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RESTATEMENT OF THE LAW OF GUARDIANSHIP AND CUSTODY IN SINGAPORE

Guardianship and custody in family law regulates the relationship between a child and the adults who exercise authority over him or her. This article attempts to restate the basic principles. The concept of guardianship should be understood in relation with parenthood. The settled family law meaning of guardian should be preserved to maintain the appropriate balance of authority between the parents, the guardian and casual minders of the child. The welfare principle is ubiquitous to resolve all guardianship applications. The courts should exercise their powers in guardianship applications to preserve parental responsibility. The law works optimally when these basic principles become firmly established.

THE law of guardianship and custody in Singapore is in transition. It has a long history and its principal statute, the Guardianship of Infants Act,[1] was last amended more than thirty years ago.[2] Clues to difficulties in this area of family law abound. A judge despaired in 1990 of the confusion in the law of custody.[3] A text begins its chapter on guardianship and custody with "Meanings" and ends the section predicting future "Trends".[4] Several

[1] Cap 122, Statutes of the Republic of Singapore, 1985 Ed.

[2] *Vide* Act 17 of 1965.

[3] Judicial Commissioner Michael Hwang in *Yasmin Yusoff Qureshi (mw)* v *Aziz Tayabali Samiwalla* OS 799 of 1990, unreported, is often quoted for his observation, "Surprisingly, the term "custody" does not have a settled legal meaning. ... The law of custody is therefore in a state of confusion." That this case concerns a Muslim child and her Muslim parents raises questions of the application of non-Muslim guardianship law to Muslims; see *infra*, note 119.

[4] Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore, Butterworths, 1997), at 527 & 542 respectively.

court decisions leave indelible impact.[5] Recent articles suggest we should rethink the fundamentals.[6]

This article attempts to restate the basic principles of the law of guardianship and custody. They are discussed in five fairly independent Parts. One, the concept as it relates with parenthood. Two, the meaning of "guardian" as discussed in cases. Three, an approach to understanding "guardian" that maintains its settled meaning. Four, the welfare principle as the ubiquitous standard of disposition of guardianship applications. Five, how the courts can exercise their powers in order that guardianship supports the continuance of parental responsibility.

I. The Concept of Guardianship

Chief Justice Yong Pung How recently affirmed that guardianship is a legal concept originating in the English fuedal system.[7] Part of the difficulty of the law of guardianship stems from it being concept so that it is worthwhile restating this character. Guardianship, to a family lawyer,[8] "is the mechanism by which the law bestows parental authority on an adult over a child." The guardian stands in the position he or she would be if he or she were a parent of the child.

The law of guardianship and custody is concerned with the relationship between an adult and a child (as in a young dependent person). A guardian

[5] The High Court in *Yasmin Yusoff Qureshi (mw)* v *Aziz Tayabali Samiwalla*, *supra*, note 3, suggested that dismissing a guardianship application brought by parents so that they are left to their legal status quo *vis-à-vis* their child may sometimes be the best temporary resolution of their dispute. Also, the Court of Appeal in *L* v *L* [1997] 1 SLR 222 decided that even a parent who was not granted custody of his young daughter retained some residual decision-making authority *vis-à-vis* the parent who was granted sole custody. The Court of Appeal again in *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor* [1999] 3 SLR 38 offered definitions of "guardian", "legal guardian" and "lawful guardian" and re-affirmed the welfare principle.

[6] See Chan Wing Cheong, "Applications under the Guardianship of Infants Act" [1998] SJLS 182, commenting on the way to understand "guardian" and "lawful guardian" and the formal requirements of a guardianship application and Debbie Ong Siew Ling, "Parents and Custody orders – A New Approach" [1999] SJLS 205, encouraging joint custody orders for parents.

[7] In *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *op cit*, at 50 para 37. The local history is traced in Leong Wai Kum, *Family Law in Singapore: Cases and Commentary on the Women's Charter and Family Law* (Singapore, Malayan Law Journal, 1990) at 251 and elaborated in Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 528-529 while the development of the statutory provisions is traced in *Butterworths' Annotated Statutes of Singapore Volume 6 Family* (Annotated by Leong Wai Kum) (Singapore, Butterworths, 1997) at 35-36.

[8] *Butterworths' Annotated Statutes of Singapore Volume 6 Family, ibid,* at 39.

under this area of law, then, is not like the guardian appointed under another area of law for a person, normally an adult, who suffers mental disability. This article is concerned only with the guardian of a child. Although some statutes use "infant" and others "child" it has been observed there is no significance in this as the terms may be thought interchangeable.[9]

A. *Relating with Parenthood*

Guardianship should be related with parenthood because it aims to bestow the same authority that would naturally accompany parenthood.

(i) *Parenthood as fact*

Parenthood is easier to grasp because it is fact more than legal concept. The vast majority of parents become so by biological means so that their parenthood can be proved with scientific evidence. The law does not create parenthood except in the very small minority of cases where an order of adoption of a child creates the parenthood of the adoptive parent.[10] In contrast, guardianship does not rest on biology and, therefore, cannot be established scientifically. It is a mere idea to convey a relationship between a child and an adult like that between the child and his or her parents, that is, a relationship the law supports and bestows effects on.

(ii) *Parent as natural guardian*

"Guardian" would be easier to understand if it denotes an adult who is never the parent of the child. Unfortunately, the terms overlap by two aspects of the law of guardianship. A parent is also, in law, the child's guardian in these two scenarios. One, the parent is, in the eyes of the law, the guardian of the child by nature, that is, the child's natural guardian. Two, among the adults who can be appointed by a court order as guardian of the child after litigation, the most common appointee is one of the parents of the child. It is the norm that a parent is appointed the child's guardian at the conclusion of a guardianship application between the spouses over

[9] *Butterworths' Annotated Statutes of Singapore Volume 6 Family, op cit*, at 41.

[10] See the Adoption of Children Act, Cap 4, Statutes of Republic of Singapore, 1985 Ed, s 7, providing that "all rights ... of the parent ... shall be extinguished, and all such rights ... shall vest in ... the adopter ... ." In future, we may further provide for the creation of parenthood in assisted conception of a child by choosing one of the possible pairs of adults involved as parents not unlike the (English) Human Fertilisation and Embryology Act 1990.

the appointment. A parent, thus, is a natural guardian, and may also be the court-appointed guardian if the spouses make an application for the court to appoint one of them.[11] The difference between a parent and a guardian is that a non-parent can also become appointed the child's guardian. The meaning of guardian is discussed in Parts II, through court decisions, and III, through a suggested approach, below.

B. *Contrast with Layman's Understanding of "Guardian"*

The legal usage of "guardian" should be distinguished from the layman's understanding. The layman may use the term rather loosely to convey anyone senior who inevitably exercises some authority. A young wife may even refer to her older husband as her "guardian".[12] While it would be ideal if we could reach consistency in the legal and layman usage of this term, it could be too much to hope for. Where a term is used as loosely in common parlance as "guardian", we should differentiate its legal usage.

Of the relationship between a child and an adult in particular, a layman may regard a number of people as the child's guardian. Any adult having contact with the child apart from the fortuitous may be thought of as the child's guardian. Certainly, the public regards the adult who has physical possession of a child as the child's "guardian". This may not suffice in legal usage of "guardian".

II. Legal Meaning of "Guardian"

In family law, the term "guardian" has a narrower meaning. The purpose of the concept is to convey the relationship between the adult and the child where the adult is authorized to exercise some or all the authority a parent can exercise over the child. It has been observed[13] "there used to be a fairly

[11] The High Court has however decided that, as the parents were already natural guardians, it could dismiss their guardianship application so that they were left to their status at law: see *Yasmin Yusoff Qureshi (mw)* v *Aziz Tayabali Samiwalla*, *supra*, note 3. It is suggested in Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 540 that this could start a trend. That it is desirable is discussed in Part V below.

[12] A validly married person cannot have a guardian as this term is used by family lawyers to refer to the adult with parental authority over a minor; see Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 551.

[13] Leong Wai Kum, *Family Law in Singapore: Cases and commentary on the Women's Charter and family law*, *supra*, note 7, at 251.

large number of types of guardianship more or less related to the different means of holding property." Of the types that remain relevant today:[14]

> Parents are ... natural guardians ... . Parents may appoint a person to become the child's testamentary guardian after the parent's death. Then, there are guardians appointed by court order who are generally guardians of the person of the infant but exceptionally may be guardians of the property of the infant. Appointments by court may be either under the Guardianship of Infants Act or the Women's Charter ... . The High Court can voluntarily become the guardian of the child if it makes the infant its ward.[15] Lastly, the Rules of Court 1996[16] require, in Order 76, that an infant may only begin an action in court through an adult who acts as his or her next friend or defend an action through his or her guardian *ad litem*. Similarly, in an application by an adult to adopt a child, the Rules of Court 1996 require, in Order 68 rule 5, that someone generally the Attorney-General be appointed the child's guardian *ad litem* to safeguard the child's interest.

The way family lawyers use the term, therefore, is determined by its purpose to seek out the adult(s) who possess(es) parental authority over a child. It may be observed of each category of persons above that the adult 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. This restricted meaning is settled among family lawyers.[17]

A. *Guardians other than of Personal Well Being of Child*

Of the categories of guardians listed above, it is possible to separate the guardian who has general authority over the personal well being of the child from the guardian whose authority is more limited. The guardians of limited authority are not the interest of this article.

[14] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 528-529. See also Chan Wing Cheong, "Applications under the Guardianship of Infants Act", *supra*, note 6, at 184.

[15] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 476: "The court, in effect, became the parent so the exercise of parental authority over the child was subject to the court's approval."

[16] S 71/96, now Rules of Court, 1997 Ed, O 76 r 2.

[17] The same meanings were observed of English family law by its academics; see PM Bromley and NV Lowe, *Bromley's Family Law* (7th ed) (London, Butterworths, 1987) at 346 and SM Cretney *Principles of Family Law* (4th ed) (London, Sweet & Maxwell, 1984) at 296-297 & 312. England has dramatically changed its terminology in guardianship law by the (English) Children Act 1989 so it is the older editions of these texts that should be consulted.

(i) *Guardian of property of infant*

First, the person who is appointed by court as the guardian of the property of the infant has authority only over his or her property and income. The guardian of the property of the infant does not in that capacity also possess authority over his or her personal well being. This limitation is made clear in the Guardianship of Infants Act,[18] which allows this exceptional appointment. It is worth noting section 15 that requires the guardian of the property of the infant to give security to assure due performance of his duties, section 16 that makes specific some limits on the authority, section 17 on the guardian's inability to give a good discharge for debts of the infant and section 18 on the extent to which the guardian may employ income for the maintenance and education of the child. To further emphasize the restrictions on the guardian of the property of the infant, section 20 expressly reminds that he or she may apply to court for opinion, advice or direction, and section 19 allows a special appointment of a guardian of the property of the infant with less restriction on his or her authority but only where it is a "small estate".

In *In re Haji Abdullah bin Haji Moosah, deceased, Syed Omar bin Mohamed Alsagoff and Another* v *Rosina binti Haji Mohamed Tahir and Others*,[19] the Straits Settlements Supreme Court was asked to approve of an arrangement whereby money owed two Muslim infants whose father had died would be paid to their mother instead. Their mother was their natural guardian. Chief Justice Hyndman-Jones observed that, although sections 792 and 794 of the Straits Settlements Civil Procedure Code[20] declared the father if living or the mother as the guardian of the person and the property of an infant, this was subject to restrictions. The court may appoint someone else to act jointly with the natural guardian and the guardian must act prudently to protect the infant's property. The Chief Justice concluded the Code[21] "has not expressly, nor ... even impliedly, sanctioned the course which the applicants seek to adopt" and thus did not approve of the arrangement. This old case continues to be relevant. It illustrates the limits on the authority of the guardian of the property of the infant. It is also notable that there are no reports of such appointments in recent years. Such a guardian is not the interest of this article.

[18] Cap 122, *supra*, note 1.
[19] (1910) SSLR 46.
[20] Straits Settlements Ord XXXI of 1907.
[21] *Op cit*, at 52.

(ii) *Guardian ad litem*

The guardian *ad litem* is similarly restricted in authority and indeed further restricted in tenure. The same is true of both the guardian *ad litem* appointed to represent the child in a civil suit in order to overcome the child's "disability" in civil procedure as well as the guardian *ad litem* appointed to protect the child's interest in adoption proceedings. In both instances, the appointment bestows authority for one specific matter only. When the civil suit or adoption proceedings terminate, the guardian *ad litem* is *functus officio*. During the time the appointment continues, the guardian *ad litem* is restricted in his or her authority to the matter at hand. The guardian *ad litem* in that capacity is not authorised to pursue the general well being of the child. He or she is not the interest of this article.

B. *Court as Guardian*

The possibility that, by wardship proceedings, the court becomes in effect the guardian of the child should also be excluded from the discussion in this article. This power has been traced from its origin as inherent in the superior courts and later encapsulated in section 17 of the Supreme Court of Judicature Act.[22] The power is affirmed by the Court of Appeal in *Soon Peck Wah* v *Woon Che Chye*.[23] It has been suggested that wardship[24] "opens up an unlimited range of remedies and powers at the court's disposal. ... Once a child is made a ward of court ... no important step in the child's life can be taken without the court's consent." The court as guardian under wardship, therefore, is hardly limited in its power. This article, however, focuses on people who are appointed guardians. Wardship is not included for discussion.

C. *No Definition of "Guardian" in Family Statute*

Despite the settled meaning that family lawyers accord the term, "guardian" is not defined in any family statute. This has been a problem. In this part, we survey judicial discussion of the term.

[22] Cap 322, Statutes of the Republic of Singapore, 1999 Ed, and for history of wardship, see Leong Wai Kum, *Family Law in Singapore: Cases and commentary on the Women's Charter and family law*, *supra*, note 7, at 259-263 and *Principles of Family Law in Singapore*, *supra*, note 4, at 476-478.

[23] [1998] 1 SLR 234.

[24] Leong Wai Kum, *Family Law in Singapore*: *Cases and commentary on the Women's Charter and family law*, *supra*, note 7, at 259-260.

(i) *Problem noted*

In the High Court on appeal from the decision of the District Court[25] in *Lim Kok Chye Ivan & Anor* v *Lim Chin Huat Francis & Anor*,[26] Justice Kan Ting Chiu noted the lack of definition. Only the facts that reflected on the status of the applicants in the originating summons *vis-à-vis* Esther, the subject of the application, are useful here. The mother of the girl handed her over to the applicants soon after her birth. They left her daily care and control with the first applicant's mother and were never able to bond with her. A first petition by the applicants to adopt her was voluntarily withdrawn when they realised that the officials of the Ministry of Community Development would not support their petition for the lack of bonding between them and the girl. Thus, the applicants came into their relationship with Esther lawfully but this relationship was not yet officially sanctioned by an order of court.

In the District Court, issue was made of the applicants' lack of relationship with Esther. The defendants argued that the only provision in the Guardianship of Infants Act[27] that permits originating application, *ie*, the enabling provision, was section 5. Section 5 allowed application by "either parent or ... any guardian appointed under this Act". The applicants clearly did not come within either category of this phrase. The issue thus became whether this phrase in section 5 limited *locus standi* to originate applications under the Guardianship of Infants Act.

The District Court judge had accepted academic opinion[28] that section 5 was the only enabling provision in the Act. On this view, the application was flawed because the applicants did not come within section 5. The District Court dismissed the application summarily.

[25] OS No 5001/96. Application in guardianship proceedings used to be made to the High Court but, after the Family Court, a District Court, was established in 1995, the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 1996, S110/96, transferred these originating applications to the Family Court.

[26] [1997] 3 SLR 1042. This decision has been commented upon; see Chan Wing Cheong, "Applications under the Guardianship of Infants Act", *supra*, note 6.

[27] Cap 122, *supra*, note 1.

[28] See Chan Wing Cheong, "Applications under the Guardianship of Infants Act", *supra*, note 6, at 183-187 citing Leong Wai Kum, *Family Law in Singapore: Cases and commentary on the Women's Charter and family law*, *supra*, note 7, at 259 and Khoo Oon Soo, *Parent-Child Law in Singapore* (Singapore, Butterworths, 1984) at 122 and pointing out that in the (English) Guardianship of Minors Act 1971 a provision "very similar" to our s 5 was also accepted as its enabling provision although this statute is now obsolete in view of the (English) Children Act 1989.

On appeal, Justice Kan Ting Chiu rejected the academic view as too limiting[29] and overturned the District Court judge's decision. His Honour decided that the application was properly begun under section 14 of the Guardianship of Infants Act. That section 5 was not the only enabling provision as section 14 was another provision that enabled originating application. Section 14, so regarded, allows any adult to originate an application whenever "an infant leaves, or is removed from, the custody of his lawful guardian". On this view, together with his Honour's broad understanding of "lawful guardian" discussed below, the applicants had properly originated the application. Justice Kan Ting Chiu sent the matter down to the District Court for re-hearing the application.

(ii) *Children and Young Persons Act definition of "guardian"*

Justice Kan Ting Chiu discussed the proper definition of "guardian". His Honour noted that the Children and Young Persons Act[30] contains a definition and decided it was useful to the definition of the same term in the Guardianship of Infants Act.[31]

The Children and Young Persons Act[32] is a statute creating criminal offences and regulating some aspects of criminal procedure although it is narrower than the Penal Code[33] in focussing only on the protection of children and young persons and also narrower than the Criminal Procedure Code[34] in focussing only on juvenile delinquents. In its section 2 Interpretation, it defines "guardian" rather loosely as "includes any person who, in the

[29] Chan Wing Cheong in "Applications under the Guardianship of Infants Act", *supra*, note 6, at 191-193 defended the academic view as not as limiting. While the Guardianship of Infants Act, Cap 122, *supra*, note 1, is better read to restrict the right to apply to a parent or an existing guardian, there is no such restriction to wardship applications allowed by the Supreme Court of Judicature Act, Cap 322, *supra*, note 22, s 17, read with the Guardianship of Infants Act, ss 5 and 10 or 13 and 14. He argued that as the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order, *supra*, note 25, had transferred applications under the Guardianship of Infants Act to the Family Court, the Family Court may be thought able to entertain applications by parents and existing guardians as well as any interested adult. The result is the same in that an application can be properly started but the process towards that result would differ. It remains unclear which will definitively be accepted.

[30] Cap 38, Statutes of the Republic of Singapore, 1994 Ed.

[31] Cap 122, *supra*, note 1.

[32] Cap 38, *op cit*.

[33] Cap 224, Statutes of the Republic of Singapore, 1985 Ed.

[34] Cap 68, Statutes of the Republic of Singapore, 1985 Ed.

opinion of the court ... has for the time being the charge of, or control over, the child or young person." The issue arose whether section 2 should also serve as the definition for the Guardianship of Infants Act.

Justice Kan Ting Chiu was referred to academic opinion that the definition in section 2 is[35] "out of line with the general use of ["guardian"]. ... "Guardian" is a term of art and should, preferably, not be used to refer to any and all caregivers." His Honour disagreed with this opinion observing,[36] "If one takes a different perspective [the definition] may indicate an intended departure from the historical classes of guardianship." Transposing the definition in the Children and Young Persons Act section 2, his Honour decided that,[37] "under our law [including the Guardianship of Infants Act] a person who has charge of or control over a child or a young person is a guardian". His Honour's definition of "guardian" would include any person with physical possession of the child. This is broader than that regarded settled by family lawyers.

(iii) *Court of Appeal accepts broad definition of "guardian" with time consideration*

The Court of Appeal in *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*[38] accepted Justice Kan Ting Chiu's broad definition of "guardian" although Chief Justice Yong Pung How would add a qualification of time. This latest appeal in the involved series of applications came about in this way. Justice Kan Ting Chiu ordered that the guardianship application should proceed on its merits before the District Court. The applicants in the original application appealed against the order the District Court made. Justice Warren Khoo heard this High Court appeal. His Honour overturned the District Court's decision and ordered that the young girl should be returned to the applicants.

The defendants in the original application appealed against Justice Warren Khoo's order. The appeal before the Court of Appeal concerned two issues. One, what is the right way to understand "lawful guardian" in section 14 of the Guardianship of Infants Act.[39] Two, to be discussed in Part IV below,

[35] Leong Wai Kum, *Family Law in Singapore: Cases and commentary on the Women's Charter and family law*, *supra*, note 7, at 253.

[36] *Lim Kok Chye Ivan & Anor* v *Lim Chin Huat Francis & Anor*, *supra*, note 26, at 1047.

[37] *Lim Kok Chye Ivan & Anor* v *Lim Chin Huat Francis & Anor*, *supra*, note 26, at 1047.

[38] *Supra*, note 5.

[39] Cap 122, *supra*, note 1.

whether an application under section 14 should be resolved by the welfare principle. In coming to the definition of "lawful guardian" discussed below, Chief Justice Yong Pung How also touched on the definition of "guardian".

a. *Court of Appeal notes three statutory definitions*

The Chief Justice began by noting that there are many references to "guardian" in Singapore statutes and that, of definitions, there are two more besides section 2 of the Children and Young Persons Act[40] that Justice Kan Ting Chiu had relied on. Of this definition of "guardian" in section 2, the Chief Justice highlighted that it contained a time limit thus "includes any person who ... has *for the time being* the charge of, or control over, the child or young person. (Emphasis added)" Besides this, there is the definition in section 2 of the Post Office Savings Bank Act[41] that "guardian" is:

> the father of a minor, or if the father is dead, the mother, or if both parents are dead or absent from Singapore or are incapable of acting owing to disability or other cause and no guardian of the minor has been appointed by will or deed or under any written law for the time being in force or by any competent court, *any adult person with whom the minor is residing and by whom be is being maintained*. (Emphasis added)

Further, there is section 2 of the Legal Aid and Advice Act[42] that defines "guardian" as "in relation to an infant, includes any person *whom the Director* (of the Legal Aid Bureau) *considers might properly be appointed* to be the next friend or guardian *ad litem* of the infant. (Emphasis added)"

b. *Court of Appeal adds time qualification to definition*

Relating these three definitions with that offered by Justice Kan Ting Chiu, the Chief Justice decided that they are[43] "consistent with one another" and "[w]e therefore agree with Kan J that the concept of "guardian" in Singapore covers more than the two types expressly catered for under the [Guardianship of Infants] Act." The definition of "guardian" became:[44]

[40] Cap 38, *supra*, note 30.
[41] Cap 237, Statutes of the Republic of Singapore, 1985 Ed.
[42] Cap 160, Statutes of the Republic of Singapore, 1985 Ed.
[43] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 51, para 44.
[44] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 51, para 44.

> a person who has charge of or control over a child or young person but we would include in the definition the phrase *at the material time*. This phrase should be added as the statutory definitions have put a time factor into the concept of "guardian".

c. *Definition broader than settled family meaning*

The definition of "guardian" by both courts strays from the "historical classes" of persons family lawyers restrict the term to seek out the adult with parental authority over the child. This is not sufficient reason for criticism. We can conceivably operate with this broader definition. The issue is whether it is advantageous to stray from the "historical classes" settled among family lawyers. This issue is taken up below.

Before that, we note a further complication in the legal usage of "guardian". This arises from the occasional addition of an adjective like "legal" or "lawful" to "guardian".

(iv) *Adjectives "legal" and "lawful" of "guardian"*

There are statutory provisions where "guardian" is prefixed by an adjective as in "legal guardian" or "lawful guardian". Unfortunately, these variants of the general term are used even in statutes that are traditionally accepted as family statutes. The principal statute on guardianship and custody, the Guardianship of Infants Act, uses the general term "guardian" in most references to the guardian of the person of the infant and "lawful guardian" in one.[45] The principal family statute, the Women's Charter,[46] contains one unfortunate reference to "legal guardian" in its Parts on family law.[47] Although this reference is obsolete,[48] it remains disturbing.

[45] See "guardian appointed under this Act" in the Guardianship of Infants Act, Cap 122, *supra*, note 1, ss 5, 6, 7, 8, 10 and 20 and "lawful guardian" in s 14. While the majority of the references to "guardian" are provisions that were inserted or amended by Act 17 of 1965, *ie*, ss 5, 6, 7 and 8, this cannot be suggested as the reason for the difference because ss 10 and 20 were there from the beginning as Straits Settlements Ord 11 of 1934. Section 14 was also enacted in Ord 11 of 1934. Right from 1934, then, the occasional addition of the adjective "lawful" has been a problem.

[46] Cap 353, Statutes of Republic of Singapore, 1997 Ed.

[47] Women's Charter, *ibid*, Second Schedule Part III. Its Part XI refers again to "legal guardian" once, see *supra*, note 66, and to "lawful guardian" in three sections, see *infra* notes 89-91.

[48] The Women's Charter, *op cit*, Second Schedule Part III, directs whose consent is required to the marriage of a "transferred child" who is under twenty-one years old. The concept of transferred child used to be in the Children and Young Persons Act but this statute, Cap 38, *supra*, note 30, no longer contains this description of a child. The Women's Charter, Second Schedule Part III, has no application today.

The issue is whether the addition of these adjectives should have any effect on the understanding of "guardian". It may be thought possible that the adjective be ignored. It will be queried below whether it was intended that "guardian", "legal guardian" and "lawful guardian" are different. Chief Justice Yong Pung How proceeded on the premise that each of these is different and defined each differently. Justice Kan Ting Chiu appeared to accept that "guardian" and "lawful guardian" at least are different from "legal guardian". Before we evaluate the alternatives, the definitions of "lawful guardian" and "legal guardian" offered by Justice Kan Ting Chiu and the Chief Justice are noted.

a. *Definition of "lawful guardian" and its Penal Code Explanation*

Section 361 of the Penal Code[49] on "kidnapping from lawful guardianship" has remained the same since its enactment in 1871.[50] The provision contains an "Explanation" that "lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor or other person." The issue arises whether this Explanation in a criminal statute should be used to explain the same term in a family statute.

Justice Kan Ting Chiu in *Lim Kok Chye Ivan & Anor* v *Lim Chin Huat Francis & Anor*[51] decided in the affirmative. His Honour relied on this Explanation to define the same term in section 14 of the Guardianship of Infants Act.[52] As noted above, the applicants were neither parents of the young girl nor her "guardians" previously appointed under the Guardianship of Infants Act. In the District Court,[53] issue had been made of this with the result the court decided that their application was flawed. Justice Kan Ting Chiu overturned the District Court's decision. His Honour decided that the application was properly begun under section 14 of the Guardianship of Infants Act that allowed any adult to apply whenever "an infant leaves, or is removed from, the custody of his lawful guardian".

Relying on the Penal Code Explanation, his Honour defined "lawful guardian" in section 14 of the Guardianship of Infants Act as[54] "all that is required is that the person is lawfully entrusted with the care and custody [of the child]". As the natural mother of the girl lawfully entrusted the

49 Cap 224, *supra*, note 33.
50 As a provision in the Penal Code Straits Settlements Ord IV of 1871.
51 *Supra*, note 26.
52 Cap 122, *supra*, note 1.
53 *Supra*, note 25.
54 *Supra*, note 26, at 1047.

applicants with her care, his Honour decided that they had properly started their application.

It is of note that his Honour's definition of "lawful guardian" is different from that of "guardian". The definition of "guardian" came from section 2 of the Children and Young Persons Act while "lawful guardian" came from the Explanation to section 361 of the Penal Code. Whether it is appropriate to transpose the Penal Code Explanation has been discussed before.

b. *Academic critique*

An academic writer[55] cited Indian commentaries to support his view that it is not desirable to use a Penal Code Explanation to interpret a family statute. The usage in a criminal statute may be wide in order to protect the child adequately. He expressed this view:[56]

> [I]t is understandable why a penal statute would embrace a broad interpretation ... to obviate the difficulty which would otherwise arise if the prosecution were required to prove that the person from whose care or custody a minor ... had been abducted was strictly recognised as a guardian in civil law.

He cautioned that, in the civil law, particularly the family law, usage of the term may have to be more circumspect:[57]

> The interests in the civil law of guardianship ... are different. [A guardian in family law] stands in the position of a parent, and may decide on many important issues affecting the infant's life until he reaches the age of majority ... . The categories of these persons capable of fulfilling parental obligations are necessarily narrower than the categories of persons accountable for the protection of the bodily security of an infant under criminal law.

It follows from these observations that it is unwise to transpose a Penal Code Explanation as definition in a family statute.

55 Chan Wing Cheong, "Applications under the Guardianship of Infants Act", *supra*, note 6, at 187-190.

56 Chan Wing Cheong, "Applications under the Guardianship of Infants Act", *supra*, note 6, at 188-189.

57 Chan Wing Cheong, "Applications under the Guardianship of Infants Act", *supra*, note 6, at 189-190.

c. *Court of Appeal rejects Penal Code Explanation as definition of "lawful guardian"*

Chief Justice Yong Pung How in *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor* endorsed the academic comment when his Honour gave more specific reasons why transposing the Penal Code Explanation to define "lawful guardian" in section 14 of the Guardianship of Infants Act was unwise. The Chief Justice pointed out that the Penal Code Explanation itself uses that the term "include" suggesting that what it offers is not exhaustive.[58] Further, limiting the definition of "lawful guardian" to a person "entrusted" with guardianship will leave out the person who voluntarily assumes the responsibility.[59]

The Chief Justice observed that the Penal Code Explanation[60] "merely purports to declare one instance wherein a person would be lawful guardian, without going further." It is submitted that this approach is preferred. An Explanation in a criminal statute especially as it begins with a non-exclusive verb should not readily be used as definition in a family statute. As the academic writer suggested, terms may be used more broadly in criminal statutes than family statutes.

d. *Court of Appeal offers own definition of "lawful guardian"*

Chief Justice Yong Pung How offered this definition of "lawful guardian":[61]

> In our opinion, the label "lawful" is simply tagged onto a guardian who has been adjudged and recognised by law as entitled to care and custody of the child and who had, at some point of time in the child's life, care and custody of the child. A person who has had care and custody of a child for a certain length of time would generally be recognised by society as the guardian. This thus accounts for the easily attainable status of "guardian" as defined above. Whether such guardianship is lawful is another matter. Such a guardian is only the "lawful guardian" wherein the court has determined him to be the caregiver and custodian of the child at the material time. This envisages a process

[58] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor, supra*, note 5, at 52, para 51.

[59] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 52, para 51.

[60] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 52, para 52.

[61] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 53, paras 54 & 55.

> wherein a value judgment has to be made. The court may make such judgment as in a case involving the [Guardianship of Infants] Act or the Penal Code or the Director of the [Ministry of Community Development] may do so as in a case involving the Women's Charter. In addition, the adjective "lawful" in the context of a provision which involves two parties claiming to be "guardian" may highlight the difference in the statuses of the parties, *ie*, the person who removed the child *vis-à-vis* the person from whom the child was taken. ...
>
> We accept [Kan J's] definition of a "guardian" as being a person who has charge of or control over a child at the material time. Whether or not such guardian is the "lawful" one would be a question for the determination of the courts or the relevant authority depending on the context. It follows that, while natural and legal guardians appointed either by court or by testament would normally be secured in lawful guardianship, other types of guardianship would only be "lawful" where the question arises and after adjudication is made.

This definition of "lawful guardian" is sufficiently differentiated from the definition of "guardian". If it were necessary or desirable to keep these terms different, this definition of "lawful guardian" can serve this purpose. We discuss whether it is indeed necessary or desirable below.

As a definition, it is submitted that the above is somewhat unwieldy. It requires a "value judgment" to be made by someone, a judge or the director of social welfare, that the control exercised over the child is by a person lawfully doing so. There may be instances when it will be inconvenient that whether the person is "lawful guardian" is suspended until the official value judgment is made. Although the Chief Justice did observe that a "natural" and a "legal" guardian is "secured in lawful guardianship", this is only "normally" so. It appears the value judgment in the definition may always have to be undertaken.

The application of this definition in the appeal itself shows that reaching the value judgment can be ponderous. To discover if Francis Lim and Catherine Thien, the appellants, and Ivan Lim and Cynthia Ng, the respondents, were "lawful guardians" of the young girl "at the material time" the Chief Justice analysed the parties' interaction with the girl over three periods, *viz*, from her birth, when she was cared for by her main caregiver (Helen) and when Francis Lim and Catherine Thien took her home. This analysis took the better of four pages of the law report and nineteen paragraphs. From this protracted analysis, it was found that Ivan Lim and Cynthia Ng became lawful guardians when the girl's mother voluntarily handed her to them, that Helen was the guardian during her care of the girl and that the lawful guardianship was not affected by events in the third period in

particular when Francis Lim and Catherine Thien took the girl home. The result of the analysis, thus, was that Ivan Lim and Cynthia Ng were Esther's lawful guardians when she was removed by Francis Lim and Catherine Thien. Ivan Lim and Cynthia Ng, therefore, made a proper complaint under the section 14 of the Guardianship of Infants Act.[62]

It is submitted that reasonable people using the Court of Appeal's definition may differ in their analyses of the events. The Court of Appeal found that because the natural mother voluntarily handed Esther over to Ivan Lim and Cynthia Ng, they were her lawful guardians. Nothing in the next three years affected Ivan Lim and Cynthia Ng's status including Francis Lim and Catherine Thien taking Esther home. In particular, that Ivan Lim and Cynthia Ng had from the beginning handed Esther to Helen who cared for her for several years and that the Ministry of Community Development officials allowed Francis Lim and Catherine Thien to bring Esther home to bond with her did not affect the lawful guardianship of the first couple in time. It is possible reasonably to differ. Helen may be found to have acquired lawful guardianship sometime during her long care of the girl. Helen could then have passed her lawful guardianship to Francis Lim and Catherine Thien. Alternatively, several of them could be found to possess lawful guardianship over Esther in the later years. In the normal family where a child lives with both parents, both parents are simultaneously guardians. It may be thought no different with "lawful guardians". The requirement of official value judgment in the definition may, thus, be problematic.

e. *"Legal guardian" and the Children and Young Persons Act definition*

The Children and Young Persons Act[63] further provides in section 3: "In this Part, unless the context otherwise requires – "legal guardian", in relation to a child or young person, means a person lawfully appointed by deed or will or by a competent court to be the guardian of that child or young person."

Justice Kan Ting Chiu was prepared to accept this as the definition[64] although his Honour did not elaborate. Chief Justice Yong Pung How in *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*[65] accepted

[62] Cap 122, *supra*, note 1.
[63] Cap 38, *supra*, note 30.
[64] *Lim Kok Chye Ivan & Anor* v *Lim Chin Huat Francis & Anor*, *supra*, note 26, at 1046, para 17 & 1047, para 20.
[65] *Supra*, note 5, at 51 paras 45 & 46.

this as the definition wherever "legal guardian" appears. The Chief Justice observed that the term appears twice in the Women's Charter,[66] in the offence of "Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl under the age of 16" in section 145 and "Consents required to the marriage of a minor" in the Second Schedule. Indeed, as the Chief Justice noted, section 145(4) defines for the purpose of section 145(3) that ""legal guardian", in relation to any girl, means 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."

The definitions of "legal guardian" in section 3 of the Children and Young Persons Act and section 145(4) of the Women's Charter are close. The Chief Justice concluded:[67]

> Thus, the term "legal guardian" has a specific meaning, limiting the types of guardianship under it only to the two expressly provided for under sections 6(3), 7 and 10 of the [Guardianship of Infants] Act. A person who is a "legal guardian" is thus either a court-appointed guardian or a testamentary guardian.

This definition also differentiates "legal guardian" from "guardian" and "lawful guardian". Just like the courts' definition of "guardian", their definition of "legal guardian" also strays from the settled family law meaning of "guardian". The courts' definition of "legal guardian" excludes the parent as natural guardian. The definition, however, does appear to work well in the provisions the Chief Justice discussed. What is less clear, as discussed below, is whether the premise that the terms should be different is sound.

III. A Suggested Approach to "Guardian", "Lawful Guardian" and "Legal Guardian"

Chief Justice Yong Pung How proceeded on the premise that each of "guardian", "lawful guardian" and "legal guardian" is different and should be defined differently. Justice Kan Ting Chiu appeared to accept that "guardian" and "lawful guardian" at least are different from "legal guardian". An adult may, however, be included in more than one of them. If this premise is unassailable, it may well be that the definitions offered by the Chief Justice are the best that can be devised. In this part, the premise is examined and

66 Cap 353, *supra*, note 46. See also *supra*, notes 47 & 48.

67 *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 51, para 46.

the problems that can arise from regarding each term as if it bore a specialized meaning are discussed. It is suggested that an alternative approach is preferred.

A. *"Lawful Guardian" and "Legal Guardian" may Not be Intended to be Different from "Guardian"*

The premise that "guardian", "lawful guardian" and "legal guardian" are different should be questioned. The premise proceeds from the view that each time the Legislature used one of these terms, it did so advisedly. It should be pointed out that the first use of any of these was probably by the Straits Settlements Legislative Council[68] of "lawful guardian" in the Straits Settlements Penal Code 1871.[69]

Should we think that the Legislature has, over the past century, used each term advisedly? Is it not more realistic to think otherwise? It is submitted that it is more likely the terms were not intended to be different. Each of "guardian", "lawful guardian" or "legal guardian" could have been intended to refer to "guardian". The addition of either of the adjectives "legal" or "lawful" that naturally come to a legislative draughtsman may simply be an innocuous embellishment.

It is submitted that the terms are better regarded as interchangeable. They can be used simply as "guardian". "Lawful guardian" and "legal guardian" can be read as if the adjective was not there.

The only instance where "legal guardian" may be thought to have been used advisedly is in the Children and Young Persons Act[70] where section 3 defines "legal guardian" "for this Part" while section 2 defines "guardian". This is the only statute that offers separate definitions of two of the terms. It should be noted, however, that this is of no significance. "Legal guardian" as defined in section 3 omits the parent as the natural guardian of his or her child. However, the only provision that uses "legal guardian" is section 12. Section 12 offers, as defence in a prosecution for unlawful transfer of a child, that "the transfer took place ... [with the consent of] the natural parents of the child or the legal guardian". This sole instance of a statute differentiating "guardian" from "legal guardian", therefore, renders the differentiation meaningless. It suggests that ascribing different meanings to the terms may not be necessary. It is possible that "guardian", "lawful guardian" and "legal guardian" are similar.

68 For a short survey of the legislative authority that preceded Parliament, see Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 2-3 & 17.

69 SS Ord IV of 1871, s 361.

70 Cap 38, *supra*, note 30.

It is desirable that they be similar. It will be simpler if this were so. More substantively, keeping them similar allows the settled family law meaning of "guardian" to be maintained across the board.

B. *Treating "Lawful Guardian" and "Legal Guardian" Differently from "Guardian" can be Problematic*

Using the terms as if each was different from the others can be problematic. A quick search of the statutes and subsidiary legislation collated on LawNet reveals that there may be more than two hundred references to "guardian", more than fifteen references to "lawful guardian" and possibly nine references to "legal guardian". It may be anticipated that the specific meaning the courts ascribed to each term may not work well in every reference to any of the terms. This part demonstrates some problems.

To appreciate the problems, it should be reminded that the courts defined "guardian" in a way that is broader than its meaning regarded settled by family lawyers. There are instances when this broader meaning is inappropriate in bestowing authority on casual child minders. "Lawful guardian" is defined differently from "guardian" so that not every guardian is necessarily "lawful". There are instances where protection is only offered to a "lawful guardian" so that the omission of the other guardians is anomalous. "Legal guardian" is defined to exclude the parent as natural guardian. There is at least one instance where, if this term were treated as different from "guardian" and "lawful guardian", the provision appears odd. The definition of "lawful guardian" generally requires an official value judgment. There are instances where this is impractical. Lastly, if there is any more variation of "guardian" apart from "lawful guardian" and "legal guardian", this could further complicate the law. There appears to be at least one more variation. Each of these is discussed.

(i) *Courts' definition of "guardian" gives more authority to casual minder than desirable*

Chief Justice Yong Pung How appreciated that his definition of "guardian" as[71] "a person who has charge of or control over a child ... at the material time" brings the term close to the layman's understanding and renders the status[72] "easily attainable". This broad understanding strays from the more limited meaning family lawyers accord the term, *viz*, an adult with parental

[71] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 51, para 44.
[72] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 53, para 54.

authority over the child. Herein lies the problem. If a person other than one who possesses parental authority over the child is included as "guardian" the term may not operate optimally in some statutory contexts. By the courts' definition, a parent who leaves a child with a baby-sitter will, during the period, have bestowed the status of "guardian" on the baby-sitter. The baby-sitter will, as guardian, have as much authority over the child as parent.

The baby-sitter, during the period he or she has the care of the child, is the quintessential "guardian" under the courts' definition, who would not be "guardian" under the settled family law meaning. It is submitted that in the following eight instances, it is not desirable that this casual minder should have as much authority as the parent even during the period that the parent has authorised the minding. The same is true of a teacher during school hours. He or she is also likely to be included by the courts' definition but is not among the adults regarded by family law as having parental authority over the child. The observations below of the baby-sitter during the period of care are equally true of the teacher during school hours.

a. *Guardian can authorise removal of kidney after death of child*

The Human Organ Transplantation Act[73] has been described[74] "[d]espite its name ... [as dealing] largely with only presumed-consent cadaveric kidney transplants." The designated medical officer is authorised to remove a kidney from the cadaver of a non-Muslim who dies in an accident between the ages of twenty-one and sixty years and who had not earlier registered an objection to the removal.

Section 5(2) of the Act applies to a child who dies thus "No authority shall be given ... for the removal of the organ from the body of any deceased person ... who is below 21 years of age unless the parent or guardian has consented to such removal." The courts' definition of "guardian" allows the baby-sitter to give such consent. The baby-sitter's consent is a good alternative to the parent's. It may be possible to justify such a broad reading of "guardian" as ultimately serving the public interest of having a good kidney available for transplant. What is anomalous, however, is the equation of the authority of a baby-sitter during the period of care with the parent's in a matter as serious as donating the deceased child's kidney. The settled family law meaning of "guardian" will better maintain the balance of authority between a parent and the baby-sitter.

[73] Cap 131A, Statutes of the Republic of Singapore, 1985 Ed.

[74] Terry Kaan, *International Encyclopaedia of Laws – Medical Law: Singapore,* (The Hague, Kluwer Law International, 1999) at 132, para 384.

b. *Guardian can consent to organ donation in lesser priority to parent*

The Medical (Therapy, Education and Research) Act[75] was enacted[76] "in 1973 ... to encourage Singaporeans to consider making gifts of their bodies or organs after death for the purposes of transplants or for medical research, and to ensure that such gifts could be made on a firm foundation." The Act covers all organs and is wider in scope than the Human Organ Transplantation Act. The Act in section 3 facilitates the donation by "any person of sound mind and 18 years of age or above." In section 4, it also[77] "empowers the immediate family of a deceased person to make a legally binding gift". The provision refers to the Schedule containing the list of the family members who may authorise the donation:

> in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary intentions by the deceased person, or actual notice of opposition of a member of the same class or prior class ... .

The list in the Schedule reads:

1. The spouse.
2. An adult son or daughter.
3. Either parent.
4. An adult brother or sister.
5. A guardian of the deceased person at the time of death.
6. Any person authorised or under obligation to dispose of the body of the deceased person.

By section 4, a parent's objection overrides the consent of the guardian if the medical officer had "actual notice" of it. Even so, it is anomalous that on the courts' definition of "guardian", a baby-sitter during the period of care is, in the parents' absence, able to give consent. The settled family law meaning, again, better maintains the balance of authority between a parent and the baby-sitter.

[75] Cap 175, Statutes of the Republic of Singapore, 1985 Ed.
[76] Terry Kaan, *International Encyclopaedia of Laws – Medical Law: Singapore, op cit*, at 132, para 385.
[77] Terry Kaan, *International Encyclopaedia of Laws – Medical Law: Singapore, supra*, note 74, at 132, para 386.

c. *Guardian can consent to child entering contract of insurance*

The Insurance Act[78] requires a child's consent to commit to an insurance contract to be bolstered by the consent in writing of his or her parent or guardian. Section 60(1) provides:

> Notwithstanding any law to the contrary, a person over the age of 10 years shall not, by reason only of being under the age of majority, lack the capacity to enter into a contract of insurance; but a person under the age of 16 years shall not have the capacity to enter into such a contract except with the consent in writing of his parent or guardian.

This provision recognises that the commitment to insurance is an onerous commercial obligation so that the child under sixteen years should obtain the written consent of the adult responsible for his or her well being before the child's commitment takes hold. It seems anomalous that a baby-sitter during the period of care should be able to give consent. The settled family law meaning also better maintains the balance of authority.

d. *Guardian can be personal representative where child so entitled*

The system of administration of estates in Singapore has been summarised thus:[79]

> [In intestate succession] Where a person dies intestate, his property vests in the Chief Justice of Singapore. ... His estate will subsequently be vested in the personal representatives after the grant of letters of administration. ... [In testate succession] A will should also contain a clause appointing executors and trustees. The testator's assets are vested in the executor upon his death. ... The personal representatives ... call in the assets ... settle the funeral expenses ... pay off the deceased debts [and] distribute the remainder of the estate to the beneficiaries.

An adult best performs the responsibilities of personal representative. Where a child stands in the best position in relation to the deceased, however,

[78] Cap 143, Statutes of the Republic of Singapore, 1994 Ed.

[79] Leong Wai Kum and Debbie Ong Siew Ling, *International Encyclopaedia of Laws – Family and Succession Law: Singapore* (The Hague, Kluwer Law International, 1999), at 218, para 393, at 233, para 423 and at 247, para 453.

the Probate and Administration Act[80] allows the child's "guardian" to be appointed until the child becomes capable. The norm is where the child is the only surviving next-of-kin. It can also be, however, that the child is the only beneficiary under the deceased's will. In either situation, section 21(1) provides:

> No probate or letters of administration shall be granted to a person while he is an infant; but where an infant would, but for his infancy, be entitled to probate or letters of administration, letters .... may ... be granted to the guardian of the person and property of the infant, or to such person as the court thinks fit, limited until the infant obtains a grant to himself.

It is not desirable for anyone other than a "guardian" in the settled family law meaning to be granted probate or letters of administration on behalf of the child. It is anomalous that a baby-sitter during the period of care stands to be considered for this role.

e. *Guardian entitled to act on behalf of child against the Land Transport Authority*

The Land Transport Authority of Singapore Act[81] in section 24 allows "A claim may be brought on behalf of a minor by his guardian or guardians ... ." It is desirable to read "guardian" in the family law settled meaning of a person with parental authority.

The proper meaning of "guardian" in relation to a suit begun for a child may also be related with the general authority to represent a child in court proceedings. It has been observed:[82]

> A basic feature of our litigation system is that a "person under disability" defined by our Rules of Court 1996[83] in Order 76 rule 1 as "a person who is an infant or a patient" may not bring an action or defend an action independently. Order 76 rule 2 requires that the infant bring an action by his next friend and defend by his guardian *ad litem*. A parent is *prima facie* entitled to act in either capacity (*Woolf* v *Pemberton*)[84]

80 Cap 251, Statutes of the Republic of Singapore, 1985 Ed.
81 Cap 158A, Statutes of the Republic of Singapore, 1996 Ed.
82 See Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 439.
83 *Supra*, note 16.
84 (1877) 6 Ch D 19.

> but it should be noted that Order 76 rule 3 allows the Court to appoint some other person "in substitution for the person previously acting in that capacity." It is expected that the removal of a parent is only considered where the parent has an interest adverse to the child's (see *Re Taylor's Application*[85] where the removal of a parent was overturned on appeal).

From that consideration as well, it seems desirable that "guardian" in section 24 should be understood in the settled family law sense. It is anomalous that a baby-sitter during the period of care may be considered to take legal action on behalf of a child.

f. *Guardian entitled to act on behalf of child in land acquisition*

The Land Acquisition Act[86] in section 2 allows *inter alia* "the guardians of minors ... shall be deemed ... the persons so entitled to act, to the same extent as the minors ... could have acted if free from disability." This is strange in not expressly referring to the parent. The omission of "parent" is not problematic under the family law settled meaning of "guardian" since a parent is included as the child's natural guardian.

The point is that the reference to "guardian" in section 2 is better if restricted to the family law meaning so that a baby-sitter even during the period of care is not among those so entitled to act on behalf of the child. The baby-sitter is unlikely to be appointed the child's guardian *ad litem* in a civil suit. He or she should also not be able to represent the child in land acquisition.

g. *Guardian can receive deposit in co-operative society made on behalf of child*

The Co-operative Societies Act[87] in section 27(1) provides that "[A] deposit made on behalf of a minor may ... be paid to the guardian of that minor for the use of the minor" and in section 27(2) that "[t]he receipt of a ... guardian ... shall be a sufficient discharge of the liability of the society ... ."

While the caveat that the deposit received is "for the use of the minor" is useful, it is still less desirable if a baby-sitter during the period of care

[85] [1972] 2 QB 369.
[86] Cap 152, Statutes of the Republic of Singapore, 1985 Ed.
[87] Cap 62, Statutes of the Republic of Singapore, 1985 Ed.

were able to receive the deposit. A better reading of the provision is that only a person with parental authority over the child may receive the deposit. Similarly, it may be thought that only the receipt of a person with parental authority should discharge the liability of the society. The settled family law meaning works better here too. The baby-sitter should not be able to receive money on behalf of a child.

h. *Guardian as parent in education endowment*

The Education Endowment Scheme Act[88] in section 2 interprets "parent" "in relation to a child, includes a guardian of the child". It may not be desirable for a baby-sitter during the period of care to receive the privileges this Act bestows on a parent of the child.

(ii) *"Lawful guardian" protected to greater extent than other guardians*

The courts' definition of "lawful guardian" as different from "guardian" and "legal guardian" renders the provision that refers only to "lawful guardian" anomalous. The "lawful guardian" then receives special treatment over the other guardians.

Part XI of the Women's Charter, the principal family statute in Singapore, is somewhat anomalous in containing "Offences against women and girls." The juxtaposition of the Straits Settlements Women and Girls' Protection Ordinance 1896[89] that developed into the Colony of Singapore Women and Girls Protection Ordinance[90] with family law provisions in the principal family statute may be suggested due to[91] "the enactment of the Women's Charter was closely bound with the objective to raise the status of women in Singapore." There are three references to "lawful guardian" among the provisions of offences in Part XI. If "lawful guardian" is different from "guardian" and "legal guardian" these references accord the "lawful guardian" protection above that of the "guardian" or "legal guardian". It is not apparent why only this "guardian" receives the protection offered in the following provisions.

[88] Cap 87A, Statutes of the Republic of Singapore, 1993 Ed.

[89] Straits Settlements Ord XVI of 1896.

[90] Cap 126, Laws of the Colony of Singapore, 1936 Ed.

[91] Leong Wai Kum, *Cases and Materials of the Family Law in Singapore* (Singapore, Butterworths, 1999) at 23.

a. *Lawful guardian can request detention of woman or girl*

Section 160(1) of the Women's Charter provides:

> Any woman or girl – (a) whose lawful guardian requests the Director in writing to detain her in a place of safety ... may by warrant under the hand of the Director be ordered to be removed to a place of safety and there detained until he has held an inquiry as to the circumstances of her case.

b. *Lawful guardian required to consent to transfer of woman and girl under detention*

Section 164 of the Women's Charter provides:

> (1) Whenever an order has been made ... for the detention of a woman or girl in a place of safety ... it shall be lawful for the Director to issue an order that the woman or girl shall be so transferred.
>
> (2) No woman or girl admitted into a place of safety in Singapore on the request in writing of her lawful guardian under section 160 (1)(a) shall be so transferred from such place of safety except with the approval in writing of her lawful guardian.

c. *Lawful guardian can consent to removal of woman or girl under detention to neighbouring countries*

Section 165 of the Women's Charter provides:

> (1) Whenever an order has been made ... for the detention of a woman or girl in a place of safety ... it shall be lawful for the Minister to issue an order that the woman or girl shall be removed to such place of safety established in Malaysia, Brunei Darussalam or Hong Kong.
>
> (2) No woman or girl admitted into a place of safety in Singapore on the request in writing of her lawful guardian under section 160 (1) (a) shall be so removed from such place of safety except with the approval in writing of her lawful guardian.

The "lawful guardian" is better understood simply as a "guardian" in the settled family law sense so that all guardians receive similar consideration in the provisions.

(iii) *"Legal guardian" singled out an anomaly*

The courts' definition of "legal guardian" excludes a parent as natural guardian. It is restricted to a testamentary guardian and one appointed by court order. This is not a problem in the instances where the statutory provision refers to "parent or legal guardian" as in the Children and Young Persons Act itself,[92] the Women's Charter[93] and the Infectious Diseases Act[94] or to "legal guardian or guardians of such minors ... or to such person or persons as the Directors in their discretion think fit and proper persons" in the Widows' and Orphans' Pension Act.[95]

There is, however, one instance in subsidiary legislation where only "legal guardian" appears. The Rules of Court[96] require in Order 71 rule 35 that "A grant [of probate or letters of administration] made ... must be in one of the forms in Form 172 [in the Second Schedule to the Rules]". The Second Schedule offers sample Grants "(a) Of Probate, (b) Of Letters of Administration, (c) Of Letters of Administration *de bonis non*, (d) Of Letters of Administration *de bonis non* with will annexed, (e) To an Attorney, (f) To a Guardian and (g) Of Double Probate." In (f), the sample Grant reads:

> Let it be known that Letters of Administration to the estate of XXX were granted to YYY as the legal guardian of ZZZ the lawful infant children and next-of-kin of the said deceased, limited until one of the said infants shall obtain a grant to himself.

This sample Grant appears to have been written on the assumption that a child can only be the most appropriate personal representative if the child were the sole next-of-kin and no parent of the child remains living. From this perspective, the reference to "legal guardian" ties in the courts' definition that excludes a parent. The discomfort arises, however, when it is observed that the Probate and Administration Act[97] in section 21 allows the Grant to the guardian on behalf of the child in any situation where the child is the most appropriate personal representative. This might also be where a non-relative wills his or her entire estate to the child. The reference to "legal guardian" in the sample Grant, read with the exclusionary Rules of Court

[92] Cap 38, *supra*, note 30, s 12.
[93] Cap 353, *supra*, note 46, s 145 and Second Schedule.
[94] Cap 137, Statutes of the Republic of Singapore, 1985 Ed, s 20D.
[95] Cap 350, Statutes of the Republic of Singapore, 1985 Ed, s 41.
[96] *Supra*, note 16.
[97] Cap 251, *supra*, note 80, and see discussion in text corresponding to notes 79 & 80.

Order 71 rule 35, will not allow the parent of the child as his "guardian" to be appointed personal representative on behalf of the child.

In any case, the terms are not used as if they were different. The Probate and Administration Act in section 21 allows the "guardian of the person and property of the infant" to be granted probate or letters of administration while the Rules of Court allow a Grant to be made only to "legal guardian". It would be desirable to maintain the settled family law meaning of "guardian" whether the reference is to "guardian" or "legal guardian".

(iv) *Other variation of "guardian" exists*

It is also of note that apart from "guardian", "legal guardian" and "lawful guardian", there is one more variation of "guardian" found in our statutes.

The Rules of Court[98] in Order 71 rule 2 "Interpretation" to "Non-contentious Probate Proceedings" contains an interpretation of "statutory guardian" as "means a guardian of an infant appointed by the High Court under sections 5, 6, or 8 of the Guardianship of Infants Act (Chapter 122)." So defined, "statutory guardian" is the "legal guardian" in section 3 of the Children and Young Persons Act discussed above. The same Order also defines a "testamentary guardian" referring rightly to section 7 of the Guardianship of Infants Act. The reference in this Order to these guardians contrasts with the Schedule to the Rules of Court that in a sample Grant refers to "guardian" and "legal guardian".

The Rules of Court, therefore, appear to use "guardian", "legal guardian" and "statutory guardian" rather interchangeably. The singular reference to "statutory guardian", on the courts' approach that each term means something different, is odd in that its definition shows that it refers to the same adults as "legal guardian" in the Children and Young Persons Act.[99] The terms are more often than not used interchangeably.

(v) *Requirement of value judgment in "lawful guardian" impractical*

The Court of Appeal's definition of "lawful guardian" is differentiated from "guardian" by the value judgment required of a court or an official. There are statutory references to "lawful guardian" where it is impractical to so require. We should be able to determine if the adult is "lawful guardian" without waiting for such official value judgment.

[98] *Supra*, note 16.
[99] Cap 38, *supra*, note 30.

a. *Prosecution of kidnapping from lawful guardianship hampered*

The Penal Code punishes the offence of "kidnapping from lawful guardianship".[100] The Court's definition of "lawful guardian" will not permit a decision on whether to prosecute an accused for this offence until the official value judgment of the character of the guardianship of the adult from whom the child was kidnapped is completed. The drafters of the Penal Code may not have anticipated this.

b. *Child protection could be hampered*

The Children and Young Persons Act[101] in section 16 empowers the Protector of Children to require the provision of security where a child brought into Singapore is detained against his or her will "by some person other than his parents or lawful guardian". By the Court's definition, the Protector will have to make the value judgment of the guardianship before deciding whether the section requires him to seek security from the guardian. This also may not be anticipated.

The same is true of the offences to protect women and girls in the Women's Charter[102] in sections 160(1), 164 and 165 discussed above. The Court's definition can be impractical there too.

c. *Regulations hampered*

There are several references in subsidiary legislation to "parent or lawful guardian" that permit the adult to do a range of acts on behalf of a child. It could not have been anticipated that these Regulations can only operate after the official value judgment is made.

The National Cadet Corps Regulations[103] in rule 4 requires enrolment only with the consent of the "parent or lawful guardian" and defines "dependant" in rule 2 as "includes the parent or lawful guardian". The Martial Arts Instruction Regulations[104] are also fairly similar. Rule 5 requires an applicant who is under the age of twelve years to apply through a "parent or lawful guardian" and rule 18 requires an application for exemption from any provision of the Act for a child who is under the age of twelve years also

[100] Cap 224, *supra*, note 33, s 361.
[101] Cap 38, *supra*, note 30.
[102] Cap 353, *supra*, note 46.
[103] Cap 194, Regulation 1, Subsidiary Legislation of the Republic of Singapore.
[104] Cap 171, Regulation 1, Subsidiary Legislation of the Republic of Singapore.

to be made with the consent of a "parent or lawful guardian". It would be cumbersome if the official value judgment were sought before such an application could proceed.

C. *Preserve Settled Meaning of "Guardian" and Ignore Adjective*

It should be reiterated that the definitions offered by Justice Kan Ting Chiu and Chief Justice Yong Pung How are sufficiently differentiated and, if need be, can interpret "guardian", "lawful guardian" and "legal guardian". None of the points made above demand their abandonment. The choice is narrower and consists of three queries. One, whether the courts' broader definition of "guardian" than that settled by family lawyers is advantageous. Two, whether each term must be understood differently. Three, whether the alternative approach avoids the problems observed above of the courts' definitions. This part raises each of these. It is submitted the family law settled meaning is preferred, "lawful guardian" and "legal guardian" need not be understood differently from "guardian" and that this approach avoids the problems observed above.

(i) *Preserving settled family law meaning of "guardian"*

Family law does not monopolise "guardian", "lawful guardian" or "legal guardian". It has been amply shown above that there are many references to one or other in statutes and subsidiary legislation. It is submitted, however, that family law should lead.

The law of guardianship and custody is a part of family law. Family law's settled meaning of "guardian" seeks out the adult who stands in the position of parent in relation to the child. The adult in this position is rightly in a status more exalted and responsible than other adults who may also temporarily have care and control of the child.

A guardian in the settled family law sense is appropriately bestowed with extensive authority over the child. Conversely, it is inappropriate for a casual minder of the child to be so bestowed even during the hours of care. The extent of a guardian's authority may be less than the parent's but it should be more than the casual minder's. Similarly, the guardian may appropriately bear responsibilities over the child that may be less than a parent's but surely more than that borne by a casual minder. An adult should, therefore, only be "guardian" by the settled family law meaning. This meaning maintains the appropriate balance of authority between the parent, guardian and casual minder.

It must be conceded that it is a problem that this settled meaning is not encapsulated in statutory provision. It has rightly been observed that no family statute defines these terms. Indeed, the definitions that currently exist

are found in other than family statutes. It is submitted that despite this, the settled family law understanding of "guardian" should be preserved. To achieve this, "guardian", "legal guardian" and "lawful guardian" should be read as the family law settled meaning of "guardian" unless the context demands a more specific meaning. It has been demonstrated that the only context that demands a more specific meaning is the Children and Young Persons Act because it offers definitions of "guardian" and "legal guardian". Conceding their specific meanings in this context does not undermine the suggested approach. The only use of "legal guardian" is in section 12. Section 12 allows as "a defence in any prosecution" that "one of the natural parents of the child or the legal guardian was a consenting party". Thus, the only "guardian" by the settled family law meaning excluded by the definition of "legal guardian" is the parent as natural guardian but the "parent" is expressly referred to in the only provision that uses "legal guardian". In every other statutory context, it is possible to use the terms interchangeably.

(ii) *"Legal" and "lawful" innocuous adjectives*

It may be observed of some of the references to these terms in statutory provisions that the Legislature has not scrupulously kept the terms different. The worst example, discussed above, may be the use of "guardian", "legal guardian" and "statutory guardian" in the Probate and Administration Act[105] and its rules in the Rules of Court.[106] It may be too much to expect that the terms are meant to be different and that each reference maintains the uniqueness of the term. The Children and Young Persons Act[107] defines "guardian" and "legal guardian" differently but this has been shown above to be oddly meaningless. The insignificance of "legal guardian" in this Act reinforces that the adjectives "legal", "lawful" and "statutory", for that matter, should be regarded as innocuous embellishments.

(iii) *Problems avoided*

Allowing the settled family law meaning of "guardian" to take the lead and ignoring the adjectives "legal" and "lawful" as innocuous embellishments will avoid every problem suggested above.

The references to "guardian" in the Human Organ Transplantation Act, Medical (Therapy, Education and Research) Act, Insurance Act, Probate and Administration Act, Land Transport Authority of Singapore Act, Land

[105] Cap 251, *supra*, note 80.
[106] *Supra*, note 16, O 71 rr 2 & 35 & Second Schedule.
[107] Cap 38, *supra*, note 30.

Acquisition Act and Co-operative Societies Act will not bestow authority and privilege on adults other than those who possess parental authority over the child. The references to "lawful guardian" in Part XI of the Women's Charter will not bear the anomaly of singling out this group for special consideration. The anomalies in the references to "guardian", "legal guardian" and "statutory guardian" in the Probate and Administration Act and the Rules of Court will dissolve. The references to "lawful guardian" will not require an official value judgment and thus are more practical.

(iv) *Approach settled*

The approach suggested is not new. On the contrary, it is better precisely because it keeps to the meaning of "guardian" that has become settled among family lawyers. Every reference to "guardian" with or without the adjective "legal" or "lawful" should be understood by this settled family law meaning. This should certainly be so of every reference in a family statute. It should also be followed of statutes other than family statutes. Definitions in statutes should be interpreted purposively to preserve the family law settled meaning of "guardian" as referring to the parent, the testamentary guardian and the court-appointed guardian.

D. *How Suggested Approach Works*

It may be asked how the suggested approach works in the case at hand.

(i) *Application fails*

The application was made under section 14 of the Guardianship of Infants Act.[108] The settled family law meaning of "guardian" will not allow the applicants, Ivan Lim and Cynthia Ng, to come within "lawful guardian" in section 14. They were neither parents, testamentary guardians nor court-appointed guardians. It is suggested the court should ignore the adjective "lawful" that prefixes "guardian" in section 14. The conclusion, then, is that the complaint of removal from lawful guardian was not made out. Under section 14, there would be no basis on which the court should make any order regarding Esther.

[108] Cap 122, *supra*, note 1.

(ii) *Application permitted under wardship jurisdiction*

To complete this discussion however, it should be noted that there is room for interested adults, like Ivan Lim and Cynthia Ng, to bring the matter of the optimal living arrangements of Esther to the court's attention. It has been noted above that the courts also possess wardship jurisdiction.[109] Ivan Lim and Cynthia Ng could invoke the court's wardship jurisdiction. As the powers of the court under wardship are unlimited, they could also have sought the return of Esther to them within the wardship jurisdiction. Whether the court will order her return to them will be decided the same way as the present application, that is, on consideration of her welfare as discussed in Part IV below.

Thus, Ivan Lim and Cynthia Ng could have done everything they did in the application at hand although by a different and even less traversed path. They may face inconveniences from using a less traversed path but these can be overcome by clear argument.

(iii) *Suggested approach preferred*

It is submitted that the suggested approach, although it allows the same result, is superior.

a. *Maintains balance of authority*

First, the settled family law meaning of "guardian" is preserved. This is highly significant. It has been demonstrated above that, were this meaning not preserved, there can be several kinds of problems that arise from the references to "guardian" in myriad statutory provisions. Only the settled family meaning maintains the appropriate balance of authority between the parents, guardians and other adults. If this meaning can be preserved and interested adults can still refer the welfare of a child to the court, the law is in equilibrium.

b. *Person not parent or guardian should not be catered to same extent*

Second, that Ivan Lim and Cynthia Ng who are neither parents nor guardians are required to seek a slightly more inconvenient path to refer Esther's welfare to the court's attention is right. It should be easier for a parent or guardian to refer her welfare than other adults however interested

[109] See discussion in text corresponding to notes 22 to 24.

they may be in the outcome. The approach taken by the courts in the application is less desirable for allowing Ivan Lim and Cynthia Ng as much ease as Esther's parents or someone already appointed as Esther's guardian to place her living arrangements under the court's scrutiny. The suggested approach better maintains the balance between persons who are primarily concerned for Esther and those who secondarily became interested in her. The law will, again, be in equilibrium if access to the courts differentiates between primary caregivers and the more casual minders. To fail to distinguish, on the other hand, is weaker law that does not give the primary caregivers their due status.

IV. Welfare Principle as Standard of Disposition

The second issue in *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*[110] was whether an application under section 14 of the Guardianship of Infants Act[111] should be resolved by the welfare principle. Chief Justice Yong Pung How decided that it should and thus affirmed that the welfare principle is "ubiquitous".[112] This affirmation may be longer remembered than the Court of Appeal's resolution of the first issue discussed above.

A. *Facts*

The facts are important to note in this context. The girl at the centre of the applications, Esther, was born on 31 December 1992 of Madam Tay, a divorcee who already had three other children. Madam Tay promised to hand over Esther to Ivan Lim and Cynthia Ng, a childless married couple, for eventual adoption. Three days after birth, Esther was handed to them. They immediately passed Esther to Ivan Lim's mother, Helen, who had brought up eleven of her own children. Helen was Esther's main caregiver for the next few years until another couple appeared.

Ivan Lim and Cynthia Ng could not bond with Esther. They both worked and spent little time with her. A first petition by them to adopt Esther filed in 1993 was withdrawn when the Ministry of Community Development indicated it would not support it for the lack of bond between them and the girl.

Helen began to seek alternative adoptive parents for Esther. She wanted to find people she knew because she feared the Ministry might take Esther from her to put into the care of some stranger.

[110] *Supra*, note 5.
[111] Cap 122, *supra*, note 1.
[112] See Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 569.

In 1996, Ivan Lim and Cynthia Ng filed their second adoption petition. At the same time, Francis Lim and Catherine Thien appeared on the scene. They were friends of Helen's daughter. They, with the approval of the Ministry of Community Development, brought Esther home for trial stays. From about February 1996, Esther stayed more or less permanently with Francis Lim and Catherine Thien. Helen stayed in touch throughout. Ivan Lim and Cynthia Ng were still hopeful but never became close with the girl.

In October 1996, Francis Lim and Catherine Thien petitioned for adoption. Ivan Lim, Cynthia Ng and Madam Tay complained of their removal of the child from her lawful guardian. On this complaint, the two petitions for adoption were adjourned.

Ivan Lim, Cynthia Ng and Madam Tay's originating summons sought the return of Esther to Ivan Lim and Cynthia Ng. It was defended by Francis Lim, Catherine Thien and the Protector of Children of the Ministry of Community Development who joined to safeguard the interest of Esther. The District Court dismissed the application on a preliminary point. The District Court judge decided that the only section that enabled an application under the Guardianship of Infants Act[113] was section 5 that limited the right to apply to "either parent or ... any guardian appointed under the Act". As Ivan Lim and Cynthia Ng were clearly not parents nor guardians appointed under the Act, they lacked *locus standi.*

Ivan Lim and Cynthia Ng appealed to the High Court against the decision on this preliminary point. Madam Tay did not proceed and thus dropped out of the picture from here onwards. The High Court[114] allowed the appeal and decided that the originating summons was properly begun under section 14 of the Guardianship of Infants Act because section 5 was not the only enabling section. The High Court sent the matter back down to the District Court for re-hearing on its substantive merits.

On considering the merits, the District Court dismissed the application once again. The judge refused to order the return of Esther to Ivan Lim and Cynthia Ng. They appealed to the High Court once more this time on the resolution of the substantive issue. The High Court judge also overturned the decision of the District Court judge on the merits. Justice Warren Khoo ordered Francis Lim and Catherine Thien to return Esther to Ivan Lim and Cynthia Ng for the reason that section 14 of the Guardianship of Infants Act was proved. His Honour decided that whether to order the return of Esther was not dependent on consideration of the "welfare of the

[113] Cap 122, *supra*, note 1.
[114] See *supra*, note 26.

child" because this was one matter that fell outside the direction of section 3 of the Guardianship of Infants Act. Once a complaint was properly made, section 14 required the order that the child be returned. Francis Lim and Catherine Thien appealed to the Court of Appeal against this decision.

The first issue in the appeal, the proper way to understand section 14 and "lawful guardian", has been discussed above. The second was whether the welfare principle directed by section 3 applied to an application like this under section 14.

B. *Welfare Principle*

Much has already been written of the welfare principle. It is directed as the standard of disposition by section 3 of the Guardianship of Infants Act[115] thus:

> Where in any proceedings before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father.

(i) *History*

Section 3 was first inserted into the Guardianship of Infants Act in 1965.[116] Before 1965, the welfare principle was less pervasive.

a. *Court of Chancery operating principle*

Although the insertion of section 3 raised the welfare principle to ubiquity, this only sealed its long process of expansion. The Court of Chancery in England had always been concerned with the welfare of the child. The first local Court of Judicature of Prince of Wales' Island, Singapore and Malacca

[115] Cap 122, *supra*, note 1.
[116] *Vide* Act 17 of 1965.

was created with jurisdiction akin to that *inter alia* of the Court of Chancery.[117] The present courts can be traced back to this first predecessor.[118] They have thus always been infused with concern for the welfare of a child whose well being is placed before the court.

b. *Old cases*

There are two old cases that continue to demonstrate the welfare principle. The Straits Settlements Supreme Court in Penang, one of the constituent states of the Straits Settlements, in *In re Sinyak Rayoon & Anor* (possibly the first reported local guardianship dispute)[119] was concerned with an application by the paternal uncle for *habeas corpus* to obtain custody of the two infants living with their maternal grandmother. The applicant alleged that under Muslim law, the paternal uncle had a prior right over the maternal grandmother to custody. Justice Pellereau decided:[120]

> [I]n the selection of such guardians the Court ... should consider the ... welfare of the infants, their treatment, their sex, their education, the religion of their parents and the rules which, according to that religion, regulate their domestic customs and relations.

Even in 1888, consideration of the welfare of the children outweighed any prior right under religious law. In the end, the application was dismissed

[117] See the Royal Letters Patent of 27 November 1826, discussed in Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 5-6.

[118] See, *eg*, Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 4-14.

[119] (1888) 4 Ky 329. It is of note that from the beginning the guardianship law was applied to both non-Muslims and Muslims alike. This continues as the Guardianship of Infants Act Cap 122, *supra*, note 1, is clearly applicable to Muslims; see Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 557, and *Yasmin Yusoff Qureshi (mw)* v *Aziz Tayabali Samiwalla*, *supra*, note 3. The application to Muslims of the non-Muslim guardianship law and the Muslim guardianship law is not altogether simple. The basic propositions including the areas where the civil courts and the Syariah Court possess concurrent jurisdiction over Muslim children and their parents have been discussed in Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 557-563. The Administration of Muslim Law (Amendment) Act 20 of 1999 wef 1 August 1999 extends this concurrent jurisdiction by allowing parties to proceedings to terminate marriage before the Syariah Court to choose to make ancillary application in guardianship and custody to the civil courts instead of making such application to the Syariah Court; see Act 20 of 1999 adding new ss 35A and 35B to the Administration of Muslim Law Act. The implications of this change are beyond this article. They are introduced in the forthcoming *Butterworths' Annotated Statutes of Singapore Noter-up Volume 6 Family* (Annotated by Leong Wai Kum).

[120] *Ibid*, at 331.

because the children were already fairly grown and no longer required a guardian to be appointed by court.

The Straits Settlements Supreme Court in Singapore in *In the Matter of the Intended Marriage between Lee Keng Gin and Catherine Wong Kim Lan*[121] faced a father of an eighteen year-old girl who refused to give his consent to her marriage. The girl was pregnant. She and her boyfriend were eager to marry. They sought the court's direction. The father did not object to the marriage or to his future son-in-law but his Roman Catholic priests threatened excommunication if he allowed her to marry. Justice Terrell decided:[122]

> [T]he court in exercising its discretion must of course consider the interests of the parties free from any denominational prejudice. The High Court, inheriting as it does the jurisdiction of the Court of Chancery in England, is especially charged with safe-guarding the interests of infants. In considering the facts of this case from this point of view there can be little doubt that it is of paramount importance to the minor that this marriage should take place ... . I therefore direct the Marriage Registrar to issue the certificate ... .

This decision demonstrates the breadth of the welfare principle even then. It applied to govern the proper disposal of a matter of marriage law, *viz*, whether the court should direct the issue of a licence to authorize the marriage of a pregnant young girl. These cases demonstrate that the welfare principle is of long distinguished vintage.

c. *Statutory encapsulation*

The original Guardianship of Infants Ordinance directed the court in guardianship proceedings to[123] "have regard primarily to the welfare of the infant, and ...the wishes of [the] parent". Thus, while in 1965, it was elevated to ubiquity, the guardianship statute always directed the welfare principle as a consideration by the court. Reported cases abound with applications of the welfare principle in all guardianship applications.

(ii) *Ubiquitous*

From 1965, the welfare principle was raised, first, to apply in "any proceedings before any court" and, second, to apply as "the first and paramount

[121] (1935) IV MLJ 201.
[122] *Ibid*, at 202.
[123] SS Ord 11 of 1934, s 11 that continues in Cap 122, *supra*, note 1, still as s 11.

consideration". The effect was settled by the House of Lords in 1970. In *J* v *C*[124] the House of Lords queried whether the welfare principle applied in a dispute between the parents of the child and a couple of strangers to the child who had been the caregivers for several years and, if so, what it meant that it was "first and paramount". Lord MacDermott decided:[125]

> Two questions arise here. First, is the section to be read as referring only to disputes between the parents of the child? [T]here is no apparent reason for confining this relief to differences between parents. ... I would hold that the present proceedings are proceedings within that section. The second question is as to the scope and meaning of the words "shall regard the welfare of the infant as the first and paramount consideration". [T]hey connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare ... . [I]t is of first importance and ... rules upon and determines the course to be followed.

The result was that the House of Lords decided the welfare of the child was best served by maintaining the child's home with the strangers who had cared for him for several years. This was the only home the child knew. As unimpeachable as his natural parents were, the welfare of the child superseded the parents' wishes.

The same is true of section 3 of the Guardianship of Infants Act. First, the welfare principle is ubiquitous in all guardianship proceedings. Indeed, it is the standard of disposition of all issues in any kind of proceedings where the "custody or upbringing of an infant or the administration of any property ... or the application of the income thereof" arises. Thus, even in a criminal prosecution, the court when resolving an issue that concerns the upbringing of a child must resolve it by the welfare principle. Second, to apply the welfare principle is to subordinate every other consideration to the welfare of the child. In particular, the fairness of the result to the parents may be noted but should never determine the outcome. Where the adults quarrel over the upbringing of a child to the extent it becomes referred to court, the court should only focus on the well being of the child. There is nothing better the court can do.

[124] [1970] AC 668.
[125] *Ibid*, at 708-711.

(iii) *Statutory confirmation*

There is also confirmation in other statutes of the ubiquity of the welfare principle as the standard to dispose of issues of the upbringing of a child.

a. *Guardianship as ancillary to matrimonial proceedings*

The issue of who to appoint as the guardian of a child may also arise ancillary to matrimonial proceedings,[126] that are now made to the Family Court, as well.[127] It may be thought that the resolution of the ancillary application for a guardian to be appointed is governed by the primary legislation, the Guardianship of Infants Act,[128] section 3 and no further direction is required in the Women's Charter.[129] The Women's Charter, in section 125(2) appropriately subtitled "Paramount consideration to be welfare of child", does however direct as follows:

> 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.

[126] These are proceedings that affect the continuance of the marriage.They may result in the grant of "a decree of nullity to declare a marriage void *ab initio*, a decree of nullity to declare a voidable marriage void, a decree of divorce, a decree of presumption of death and divorce [or] a decree of judicial separation": see *Butterworths' Annotated Statutes of Singapore Volume 6 Family*, *supra*, note 7, at 255. That an issue of guardianship can arise ancillary to these matrimonial proceedings is provided by the Women's Charter Cap 353, *supra*, note 46, s 124. The Administration of Muslim Law (Amendment) Act 20 of 1999 even allows Muslim parties to proceedings before the Syariah Court to choose to make ancillary guardianship application to the civil courts; see *supra*, note 119.

[127] Matrimonial proceedings under the Women's Charter used to be brought to the High Court, see the Women's Charter Cap 353, *supra*, note 46, s 92, but by the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 1996, *supra*, note 25, applications for these decrees are made to the Family Court as are applications in guardianship proceedings. The Supreme Court of Judicature (Transfer of Proceedings pursuant to s 17A(2)) Order 1999, S 347/1999, also transfers guardianship applications by Muslim parties from the High Court to the Family Court; see *ibid*, and *supra*, note 119.

[128] Cap 122, *supra*, note 1.

[129] Cap 353, *supra*, note 46.

It has been observed that there is[130] "slight difference between this provision and the direction in the Guardianship of Infants Act s[ection] 3". The observation continues:[131]

> [This] may partly be explained by the more specific group of persons who may invoke the provisions in Chapter 5 of the Women's Charter compared with the more generally available Guardianship of Infants Act. ... Only a father or a mother [of the child as petitioner or respondent in the matrimonial proceedings] may apply for an order [under the Women's Charter]. In contrast, a similar order may be sought under ... the Guardianship of Infants Act by "either parent or ... any guardian appointed under [the Guardianship of Infants Act] ... .

As the choice in the ancillary application is between the two parents, this may explain the reference in the provision to their wishes. This difference in the directions is "slight" and, more notably, the focus of the court remains the "welfare of the child" as the paramount consideration.

b. *Adoption*

The Adoption of Children Act[132] was enacted in 1939.[133] From the beginning, the provision of "Matters with respect to which court to be satisfied", now section 5,[134] requires *inter alia* "that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant ... ."

Adoption of a child by adults, generally other than the natural parent,[135] who will then be the adoptive parents, must surely be directed by the welfare of the child. The other two considerations in this provision that the court is required to consider are not presented as subordinate to the welfare principle so that[136] "these three considerations are presented on par". It has nevertheless

[130] *Butterworths' Annotated Statutes of Singapore Volume 6 Family*, *supra*, note 7, at 379.
[131] *Butterworths' Annotated Statutes of Singapore Volume 6 Family*, *supra*, note 7, at 379-380.
[132] Cap 4, *supra*, note 10.
[133] Straits Settlements Ord 18 of 1939.
[134] Originally Ord 18 of 1939 s 4.
[135] A natural parent can adopt his or her child with a spouse who is not also parent.
[136] *Butterworths' Annotated Statutes of Singapore Volume 6 Family, supra*, note 7, at 12.
[137] *Butterworths' Annotated Statutes of Singapore Volume 6 Family, supra*, note 7, at 12.

been suggested that:[137]

> "the welfare of the infant" is the pivot of the application. Unless the adoption order if granted were in the infant's welfare, it does not matter whether any or all of the other requirements are fulfilled. Indeed, the others should be considered only when the order is in the infant's welfare ... .

The High Court on appeal in *Re Wan Yijun & Anor*[138] applied this standard. The male applicant and a woman cohabited outside marriage and had two daughters. The relationship failed and they agreed that the father would continue to maintain the girls while their mother had custody. Later, she agreed to allow him to adopt them for $200,000. She signed a deed of severance of cohabitation and two consents to adoption. The girls were handed to their father who petitioned for adoption with his wife. The mother changed her mind, refused consent to their adoption and took them back. Following an incident when the girls required hospitalisation for bruises, the father obtained custody. In the hearing of the petition for adoption, he argued that the mother's consent should be dispensed with. The High Court refused to dispense with her consent and decided against allowing the father and his wife to adopt the children. The former Chief Justice Wee Chong Jin concluded:[139]

> [I]t cannot be for the welfare of the twins to be brought up by the petitioners [their father and his new wife]. Though their relationship has improved under supervision and though the female petitioner is undergoing counselling I am of the view these are not compelling enough to sever the natural ties between the natural mother and the twins. The only factor in the petitioners' favour is the material advantage they can offer the twins. In my view this factor alone is insufficient to grant an adoption order. It is for the natural mother to choose whether to bring up the twins with her own means or to allow the petitioners to do so. She has chosen the former.

(iv) *Universal embrace*

To complete the discussion of the development of the welfare principle, it should be noted that it has become universally embraced. The United Nations Convention on the Rights of the Child 1989 has become the most

[138] [1991] 1 MLJ 16.
[139] *Ibid*, at 21 & 22.

popular international document to date. As such, this document reflects universal consensus. Article 3 of the Convention requires of States Parties that all decisions comply with the welfare principle thus:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

It has been noted[140] "[f]rom an operating principle of the Court of Chancery, the principle has spread its influence far and wide. This attests to its appeal as the correct approach by parents, guardians, the courts and other authorities towards an infant."

(v) *Welfare principle in guardianship applications*

Given the character of the direction in section 3 of the Guardianship of Infants Act and judicial and other statutory confirmation of its breadth, it is surprising that the High Court on appeal in *Lim Kok Chye Ivan and Ng Lee Hwa Cynthia* v *Lim Chin Huat Francis and Thien Lee Chin Catherine and the Protector of Children and Young Persons*[141] decided that there are some guardianship applications including the one at hand where the direction did not apply. It is fortunate that the Court of Appeal had opportunity to set the law on the correct path once more. Chief Justice Yong Pung How decided unequivocally that the resolution of any dispute that pertains to the upbringing of a child must involve the proper exercise of discretion by the court and this requires consideration of the welfare of the child.

a. *What section 14 provides*

The Chief Justice began by carefully noting the provision in section 14 of the Guardianship of Infants Act. His Honour made two points. First, that even in a good complaint of removal from lawful guardian made under it, the provision does not mandate a return. His Honour said[142] "We reiterate that the court has a discretion under section 14 whether the infant, who has left or been removed from the lawful guardian's custody, should be

[140] Leong Wai Kum, *Cases and Materials of the Family Law in Singapore*, *supra*, note 91, at 399.
[141] District Court Appeal No 5028/98, unreported.
[142] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 59, para 83.

returned to the guardian." Second, section 14 does not concern itself with "unlawful removal" but rather "removal from lawful guardian". His Honour said[143] "There is no requirement under section 14 for the taking or removal to have been unlawful. [All that is required is that] the infant has left or been removed from the applicant as lawful guardian".

In both respects, the decision of the High Court had been faulty. It had found that Francis Lim and Catherine Thien had unlawfully removed Esther from the guardianship of Ivan Lim and Cynthia Ng. This despite both parties being fully aware of their removing her for trial stays to discover if they could bond with the girl, the officials of the Ministry of Community Development sanctioning these trials and the girl's caregiver Helen consenting to the trials. The High Court then decided that, on proof of the unlawful removal, section 14 required it to order that the girl be returned.

b. *Resolution of section 14 directed by sections 11 and 3*

Having decided that section 14 does not mandate a return of the child to the person she was removed from, the Chief Justice elaborated on the proper way to come to a decision of what to order of the child. His Honour observed that sections 11 and 3 of the Guardianship of Infants Act direct the paramountcy of the welfare principle thus:[144]

> Section 11, in essence, directs the court in exercising its powers under the Act to have a primary or paramount regard for the welfare of the infant, and is consonant with the welfare principle stated in section 3. The welfare principle is therefore always applicable in the exercise of the court's discretion under the second stage of a section 14 application ... .

Ivan Lim and Cynthia Ng's submission that the court must order Esther be returned to them, which the High Court on appeal accepted, failed.

c. *Reason also supports welfare principle*

The Chief Justice further observed that[145] "[e]ven without relying on [the Guardianship of Infants Act sections 3 and 11] the same result would be

[143] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 59, para 83.
[144] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 60, paras 84 & 85.
[145] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 60, para 85.

reached." This follows simply from consideration of the "lawful guardian", a person entitled to the care and custody of the infant, as[146] "so connected to the infant's upbringing and proprietary interests that we cannot see how the respondents may even begin to argue to the contrary."

With this observation, the Chief Justice sealed the character of the welfare principle as ubiquitous. There are two provisions in the Guardianship of Infants Act that direct its consideration one of which clearly characterises the consideration as "first and paramount". Even without them, however, it will be possible to reach the same consideration simply by thinking about who the "lawful guardian" is in relation to the child. The lawful guardian is the adult concerned with the personal well being of the child. Whether to order the child to be returned to her lawful guardian cannot be fully considered without thinking of the child's welfare.

It should be observed that the discussion above of there being another approach to understanding "lawful guardian" than that adopted by the Chief Justice is separate from the matter of the welfare principle. There can be no disagreement with the Chief Justice's decisions regarding the welfare principle. His Honour showed insight into the relationship between a child and her caregivers. Proper legal regulation of the relationship must pivot on the child's well being.

C. *Application of Welfare Principle to Esther*

Chief Justice Yong Pung How proceeded to apply the welfare principle to the case at hand. His Honour noted that the broad strokes in this principle have been painted by the High Court in *Tan Siew Kee* v *Chua Ah Boey*[147] and the Court of Appeal earlier in *Soon Peck Wah* v *Woon Che Chye*.[148]

(i) *Modern understanding of welfare principle*

The High Court decision was outstanding. In *Tan Siew Kee* v *Chua Ah Boey* the court ordered that the custody, together with care and control, of the infant boy under two years old should be with his father while the mother should only have reasonable access. The parents never married. The mother was married to another man but living separately from her husband

[146] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 60, para 85.

[147] [1988] 3 MLJ 20 and see Leong Wai Kum, *Cases and Materials of the Family Law in Singapore*, *supra*, note 91, at 405-408.

[148] [1998] 1 SLR 234 and see Leong Wai Kum, *Cases and Materials of the Family Law in Singapore*, *supra*, note 91, at 412-415.

when she cohabited with the father. This relationship also deteriorated and she left with the infant. The mother's sister took care of the infant for a while. This application was made by the father to formalise his son's living arrangement with him. The mother defended the application.

The father claimed he loved his son and that his own aunt would look after him when he worked. He claimed the mother was a gambler who never took care of the infant. The mother denied the allegations and, in particular, recalled the time when the father offered "to buy his son for $5,000" from her.

Justice Chan Sek Keong, as he then was, demonstrated remarkable sensitivity towards the father's action of offering money to settle his infant son's living arrangement. His Honour said:[149]

> Obviously, the allegations ... are intended to suggest the [father] was prepared to buy the child or his custody and that it is wrong to do so. On my part, I am not sure that such an inference should be made or that it is reprehensible or wrong for a father to want to obtain custody of his own son, even if he has to pay money for it, when he believes that his welfare had not been looked after by the natural mother.

At the end of the day, his Honour was left with this comparison of the alternatives the father and mother offered the infant.[150]

> [The mother] is more concerned with her own welfare than that of her children. ... [A]lthough ... the plaintiff had forcibly taken his son away ... she took no steps to resume custody of the child. It is the father who has taken the initiative to regularise his position *vis-à-vis* his son by making this application for custody. This, to me, is a clear indication that he cares more for his son and his welfare than his mother.

This decision has been described as[151] "an excellent application" of the standard of disposition. The judge was not too ambitious as some judges may be tempted to be. His Honour focused sharply on the present and, in particular, on how the recent behaviour of the two parties reflected on their parenting abilities. Comparing the parents' behaviour allowed the judge

[149] *Op cit*, at 21.
[150] *Supra*, note 147, at 22.
[151] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 577.
[152] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 577.

to pick the more concerned parent. This was excellent because it[152] "shows an appreciation that the best the court can achieve for the infant is to pick the more concerned of his parents. The future remains imponderable and the order cannot be improved by trying to guess it."

(ii) *How welfare principle applied to Esther*

Chief Justice Yong Pung How began by reminding that the ultimate fate of Esther in the case at hand will only be determined by the outcome of the two petitions for adoption that had been adjourned. Indeed, his Honour expected the adoption petitions to[153] "resume expeditiously after the disposal of this appeal." In that sense, the order made here would be even more provisional than another in guardianship applications. Of the potential of variation in every guardianship order, it has been observed:[154]

> An order appointing a guardian is of continuing nature. As such it is always subject to be changed even after rights of appeal have lapsed. ... The order may be varied or discharged if new circumstances show that such variation or discharge will serve the welfare of the infant.

a. *Esther well cared for by present care givers*

Of the proper order in this application, the Chief Justice noted that the District Court and the High Court had found Esther "well-cared for whilst living with the appellants". Francis Lim and Catherine Thien, a working couple, had understandably placed Esther in a full-day childcare centre. In the absence of evidence to the contrary, the Chief Justice was prepared to assume that they brought her home every evening. Her present caregivers, then, appeared to be doing right by her.

b. *Comparison of available alternatives*

The Chief Justice then compared the alternatives. If Esther's present living arrangements with Francis Lim and Catherine Thien were ordered maintained the only effect of this might be that Ivan Lim and Cynthia Ng, who currently had access to her, will disappear from the scene altogether.

[153] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor, supra*, note 5, at 61, para 89.
[154] *Butterworths' Annotated Statutes of Singapore Volume 6 Family*, *supra*, note 7, at 52.

Thus, if Ivan Lim and Cynthia Ng were finally to be allowed to adopt Esther, maintaining the status quo now only deferred their caring for her for a while longer.

In the alternative, changing the present living arrangements would mean[155] "an uprooting of the child from her current daily residence" with presumably reasonable access to Esther's present caregivers. Even if this uprooting were not reason itself to reject Ivan Lim and Cynthia Ng's application to have Esther returned to them, the Chief Justice noted that so ordering carried the risk of further uprooting should the adoption petitions be finally resolved in favour of Esther's current caregivers. Then, if Francis Lim and Catherine Thien were finally allowed to adopt Esther, the Chief Justice reasoned:[156]

> the consequence would be drastic. Esther, after having only been shortly pulled out from [Francis Lim and Catherine Thien's] dominant and daily care into [Ivan Lim and Cynthia Ng's], would have to be returned to the [former]. In our view, the trauma created by this plausible last scenario would be very extreme ... .

It was not surprising that the conclusion was[157] "the better of the two options would be to maintain the status quo". While there was room to consider the wishes of Madam Tay, Esther's mother, and the Chief Justice did so consider, there was no real reason to give much significance to her preference of Ivan Lim and Cynthia Ng as Esther's caregivers.

(iii) *Relate with parental responsibility*

Chief Justice Yong Pung How supported his view that maintaining the status quo was the best outcome of this appeal. His Honour made clear his view of the responsibilities of adults seeking to become adoptive parents:[158]

> Little Esther has been subject to too many upheavals, and faced too many emotional trials for an infant of her age. ... A child is not a thing or an animal one can simply take for granted and discard at one's convenience, to pick up again later when circumstances become pressing. A child is a living being, dependent on adults from birth and must

[155] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor, supra*, note 5, at 61 para 89.
[156] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 61, para 89.
[157] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 61, para 89.
[158] *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*, *supra*, note 5, at 62, para 91.

> be cherished with genuine love from the outset. ... In any case ... the very least the court must do is to advocate the underlying premise that parents, natural or potential, must care for the children.

These are strong, timely words. The moral view underlies all aspects of child law. The Chief Justice emphasised that the responsibility the law holds a parent to with regard to his or her child, discussed in Part V below, is equally true of adults who want to become adoptive parents. A parent owes responsibility to his or her child. The same is expected of those who aspire to be parents. They too must demonstrate readiness to discharge their moral commitment to the well being of the child.

The saga, thus, ended with the Court of Appeal maintaining the child's current living arrangements and reminding the two couples aspiring to become Esther's adoptive parents of their moral responsibilities to her. There can be no better ending to the court drama. The Chief Justice has seized the opportunity to send a strong moral message to all parents and would-be parents.

V. Guardianship to Support Parental Responsibility

It has been noted that guardianship and parenthood overlap in that a parent is a natural guardian and a parent is the most likely appointee by the court as guardian of a child at the end of litigation between the parents over this matter. It was also noted that the law and courts view guardians, just as a parent and a potential adoptive parent, to owe responsibility to the child. In this Part, we discuss the effect of the overlap and how the courts may use their powers so that guardianship orders support rather than undermine parental responsibility.

A. *Parental Responsibility*

The fundamentals of child law are provided in the Women's Charter,[159] the principal family statute, from its enactment in 1961.[160] Section 46(1) provides "the husband and the wife shall be mutually bound to co-operate with each other ... in caring and providing for the children."

[159] Cap 353, *supra*, note 46.

[160] As the Colony of Singapore Ord 18 of 1961. For its enactment, see Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 38-44.

(i) *Powerful expression of moral commitment*

This provision was described thus:[161]

> [The provision] may be of imperfect obligation but [is] nevertheless powerful. ... The provision declares that parenthood ... encompasses responsibility to the child ... . Parental responsibility is owed by both father and mother. It is a co-operative responsibility. It should be discharged for the benefit of the child. Parental responsibility is tenacious, lasting for the lives of the parent and child ... .

(ii) *Extends to parents not married to one another and adults planning to become adoptive parents*

The exhortation of parental responsibility may:[162]

> on a purposive reading, apply equally to parents who are not spouses. [By section] 46(1), all parents whether married to each other are exhorted to discharge their responsibility for the benefit of their children and to co-operate with one another in so doing.

The Chief Justice's strong words towards the end of the judgment in *Lim Chin Huat Francis & Anor* v *Lim Kok Chye Ivan & Anor*[163] affirm that the law views parenthood as moral commitment to the child. The courts will not shy from their duty to hold parents to this commitment. Indeed, the Chief Justice suggested that potential adoptive parents must also demonstrate capacity to discharge this obligation. *A fortiori* a parent.

(iii) *Continues after parents' relationship deteriorated*

It is further of note that the provision exhorts the discharge of parental responsibility even where the relationship between the spouses has waned.

[161] Leong Wai Kum, *Cases and Materials of the Family Law in Singapore*, *supra*, note 91, at 293.
[162] Leong Wai Kum, *Cases and Materials of the Family Law in Singapore*, *supra*, note 91, at 294.
[163] *Supra*, note 5, and see text corresponding to note 158.

Section 46(1) in its reference to parental responsibility does not provide that the responsibility is suspended when the spousal relationship deteriorates. It was observed:[164]

> The law also ... does not distinguish between parents who are ... in the process of terminating their marriage or whose marriage has been unnaturally terminated by court decree. While parents who are no longer married may have more pressing cause for formalisation of their relationship with the child, the incidents of the relationship and, in particular, what the law expects of the parent, are unaffected by the failure of the marriage. Even when their marriage has become unnaturally terminated by court decree, the law continues to expect of the former spouses that they discharge their parental roles in caring and providing for the children. The clearest illustration of the law continuing to hold parents to their responsibility is the change brought by Act 30 of 1996 whereby their duty to maintain their dependent child is, now, expressed by the same provisions, sections 68 and 69, whether the parents are married or their marriage terminated by court decree ... .

It is right that the law exhorts parents to continue their responsibilities to their child even though their marriage has ceased functioning. A lesser exhortation will be poor legal regulation of the relationship between parent and child.

B. *How Guardianship can Support Parental Responsibility*

It is clearly better for guardianship to support the continuance of parental responsibility. This means that where the guardian of a child is appointed at the end of guardianship proceedings, the responsibility of the parent who is not appointed the guardian should not be eclipsed to any greater extent than absolutely necessary. It has been suggested that[165] "[c]urrent law favours keeping as much of the relationship between the child and his or her parents intact as possible. The law of guardianship has to accommodate the law's recognition of natural parental authority."

The most common guardianship application is that between spouses in matrimonial proceedings after their relationship has broken down. In this

[164] *Butterworths' Annotated Statutes of Singapore Volume 6 Family*, *supra*, note 7, at 184.

[165] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 531. See also Debbie Ong Siew Ling, "Parents and Custody orders – A New Approach", *supra*, note 6, who proposes that more orders of joint parenting or joint custody be made.

application, the spouses desire the court to appoint one of them as the guardian of their child. It follows that the most common guardian appointed by court is one of the parents of the child. The appointment of the guardian is often, rather loosely ordered, of "custody". "Custody", in theory, signifies the totality of parental authority.[166] The effect of the court ordering one parent to have the "custody" of the child while the other does not, therefore, suggests that only the parent appointed guardian retains his or her parental authority. It suggests that the parent who is not appointed guardian with "custody" over the child loses his or her parental authority during the continuance of the court order.

This effect would not be desirable. Where section 46(1) of the Women's Charter exhorts that parental responsibility to the child continues through any deterioration of the relationship between the spouses, it would be unfortunate if the court exercises its powers in guardianship in a way that undermines the exhortation and releases one parent from his or her responsibility to the child. This and other problems arising from the actual kind of order made by the court have been discussed before.[167] It was then suggested that the exercise of powers by the court should be aimed as follows:[168]

> The authority of parents should, as far as possible, not be completely undermined by an order of custody. An order giving one parent sole custody is unattractive precisely because it undermines the authority of the other parent. ... It is expected that courts will, first, increasingly prefer making care and control and access orders and not custody orders so that decision-making, other than the mundane, continues to be shared by the two parents and, second, custody orders are more likely to be jointly held by both parents.

While there are no decisions on the above propositions, it is submitted that some recent decisions can be read to approve of them. Parental responsibility is better preserved when a court makes the following considerations.

(i) *Dismiss guardianship application to leave parents to status quo*

The innovative High Court decision in *Yasmin Yusoff Qureshi (mw)* v

[166] See Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 536-538.
[167] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 536-542.
[168] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 542.
[169] *Supra*, note 3.

Aziz Tayabali Samiwalla[169] is instructive. The parties were Muslims from different sects. They agreed that their young daughter should remain in the care and control of her mother. She later applied to the High Court for an order of sole custody as well. The father counter-claimed seeking an order of joint custody.

Judicial Commisioner Michael Hwang observed features of the case that may not be unique in guardianship applications between parents. His Honour said, "There is in fact a large measure of agreement between the parties. .... [T]he point of difference is that the mother wants an order for sole custody to be granted to her while the father seeks an order for joint custody." Both parents were devoted to the child. His Honour rightly noted that there are three possible orders that can be made, *viz*, "to award the mother sole custody, ... joint custody as requested by the father, or to make no order as to custody, leaving only the orders for care and control and access ... ."

Evaluating the options, his Honour said:

> It would not be right at this stage to give one parent the absolute right to determine any decisions with long-term implications without hearing the other parent ... . 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; even if he exercised his rights under the joint custody order in good faith, there might well be constant disputes over what decisions should fall under custodial rights and what decisions under rights of care and control.

His Honour concluded:

> While therefore I recognise that the father should have some rights over the upbringing of the child, I do not wish to encourage unnecessary dissension between the parties. I am concerned about the psychological effect of a joint custody order, particularly as the law is unclear as to what this means. In the circumstances, I believe that the appropriate decision is to make no order as to custody, thereby leaving neither party the *prima facie* advantage of deciding any serious matters relating to the child's upbringing. Hopefully, the parties will have enough sense to resolve important matters affecting the child by mutual agreement, given their knowledge that any disagreements will have to be resolved by litigation. If, in due course, the order I have made proves unworkable because of a plethora of applications to court, the court may then review the situation and make a formal order for custody.

In the result, no order of custody was made but "care and control of the child" was granted to the mother with access to the father.

Although his Honour was perturbed that "custody" is not defined and this remains true, an acceptable explanation may be:[170]

> A guardian has "custody" over the infant. The term, therefore, refers to the bundle of rights, duties, obligations and responsibilities that the guardian possesses over the infant as his or her authority. As the guardian is appointed to possess parental authority over the infant, this bundle of rights and duties is as broad as parental authority.

The effect of his Honour's order was therefore that neither father nor mother was given the totality of parental authority at the expense of the other. Parental authority between them continued as before. A parent naturally possesses authority over the child. The law supports this but now describes it as the parent's responsibility towards the child. His Honour's decision continued both parents' responsibility. Only the daily care and control of the child was settled to be with the mother with access to the father.

The preservation of the responsibility of both parents may, at first sight, appear to achieve the same effect as making the order of joint custody the father sought. There may be only a symbolic difference between dismissing a guardianship application to leave the parents at legal status quo and making an order of joint custody. It has, however, been suggested that this symbolic difference is useful in affirming the basic principle of minimal interference in a child's relationship with his or her parents:[171]

> It is submitted there was a significant symbolic difference. ... His Honour has sent out a strong message ... that the role of the courts ... is to step in only when there is a real dispute between the parents because it is only then that, through its order, the court can make a real improvement to the child's living arrangements.

It was also observed:[172]

> In not making either of the orders sought, his Honour achieved two objectives. First, from the infant's perspective, his Honour has required

[170] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 536.

[171] Leong Wai Kum, "Trends and developments in family law" *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995* (Butterworths, Singapore, 1996) 632, at 654.

[172] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 540.

> both parents to continue to discharge their responsibility and authority over her. Second, his Honour has affirmed the proper role of the court to intervene, only, when it can do some real good. Courts may make less broad orders of custody and this may be a healthy trend.

A further symbolic advantage in dismissing a guardianship application brought by the parents is that this result reinforces how temporary a court order is as "resolution" of the disagreement between the adults over the upbringing of the child. The relationship between the child and the adults on whom the child is dependent, primarily his or her parents, is truly dynamic. All that any order made by court achieves is temporarily to assuage a pressing point of disagreement. No order, however well and deeply considered, can truly resolve parental disagreement with finality. It behoves the court to remind parties that it is painfully aware of the real limits of its powers. The adults must be cajoled to rise above petty concerns to give the child under their care the best they are capable of.

(ii) *Order appointing both parents as guardians*

If an order of custody were thought useful, the court should consider an order of joint custody. This appoints two adults, including possibly the two parents, as guardians. To prefer joint custody over sole custody has been suggested as a possible trend the courts may pursue:[173]

> An order giving one parent sole custody is unattractive precisely because it [in theory] undermines the authority of the other parent. It suggests the other parent is cut off decision-making over the child. It is expected that courts will, first, increasingly prefer making care and control and access orders and not custody orders so that decision-making other than the mundane continues to be shared by the two parents and, second, custody orders are more likely to be jointly held by both parents.

(iii) *Parent as sole custodian must still consult other parent*

The Court of Appeal in *L* v *L*[174] decided that the sole custodian of the child is required to continue to consult a parent despite the parent not entrusted

[173] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 542. This was also suggested in Debbie Ong Siew Ling, "Parents and Custody orders – A New Approach", *supra*, note 6.

[174] *Supra*, note 5.

with "custody" over the child by the court. The Court was faced with this sequence of events involving the two parents of a girl. On the parents' divorce, a consent order gave the mother sole custody of the girl then two years old. The father settled for "generous access" and continued financially supporting the girl and the mother. The mother formed a relationship with a man, T. Without consulting the father she, by the relatively simple method of deed poll, changed the girl's surname from that of her father, "M", to "T". She later married T and had two other children by him both, naturally, also of the surname "T". It was only when the girl started school several years hence that her father discovered her change of surname. The father applied to court for the deed poll to be made void or that another deed poll be executed for her to re-assume his surname.

Both the High Court and the Court of Appeal chastised the mother for her unilateral action. The courts differed in their consideration of whether, several years after living with her new surname that is similar to that of her step siblings, it was in her welfare to have it changed back to her father's. The High Court reluctantly thought not but the Court of Appeal thought affirmatively and ordered the mother to have the girl's surname changed back to her father's.

The point that interests us here arises from the consent order earlier made that appointed the mother guardian of the girl entrusted with her "custody". She was the girl's sole custodian. The issue arose of the extent of the authority of a sole custodian in particular *vis-à-vis* the parent not appointed custodian. Justice Goh Joon Seng decided that her authority as sole custodian did not extend to unilaterally changing the girl's surname as this was one matter exceptionally important to her well being.[175] His Honour decided:[176]

> 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 a 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.

[175] There appears to be at least two more matters where statute demands that the custodian must consult with the parent or obtain the leave of court; see the Adoption of Children Act Cap 4, *supra*, note 10, s 4(4) requires that the consent of "every person ... who is parent or guardian of the infant" and the Women's Charter Cap 353, note 46, s 126(3) prohibits the removal of a child out of Singapore for longer than one month "except with the written consent of both parents" and see also Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 453-457.

[176] *Supra*, note 5, at 228.

Justice Goh Joon Seng felt compelled to downplay the amount of authority bestowed by an order of custody. His Honour observed possibly in *obiter dictum* that,[177] "A custody order ... would only empower the custodial parent to decide on the day to day matters relating to the child." This observation may be somewhat extreme. A custody order should bestow more authority than an order of care and control. In any case, this statement and the decision of the court demands reconsideration of the proper relationship between the courts' powers in guardianship and custody and the character of parental responsibility. It has been said:[178]

> His Honour's *obiter dictum* aimed to reduce the gain of the parent given sole custody and concomitantly retain the decision-making authority of the other parent not given custody. The *obiter dictum* is consistent with the view that the more of the non-custodial parent's authority is retained, *ie*, the closer to status quo the infant and the two parents are left in, the better off the infant is. It is submitted that a fair suggestion of the extent of the authority of the parent denied custody may be said to be as follows. A parent, despite not given custody, continues to retain decision-making authority over serious matters concerning his or her child. The less serious have been left to the sole discretion of the parent given sole custody. Serious matters, however, are set aside and both parents continue to retain decision-making authority over them. The balance of authority between the parent granted sole custody and the other may be that the less serious incidents of parental authority have been bestowed on the parent given sole custody but the most serious continue to be shared by them.

For present purposes, the decision suggests that the right way for courts to use their powers in guardianship applications is to preserve parental authority. Orders that suggest a parent is shut out of a child's life should be avoided unless absolutely necessary. In contrast, joint custody orders that promote[179] "joint parenting" should be made more frequently precisely because such joint orders are more consonant with the exhortation section 46(1) of the Women's Charter makes of all parents. Preserving parental responsibility upholds the welfare principle.

[177] *Supra*, note 5, at 228.

[178] Leong Wai Kum, *Principles of Family Law in Singapore*, *supra*, note 4, at 541.

[179] See Debbie Ong Siew Ling, "Parents and Custody orders – A New Approach", *supra*, note 6.

C. *Good Outcome of Guardianship Application*

A cynic might regard the hope of a good outcome of guardianship application as an impossible dream. The well being of the child is seriously challenged whenever his or her parents cannot resolve their differences and require the court's scrutiny into the living arrangements of the child. Recognizing this, the courts now pursue a more[180] "practicable goal" over their former "more expansive" approach to the welfare principle. Some orders however are, within the sombre reality of a family in trouble, better than others.

An attempt will also be made to relate this discussion with the revamped English law to regulate the relationship between an adult and a child. The Law Commission of England and Wales expressed dissatisfaction with the then law that suffered the same problems as highlighted above.[181] It recommended that the law be substituted altogether in the main to allow this area of the law to better support parental responsibility. The English Parliament implemented these recommendations through the (English) Children Act 1989. English courts no longer make "custody" or "care and control" orders. Instead they make "residence", "contact", "specific issue" or "prohibited steps" orders as ways of regulating the relationship between an adult and a child. It is suggested that we can just as well retain the law of guardianship and custody and the kinds of orders our courts have always made, and still align the exercise of their powers to preserve parental responsibility. It may not be necessary to revamp the law to achieve this. Some propositions are offered for consideration.

(i) *Care and control order*

An order of "care and control" decides with which parent the child should live. This order is a necessary evil when two parents separate. It is of note that courts in England today readily make "residence" orders. The making of an order of care and control furthers the well being of the child in settling who he or she is to live with. The parent entrusted with care and control will also be entrusted with decision-making authority over the myriad day-to-day matters that come up.

It is now generally expected that the parent who does not have "care

[180] See the two High Court decisions contrasted in Leong Wai Kum, *Cases and Materials of the Family Law in Singapore*, *supra*, note 91, at 401-408

[181] Law Commission of England and Wales, *Review of Child Law Guardianship and Custody,* Law Com No 172 (1988) HC 594.

and control" of the child should get generous access. The High Court has expressed that it will require very convincing evidence before it denies a parent generous access to a child.[182] Similarly, a court in England will readily make a "contact" order.

(ii) *No custody order*

An order of custody is not as necessary. It purports to leave major decision-making authority in one person. Where the guardianship application is brought between the two parents, as is the norm, and one parent is bestowed custody, the theoretical effect of the order on the relationship between the child and the parent not entrusted with custody is undesirable. This explains the Court of Appeal's reluctance in *L* v *L*[183] to regard an order of sole custody to one parent as having bestowed any more power than daily care of the child and the inevitable small decisions that go with that. It was noted above that this view is somewhat extreme. An order bestowing custody should grant more authority than one that only gives care and control. The view expressed by the Court of Appeal has been described as[184] "reflects an underlying dissatisfaction with an order of sole custody." Accepting that an order of custody does grant the parent more than the authority to "decide on the day to day matters", the possibility of not making an order of custody should always therefore be considered.

In the normal guardianship application between the two parents, it may more often than not be possible to refrain from making a custody order. The High Court in *Yasmin Yusoff Qureshi (mw)* v *Aziz Tayabali Samiwalla*[185] has shown the way. Not making an order of custody upholds the exhortation in section 46(1) of the Women's Charter at a crucial time in the parents' relationship with their child. It provides a timely reminder to them of their continuing responsibility. Section 1(5) of the (English) Children Act 1989 reminds in England "Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order ... unless it considers that doing so would be better for the child than making no order at all." This affirmation of minimal encroachment

[182] See *Tay Ah Hoe (mw)* v *Kwek Lye Seng* Div Pet No 3080 of 1995, unreported.
[183] *Supra*, notes 5 and 177.
[184] Leong Wai Kum, *Principles of Family Law in Singapore, supra*, note 4, at 541.
[185] *Supra*, note 3.

into the delicate dynamic relationship between a child and his or her parents is always timely. It is usually better for the child if both parents' status at law are preserved. Making a custody order will only threaten the ideal that has been set at law.

The need to make a custody order, therefore, really only arises in the exceptional situation where the court is asked to consider appointing a non-parent as guardian. In this scenario, the court should make serious consideration and, where the situation warrants the appointment, the court should make the custody order. For the non-parent, the making of a custody order in his or her favour is critical. The custody order bestows the non-parent with parental authority over the child that he or she would not otherwise possess.

(iii) *Joint custody order*

Where a custody order must be made, the court should consider if more than one person should be appointed. The theoretical weakness of an order of sole custody should persuade the court to make this consideration.

Where there is nothing to indicate otherwise, a parent should be one of the persons bestowed with custody. Only this overcomes the suggestion otherwise that his or her parental responsibility is suspended during the continuance of the order of sole custody in favour of the other parent or another adult.

In the normal guardianship application between the two parents, a custody order appointing both parents guardians of the child is preferred over an order of sole custody. It has been argued that the factors courts consider under the welfare principle only go towards showing which parent is better placed to provide daily care so that, of custody, the court should lean towards a joint custody order.[186] While there are situations where joint custody is not recommended, the writer suggested that the fear that the parents cannot co-operate to make such joint order practicable may be overstated.[187] The courts or the law cannot make parents any better than they are. What they can do is reinforce the expectations society legitimately makes of two people who choose to engage in the moral commitment that follows bringing a child into the world.

[186] Debbie Ong Siew Ling, "Parents and Custody orders – A New Approach", *supra*, note 6, at 215-223.

[187] See Debbie Ong Siew Ling, "Parents and Custody orders – A New Approach", *supra*, note 6, at 223-227.

VI. Conclusion

It has been argued that several fundamental principles of the law of guardianship and custody can be put on more solid footing in order to better relate with parenthood and its responsibility. When fundamentals require to be restated, it may be time to revise the statutes. The Guardianship of Infants Act could stand revision. Until that is achieved, however, it has been suggested that several improvements can incrementally be put into place. The concept of guardian can be more firmly understood. The settled family meaning of an adult who possesses parental authority over a child should be preserved. The terms "lawful guardian" and "legal guardian" should be understood as no different from "guardian". The disposition of any guardianship application should be on the standard of the welfare of the child. Court orders of guardianship should be tailored to support the continuance of parental responsibility. When these basic propositions are firmly established, the law of guardianship and custody will continue to serve us well.

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