Wong Phila Mae
v
Shaw Harold

[1991] SGCA 8

Court of Appeal — Civil Appeal No 106 of 1989
L P Thean J, Goh Joon Seng J and Chao Hick Tin J
22 April 1991

Civil Procedure *— Affidavits — Adjournment of hearing — Whether application for adjournment to file further affidavits to answer adverse allegations should be granted — Whether both sides being given fair opportunity of putting forth all facts before court*

Family Law *— Custody — Care and control — Order of court granting sole custody of children to father — Mother applying to vary order to gain custody of children — Factors to be taken into consideration in determining welfare of children — Whether education received by children under respective parties' care in their best interests — Whether change in living arrangements or preserving status quo in best interest of children*

Facts

Upon the grant of a divorce decree nisi, in 1985, the court by consent ordered that the respondent and the appellant be granted joint legal custody of their children with care and control of the children to the appellant ("the 1985 order"). In March 1989, the respondent applied to vary the earlier order so that he would be granted sole legal custody of the children, alleging that the appellant had, without his consent, kept the three younger daughters in the United States since January 1989, living in a motorhome, instead of bringing them back to Singapore to resume their studies and that she gave insufficient attention to them. The court allowed the application and the respondent was given sole custody of the three younger children ("the January 1989 order"). In July 1989, the appellant applied to vary the January 1989 order to obtain custody of the three children. The respondent raised doubts about whether the appellant's second husband would be a good stepfather and his solicitor filed affidavits relating to the conduct and character of the second husband. At the hearing of the appellant's application, her counsel sought an adjournment to refute the adverse allegations made against her second husband in the affidavits. The adjournment was refused as the judge felt that the issues were sufficiently clear and more affidavits would not help. The judge also refused the appellant's application to vary the January 1989 court order (see [1989] 2 SLR(R) 470).

Held, dismissing the appeal:

(1) The appellant should have been granted an adjournment to enable her second husband to answer the adverse allegations made in the respondent's solicitor's affidavits. If the appellant's association with him was a relevant factor, it was not unreasonable for the appellant to request an adjournment to answer the various adverse allegations made against her husband. The point was

whether both sides had been given a fair opportunity to put forth all the facts before the court to enable it to make up its mind. Accordingly, the motion of the appellant to adduce additional affidavits was allowed: at [16].

(2) In considering a child's welfare, the following factors are important: (a) the conduct of the parents; (b) the wishes of the parents and the wishes of the child where he or she was of an age to be able to express an independent opinion; (c) a young child would be best looked after by its mother; (d) which parent could offer better security and stability; and (e) that siblings should not be separated. The fact that one parent was more capable of providing material comfort for a child did not necessarily render that parent a better parent and thus entitle him or her to the custody of the child. In the final analysis it is an exercise in weighing the relevant factors which often conflict: at [22] and [23].

(3) Education was a very important aspect in the consideration of the welfare of the children. The appellant preferred the children to undergo an unconventional and informal educational method in the United States. This has caused the children to miss almost half a year of formal education in Singapore and this was not in their best interests. The children were at an age where it was essential that they should be properly guided: at [25].

(4) Whether a switch in living arrangements was in the best interest of a child depended on the circumstances of each case. In this case, the children had all been placed in schools here and were in the course of settling down in their studies. Altering their living arrangements was likely to cause the children emotional stress and affect their studies. Accordingly, it was in the children's best interests to have custody remain with the respondent: at [26] to [28].

Case(s) referred to

Chan Bee Yen v Yap Chee Kong [1989] 1 MLJ 370 (refd)

Koh Teng Lam v Koh Chen Chee Elsie [1974–1976] SLR(R) 510; [1975–1977] SLR 407 (refd)

L (minors), Re [1974] 1 WLR 250; [1974] 1 All ER 913 (refd)

Sim Hong Boon v Sim Lois Joan [1971–1973] SLR(R) 597; [1972–1974] SLR 143 (refd)

Legislation referred to

Women's Charter (Cap 353, 1985 Rev Ed) s 119(2)

Lai Siu Chiu and Angeline Yap (Allen & Gledhill) for the appellant;
Harry Elias and Flexie Sion (Harry Elias & Partners) for the respondent.

[Editorial note: The decision from which this appeal arose is reported at [1989] 2 SLR(R) 470.]

22 April 1991

Chao Hick Tin J (delivering the grounds of decision of the court):

1 This was an appeal against a decision of the High Court refusing the appellant's application to vary an order of court made on 21 April 1989 which granted custody care and control of three children of the marriage between the appellant and the respondent, to the respondent. We dismissed the appeal and now give our reasons.

2 The appellant and the respondent were married at the Singapore Registry of Marriages on 18 January 1967. They have five children out of the marriage, namely, a son, *ie* Chai Chian (born on 18 October 1967) and four daughters, Soo Ling, Soo Mei, Soo Wei and Soo Xian (born on 3 September 1969, 5 July 1972, and 26 February 1975 and 5 October 1980 respectively).

3 In 1985, the respondent filed a petition to dissolve the marriage on the ground that the parties had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition and the appellant consented to the petition. A decree *nisi* was granted on 24 September 1985; it was made absolute on 3 January 1986. Pursuant to the decree *nisi*, and at an adjourned hearing in chambers on 22 November 1985, the court, by consent, ordered, *inter alia*:

> 5 The (respondent) and the (appellant) be granted joint legal custody of the said children with care and control of the said children to the (appellant).
>
> 6 The (respondent) be granted access to the said children during weekends, public holidays and school holidays and such other days as the (respondent) may reasonably require.
>
> 7 The (respondent) and the (appellant) shall make jointly all decisions concerning the education of the children save that the (respondent) shall after consultation with the (appellant) have the final decision as to the choice of schools, colleges and universities.
>
> 8 Neither the (respondent) nor the (appellant) shall take the children out of Singapore without the prior consent in writing of the other.

4 On 16 March 1989, the respondent applied to vary the order of court of 22 November 1985 to the extent that he be granted sole legal custody of the children. By then the son had already reached majority and the eldest daughter, Soo Ling, was almost 20 years old. She was due to be admitted into Oxford University in October 1989. The other daughters were aged 17, 14 and 9. The principal grounds upon which the respondent relied to make the application were:

> (a) The appellant, without the respondent's consent, kept the three younger daughters abroad in the United States since January 1989

living the life of a gypsy in a motorhome instead of bringing them back to Singapore to resume their studies.

(b) The appellant was irresponsible. She did not give sufficient attention to the children; she spent more time with her American boyfriend, one Steve Sage, whom she later married, and in travelling. In 1986–1987 she made frequent and prolonged trips abroad.

5 The papers relating to the application were served upon the appellant's previous solicitors (M/s Wee Swee Teow & Co) who attempted in vain to obtain her instructions thereon. As a result the appellant's previous solicitors obtained an order of court discharging themselves from further acting for the appellant.

6 On 21 April 1989, the application came up for hearing and the court varied the order of 22 November 1985 and granted sole custody of the three younger children (Soo Mei, Soo Wei and Soo Kian) to the respondent. It also ordered the appellant to bring the children back to Singapore and hand over custody of the children to the respondent. Liberty was given to the appellant to apply.

7 In June 1989 the respondent commenced proceedings in the Superior Court of California, County of Placer, to get the children back to Singapore. His application was granted.

8 The children and the appellant returned to Singapore towards the end of June 1989. On 8 July the appellant applied to vary the order of 21 April 1989 in order to gain the custody of the three children, with reasonable access to the respondent. The appellant explained in her affidavit that she:

> did not take the children out of the (respondent's control). He handed me the children in Florida in December 1988. Because of his continual violent and abusive treatment the children and I were threatened and we fear him. We all decided to remain in the United States away from his terrible anger and punishment.

9 She also alleged that the respondent was an uncaring father, very temperamental and had no time for the children. She further described how she came to know one Steve Sage, her present husband, who she said was caring and concerned and who got along very well with the children.

10 The respondent countered that while he did leave the children with the appellant in Florida on 21 December 1988, that was on the explicit understanding that they would return to Singapore on 29 December 1988 so that the children could resume their studies commencing in January 1990. In view of the background of Steve Sage, the respondent questioned whether Sage would be a good stepfather to his children. He referred to the following allegations made against Sage – Sage's first wife, Jane, divorced him on the ground of acts of extreme and repeated mental cruelty; while that divorce proceedings were pending, Sage bigamously married his

second wife Linda on 5 June 1986, which marriage was subsequently declared by a US court to be invalid; he had also failed to make payment for the support of his child. There was also the allegation that Steve Sage was a drug-taker and an alcoholic and unemployed, living off the appellant.

11 On 14 September 1989 Ms Flexie Sion, the solicitor having the conduct of the matter on behalf of the respondent, affirmed and filed an affidavit exhibiting certified copies of documents from the 19th Circuit Court for the County of Lake, Illinois, relating to the nullity proceedings in *Linda Sage v Steven Sage* and the divorce proceedings in *Jane Sage v Steven Sage*, which a private investigator by the name of Pamela Maxwell Fea had obtained.

12 Again on 16 September 1989, Ms Flexie Sion affirmed and filed an affidavit exhibiting a copy of an affidavit sworn by one Craig Wesley Rimer, a California-licensed private investigator engaged by the respondent to locate the missing children. In the affidavit, the private investigator made a number of disparaging remarks about Steve Sage, *eg* operating an automobile in California without proper licence; being arrested for theft of a police automobile; his original name was Steven Krindson; it was unsafe to leave the three daughters with Steve Sage.

13 On 19 September 1989 the application of the respondent to vary the order of court of 21 April 1989 came up before Yong Pung How J (as he then was). Counsel for the appellant sought an adjournment in order primarily to refute the adverse allegations made against Steve Sage. Counsel for the respondent objected to an adjournment. The learned judge refused the adjournment requested as he felt that the issues were sufficiently clear and more affidavits would not help.

14 On the hearing of the appeal before us on 18 January 1991, the appellant, by way of a notice of motion, sought leave of the Court of Appeal to adduce additional evidence through 24 affidavits affirmed by different persons refuting the adverse allegations made against Steve Sage and showing that the appellant was a good and concerned mother. Miss Lai for the appellant submitted that the court below should have allowed the adjournment sought by the appellant as the allegations made against the appellant and Steve Sage in the affidavits filed shortly before the hearing, were highly material to the issues in the proceedings and there was hardly any time for the appellant and Steve Sage to respond thereto.

15 The learned judge, in his grounds of decision, quite rightly noted that "in divorce proceedings, as in other proceedings, the court has an inherent power to adjourn a hearing in order to do justice between the parties. Adjournment is a judicial act, but it is a matter of discretion for a judge to exercise according to the facts and circumstances of each case". After reviewing the facts of the case the learned judge reached this conclusion at [16]:

> … I was unhesitatingly of the view that, while the [appellant's] association with Mr Sage might be relevant, it was by no means the most relevant of the factors to be considered in deciding on the [appellant's] application before me. Quite apart from any reference to Mr Sage and subject to any help which counsel might be able to give me in their submissions, there was already much more than sufficient evidence for me to consider the issue of custody. I could not see how an adjournment to file further affidavits about Mr Sage by a former wife of his, and by a Pastor Coyle, could add anything to help the court in deciding on the issue. I, therefore, refused the application for an adjournment.

16 From this passage it seemed clear to us that the learned judge was of the opinion that the appellant's association with Steve Sage was a relevant factor, though not the most relevant factor. And if that was a relevant factor, it was not unreasonable, in our opinion, for the appellant to have requested for an adjournment in order to answer the various adverse allegations made against Steve Sage filed just a few days before the hearing. It seemed to us that the point was not whether there was sufficient evidence before the court but whether both sides had been given a fair opportunity of putting forth all the facts before the court to enable it to make up its mind. It would have been perfectly in order if the learned judge had disregarded the affidavits of Flexie Sion wherein the adverse allegations against Steve Sage were exhibited and then refused an adjournment; that would have been an exercise of discretion no appellate court would interfere with. But in this case there was nothing to suggest that the learned judge had disregarded the affidavits of Flexie Sion in the determination of the issues before him. In our opinion an adjournment should have been granted to the appellant to enable Steve Sage to answer those adverse allegations. Accordingly, we granted the motion of the appellant and admitted the 24 affidavits for the purpose of deciding this appeal.

17 We now turn to the appeal proper. Section 119(2) of the Women's Charter (Cap 353, 1985 Rev Ed) provides that in deciding the question of custody, the paramount consideration shall be the welfare of the child.

18 In arriving at his decision not to shift the custody of the children to the appellant the learned judge, after noting that the children feared the respondent as he is a strict father and that no adverse or negative factors regarding the respondent had been disclosed, went on to say at [18]:

> The [appellant] on the other hand stands out from the affidavits as a woman who loves her children dearly, but in her own unconventional way, even to the extent of committing what was clearly a breach of the order of court which gave her care and control of the children. In the circumstances, even without further evidence, and even without the benefit of proper submissions from counsel, I had no doubt that nothing could be more harmful to the children concerned than my transferring their custody back to her again, after it had only recently

> changed hands; and also that their welfare would be best served by allowing them to settle for some time back in Singapore. …

19 Counsel for the appellant submitted that the learned judge, in saying that the appellant was unconventional, seemed to give undue weight to the unsubstantiated allegations that the appellant was a staunch follower of the Seventh Day Adventist who "indoctrinated the children with her beliefs and changed their schools to suit her preference". We did not think that the learned judge had in any way by what he said faulted the appellant for being religious. Neither did we think that the learned judge thought that subjecting the children to stricter religious discipline was wrong. He certainly thought that the way in which the appellant wished to bring up the children was unconventional. What he found to be wrong was for the appellant to have disregarded the order of court of 22 November 1985. Here, counsel for the appellant sought to impress upon us that this was not a case where the appellant took the children out of the jurisdiction. It was the respondent who took the children on a holiday in the United States and handed them over to the appellant at Epcot Centre, Orlando, Florida. We would observe that there was nothing in the grounds of decision of the learned judge to suggest that he had wrongly appreciated that fact.

20 Counsel then went on to say that even if the appellant had failed to comply with the order, the court should not punish the appellant for her wrongdoing as the main consideration to be decided by the court was still the welfare of the children. Miss Lai also submitted that the learned judge had erred in deciding that it would be more harmful to the children to transfer the custody back to the appellant after it had only recently changed hands pursuant to the order of 21 April 1989.

21 Obviously the court has to take all relevant factors into account in considering the welfare of the children. It seemed to us clear that the learned judge had this foremost in his mind when he made the following observations at [18]:

> The practical application of this principle [s 119(2) of the Women's Charter)] is not always easy in matrimonial disputes where custody is fought for, and children are almost always the unfortunate objects of their parents' attention: more often than not, a court has to decide on a balance of various competing and conflicting considerations.

22 We agree with counsel for the appellant that some of the relevant factors are these:

(a) the conduct of the parties;

(b) the wishes of the parents and the wishes of the child where he or she is of an age to be able to express an independent opinion;

(c) a young child would be best looked after by its mother;

(d) which party can offer better security and stability; and,

(e) that siblings should not be separated.

23 We also agree that the fact that one parent is more capable of providing material comfort for a child does not necessarily render that parent a better parent and thus entitle him or her to the custody of the child. In the final analysis it is an exercise in weighing the relevant factors which often conflict.

24 Counsel for the appellant also submitted that a female child should be looked after by her mother and she relied on *Re L (minors)* [1974] 1 All ER 913. We think this rule must necessarily have to depend on the age of the female child; the younger the child the stronger will be the case for it. The daughter in *Re L* was 11½ years old and the judge made the observation that the girl was of age where she ought to have a mother's care. Even then the judge there, after weighing all the factors, felt that the daughter and a son should be returned to their German father.

25 From the facts set out in the affidavits it seemed to us clear that both the appellant and the respondent have different ideas as to how the children should be brought up and educated. While under the order of court of 22 November 1985, the parties were required to consult each other with regard to the education of the children, the final decision would be made by the respondent. We could see that a great deal of the dispute, as reflected in the affidavits, related to the education of the children. We were of the view that education was a very important aspect in the consideration of the welfare of the children. We were not at all impressed with the unconventional and informal educational method which the appellant would appear to prefer the children to undergo. This was what happened for a period of about six months between January and June 1989 when the children literally lived out of a mobile home in the United States. This absence had in fact caused the children to miss almost half a year of formal education in Singapore and we did not think that this was in the interest of the children. Because of this absence, the three children have lost out a year, and they will pass out from school a year later. We would stress that they were and are at an age where it is essential that they should be properly guided.

26 Finally, there was the point made by the appellant's counsel that the learned judge was wrong in holding that "nothing could be more harmful to the children concerned than my transferring their custody back to (the appellant) again, after it had only recently changed hands". Certain passages in *Sim Hong Boon v Sim Lois Joan* [1971–1973] SLR(R) 597 at [8], *Koh Teng Lam v Koh Chen Chee Elsie* [1974–1976] SLR(R) 510 at [123]–[127] and *Chan Bee Yen v Yap Chee Kong* [1989] 1 MLJ 370 at 372 to the effect that taking the child from an environment he is used to is not necessarily against his long term interest, were cited. We do not dispute

those propositions. It is the circumstances of each case which will determine whether a switch is in the best interest of a child.

27 The learned judge here would obviously have considered all the relevant circumstances in deciding that it would not be in the children's best interest to have their custody switched from the respondent to the appellant. We noted that by the time the matter came up for hearing before the learned judge, the children had all been placed in schools here and were in the course of settling down in their studies. We did not think that the exercise of the discretion by the learned judge was wrong considering all the circumstances. When the appeal came up before us more than a year later, all the more so we did not feel inclined to alter the order of things which alteration we thought was likely to cause the children emotional stress and affect their studies.

28 Admittedly, the respondent is a busy businessman who sometimes travels abroad. He spends in the average two months in a year away from Singapore. In the case of the appellant, while she is not working but from past record she spends just as much time abroad, if not more. There is evidence that from August 1986 to June 1987, the appellant was away from Singapore for a total period of about six to eight months. Of course, the appellant is entitled to her own interest. Whatever it is, we see that both the appellant and the respondent depend to a large extent on house maids and other employees to meet the needs of the children. This fact is not likely to change. We had noted that the appellant is now married to Steve Sage. But in this case we did not think that that fact materially altered the equation. Considering all the circumstances, and the long term interest of the children, we were of the opinion that their interest is best served by remaining in the custody of their father.

Headnoted by Paul Tan Beng Hwee.