CX v CY (minor: custody and access)
[2005] SGCA 37

Case Number : CA 104/2004

Decision Date : 19 July 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : S Radakrishnan and Deepak Natverlal (Bernard Rada and Lee Law Corporation) for the appellant; Joyce Fernando and Krishnan Nadarajan (Robert Wang and Woo LLC) for the respondent

Parties : CX — CY (minor; custody and access)

Family Law – Custody – Access – Parties living in different jurisdictions – Father granted right to bring child overseas – Whether overseas access order should be varied

Family Law – Custody – Care and control – Distinction between custody order and care and control order

Family Law – Custody – Joint orders – Circumstances where sole custody order should be made instead of making joint or no custody order – Circumstances where no custody order should be made instead of making joint custody order – Whether joint custody order should be varied

19 July 2005

Lai Siu Chiu J (delivering the judgment of the court):

1 This appeal arose out of various orders made by Kan Ting Chiu J ("the judge"), whereby joint custody of a child was given to his parents, with limited overseas access to the respondent ("the father"). Being dissatisfied with the judge's orders, the appellant ("the mother") appealed to this court. After considering the submissions for both sides, we decided to dismiss the appeal. We now give our reasons.

Background facts

2 At the centre of this appeal lies the fate of a young boy ("the child") who is just about four years old. His parents are still married to one another but their marriage has already broken down. On 11 May 2005, prior to the hearing of this appeal, the mother filed a divorce petition in the Family Court. Currently, the parties' relationship is severely strained. For more than a year, they have been fighting over the custody, care and control of the child. They have also been unable to agree on the terms of access. The pertinent facts are set out below.

3 The father is a Dutch national working in Thailand. The mother is a Singapore national residing and working in Singapore. Since 1999, they had been staying together in Bangkok. They were married in Singapore on 23 June 2001, and the child was born on 2 October 2001 in Thailand. The child is both a Dutch national and a Singapore citizen. After the child was born, the parties continued to live together in Bangkok, but separated in May 2003 subsequent to the mother's discovery of the father's extramarital affair. The mother left the family home with the child and moved to Phuket before returning to Singapore in July 2003. Since then, the child has been residing with his mother and maternal grandmother in Singapore.

4 Sometime in October 2003, the father made an application to the Family Court under s 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("the GIA"), and sought sole custody, as well

as care and control of the child, with reasonable access to the mother. This application was contested by the mother, who succeeded in persuading the district judge to dismiss the father's application. No order was made on custody, but care and control of the child was given to the mother. The father was effectively granted daytime access twice a month for five days each time in Singapore. He was also entitled to bring the child out of Singapore once every six months for not more than 14 days each time.

5 Both parties, being dissatisfied with the decision, appealed to a judge in chambers in the High Court. The father wanted sole custody, as well as care and control of the child. Alternatively, he sought joint custody, with increased access to the child. As for the mother, she wanted the district judge's orders set aside, and substituted with an order that she should have sole custody of the child, with reasonable access being granted in Singapore to the father.

6 The judge heard arguments and further arguments from both parties. Apart from some other minor amendments to the district judge's orders, the judge ordered that:

(a) The parties were to have joint custody of the child.

(b) The mother would have care and control of the child.

(c) The child would not be removed out of jurisdiction by either party without the prior written consent of the other party. However, the father would be entitled to bring the child out of jurisdiction once every six months for not more than 14 days each time, provided that he furnished the mother with an itinerary and flight details at least 14 days in advance. The mother would hand over the child's passport to the father when handing over the child for trips.

(d) The father would have daytime access to the child twice a month for five days each time. The father would collect from, and return the child to, the mother's residence and give the mother two days' advance notice of his intended visit.

(e) Each party would inform the other in writing of any change of residential address or employment within five days of its taking place.

(f) There would be liberty to apply for variation of the orders.

7 In this appeal, the mother's main contentions were against the grant of joint custody to the parties and of overseas access to the father.

The decision below

8 The judge disagreed with the district judge on the issue of custody. The district judge had thought it appropriate not to make a joint custody order on the basis that the acrimony between the parties would result in constant battles over the extent of their custodial powers. A sole custody order to the mother was also deemed inappropriate because the mother had not made out her case that she should have the *prima facie* advantage of determining long-term decisions about the child's upbringing. Accordingly, the district judge declined to make any orders as to custody.

9 The judge, on the other hand, ordered joint custody as he felt that "passivity [was] not necessarily the best course". He did not find it advantageous to keep the matter in suspension even if there was some apprehension that the parties might not be prepared to exercise custody rights together. Instead, he was of the view that the making of a custody order, which could subsequently

be varied, would allow the parties and the court to know if the parties could really work together. If they could not, it was still open to the court to make the necessary changes. He elaborated at [18] and [19] of his grounds of decision (see *CX v CY (minor: custody, care, control and access)* [2005] 1 SLR 724) that:

> *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.
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> 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.
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> [emphasis in original]

10 As for the issue of care and control, the judge agreed with the district judge that it was in the welfare of the child not to upset the current care arrangements and that the child would be better looked after by his mother and grandmother rather than by his father and a nanny. As neither party appealed against this order, we need not comment further on this issue.

11 On the question of access, the judge concurred with the district judge that, in the light of the child's tender age, it would not be advisable, at least for the initial period, to grant overnight access or to allow the father to take the child to Bangkok. This was because it would not be in the child's interest to be taken away from his familiar surroundings in Singapore into the company of the father who had had little contact with him since the separation. Nevertheless, the judge did not rule out the possibility that the terms of access could subsequently be varied when the bond between the father and child strengthened. The judge also affirmed the district judge's observation that it was reasonable to grant overseas access once every six months for not more than 14 days each time so that the child, together with his father, could visit his paternal grandparents who resided in the Netherlands. The mother argued that the father should be ordered to provide security whenever he should take the child out of Singapore, but the judge found it inappropriate to order the provision of security because there were inadequate arguments and information on this issue.

The appeal

12 Initially, the mother raised three issues in this appeal. However, in her case, the mother did not make any submission on the issue of whether the judge erred in failing to order the father to

provide security when taking the child out of Singapore. In the course of the appeal, it appeared that the mother had dropped her contentions altogether concerning this requirement. As such, we dismissed this ground of appeal.

13 That left us with two main issues for determination:

(a) Whether the judge erred in granting joint custody to the parties instead of sole custody to the mother; and

(b) Whether the judge erred in allowing the father to bring the child out of Singapore once every six months for not more than 14 days each time.

14 In the course of the appeal, the mother raised another peripheral issue. She asked us to vary the judge's orders (see [6(e)] above) such that she need not reveal her employment address, as she did not want the father and his girlfriend to harass her at her workplace. This issue was not stated in her case. In any event, we decided not to disturb this order, as the employment address may be relevant in determining the whereabouts and financial position of the parties.

Principles governing appellate intervention in cases involving the welfare of children

15 At this juncture, it would be useful for us to revisit the principles governing appellate intervention in cases involving the welfare of children. A pertinent question that we had to answer was whether the principles in such cases are the same as those that apply to general appellate intervention. It is trite law that in deciding custody and upbringing issues, the court must regard the welfare of the child as the first and paramount consideration: s 3 of the GIA. We must stress that it does not always follow that the only way in which an appellate court can assess whether the judge below has exercised his discretion correctly is to carry out the same balancing exercise as the judge below did, and to allow the appeal if it were to reach a different conclusion as to what is in the welfare of the child. The House of Lords in *G v G* [1985] 2 All ER 225 has clarified that the principles governing appellate intervention are the same even in custody cases involving the welfare of children. Lord Fraser of Tullybelton opined (at 228):

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion …

16 Subsequently (*ibid*), Lord Fraser approved of Asquith LJ's observations in *Bellenden v Satterthwaite* [1948] 1 All ER 343 at 345:

> We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.

17 Having regard to the fact that in such cases, there are often no right answers and the judge below was faced with the task of choosing the best of two or more imperfect solutions, we were in agreement with the above approach. We must stress that an appeal should not automatically succeed simply because the appellate court preferred a solution which the judge had not chosen. In

other words, similar to the principles that apply to general appellate intervention, the appellate court should only reverse or vary a decision made by the judge below if it was exercised on wrong principles, or if the decision was plainly wrong, as would be the case if the judge had exercised his discretion wrongly. This approach is consistent with this court's previous decision in *AD v AE* [2004] 2 SLR 505 at [21] where it was decided that although the substantive appeal involved custody of children, the discretionary powers to extend time should not be exercised differently from those in typical cases.

Whether the judge erred in granting joint custody to the parties instead of sole custody to the mother

18 As a preliminary point, we noted that both parties did not take issue with the judge's variation of the district judge's "no custody order" to that of a "joint custody order". We should make it clear from the outset that a "no custody order" is not tantamount to depriving both parents of custody. It is generally accepted that the practical effects of a "no custody order" and a "joint custody order" are similar where a "care and control order" has been made. In the normal course of events, the parents of a child will have joint custody over him. We thus agree with Prof Leong Wai Kum's comments in *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 538–539 that the making of a "no custody order" should be seen as leaving the law on parenthood to govern the matter, as both parents continue to exercise joint custody over the child. Such an order also affirms the approach of the courts not to intervene unnecessarily in the parent-child relationship where there is no actual dispute between the parents over any serious matters relating to the child's upbringing (see *Re Aliya Aziz Tayabali* [2000] 1 SLR 754 and *Re G (guardianship of an infant)* [2004] 1 SLR 229 ("*Re G*")).

19 Since the practical effects of a "no custody order" and "joint custody order" are similar, the more important question to address is: Under what circumstances should a "no custody order" be preferred over a "joint custody order"? As mentioned earlier, where there is no actual dispute between the parents over any serious matters relating to the child's upbringing, it may be better to leave matters at status quo, and not to make any custody order. As was suggested by Assoc Prof Debbie Ong in her article "Making No Custody Order: *Re G (Guardianship of an Infant)*" [2003] SJLS 583 at 587–588, in other circumstances where there is a need to prevent parties from drawing the child into the battle over the extent of their custodial powers, or where there is a need to avoid any possibly negative psychological effect that comes about when one parent "wins" and the other parent "loses" in a custody suit, it may also be appropriate not to make any custody order.

20 However, in the present case, it was our view that it was appropriate for a joint custody order to be made. This is because the symbolism of such an order may be used to remind the mother that the father has an equal say in more significant matters concerning the child's upbringing. Upon an examination of the affidavit evidence, it appeared to us that there had been previous attempts by the mother to exclude the father from the child's life altogether by denying him access rights. Since the mother, who had been given care and control, appeared to be so inclined, it was necessary to make a "joint custody order" instead of making a "no custody order", to send a signal to the mother that she should be more co-operative with the father.

21 We now turn to the substantive issue raised by the mother, that is, whether the judge erred in granting joint custody to the parties instead of sole custody to her. The mother argued that the judge had erred in making a joint custody order on the premise that it was only when it was evident that joint custody would not work that an alternative order should be made. The mother termed this an experimental joint custody order, which was definitely not in the interest of the child. She submitted that the joint custody order was unworkable as the parties had been unable to make any

major decisions for the child from the time the order was made up to the day the present appeal was heard by us. In support of her case, the mother relied on the decision of Winslow J in *Ho Quee Neo Helen v Lim Pui Heng* [1972–1974] SLR 249 ("*Helen Ho*"), that joint custody orders should only be made where there was a reasonable prospect that parties would co-operate. She also cited various cases such as *CJ v CK* [2004] SGDC 135, *EY v EZ* [2004] SGDC 91 and *T v C* [2003] SGDC 304 which had applied the principle in *Helen Ho*.

22 The mother argued that similar to these cases, the relationship between the parties in the present appeal had totally broken down and they could not work things out. It was undisputed that there was acute acrimony between the parties. They no longer communicated with each other directly, but only through their respective solicitors. The parties had also made various allegations and counter-allegations against one another in their affidavits. In view of the deep-seated hostility between them, the mother submitted that the judge went against the weight of authorities by making a joint custody order, which was both impractical and unrealistic. Instead, the mother relied on the authority of *Soon Peck Wah v Woon Che Chye* [1998] 1 SLR 234 ("*Soon Peck Wah*") to argue that all things being equal, she, as the natural mother, should be granted sole custody of the child who was of tender years. Moreover, she had always been regarded as the primary caregiver of the child as compared to the father, who often travelled and had an uncertain residence status in Thailand.

23 In response, the father asked for the judge's decision on joint custody to be affirmed because he believed that with the passage of time, there was a possibility that the parties would have moved on with their lives and would be able to make joint decisions in the child's best interests. Besides, in the light of the child's tender age, there was no need for the immediate determination of any important decisions relating to him. The father argued that the judge was not merely making an experimental order, but that his reasoning was consistent with the idea that as parents, the parties must take their joint parental responsibilities seriously and act in the child's best interests. The father then relied on *Re G* to submit that cases like *Helen Ho* must be viewed in their proper perspective, and that a mere apprehension that the parties would not be able to exercise custody rights together was insufficient to warrant a grant of sole custody. It was further argued that acrimony alone was not enough to justify a sole custody order and that courts should be slow to deprive a parent of his natural parental rights of custody.

24 It was apparent to us from his judgment that the judge below was generally inclined towards the idea of joint custody. He opined that the child's welfare, which was the paramount consideration, was not best advanced by removing the rights and responsibility of custodianship from the parents or by depriving one parent of his or her rights. We accepted the father's submission that the judge's view on the law of custody was consistent with the notion that acrimony alone was not sufficient to justify a sole custody order. We were of the view that the decision of *Helen Ho* should be clarified. *Helen Ho* was decided more than 30 years ago, and in our view, it has been given too much weight not only by practitioners but also by subsequent judicial decisions. To our minds, the notion that joint custody should only be made where there is a reasonable prospect that the parties will co-operate is no longer appropriate in this day and age. Instead, we felt that in line with the outlook that parental responsibility is for life, the time was right for us to expressly endorse the concept of joint parenting. We believe that, generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule. We will now elaborate on our views.

How the law of custody can support joint parenting

25 This court had previously said in *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR 177 at [12]:

> [I]t is our opinion that the interest of the children demands that both parents should be involved in determining what is best for them in that regard. While as between the parties there is bitterness, it does not necessarily follow that this would spill over in determining the educational needs of the children. The court should not decree an arrangement which gives an impression to a child that either the father or mother does not care about his welfare. As we have no doubt that both parents have and will continue to have the children's interest at heart, we do not think that there would be any insurmountable difficulties. In the unlikely event that an impasse should arise, the assistance of the court could always be sought.

26 This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Charter") exhorts both parents to make equal co-operative efforts to care and provide for their children. Article 18 of the United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory, also endorses the view that both parents have common responsibilities for the upbringing and development of their child. Similarly, jurisdictions like England and Australia have adopted approaches that impose on both parents the concept of life-long parental responsibility. With parliamentary intervention in these jurisdictions, the very concept of custody orders was abolished as it was acknowledged that it was in the interests of the child to have both parents involved in his life. There can be no doubt that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents. The needs of a child do not change simply because his parents no longer live together. Thus, in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.

27 We note that local academic opinion has long advocated using the law of custody to preserve joint parental responsibility. The making of joint or no custody orders is very much in the welfare of the child. As was aptly put by Debbie Ong in her article, "Parents and Custody Orders – A New Approach" [1999] SJLS 205 at 223:

> When a marriage breaks up, the child is in fear of losing his parents, his siblings and his familiar home. Joint custody protects the child from the reality and the fear of losing a parent. A child who can understand that both his parents have custody of him and be assured that both parents continue to be involved in his life may feel more secure. He will feel less abandoned even though family life has to undergo some changes. If the child believes that both his parents are still cooperating and raising him together despite the breakdown of their own relationship, he may be spared from suffering "from a conflict of loyalties". Further, in granting joint custody, parents are expected to consult each other regarding important matters and it is beneficial that the perspectives from a mother and a father are brought together in a decision.

28 More significantly, we feel that the making of joint or no custody orders reminds the parents that the law expects both of them to co-operate to promote the child's best interest. With the grant of joint or no custody orders, the likelihood of the non-custodial parent being excluded from the child's life is much reduced. It also encourages the parent who does not reside with the child to continue to play his or her role in joint parenthood.

29 Accordingly, we agree with the recognition by the judge below that joint custody can still be ordered even if there is an apprehension that the parties may be unable to agree. This is a move in the right direction in support of joint parenting. Recent cases have revealed an emerging trend where the courts are no longer inclined to assume that sole custody orders should be made simply because parents display animosity towards each other in the midst of litigation. As Tan Lee Meng J rightly observed in *Re G* ([18] *supra*) at [8], even where the parents have an acrimonious relationship at the time of the custody proceedings, making a sole custody order is not the only possible outcome. We

have mentioned earlier that cases like *Helen Ho* must be viewed in their 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. *Helen Ho* was a unique case in itself where there was cruelty on the part of the father. Moreover, Winslow J made the statement in response to a request for joint custody, as well as care and control orders. It is obvious that a joint care and control order, requiring the parties to agree on every day-to-day decision relating to the child, is unworkable where the parties have a bitter relationship with each other. However, a joint custody order is of a different nature.

"Custody and "care and control" orders

30 It would be appropriate at this juncture to define what "custody" and "care and control" orders entail. The lack of an authoritative opinion on what each order involves has contributed largely to the constant "custody" disputes, and the law of custody in Singapore is in a state of confusion because the demarcation between the two orders has not been made clear. Often, in an attempt to limit the powers of the custodial parent, which is indicative of a trend towards joint or no custody orders in support of joint parenting, the definition of "custody orders" has been muddled with that of "care and control orders" (see *L v L* [1997] 1 SLR 222 at [21]). The statutes are also of little assistance in the definition of either order. The GIA is silent as to the definition of "custody orders", and the closest definition we have is in s 126(1) of the Charter, which states that the person given custody shall be entitled to decide all questions relating to the upbringing and education of the child. The reference to "non-custodial parent" in Form 27 of the Schedule, pursuant to s 8(1)(*b*) of the Women's Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2004 Rev Ed), as the "parent who does not live with the child" also does not help to clarify the law. It appears to give the impression that the non-custodial parent is the parent who does not live with the child and conversely, the custodial parent is the one who lives with the child. This leaves out the possibility that a custodial parent, who is not granted a care and control order, may also not live with the child.

31 To understand what each order entails, we must first realise that, where parties are splitting up, custody as a general concept is divided into two smaller packages, *ie*, "care and control" and residual "custody". In this context, residual "custody" is no longer the same concept as our general understanding of custody. Instead, residual "custody" is the package of residual rights that remains after the grant of a care and control order that dictates which parent shall be the daily caregiver of the child and with whom the child shall live. To put it simplistically, "care and control" concerns day-to-day decision-making, while residual "custody" concerns the long-term decision-making for the welfare of the child.

32 As was appropriately summarised by Anthony Dickey in *Family Law* (LBC Information Services, 3rd Ed, 1997) at pp 326–327:

> [A]t common law, care and control concerns the right to take care of a child and to make day-to-day, short-term decisions concerning the child's upbringing and welfare. Custody without care and control (that is, custody in its narrow sense) concerns the right to make the more important, longer-term decisions concerning the upbringing and welfare of a child.

33 In other words, a "custody order" only gives the parent the *residual* right to decide on long-term matters affecting the child's welfare. For instance, the right to decide on the type of education resides with the parent(s) with custody as it concerns the more important and long-term aspects of a child's upbringing. The right to decide the particular school may also reside with the custodian(s) depending on the importance of this decision to the child's education. However, the right to decide how a child should dress or travel to school, what sport he should take up or musical instrument he should play and similar ordinary day-to-day matters, resides with the parent who has care and

control. Such a demarcation between the two types of orders proposed by Dickey is generally consistent with our local jurisprudence where matters such as choice of schools, tutors or healthcare have been regarded as matters for the custodian(s) to decide (for example, see *Yeap Albert v Wong Elizabeth* [1998] SGHC 97 at [16]).

34 For the development of the law of custody, we deem it necessary to lay down a general definition detailing the scope of each order. Our observation is that in most *custody* cases, parties are simply concerned over which parent has *care and control* and access. Parties labour under the mistaken impression that if they are denied custody, they will be unable to see their child anymore and will lose all contact with the child. We regret to say that some family law practitioners further muddy the waters by failing to advise their clients adequately as to what "custody orders" actually entail. If parties are assured of their respective rights to care and control and access, we foresee lesser tension and acrimony in disputes over custody issues.

35 Adopting this narrow definition of "custody", it appears that there will be relatively few occasions where significant and longer-term decisions need to be made for the child. Hence, parties will seldom need to come together to make a joint decision even if joint or no custody orders were granted. We should add that it is an almost impossible task for us to lay down an exhaustive list of matters which will fall under the concept of residual custody. The line is not always clear as to what matters would be considered the important and longer-term decisions concerning the upbringing and welfare of a child. It suffices to say that decisions pertaining to religion, education and major healthcare issues would fall into such a category.

Joint or no custody orders to be preferred

36 In this day and age, we feel that the preferable position in the law of custody is that advocated by the father, *ie*, to preserve the concept of joint parental responsibility, even if the parties may harbour some acrimony towards each other. Often, advocates of the *Helen Ho* position rely on the acrimonious relationship of the parties to argue that joint custody will be detrimental to the welfare of the child. However, they fail to appreciate the fact that some degree of acrimony is to be expected when parties are undergoing the stresses of a marital breakdown. As allegations of wrongdoings and breaches of fidelity can be hurtful, the time when the marriage breaks down may not be the best time to assess whether both parents can co-operate for the rest of the child's life. We believe that the fear that parties cannot co-operate may be overstated. It is a quantum leap in logic to assume that the parties' inability to co-operate during the period of divorce or custody proceedings equates to an inability to agree on the future long-term interests of the child.

37 To begin with, most custody cases arise over each parent's concern for his or her child's welfare. We agree with the judge's observation that the parties' relationship may be currently strained but there is room for hope that they will act in the best interests of the child in future. With the passage of time, emotions would have quietened down, the parties would have moved on with their respective lives and they should be able to make joint decisions objectively in the child's best interests. We were therefore inclined towards the grant of either joint or no custody orders in support of joint parenting. Consequently, the judge was right in granting a joint custody order so as to send a message to the parties to co-operate with one another. Such an order would also remind the mother that she should consult the father on long-term and significant matters concerning the child's welfare and upbringing.

38 We would emphasise that recent decisions have been inclined towards making joint or no custody orders due to the need to ensure that the child becomes attached to both parents. The idea behind joint or no custody orders is to ensure that neither parent has a better right over the child and

that both have a responsibility to bring the child up in the best way possible. Similarly, the child has a right to the guidance of both his parents. Parenthood is a lifelong responsibility and does not end at a particular age of the child, but continues until the child reaches adulthood. The question we have to answer will always be what is best for the child in the future. We agree with Assoc Prof Debbie Ong that the exceptional circumstances where sole custody orders are made may be where one parent physically, sexually, or emotionally abuses the child (see Debbie Ong, "Making No Custody Order" ([19] *supra*) at 586), or where the relationship of the parties is such that co-operation is impossible even after the avenues of mediation and counselling have been explored, and the lack of co-operation is harmful to the child (see Debbie Ong, "Parents and Custody Orders" ([27] *supra*) at 222–223).

Whether exceptional circumstances exist to warrant sole custody

39 Adopting the view that joint or no custody orders should be granted unless there are exceptional circumstances, we were of the opinion that the judge was not plainly wrong in granting joint custody, notwithstanding the allegations and counter-allegations made by each party. The mother had made various allegations about the father's failure to pay for the child's maintenance and medical expenses. It was also alleged that the father used foul language and abused her in the presence of the child. Not only was there a communication breakdown between the parties, the geographical distance made it even harder for the parties to communicate. It was argued that the father had failed to discharge his parental duty as he scarcely visited the child during periods of access and often placed his personal interest over the child's welfare. The mother also relied on the sexual misconduct of the father to argue that the father's lifestyle would have a negative influence on the child if the father were to be part of the decision-making process.

40 On the other hand, the father alleged that the mother was trying to prevent him from contacting the child. The father had sent various e-mails explaining his desire to maintain contact with the child. He also professed that he was always willing to maintain the child and his failure to pay maintenance was due to the fact that he did not know the whereabouts of the mother and child.

41 We had reviewed the affidavit evidence of the parties as exhibited in their respective cases. An examination of the various allegations would reveal that most of them arose from the parties' unhappiness with one another rather than from the fact that they did not care for the child and would be unable to co-operate for the child's welfare. The mother's concerns that the father was irresponsible and had compromised the child's welfare, have not been borne out. Instead, the allegations and cross-allegations were likely due to differences in the parties' parenting expectations and lack of trust in one another. It must be kept in mind that in hotly contested custody cases such as the present one, where both parents love their child dearly, there is often a tendency to exaggerate the wrongdoings of the other party.

42 In this situation where both parents clearly love the child, we agreed with the judge that we could not rule out the possibility that the parties could eventually co-operate for the benefit of the child. We appreciate the mother's concerns that communication will be difficult as the father is based in Bangkok. However, with modern-day technology, we do not think that it will be an insurmountable task for both parties to keep in contact and for the mother to consult the father on longer-term decisions concerning the child's upbringing. We therefore concluded that the judge, having had the opportunity to assess the parties in person, was not plainly wrong in coming to a decision that a joint custody order would be in the welfare of the child.

43 Since we had decided to dismiss the mother's appeal, it was not strictly necessary for us to deal with her submissions for sole custody. We would however add a word of caution that the case of *Soon Peck Wah* should not be taken beyond its context. Within that case itself, this court had taken

pains to make it clear that the decision was not intended to revive the old presumption of maternal custody. Parliament has also mandated that neither parent should have a better claim to the custody of the child. At the time of the decision, there was no proper delineation between "custody" and "care and control" orders, so one should not be quick to jump to a presumption that *Soon Peck Wah* equates to a judicial preference for mothers to have custody of young children where all things are equal. At most, *Soon Peck Wah* is helpful in the determination of who should be granted care and control; it cannot be denied that a young child requires a mother's daily care.

Whether the judge erred in allowing the father to bring the child out of Singapore once every six months for not more than 14 days each time

44 The mother submitted that the judge had made an experimental access order by granting the father overseas access. It was argued that, for the child to maintain contact with his father and paternal grandparents, it was sufficient for access within Singapore because there was a real risk that once the child was taken out of jurisdiction, the father might not return the child, especially in the light of the uncertainty of the father's residential status in Thailand. Moreover, Singapore was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 so there would be no avenue for the child to be returned to Singapore. The mother also relied on the judge's observation in denying overnight access at least for the initial period (*viz* it would not be in the child's interest to be taken away from his familiar surroundings in Singapore into the company of his father who had had little contact with him since the separation), to argue that the same reasoning should apply to overseas access. As an alternative, the mother suggested that the paternal grandparents could visit the child in Singapore, as overseas travel was unsuitable for the young child who often fell ill.

45 Initially, the father contended that the mother had failed to comply with the current access orders, and that in any event, the access orders should be varied. However, we did not entertain this submission because the father did not file a cross-appeal as required.

46 In response to the mother's arguments, the father argued that there was no real risk that he would not return the child to the mother. The father professed that he would not take the child away from the mother. In fact, if he had wanted to do so, he would have done so a long time ago during his periods of access. Instead, he had always complied with the access orders. He had also submitted to the local courts' jurisdiction by making the first application under the GIA seeking custody, care and control, complying with the maintenance orders made by the local courts, as well as attending each and every court hearing. The father denied that he had an uncertain residence status and clarified that the paternal grandparents were no strangers to the child.

47 Where parties are in different jurisdictions, the grant of overseas access is always an issue due to the perennial fear of each party that he or she may not get the child back. In our opinion, the mother had failed to show that the judge, having had the opportunity to assess both parties in person, was plainly wrong in allowing overseas access. We felt that it was in the interests of the child to maintain his bond with his paternal grandparents. The mother's fear that the father may never return the child appeared exaggerated in the light of the fact that the father had always complied with our courts' orders and that he had consistently professed that he would never take the child away from the mother. The father seemed to be a responsible parent in this respect.

48 The mother also relied on the authority of *T v C* ([21] *supra*) to argue that overseas access should only be granted when the child reaches 12 years old and is better able to take care of himself. In *T v C*, after the parties began to live separately, the husband went back to live in the US, while the wife and the child remained in Singapore. Both parties sought sole custody, care and control of

the child, with the husband seeking joint custody in the alternative. On the issue of access, the husband sought liberal access to the child, including overseas access in the US in June and December every year. However, the wife argued that overseas access should only be granted from the time the child turned 13 years old. The district judge agreed with the wife and considered it prudent to wait till the child was of an older age before he was to travel to the US for overseas access. This was because the husband and the child had not really been in contact for the past few years. The child, being only six years old, would need time to forge a bond with his father, and to feel comfortable about leaving home to be with the father. He would also need time to grow up a little more, to be able to take care of himself while away from home, before he commenced travelling to the USA for overseas access. Thus, overseas access was granted only when the child turned 12 years old.

49 In our view, the present case was distinguishable from *T v C* because in the latter, the father and child had not been in contact for the past few years so there was the fear that the child would need some time to bond with his father. In contrast, in the present case, the father and child had only lost contact for over half a year. Since then, the father had at times exercised his access rights. Thus, there was no question of the child's level of comfort with his father being an obstacle to overseas access for only twice a year, and for not more than 14 days each time. We therefore upheld the overseas access order because we found it beneficial for the paternal grandparents to be involved in the child's upbringing. The fact that the paternal grandparents were present in court for the appeal testified to their concern and interest in their grandson.

Conclusion

50 This was a situation where the court was faced with a difficult decision concerning the fate of a young child. The child is inevitably the unseen and unheard victim of the breakdown in the parents' marital relationship. In furtherance of the child's welfare, we wanted to send a signal that joint parenting is to be preferred.

51 It is hoped that by setting out the proper guidelines to be applied in custody cases as well as defining the general scope of "care and control" and "custody" orders, practitioners will be better equipped to advise their clients.

52 For the foregoing reasons, we dismissed the appeal. Accordingly, no variation was made to the judge's orders. We also made no orders on costs and ordered the security deposit to be returned to the mother.

Appeal dismissed.