POST-DIVORCE PARENTING

The child’s welfare must come first

By Debbie Ong  
For The Straits Times

A FUNDAMENTAL misunderstanding of the legal concept of “custody” in Singapore, and hence “joint custody”, permeated an article: “No cookie cutter solutions” by Andy Ho (The Straits Times, Review Page 26, June 3).

One of the writer’s main objections to joint custody is that it is highly impractical for the children to “pack up and change homes every week or two”. Further, he argues that the “on/off arrangement makes it difficult for parents and children to have a consistent and coherent relationship.”

The writer is in fact referring to the concept of “care and control” and not “custody”. In Singapore, “custody” should be distinguished from “care and control”. The courts do not make such “shared care and control” orders suggested by the writer.

Instead, court orders commonly give one parent “care and control” and the other “access”.

“Custody” is a distinct concept from these.

Section 126 of the Women’s Charter provides that an order of custody entitles the person given custody to “decide all questions relating to the upbringing and education of the child”.

Thus “custody” embodies the control over the important aspects of the child’s life, such as his or her education and health. Deciding which school the child should attend or whether the child should undergo orthodontic treatment may be matters within the parent’s control.

As parents may have different views on decisions, which call for decisions on such important matters, it is often only once in a while, and certainly not on a daily basis. When so discorded, the parent without custody is deprived of involvement in the major issues in the child’s life.

An order of “care and control” gives one parent control over the day-to-day matters of the child. For example, that parent can decide, unilaterally, whether the child should eat more fruit on Tuesdays. The child resides with the parent given “care and control” of him or her. An order of “access” enables the parent without “care and control” of the child, usually on a regular basis, such as one day during the weekend and part of a weekday or two.

The term “custody” is unimportant, or it is in different jurisdictions. In some jurisdictions, “custody” is broader, encapsulating both “care and control”; in other jurisdictions, Singapore’s “custody” embodies a more abstract concept of parental responsibility and authority.

When a court in Singapore orders joint custody, both parents are free to make joint decisions on important matters in the child’s life (such as whether the child to boarding school). One parent will have care and control of the child while the other will have access to the child.

If, instead of a joint or sole custody order, no custody order is made, both parents will continue to have control over the important aspects of the child’s life, since “care and control” order does not alter the major parental authority of either parent. Making no custody order achieves the same practical effect as that of a joint custody order.

A joint custody order makes a formal statement that both parents are to continue to guide the child in important matters. Not making no custody order quietly leaves parents with the original parental responsibility and authority, which they have always possessed as parents.

While the practical effect of a joint custody order is largely the same, different messages are sent out by each. If one parent obtains a joint custody order when the other parent has sought only sole custody, the former may feel that he or she has “won” the legal battle. On the other hand, if no custody order is made, or if the whole concept of custody is abolished, there will not be any legal battles over that issue and both parties simply accept that they will always remain parents with parental responsibility over the child, even after a divorce. Only “care and control” and “access” orders are necessary.

Academics advocate the latter approach, which sends the message that parenthood is for life and does not cease on divorce. It also reduces the opportunity to fight over one more issue in a divorce.

Justice Lai Sio Chiu’s speech at the LawAsia Conference on “Children and the law” calling for reform is welcomed. She suggests that a comprehensive review of the law on custody be made and that we learn from the experiences of other jurisdictions which have abolished the concept of custody.

In jurisdictions such as England and Australia, courts can make limited orders to organise the child’s living arrangements, such as residence orders and specific issues orders.

The English Law Commission’s recommendations that both parents should retain parental power to act for the benefit of the child led to the abolition of the concept of custody.

Australian law has also discarded the concept of custody. In 1996, the Australian Family Law Reform Act 1992 came into force, providing for “parenting orders” which cover issues concerning the child’s residence, contact between the child and parents, and other specific issues.

Translated into the concepts familiar in Singapore law today, the English and Australian positions permit orders of “care and control”, “access” and other specific orders but no custody orders. Parental authority over major issues of the child’s life remain with both parents.

If we accept that joint parenting is best but give up on the idea just because parental conflict is an obstacle, are we doing enough for the children? Joint custody will not resolve parental conflict but it is the first step that we must take. If parents are unable to cooperate, what can be offered as assistance in promoting the child’s welfare? Can the state help our children by helping their parents reduce conflict between them in the long term?

It is the issue that we must seriously pursue.

The writer is an associate professor in the Faculty of Law at the National University of Singapore.

Andy Ho replies:

TERMINOLOGICAL differences aside, Prof Ong may have missed the main thrust of my argument, which was that any reform of the law which requires a presumption of joint custody is not to be welcome.

Because it is precisely true that the courts in Singapore do not (yet) make “shared care and control” or joint physical custody — orders, my argument was that a call for reform — “at the extreme”, as I stressed — could include passing laws to make it mandatory for courts to consider joint (physical) custody in all cases.

Why? As Prof Ong points out, the joint custody orders currently available are already basically joint custodial orders or shared responsibility, regardless of where the children are actually living — for making major decisions about their welfare, including education, health care and religious upbringing. This gives both parents equal responsibility and authority to raise their children.

Any call to reform the current system must include, at a minimum, making joint legal custody a presumption that the court must rebut if it decides not to order it. This would be burdensome. But more than this, I was worried that, “at the extreme”, a call to reform the current system might include making joint physical custody a rebuttable presumption. In that case, the court would always have to show why it does not make such an order in any particular case.

I did not assume this would indeed already be ordered, here, but it is this which I urged Parliament, above all, not to legislate for.

My argument that court-imposed joint custody would not be good policy was no doctrinaire stance but one grounded in empirical facts. Accordingly, I pointed out what that evidence against court-imposing joint custody over the past three decades looks like.

Thus I cannot agree that “joint parenting is best”. Remember, we are talking about decision-making.

Moreover, the evidence also makes clear that when there are good parents of different purposes, imposing joint custody does not move them in the direction of cooperation. Thus, the evidence just does not bear out the claim that joint parenting is best to co-parenting by the parties.

At their best, custody arrangements can lead to divorcing family’s needs. As such, legislators should be wary of implementing any law which imposes any one type of arrangement.

Prof Ong and I also differ on the solution. Instead of another government agency, I argued for a primary care-taker preference in deciding custody because this serves the best interests of the child and there would be continuity and stability of care.