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CUSTODY ORDERS, PARENTAL RESPONSIBILITY AND ACADEMIC CONTRIBUTIONS

CX v. CY (minor: custody and access)

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I. INTRODUCTION

The Court of Appeal decision in the case of *CX v. CY (minor: custody and access)*[1] marks an important watershed in the law in Singapore concerning child custody. The judgment sets out very clearly the legal definition of the term "custody", the situations when the appropriate order should be made, and the expectations of how parents should behave *vis-à-vis* their child even as they encounter problems in their marriage. This decision is particularly important in view of the divergent practices in the lower courts when ordering custody of a child;[2] and the increasing emphasis on the need for parents to co-operate in matters relating to their child's upbringing.[3]

II. THE FACTS

The facts of the case itself, though sad, are not uncommon. The father and mother were embroiled for more than a year in a fight over the custody, care and control of a child who was nearly four years old. The father is a Dutch national and the mother a Singapore national. They had been cohabiting in Bangkok, Thailand, since 1999. They were married in Singapore on 23 June 2001 and the child was born in Thailand on 2 October 2001. The parties lived together in Bangkok but separated in May 2003 after the mother discovered that the father was having an extramarital affair. The mother took the child with her, first to Phuket, and then to Singapore where they have been residing since July 2003.

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1 [2005] 3 S.L.R. 690 [*CX v. CY*]. Lai Siu Chiu J. delivered the judgment of the court which comprised her Honour, Chao Hick Tin J.A. and Yong Pung How C.J.

2 Debbie Ong, "Making No Custody Order" [2003] Sing. J.L.S. 583 [Ong, "No Custody Order"] and "Insisting on a Custody Order? A Year After *Re G*" *Singapore Law Gazette* (January 2005) [Ong, "*Re G*"]; Debbie Ong & Valerie Thean, "Family Law" (2004) 5 S.A.L. Ann. Rev. 281 at paras. 13.17 and 13.18.

3 See Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths Asia, 1997) [Leong, *Principles of Family Law*] at c. 9 and 10.

In October 2003, the father applied to the Family Court under the *Guardianship of Infants Act*[4] seeking sole custody, as well as care and control of the child, with reasonable access to the mother. The mother opposed the application. The District Judge dismissed the father's application with no order being made on custody, but granted care and control to the mother.[5] The father was granted daytime access twice a month for five days each time in Singapore. He was also entitled to bring the child out of Singapore once every six months for not more than 14 days each time.

Both parties appealed to the High Court. The father wanted sole custody as well as care and control of the child. In the alternative, he sought joint custody, with increased access to the child. The mother wanted sole custody of the child, with reasonable access in Singapore to the father. Kan Ting Chiu J. made an order for both parties to have joint custody of the child, with care and control to the mother. The access arrangements for the father remained largely the same.[6]

The mother appealed to the Court of Appeal against the order of joint custody to the parties and overseas access to the father.[7]

III. Legal Terminology

From the history of the case described above, it can be seen that there are three types of custody orders possible: (i) no order as to custody; (ii) sole custody to either the father or the mother; (iii) both parents to have joint custody of the child. The battle lines are not just about which type of custody order. At the heart of it is the very meaning of "custody" itself. The Court of Appeal remarked that parents may have fought custody battles when they were only concerned with care and control and access, thinking that "if they are denied custody, they will be unable to see their child anymore and will lose all contact with the child."[8]

In as early as 1992, in the case of *Re Aliya Aziz Tayabali*, Michael Hwang J.C. pointed out that the law of custody was in a state of confusion in that it had no settled meaning or definition.[9] In *L v. L*, the Court of Appeal in an *obiter dictum* unfortunately described the authority conferred by a custody order as being only to "empower the custodial parent to decide on the day to day matters relating to the child".[10]

This problem is further compounded by the fact that some statutory provisions still refer to "parental rights" such that a parent with sole custody of a child may

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4 Cap. 122, 1985 Rev. Ed. Sing. Divorce proceedings were only instituted on 11 May 2005 prior to the hearing of the appeal before the Court of Appeal.

5 [2004] SGDC 166.

6 [2005] 1 S.L.R. 724.

7 The issues regarding access are not discussed here.

8 *Supra* note 1 at para. 34. The misunderstanding of the term extends to lower court judges, see *C v. M* [2004] SGDC 149 cited in Ong, "*Re G*", *supra* note 2.

9 [1992] SGHC 319; [2000] 1 S.L.R. 754 at para. 11 [*Re Aliya Aziz Tayabali*]. This decision was not reported in the official law reports till 8 years after it was decided. Fortunately, the unreported decision's (known as *Yasmin Yusoff Qureshi (mw) v. Aziz Tayabali Samiwalla*) immense value was realised and analysed by Leong Wai Kum in "Trends and Developments in Family Law" in *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995* (Singapore: Butterworths, 1996), *Principles of Family Law in Singapore*, *supra* note 3, and *Cases and Materials of Family Law in Singapore* (Singapore: Butterworths Asia, 1999).

10 [1997] 1 S.L.R. 222 at 228.

think that only he or she has "rights" over the child and not the other parent.[11] Other statutory provisions draw a misleading distinction between a parent or guardian and a person with "actual custody" of a child.[12] The latter phrase can only mean physical possession of a child, or more appropriately, care and control of the child, and not "custody".

The Court of Appeal in the present case explained that where parties are splitting up, parental responsibility is divided into smaller packages of "care and control" and residual "custody". In that sense, the legal term "custody" does not mean physical custody of a child unless the context requires that meaning to be given. "Care and control" concerns the day-to-day decision-making authority, while residual "custody" concerns the authority to make long-term decisions for the welfare of the child.[13] Examples of the latter given by the Court of Appeal include the right to decide on the type of education and the particular school for the child, but not the right to decide how the child should dress or travel to school, what sport he should take up or musical instrument he should play.[14] It is not possible to draw a definitive list of matters which are so important to the upbringing and welfare of a child, but the Court of Appeal opined that decisions relating to religion, education and major healthcare issues would be in this category.[15]

The Court of Appeal went on to explain that the case of *Soon Peck Wah v. Woon Che Chye*[16]—a case oft cited by counsel—should not be read as favouring natural mothers to have custody of young children where all things were equal. The possible misunderstanding as to the impact of the decision was because "there was no proper delineation between 'custody' and 'care and control' orders" and that "[a]t most, *Soon Peck Wah* is helpful in the determination of who should be granted care and control" only.[17]

The current confusion over the meaning of "custody" is not surprising given that the same situation existed in England until their child law was fundamentally reformed in 1989. The English Law Commission admitted that "[o]ur present law has no coherent legal concept of parenthood as such."[18] Under the English *Children Act 1989*,[19] the concept of parental rights was replaced by "parental responsibility" and the orders of custody, care and control, and access replaced with others such as residence orders and specific issues orders.[20] Several jurisdictions have since followed suit such as Australia,[21] and it may well be time for Singapore to consider this route as well to place what has been achieved in *CX v. CY* on a legislative footing

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[11] See *Adoption of Children Act* (Cap. 4, 1985 Rev. Ed. Sing.), s. 5(a) and *Guardianship of Infants Act*, s. 6(3).

[12] See *Adoption of Children Act*, s. 4(4); the definition of a "parent" in *Compulsory Education Act* (Cap. 51, 2001 Rev. Ed. Sing.), s. 2; *Women's Charter* (Cap. 353, 1997 Rev. Ed. Sing.), ss. 69(3) and 70(4).

[13] *Supra* note 1 at para. 31.

[14] *Ibid*. at para. 33.

[15] *Ibid*. at para. 35.

[16] [1998] 1 S.L.R. 234.

[17] *Supra* note 1 at para. 43.

[18] *Review of Child Law, Guardianship and Custody* (Law Com. No. 172, 1988), at para. 2.2.

[19] (U.K.), 1989, c. 41.

[20] The concept "parental responsibility" is curiously found in the definition of "arrangements for the welfare of every dependent child" in *Women's Charter (Matrimonial Proceedings) Rules 2003* (S 167/2003), r. 2.

[21] *Family Law Reform Act 1995* (Cth.).

and prevent any future misunderstanding by lawyers and laymen alike on the law relating to custody and the parent-child relationship.[22]

The Law Commission of Hong Kong in its *Report on Child Custody and Access* had this to say which is equally applicable to Singapore:

> The underlying approach of [the Hong Kong] custody model is to divide up between the divorcing parents a perceived bundle of parental "*rights*" over the children, and to do so with the children's best interests in view. Unfortunately, this legal focus on the allocation of parental rights and authority has tended to polarise the post-divorce involvement of the parents in the lives of their children, with one parent assuming the dominant role in the children's upbringing and making all the key decisions affecting them, while the other is left with a relatively minor parental role to fulfil. Over time, this can lead to the access parent maintaining only minimal contact with the children, or eventually drifting out of their lives altogether.
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> In other common law jurisdictions, there has been a shift away from this legal emphasis on the rights and authority of each of the parents over their children, towards a more child-focused concept of "*joint parental responsibility*". This newer approach, which stresses the rights of the children to maintain a continuing relationship with both parents after divorce is … a possible model for Hong Kong's future legislation in this area.[23]

Despite the absence of legislative development in Singapore on these lines, the Court of Appeal in *CX v. CY*, with the urging of academic writing, has been able to adopt the approach of joint parenting in a most admirable fashion.

IV. Parenthood is for Life

The sentiment that "parental responsibility is for life" was clearly endorsed by the Court of Appeal.[24] This means that parental responsibility does not terminate for the father or the mother on their divorce. It continues for both parents until their children reach adulthood and therefore both parents will have to seek ways to accommodate their differences for the sake of their children. It was said:

> There can be no doubt that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents…. Thus, in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.[25]

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[22] *Cf.* Leong, *Principles of Family Law*, *supra* note 3 at 584–587, suggests that legislative reform is not necessary provided that our courts stop making sole custody orders as this effectively achieves the same results.

[23] *Report on Child Custody and Access* (March 2005) at paras. 1.2 and 1.3 [emphasis in original].

[24] *Supra* note 1 at para. 24. See also the earlier Court of Appeal decision in *L v. L*, *supra* note 10, where the same sentiment guided the court but was not as clearly articulated as in the present case.

[25] *Supra* note 1 at para. 26.

In another case, *Chan Teck Hock David v. Leong Mei Chuan*, the Court of Appeal noted that:

> [T]he interest of the children demands that both parents should be involved in determining what is best for them…. The court should not decree an arrangement which gives an impression to a child that either the father or mother does not care about his welfare.[26]

Support for the concept of joint parental responsibility was said by the Court of Appeal in *CX v. CY* to be "deeply rooted in our family law jurisprudence."[27] Reference was made to section 46(1) of the *Women's Charter*;[28] article 18 of the *United Nations Convention on the Rights of the Child 1989*;[29] and the laws of England and Australia.[30] Notice was also given by the Court of Appeal to the argument advanced by Assoc Prof Debbie Ong that a joint custody order can promote and preserve joint parental responsibility.[31]

It is hoped that with this latest decision of the Court of Appeal in *CX v. CY*, judges will be emboldened to interpret statutory provisions in accordance with the spirit of joint parenting where a literal reading may point to a different result. One example comes from the requirement that a person who is over 18 but under 21 years of age obtain parental consent in order to marry.[32] Where the parents are divorced or separated, only the parent who has custody of the minor needs to consent to the marriage. Where one parent has been deserted by the other, only the parent who has been deserted needs to consent. In the case of an illegitimate minor, only the mother and not the father needs to consent. All of these are inconsistent with the message of joint parenting where *both* parents should be involved in a child's life especially when it deals with something as fundamental as a child's marriage.[33]

The second example comes from the constitutional enshrinement of the right of parents to determine the religion of their child. Article 16(4) of the *Constitution of the Republic of Singapore*[34] states that "the religion of a person under the age of 18 years shall be decided by his parent or guardian." A literal interpretation of the word "parent" in the singular would lead to the conclusion that one parent can decide on his or her child's religion without the other parent's consent which would be undesirable. It is submitted that a better interpretation is to read the word "parent" as meaning both parents in recognition of the importance of the decision on the child's life.[35]

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[26] [2002] 1 S.L.R. 177 at para. 12.

[27] *Supra* note 1 at para. 26.

[28] *Supra* note 12.

[29] This is the first instance where the *United Nations Convention on the Rights of the Child* 20 November 1989, U.N. Doc. A/RES/44/25 has been cited in a Singapore judgment. Singapore acceded to this Convention in 1995.

[30] *Supra* note 1 at para. 26.

[31] *Ibid.* at para. 27, citing Debbie Ong, "Parents and Custody Orders—A New Approach" [1999] Sing. J.L.S. 205 [Ong, "Custody Orders"] at 223. See also Leong, *Principles of Family Law*, *supra* note 3 at 538–542, Leong Wai Kum, "Restatement of the Law of Guardianship and Custody in Singapore" [1999] Sing. J.L.S. 432 [Leong, "Restatement"] at 489 and Ong, "*Re G*", *supra* note 2.

[32] *Women's Charter*, *supra* note 12, ss. 13 and 17 and Second Schedule.

[33] See also Ong, "Custody Orders", *supra* note 31 at 213–214.

[34] 1999 Rev. Ed.

[35] Two conflicting decisions have emerged from the Malaysian High Court where a similar constitutional provision is found: *Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam* [2003] 5 M.L.J. 106 (both parents to be involved) and *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah* [2004] 2 M.L.J. 648 (one parent can decide on the religion of the child). See also Ong, "Custody Orders", *supra* note 31 at 214.

V. No Custody Order or Joint Custody Order?

Kan Ting Chiu J. at the High Court raised several rhetorical questions when dealing with this case:

> When no custody order is made, does it mean that neither parent has the authority? … Who is to make [important decisions such as schooling and religious education] for the boy? Alternatively, does it mean that such decisions are to be taken by both parents, effectively putting them in joint custody?[36]

The Court of Appeal was emphatic that "a 'no custody order' is not tantamount to depriving both parents of custody."[37] By the same token, a sole custody order will also not deprive the other parent of his or her rights and responsibilities.[38]

The Court of Appeal noted that "the practical effects of a 'no custody order' and a 'joint custody' order are similar where a 'care and control order' has been made."[39] They agreed with the view advanced by Professor Leong Wai Kum that making a "no custody order" leaves the law on parenthood to govern the matter such that both parents continue to exercise joint custody over the child.[40] As such, either joint or no custody orders are preferred since it reminds the parents to co-operate with each other in the child's upbringing, and sole custody orders are only to be made exceptionally.[41] The Court of Appeal approved the suggestion made by Assoc Prof Debbie Ong that:

> [T]he exceptional circumstances when sole custody orders are made may be where one parent physically, sexually, or emotionally abuses the child…, or where the relationship of the parties is such that co-operation is impossible even after the avenues of mediation and counselling have been explored, and the lack of co-operation is harmful to the child….[42]

On the other hand, granting "joint custody" orders are not without its problems too. In *Re Aliya Aziz Tayabali*, it was pointed out that the parent without care and control of the child may seize upon this and use it to impinge on matters which may be more appropriately be left to the parent who has care and control of the child.[43] The disputes between parents will therefore only be aggravated by this approach.

The preferred method to deal with custody disputes is thus a "no custody order". This also accords with the principle that there should be minimal intervention in the parent-child relationship. Where there is no actual dispute between the parents over any serious matters relating to the child's upbringing—and such occasions will naturally be few—it is preferable not to make any custody order. This point was in fact made earlier in two High Court cases, *Re Aliya Aziz Tayabali* and *Re G (guardianship*

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[36] *Supra* note 6 at para. 17.
[37] *Supra* note 1 at para. 18.
[38] See *L v. L*, *supra* note 10.
[39] *Supra* note 1 at para. 18.
[40] Leong, *Principles of Family Law*, *supra* note 3 at 538–539.
[41] *Supra* note 1 at paras. 24 and 28.
[42] *Ibid.* at para. 38, citing Ong, "No Custody Order", *supra* note 2 and Ong, "Custody Orders", *supra* note 31.
[43] *Supra* note 9. The decision has been described as "innovative" (Leong, "Restatement", *supra* note 31, at 484) and "brilliantly sensible" (Ong, "No Custody Order", *supra* note 2).

of an infant)[44] where Michael Hwang J.C. and Tan Lee Meng J. respectively made no order as to custody over the child.

The Court of Appeal in *CX v. CY* agreed with Assoc Prof Debbie Ong that making "no custody order" helps to prevent the child being drawn into a custody battle between the parents and any possibly negative psychological effect when one parent "wins" and the other parent "loses" a custody suit.[45] To that extent, the *dictum* by Kan Ting Chiu J. in the High Court that "[p]assivity is not necessarily the best course" can thankfully be laid to rest.[46]

Professor Leong Wai Kum, writing in 1999, pointed out one other advantage to not making any custody order in cases of a dispute between parents over their child. She points out that:

> [T]his 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.[47]

However, in the particular circumstances of *CX v. CY*, it was felt that a joint custody order should be made. The Court of Appeal was of the opinion that the mother in this case had sought to exclude the father from the child's life by denying him access. Hence, a "joint custody order" was preferred to send a message to the mother that she should be more co-operative with the father.[48] In terms of the various allegations and cross-allegations made by both parties, the court observed that "in hotly contested custody cases such as the present one, where both parents love their child dearly, there is often a tendency to exaggerate the wrongdoings of the other party."[49]

VI. Acrimony Between Parents

The Court of Appeal in *CX v. CY* also rejected the mother's argument that the joint custody order made by the High Court was wrong in that this should only be made where there was reasonable prospect that parties would co-operate.[50] The facts in this case showed that there was extreme acrimony between them and they no longer communicated directly with each other.[51]

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[44] [2004] 1 S.L.R. 229 [*Re G*].
[45] *Supra* note 1 at para. 19, citing Ong, "No Custody Order", *supra* note 2 at 587–588.
[46] *Supra* note 6 at para. 14.
[47] Leong, "Restatement", *supra* note 31 at 487.
[48] *Supra* note 1 at para. 20.
[49] *Ibid.* at para. 41.
[50] *Ibid.* at para. 21.
[51] *Ibid*. at para. 22.

The Court of Appeal was of the opinion that "acrimony alone was insufficient to justify a sole custody order."[52] The view advocated in *Ho Quee Neo Helen v. Lim Pui Heng*[53] to the contrary was "no longer appropriate in this day and age" where the emphasis is on joint parenting.[54] In any case, "some degree of acrimony is to be expected when parties are undergoing the stresses of a marital breakdown."[55] The decision of the High Court to grant joint custody was therefore upheld.

This approach is much welcomed. The position advocated in *Helen Ho* had been challenged locally some years earlier by two noted academics, Professor Leong Wai Kum and Assoc Prof Debbie Ong.[56] The English case relied on in *Helen Ho*, *Jussa v. Jussa*,[57] itself fell out of favour barely eight years later in its country of origin in recognition that joint parenting is the better approach.[58] An article written in 2003 came to the conclusion that "[i]n the light of this trend [towards joint parenting] in the twenty-first century, the scope of the application of [*Helen Ho*] may need to be reviewed."[59]

In *Re G*, Tan Lee Meng J. was confronted with a situation where the father and mother could also be described to be in an acrimonious relationship. He was keenly aware of the symbolic nature of a custody order:

> 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 always follow that the alternative in such a situation is to grant sole custody of the child to the other parent.… One must be mindful of the fact that s 3 of the Guardianship of Infants Act (Cap 122) provides that in any proceedings relating to custody or the upbringing of an infant, the infant's welfare is "the first and paramount consideration" ….
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> In the present case, while a joint custody order may not be appropriate in view of the state of [the father's] relationship with his wife, granting [the mother] sole custody of [their son] would result in the unnecessary severing of the joint parental responsibility for his upbringing far too early in the day.… All that is presently required is an order for care and control of the child [with no order as to custody].… Hopefully, the parents will realise in due course that it is best if they can cooperate in matters in relation to their child's upbringing. If they do not and it becomes necessary in the future to deal with the question of custody, the parties can come to court to settle the issue. Such an approach is in the best interest of this child.[60]

It therefore behoves the Family Court to be sensitive to the various possible orders it can make and to exercise its powers wisely.

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[52] *Ibid*. at para. 24.

[53] [1972–1974] S.L.R. 249 (C.A.) [*Helen Ho*]. The cases of *CJ v. CK* [2004] SGDC 135; *EY v. EZ* [2004] SGDC 91; and *T v. C* [2003] SGDC 304 were also cited in argument.

[54] *Supra* note 1 at para. 24.

[55] *Ibid*. at para. 36.

[56] Leong, *Principles of Family Law*, *supra* note 3 at 537–538; Ong, "Custody Orders", *supra* note 31.

[57] [1972] 1 W.L.R. 881 (D.C.).

[58] See the *dictum* of Ormrod L.J. in *Dipper v. Dipper* [1980] 1 Fam. L.R. 286 at 296 (iv) and *Caffell v. Caffell* [1984] Fam. L.R. 169 at 171F–H.

[59] Debbie Ong & Valerie Thean, "Family Law" (2002) 3 S.A.L. Ann. Rev. 224 at para. 13.16.

[60] *Supra* note 44 at paras. 8 and 9.

VII. Conclusion

In a perfect world, there should be no marital disputes. If there are, the disputes should be resolved before they escalate till divorce is inevitable. But if divorce is inevitable, the parties should be able to overlook their differences with each other for the sake of their children and raise them together. But if the parties are unable to cooperate with each other in raising their children, they should be helped to do so. Family law endeavours to help parties to co-operate with each other by reiterating the principle that it is in the child's best interests that neither parent is excluded from the child's life even where there is a breakdown in the parents' marriage.

Earlier cases such as *Re Aliya Aziz Tayabali* and *Re G* as well as academic commentary have sought to show that either by not making an order of custody or making an order of joint custody sends a strong message about joint parenting even on the breakdown of the parents' marriage. This latest Court of Appeal decision in *CX v. CY* serves to confirm these developments as well as the path urged by family law academics. While divorce may be inevitable for some, the damaging effects of the divorce on the children need not be.