Re C (an infant)
[2002] SGCA 50

Case Number : CA No 79/2002

Decision Date : 14 November 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Mr Charles Ezekiel, Anna Oei Ai Hoea, and Valerie Yang (Lim Ang & Partners) for the appellant; Kesavan Nair (Harry Elias & Partners) for the respondents

Parties : —

Family Law – Custody – Access – Granting access to maintain relationship with surviving parent

Family Law – Custody – Care and control – Removal of child out of jurisdiction by party having custody – Relevant factors

Family Law – Custody – Care and control – Whether surviving parent has prima facie right to custody of child – s 6 Guardianship of Infants Act (Cap 122, 1985 Rev Ed)

Family Law – Guardianship – Welfare of child – Meaning – Whether financial standing and occupation of party seeking to be guardian of child relevant

1 The present appeal concerned a custody battle for a two-year-old boy between the child's father and paternal grandmother on the one hand, and his maternal grandparents on the other. In the court below, the judge made the maternal grandparents, the plaintiffs in those proceedings, the guardians of the child and awarded custody to them. The father, who was the defendant, and the paternal grandmother were dissatisfied with the decision below and appealed to us. It should be mentioned that the father is now in prison and will only be released in the year 2008 at the earliest. At the conclusion of the hearing we dismissed the appeal, but granted limited access rights to the paternal grandmother.

The background

2 The family history of the child is rather sad as his father, the appellant, is currently serving a ten-year prison sentence for causing the death of his wife, the child's mother.

3 The maternal grandparents, A and B, are both Australian citizens and they ordinarily reside in Australia. However, they come to Singapore once a year to visit A's mother (maternal great grandmother of the child) who lives at Jubilee Road. A is a classical musician by profession and B runs a dance school in Perth, teaching Indian classical dance. Even while the child's mother was alive, they have effectively been taking care of the child since birth, either in Perth or in Singapore. After the mother's death, they became the sole caregivers. The child is very attached to them.

4 The appellant is an Indian national. So is his mother, whose occupation is to tell fortunes and perform religious rituals. She resides in Tamil Nadu, India but often comes to Singapore. The appellant met his wife in India through his mother and fell in love with her. He is younger than her by two years. In February 2000 he came over to Singapore and on March 2000, they registered their marriage. The couple stayed with the wife's extended family at Jubilee Road. In the second half of 2001, they moved to live in a flat at Pine Close, their matrimonial home. The child was born to them on 2 December 2000 and is a Singapore citizen by birth.

5 Troubles began to appear between the couple, which the appellant alleged was due to interference by his wife's family. The fact was that he could not find employment here despite

considerable effort. He claimed to be a graduate of the University of Madras when he is not such a graduate. It was also alleged that the appellant is violent by nature.

6 On 29 September 2001, the couple had a serious quarrel at their Pine Close home which led to the appellant stabbing his wife in the abdomen, from which injury she died. The appellant pleaded guilty to a charge of culpable homicide not amounting to murder, and on 13 March 2002 he was sentenced to a ten-year imprisonment term which was backdated to 29 September 2001. He was also ordered to be given 15 strokes of the cane. Subject to good conduct which would earn him one-third remission, he should be released in June 2008.

7 As the mother had passed away and the father, the appellant, was in prison, the wife's parents thus applied for custody of the child. The appellant opposed the application in part because the respondents intended to take the child out of Singapore to reside in Perth, Australia. We would observe straight away that this was hardly a valid point as the appellant's mother, if custody of the child was granted to her, would also be taking the child to live with her in India. He also said the maternal grandparents were not suitable because of their age (A was then 62 and B, 56). The appellant's mother is a single mother herself. While she is not rich, she has sufficient means to maintain the child. The appellant also said that his two married sisters, who lived in Tamil Nadu, would help him care for the child. He also averred that since his arrest, the relatives of his wife had never brought the child to see him. He emphasised that the child, being a Hindu, should be brought up immersed in the values of Indian cultures and traditions and not be exposed to the ills of a Westernised permissive society.

8 The respondents also have two other daughters who would help in looking after the child. According to the respondents, the appellant is short-tempered and quarrelsome and has a propensity to violence. They also declared that they had better home support in bringing up the child than the appellant's mother.

Decision below

9 In view of the conflicting assertions, the judge below directed the children welfare authorities to investigate the background of both parties. Taking into account the welfare report, and the first and paramount consideration laid down in s 3 of the Guardianship of Infants Act (Cap 122), ("the Act"), *ie*, the welfare of the child, the court granted custody to the maternal grandparents.

10 In coming to her decision, the judge noted that although the marriage was not really approved by the maternal grandparents, the latter were nevertheless "totally devoted to the infant". She was convinced that they would be able to give the child a better life, in every sense of the word, than the appellant's mother could. She also took into consideration the following circumstances:

(a) The respondents' extended family is a closely knit one, both here and in Perth, and the members thereof would be able to help, and extend to each other physical and emotional support, in bringing up the child;

(b) The appellant has a propensity towards violence and giving custody to him and/or his mother would expose the child to some risk. He also did not show true remorse for having killed his wife.

Issues

11 The main issues which the appellant and his mother sought to canvass before us were the following:

(a) The judge failed to have regard to the fact that the appellant, being the surviving parent, should have a better right to custody of the child;

(b) The judge below was unduly influenced by the fact that the appellant's mother had an unconventional occupation and her erroneous perception that Australia was a better place to bring up the child;

(c) The judge failed to give sufficient consideration to the fact that the child, being so young, it was important that the person to whom custody was given should be a younger person and here, the respondents were considerably older than the appellant's mother who was then only aged 46.

12 In the alternative, the appellant asked if the court was not inclined to grant him custody of his son, that either he or his mother, or both of them, be given access in order that ties between him and his son are not severed.

13 We should also add that the appellant had also raised a number of procedural issues, none of which were of any great moment or likely to have any significant effect on the substantive issues relating to the welfare of the child. So we do not propose to go into them.

A parent's rights

14 The appellant's point here was that being a natural parent, and the other parent having passed away, he should automatically be entitled to the custody, care and control of the child. In this regard, he relied upon the English case of *Re D* [1999] 2 FCR 118 which concerned a custody tussle between the father and the maternal grandmother. The English Court of Appeal said that the question for the court in a case such as this was whether there were any compelling factors which override the *prima facie* right of a child to an upbringing by its surviving natural parent. It held that the judge below had adopted the wrong test in reaching his decision by performing a balancing exercise as though the question was which of the households would provide the better home. The correct approach was first to consider whether the father was a potential carer for his son.

15 We accept the principle advanced that, *prima facie*, a surviving parent should have the right to custody of his child. This follows naturally from the settled rule that both parents of a child have equal rights over the child and if one parent should die, then the surviving parent would ordinarily have the sole right over the child. This is substantially provided in s 6 of the Act. However, this right is subject to the overriding power of the court, in exercise of the jurisdiction conferred under the Act, of either removing that parent as a guardian over the child, if it is established to the satisfaction of the court that it is not in the welfare of the child to be in the custody, care and control of that parent; or appointing another person as an additional guardian to act jointly with the surviving parent.

16 The word "welfare" is not defined in the Act. It is a very wide word and no court should seek to circumscribe it. It obviously covers both the material and non-material aspects relating to the well-being of the child: see *Tan Siew Kee v Chua Ah Boey* [1987] SLR 549 per Chan Sek Keong JC at 21. However, in our view, greater emphasis must be placed on "stability and security, the loving and understanding, care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents": see *Walker v Walker & Harrison* [1981] NZ Recent Law 257. Ultimately, the court must decide based on the child's best interest.

17 In the circumstances of the present case, the appellant is in no position to be the care-giver as he is in prison for a crime he had committed and will not be released until June 2008. So the tussle here is between the maternal grandparents and the paternal grandmother. Who should be appointed the guardian(s) of the child and be given the care and custody of the child, bearing in mind his welfare? Very often, in such cases, the decision would be a delicate and difficult one. It involves a

balancing exercise. Here, the judge below did consider all the relevant factors. On our part, we had and have no doubt that the decision of the court below is correct, bearing in mind:

(a) the child has, to all intents and purposes, been taken care of by the maternal grandparents since birth and has developed a close attachment to them; to take the child out of their care would certainly cause him emotional upset;

(b) while the maternal grandparents are somewhat older than the paternal grandmother, they have very good extended family support and if anything untoward should happen to them, the child would not be left in the lurch.

18 Counsel for the appellant suggested that the judge below seemed to have been prejudiced by the fact that the appellant's family might be poor. Nothing in the judge's grounds of decision indicated that. Nowhere did the judge say that the appellant's mother could not afford to bring up the child. Poverty *per se* is never a disqualification. But that is not to say that it is not a relevant factor. After all, the welfare of the child would encompass both emotional and material needs.

19 Another point which the appellant raised was that the judge seemed to be influenced by the unorthodox occupation of his mother. Here, it is important to appreciate the manner in which the judge viewed the point, and thus we will quote what she said:

> … [the appellant's] mother can only be said to have an unorthodox vocation, whether one describes it as religious teaching, fortune telling or soothsaying. I cannot imagine that she can offer a better environment to the infant during his tender years than the plaintiffs; indeed it would be the opposite. As she and her disciples had deposed to in their affidavits, she visits Singapore and Malaysia often. What would happen to the infant during those frequent visits? Would she bring him along on her trips or would she leave him behind in India? If the latter scenario is to be the case, who would be taking care of the infant during her absence? It was not possible for our social welfare authorities to extend their inquiries and investigations to Chennai, Tamil Nadu, where the defendant's mother (and his two [2] siblings) live. I have no inkling what her living conditions in India are like. Indeed, no information was forthcoming from the defendant or his mother in that respect. If, as the defendant's mother deposed in her affidavit, she rents out her property in India, where does she live? In the interests of the infant, I could not take a risk and allow the defendant's mother to raise the infant in conditions unknown.

20 Clearly, it cannot be gainsaid that the occupation of a party seeking to be a guardian and have the care and control of a child is a very relevant consideration. The judge took into account the paternal grandmother's occupation essentially in relation to her ability (not in the financial sense) to provide the care which the infant requires. In our opinion the judge was well justified to do so.

21 Accordingly, having considered all the circumstances, we did not think that the appellant had established that the court below erred in granting custody and care of the child to the maternal grandparents over the appellant and/or his mother.

22 We appreciated that the grant of custody of the child to the maternal grandparents would mean that the child will be taken out of jurisdiction. But such an order allowing the party to have custody to take a child out of jurisdiction is hardly unusual: see *Poel v Poel* [1970] 1 WLR 1469, *Nash v Nash* [1973] 2 All ER 704, *Lonslow v Hennig* [1986] 2 FLR 378. It is the reasonableness of the party having custody to want to take the child out of jurisdiction which will be determinative, and always keeping in mind that the paramount consideration is the welfare of the child. If the motive of the party seeking to take the child out of jurisdiction was to end contact between the child and the other parent, then that would be a very strong factor to refuse the application. Therefore, if it is shown

that the move abroad by the person or parent having custody is not unreasonable or done in bad faith, then the court should only disallow the child to be taken out of jurisdiction if it is shown that the interest of the child is incompatible with the desire of such person or parent living abroad. As quoted by Ormrod LJ in *Chamberlain v de la Mare* (1983) 4 FLR 434 from his decision in *Moodey v Field* (unreported judgment dated 13 February 1981):

> The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible. One might postulate a situation where a boy or girl is well settled in a boarding school, or something of that kind, and it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system. I merely take that as an example. Short of something like that, the court in principle should not interfere with the reasonable decision of the custodial parent.

23 In any event, in the present case, if custody and care of the child were to be granted to the appellant and his mother, his mother would also be taking the child out of Singapore to live in India. So whichever way the court was to decide the case, the party who is given custody will be taking the child out of jurisdiction. Thus, we did not see how either party could object to the winning party taking the child to live abroad. The fact of the matter is that both sides, the maternal grandparents and the paternal grandmother, live outside of Singapore. No sinister motive was involved. More importantly, we did not think that it would be against the interest of the child to be brought to live with his maternal grandparents in Australia.

Question of access

24 We now turn to the question of access. It was probably because of the manner in which the appellant pursued the proceedings below that the judge did not deal with the question of access.

25 There are studies which indicate that in the situation of a broken home, children who fare best are those who are able to maintain a good relationship with both parents: see *Clarke Hall & Morrison on Children: Special Bulletin – A Guide to the Children Act 1989* (10th Ed, 1990) at para 3.3 and footnote 1. Here, the child's mother had passed away. There is no reason why the child should be deprived of the opportunity of establishing a relationship with the father, the surviving parent. Granted that his mother's death was caused by the father, it does not necessarily follow that he would be violent to the child. In any case, the judge below could not have considered access rights by the father as he was and still is in prison. If access was considered, it would be for the paternal grandmother. In our judgment, this contact by the paternal grandmother will be useful to enable the child to know, as he grows up, that his father is still around. Kinship is a vital aspect of human life.

26 We noted that the maternal grandparents could not seriously challenge that it would be in the welfare of the child to be in contact with his father, through the paternal grandmother, even though understandably they would not wish that such access be allowed. Following the custody order given by the court below, the maternal grandparents will undoubtedly bring the child back to Perth, Australia where they have their home and business. Accordingly, so long as the appellant is in prison, we felt that the appellant's mother should be granted access to the child, twice a year in Australia, in the home of the maternal grandparents, on each occasion for a duration of not less than a week and we so ordered. When the appellant is released from prison, he is at liberty to apply for custody/access to the child and it will be for the court then to assess the situation as to what is in the best interest of the child.

Ward of court

27 Finally, before we conclude, we should mention that in the court below, counsel for the maternal grandparents had asked the court to exercise its jurisdiction to make the child a ward of court. The judge below did not refer to this jurisdiction in her grounds of decision, presumably because she did not think it was necessary.

28 In the Appellant's Case, the appellant did not elaborate on how the wardship jurisdiction should be exercised other than a bare statement that:

> … in the event the infant is not made a ward of the court, safeguards should be put in place to prevent the [maternal grandparents] from either adopting or allowing the said infant to be adopted by a third or related person or persons.

There was no basis whatsoever for the appellant to suggest that the maternal grandparents were contemplating such a course. If ever the maternal grandparents would want to adopt the child themselves or give the child away for adoption, they would surely have to disclose to the Australian adoption court the fact that the child's father is in Singapore or India.

29 As the appellant's counsel had not really canvassed the issue relating to the wardship jurisdiction of the court, this would not be an appropriate occasion for us to explore that question.

Appeal dismissed but limited access rights granted to appellant's mother.