

PARENTS AND CUSTODY ORDERS – A NEW APPROACH

When divorce terminates a marriage, the children of the marriage lose a fundamental cornerstone to their world of happiness and security. The law recognizes the welfare of such children to be of paramount importance. The court makes custody orders which it considers to be the best for the children under the circumstances. It is proposed that the law should move towards instilling in parents a greater sense of responsibility for their children by embracing the concept that parenthood is for life and that parenthood entails heavy responsibilities. Today, England has replaced the concept of custody orders with parental responsibility. As a consequence of the English Children Act, both parents with parental responsibility continue to be involved in the child's life regardless of the breakdown of the marital relationship. This article discusses recent cases on custody orders as well as the direction Singapore should take with respect to custody orders and parenting responsibilities.

I. INTRODUCTION

ON 7 February, 1999, the Sunday Times reported:¹

More children are getting caught in bitter custody disputes as the number of divorces continues to climb ... Sometimes, parents ask for custody out of spite, to make life difficult for the ex-spouse.

When a marriage breaks down, the court attempts to find an arrangement which will promote the best interests of the children. Section 125 of the Women's Charter² empowers the court to order a child to be placed in the custody of his or her father or mother or any other suitable person. It further directs that the paramount consideration in making the order is the welfare of the child.

Today, jurisdictions such as England and Australia have ceased making the broad custody orders, so that orders made regarding the child's living arrangements operate within the new approach that imposes on both parents parental responsibility which continues regardless of the breakdown of their

¹ The Sunday Times, February 7, 1999, at 32.

² Cap 353, 1997 ed.

relationship. 'Parental responsibility' is defined in the English Children Act³ 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

Singapore, however, retains the traditional position where custody orders are commonly granted to divorcing parties. In 1996, Singapore ratified the Convention of the Rights of the Child 1989. Of relevance to the discussion is Article 18 of the Convention which provides:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern.

This is a welcome step towards the recognition that the law must give priority in ensuring that the welfare of children is given sufficient attention. Singapore's commitment to this principle may, itself, require thought of whether broad custody orders remain appropriate.

Recent cases and statutory changes on the effect of custody orders will be examined. Custody orders are so commonly made in Singapore that one would assume that the meaning of custody is reasonably clear. Unfortunately, the reality is that "guardianship" and 'custody' are often used but seldom well understood."⁴ After a brief examination of the law on custody, the Singapore High Court remarked in *Yasmin Yusoff Qureshi (mw) v Aziz Tayabali Samiwalla*:⁵

Surprisingly, the term "custody" does not have a settled legal meaning. It is not defined in the Singapore legislation, either in the Guardianship of Infants Act or in the Women's Charter ... The law of custody is ... in a state of confusion.

The next step is to consider how the law can promote the interests of the children under the unfortunate circumstances of a breakdown of a marriage. This article focuses on custody orders relating to the children of the marriage terminated by a divorce where the choice made by the court is, almost always, between the two parents.⁶ It is submitted that, when parents divorce, the

³ 1989, c 41.

⁴ Leong Wai Kum, *Principles of Family Law in Singapore* (1997) at 527.

⁵ Originating Summons 799 of 1990, High Court, 19 December, 1992.

⁶ Ss 124-125, Women's Charter, *supra*, note 2.

best arrangement for the child is to award joint custody to both parents, thereby enabling the child to retain a strong connection with both parents despite his parents' break-up. Although it is possible for persons other than the parents to be given custody or to be appointed guardians of the children, this issue is beyond the scope of this article.

It is argued that parents must first be educated on their roles as parents. They must be made to realize that, despite their own emotional stresses, the law still expects them to ensure that the children continue to be well cared for physiologically as well as emotionally. The law should then move towards encouraging joint parenting by granting more joint custody orders or making no order as to custody. It should also ensure, as far as practicable, that parents possess the necessary support to carry out joint parenting.

II. CUSTODY ORDERS: RECENT CASES AND STATUTORY CHANGES

The advent of the Children Act 1989⁷ in England abolished the concept of 'custody' in that jurisdiction to focus even more sharply on the concept of parental responsibility arising from parenthood. This new concept of parental responsibility therefore in practice replaces the old notions of guardianship and custody.⁸ English courts today has granted more limited orders to organize the child's living arrangements such as residence orders and specific issues orders. The enactment followed the the English Law Commission's⁹ recommendations that both parents should retain parental power to act for the benefit of the child subject to any court orders on residence, contact or other specific issues. It is thought that this scheme would encourage cooperation between the parents.¹⁰

Australian law has also moved in the same direction. In 1996, the Family Law Reform Act 1995¹¹ came into force. 'Parenting orders' are now granted by the court which cover issues concerning the child's residence, contact between the child and parents and other specific issues.¹²

Singapore retains the position prior to the enactment of the Children Act in England. The court may award one parent care and control but joint custody to both parents. In such a case, the parent with care and control has the responsibility of managing the day to day matters of the child while

⁷ *Supra*, note 3.

⁸ For some discussion on the history and meanings of these terms, see the English perspectives in Cretney & Masson, *Principles of Family Law* (6th ed, 1997), at 609-611; see also Ch 11, Leong Wai Kum, *Principles of Family Law*, *supra*, note 3.

⁹ Law Com No 172.

¹⁰ *Ibid*, paras 4.5-4.9.

¹¹ No 167 of 1995.

¹² See Ch 21 of Anthony Dickey, *Family Law* (3rd ed, 1997).

the other parent has regular hours of contact with the child in accordance with any access order. Both parents make major decisions regarding the upbringing of the child. It is also possible for a court to give care and control to one parent but make no orders concerning custody. In these cases, one parent controls the day to day matters of the child while both parents retain control and responsibility over major decisions. These two orders can be contrasted with the order for sole custody. Where sole custody is granted to one parent, the other parent's involvement in the important aspects of the child's life is diminished by the order. Recent cases in Singapore have shed some light on the effects of sole and joint custody orders on the rights and responsibilities of the parents.

A. Custody Excludes the Non-custodial Parent's Involvement in Some Important Decisions Relating to the Upbringing and Education of the Child

Section 126 of the Women's Charter¹³ provides that the person given custody shall be entitled "to decide all questions relating to the upbringing and education of the child". This affirms the theory that 'custody' embodies all authority, including decision-making large and small, over the child. While the Women's Charter makes it clear that the parent given custody may make decisions relating to how the child should be brought up, it does not prescribe the extent to which the parent deprived of custody is excluded from involvement in the child's upbringing.

In *Tan Yong Chew v Tan Bee Lay*,¹⁴ the court awarded sole custody to the mother of the child. The judgment suggests that the parent deprived of custody is also deprived of involvement in making major decisions such as "which school the child is to attend".

In *Albert Yeap @ Yeap Beng Yong v Wong Elizabeth (MW)*,¹⁵ the High Court was of the view that:

Given such animosity,...(if) joint custody were given, I anticipate that the parties would have endless arguments on matters *such as the choice of schools, tutors, healthcare, etc.* It is clear in my mind that what is called for in this case is for custody of the minor children be (*sic*) granted to their mother who knows the children best and, in the circumstances, will be in a better position than the husband to take such decisions. (emphasis added)

¹³ *Supra*, note 2.

¹⁴ Divorce No 579 of 1996, High Court, 9 June, 1997.

¹⁵ Divorce No 3667 of 1995, High Court, 1 April 1998.

The judgment suggests that the non-custodial parent has no control over matters concerning the education and healthcare of the child.

The effect of these two recent cases appear to be that the parent deprived of custody is involved with the child only by way of contact with the child. He can spend limited time with the child but has no direct influence over the major decisions taken with respect to the child. The influence is at best only indirect, in the form of shaping the child's life or influencing the child's choices during the contact hours. These cases, however, do not deal with the question of whether there are any other fundamental matters which the non-custodial parent continues to control jointly with the other parent. It is by no means clear that this view is correct. It is possible to suggest that, whatever the original theory behind custody, the law has changed in several regards. It will be shown below that judicial and statutory changes limit the extent of authority of the 'custodian' of the child.

B. Custodial Parent's Control not Unlimited

Recent cases and amendment to the Women's Charter indicate that the control of the custodial parent over the child's life is not unlimited. There are at least three identifiable aspects fundamental to the relationship between parent and child which the non-custodial parent continues to control.

(i) Surname of child

In *L v L*,¹⁶ the mother obtained sole custody of the child when she divorced her husband in 1990. The mother changed the child's surname from L to T the following year. The father discovered the change of surname only when the child started school in 1995. He made an application to avoid the deed poll or to have the child's name reverted to L but the application was refused. On appeal, the Court of Appeal held:¹⁷

The surname of a child is the symbol of his identity and the link between the child and his father. To change the surname of the child is thus a serious matter and the court will not countenance such a change unless there are compelling reasons to do so...The mother was not empowered by the custody order to sever this link between M and the father unilaterally by renouncing on M's behalf her surname L and assuming on her behalf the surname T.

¹⁶ [1997] 1 SLR 222.

¹⁷ *Ibid*, at 228.

The court drew support from *Re T (otherwise H), an infant*¹⁸ which stated that the right of the custodial parent is not unlimited:

An order for custody ... gives the person to whom custody is given the right to the custody of the child and to bring the child up....It does not deprive a father, who is not given the custody of the child, of all his rights and obligations in respect of his child. He remains, subject to the rights conferred on the person to whom custody is given by the court, the natural guardian of the child, and among the residual rights which remain to him are any rights which he may have at law with regard to the control of the child.

Thus the award of custody does not give the custodial parent all rights over the child to the exclusion of the other parent. The non-custodial parent retains some residual rights of which control over the surname of the child is one of them. This position is rather similar to the current English position. The English Children Act 1989 provides in section 13(1)(a):

Where a residence order is in force with respect to a child, no person may –
 (a) cause the child to be known by a new surname ... without either the written consent of every person who has parental responsibility for the child or the leave of the court.

Arguments for a contrary position in respect to this issue have been offered.¹⁹ Whether the control over the surname of the child should be within the unilateral control of the custodial parent may be considered in the light of the role of the step-family in contributing to the welfare of the child. Where, as in *L v L*, the child has settled down into a new step-family, there is merit in the argument that it promotes the child's welfare for him to be intergrated into the full-time step-family by sharing a common surname with the rest of the family.

The current position of the law in *L v L* is premised on the belief that the surname link is crucial to the father and child relationship and is beneficial to the child such that it outweighs the benefits which may be produced

¹⁸ [1962] 3 All ER 970.

¹⁹ See Abigail Bond, "Reconstructing families – changing children's surnames" [1998] CFLQ 17. See also the conflicting lines of authority in *Re WG 31/1975* [1979] Fam Law 210 and *Re T (Otherwise H) (An Infant)* [1963] 1 Ch 238 on the one hand and *R v R (Child: Surname)* [1977] 1 WLR 1256 and *D v B (Otherwise D) (Surname: Birth Registration)* [1979] Fam 38 on the other hand.

by a common surname shared with the step-family. The case rightly holds that the matter is one which should involve both parents. However, it is hoped that it will not send the signal to parents that the surname of a child can never be changed whatever the circumstances. Although this is rightly a matter which is not in the unilateral control of one parent, the concept of joint parenting demands that both parents cooperate to promote the welfare of the child. This may require one parent to make certain sacrifices in order to further the interests of the child. Changing the surname may not necessarily lead to a diminished quality in the link between father and child. In a reverse situation where the father is given custody, care and control, the mother does not share the same surname as the child. Is the quality of the relationship between the child and the non-custodial mother affected by the lack of linkage by names? Where the change can be shown to promote the welfare of the child by giving him a sense of belonging in his new family, perhaps, the reason is sufficiently compelling to permit a change of name. On the other hand, where the change of name is made primarily to interfere with the relationship between the father and child, it should not be permitted.

(ii) *Taking the child out of the jurisdiction*

Another ‘residual right’ retained by the non-custodial parent is the control over the period of time which the child may be taken overseas by the custodial parent or any other person. The recent amendments²⁰ to the Women’s Charter²¹ have provided this restriction in section 126(3) as follows:

...where an order for custody is in force, no person shall take the child who is the subject of the custody order out of Singapore except with the written consent of both parents or the leave of court.

Section 126(4) makes an exception in cases where the child is taken out of Singapore for less than one month:

Subsection (3) does not prevent the taking out of Singapore for a period of less than one month of the child by the person given custody of the child or by any other person who has the written consent of the person given custody of the child to take the child out of Singapore.

²⁰ The Women’s Charter (Amendment) Act 1996, Act 30 of 1996, effective on 1 May 1997.

²¹ *Supra*, note 2.

In *Tan Kah Imm v D'Aranjo Joanne Abegail*,²² the mother, who had custody of the children, applied for leave to bring her three children out of the court's jurisdiction to the United States of America. Her reason was to take advantage of her immigrant visa in the US in order to enable the children to further their studies there. The father of the children resisted her application, alleging, amongst other things, that taking the children to the US would deny him all access to them thus preventing him from counselling and taking care of them. The court recognized that taking the children to the US would result in the loss of their relationship with their father. However, it decided that:

Balancing the advantages of a US university education ... and the immeasurable benefits of the children living together with their custodial mother against the loss of the relationship with their father, it was plain to me that the factors clearly weighed in favour of allowing them to leave the jurisdiction. If so, the wishes of the father had to yield to the overall interest and welfare of all the children.

The court believed that the mother intended to take the children to the US in order to further their education and would return to Singapore eventually. Although the non-custodial parent lost the right to have the children reside within the jurisdiction, the case illustrates the importance placed on the non-custodial parent's role in keeping close, personal contact with the child and having the child live in the same country. The custodial parent does not have the unilateral right in this matter.

(iii) *Consent to adoption*

Section 4 of the Adoption Act²³ provides that:

an adoption order shall not be made except with the consent of every person or body who is a person or guardian of the infant in respect of whom the application is made or who has the actual custody of the infant or who is liable to contribute to the support of the infant.

As adoption permanently severs the link between parent and child, consent is required from both parents, whether or not they possess custody of the child.

²² Divorce petition No 2417 of 1991, High Court, 20 July 1998.

²³ Cap 4, 1985 ed.

(iv) *Others*

It is possible to find a common basis, in the three areas identified, for the retention of control by the non-custodial parent. The three areas have direct relevance to the preservation of the link between parent and child. The surname of the child has been held to be “the symbol of his identity” and is “the link between the child and his father”.²⁴ Regular, personal, face to face contact is also essential to the preservation of the link. Adoption severs the link and as such, consent is required from both parents.

Besides these, there are possibly other fundamental rights and responsibilities which the parent cannot lose by the loss of custody. It may be argued that a parent should retain control over the matter of his infant child’s marriage.²⁵ Marriage requires mature commitment and carries with it heavy responsibilities. It alters the relationship and lifestyles of the parents and children and diminishes the authority of the parent over the child. For example, the Voluntary Sterilization Act²⁶ requires parental consent where the person seeking sexual sterilization is under 21 years of age but such consent is not required where the minor is married. Further, the married child belongs to the new nucleus family formed by him and the new spouse. Marriage removes the child from the former nucleus family comprising himself, his parents and siblings. It makes sense to involve both parents in a matter which is so fundamental to the future of the child and the relationship between the parent and child. However, the Women’s Charter²⁷ does not take such a position. It has identified this as an area which is within the unilateral control of the custodial parent. A person possesses the capacity to marry at the age of 18 years²⁸ but his parents’ consents are required as long as he is below the age of 21 years.²⁹ The second schedule, which specifies the persons whose consents are required for a minor’s marriage, provides that if the parents are living together, both parents’ consents are required but “if parents are divorced or separated by order of court or by agreement” only the consent of “the parent to whom custody of the minor is committed by order of any court or by agreement” is required. Thus the schedule provides that where custody of the child is given solely to one parent, only that parent’s consent is required. It further provides

²⁴ [1997] 1 SLR 222, at 228.

²⁵ See Leong Wai Kum, *Principles of Family Law in Singapore* (1997) at 440-441,454.

²⁶ Cap 347, 1985 ed.

²⁷ See S 9, 17 and the second schedule to the Women’s Charter, Cap 353, 1997 ed.

²⁸ S 9, Women’s Charter, *ibid*.

²⁹ S 17, Women’s Charter, *ibid*.

that where the child is “illegitimate”, only the mother’s consent is required. The schedule is too complicated as it provides for too many specific situations and makes unnecessary distinctions between legitimate and illegitimate children.³⁰ Further, it is outdated in view of the development of the law which encourages both parents to cooperate for the welfare of the child.³¹ This area is due for a review.³²

Another area where the non-custodial parent continues to control is possibly the right to guard and protect the child. The parent as natural guardian of his child ought to retain this right, which may be necessary for the child’s welfare particularly if the custodial parent, or the new family in which the child has been brought to live, fails to carry out the role as protector of the child. The non-custodial parent should retain the right to take up proceedings on behalf of the child.

In the matter of deciding the child’s religion, conflicts will arise only where the parents are of different religions. The Constitution of the Republic of Singapore³³ provides in Article 16 that “the religion of a person under the age of 18 years shall be decided by his parent or guardian”. A parent has the constitutional right to decide the religion of his child. If this matter is so important that it has been raised to such a status, it may be another matter in which one parent has no unilateral control over, despite having custody of the child. Singapore comprises a multi-racial society where religious harmony is regarded as crucial to society. In all likelihood the court will avoid placing control over this matter in one parent to the exclusion of the other so that it will not be, directly or indirectly, choosing the religion for the child in cases involving parents of different religions.

The list of matters which both parents continue to control despite the existence of a sole custody order is not exhaustive,³⁴ although a few areas have been identified. It is argued that in considering whether a particular matter should fall within the joint control of both parents, the court should, when there are doubts, lean in favour of joint control. The roles of a mother and a father are different and equally important in the child’s life, and the law should not interfere in this respect unless it is certain that the best interests of the child compels the intervention.

³⁰ The distinction between legitimate and illegitimate children is slowly eroding. For example, in s 68 of the Women’s Charter, *supra*, note 2, the law clearly provides that a parent has the duty to maintain both his legitimate and illegitimate children.

³¹ See s 46 of the Women’s Charter, *supra*, note 2, and Pt IV, *infra*.

³² See Leong Wai Kum, *Principles of Family Law in Singapore* (1997), at 154-156.

³³ The Constitution of the Republic of Singapore, 1992 ed.

³⁴ The right and duty to bury one’s deceased’s child may be another aspect.

III. CONSIDERATIONS IN MAKING ORDERS

An examination of the considerations by the court s appropriate. It will be argued that most of these help to show up only which parent can better provide daily care to the child. Few, if any, show up decision-making skills.

A. General

‘Custody’ is distinct from ‘care and control’.³⁵ It is pointed out in this part that the factors highlighted in the cases are more relevant to care and control orders than custody orders. The significance of this conclusion is, it is argued, that the factors commonly used by the court should be relevant to the issue of care and control while custody should be given jointly to both parents. This approach endorses joint parenting but does not undermine the value of precedent cases which have used the factors in custody and care and control orders. The factors remain relevant to the award of care and control.

Section 125 of the Women’s Charter³⁶ provides:

- (2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard –
 - (a) to the wishes of the parents of the child; and
 - (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

The “paramount consideration” in the making of all orders concerning children “shall be the welfare of the child”. The High Court in *Tan Siew Kee v Chua Ah Boey*³⁷ has held that the welfare of the child includes:

...the general well-being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not measured in monetary terms.

³⁵ These orders have been briefly described in Pt II, *supra*. S 126(2)(b) provides an instance in statute where care and control is considered to be separate from custody: “...an order for custody may – (b) provide for the child to be temporarily in the care and control of some person other than the person given custody.”

³⁶ *Ibid.*

³⁷ [1988] 3 MLJ 20.

The courts have considered various aspects of a child's life which are relevant to his or her welfare. The court will hear the wishes of the parents and the child, as provided by statute. It will consider whether the father or the mother has been the main care-giver of the child throughout the latter's life. The court will also look at the daily living arrangements of the child, in particular, how the child will be cared for on a daily basis and whether the parent's lifestyle enables him or her to spend time with the child. It will consider which parent is more likely to allow frequent and meaningful contact with the other parent. Although the list of considerations cannot be exhaustive, some important factors used in the cases are discussed here.

(i) *Age of the child*

In *Tan Siew Kee v Chua Ah Boey*,³⁸ the court awarded custody of an infant who was under two years old to the father. The court accepted that, amongst other things, the gambling habits of the mother would reduce her ability to contribute to the infant's welfare. This case illustrates that a father may sometimes be the better person than the mother to have custody of even a young child. However, it must be read in the light of a recent case which has placed great weight on the maternal bond in cases of very young children. In *Soon Peck Wah v Woon Che Chye*,³⁹ the Court of Appeal held:

All other things being equal, a very important factor to bear in mind was that we were dealing with an extremely young infant. We felt that the maternal bond between the natural mother and the infant was a pivotal consideration here. The bond between the natural mother and her child is one of the most unexplainable wonders of human nature. It should never be taken for granted or slighted. We have heard of the story of the mother who fought a tiger with her bare hands to save her child from the ferocious beast. Such is the love and sacrifice of the maternal instinct. Since the beginning of civilisation to this age of consumer materialism, the mother's love for her child remains just as strong and unchanging. This court would be doing a disservice to justice and humanity if it turned a blind eye to the most fundamental bond of mankind – between a mother and her child, by taking the child away from the mother. (emphasis added)

³⁸ *Ibid.*

³⁹ [1998] 1 SLR 234.

It is submitted that *Soon Peck Wah* does not undermine *Tan Siew Kee*. As long as it is clear that it states a rebuttable starting position where all other things are equal, it accommodates the result in *Tan Siew Kee*. It is important to bear in mind that the “presumption” is “not one of law but is founded on experience and upon the nature of ordinary human relationships”.⁴⁰ The court in *Soon Peck Wah* cautioned:

We should not be mistaken as reviving the old presumption of ‘maternal custody’ of all young infants. It is only a natural conclusion that, by reason of very tender, young age, the infant would be most dependent on his mother for his physical and psychological needs.

The Court of Appeal also drew support from the earlier case of *Chan Kah Cheong Kenneth v Teoh Kheng Yau*.⁴¹ In this case, the court ordered that the two children of the marriage be in the joint custody of the parents and were to spend their weekdays with their mother and weekends with their father. The learned judge opined:

I felt that it was only right that children so tender as Michael and Neil be, at least for the time being, under maternal care, with substantial exposure to the father, and hence my orders. I was originally disposed to grant custody, care and control to the wife with only reasonable access to the husband but, as a cooling-off mechanism, granted an order whereby the children are to spend their weekdays with their mother and all their weekends from 8pm on Fridays till 7.59pm on Sundays with their father with liberty to apply.

Thus, the order was that custody is jointly held by both parents and care and control is shared unequally with the greater proportion of the time given to the mother since the children were of tender years. The case makes a distinction between ‘custody’ and ‘care and control’. It is respectfully submitted that *Soon Peck Wah* did not accord sufficient attention to the distinction. The High Court in *Chan Kah Cheong Kenneth* took into account the tender age of the children and awarded substantial care and control to the mother, but custody was jointly given to both parents. The Court of Appeal in *Soon Peck Wah*, however, took into account the age of the infant and reached the order that “granted interim *custody*, care and control to the (mother)

⁴⁰ The court quoted from *Shanta Kumari K v Vijayan* [1986] 2 MLJ 216.

⁴¹ [1994] 2 SLR 879.

with liberal access to the respondent.”⁴² The “presumption” is submitted to be appropriate where the issue concerns the order of care and control but not custody. The age of the child is thus an important factor to be taken into account when making the award of care and control. The younger the child, the more likely he is to need the mother’s daily care. Mothers who are still breastfeeding their very young infants are clearly the best candidates for caring for the child on a daily basis. If a young infant is dependent on the mother for his physical needs, the award of care and control to the mother fulfils his needs. But the award of custody need not be given solely to the mother. There is no reason to exclude the father from being involved in matters outside the day-to-day decisions concerning the child.

It may be interesting to add that the approach in *Soon Peck Wah* is unlikely to be used in some other jurisdictions.⁴³ For example, in *R Appellant/Husband and B Respondent/Wife and the Separate Representative Appeal*,⁴⁴ the Family Court of Australia rejected the view that the father lacked “instinctive insight” which the court below had found was lacking in the appellant father:

Having found that the husband could provide adequately for the children’s physical needs, it appears that Kay J also finds that something more is required, namely instinctive insight. This, in my view, is gender stereotyping thinking, suggestive of a concept that a father, as distinct from a mother, is likely to display a lack of instinctive empathy for the welfare of young children...The use of the word “instinctive” suggests the importation of a foreign and gender stereotypical notion related to all fathers.

Thus if fathers and mothers are equally capable of displaying instinctive insight or empathy for their children, then a father would equally be capable of fighting a tiger with his bare hands to save his child. No presumption, factual or legal, nor any general observation on the reality of relationships, is likely to be made in this respect under the Australian position.

⁴² [1998] 1 SLR 234 at 252.

⁴³ See Marygold S Melli, “Toward a Restructuring of Custody, Decision-making at Divorce: an Alternative Approach to the Best Interests of the Child” in Eekelaar & Sarcevic, *Parenthood in Modern Society, Legal and Social Issues for the Twenty-first Century* (1993) 325, at 327-328.

⁴⁴ Appeal No SA 37 of 1995, Full Court of the Family Court of Australia, 21 December 1995.

(ii) *Preserving status quo or continuity of living arrangements*

Stability of environment is important to a child's well-being. In *Wong Phila Mae v Shaw Harold*,⁴⁵ the mother of the children was living in America while the father, who had custody, care and control of the children, was living with them in Singapore. The Court of Appeal noted that at the time of the hearing, the children had been placed in schools in Singapore and were in the course of settling down in their studies. The court refused to interfere with the current arrangements and held that:⁴⁶

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.

In this case, the mother was living abroad and the court opined that the education which the children would receive by living with her in America would be less than conventional:⁴⁷

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 education method which the (mother) would prefer the children to undergo. This was what happened for a period of about six months...when the children literally lived out of a mobile home in the United States.

In this case, there was an earlier order that required the parties to consult each other with regard to the education of the children, with the final decision resting on the father. Apparently, this arrangement was not practical as there was a great deal of dispute concerning the education of the children. The court's final decision to award sole custody, care and control to the father is a sensible one. The unusual facts of *Wong Phila Mae* justified the case for sole custody. There is a world of difference between placing the children in schools in Singapore for formal and systematic education and sending them to America for an informal education by travelling with their mother. As the parents could not agree on the major issue of how the children should be educated, the court, in giving the father sole custody, care and control,

⁴⁵ [1991] 2 MLJ 147.

⁴⁶ *Ibid.*, at 150-151.

⁴⁷ *Ibid.*, at 150.

in effect made a decision on that issue. Its decision places importance on a stable environment where the children can be formally educated. If the court had awarded joint custody to both parents with care and control to the father, the dispute may not cease since both parents will continue to have equal control over the matter of education.

However, had the facts been different, for example, if the mother also lived in Singapore, the case for sole custody may be greatly weakened. In such a case, the court could give the father care and control to preserve the continuity of daily living arrangements, but grant joint custody so that the mother can continue to be involved in the important matters of the children's lives. The children need not be uprooted from the stable environment if care and control remains with the father, yet they will continue to receive guidance in important matters from their mother. The dispute over the education of the children will be minimized if the choices were confined to those offered in Singapore,⁴⁸ unlike the case in *Wong Phila Mae* which also offered an unconventional education through a gypsy-lifestyle in the US. Thus the factor of preserving continuity of living arrangements is again relevant to the award of care and control but not necessarily relevant to that of custody in cases where both parties are living in Singapore. Further, the need to preserve stability in the child's life supports the case for joint custody since joint custody can provide some assurance to the child that both his parents continue to play a parenting role in his life.

(iii) *Cooperation between parents*

A joint custody order is clearly appropriate where the parents are likely to cooperate in matters concerning the child. But where there is acrimony between the parents, the court may refuse joint custody since it may

result in the two parties pulling in opposite directions when it came to decisions such as which school the child is to attend. Such conflicts between the parents could be detrimental to the interests of the child.⁴⁹

According to *Albert Yeap v Wong Elizabeth (mw)*,⁵⁰ sole custody, which places major decisions on one parent, may simply be the lesser evil in such situations. The court lamented:

⁴⁸ See Pt IV, *infra*.

⁴⁹ *Tan Yong Chew v Tan Bee Lay*, Divorce No 579 of 1996, High Court, 9 June 1997.

⁵⁰ Divorce No 3667 of 1995, High Court, 1 April 1998.

Sometimes it is better for a decision (of sole custody) to be made, even if it turns out that the perfect option is not chosen, rather than for the matter to be the subject of conflict between the parents.

It is submitted that the choice between the devil and the deep blue sea occurs less often than is perceived. It is only to be expected that spouses undergoing the stresses of a divorce will behave uncooperatively *vis-à-vis* each other. It may be a means of buttressing their respective bargaining positions over ancillary issues such as property division and maintenance.⁵¹ When the parties are able to separate the financial issues from the issues concerning the child, it is possible, with help from the mediators and counsellors, for the parents to work together for the good of their children. Some parties do not even appreciate the meaning of ‘custody’. Often a parent who is really pursuing rights of care and control or even access rights fight bitterly for sole custody, erroneously thinking that the loss of custody meant the loss of all contact with the child. The lack of clarity in the law between the various terms does not help the situation. The law must give the parents the opportunity for their parental commitment to flourish, after helping them to see more clearly through the divorce and other ancillary matters. The Family Court offers mediation in such matters. In cases of divorce, a District Judge or Deputy Registrar acts as Mediator to the parties. The Mediator puts in “reality checks” to guide the parties towards an amicable settlement. He or she may suggest that the parties review their expectations by consulting their lawyers and come to a more reasonable proposition. Often, parents accept joint custody and consequently joint decision-making in major issues after being assured of their respective rights to care and control and access.

Although the level of cooperation may be a factor relevant to the award of custody, it must be considered with caution. It is only to be expected that the level of cooperation between the parties is very poor when they are in the midst of divorce proceedings as well as contesting various related issues. It may well be that parties will cease contesting custody once it is clear that the law expects joint parenting as the norm.

(iv) *Psychological effects of a custody order*

The court may also be minded to consider the effects of making an order on the behaviour of the parties affected. In *Yasmin Yusoff Qureshi (mw) v Aziz Tayabali Samiwalla*,⁵² the learned judge made no order as to custody as it was of the view that:

⁵¹ See Pt IV, *infra*.

⁵² Originating Summons 799 of 1990, High Court, 19 December 1992.

A joint custody order would only be useful if it indicated symbolically that the father had an equal say in these long-term decisions relating to the child. However, the symbolism could be abused if the father decided to use the joint custody order to impinge on matters which might properly or more appropriately be left to the decision of the mother having care and control. .. I am concerned about the psychological effect of a joint custody order...

The court's ultimate decision to make no order as to custody meant that both parents continued to be involved in the major decisions concerning the child. A joint custody order also achieves somewhat similar results except that it carries with it a psychological impediment. Alternatively, the court may consider awarding sole custody to a parent who appears to be cooperative, while denying custody to the other who is not cooperative and has the tendency to intermeddle. The cooperative parent may be required to consult the other whilst retaining the final right to make decisions. In this way, there will be some consultation between parents but the non-custodial parent will not be able to use any custody order in his favour to impinge on matters.

The consideration of this factor is likely to lead to the same decision as that reached in *Yasmin Yusoff*, that is, to make no orders as to custody. The consequence of this is that both parents continue to take on joint parenting roles. It supports the proposition that the law should intervene minimally in parent-child relationships and adopt joint parenting as the norm. The factor buttresses the case for joint parenting.

B. *Comments*

The making of orders concerning children involves a delicate process of looking at all relevant factors and reaching a conclusion perceived as promoting the welfare of the child. It has been said that the age of the child is highly relevant in the making of care and control orders but less so in custody orders. Similarly, the preservation of *status quo* has direct bearing on whether it is beneficial to leave the child physically in the care of one parent who already has care and control of the daily arrangements but has less to do with the issue of custody. The only factor which is pertinent to the making of custody orders is the level of cooperation between the parents. It has already been argued briefly that, given some time to work things out, it is possible for parents to cooperate for the good of the child. It is submitted that the court should use the factors of age and preservation of *status quo* in making orders of care and control and consider the issue of custody separately. It should grant joint custody in all cases with two exceptions. First, where one parent is so unfit for parenting that the benefits of having

his or her involvement in the child's life is far outweighed by the harm which his involvement may bring to the child. Second, where the relationship of the parents is such that cooperation is impossible even after the avenues of mediation and counselling are exhausted and the lack of cooperation is harmful to the child. The following discussion makes further arguments for joint parenting.

IV. JOINT PARENTING

It is proposed that the law takes on a fresh approach to orders concerning children. It should first recognize that it is important to preserve as much stability in the child's life as possible. 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.⁵³ 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.⁵⁴ 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".⁵⁵ 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 into a decision.

The main resistance to joint custody is the lack of confidence that the parents can cooperate in matters concerning the child's future.⁵⁶ Sometimes, the future conflicts perceived by the court appear greater than they really are. In the matter of education, the greatest conflicts arises when the children are young and are not yet placed in primary schools. Where the children are a little older and already settled down in their respective primary schools, there is little to dispute about under the Singapore education system, where choices are limited by the child's academic abilities. When a decision has to be made at the next stage of formal education, that is, in which secondary

⁵³ See Meyer Elkin, "Joint Custody: In the Best Interests of the Family" in Jay Folberg, *Joint Custody and Shared Parenting* (1985), at 12.

⁵⁴ See *ibid.*, at 13.

⁵⁵ The Sunday Times, February 7, 1999, at 32. The report suggests that children suffer greatly from a conflict of loyalties when they live with one parent and feel that they must not be too close to the other.

⁵⁶ See also Joan B Kelly, "Examining resistance to Joint Custody" in Jay Folberg, *Joint Custody and Shared Parenting* (1985), at 39.

school the child should be placed, the Singapore education system limits the choices by its system of placement according to the child's academic merits. It is thus only with respect to pre-primary school children that both parents may wish to be actively involved. Parents may wish to place them in their *alma mater* primary schools, particularly when placement priority depends much on the parents' connection with the schools. In the matter of healthcare, it is unlikely that there will be disputes regarding the treatment that a sick child should receive or whether the child should wear braces. The potential conflicts which spring to mind are relatively few, once we consider the specific practical issues which may arise for joint decisions. The converse argument is that since there are only a few areas which need both parents' input, it is more practical for the parent with care and control to have sole custody and decide all matters. It is submitted that if the parties can cooperate so that there is no disagreement, whether the decision is always taken jointly or unilaterally, then granting joint custody can only be good for the child. The assurance that a parent has custody of his child who does not reside with him, is valuable to that parent and the child, even if there are not many major decisions that he can be involved in. For example, the child may want one parent to represent his view on a matter to the other parent. The positive effects of joint custody go beyond the making of joint decisions. The arrangement is a symbol to the child that the family is still functioning normally, although under different circumstances which are inevitable due to the separation of the parents.

Recent developments in the law, such as the recent case of *L v L* and the statutory developments in section 126, indicate that our law recognizes the similar sentiment existing in England that parenthood is for life. Cases such as *Albert Yeap v Wong Elizabeth (mw)*,⁵⁷ acknowledge that sole custody is not in itself the ideal solution but merely the more preferable option given the perceived conflicts which may arise from a joint custody order. Modern family law has recognized the importance of both the roles of the mother and the father in caring for the children.⁵⁸ In particular, section 46 of the Women's Charter provides that the spouses are equally bound "in caring and providing for the children".⁵⁹ The roles of the mother and father are complementary to each other. A mother can never teach her son by example how to relate to the world as a man. Her relationship with her daughter cannot substitute a relationship between father and daughter.

⁵⁷ Divorce No 3667 of 1995, High Court, 1 April 1998.

⁵⁸ See Leong Wai Kum, *Principles of Family Law in Singapore* (1997) at 424-431.

⁵⁹ S 46(1), Women's Charter, Cap 353, 1997 ed.

It is argued that placing sole responsibility and rights over major decisions on one parent to the exclusion of the other should be avoided unless there is clear evidence of acrimony which is unlikely to be resolved even in the future and which will produce results that are harmful to the child. Joint parenting should remain the preferred option in most cases, even where there is some evidence of lack of cooperation between the parents. The extra-judicial avenues of mediation and counselling⁶⁰ should be explored with greater fervour for it is possible that initial acrimony can be overcome by the parental commitment to work things out for the child's welfare.

In choosing joint parenting, the court can employ assistance from procedural law and the alternative dispute resolution processes. In May 1997, the Women's Charter (Parenting Plan) Rules⁶¹ came into force. The Rules require the filing of a parenting plan together with the divorce petition. It is understood that currently, the parenting plans filed by parties are brief and merely state the personal particulars of the child, such as his name and age, and the name of the school in which he attends. It also contains brief information on who his daily care-giver is, whether he is suffering from any disability and whether he is the subject of any court order. The court may have to insist on a fuller and more comprehensive plan concerning the welfare of the child. This may compel parties to think more carefully about the need to cooperate for the sake of the child's welfare. It may require parties to think specifically about whether they can commit to what the law demands of them, that is, to continue to bring up the children together. Where sole custody is sought despite knowing the law's expectations, the court may even require parties to give reasons why joint parenting is inappropriate in the parenting plan.

The alternative dispute resolution processes of mediation and counselling can also help parties work out a solution which is acceptable to both. It is hoped that the parties will agree to joint parenting, allowing both the roles of the mother and the father to be discharged. It is believed that parental agreement is desirable and ought to be encouraged.⁶² The idea that parties will be more committed to carrying out the arrangement that they have

⁶⁰ S 50 of the Women's Charter, Cap 353, 1997 ed, which was inserted by the Women's Charter (Amendment) Act 1996, Act 30/96, effective on 1 May 1997, provides that the court may refer the parties for mediation or counselling.

⁶¹ S 214/1997.

⁶² See Marygold S Melli, "Toward a Restructuring of Custody, Decision-making at Divorce: an Alternative Approach to the Best Interests of the Child" in Eekelaar & Sarcevic, *Parenthood in Modern Society, Legal and Social Issues for the Twenty-first Century* (1993) 325, at 329.

agreed upon, in contrast to one that is imposed on them, is attractive.⁶³ Parents are the best persons to assess their own capacities and when they agree to a parenting plan which involves both parents as much as possible, whilst recognizing each party's strengths and limitations in managing the different aspects of the children's lives, the children will benefit much from the arrangement.

It is proposed that the Singapore Family Court implements an "information session" similar to the one currently in place in the Family Court system in Australia.⁶⁴ At the information session, which should be held within a reasonable time after a divorce petition has been filed, a Judicial Officer of the Family Court will address the participants on the legal processes that will follow the filing of the divorce petition. A Court Counsellor may then address the participants on the effects of the breakdown of the marriage on the children. He or she may alert them to the dangers of drawing the children into their own problems, manipulating the children to strengthen their positions and so forth. The participants should be educated on their roles as parents; that the law expects them to continue to raise the children without compromising on the children's physical and emotional well-being.

While it is argued that joint custody should be pursued, it is recognized that "joint custody is not for everyone".⁶⁵ In an article of this title,⁶⁶ the author identifies traits in parents which enable them to benefit from joint parenting and traits which make up poor candidates for joint custody. The traits which make up poor candidates are:

1. People who cannot communicate with one another....
2. Parents who cannot cooperate....
3. Parents who are actively litigating for sole custody of the children....

The second trait identified must be considered with this caution:⁶⁷

⁶³ See Simon Roberts, "Mediation in Family Disputes" [1993] 46 MLR 537; Trina Gillo, "The Mediation Alternative: Process Dangers for Women, [1991] 100 Yale L J 1545.

⁶⁴ See Family Law Rules, Case Management Guidelines in the *Australian Family Law – Court Handbook* (1997), at 8242.

⁶⁵ Richard A Gardner, "Joint Custody is Not for Everyone" in Jay Folberg, *Joint Custody and Shared Parenting* (1985), at 63.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at 66.

Because the animosity between parents may be greatest at the time of their divorce, that often is not a good time to recommend a joint custody arrangement.

The third trait must also be seen in the light of the parties' emotional conditions:⁶⁸

But not everyone agrees that parents who are actively litigating are automatically poor candidates for joint custody. Some argue that a joint custody arrangement might reduce hostilities by removing one area of conflict.

An example of a case where joint custody is unsuitable is possibly that of *Helen Ho Quee Neo v Lim Pui Heng*⁶⁹ where the court opined:

It seemed to us absurd, having regard to the obvious bitterness and lack of cooperation prevailing between the divorced parties, to make any such orders (of joint custody). It did not appear to us that the relationship between the parties, culminating in the uncontested divorce proceedings founded on cruelty on the part of the respondent, was such as to make any order for joint custody workable or desirable.

It is hoped that the processes of mediation and counselling will enable the unsuitable candidates to be picked out. Once it is recognized that the second and third traits may arise due to the parties' temporary emotional state at the time of divorce proceedings, it is possible that joint custody can be best for the family in the majority of cases.

V. CONCLUSION

A parent is capable of making great sacrifices for the good of his or her child. Whether it is the sacrifice of risking life and limb fighting a tiger or giving up the child for its own good,⁷⁰ the parental commitment to work things out for the best interests of the child should not be underestimated.

The failure to give sufficient attention to the children of broken families lead to very severe consequences. It is reported that "(t)eens rebel by getting into trouble with the law and skipping school...(s)ome carry the scars into

⁶⁸ *Ibid*, at 67.

⁶⁹ [1974] 2 MLJ 51, at 53.

⁷⁰ See the example recorded in the Bible in 1 Kings 3:16 to 27.

adulthood and find it hard to commit to a relationship”.⁷¹ The stability of society depends much on the strength of the family. If a divorce is inevitable, the law must attempt as far as possible, to rescue the victims of divorce – the children, from the destruction it may cause them. It can begin by educating parents that divorce does not relinquish them from their responsibility to raise their children lovingly and free from the emotional hardships arising from the break-up. It must expect more from parents, compelling them to work much harder to bring the children up unscathed by the marital breakdown. Singapore does not need to abolish the concept of custody orders in order to move towards joint parenting. It can retain the present position which has the advantage of a discretion in the court to make sole custody orders in cases where joint custody may be unsuitable.

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⁷¹ The Sunday Times, February 7, 1999, at 32.

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