CX v CY (minor: custody, care, control and access)
[2005] SGHC 16

Case Number : RAS 720054/2004, 720055/2004, OS 650185/2003

Decision Date : 28 January 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Joyce Fernando (Robert Wang and Woo LLC) for the plaintiff; Peter Cuthbert Low (Peter Low Tang and Belinda Ang) for the defendant

Parties : CX — CY

Family Law – Custody – Access – Whether in child's best interest to allow father access to child out of jurisdiction – Whether father should be ordered to provide security when taking child out of jurisdiction

Family Law – Custody – Care and control – Whether infant's welfare better looked after by mother or father

Family Law – Custody – No order made – Circumstances where joint custody order should be made – Whether district judge should have made joint custody order

28 January 2005

Kan Ting Chiu J:

1 A little boy is in the centre of this case. He was barely three years old when this matter came before me. His parents are still married to one another but the marriage has broken down, and the relationship between them is severely strained.

2 The husband (the plaintiff) is a Dutch national working in Thailand. The wife (the defendant) is a Singapore national residing and working in Singapore. They met while they were working in Thailand, and were married in Singapore on 23 June 2001. The boy was born on 2 October 2001 in Thailand, and took his father's nationality.

3 The parties stayed together in Bangkok after the boy was born, but separated in May 2003 after the defendant discovered the plaintiff was having an extramarital affair. The defendant left the family home with the boy and moved to Phuket before returning to Singapore in July 2003 with him. Disagreements arose between the parties over the custody, care and control of the boy. The plaintiff brought the matter before the Family Court under the Guardianship of Infants Act (Cap 122, 1985 Rev Ed).

4 The hearing before the court was contentious. The district judge made interim custody and access orders and called for a social welfare report from the Ministry of Community Development and Sports before she made her final decision on 19 May 2004.

5 The district judge declined to make the custody order that the plaintiff sought. Instead she ordered that:

1. The Plaintiff's application be dismissed.

2. The Defendant shall have care and control of the child.

3. The Plaintiff shall have access to the child twice a month for five days each time from 9 am to 7 pm. The Plaintiff shall pick the child up and return the child to [the child's residential address].

4. Subject to order 5, the child is not to be removed from the jurisdiction by either party without the written consent of the other party.

5. The Plaintiff shall be entitled to bring the child out of the jurisdiction once every six months for not more than 14 days each time. The Plaintiff shall inform the Defendant in writing of the itinerary and flight details at least 14 days in advance. The Defendant shall hand over the child's passport to the Plaintiff when the child is handed over to the Plaintiff for the trip.

6. The Defendant shall inform the Plaintiff of the address and contact number of the child's residence.

6 The decision did not satisfy either party and they both appealed. The plaintiff wanted custody, care and control of the boy to be given to him, or alternatively, to him jointly with the defendant. On access, he wanted access to the boy five days a month out of the jurisdiction, or alternatively, that the access periods ordered include overnight access.

7 The defendant, on the other hand, wanted the orders set aside and be substituted by an order that she shall have sole custody of the boy, with reasonable access to the plaintiff in Singapore.

8 The district judge had set out the reasons for her orders in her written judgment ([2004] SGDC 166). She noted that the plaintiff had professed love and concern for his son, claimed to have devoted time to him, and complained that after their separation, the defendant had made it difficult for him to have access to the boy. If the boy was given to his custody, the plaintiff proposed to engage a full-time live-in nanny for the boy, and gave the assurance that he would look after the boy himself as he worked from home.

9 The defendant gave a different account of the situation. She accused the plaintiff of neglecting his duties as a husband and father, and of having and continuing an affair with another woman. (The last charge was not denied.) She alleged that the plaintiff had threatened to take the boy from her. She also raised questions over the boy's immigration status in Thailand as the plaintiff did not hold a work permit in Thailand to enable him to apply for a dependant's pass for the boy.

Custody

10 The district judge declined to make an order for the custody of the boy. In her Grounds of Decision, the district judge referred to *Re Aliya Aziz Tayabali* [2000] 1 SLR 754 and *Re G (guardianship of an infant)* [2004] 1 SLR 229 where the courts made no custody orders because of the acrimony between the parents.

11 In the first case, Michael Hwang JC considered the state of the law by going through a series of decisions. In *Jussa v Jussa* [1972] 1 WLR 881, the English Court of Appeal held that a joint custody order, with care and control to one parent, should only be made where there was a reasonable prospect that the parties would co-operate. This decision was referred to with approval by the Singapore Court of Appeal in *Ho Quee Neo Helen v Lim Pui Heng* [1972–1974] SLR 249.

12 But a more flexible approach has been taken in subsequent cases. The English Court of Appeal in *Caffell v Caffell* [1984] FLR 169 and *Hurst v Hurst* [1984] FLR 867 held that a parent who does not have care and control but who is anxious over the upbringing of a child could also have joint custody with the other parent who has the care and control.

13 In *Re G*, Tan Lee Meng J set aside a sole custody order and explained at [8] that:

> While it is true that a joint custody order may be unrealistic where the parents of a child have an acrimonious relationship, it does not always follow that the alternative in such a situation is to grant sole custody of the child to one parent. Where there is no immediate or pressing need for the question of custody to be settled, one should seriously consider whether an order for sole custody is in the best interest of a child, who should, without more, be entitled to the guidance of both parents. *Jussav Jussa* must be viewed in the proper perspective and should not always be relied on to justify an order for sole custody merely because the child's parents have an acrimonious relationship. One must be mindful of the fact that s 3 of the Guardianship of Infants Act (Cap 122) provides that in any proceedings relating to custody or the upbringing of an infant, the infant's welfare is "the first and paramount consideration" and save in so far as such welfare otherwise requires, neither the father nor the mother shall have any right superior to the other.

His Honour made no order on custody.

14 Passivity is not necessarily the best course. One may ask whether a custody order should be deferred because there is no immediate or pressing need for the question of custody to be settled. If there is some apprehension that the parents may not be able or prepared to exercise custody rights together, the making of an order would allow them (and the court) to know if they can work together, and to make the necessary changes if they cannot. There is no advantage in keeping the matter in suspension and then making an order when there is an immediate or pressing need for an order without the benefit of a "trial" period.

15 The district judge explained her decision at [24]:

> Since my task was to make a decision that took into account [the boy's] welfare as the first and paramount consideration, I felt that it would not be appropriate in this case to make a custody order. Both parties in this case were mature, able-bodied adults who undoubtedly loved [the boy] deeply. They were however not able to communicate effectively due to the level of acrimony between them. A joint custody order was thus not suitable since it was rather likely that they would continue to do battle over their custodial powers over [the boy]. I was also reluctant to award sole custody of [the boy] to the Defendant, seeing that she firstly, had not applied for sole custody but was merely defending the Plaintiff's application for sole custody, and secondly, had not stated anything that could persuade me that it was necessary to give her the prima facie advantage of making serious long-term decisions about [the boy's] upbringing.

16 I think a more accommodating approach may be adopted. We should begin on first principles that someone should have responsibility and authority over the welfare of a child. In the normal course of events, the parents of a child would have joint custody over him: see *Halsbury's Laws of Singapore*, vol 11 (LexisNexis, 2003) at para 130.516. If the parents are not available or are unable to discharge that responsibility, then a guardian can be appointed for the child.

17 It is desirable that someone be vested with the authority to make important decisions for the child's welfare, *eg* the schooling and religious education the child is to receive. When no custody order is made, does it mean that neither parent has the authority? That is a most unsatisfactory state of affairs. Who is to make those decisions for the boy? Alternatively, does it mean that such decisions are to be taken by both parents, effectively putting them in joint custody?

18 *Prima facie*, a parent of a child, by the fact of parenthood, has a right of custody over the child. That continues to be true even when the marriage of the parents has been dissolved because the parent-child relationship is not dissolved. When the question of custody is raised and has to be determined by the courts, the child's welfare, which is the paramount consideration, is not best advanced by removing the rights and responsibility of custodianship from the parents, or by depriving one parent of his or her rights. When a parent has care and control over a child, and the other parent has access to the child, and is also obliged to pay or contribute towards his or her maintenance, it is appropriate for the child to be placed in their joint custody. If the relationship between the parents is acrimonious, granting the custody of the child to one parent to the exclusion of the other, or denying both of them custody, will add to the unhappiness between them.

19 As in this case, most disputes over the custody of children arise from the parents' concern over the welfare and upbringing of the child. It would be ironic that one or both parents should then forfeit custody because of that. When there is *apprehension* that the parties may be unable to agree on what is good for the child, or may misuse the right of joint custodianship to draw the child into the conflict between them, to the detriment of his or her welfare, a joint custody order can and should still be made. It is only when it is evident that joint custody will not work that an alternative order should be made. For the reasons I have stated, it would then be preferable for the custody to be given to one parent than to make no custody order at all, unless both parents are unworthy of that responsibility.

20 An essential character of custody orders is that they can be varied. When a parent exercises the right of custodianship for purposes other than the good of the child, that right can be revoked on the application of the other parent. Foreknowledge of this possibility will caution the parents against being unreasonable.

21 In the present case, when the district judge accepted that both parties are mature, able-bodied adults who love the boy deeply, the apprehension that it is rather likely that they would continue to disagree over their custodial powers over the boy should not mean that no custody order can be made. There is room to hope that they will take their responsibility as the boy's parents seriously and act in his best interests. It is preferable that they should have joint custody over him, and I therefore varied the district judge's order accordingly.

Care and control

22 When the boy is with the defendant, he resides with her at his maternal grandmother's house and attends a day care centre when the defendant is at work. Besides his grandmother, there is also a domestic maid who assists in looking after him.

23 This compares more favourably with the plaintiff's proposal to engage a full-time nanny to look after the boy when he is at work or is away from home when he travels in the course of his work. I think an infant like the boy would be better looked after by his mother and grandmother rather than by his father and a nanny. The district judge was right to place the boy in the care and control of the

defendant.

Access

24 The plaintiff sought increased access to the boy. The defendant had, on the other hand, wanted sole custody of the boy and wanted the plaintiff's access to him to be restricted to Singapore.

25 In her judgment, the district judge explained that:

> [T]he Plaintiff's counsel requested that he be given the opportunity to bring [the boy] to Thailand regularly during access and return him to Singapore. I was not able to accede to the Plaintiff's request. [The boy] is a [two-and-a-half-year-old] toddler. From an objective point of view, it would be very destabilising to fly such a young child in and out of the country every month or so. [The boy's] welfare would have been compromised. Thus, I felt that until such time as [the boy] was older, it would be in his welfare for the Plaintiff to exercise regular access in Singapore. The Plaintiff had managed to exercise bi-monthly interim access in Singapore prior to the final resolution of the case. As the Plaintiff is a Dutch national, I did however accept that it was reasonable for [the boy] to visit, together with the Plaintiff, his paternal grandparents who resided in the Netherlands. For a young child, an overseas trip not more than once every six months, for no longer than 14 days each time would, in my opinion, be more reasonable and appropriate.

26 Taking into account the boy's tender age, and the fact that he has been in the company of the defendant and his grandmother, the district judge was right not to allow the plaintiff to take him back to Bangkok during his periods of access, at least for the initial period. Taking him away from his mother and grandmother and his surroundings in Singapore, and taking him to Bangkok, which must be unfamiliar to him, into the company of the plaintiff who has had little contact with him since the separation from him, and a nanny, may not be in his interest. Similarly, it would not be in the boy's best interest to allow the plaintiff to take him away from his home for overnight access during the plaintiff's periods of access.

27 Access orders, like custody orders, can be varied. I have told counsel for the plaintiff that her client should abide by the district judge's orders for a few months to see how matters work out, rather than seek the immediate right to bring the boy to Bangkok, or to have overnight access in Singapore by appealing against the orders. When the bond between him and the boy has strengthened, he can apply for the terms of access to be varied.

28 During the appeal before me, counsel for the defendant argued that the district judge should have ordered the plaintiff to provide security when he takes the boy out of the jurisdiction. He did not propose any specific form of security, and only submitted that the security could take the forms ordered in *Ryan v Berger* [2001] 1 SLR 419, *Re S (Leave to remove from jurisdiction: securing return from holiday)* [2001] 2 FLR 507 and *Re L (Removal from jurisdiction: holiday)* [2001] 1 FLR 241.

29 In *Ryan v Berger*, the parties had agreed to a consent order that if either one of them failed to return the child after taking the child out of Singapore, the defaulting party would forfeit its rights to two properties which formed part of their matrimonial assets. When an order was made for the sale of the properties in the division of the matrimonial assets, Judith Prakash J, on appeal, confirmed that the properties were to be sold, but ordered that each party put up a bond of $150,000 to replace the previous agreement.

30 In *Re S*, the English High Court made two children wards of the court before allowing them to be taken to India for a family visit.

31 In *Re L*, the English High Court allowed a mother to take her son to visit her family in the United Arab Emirates on the condition that she deposit in court £50,000 as security, and that she and members of her family make declarations on the Koran that the child would be returned after the visit.

32 I did not find the cases to be of great assistance. In *Ryan v Berger*, where the parties were agreed on the principle that security was to be provided, Prakash J was only dealing with the substitution of the security when the properties were sold.

33 *Re S* was not helpful because there is some doubt whether there is wardship jurisdiction in our courts: see *Halsbury's Laws of Singapore*, vol 11 ([16] *supra*) at paras 136.401 and 130.494. Even if the boy can be made a ward of court, that is not an effective safeguard if the plaintiff is determined not to return the boy to Singapore, because the plaintiff is a Dutch national residing out of the jurisdiction of the Singapore court.

34 That leaves *Re L*. I do not expect the defendant to be satisfied with any declaration by the plaintiff that he will return the boy to her after his overseas trips. The question whether he should be ordered to execute a bond as security was not adequately argued before the district judge or me. For a bond to be considered properly, the amount of the bond must be appropriate. It should not be so high as to be beyond the means of the plaintiff, or so low as to be ineffective as a deterrent. No figure was named, nor any further thought given to the matter. I was not prepared to order the plaintiff to enter into a bond without proper information being available.

35 However, I made minor changes to the arrangement for the collection and return of the boy and mutual notification of changes of residential address and employment.

36 The plaintiff has apparently accepted my decision, but the defendant has not, and has filed a further appeal to bring the matter before the Court of Appeal.