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THERAPEUTIC JUSTICE, PARENTAL RESPONSIBILITY, AND VARIATION OF ACCESS ORDERS

DDN v DDO

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In *DDN v DDO*, the Appellate Division of the High Court explored how the notion of therapeutic justice applies in the context of a variation of access orders. This note reviews *DDN v DDO* and argues that the approach adopted by the Appellate Division of the High Court has much to commend it for recognising the need for flexibility when varying orders relating to children while at the same time reminding parents of the importance of parental responsibility and encouraging them to put in their best efforts to make adjustments to access orders by agreement in the spirit of therapeutic justice.

I. Introduction

In recent years, the notion of therapeutic justice has taken the family justice system in Singapore by storm,[1] especially after the Court of Appeal expressly adopted therapeutic justice in its landmark decision of *VDZ v VEA*[2] in 2020.[3] True to the prediction that "one can expect [therapeutic justice] to play a more prominent role in judgments relating to divorce proceedings",[4] the Appellate Division of the High Court in its recent decision of *DDN v DDO*[5] explored how the notion of therapeutic

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1 Tricia Ho & Aaron Yoong, "Family Law" (2022) 23 SAL Ann Rev 490 at [17.1]; Ho Wei Jing, Tricia, "Family Law" (2021) 22 SAL Ann Rev 479 at [17.20]; Ho Wei Jing, Tricia, "Family Law" (2020) 21 SAL Ann Rev 553 at [17.1]. Notably, the notion of therapeutic justice has featured prominently in recent speeches delivered by Sundaresh Menon CJ: see, *eg*, Sundaresh Menon, "From Family Law to Family Justice", speech at the Law Society Family Conference 2020 (14 September 2020) at [33]–[35]; Sundaresh Menon, "Through the Eyes of a Child", speech at the 8th Family Law & Children's Rights Conference: World Congress 2021 (12 July 2021) at [5]–[12] [Menon, "Through the Eyes of a Child"]; Sundaresh Menon, "International Family Justice as Collaborative Justice", speech at the 18th Conference of Chief Justices of Asia and the Pacific (18 November 2022) at [44]; Sundaresh Menon, "The Role of the Courts in Our Society – Safeguarding Society", speech at the Singapore Courts – Conversations with the Community (21 September 2023) at [45].

2 [2020] 2 SLR 858 (CA).

3 *Ibid* at [75]–[79]. See also Leong Wai Kum & Debbie Ong, "With Head and Heart in Equal Measure: Justice Phang and Therapeutic Justice in Family Law" in Goh Yihan, ed, *Pursuing Justice and Justice Alone: The Heart and Humanity of Andrew Phang's Jurisprudence* (Singapore: Academy Publishing, 2022) at 249–251; Debbie Ong, "The 34th Singapore Law Review Annual Lecture: Justice that Heals" (2022–2023) 40 Sing L Rev 1 at 9.

4 Chen Siyuan & Joel Fun, "Achieving Therapeutic Justice in Divorce Proceedings" [2021] SAL Prac 31 at [11].

5 [2024] SGHC(A) 2 [*DDN*].

justice applies in the context of a variation of access orders.[6] This note reviews *DDN v DDO* and argues that the approach adopted by the Appellate Division of the High Court has much to commend it for recognising the need for flexibility when varying orders relating to children while at the same time reminding parents of the importance of parental responsibility and encouraging them to put in their best efforts to make adjustments to access orders by agreement in the spirit of therapeutic justice.

II. Facts and Decision

The facts of *DDN v DDO* were as follows. The mother and the father, who divorced after fifteen years of marriage, had two children aged twelve and fifteen.[7] The divorce proceeded on an uncontested basis, with the mother and the father arriving at an agreement in October 2021 on the access orders relating to the children, which gave the father access to the children on Thursdays (after school) to Sundays before noon, overnight access within those days, and overseas access during the June and November/December school holidays.[8]

In June 2023, the mother applied to vary the by-consent access orders made in October 2021 on the ground that there had been a material change in the circumstances.[9] More specifically, the mother sought to reduce the father's access to the children, as follows:

> (a) that there would be reasonable access to the [f]ather in the form of weekly outings on weekends to be arranged directly with the children; and
> (b) that there would be no more overseas and overnight access to the [f]ather.[10]

Chan Seng Onn SJ in the General Division of the High Court (Family Division) granted the mother's application and held that the father's access to the children should be reduced on the ground that there had been a material change in the circumstances.[11] In Chan SJ's view, it would be in the children's best interests for the father's overseas and overnight access to be removed in light of his persistent failure to utilise them, as well as various allegations raised by the mother regarding the father's behaviour.[12] Accordingly, Chan SJ varied the by-consent access orders made in October 2021 to the following:

> (a) Reasonable access to the [[f]ather] as follows (subject to the children's agreement to the schedule below):
> (i) Every Tuesday and Thursday from 6pm to 9pm;
> (ii) Every Sunday from 10am to 9pm;

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6 *Ibid* at [2].
7 *Ibid* at [3]–[4].
8 *Ibid* at [4].
9 *Ibid* at [5].
10 *Ibid*.
11 *Ibid* at [9].
12 *Ibid* at [9]–[11].

(iii) On public holidays, from 10am to 9pm; and
(iv) On the eve of the children's birthdays and the [f]ather's birthday from 6pm to 9pm.

(b) Liberty to the [f]ather to place calls to the children on the days without access.[13]

Dissatisfied, the father appealed against Chan SJ's decision. Debbie Ong Siew Ling JAD, delivering the judgment of the Appellate Division of the High Court comprising Audrey Lim J and herself, dismissed the father's appeal and held that Chan SJ was justified in varying the by-consent access orders made in October 2021 on the ground that there had been a material change in the circumstances.[14] In particular, Ong JAD expressed agreement with Chan SJ that "the circumstances surrounding the [f]ather's failure to exercise access and the evidence on his promiscuous behaviour taken in totality give cause for the reduction of access".[15] Emphasising that the appellate courts would usually be slow in intervening with orders relating to children,[16] Ong JAD took the view that Chan SJ's "overall assessment of the evidence [was] commensurate with the orders he [had] made".[17] Ong JAD further noted that the father still had reasonable access to the children pursuant to the varied access orders notwithstanding that his access was reduced,[18] and reminded that "[p]arental responsibility is not just a personal responsibility which involves the parents' time and personal sacrifices; it is a *legal* responsibility, and a very meaningful one" [emphasis in original].[19]

III. Analysis

When one parent is awarded care and control[20] of a child, it is "standard practice" for the other parent to be given reasonable access[21] to the child in order to "maintain the strength of the parent-child bond with both parents despite the dissolution of the relationship between the parents *inter se*".[22] Unfortunately, the issue of access has been said to give rise to the "greatest parental conflicts".[23] For instance, a parent

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13 *Ibid* at [11].
14 *Ibid* at [13].
15 *Ibid* at [28].
16 *Ibid* at [20].
17 *Ibid* at [21].
18 *Ibid*.
19 *Ibid* at [32].
20 It is important to appreciate the difference between "care and control" and "custody". As Lai Siu Chiu J (as she then was) explained in the Court of Appeal decision of *CX v CY* [2005] 3 SLR(R) 690 (CA) at [31] [*CX v CY*], the former relates to "day-to-day decision-making" while the latter relates to "the long-term decision-making for the welfare of the child". For academic commentary on *CX v CY*, see Chan Wing Cheong, "Custody Orders, Parental Responsibility and Academic Contributions" [2005] Sing JLS 407.
21 Access orders "enable the parent without care and control of the child to spend time with the child": see Debbie Ong Siew Ling, "The Next Step in Post-Divorce Parenting" (2005) 17 SAcLJ 648 at [7].
22 *TSF v TSE* [2018] 2 SLR 833 (CA) at [97].
23 Debbie Ong Siew Ling & Lim Hui Min, "Custody and Access: Caring or Controlling?" in Teo Keang Sood, ed, *Singapore Academy of Law Conference 2006: Developments in Singapore Law between 2001 and 2005* (Singapore: Academy Publishing, 2006) at [81].

who has been awarded care and control of a child may be reluctant to allow the other parent access to the child, perhaps due to the "psychological trauma of the [parents'] failed relationship".[24] Moreover, the "chances of further multiple applications for variation" may also be increased in light of the "emotional dimensions involved in family cases".[25] In this regard, the decision of the Appellate Division of the High Court in *DDN v DDO* is particularly significant for illuminating the approach to be adopted by the courts when varying orders relating to children against the backdrop of therapeutic justice.

A. *Wider and More Flexible Approach Adopted by the Courts when Varying Orders Relating to Children*

As is well known, the court's power to vary orders relating to children can be found in section 128 of the Women's Charter 1961, which provides as follows:

> The court may at any time vary or rescind any order for the custody, or the care and control, of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any *material change in the circumstances*.[26] [emphasis added]

In *DDN v DDO*, Ong JAD held that the phrase "material change in the circumstances" in section 128 of the Women's Charter 1961 should be given a "wider and more holistic" interpretation by the courts when children are involved.[27] Recognising the dynamic nature of the parent-child relationship and that "children have new needs and preferences as they grow older", Ong JAD took the view that the courts must have "sufficient flexibility to adjust orders relating to the child's arrangements to suit the current circumstances facing the child".[28] In this regard, Ong JAD endorsed the holding in the High Court (Family Division) decision of *AZB v AZC*[29] that "the determination of any material change in circumstances requires 'a principled and pragmatic approach' that considers the welfare of a child and that s[ection] 128 of the [Women's Charter 1961] should not be read too narrowly".[30]

Notably, this wider and more flexible approach that applies in the context of a variation of orders relating to children differs significantly from that which applies in the context of a variation of financial orders on divorce. For instance, as regards the division of matrimonial assets, the courts have adopted a stricter approach when interpreting section 112(4) of the Women's Charter 1961, which gives power to the

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[24] Choo Han Teck, "Family Law Through the Ages – CJ Koh Lecture 2022", speech at the Family Conference 2022 (13 September 2022).

[25] Debbie Ong, "Family Justice Support Scheme Launch 2022", speech at the Family Justice Support Scheme Launch 2022 (19 October 2022) at [3].

[26] Women's Charter 1961 (2020 Rev Ed) s 128.

[27] *DDN*, *supra* note 5 at [17].

[28] *Ibid* at [16].

[29] *AZB v AZC* [2016] SGHCF 1 at [32] [*AZB*].

[30] *DDN*, *supra* note 5 at [15].

courts to vary an order for the division of matrimonial assets "at any time it thinks fit".[31] As Andrew Phang Boon Leong JA (as he then was) made clear in the Court of Appeal decision of *AYM v AYL*,[32] section 112(4) of the Women's Charter 1961 "must have *a limited operation only*" [emphasis in original][33] and there must be "exceptional reasons" before the courts can vary an order for the division of matrimonial assets.[34] Phang JA further elaborated as follows:

> … there must be some *finality* once the matrimonial assets have been divided between the parties … This is only logical as well as commonsensical. After all, a division effected pursuant to s[ection] 112 [of the Women's Charter 1961] is, *ex hypothesi*, premised on the fact that the parties would each go their own separate ways and want to have nothing more to do with each other thereafter. Hence, to allow the court to re-open the distribution already made is to undermine the very finality which is one of the *raisons d'être* of s[ection] 112 [of the Women's Charter 1961] itself. …[35] [emphasis in original]

The same, however, cannot be said of orders relating to children. While an order for the division of matrimonial assets "is of the nature of a 'one-off' order and that itself argues against allowing it to be too readily subject to being varied",[36] orders relating to children are "continuing in nature" and are "liable to be varied … should it become appropriate to do so upon further consideration of the welfare of the child, especially in altered circumstances".[37] This critical distinction between financial orders on divorce and orders relating to children was also elucidated by Chao Hick Tin JA (as he then was) in the Court of Appeal decision of *AUA v ATZ*[38] in the following way:

> In the case of the division of matrimonial assets (and, to a lesser extent, the maintenance of the child), the substance of the question is one of finances. As the issue is merely one which relates to the ownership of property, or the distribution of the financial burdens of parents *inter se*, understandably the court would be inclined towards playing a comparatively minor role. However, where the court is concerned with questions of custody and care and control, the subject is not wholly pecuniary but the welfare of a child. A child's welfare is not something to be bartered or negotiated [with] at the termination of a marriage. Thus, where the court decides on questions of custody and care and control, it always acts to maximise the welfare of the child, which is the "paramount consideration" (s[ection] 125(2) of the [Women's] Charter [1961]).[39]

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31 Women's Charter 1961 (2020 Rev Ed) s 112(4).
32 [2013] 1 SLR 924 (CA) [*AYM*].
33 *Ibid* at [15].
34 *Ibid* at [11].
35 *Ibid* at [12].
36 Leong Wai Kum, *Elements of Family Law in Singapore*, 3d ed (Singapore: LexisNexis, 2018) at [15.201].
37 *Ibid* at [9.166].
38 [2016] 4 SLR 674 (CA).
39 *Ibid* at [57].

Viewed in this light, it is submitted that the decision of the Appellate Division of the High Court in *DDN v DDO* should be welcomed for adopting a wider and more flexible approach when varying orders relating to children given that the welfare of the child is the "paramount consideration".[40] While there is certainly an interest in ensuring that "parties leave with an effective and lasting solution that does not require repeated or further recourse to the courts [in family disputes]",[41] it must be borne in mind that "[f]amily relationships are dynamic and where new developments occur such that the orders are no longer working well for the children, the new needs of the children ought to be considered".[42]

B. *Parents Should Attempt to Make Adjustments to Access Orders by Agreement in the Spirit of Therapeutic Justice Instead of Litigating in the Courts as a First Resort*

Notwithstanding a wider and more flexible approach adopted by the courts when varying orders relating to children, Ong JAD in *DDN v DDO* stressed that this must be viewed against the backdrop of therapeutic justice, which entails that "parents should endeavour to make adjustments by agreement to the care and access orders where necessary" as opposed to "litigating in the courts for the variation of orders".[43] According to Ong JAD, parents are expected to "do their utmost to make the ordered arrangements work" and should not be encouraged to "pursue a variation of orders at the earliest opportunity".[44] In other words, only when parents are unable to resolve their disputes "despite their best efforts" should they seek recourse from the courts.[45] In this regard, the observations of the High Court (Family Division) in *VDX v VDY*[46] are most apposite:

> Parental responsibility is a personal responsibility. The [c]ourt is the last resort for the resolution of parenting matters, for parents should intentionally endeavour to make these decisions for their children themselves. They should strive hard not to mire the family, including the children, in litigation, nor should their resources and the court's resources be spent on litigation to deal with an emotionally-driven conflict. This will involve some measure of compromise; it may involve being bigger, wiser and kinder – which must be very difficult when relationships have broken down, yet this is the legal responsibility placed on all parents. …[47]

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40 *UBQ v UBR* [2023] 1 SLR 1294 (HC(A)) at [52].

41 Sundaresh Menon, "Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2024", speech at the Opening of the Legal Year 2024 (8 January 2024) at [25].

42 *DDN*, *supra* note 5 at [27].

43 *Ibid* at [19].

44 *Ibid* at [17].

45 *Ibid* at [19].

46 [2021] SGHCF 2 [*VDX*].

47 *Ibid* at [42].

Moreover, it makes good sense for parents not to "pursue a variation of orders at the earliest opportunity"[48] since "[a]ll court orders, especially those involving custody, care and control of the children in a divorce, must be given time to settle".[49] The General Division of the High Court (Family Division) decision of *WQI v WQH*[50] illustrates this point. In this case, the mother and the father initially agreed by consent to have shared care and control of their two children.[51] Subsequently, the mother applied to vary the consent order, seeking sole care and control of the children.[52] While acknowledging that the arguments raised by the mother in her application to vary the consent order had "some merits", Choo Han Teck J held that a variation of the consent order was not warranted yet and that it "must be given time to settle".[53] In the circumstances, Choo J granted the mother "liberty to apply for a review of the access in 10 months' time".[54] A similar point was also made more recently in the General Division of the High Court (Family Division) decision of *WOZ v WOY*:[55]

> … Relationship building requires time, effort, and patience from both sides. Above all, it is unique in each relationship. It is not amenable to judicial commands, and the courts must leave it to the parents to develop their own bond with their children, each in his or her own way. Sometimes, the court might offer a nudge here and there, but in the end, it must be left to the parent to find the formula. I thus allowed the current access arrangements to remain for now, but I granted the [father] liberty to apply after three months, to see if there is room for change in the access conditions.[56]

Ultimately, in the spirit of therapeutic justice, parents should endeavour to resolve their disputes "by compromise, graciousness and flexibility"[57] and adopt a "shared spirit of give and take".[58] After all, as a learned commentator aptly observed, "[p]arents by law bear the responsibility to co-operate in caring and providing for their children".[59] Returning to the facts of *DDN v DDO*, although the father's access to the children was reduced, Ong JAD "note[d] that it remain[ed] open to [the mother and the father] to make arrangements for additional access and for the children

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48 *DDN*, *supra* note 5 at [17].
49 *WQI v WQH* [2024] SGHCF 5 at [6].
50 [2024] SGHCF 5.
51 *Ibid* at [1]–[2].
52 *Ibid* at [2].
53 *Ibid* at [6].
54 *Ibid*.
55 [2024] SGHCF 11.
56 *Ibid* at [4].
57 *VDX*, *supra* note 46 at [28].
58 *Ibid* at [27].
59 Leong Wai Kum, "Parental Responsibility as the Core Principle in Legal Regulation of the Parent-Child Relationship" in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, eds, *Singapore Academy of Law Conference 2011: Developments in Singapore Law between 2006 and 2010* (Singapore: Academy Publishing, 2011) at [2]. In a similar vein, it was opined in Leong Wai Kum & Debbie Ong, "Family Justice in Divorce Proceedings in Singapore for Spouses and Their Children" (2020) Journal of the Malaysian Judiciary 165 at [1] that "[d]ivorce should be no worse than a re-organisation of family members' living arrangements and the divorced spouses should still be able to continue to discharge their parental responsibilities with some degree of co-operation".

to have overseas travel access with the [f]ather by consent", and "remind[ed] the [m]other to be reasonable and supportive where such arrangements are suitable".[60] Hearteningly, Ong JAD commended "the [m]other's approach of taking a step to recast the future in the hope for a more positive outcome for the children (when agreeing to the generous access rights in 2021)".[61]

C. *Suggestions for the Way Forward*

To ensure that parents have "do[ne] their utmost to make the ordered arrangements work" and are not "pursu[ing] a variation of orders at the earliest opportunity",[62] two suggestions are offered.

First, it is suggested that the courts could introduce a threshold requirement that makes it mandatory for parents who file applications for variation of orders relating to children based on material changes in circumstances to adduce evidence of their attempts (albeit unsuccessful) to make adjustments to the orders by agreement before the courts will hear such applications. If this threshold requirement is not satisfied, then the courts may dismiss the applications for variation. The introduction of such a requirement would ensure that the courts are hearing applications for variation made by "parties who require a resolution to disputes that they are unable to resolve despite their best efforts".[63] Indeed, as Debbie Ong Siew Ling JAD observed in the General Division of the High Court (Family Division) decision of *WBU v WBT*[64] (in the context of a variation of maintenance orders):

> … going to the court ought to be the last resort in parenting matters … and if parents file court proceedings for variation each time there is a change, there is something precious that we will have lost in our society made up of family units, for parenting is to be carried out cooperatively by parents themselves. Parents must *find the resolve* to overcome the difficulties in co-parenting by a strong *commitment to discharging their parental responsibility*. Litigation has harmful effects on the child – materially, because the family loses in incurring litigation expenses, and psychologically, because conflict affects the whole family in ways not easily visible.[65] [emphasis in original]

Second, it is suggested that the courts could impose negative costs orders on parents who file frivolous applications for variation of orders relating to children as a deterrent against such conduct. As Debbie Ong Siew Ling J (as she then was) pointed out in the General Division of the High Court (Family Division) decision of *VVB*

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60 *DDN*, *supra* note 5 at [21].
61 *Ibid* at [26].
62 *Ibid* at [17].
63 *Ibid* at [19].
64 [2023] SGHCF 3.
65 *Ibid* at [47]. This was reiterated by the Appellate Division of the High Court in *DDN*, *supra* note 5 at [19].

v VVA,[66] "awarding costs … signals that adversarial stances are not acceptable in a family justice system that adopts therapeutic justice".[67] Similarly, in the Court of Appeal decision of *AYM v AYL*, Andrew Phang Boon Leong JA (as he then was) cautioned (in the context of a variation of orders for the division of matrimonial assets) that "the courts would not look favourably upon frivolous applications that would constitute an abuse of the process of court, which applications would be subject, *inter alia*, to the appropriate costs orders".[68] All in all, imposing negative costs orders on parents who file frivolous applications for variation of orders relating to children would discourage parents from "mak[ing] variation applications based on material changes in circumstances when there is in fact none, just because they are not satisfied with the original order",[69] and is in line with the "clear interest in encouraging the parties to move on to face the future instead of re-fighting old battles".[70]

IV. Conclusion

The commitment of the Singapore courts to therapeutic justice has been lauded by Barbara A Babb,[71] who observed that she is "aware of no other family justice system that has undertaken this extraordinary commitment to such a dramatic effort aimed at improving families' and children's lives".[72] In light of the potential of therapeutic justice to "revolutionise the family justice system by placing the human being at the front and centre of the legal process",[73] the approach adopted by the Appellate Division of the High Court in *DDN v DDO* in recognising the need for flexibility when varying orders relating to children while at the same time reminding parents of the importance of parental responsibility and encouraging them to put in their best efforts to make adjustments to access orders by agreement in the spirit of therapeutic justice serves as an excellent illustration of how "[j]udicial decisions and frameworks … can have a significant impact on the therapeutic influence of the law".[74]

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66 [2022] 4 SLR 1181 (HCF).

67 *Ibid* at [26].

68 *AYM*, *supra* note 32 at [23].

69 *AZB*, *supra* note 29 at [33]. Debbie Ong Siew Ling JC (as she then was) further added that "[i]t is not in the welfare of the children to have their parents constantly applying to the court for new arrangements when there is no genuine need for review": see *AZB*, *ibid*.

70 *TNL v TNK* [2017] 1 SLR 609 (CA) at [68].

71 Barbara A Babb was "the first scholar to apply [therapeutic jurisprudence] to family law": see Barbara A Babb, "Family Law and Therapeutic Jurisprudence: A Caring Combination – Introduction to the July 2021 Special Issue of *Family Court Review*" (2021) 59(3) Fam Ct Rev 409 at 410. She was appointed to the Advisory Research Council on Therapeutic Justice established by the Family Justice Courts: see Debbie Ong, "Through the Therapeutic Justice Lens: A Balanced Application of the Law" [2021] SAL Prac 5 at [75].

72 Babb, *supra* note 71 at 411.

73 Menon, "Through the Eyes of a Child", *supra* note 1 at [17].

74 *Ibid* at [9].