to do so.

The picture which emerges of the respondent is of a father who is determined, at all costs, to get his own way, no matter the effect on his children. The respondent seems to have formed a vision that the interest of the children would best be served if Mr. Yasuda was out of their lives and he was allowed unfettered access to them. The respondent sees the needs of the children being satisfied only if the above provision is made. He seems unable to entertain any other notion.

Throughout the course of this matter, the court has been continually astounded by the specious arguments put forward by the respondent, tending more towards dishonesty than misunderstanding. The respondent has, on more than one occasion, made known to the court that he is a law student and is familiar with the trappings of the law, and therefore, the court expects a little higher standard of care from him than another lay litigant. The respondent has, to coin the phrase of Judge Inglish,

"demonstrated a degree of self-delusion astonishing in a person of [his] intelligence."[30]

The basis of my assessment of the untrustworthiness of the respondent is based on the following:

1. That the respondent from the first hearing of the 29th June, 2017 continually thereafter, and without reprieve, referred to the attempted kidnapping of the children by the applicant for which she was arrested and charged. He failed, at any point, to inform the court, that following an application of Nolle Prosequi the charges were discharged by the Chief Justice on the 8th July, 2013.[31]

   This was to my mind a deliberate and calculated misrepresentation to mislead and prejudice the mind of the court against the applicant.

2. That whenever the issue of his having caused the severe decay of C's teeth was raised by the applicant as an example of his parental negligence, and that she had attempted to seek dental care in Japan, he countered the argument by saying that it was a ruse on the part of the applicant and her partner to abscond with the children when the treatment could have been obtained in Vanuatu. He failed at every instance to inform this court that there were medical reports from doctors in Vanuatu stating that recommended treatment was to be under general anesthesia and could not be undertaken in Vanuatu. He failed to explain his reasons for opting for medical treatment in Vanuatu over Japan.

   This was a deliberate and calculated misrepresentation to the court to mislead and prejudice the mind of the court against the applicant.

3. That when the applicant sought reparative medical treatment for C's arm in Japan about July 2017, the respondent again opposed the application on the ground that it was a ruse to abscond, and presented the court with what he deemed a viable option of a competent New Zealand team arriving in Vanuatu who could perform the surgery. He failed to inform the court that the surgical team was merely going to be responsible for overseeing operations in the jurisdiction and this of course did not amount to direct care of the child.

   This was a deliberate misrepresentation to the court intended to mislead the court into making a decision favourable to the respondent rather than in the best interests of the child.

4. That in all his appearances before this court he consistently represented that the Court of Appeal had determined custody and recognized his right to access to his children. Paragraph 3 of his application for Inspection of C by visiting expert orthopedic team of the 9th June, 2017 went so far as to state that *"the threat to the Dalley children of parental abduction was deemed to be so serious that the 7 learned Judges of the Appeal court ordered that the*

[30] Supra, n.10, p.3
[31] Sworn statement of Yuka Nakumura of the 27th June, 2017, Exhibit 4

Dalley children are not to travel overseas without the express written consent of both parents." When asked more than once by the court to produce the said order and refer the court to these findings the respondent's response was always that he did not have the document to hand. This court found that there were no such statements out of the Court of Appeal, the matter having been concluded by a consent order merely approved and signed by the court. Even when the erroneous representation was corrected by this court the respondent continued to put it forward, with certitude, to support his right to access.

This was a continuing and calculated misrepresentation to the court, designed to influence this court by the supposed findings of a superior court.

5. That equity demands that one must approach the court with clean hands. In the respondent's continued accusations of kidnapping by the applicant, he failed to inform the court that a police report of physical abuse and kidnapping had been filed by the applicant in Santo after he had left with S for more than 2 days following an altercation with the applicant. He has never brought this fact to the attention of the court or sought to defend it when raised by the applicant in her sworn evidence of the 29th June, 2017 with police report attached.

   This was a deliberate misrepresentation by the respondent designed to paint himself in a favourable light while attempting to excoriate the applicant for the same or similar act to cause the court to be biased in his favour.

6. That the respondent, without fail, and at every appearance, raised the alleged adultery of the applicant as leading to the demise of his marriage in an effort to convince the court of her unfitness as a mother and to generally prejudice the court's mind against her. He failed to inform the court that the marriage was finally dissolved by consent order, wherein he admitted that the breakdown of the marriage was due to his adultery. Even when the court continued to caution him from referring to the alleged adultery of the applicant as it had no bearing on the custody issues he persisted.

   This was another deliberate misrepresentation by the respondent intended to prejudice the court against the applicant.

7. That the respondent continued, throughout all these proceedings to fling unsubstantiated accusations of alcoholism, sexual and physical abuse and kidnapping at the partner of the applicant even against the cautions of the court.

   Another deliberate and calculated attempt to misrepresent facts to the court so as to prejudice the mind of the court.

8. That while the application for custody was pending, he failed to inform the court of his status in the country, that is, that there was the possibility that he might have been deported. Even when summoned by the court to address the issue as it meant his status could affect any likely outcome in this matter as

well as his children, he kept attempting to sidetrack the court's attention by implying that Mr. Yasuda had influenced authorities to seek his deportation.

The court viewed this as dishonest behaviour.

9. That in spite of this court having deemed parts of Laurina Liwuslili's report biased in his favour, and the affidavit of Yvette Kasuga being given no weight by this court as she had never presented herself to the court and her evidence could not be tested under cross-examination, the court having informed him in previous hearings that each case was unique and had to be decided on the facts, and therefore, it could not take the experience of Ms. Kasuga's with her Japanese partner and apply it to these circumstances, simply because his, (the respondent's) antagonist was Japanese, he continued in this and previous hearings to put these documents forward as some form of viable evidence, with the expectation I presume, that if he said it long enough and loud enough the court would accept it, without more, as weighty and persuasive evidence in his favour.

   Being therefore fully aware of the court's ruling on both these reports the court considered it the act of an unreliable and untrustworthy person.

10. That in the respondent's application to oppose the travel of the children to Japan about July 2017, the respondent, in the final analysis, requested permission to visit C on the day of his operation in Japan, and thereafter, to visit the children. He was granted leave to do so. The court then had no expectation that the respondent would have exercised that option as it was left with the impression that it was not a request motivated by genuine concern to be at the side of C but merely to give the impression of concern to the court.

   The court is aware that the respondent never exercised that option, and at the time of that hearing, the court considered it disingenuous of the respondent to have made no offer for payment of treatment in Japan when he had expressed a willingness to fully fund the treatment and accommodation for the applicant and her partner in New Zealand. In not making any similar offer to meet treatment in Japan was a clear indication to the court that the respondent is a person whose words often belie his actions. Had he gotten his way in treatment being delivered in New Zealand he would have paid, but his application being denied, he resiled from the offer. This is a person whose intentions are not genuine, whose words do not match with his actions and whose actions are not motivated by a real concern for the welfare of his children.

   The court interpreted his motive as disingenuous and therefore a person whose words and actions could not be trusted.

11. That in spite of frequent communications by the applicant via email to the court and the respondent on C's condition while in Japan for treatment of his arm, and the applicant informing both the court and the respondent that they would be unable to return to Vanuatu at the appointed time due to the

Doctor's assessment of C's recovery, and the respondent consenting by email of the 27th July, 2018 regarding the date of return being extended to about the middle of September 2018, the respondent, by the 13th September, 2018 proceeded to file an application for contempt of order for the applicant failing to return by the date appointed by the court. He failed to include in his application to the court his consent and that he had dissuaded the applicant from taking any step with the court to formalize the consent, *"I don't think a consent order is required. My consent is given herein."*

On the 6th November, 2017 when the application came up for hearing, the respondent withdrew the application and informed the court that communication had gone well between the parties while the applicant was in Japan. Based on these facts, the court was astonished by the conduct of the respondent in filing an application for contempt, after having left the applicant with the impression that he took no issue with the extension of time for C's care.

In his withdrawal of the application and contradictory information as to the good communication between the parties, the court is of the view that the respondent's application was designed merely as an intimidating tactic. The resources of the court were not employed to the benefit of the children but rather his, and the court therefore viewed his application as an abuse of the court's process.

The court viewed his action in this regard as deceitful and malicious.

Criteria 10 - Any harm which the children have suffered or are at risk of suffering.

The negligent incidents when taken cumulatively demonstrate a careless father who could potentially place the children at greater risk. His unwavering trust in the people around him has allowed him, or can lead to him leaving the children in the care of someone who proves unsuitable. He does not seem cognizant of apparent dangers that can be suffered by the children and that is a dangerous attitude for a parent, whether intentional or not. The court wonders at what more could go wrong in New Zealand if the children were placed in his care.

The likely effect on the children of any change in their circumstances or disruption to the continuity of their care, and the likely effect on them of any separation from either parent or each other or other person with whom they have been living.

When interviewed, neither child was interested in moving to New Zealand permanently. Aside from not out-rightly choosing the respondent to live with, they both said that they would miss their mother and each other. They both indicated an interest only in visiting, with C's condition being that it could only be for a very short time. S was not overly committed to the idea of visiting, and though C was more keen, he appeared at ease and comfortable with the status quo, that is just communicating with the respondent over skype and telephone for now.

Neither of the children mentioned any ties to New Zealand or relatives there. They each said they had only been there once when much younger. They both seemed more committed to a life in Japan where they spoke of their home, relatives and friends.

Judge Frater in the case of **Gill v Gill**[32] informs that **"change is not to be undertaken lightly and without compelling reasons."** With that in mind, this court does not believe that any transition to move the children or C from the care of the mother to the father would be transitory. I believe it would, taking into account the personality and limitations of the father, and the characteristics and wishes of the children, have serious, long term psychological and emotional effects on the children.

I think the case of **Molu v Molu**[33] would offer some useful insight as it relates to the respondent's verbal proposition to the court in the presentation of his application for custody that the children be separated as was done under the order of Justice Aru to better facilitate access to each, as it would force needed communication.

The case of **Molu** is a Vanuatu case in which the youngest of the 3 children who was 2 years old had been living with his biological father and his family for about 9 months. The eldest boy was allowed to remain on Pentecost Island with his grandparents to complete his primary schooling and the second child, a girl, was allowed to remain with the biological mother. The court found no compelling reason to disrupt the arrangements as they stood, even though the father had taken the youngest without the consent of the mother. The court's reasoning was that the child was, even by the mother's account, well looked after by the biological family of the father and the father. The court felt the child had adjusted to life with his father and any ill-effects of being separated from his mother would be transient as he was of a very young age which would permit this.

While the particular circumstances of this case dictated its outcome, the court recognizes that a completely different regime would have to apply for the children in this case, which would not support an order for their separation. The culture in Vanuatu lends itself to the possibility of successfully separating siblings as close extended family ties and traditions allow for this. C and S are not Ni-Vanuatu, have not adopted a Ni-Vanuatu culture or been assimilated into it, save for their speaking of the language. The children have no extended family in this country and are very clearly being raised in a westernized culture, with a strong Japanese tradition. If the children were separated from each other, the familiarity of their surroundings and their mother and her partner it would likely have a most damaging effect on them.

As the proposal was put forward as a solution to facilitate better access to each child by each parent, I would have to out-rightly reject it as a viable option in light of the *"best interests of the child"* as it clearly supposes a more parent oriented approach than child oriented approach.

[32] Supra, n.11, p. 10
[33] Supra, n.15

GUARDIANS REPORT AND RECOMMENDATION

Ms. Kalwatman helpfully provided the court with what she considered relevant legal authority in this jurisdiction to support her conclusion that the children were best placed to remain in the custody of the applicant:

- **Dalley v Dalley**[34]
- **Nauka v Kaurua**[35]
- **Fisher v Fisher**[36]
- **Tor v Tor**[37]
- **Kong v Kong**[38]

CONCLUSION

This case is not about parental rights but the rights of the children and the parents responsibilities to them and how best each exercises that responsibility.

I have had the benefit of listening carefully to and observing both parents intently throughout these proceedings.

Throughout the course of these proceedings the court has become convinced of the possibility that the respondent suffers from a personality disorder,[39] more specifically, a narcissistic personality disorder. While the court is in no way qualified to diagnose this clinical condition, it may offer a reasonable explanation for the actions and behaviours of the respondent. Even if this were not the court's assessment, based on all the evidence, the court would still conclude that the respondent is a man who has allowed his experience with the applicant and her partner to affect his relationship with his children and his ability to properly parent them. He lacks the maturity to provide a safe parenting environment for them. He has sought to justify all his decisions and all the difficulties in his life by casting aspersions against the applicant and her partner.

I am deeply concerned regarding the psychological well-being of the respondent which I do not believe comes from the breakdown of his marriage and separation from his children but a more deep seated issue. This can only be gleaned through proper, in-depth psychological assessment.

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[34] [2016] VUCA 32; http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2016/32.html?stem=&synonyms=&query=title(dalley%20and%20dalley%20)
[35] [1998] VUSC 53; http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1998/53.html?stem=&synonyms=&query=title(nauka%20and%20nauka%20)
[36] [1991] VUCA 2; http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/1991/2.html?stem=&synonyms=&query=title(fisher%20and%20fisher%20)
[37] [1999] VUSC 1; http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1999/1.html?stem=&synonyms=&query=title(tor%20and%20tor%20)
[38] [2000] VUCA 8; http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2000/8.html?stem=&synonyms=&query=title(kong%20and%20kong%20)
[39] Supra, n.18, p. 1069 where the court considered whether the respondent had a personality disorder.

The respondent would wish to have the court believe that the applicant and her partner have deliberately and maliciously tried to sabotage his relationship with his children by attempted kidnappings, his deportation from Vanuatu and persistent denial of court ordered access to the children. I do not believe or accept this to be the case.

The respondent has mistaken religious zeal and religious devotion for good parenting. He seems to place very little attention on the other needs of the children and feels that love will cover a multitude of sins including financial deprivation. He has shown his capacity for vindictiveness by persisting in unsubstantiated accusations of alcoholism, sexual abuse, physical abuse and adultery leveled at the applicant and her partner, all in an effort to abuse the court's mind against the applicant and her partner.

I assess the respondent to be a selfish person. I assess his attitude in regard to his children, more particularly C as possessive rather than protective, and his attitude to his ex-wife as vindictive rather than compassionate. His anger toward the applicant and her partner is palpable.

I do not believe that the respondent is naturally cooperative or conciliatory. His actions belie his words. He believes that it is the applicant and her partner that is prolonging these custody matters. He seems to exist in a self-created world where he sees himself as the victim of their abuses, his good nature and intentions having been taken advantage of. He seems to have great difficulty in seeing things from any vantage point but his own. I have no confidence that this will change in the near future, and I have every expectation that the respondent will, rather than view this judgment as an opportunity to remedy the flaws in himself and the issues with his children, particularly his daughter, will see this as a personal attack and unmeritorious criticism. I would hope that the respondent might be able to see this decision in the best light, a decision which proposes the least risk to the children.

The respondent has much work to do to repC the relationship with his daughter and build her trust and confidence in him, as a person whom she can rely on and feel safe with. He must work to disabuse his daughter's mind of the notion that C is his preferred child, and he must work to separate his wishes for C for the future and what C genuinely wants for his future. The respondent needs to establish a track record of trust and performance with his daughter and with C as he gets older and becomes more able to discern the same/similar behaviours in him as S has done.

The respondent has approached this case more as an academic than as a father trying to obtain the best situation for his children no matter the disadvantage to himself or the pain and suffering. He has not demonstrated to the court that high standard of care that is expected of a parent and which the applicant has shown and attempted to demonstrate at every turn. He has convinced the court of the impact which all of this has had on him rather than the impact which it has had on the children. Even when the court laid bare his daughter's feelings towards him following the first interview he did not appear to be a parent particularly moved by the gravity of what he was receiving, has never again addressed it or how he intends to remedy.

it. His insouciant manner in that regard is of grave concern to the court. It appears to the court as if the discussion had never taken place.

By a wide margin, I have come to the conclusion that there is no equality between the parents in parenting skills. It is patently clear that the applicant is far superior in all respects to the respondent. She is devoted to the children equally, and in spite of her obvious disdain for the respondent, she does not unreasonably hinder contact with him and the children, except where she has felt it was not in the interest of the children and then moved herself to seek the intervention of the court to limit access. Even at her most fierce in this matter, she has never requested a complete break of all access with the respondent.

There is no doubt in this court's mind of the ability and suitability of the applicant to meet all the needs of the children.

Additionally, the fact that the evidence overwhelmingly shows that the children were and are thriving in the care of the applicant, there is therefore no need to alter their situation. On the evidence, the applicant is the more responsible and responsive parent, capable of providing the sanative environment the children need.

The children are more likely to grow up with proper appreciation of their background if their primary care is entrusted to the applicant.

I am satisfied that in pursuing these and other proceedings the applicant was motivated by a real and genuine concern for the welfare of the children.

Although the court has seen no formal qualifications of the applicant, she has shown herself to be an intelligent and able person. She has impressed this court throughout the length of these proceedings with the ability to coherently order her arguments, in spite of the limitations of language, to assign actions of the respondent to analyzed outcomes and their impact on the children. I do not doubt, that even if her relationship with Mr. Yasuda was to break down, and she was required to be the sole financial provider for her children that she would be more than capable of doing this, or, at the very least find the best possible solution and circumstance for them. She strikes this court as a very organized, disciplined and structured individual who prides herself on creating a loving and safe environment for the children.

I am therefore satisfied, that having regard to the respondent's personality there would be more damage done to the children if placed in his care, and rather than abating the conflict I believe it would continue to be maintained and wielded as a weapon to subdue the applicant. Notwithstanding, the court must be able to find some happy balance between its priority to protect the children from the respondent's behaviours while still seeking to preserve the children's need for a continuing relationship with him.

My interim orders are as follows:

1. That the respondent undergo the recommended psychological assessment:
    - Gordon - GPP1 – Personality Profile Inventory, and

REPUBLIC OF VANUATU COUR COURT LEX LEX SUPREME REPUBLIQUE DE VANUATU

- Parenting Risk Scale (Mrazek, Mrazek & Klinnert, 1995)

The court reserves the right to request further psychological assessments of the father should it deem it necessary in the interests of the children.

2. The applicant will retain physical and legal custody of the children until further order of the court. She will have the right to make all decisions in relation to education, health and place of abode in Vanuatu.

3. That the respondent while outside of Vanuatu will have access which will be limited for the time being to skype or other forms of face to face online communication and telephone calls three times per week: Monday, Tuesday and Wednesday at 5 p.m. to 6 p.m. Vanuatu time.

4. That if the respondent is allowed re-entry into Vanuatu then leave is granted to the respondent to apply for supervised in-person visitation with the children.

5. That any request for unsupervised in-person visitation in Vanuatu or New Zealand must be accompanied by the aforementioned psychological assessments at 1 above.

6. That the respondent is granted leave to visit the children in Japan during their school holidays, once a year for 10 days, during the hours of 10 a.m. and 4 p.m. All visits will be supervised by the applicant or a person to be named by the applicant at her own costs.

7. That there are to be no applications pertaining to custody of the children for at least 4 years except with the leave of the court and for compelling reasons only, supported by evidence.

   My reason for this moratorium is that the matter of custody and access of the children has been ongoing for some years now and there needs to be a respite for the children for the sake of their psychological and emotional well-being as they have been continually caught up in this discordant battle between their parents and need a period to adjust to normal living without the uncertainty that comes from litigious action. They are much too young to continue to be subjected to such lengthy periods of court action.

8. That this court has no jurisdiction to grant the request of the guardian to allow the respondent to re-enter Vanuatu for the purpose of visiting the children.

9. That the respondent is granted leave to apply to the court for supervised visits with the children to New Zealand providing it does not clash with school activities and other planned travel for the children. If leave is granted for the children to travel, the respondent is to meet half the upfront costs of their ticket and half the upfront costs of the ticket for the applicant to accompany the children to New Zealand and back. The visits may be supervised either by the applicant or other person appointed by the applicant at her own costs.

10. That the applicant is nolonger under an obligation to seek the consent of the respondent for the children to travel outside of Vanuatu. Consent is hereafter to be obtained through leave of the court upon application. The respondent will be notified by the court of any such application, via email, giving notice of not less than three (3) days.

11. That the respondent is to communicate with the applicant only on matters related to access to the children and only via text or email.

12. That following judgment the respondent informed the court that he was not in possession of the children's New Zealand passports and the applicant indicated that neither was she.

    Consequently, I have ordered the respondent to re-apply for the children's passports and submit to the applicant within six (6) weeks from date of judgment via federal express.

13. That the respondent is to be kept regularly informed by quarterly reports via email of the children's progress in terms of health, education and other miscellaneous activities. The first report is to be sent by the 10th October, 2018 and every three (3) months thereafter.

14. That the respondent is to provide to the applicant leasehold titles purchased for the children within 14 days of judgment to be held on trust for them.

    Following judgment the respondent informed the court that the leaseholds were still in his name. I therefore modify my order and instruct the respondent to transfer the leaseholds into the name of the applicant as trustee for the children within sixty (60) days from date of judgment. That leasehold titles to be either sent via federal express or other suitable arrangement to have them delivered to the applicant.

15. That the applicant is restrained from selling or mortgaging said leaseholds except with the leave of the court.

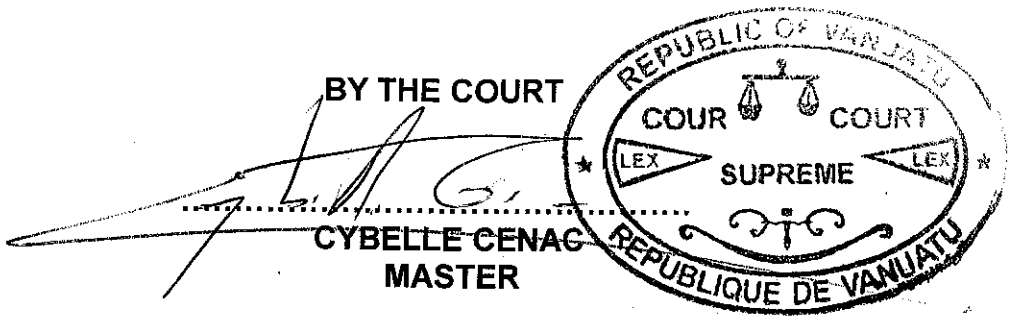
16. That hearing of application to reconsider maintenance is to be considered on the papers. The respondent is to file application with sworn statement in support with annexures by the 25th July, 2018 via email to the Clerk of Court and served on the applicant via email.

17. That the applicant is to file her response to application for reconsideration of maintenance 14 days from receipt of application and served on the respondent by email.

18. That Pauline Kalwatman's commission as guardian to the children is ended until further order of the court.

REPUBLIC OF VANUATU COUR COURT LEX LEX SUPREME REPUBLIQUE DE VANUATU

BY THE COURT



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