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MAKING NO CUSTODY ORDER: *Re G (GUARDIANSHIP OF AN INFANT)*[1]

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I. INTRODUCTION

More than a decade ago, the Singapore High Court remarked in *Re Aliya Aziz Tayabali; Yasmin Yusoff Qureshi (m.w.) v. Aziz Tayabali Samiwalla*,[2] that "[t]he law of custody is . . . in a state of confusion." It has been observed that *inter alia* one nagging problem is how to relate the authority a guardian obtains through a custody order made by a court with the authority that the family law in Singapore recognizes a parent to naturally possess over his or her child.[3] In *Re Aliya*, the parents had agreed that the mother should have care and control of the child but the custody suit was begun by the mother applying for an order for sole custody while the father responded by applying for an order of joint custody. In a brilliantly sensible judgment, the learned judge, on observing that there were then no outstanding major issues concerning the child that required the parents' immediate decision, held 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.

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1 [2003] S.G.H.C. 265, unreported judgment of the High Court dated 29 October 2003. [*Re G*]

2 *Re Aliya Aziz Tayabali* [2000] 1 S.L.R. 754 at 758 (decided in 1992 but reported only in 2000).

3 See Leong Wai Kum, *Halsbury's Laws of Singapore Volume 11 Family Law* (Singapore: Butterworths Asia, 2001) at paras. 130.474–130.486.

The court's decision to make no order of custody meant that the parents would have to continue to be involved in the upbringing of their child. This decision, which supports joint parenting, has been welcomed in academic writings as the desirable position that this part of family law should strive towards.[4]

Despite the exhortation in *Re Aliya* to use the law of guardianship and custody to support continued joint parenting, the trend of the Family Court decisions in the decade that followed reveals that few cases have abided by it. Cases of the last two years disclose an encouraging trend towards orders that required the continuation of joint parenting[5] but some of the cases this year have started straying from it.[6]

Against this background, the most recent High Court decision dealing with the issue is warmly welcomed. *Re G*[7] has clarified the law on guardianship and custody as it should affect parents of the child and has rightly returned the law to the track paved by *Re Aliya*. It adopts the spirit of *Re Aliya* and provides food for thought on how the law of guardianship and custody could optimally support rather than undermine parental responsibility.[8]

II. *Re G (Guardianship of an Infant)*[9]

In *Re G*, the parents, even before they became divorced but in preparation thereof, agreed that the mother should have care and control of their young child K, who was less than two years of age. However, the mother applied for a court order of sole custody while the father sought joint custody. The mother alleged, *inter alia*, that the father denied he was the child's father, failed to ferry her to the hospital for the child's delivery, showed no interest in the child, kept late nights and had an adulterous affair. The father denied

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4 See Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths Asia, 1997) at 538–542 [Leong, *Principles of Family Law*] and Debbie Ong Siew Ling, "Parents and Custody Orders—A New Approach" [1999] S.J.L.S. 205.

5 See (2002) 3 S.A.L. Ann. Rev. 230–231 and (2001) 2 S.A.L. Ann. Rev. 227–229.

6 For example, sole custody was granted in *Shoba Gunasekaran v. Rajendran*, LawNet Unreported Judgments [2003] S.G.H.C. 202; *Doo Suet Choon v. Leow Chow Tong*, LawNet Unreported Judgments [2003] S.G.D.C. 59; *Pham Thai Keiu My (m.w.) v. Montanos Tejam* Div. No. 600612 of 2002 & R.A.S. No. 720011 of 2003, LawNet Unreported Judgments [2003] S.G.D.C. 87.

7 *Supra* note 1.

8 See the point made in Leong Wai Kum, "Restatement of the Law of Guardianship and Custody in Singapore" [1999] S.J.L.S. 432 at Part V, 481–492 [Leong, "Restatement"].

9 *Supra* note 1.

the allegations and further alleged that the mother had tried to keep the child away from him.

The District Judge relied on the cases of *Jussa v. Jussa*[10] and *Ho Quee Neo Helen v. Lim Pui Heng*[11] and held that, as the parties had an acrimonious relationship and could not cooperate in matters relating to the child, the mother should have sole custody of K.

On appeal, the High Court set aside the District Judge's order on custody. Tan Lee Meng J. held that

> While it is true that a joint custody order may be unrealistic where the parents of a child have an acrimonious relationship, it does not follow that the alternative in such a situation is to grant sole custody of the child to one parent. Where there is no immediate or pressing need for the question of custody to be settled, one should seriously consider whether an order for sole custody is in the best interest of a child, who should, without more, be entitled to the guidance of both parents. *Jussa v. Jussa* must be viewed in the proper perspective and should not always be relied on to justify an order for sole custody merely because the child's parents have an acrimonious relationship.

His Honour stated in no uncertain terms that

> It ought to be noted at the outset that as a general rule, it is preferable that joint parental responsibility for a child's welfare be maintained. In *Principles of Family Law in Singapore*, Professor Leong Wai Kum, who took the view that an order for sole custody is losing favour, rightly pointed out at p. 537 that a joint custody order of both parents is theoretically ideal because it maintains a non-resident parent's parenting role.

This outstanding decision marks a significant step in the development of Singapore law on custody orders. It is especially instructive for cases that involve parents who may, in the course of the custody suit that remains within the adversarial system of litigation, appear to be uncooperative and even somewhat acrimonious towards each other. Some judges in cases preceding this have been too liberal in concluding that these parents may remain acrimonious even after the heat of the custody suit is over and then granted orders of sole custody.

Re G is a landmark in setting out clearly and persuasively that the preferable position is to preserve both parents' joint parental responsibility, even if the parties may harbour some acrimony towards each other. An order giving one parent sole custody should generally be avoided. If in 1992, "the law of

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[10] [1972] 2 All E.R. 600.
[11] [1972–74] S.L.R. 249.

custody (was) … in a state of confusion",[12] the decision in *Re G* may make it less confused today. Academic opinion in recent years has fervently advocated using the law of guardianship and custody to preserve joint parenting as this best serves the welfare of the child.[13] *Re G* supports this view. It is expected that when this *ratio decidendi* is followed in future cases, sole custody orders in custody suits between parents will only be made in exceptional circumstances such as where one parent has been demonstrated to be 'bad' for the child where he or she has physically, sexually or emotionally abused the child.

III. Academic Argument for Joint Parenting

The learned Judge in *Re G* quoted from Professor Leong, who has also argued in *Principles of Family Law in Singapore* that[14]

> An order giving one parent sole custody is unattractive, precisely because it undermines the authority of the other parent. It suggests the other parent is cut off from decision-making concerning the child. It is expected that courts will first, increasingly, prefer making care and control orders so that decision-making, other than mundane decisions, continues to be shared by the two parents and second, custody orders are more likely to be jointly held by both parents.

The learned author has also pointed out in an article that:[15]

> 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 … 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.

In *Tsang Sow May v. Owyong Mun Heng*,[16] the District Judge granted joint custody and embraced academic opinion advocating joint parenting:

> In her article 'Parents and Custody Orders—A New Approach', by Ms Debbie Ong Siew Ling [1999] SJLS page 205 at page 222 the author

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12 *Re Aliya Aziz Tayabal, supra* note 2, at 758, para. 11.

13 See *supra* note 4.

14 Leong, *Principles of Family Law, supra* note 4 at 542.

15 Leong, "Restatement", *supra* note 8 at 491.

16 Divorce Petition No. 605/98, District Court, Unreported, at paras. 9–10. Unfortunately, on appeal, sole custody was awarded to the mother; no grounds of decision were given.

stated as follows:-

> "It is submitted that the court should use the factors of age and preservation of *status quo* in making orders of care and control and consider the issue of custody separately. It should grant joint custody in all cases with two exceptions. First, where one parent is so unfit for parenting that the benefits of having his or her involvement in the child's life is far outweighed by the harm which his involvement may bring to the child. Second, where the relationship of the parents is such that cooperation is impossible even after the avenues of mediation and counselling are exhausted and the lack of cooperation is harmful to the child … When a marriage breaks up, the child is in fear of losing his parents, his siblings and his familiar home. Joint custody protects the child from the reality and the fear of losing a parent. A child who can understand that both his parents have custody of him and be assured that both parents continue to be involved in his life may feel more secure. He will feel less abandoned even though family life has to undergo some changes.
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> I agree with the views (and) … felt that a joint custody order would be more appropriate. This would also reduce the possibility of the husband being cut off from the children and would in fact encourage the husband to take a more responsible and active role in the upbringing and development of the children.

Where the court decision requires the continuation of joint parenting, whether this is achieved by the court making an order of joint custody or by the court not making a custody order at all, sends a powerful message to both parents and child. First, it assures the child that despite a breakdown in the parent's marriage, they are still involved in his or her life and neither will abandon him or her. Second, it reminds the parents that both continue to be expected by the law to cooperate to promote the child's best interests. The court decision avoids the possibility of the non-custodial parent being increasingly cut off from the child's life as the years wear on. Indeed, on the contrary, such a decision encourages the parent, despite the child living with the other, to continue to take an active role in jointly parenting the child.

It is noteworthy that *Re G* and *Re Aliya* adopt the approach of making no order of custody. The effect of such an approach is to leave the law on parenthood to govern the matter. It affirms that the court is slow to interfere with parental authority and is reluctant to remove a parent's involvement in his child's life. While the practical effect may be the same as that achieved by making an order of joint custody, this approach may even be regarded as preferable because it avoids any possible negative psychological effect that comes about when one parent "wins" and the other "loses" the custody suit.

As the court in *Re Aliya* astutely observed[17]

> The symbolism (that the father has an equal say if I were to make a joint custody order) could be abused if the father decided to use the joint custody order to impinge on matters which might properly or more appropriately 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 be constant disputes over what decisions should fall under custodial rights and what decisions under rights of care and control. While therefore I recognize 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 ….

A joint custody order may be worth considering where the parent with care and control of the child has shown herself or himself to be so unreasonable as to refuse any attempt to cooperate with the other and may even be inclined to excluding the other parent from the child's life altogether. Here the symbolism of a joint custody order may serve as a reminder to this unreasonable parent that, even though he or she has the child living with him or her, he or she should still consult the other parent in more significant matters concerning the child's upbringing. In *Maathavi w/o Mathi Alegen v. Mathi Alegen s/o Gothendaraman*[18] the court found that "the wife appeared to have nothing but utter disdain for the easy-going husband" and refused to interfere with the joint custody order then in force. A joint custody order may be useful in such a case where the parent without care and control is "easy-going" while the parent with care and control is likely to actively exclude him from a parenting role; the "easy-going" parent is unlikely to "abuse" the joint custody order while the unreasonable parent with care and control could do with the legal reminder of having to cooperate over the more significant matters in the upbringing of the child.

IV. The "Exception" in *Jussa v. Jussa*[19] and *Ho Quee Neo Helen v. Lim Pui Heng*[20]

The cases which have awarded sole custody to one parent usually do so on the basis that the parties have an acrimonious relationship and are unable to cooperate.[21] *Ho Quee Neo Helen* is usually relied on for this holding.

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17 *Re Aliya, supra* note 2 at 759.

18 Divorce Petition 1508/2000, unreported.

20 *Supra* note 10.

20 *Supra* note 11.

21 The Family Court decision in *Re G* relied on this "exception" as did cases such as *Doo Suet Choon v. Leow Chow Tong, supra* note 6; *Zee Sook Meng v. Foon Man Kong*, Divorce Petition

The High Court in *Re G* rightly observes that, even where the parents of the child have an acrimonious relationship at the time of the custody suit, making an order of sole custody is not the only possible outcome of the suit. Where there is no immediate or pressing need for a matter of significance over the child to be settled, the court should consider making no order of custody or making an order of joint custody. In *Re G*, His Honour emphasised that generally a child should be entitled to the guidance of both parents whether the parents live together or not.

It has been noted that when a court declines to make any custody order this achieves two objectives:[22]

> First, from the infant's perspective, (the court) has required both parents to continue to discharge their responsibility and authority over her. Second, (the court) 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.

After all,

> 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.[23]

Not making an order of custody can serve the best interest of the child even when the parents are currently embroiled in an acrimonious relationship and appear uncooperative. It should not be surprising that parties enmeshed in divorce proceedings are acrimonious towards each other. One reason may be that the greatest bitterness is felt in the course of divorce proceedings where allegations of misconduct and fault can be hurtful and injure the other party's feelings. The period of greatest emotional trauma and bitterness is not the best point in time to determine if the parties can cooperate for the rest of the child's life. Another reason is that parties may appear disagreeable as a strategy during litigation. This strategy may prove successful at the negotiating table if say, a party initially bent on obtaining custody of the child, subsequently agrees to "give up" custody to the other party in the spirit of compromise to obtain a better deal in other ancillary reliefs.

It may thus be premature for a court to determine that one party should be deprived of continued parenting while the other party wields sole authority over the upbringing of the child for the foreseeable future on the basis

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No. 1001/98; *Yu Sau Ki Grace v. Choo Kwong Wah David*, Divorce Petition No. 3472/1998, *Lyle George Macfarlane v. Maria Luana Maweikere*, Divorce Petition No. 4275/1998.

22 Leong, *Principles of Family Law, supra* note 4 at 540.

23 Leong, "Restatement", *supra* note 8 at 487.

that they appear unable to cooperate during the divorce or custody proceedings. The court should only do what is absolutely necessary to resolve the divorce or custody proceedings and leave the law of parenthood to continue to regulate the parents in their relationship over their child. The fear that the parents may never be able cooperate over their child may be overstated in the majority of cases.[24] In most cases, orders of care and control and access are all that is required for the resolution of the custody suit brought between the parents of the child. Sole custody orders, whether ordered on the basis of the *Jussa* and *Ho Quee Neo Helen* exception or other reasons, should be confined to cases of exceptional circumstances.[25]

V. Parenthood Responsibility

In *Lim Chin Huat Francis & Anor v. Lim Kok Chye Ivan & Anor*,[26] two couples were prepared to apply to adopt a little girl named Esther whose natural mother had consented to give her up for adoption. The couples were then engaged in applications to seek to have the girl removed from one couple and ordered to live with the other. The Chief Justice prefaced his decision not to make any of the orders sought by the couples by stating clearly his view of the responsibility of parents and potential parents:

> Little Esther has been subject to too many upheavals, and faced too many emotional trials for an infant of her age. It was our wish to avoid putting any further emotive burdens on her. … 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 be cherished with genuine love from the outset. In this, natural parents certainly have the edge over would-be adoptive parents, but that is only because society has always worked on the premise that being the natural parents, the child would be certain to be cherished and loved. Of course, this social presumption may fail, from time to time. In any case, where the parties do not involve the natural parents, the very least the court must do is to advocate the underlying premise that parents, natural or potential, must care for their children.

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24 See Ong, *supra* note 4 at 223–227, which point was observed in Leong, "Restatement", *supra* note 8 at 492.

25 See discussion in Ong, *supra* note 4 at 226–227, a possible circumstance being *Ho Quee Neo Helen* itself where the petition was based on the then ground of divorce, the cruelty of the respondent.

26 [1999] 3 S.L.R. 38 at 62.

The law expects no less from persons who aspire to be adoptive parents than it does of natural parents. By the law in Singapore that regulates parenthood, parents owe their children a serious responsibility that has been observed to be

> a cooperative responsibility. It should be discharged for the benefit of the child. Parenthood responsibility is tenacious, lasting for the lives of the parent and child …[27]

Parental authority occurs "naturally" between a parent and his or her natural child. No court order is required to clothe a parent with such authority. It is, however, of no small significance that the law in Singapore chooses to express parental authority in terms of parental responsibility. As befits a society that expects that "the child would be certain to be cherished and loved"[28] by his natural parents, our law exhorts the parents to discharge their responsibility to serve the child's best interests. The child's best interests are normally best served by his or her being cared for and brought up by both parents.

A stranger, whether or not a relative of the child, is in a very different position in terms of possessing authority over a child. The stranger has no natural authority over the child that the law can possibly recognize. If the stranger wishes to assume authority or responsibility for a child, he or she requires to be specifically bestowed such authority or responsibility. This only occurs when a court makes an adoption order to create an adoptive parental relationship between the stranger and the child or a custody order that gives guardianship authority to the stranger over the child.

When a court considers granting a custody order, it should do so with clear awareness that parents are primarily responsible for their child and that, while the law exhorts parents to exercise their parental authority responsibly, it is not from the law that the authority sprang. The court should make custody orders which support parental responsibility rather than those that unfortunately appear to undermine it. Whether the custody orders give authority to a stranger where none existed before or merely help the parents to distribute their natural authority upon their divorce, these orders should not have the effect of depriving any parent of his or her parental responsibility. The Chief Justice has forcefully observed of the role of parents and this should not be weakened by custody orders that are somewhat carelessly made.

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[27] Leong Wai Kum, *Cases and Materials of the Family Law in Singapore* (Singapore: Butterworths, 1999) at 293.

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

VI. Parenthood a Lifelong Responsibility: Lessons From Other Jurisdictions

The Children Act 1989[29] in England abolished the concept of "custody" in that jurisdiction. One of the objectives was to focus on the concept of parental responsibility arising from parenthood. English courts today grant orders to organize the child's living arrangements such as residence orders and specific issues orders and no longer make orders of "custody". The enactment followed the English Law Commission's[30] recommendations that both parents should retain parental power to act for the benefit of the child subject to any court orders on residence, contact or other specific issues. It is thought that this approach would encourage cooperation between the parents.[31] Australia has also moved in the same direction when the *Family Law Reform Act 1995* came into force. "Parenting orders" are now granted by the court which cover issues concerning the child's residence, contact between the child and parents and other specific issues.[32]

The approach in *Re G* and *Re Aliya* of making only care and control orders but no order of custody may also be welcomed as bringing our law of guardianship and custody in line with the modern law on parenting orders in these other jurisdictions. It has been observed before that Singapore law need not await legislative changes to refocus the law of guardianship and custody towards the current philosophy that upholds parental responsibility towards their child during marriage and beyond the breakdown of the parents' relationship.[33] *Re G* is one decision that will help achieve this.

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29 C. 41 of 1989.

30 Law Com. No. 172, Guardianship and Custody, 1988.

31 *Ibid.*, paras. 4.5–4.9.

32 *Family Law Act 1975*, Act No. 53 of 1975, section 61D; section 64B (2): A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child … A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any) … expressly provided for in the order; or … necessary to give effect to the order … A parenting order may deal with one or more of the following: (a) the person or persons with whom a child is to live (residence order); (b) contact between a child and another person or other persons (contact order); (c) maintenance of a child (child maintenance order); (d) any other aspect of parental responsibility for a child (specific issues order).

33 See Leong, *Principles of Family Law, supra* note 4 at 584–587 and Ong, *supra* note 4 at 228.