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1. [\[130.463\]. Regulating adults' relationship with children](#)

**Client/Matter:** -None-

## **(1) Parent and Guardian**

Halsbury's Laws of Singapore - Family Law (Volume 11)

### **Halsbury's Laws of Singapore - Family Law (Volume 11) > 130 – Family Law > (9.) Guardianship and Custody**

#### **(9.) GUARDIANSHIP AND CUSTODY (1) PARENT AND GUARDIAN**

### **[130.463] Regulating adults' relationship with children**

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The law of guardianship and custody is concerned with the upbringing of a child and with regulating the relationships that adults form with the child because they are or want to become involved in the child's upbringing.

The law of parenthood imposes on the parents of the child the primary responsibility for his or her care and upbringing.<sup>1</sup> Parental responsibility continues despite the failure of the spousal relationship itself.<sup>2</sup> The law of guardianship and custody comes in only when it is necessary to provide for the optimal division of parental responsibility between the parents, that is when the parents separate. Besides the parents, other adults may also become involved in a child's upbringing. Some of these adults wish to formalise their relationship with the child, while others do not see the need to. For those adults who wish to formalise their relationship with the child, the law of guardianship and custody provides for their appointment as the child's guardian.<sup>3</sup> With this appointment as the child's guardian, the adult is legally bestowed with authority over the child. Where there are both parents and guardians exercising authority over the same child, the provision of the guardian's authority by the law of guardianship and custody needs to be rationally related with the parents' natural authority<sup>4</sup> as well as with the authority that may occasionally be informally exercised by other adults. In a more piecemeal fashion, the law of guardianship and custody also provides the means by which parents, guardians and other adults can bring the attention of the courts to a problem that they face regarding the upbringing of a child,<sup>5</sup> so that the courts may give an appropriate direction or resolve the particular substantive disagreement.<sup>6</sup> In all the roles of the law of guardianship and custody, it mandates that every decision that affects the upbringing of a child should be made in pursuit of the welfare of the child.<sup>7</sup>

With regard to a child and his or her parents, the law of guardianship and custody plays a supplementary role to the law that regulates parenthood.<sup>8</sup> A child's upbringing by his or her own parents can adequately be regulated by the law exhorting parental responsibility which demands that parental authority be exercised in an equal co-operative manner by the parents and always in pursuit of the welfare of the child.<sup>9</sup> It is only when parents decide to live separately that the law of guardianship and custody provides the means of formally dividing up what the parents performed jointly while they lived together.<sup>10</sup>

With regard to a child and the non-parent who participates in the child's upbringing, however, the law of guardianship and custody is of greater significance because, if not for the appointment as guardian that the law allows,<sup>11</sup> the non-parent will not have a formal legal status vis-à-vis the child. The non-parent's appointment as guardian of the child legally bestows authority on the non-parent that is similar in substance to the authority that a parent naturally possesses over the child. In terms of possessing authority over the child, then, the parent is a natural guardian (although this term will be shown to be somewhat superfluous) while the non-parent is, in contrast, a guardian. At this point it becomes important to rationally relate the authority that the guardian acquires under the law of guardianship and custody with the authority the parents naturally possess over their child or to rationally relate the parent's status with the guardian's status.<sup>12</sup>

Once these ideas are sorted out, the law of guardianship and custody could not be easier in its ubiquitous demand that every decision affecting the upbringing of a child must be taken by a guardian or the court in pursuit of the welfare of the child.<sup>13</sup> Until the ideas are sorted out, however, the law of guardianship and custody can seem something of a maze.<sup>14</sup>

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- <sup>1</sup> See [\[130.370\]](#). 'Parent' means the natural biological parent and an adoptive parent: see [\[130.349\]](#).
- <sup>2</sup> This could lead to the parents separating and ultimately terminating their marriage. For continuity of parental responsibility, see [\[130.354\]](#).
- <sup>3</sup> These adults can be either relatives of the child including a stepparent or non-relatives who are 'strangers' in this sense. As to appointment of 'guardian', see [\[130.487\]](#)–[\[130.498\]](#).
- <sup>4</sup> As to parental and guardianship authority see [\[130.474\]](#)–[\[130.486\]](#).
- <sup>5</sup> As to formal limits to application to court see [\[130.499\]](#)–[\[130.507\]](#).
- <sup>6</sup> As to orders court can make see [\[130.508\]](#)–[\[130.516\]](#).
- <sup>7</sup> As to standard of disposition of any legal issue affecting the upbringing of a child within any court application being the welfare of the child see [\[130.517\]](#)–[\[130.526\]](#).
- <sup>8</sup> See the pivotal provision in the Women's Charter (Cap 353, 2009 Rev Ed)s 46(1) require of the parents that they are 'mutually bound to co-operate with each other ... in caring and providing for the children'. With effect from 1 April 2006, Pt X of the Women's Charter on 'Divorce, Judicial Separation, Nullity of Marriage, Financial Provisions Consequent on Matrimonial Proceedings, Welfare of Children and General Provisions' is replaced with the current to implement the simplifications in terminology and originating processes of matrimonial proceedings made by the Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act 42 of 2005). In *TIE v TIF* [2015] SGFC 142, the Court held that where the wife had manipulated the legal system with delays and with the filing of her applications in 2 jurisdictions, such conduct showed a disregard for the children's emotional needs and mental well-being. Her manipulation of legal proceedings and non-compliance of court orders did not augment well for the children under her care. Instead of engaging the husband in the lives of the children and co-operating with him, her actions had been against the husband; the Court removed the children from the toxic environment created by the wife and reversed care and control orders. For parenthood see [\[130.347\]](#) et seq.
- <sup>9</sup> The Women's Charters 46(1) characterises parenthood as the equal co-operative responsibility of the parents and parental responsibility as the moral perspective of parental exercise of their authority for the welfare of their child. This moral perspective of the nature and aim of parenthood suffices to regulate the relationship between the parent and child and that between the two parents in their capacity as parents.
- <sup>10</sup> Thus, 'custody', 'care and control' and 'access' that are the classic ways of dividing up parental authority: see [\[130.508\]](#) et seq.
- <sup>11</sup> The adult becomes formally a 'guardian' of the child: see [\[130.487\]](#) et seq. But see the courts give a confusing interpretation of this term: [\[130.463\]](#) et seq.
- <sup>12</sup> This could be complicated if it is not appreciated that the law of guardianship and custody plays a supplementary role to parenthood: see [\[130.474\]](#) et seq.
- <sup>13</sup> See the Guardianship of Infants Act (Cap 122, 1985 Rev Ed)s 3; and [\[130.517\]](#).
- <sup>14</sup> It will take this section and the next (see [\[130.464\]](#)–[\[130.486\]](#)) to sort out these ideas.

## **[\[130.464\]](#) Meaning of guardian**

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There remains some controversy over the meaning of 'guardian'.<sup>1</sup> The available statutory definition of guardian and associated terms apply for specific purposes and may be more problematic than helpful.<sup>2</sup>

In contrast there is a simpler academic suggestion that 'guardian' is either a parent (who is a natural guardian) or an adult who has been appointed guardian (in any of the ways allowed by the law of guardianship and custody). This simple interpretation relates the adult appointed as guardian with a 'parent' who is also the child's guardian naturally without any need of appointment.<sup>3</sup>

The High Court and Court of Appeal have offered more complicated interpretations of 'guardian' that may only suit the requirements of the particular case before them.<sup>4</sup> When applied more generally, the interpretations the courts offered may unfortunately confuse rather than clarify.

With respect, then, it is suggested that the simpler academic suggestion may be the better understanding of the

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term. The term 'guardian' is best understood to pick out the adult who, apart from the child's 'parent',<sup>5</sup> is bestowed with legal status vis-à-vis the child so as to distinguish the 'guardian' from other adults who more casually enter into informal relationships with the child without acquiring legal status. Such understanding as the academic suggestion provides allows the law of guardianship and custody to achieve the optimal balance of power between adults in their relationships with a child.

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In *Re Aliya Aziz Tayabali* [2000] 1 SLR 754 (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C334–337), Michael Hwang JC (as he then was) observed that this area of law 'is in a state of confusion'. It may not have improved all that much since 1992, when the judgment was delivered. The reason may be that guardianship originated from the feudal system of land tenure, transformed into expressing a father's authority over his legitimate children to the modern 'guardian' which came into use when the courts began to appoint a guardian to protect an infant: Leong Wai Kum The Family Law Library of Singapore CD-ROM at B39. Besides its own convoluted evolution, the law of guardianship and custody has to relate with changes in the law regulating parents from its origin in common law: see [\[130.358\]–\[130.372\]](#). The law of guardianship and custody can appear fairly confusing unless one keeps clearly in mind its relationship with the law regulating parenthood: see [\[130.463\]](#).

<sup>2</sup> The explanation of 'lawful guardian' for the offence of kidnapping from lawful guardianship pursuant to the Penal Code (Cap 224, 2008 Rev Ed) s 361 includes any person lawfully entrusted with the care and custody of the child. Further, 'guardian' under the Children and Young Persons Act (Cap 38, 2001 Rev Ed) s 2 in relation to a child or young person, includes any person who, in the opinion of the court having cognizance of any case in relation to the child or young person, or in which the child or young person is concerned, has for the time being the charge of, or control over, the child or young person; and s 12 defines 'legal guardian' as 'a person lawfully appointed by deed or will or by the order of a competent court to be the guardian of that child or young person' for the purposes of the offence of unlawful transfer of possession, custody or control of child or young person (as inserted by the Children and Young Persons (Amendment) Act 2019 (No 30 of 2019) s 11, with effect from 1 July 2020). The Women's Charter (Cap 353, 2009 Rev Ed) s 145(4) defines 'legal guardian' for the purposes of the offence under s 145 in relation to any girl as any person who is for the time being her guardian, having been appointed according to law by deed or by order of a court of competent jurisdiction. Some of these were discussed in *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA). See also [\[130.467\]](#), [\[130.469\]](#), [\[130.470\]](#). To the extent that the courts' definitions stray from the settled family law meaning of 'guardian' and suggest that 'guardian', 'legal guardian', 'lawful guardian' and 'statutory guardian' are different from each other, they provide a less than optimal balance of authority between the parent, guardian and other adults and unfortunately perhaps the judgment introduces some confusion: see Leong Wai Kum 'Restatement of the law of Guardianship and Custody in Singapore' [1999] SingJLS 432 at 438, 464; Chan Wing Cheong 'Applications under the Guardianship of Infants Act' [1998] SingJLS 182 (Leong Wai Kum, The Family Law Library of Singapore CD-ROM at C377 383).

<sup>3</sup> See [\[130.465\]](#).

<sup>4</sup> See *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA).

<sup>5</sup> For the meaning of 'parent', see [\[130.349\]](#). See also [\[130.465\]](#).

## **[\[130.465\]](#) Settled family law meaning**

Family lawyers have long operated from the basis that guardianship is a pure legal concept developed to bestow on selected adults some or all of the authority that a parent naturally possesses over the child.<sup>1</sup> The 'guardian' is the adult who is appointed to step into the position a parent naturally is in with respect to a child. The most common means of appointment to that position is when a court orders that the adult is the 'guardian' of the child.<sup>2</sup> By the settled family law meaning, then, a 'guardian' apart from the parents who are natural guardians,<sup>3</sup> is an adult who has been formally appointed to the status.

The settled meaning 'is determined by [the family law purpose] to seek out the adults(s) who possess(es) parental authority over a child. [A guardian] is able to exercise authority over the child that would have come naturally to him or her if he or she were the parent of the child'.<sup>4</sup>

The settled meaning is restrictive in seeking formal appointment of the guardian. Not every adult who comes to care for a child, however lawfully the care began, is the child's guardian. The settled meaning excludes casual minders<sup>5</sup> including those who have been informally authorised to exercise some authority over the child within time or substantive limits.

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<sup>1</sup> See Leong Wai Kum *Family Law in Singapore: Cases and commentary on the Women's Charter and Family Law* (1990) pp 251–253, Bromley and Lowe *Bromley's Family Law* (7th Edn, 1987) p 346; Cretney *Principles of Family Law* (4th Edn, 1984) pp 296–297, 312. England has overhauled their law and abandoned 'guardianship' for new ideas pursuant to the Children Act 1989 (UK), so that older versions of English texts need to be consulted.

<sup>2</sup> See Leong Wai Kum *The Family Law Library of Singapore* CD-ROM at P528.

<sup>3</sup> See *L v L* [1997] 1 SLR 222 (CA) (Leong Wai Kum *The Family Law Library of Singapore* CD-ROM at C366–371).

<sup>4</sup> Leong Wai Kum 'Restatement of the Law of Guardianship and Custody in Singapore' [1999] SingJLS 432 at 436.

<sup>5</sup> For eg servants employed or simply permitted by the parents to care for the child for as long as the parents agree and school teachers who have care of the child during school hours are not guardians.

## **[130.466] Classes of guardian**

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There are two means of formal appointment<sup>1</sup> of a guardian, which create two classes of guardian. First, a parent can appoint someone to be the testamentary guardian of the child in his will.<sup>2</sup> On the parent's death, this guardian steps into his or her shoes in terms of being able to exercise authority over the child. Second, a person can be appointed by the court<sup>3</sup> as guardian of the child.<sup>4</sup> It is a complication, discussed below, that this person can also be one of the parents.<sup>5</sup>

There are two other classes of guardian, not formally appointed in the above two ways: a parent (who is the natural guardian of his or her child so that no appointment is involved),<sup>6</sup> and the court when it makes a child its ward,<sup>7</sup> the effect being as if the court became guardian of its ward because the court will now be making all the major decisions that affect the child who is its ward.

It follows from the settled family law meaning of 'guardian'<sup>8</sup> that an adjective preceding the term 'guardian', where there be one, does not affect its meaning as an adult who was formally appointed to possess the authority that the parent naturally possesses with regard to a child. Sometimes the adjective describes the means of formal appointment (as in 'testamentary' or 'court-appointed' guardian) or the fact that no appointment was needed for the authority to arise (as in 'natural' guardian) or sometimes the adjective has little significance (as in 'lawful' or 'legal' guardian). With respect, it is submitted that it would be misguided to read more into the adjectives as the Court of Appeal had done.<sup>9</sup>

<sup>1</sup> By the settled family law meaning a guardian, besides the parents who are natural guardians, must be an adult who is formally appointed to the status. As to the settled family law meaning, see [130.465].

<sup>2</sup> See the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ss 7, 8. See also [130.487].

<sup>3</sup> There are two forms of application for such appointment, at any time, under the Guardianship of Infants Act and, as ancillary to matrimonial proceedings, under the Women's Charter (Cap 353, 2009 Rev Ed) s 124. See [130.490]–[130.497].

<sup>4</sup> The norm is to be appointed guardian of the person of the child. Exceptionally a person can be appointed to the more limited role of guardian of the property of the child: see [130.474] note 1.

<sup>5</sup> Indeed as most custody disputes are between the parents themselves, it is more than likely that a 'guardian' appointed at the conclusion of the dispute is one of the parents. As to the effect of appointing one parent as guardian see [130.478]–[130.485].

<sup>6</sup> As the common law only recognised the legitimate relationship between parent and child, it used to be thought that the rule only applies to a legitimate relationship. Given the manifold changes to ameliorate the effects of legitimacy (see [130.527] et seq), it should be that both parents are today natural guardians of their child, whether legitimate or illegitimate.

<sup>7</sup> See [130.496].

<sup>8</sup> See [130.465].

<sup>9</sup> See *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1999] 3 SLR 38 (CA).

## **[130.467] Broader meaning accepted by courts**

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The High Court and Court of Appeal offered meanings of 'guardian' that are broader than that regarded settled by family lawyers.<sup>1</sup> In a series of applications<sup>2</sup> where a couple who hoped to adopt a young girl complained that another set of hopeful adoptive parents had removed the child from their possession and that they were the child's lawful guardians,<sup>3</sup> the courts offered slightly varying definitions neither of which was the settled family law meaning. Both definitions would include casual minders of a child as guardian.

The High Court,<sup>4</sup> proceeding from the definitions of 'guardian' in the Children and Young Persons Act<sup>5</sup> and 'lawful guardian' in the Penal Code,<sup>6</sup> decided that<sup>7</sup> under our law (including the Guardianship of Infants Act) a person who has charge of or control over a child or young person is a guardian.<sup>8</sup> The court rejected the academic view that the definition in the Children and Young Persons Act could be out of line with general usage.<sup>9</sup> The Court of Appeal agreed with the High Court's reliance on the statutory definition adding only that there was a time consideration required so that a guardian is 'a person who has charge of or control over a child or young person ... at the material time'.<sup>10</sup>

<sup>1</sup> See *Lim Kok Chye Ivan v Lim Chin Huat Francis*[1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA). As to the settled family law meaning see [130.465].

<sup>2</sup> The first application (unreported; OS No 5001 of 1996) was dismissed by the District Court on the preliminary point that it was started under a provision that did not permit an originating application. On appeal, reported as *Lim Kok Chye Ivan v Lim Chin Huat Francis*[1997] 3 SLR 1042 (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C373–377), the High Court decided the application was properly begun and sent the case back to the District Court. The District Court, on re-hearing the complaint, dismissed it on substance by refusing to order the return of the child to the applicants. The applicants appealed again. The High Court allowed the appeal and did order the return of the girl to the applicants. The respondents then appealed to the Court of Appeal (*Lim Chin Huat Francis v Lim Kok Chye Ivan*[1999] 3 SLR 38), and the Court noted the multiplicity of applications before deciding to overturn the High Court's order that the child should be returned to the applicants.

<sup>3</sup> The complaint was made in an application taken under the Guardianship of Infants Act (Cap 122, 1985 Rev Ed)s 14.

<sup>4</sup> *Lim Kok Chye Ivan v Lim Chin Huat Francis*[1997] 3 SLR 1042.

<sup>5</sup> See the Children and Young Persons Act (Cap 38, 2001 Rev Ed)s 2 defines 'guardian' for the purposes of some provisions in the Act.

<sup>6</sup> See the Penal Code (Cap 224, 2008 Rev Ed)s 361 define 'lawful guardian' for the purposes of the offence of 'kidnapping from lawful guardianship' as any person 'lawfully entrusted with the care and custody' of a child; and see also [130.469].

<sup>7</sup> *Lim Kok Chye Ivan v Lim Chin Huat Francis*[1997] 3 SLR 1042.

<sup>8</sup> The reliance on criminal statutes that require to catch offending conduct by all adults to understand 'guardian' for the more select purposes of a family statute, has been criticised, see Chan Wing Cheong 'Applications under the Guardianship of Infants Act' [1998] SingJLS 182 at 187–190 (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C377–383).

<sup>9</sup> In *Lim Kok Chye Ivan v Lim Chin Huat Francis*[1997] 3 SLR 1042 at [20], the High Court observed that, from a different perspective, the statutory definition could be intended to depart from traditional usage.

<sup>10</sup> *Lim Chin Huat Francis v Lim Kok Chye Ivan*[1999] 3 SLR 38 (CA) at [44].

## **[130.468] Problem with including casual minder**

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The definitions of guardian that the High Court and Court of Appeal<sup>1</sup> have offered do not differ substantially. They do, however, differ from the settled family law meaning by including a person who for a time lawfully possesses the child or has been informally authorised to exercise some authority over him or her.<sup>2</sup> A baby-sitter, school teacher or neighbour asked by a parent to keep an eye over a child have all lawfully come into possession of the child and by the courts' rather loose definitions of 'guardian' and 'lawful guardian' are all guardians of the child.



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By this inclusion, the casual minder becomes, in terms of the extent of authority he or she possesses over the child, equated with another adult who is more formally appointed the guardian of the child by the parent in a valid will<sup>3</sup> or by the court at the conclusion of a guardianship application concerning the child.<sup>4</sup> Even more significantly, the casual minder as guardian may be equated with the parent inasmuch as a guardian of a child is bestowed with authority that the parent naturally possesses.<sup>5</sup> The effect of this may be best appreciated by considering statutory provisions that affirm the authority of a parent in various matters and, in the alternative, bestow it on a guardian.<sup>6</sup> It has been suggested that this equation of a casual minder with a formally appointed guardian or parent bestows more authority on the casual minder than is desirable.<sup>7</sup> Parents and formally appointed guardians should have more entrenched authority over a child than a casual minder.

<sup>1</sup>

See *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA). See also [130.467].

<sup>2</sup> In *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 at [44], [54], the Court of Appeal appreciated that its definition brings the term close to a layman's understanding and is 'easily attainable'.

<sup>3</sup> The appointment is as 'testamentary guardian' of the child: see the Guardianship of Infants Act (Cap 122, 1985 Rev Ed)s 7; and [130.487].

<sup>4</sup> The appointment can be made at any time under the Guardianship of Infants Acts 5 or an ancillary to matrimonial proceedings to terminate the parents' marriage under the Women's Charter (Cap 353, 2009 Rev Ed)s 124; see [130.490], [130.497].

<sup>5</sup> See [130.474].

<sup>6</sup> See eg the Human Organ Transplant Act (Cap 131A, 2012 Rev Ed)s 5(2) which allows a 'parent or guardian' to give consent for the removal of the dead child's kidney; the Medical (Therapy, Education and Research) Act (Cap 175, 2014 Rev Ed)s 4 read with the Schedule allows 'parent' or 'guardian' to allow the removal of the dead child's organs although the parent is given the authority to veto the donation; the Women's Charter (Cap 353, 2009 Rev Ed)s 13 read with the Sch 2 requires a child to obtain the consent of 'parent' and/or 'guardian' to the child's marriage; and the Insurance Act (now Cap 142, 2002 Rev Ed)s 58(1) requires a child wishing to enter into a contract of insurance to obtain the consent of either the 'parent or guardian'.

<sup>7</sup> See Leong Wai Kum 'Restatement of the law of guardianship and custody in Singapore' [1999] SingJLS 432 at 451–457.

## [130.469] Guardian and lawful guardian

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The High Court and Court of Appeal have further decided that the term 'guardian' is different from 'lawful guardian'.<sup>1</sup> The Courts, however, differed in their definitions of this term.

The High Court<sup>2</sup> was content to adopt the explanation in the Penal Code,<sup>3</sup> although this purported to explain 'lawful guardian' only for the offence of 'kidnapping from lawful guardianship'. The court was prepared to accept as lawful guardian anyone 'lawfully entrusted with the care and custody' of the child.<sup>4</sup> It has been observed that an explanation of the term in a penal statute may not be appropriate for other contexts because it is expected that the net will be cast wide to catch the particular criminal behaviour.<sup>5</sup>

The Court of Appeal<sup>6</sup> endorsed this observation<sup>7</sup> and offered instead its own definition, which may be described as somewhat unwieldy. A lawful guardian is 'a guardian ... wherein [by a process involving a value judgment] the court [or the relevant officer at the Ministry of Community Development, Youth and Sports] has determined him to be the caregiver and custodian of the child at the material time. ... [W]hile natural and legal guardians ... would normally be secured in lawful guardianship, other types of guardianship would only be 'lawful' where the question arises and after adjudication is made'.<sup>8</sup>

<sup>1</sup>

See *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA); and [130.468] on the courts' interpretation of 'guardian'. The applications were made by a set of hopeful adoptive parents of the child who claimed to be her 'lawful guardian' for the purposes of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed)s 14.

<sup>2</sup> *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042.

<sup>3</sup> In the Penal Code (Cap 224, 2008 Rev Ed)s 361. For the meaning of 'lawful guardian', see [130.464] note 2.

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<sup>4</sup> *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042 at [22] (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C373–377).

<sup>5</sup> Chan Wing Cheong 'Applications under the Guardianship of Infants Act' [1998] SingJLS 182 at 187–190 (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C377–383), citing Indian commentaries to the same effect.

<sup>6</sup> *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 (CA).

<sup>7</sup> *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 (CA) at [51].

<sup>8</sup> *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 (CA) at [54], [55]. Further, it has been suggested that the requirement of adjudication in the course of which a value judgment on the lawfulness of the guardianship is made, is too unwieldy to allow statutory references to lawful guardian to operate well. See the Penal Codes 361 (kidnapping from lawful guardianship); Children and Young Persons Act (Cap 38, 2001 Rev Ed) s 16 (allowing the Director-General of Social Welfare or the protector of children to accept the provision of security when a child is detained by some person other than his parents or lawful guardian) (s 16 was amended by the Children and Young Persons (Amendment) Act 2019 s 14, with effect from 1 July 2020); Women's Charter (Cap 353, 2009 Rev Ed) ss 160(1), 164, 165 (allowing the detention, transfer or removal of girls for their protection) and subsidiary legislation under the National Cadet Corps Act (Cap 194, 2014 Rev Ed). If the definition is adopted, nothing can be done under any of these provisions until adjudication on the lawfulness of the adult's guardianship is undertaken. It is not obvious that the adjective 'lawful' should be accorded such significance as to render 'lawful guardian' different from a 'guardian'. See [130.471].

## **[130.470] Guardian and legal guardian**

The High Court and Court of Appeal have even further observed that the term guardian is different from 'legal guardian' but, because 'legal guardian' does not appear in the Guardianship of Infants Act,<sup>1</sup> the observations were not central to the decisions in which they were made.<sup>2</sup> The Court of Appeal<sup>3</sup> has agreed with the High Court<sup>4</sup> that the definition of 'legal guardian' in the Children and Young Persons Act<sup>5</sup> should apply in other contexts as well.<sup>6</sup> The legal guardian, by this definition, means a person lawfully appointed by deed or will or by a competent court to be the guardian. As the Court of Appeal noted, the effect is that legal guardian only consists of a court-appointed guardian or a testamentary guardian.<sup>7</sup> The definition excludes the parent from the term 'legal guardian'.

To exclude the parent from a statutory reference to 'legal guardian' is not problematic where the statute provides the same authority for 'parent or legal guardian'.<sup>8</sup> Where the statutory provision does not refer to 'parent' as an alternative to 'legal guardian',<sup>9</sup> however, the definition of legal guardian that excludes the parent is anomalous in suggesting that the legal guardian could possess authority beyond that of the parent of the child.<sup>10</sup>

It is suggested that the adjectives 'lawful' and 'legal' may not have been intended to have the effect of making 'lawful guardian' and 'legal guardian' unique classes of guardians.<sup>11</sup>

<sup>1</sup> See the Guardianship of Infants Act (Cap 122, 1985 Rev Ed).

<sup>2</sup> See *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA). See also [130.468], [130.469].

<sup>3</sup> *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 (CA).

<sup>4</sup> *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042 at [45], [46].

<sup>5</sup> See the Children and Young Persons Act (Cap 38, 2001 Rev Ed) s 12.

<sup>6</sup> See the Children and Young Persons Act s 12; Women's Charter (Cap 353, 2009 Rev Ed) s 145, Sch 2; Infectious Diseases Act (Cap 137, 2003 Rev Ed) s 25; Widows' and Orphans' Pensions Act (Cap 350, 1985 Rev Ed) s 41.

<sup>7</sup> *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 (CA) at [46].

<sup>8</sup> See Leong Wai Kum 'Restatement of the Law of Guardianship and Custody in Singapore' [1999] SingJLS 432 at 459–460: of all the statutory provisions in note 6 above, only the RCSch 2 refers to 'legal guardian' without having as alternative, the 'parent'. The other provisions do not create a problem in this regard by expressly providing for the 'parent' to have the same authority as 'legal guardian'.

<sup>9</sup> See RCSch 2 which contains a reference to 'legal guardian' under 'Grants' made pursuant to O 71 r 35.



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<sup>10</sup> See Leong Wai Kum 'Restatement of the Law of Guardianship and Custody in Singapore' [1999] SingJLS 432 at 459–460 observes that this produces the anomaly whereby a parent may not be allowed to be appointed the legal representative of his deceased child's estate, and only a court-appointed guardian or testamentary guardian may be so appointed: see [\[130.474\]](#).

<sup>11</sup> See [130.471]. Further the classes of guardians arise only from the different methods of appointment to the status: see [130.466].

## **[130.471] 'Lawful' and 'legal' as innocuous embellishment**

While there are statutory provisions that use the term 'guardian' with a preceding adjective, as in 'lawful guardian' and 'legal guardian',<sup>1</sup> it may be better to treat them all as similar.<sup>2</sup> The legislature, in the course of enacting these statutory provisions separately over a period of a century or so may not have used each term advisedly. It may be more likely that the additions of the adjective 'lawful' or 'legal' were innocuous and came readily to the draughtsmen. Every reference to guardian used in contradistinction to parent, whether preceded by an innocuous adjective, should, on this view, refer to an adult who has formally been bestowed with the authority over a child, that the parent naturally possessed, in such a way as to be identifiable from casual minders of a child.<sup>3</sup> Where in the context the term guardian is used even more generally so as not to be in contradistinction to parent, it should refer to the parent as natural guardian and the appointed guardian. There should be no need to engage in the rather tortuous exercise of finding some minor difference between the generic 'guardian' and the 'lawful guardian' and 'legal guardian'.

<sup>1</sup>

See [130.469], [130.470].

<sup>2</sup> See Leong Wai Kum 'Restatement of the Law of Guardianship and Custody in Singapore' [1999] SingJLS 432 at 450–451, 463.

<sup>3</sup> See [130.465].

## **[130.472] Guardian, lawful guardian and legal guardian as settled meaning**

It may be that statutory provisions referring to 'guardian', 'lawful guardian' and 'legal guardian' are best read if the references to guardian, lawful guardian and legal guardian are understood by the one meaning of 'guardian' regarded settled among family lawyers, that is the adult who possesses parental authority over a child. Where any of the terms is used as alternative to 'parent', the term refers to the adults who are formally appointed guardians, that is the testamentary guardian and court-appointed guardian. Where any term is used even more generally and not as alternative to 'parent', the term refers to both the parent as natural guardian and adults who are formally appointed guardians.<sup>1</sup>

In summary, among the persons who possess authority over a child, the parent as natural guardian should never be treated as possessing less authority than a non-parent who becomes the testamentary or court-appointed guardian.<sup>2</sup> No process of adjudication should be necessary to decide if a person is included in these terms. Guardians, whether natural or formally appointed, should be treated with greater favour, in terms of their authority over a child, over other adults who are casual minders of the child. It is submitted that this may be the best way to understand the terms and to them. To the extent the decisions of the High Court and Court of Appeal<sup>3</sup> differ, a review is awaited.<sup>4</sup>

<sup>1</sup>

See Leong Wai Kum 'Restatement of the Law of Guardianship and Custody in Singapore' [1999] SingJLS 432 at 462–464.

<sup>2</sup> See [\[130.475\]](#), [\[130.476\]](#).

<sup>3</sup> *Lim Kok Chye Ivan v Lim Chin Huat Francis* [1997] 3 SLR 1042; on appeal [1999] 3 SLR 38 (CA).

<sup>4</sup> On the other hand, there are three aspects of the decisions that are welcome clarifications of the law of guardianship and custody. The decision of the Court of Appeal in *Lim Chin Huat Francis v Lim Kok Chye Ivan* [1999] 3 SLR 38 to proceed with the

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hearing whether there was an irregularity in the way the applicants started their application clarifies that application to the courts with respect to an alleged problem faced by a child should be allowed with appropriate swiftness. The ultimate decision that the Court of Appeal made, namely not to make the order sought because no order will improve the young girl's status quo other than marginally, is welcome as the wise way of resolving an application regarding the living arrangements of a child. For both decisions see [\[130.392\]](#). Further the observation by Yong Pung How CJ (as he then was) that anyone who aspires to become appointed the adoptive parents of a child is expected to show care and love for the child is also timely and to be welcomed; see [\[130.477\]](#) note 3, [\[130.523\]](#).

## **[130.473] Applicable to non-Muslims and Muslims**

The law of guardianship and custody is general and applies to every person in Singapore, whether non-Muslim or Muslim.<sup>1</sup> Indeed, beginning from an extremely old case where the Straits Settlements Supreme Court applied the law to Muslim infants and their paternal uncle,<sup>2</sup> Muslim children are regulated in their upbringing in the same way as non-Muslim children.<sup>3</sup>

<sup>1</sup>

See [\[130.003\]](#).

<sup>2</sup> *Re Sinyak Rayoon* (1888) 4 Ky 329 (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C391–393).

<sup>3</sup> See eg *Re Aliya Aziz Tayaball* [2000] 1 SLR 754 (Leong Wai Kum The Family Law Library of Singapore CD-ROM at C334–337).