BNS *v* BNT
[2015] SGCA 23

Case Number	: Civil Appeal No 141 of 2014
Decision Date	: 20 April 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: R S Bajwa (Bajwa & Co) and Kelvin Lee Ming Hui (WNLEX LLC) for the appellant; The respondent in person and Anusha Prabhakaran (Drew & Napier LLC) as the respondent's McKenzie friend.
Parties	: BNS — BNT

Family law – Custody – Care and control – Relocation

20 April 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 In modern times, advances in technology, travel, and modes of communication have all shaped an interwoven world in which the cross-border movement of people occurs on an increasingly regular basis. Not infrequently, such persons will consist of married couples who choose to leave their countries of origin for a variety of reasons, such as to take up more attractive job opportunities for one or both of the spouses elsewhere, or to settle down in a place which they have assessed as having a more ideal environment for raising a family. So long as the marriage remains stable and loving, problems will not surface before the courts. However, in the unfortunate event that the marriage breaks down, difficult (and oftimes emotional) issues will have to be resolved by the courts where they cannot be resolved amicably by the parties, and these issues are invariably made more difficult where children, particularly young children, are implicated in the wake of the fallout of their parents' marriage.

2 One such issue came before us in the present case. It concerned the permanent relocation of children. Cases of this nature are never easy to decide. As Mostyn J observed pithily in the English High Court decision of *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam) at [4], "[t]hey involve a binary decision – either the child stays or he goes" and hence, whichever way the court decides, the decision is bound to cause considerable pain and anguish to one of the parties. The relocating parent will be aggrieved by a refusal of the application as that ostensibly ties him or her down, against his or her wishes, to an environment which he or she has little affinity towards. On the other hand, it is the left-behind parent who suffers if the relocation application is allowed because that naturally curtails not just the quantity but also the quality of that parent's contact with the child (or children).

3 It may be noticed that the competing tensions as set out above are framed exclusively from the perspective of the *parents'* interests. However, it bears emphasis at the outset of this decision that this is *not* how the courts should approach an application for relocation. The interests of the parents must, in every case, be subordinated to that of the *children*. It follows from this that the impact of the court's decision on the parents is not relevant *per se*: it is relevant only to the extent that it is shown to have an impact upon the children. In essence, the simple (but critical) point being

made here is that the court must decide relocation applications with constant and abiding reference to a single touchstone principle, *viz*, to uphold the welfare of the children (which is *paramount*). This may seem trite in light of the developments in family jurisprudence but we note with caution that the interests of the child may sometimes slip from view because it is, after all, the parents who are the parties arguing their respective cases before the court. It is not for nothing, therefore, that children have often been described as the "silent victims" of a marital breakdown or the "unheard voices" in family litigation, but that, as we emphasise once again, should *not* be the case. The welfare of the children must take its place as the court's *focal (indeed, paramount)* concern at all times.

4 The present case concerned a contested application for the permanent relocation of two children to Canada. The applicant ("the Wife") succeeded at first instance in the Family Court (see *BNS v BNT* [2014] SGDC 13 ("GD(FC)")) but this decision was overturned on appeal by the respondent ("the Husband") to the High Court (see *BNT v BNS* [2014] 4 SLR 859 ("GD(HC)")).

5 In our view, the High Court Judge ("the Judge") had made several pertinent observations regarding the paramount welfare principle with respect to the children (and which we fully endorse below). We also agreed with her assessment that, on the facts of this case, what was particularly significant was that the children enjoyed a meaningful relationship with their father, the Husband, who, for his part, took active steps to be involved in their lives. We had no doubt that it was in the children's best interests for that parent-child bond to be preserved and thus were not inclined to allow relocation as that would, in the nature of things, impact adversely on the closeness of the relationship. We therefore upheld the Judge's decision and dismissed the Wife's appeal accordingly. These are the detailed grounds for our decision.

The background facts

6 The Wife and the Husband are both Canadian citizens and married in Canada on 11 May 2002. Subsequently, the Wife quit her job in the conference and events management industry and moved to Singapore in August 2002 to be with the Husband who had been (and currently still is) working as a corporate lawyer here. The Wife was primarily a homemaker during the subsistence of the marriage but, since its breakdown in 2011, she re-entered the workforce on a part-time basis as a meeting and conference planner.

7 In 2004, the parties moved to Bangkok, Thailand, as the Husband had to relocate there for work. They lived in Thailand for four years where the two children of the marriage were born in March 2006 and December 2007, respectively. Their first child was a girl who is now nine years old while their second child was a boy who is now aged seven. In May 2008, the family returned to Singapore and have lived here ever since.

8 On 17 February 2011, the Wife filed for divorce on the basis of the Husband's unreasonable behaviour. She then moved out of the matrimonial home with the children sometime in May 2011 and this led to the Husband filing an application seeking, *inter alia*, interim care and control of the children. On 20 October 2011, the court ordered that both parents were to have interim joint custody of the children but that the Wife was to have interim care and control with fairly liberal access granted to the Husband. Interim judgment for divorce was granted on an uncontested basis on 26 May 2012.

9 On 13 September 2012, the Wife filed the underlying application in Summons No 14265 of 2012 to relocate to Toronto, Canada with her two children. The Husband sought to stay the Wife's application pending the resolution of the ancillary matters but his application in the Family Court and subsequent appeal to the High Court were both dismissed. The Wife's relocation application was thus

directed to proceed and, on 17 October 2013, the District Judge ("the DJ") allowed the Wife's application. However, this was, as mentioned above, overturned on appeal by the Judge who delivered her written grounds on 24 September 2014. The Wife subsequently applied for leave to appeal to this court which the Judge heard and granted on 1 August 2014. The Wife filed the present appeal on 28 August 2014.

The decisions below

The first instance decision

10 The DJ granted the Wife's relocation application at first instance. The DJ found that the Wife's desire to relocate was "very reasonable" as she had only come to Singapore because of the Husband's employment and thus had no reason, now that the marriage had broken down, to remain in a place where she had no roots (see GD(FC) at [17]–[18]). The DJ also found that the absence of support from family members or close friends here made the Wife feel "very isolated and distraught" and that her long-term prospects of rebuilding her career were better in Canada (see GD(FC) at [20]–[21]). The DJ therefore considered that relocation would allow the Wife to obtain the emotional and psychological support she needed and to regain her self-esteem and self-confidence; this would in turn benefit the overall well-being of the children who were closer and more emotionally attached to her as the primary caregiver (see GD(FC) at [23] and [31]).

11 The DJ also rejected the Husband's claim that the Wife's relocation application was a disguised effort to destroy his relationship with the children. In this connection, the DJ found that the Wife had generally allowed access to the Husband in accordance with the 20 October 2011 court order (see above at [8]). Further, the DJ also found that the Wife had laid out "sufficiently clear plans" to secure suitable accommodation and arrange for the children's schooling in Canada (see GD(FC) at [29]).

12 After taking into account several other factors, the DJ concluded by acknowledging that relocation would reduce the Husband's contact time with the children. However, the DJ opined that the use of phone and internet technology, together with more liberal access to the children whenever the Husband visited them in Canada, could go towards ameliorating the situation (see GD(FC) at [36]).

The High Court's decision

13 The Judge arrived at a different conclusion from the DJ. Having weighed the evidence, the Judge found that it was *not* in the children's best interests to allow the relocation.

14 The Judge began by noting that the Husband participated meaningfully in the children's lives and maintained a keen sense of responsibility for their upbringing (see GD(HC) at [24]). Following the breakdown of the marriage in 2011, he shifted homes ostensibly so as to be closer to the children (who had moved out of the family home with the Wife (see above at [8])), and, since the court's 20 October 2011 order, it was also apparent through the various activities which he carried out with his children on his access days that he valued face-to-face interaction with them and took steps to play an active role in their daily lives (see GD(HC) at [25]–[26]). Further, the Judge also noted that the Husband was concerned about his children's long-term development as was evident from the interest which he took in their education (see GD(HC) at [27]).

15 The Judge then proceeded to state that the close bond between the children and the Husband would likely be undermined if the relocation application was allowed. This was the Judge's "primary

reason" for allowing the Husband's appeal (see GD(HC) at [54]), and she gave three reasons to support this view (which were summarised at [35] of GD(HC)):

(a) First, the Wife had displayed hostility towards the Husband which suggested that she would not actively facilitate contact once in Canada. The Judge observed that: (i) the Wife held the Husband in low esteem as was clear from her relocation affidavits; (ii) her hostility had boiled over into physical violence when she assaulted the Husband in breach of an expedited Personal Protection Order; and (iii) her hostility had also driven her on occasion to behave inconsistently with the children's best interests (see GD(HC) at [36]–[37]).

(b) Second, the Wife's relocation plan was also poorly conceived. The Judge departed from the DJ's finding in this regard (see above at [10]), noting that the Wife had only made inquiries with schools in Canada a long time *after* the relocation application was filed and her emails to her real estate agent in Canada were also not sufficiently regular (see GD(HC) at [47]–[49]). This suggested to the Judge that the Wife's relocation application was primarily motivated by a desire to avoid the unpleasantness of dealing with the Husband and, again, this created doubts as to whether she would actively facilitate access upon relocation. In this connection, the Judge also expressed doubts over the DJ's finding that the Wife's application was genuinely motivated by her feelings of isolation in Singapore given that this was not supported by the evidence (see GD(HC) at [52]).

(c) Third, the children's young ages and the difference in time zones between Singapore and Canada would also make it difficult for the Husband to sustain his present close relationship with the children.

The parties' arguments on appeal

16 The thrust of the Wife's arguments on appeal was that the entire family were Canadian citizens and thus her desire to relocate was eminently reasonable given that she was merely seeking to relocate "back to her homeland". She claimed that her overall well-being as the primary caregiver (and, by extension, that of the children) would benefit from the support she would receive from her family in Canada and that the Judge had failed to place sufficient weight on this factor. In this connection, she disputed the finding that her relocation plans were inadequate and sought to consign the instances of hostility cited by the Judge to the past. The Wife also claimed that the Judge had, conversely, placed a disproportionate amount of weight on the adverse impact that relocation would have on the children's prospective relationship with the Husband. In this vein, the Wife suggested that the Husband's likely diminished contact with the children was not as drastic as it seemed as there were several ways by which he could ameliorate the situation (which are elaborated below at [33]).

17 The Husband's case was fairly straightforward as he sought, in essence, to support the Judge's decision. In this regard, he echoed the Judge's reservations about the Wife's underlying motivation for applying to relocate, highlighting the Judge's observations that the Wife's relocation plans were poorly conceived, that she had (and continues to be) hostile towards him, and that her emotional and psychological well-being had not been adversely affected by remaining in Singapore. He therefore expressed concern at the prospect of the Wife severing his contact with the children once they had relocated to Canada.

The applicable legal principles

18 In our view, the legal principles to be applied in relocation applications have been clearly and

accurately set out in the Judge's decision which, we note, has also since been cited with approval in another recent decision of the High Court (see *TAA v TAB* [2015] SGHCF 1 ("*TAA*")). We take this opportunity to affirm these principles.

19 First, we emphasise that there is ***only one fundamental*** – indeed, ***critical*** – legal principle upon which everything else (including the ultimate decision of the case itself) depends. And it is this – in considering relocation applications, ***the welfare of the child is paramount and this principle ought to override any other consideration*** . This principle was identified by the Judge at [16] and [18] of GD(HC) and was not disputed by the parties on appeal. In any case, there would have been no basis for them to do so as we find that this controlling principle is one that is firmly grounded in logic, principle, and commonsense. Indeed, if we take a broader view of matters, we observe that this principle is also, without doubt, the golden thread that runs through *all* proceedings directly affecting the interests of children. In this connection, it is apposite for us to point to s 3 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), which enjoins the court to have regard to the welfare of the child as the "*first and paramount consideration*" in *any* proceedings where the custody or upbringing of a child is in issue. As one learned commentator has aptly described it, this statutory direction "casts its effect on the whole law regulating the parent-child relationship"; hence it is, in that sense, a "ubiquitous" standard by which the court must subject every exercise of parental authority (see Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 442–443). This no doubt includes the exercise of a relocating parent's authority to permanently remove a child from the jurisdiction.

20 Second, we note that there exists a multitude of factors which may impact on the ultimate inquiry into what is best for the welfare of the child. And, in the specific context of relocation applications, we observe that there is one particular factor which has received much attention in the cases here and abroad (and which is also relied on heavily by the Wife in this appeal), *viz*, the reasonable wishes of the primary caregiver to relocate. This is often identified as an important factor affecting the child's welfare because the child's emotional and psychological welfare is, generally speaking, intertwined with that of the primary caregiver. Hence, if the primary caregiver reasonably wishes to relocate because he or she is not emotionally and psychologically stable in his or her present environment, that has to be sensibly weighed in the balance. However, as we alluded to at the outset of this decision at [3], the relocating parent's reasonable wish to relocate is not relevant *per se*. It is relevant *only to the extent* that it is found that there will be a transference of his or her insecurity and negative feelings onto *the child*. It is, after all, *the child's* welfare that lies at the heart of the inquiry, and not the interests of the relocating parent (or either of the parents for that matter). This point was well made by Debbie Ong JC in *TAA* (at [17]), which we endorse:

> 17 … The court is obliged to consider all the relevant facts and circumstances in each individual case in determining what is in the welfare of that particular child. ***Of course, the wishes of parents may have a bearing on the welfare of the child, but it is for the court to determine if their wishes are compatible with the interests of the child. The law expects parents to put the interests of the children before their own.*** *A decision to relocate itself may not be made in bad faith nor be unreasonable because one can understand that a parent may have a need to relocate for genuine personal reasons. But* ***that decision is not necessarily the same as a decision that is in the best interests of the child*** *.* … [emphasis added in italics and in bold italics]

21 A further (and related) point which we wish to emphasise is that, even where the primary caregiver is able to establish that she reasonably wishes to relocate in the best interests of the child, that is no more than *a* factor to be weighed in the overarching inquiry into the child's welfare. It is *not* a singularly *determinative* factor which, if shown to exist, necessarily trumps all other relevant

considerations. We pause to note that the word "determinative" was indeed used by this court in *Re C (an infant)* [2003] 1 SLR(R) 502 ("*Re C*") at [22] to describe the reasonable wishes of the primary caregiver. However, as the Judge had rightly cautioned, this description should not be read out of context. On a reasonable reading of the relevant passage in *Re C*, it appears to us that all that the court meant to convey was that the primary caregiver's wish to relocate is an *important* factor. The court was certainly not attempting to attribute to this factor *decisive* weight, and this must be so given that it explicitly reminded that the welfare of the child is paramount in relocation applications (see also the Singapore High Court decision of *AZB v AYZ* [2012] 3 SLR 627 ("*AZB*") at [20]). Implicit in that reminder, in our view, is a recognition by the court that there may well be *other* relevant factors bearing on the child's welfare which, when considered holistically, may yet tip the balance *against* relocation. It bears setting out the Judge's views at [15]–[16] of GD(HC) in this regard:

> 15 The Court of Appeal set out in *Re C* ([6] supra) the general approach to be followed when considering relocation applications. The court stated at [22]:
>
> > (a) ... *It is the reasonableness of the party having custody to want to take the child out of jurisdiction which will be determinative*, and ***always keeping in mind that the paramount consideration is the welfare of the child*** . If the motive of the party seeking to take the child out of jurisdiction was to end contact between the child and the other parent, then that would be a very strong factor to refuse the application. Therefore, *if it is shown that the move abroad by the person or parent having custody is not unreasonable or done in bad faith, then the court should only disallow the child to be taken out of the jurisdiction if it is shown that the interest of the child is incompatible with the desire of such person or parent living abroad*. ... [emphasis added]
>
> Before me, there was disagreement between the parties as to the weight that should be attached to the reasonable wishes of the primary caregiver to relocate. …
>
> 16 ***In my view, the only applicable principle of law in relocation cases is that the welfare of the child is the paramount and overriding consideration*** : *AZB v AYZ* ([6] supra) at [20]. **Re C *should not be understood as suggesting anything contrary. In fact, it expressly accepts this principle. The suggestion that the reasonable wishes of the primary caregiver are "determinative" must be understood within this context.***
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> [original emphasis in italics; emphasis added in bold italics]

22 To be clear, what we are effectively saying, at a broader level, is that there can be *no pre-fixed precedence or hierarchy* among the many composite factors which may inform the court's decision as to where the child's best interests ultimately lie: where these factors stand in relation to one another must depend, in the final analysis, on *a consideration of all the facts in each case*. In this vein, we wholly endorse the Judge's observation that "there is no *legal presumption* in favour of allowing relocation when the primary caregiver's desire to relocate is not unreasonable or founded in bad faith" [emphasis in original] (see GD(HC) at [20]; see also *TAA* at [17]). This was elaborated upon by the Judge as follows:

> 20 … By this, I mean that this is not a situation where the burden of proof shifts to the party challenging the application upon the applicant proving the reasonableness of his or her desire to relocate, nor is it a situation where the presumption is decisive of the outcome unless displaced.

23 It is useful to note that the courts elsewhere have also distanced themselves from the use of presumptions in assessing the welfare of the child in relocation applications and we are assisted, in

this regard, by the helpful cross-jurisdictional analysis undertaken in Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) ("*Ong*") at paras 9.18–9.26. These jurisdictions have, in the main, cautioned against adopting an unduly prescriptive approach as it is liable to detract from the primacy of the welfare of the child. Indeed, Ong JC has made the same point in the local context in *TAA*, stating (at [17]) that it is imperative for the court *not* to be "constrained by any guiding principles that have the practical effect of moving it towards a certain presumption, since the paramount consideration is the welfare of the child". We agree.

24 A brief survey of the foreign authorities demonstrates that the jurisdictions which prefer not to rely on the use of presumptions include Canada (see, for example, the Supreme Court of Canada decision of *Gordon v Goertz* [1996] 2 SCR 27 at [47] and [49]), Australia (see, for example, the Family Court of Australia decision of *Morgan v Miles* (2007) 38 Fam LR 275 at [74]), Scotland (see, for example, the Court of Session (Inner House) decision of *M v M* [2012] SLT 428 at [15] and [52]), and New Zealand (see, for example, the New Zealand Supreme Court decision of *Kacem v Bashir* [2011] 2 NZLR 1 at [23]–[24]). The prevailing approach in England is also the same, though it is instructive to note that there was a period of time following the English Court of Appeal's landmark decision in *Payne v Payne* [2001] Fam 473 ("*Payne*") when many decision-makers appeared to have placed *too much* emphasis on this factor alone (see *Clarke Hall & Morrison on Children* (Alistair MacDonald gen ed) (LexisNexis, Looseleaf Ed, 1985, May 2014 release) vol 1, div 2 at para 647), such that some commentators noted the emergence of what was, in effect, a *bias* towards the relocating parent (see, for example, Mary Hayes, "Relocation Cases: Is the Court of Appeal Applying the Correct Principles?" (2006) 18(3) CFLQ 351). This development could be traced to certain aspects of Thorpe LJ and Dame Elizabeth Butler-Sloss P's judgments in *Payne*, not least their unified emphasis on the "great weight" that ought to be placed on the reasonable proposals of the primary caregiver to relocate (at [41] and [84], respectively). *However*, it is notable that both Thorpe LJ and Butler-Sloss P had *also* endorsed the paramountcy of the welfare principle (at [26] and [85], respectively) and had warned, *specifically*, *against* elevating the primary caregiver's wishes to the status of a legal presumption (at [40] and [84], respectively). Therefore, it was unsurprising to find that that there were growing judicial attempts to cast *Payne* in its proper light (see, for example, the English Court of Appeal decision of *In re H (Leave to Remove)* [2010] 2 FLR 1875 at [21]) and these efforts finally culminated in the English Court of Appeal decision of *K v K (Children: Permanent Removal from Jurisdiction)* [2012] Fam 134 ("*K v K*"). In this case, Moore-Bick LJ left the English position in no doubt when he stated that the only *principle* of law to emerge from *Payne* was that the welfare of the child was paramount while the rest of the other observations were useful only as *guidance*. Moore-Bick LJ's observation in this regard (at [86], and which Thorpe LJ agreed with at [39] of *K v K*) was also noted by the Judge at [18] of GD(HC) (as well as by Andrew Ang J in *AZB* at [17]), and bears setting out here at length as it echoes our own views on the proper approach to adopt in considering relocation applications:

> … [H]aving considered *Payne v Payne* itself and the authorities in which it has been discussed, I cannot help thinking that the controversy which now surrounds it is the result of a failure to distinguish clearly between legal principle and guidance. In my view Wilson LJ was, with respect, quite right to warn against endorsing a parody of the decision. As I read it, ***the only principle of law enunciated in* Payne v Payne *is that the welfare of the child is paramount; all the rest is guidance*** . Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted. *Guidance of the kind provided in Payne v Payne is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However*, ***the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and***

make whatever decision he or she considers to be in the best interests of the child *.* As Hedley J said in *In re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330, ***the welfare of the child overbears all other considerations, however powerful and reasonable they may be*** *. I do not think that the court in* Payne v Payne *intended to suggest otherwise*. [emphasis added in italics and in bold italics]

25 Finally, we leave the issue with regard to the reasonable wishes of the caregiver to make our third observation, and this has to do with *another* factor that is relevant in assessing the welfare of the child, *viz*, *the child's loss of relationship with the left-behind parent*. We pause to observe that, until the Judge's decision, this factor did not receive much consideration in the local case law as the focus had tended largely to be on the wishes of the relocating parent (see *Ong* at paras 9.5 and 9.44). In our view, that is unfortunate. It is axiomatic that a child benefits from the nurturing presence and joint contribution of *both* parents in his or her life and this does not cease to be true upon the breakdown of marriage. Relocation, however, represents a serious threat to this ideal state of joint parenting since the left-behind parent would, as its appellation suggests, become less of a presence in the child's new life.

26 We must emphasise, however, that although the loss to the child of his or her relationship with the left-behind parent is an important consideration, it is, like that of the wishes of the primary caregiver, not to be treated as having determinative weight or as being decisive in every case. How adversely the loss of that relationship will impact on the child's welfare is, of course, a matter that depends on the facts, *in particular, the strength of the existing bond between the left-behind parent and the child*. In general, the stronger the bond, the larger the resultant void in the child's life if relocation is allowed, and, accordingly, the weightier this factor must be in the overall analysis. Indeed, it may *further* be appreciated that it is only when there is a *subsisting* relationship between the left-behind parent and the child that one can properly speak of there being a "*loss*" of that relationship upon relocation. As has been astutely contrasted in *Ong* at para 9.42, the severance of an already functioning (if not blossoming) relationship will generally be both more agonising and disruptive to the child than if the effect of relocation was, relatively speaking, merely to hamper the "*building*" up of that particular parent-child relationship:

> There is a difference between the trauma and harm to a child arising from the *loss* of a close relationship and the benefits of *building* a relationship with both parents. Where the relationship between the child and non-custodial parent is not close, it may still be beneficial for the law to support the maintenance of this relationship or encourage parties to strengthen the relationship. However, if this must be sacrificed because of pressing reasons for relocation, it may be the less harmful choice for the child. In contrast, where a *loss* of a close relationship is concerned, the harm to the child may not justify the sacrifice. [emphasis in original]

27 The points which we have just canvassed at [25]–[26] above in connection with the loss of the child's relationship with the left-behind parent were also noted by the Judge and, as we shall see, these observations were also *completely apposite* in the context of the facts of *the present case* (see GD(HC) at [21]–[22]):

> 21 Second, ***the court must bear in mind that, in general, it is in the child's interests for him to continue to have a meaningful relationship with both his mother and father notwithstanding that the relationship between the parents has broken down*** . The Court of Appeal in *CX v CY* [2005] 3 SLR(R) 690 observed at [26] that "the welfare of a child is best secured by letting him enjoy the love, care and support of both parents". The understanding is that a child will feel more secure if both his parents continue to be involved in his life: *BG v BF* [2007] 3 SLR(R) 233 at [13]. *Although these comments were made in the context of joint*

custody orders in CX v CY and access orders in BG v BF, I consider them relevant in the context of relocation applications as well.

22 The idea that a child needs both his mother and father was recognised in the context of relocation applications by the Hong Kong District Court in *HKMB v LKL* [2007] HKCU 291. The court stated that it was important for the child's "emotional and psychological stability" to maintain "regular and meaningful contacts" with both parents and that the child would experience a "sense of loss" if his relationship with the parent who is left behind was adversely affected (at [59]). Admittedly, this comment was specific to the facts of that case and was made with the benefit of psychological assessment of the child involved. *Common sense, however, would dictate that similar observations would apply equally in cases where the children concerned enjoyed a good relationship with both parents.* ***Much would depend on the facts of the case.*** *For example, it would undoubtedly not be in a child's interests to force him to maintain a relationship with an abusive or estranged parent.* ***However, in general, a child would benefit from continuing to have a meaningful relationship with both parents. Therefore, the potential loss of an opportunity to have a meaningful relationship with the parent who is left behind must be considered when assessing whether a relocation application should be allowed.***

[emphasis added in italics and in bold italics]

28 To conclude our analysis of the applicable legal principles, it will be seen that the observations which we have made regarding the reasonable wishes of the primary caregiver (see above at [20]–[24]) and the child's loss of relationship with the left-behind parent (see above at [25]–[26]) *flow naturally from* the fundamental (or critical) principle that *the welfare of the child is paramount.* However, as is often the case (at least in the sphere of legal practice), the real difficulty lies not in stating the applicable legal principles but, rather, in the *application* thereof. It follows, therefore, that the process of analysis by the court as well as the decision it ultimately arrives at is ***an intensely fact-centric exercise*** .

Our decision

29 Turning, then, to the facts of the present appeal, it is clear to us that whilst the Wife's desire to relocate to her country of origin is understandable (especially when viewed from her perspective), it can only be relevant to the extent that it *simultaneously* impacts *the welfare of the children*. As just noted, this is ultimately a *fact-centric* exercise which involves the *balancing* of all the relevant facts and circumstances of the case, although it is of the first importance to reiterate that the ultimate decision of the court *must* be based on *the welfare of the children (which is the paramount consideration)*. Hence, although the Wife is the primary caregiver of the children, her *personal* well-being (whilst not unimportant) *cannot trump* the welfare of *the children*. As Ong JC stated quite simply, yet profoundly, in *TAA* at [18], the law expects parents to "place the needs of their children before their own".

30 What, then, *is* in the *best interests* of *the children in the context of the precise facts of the present case*? In this regard, the Judge's view (consistently with her observation noted above at [27]) was that *it was in the best interests of the children that the good and close relationship that they currently shared with their father (the Husband) should continue*. We agreed with the Judge that this was the primary consideration in the present case.

31 Counsel for the Wife, Mr R S Bajwa ("Mr Bajwa"), argued that the Judge should have given more weight to her reasonable wish to relocate instead. It is clear to us, however, that the Judge had

undertaken a careful consideration of all the relevant evidence in this case and, in so doing, was entitled to her doubts over the underlying motivation behind the Wife's relocation application (see above at [15(b)]). Nevertheless, as alluded to earlier, we were prepared to accept that the Wife has reasonable grounds for wishing to relocate back to Canada but, *even then*, we are unable see how this factor outweighs the interests to the children of maintaining the strong, vibrant relationship which they presently enjoy with their father.

32 There are, sadly, many instances where, upon the breakdown of a marriage, the non-custodial parent drifts out of the child's life completely. There are a variety of reasons for why this may happen. In some instances, it is because the non-custodial parent loses the will to keep at the relationship with the child to keep it alive. In other instances, it is the child who rejects the non-custodial parent emotionally because that parent is perceived by the child as having caused the breakdown of the family unit. However, regardless of the root cause for the deterioration in the relationship between the child and the non-custodial parent, the fact is that, in all such instances, a regrettable state has been reached where there is little, if any, meaningful relationship to speak of between the two. In these situations, it is only logical that the impact of relocation on the child's relationship with the non-custodial parent would not be a very influential factor in weighing up what is in the best interests of the child going forward (see also above at [26]). *Fortunately in this case*, the relationship between the non-custodial parent and the children remains strong despite the breakdown – and, indeed, somewhat acrimonious breakdown – of the spousal relationship. A loving mutual relationship subsists between the Husband and the children not least because the Husband has taken steps to play an active, involved role in their lives. As a result, the children are able to enjoy, to the fullest extent possible, a normal family life in which they can benefit from the input of *both* parents. As we pointed out to Mr Bajwa during the hearing, this really is the optimal in a sub-optimal situation *from the children's perspective* and we would be slow to disturb it by permitting relocation.

33 Mr Bajwa candidly accepted during the course of oral submissions that the Husband shared a close relationship with the children in Singapore. He also accepted that if we were to permit relocation, then that would cause, at the very minimum, a dilution in the children's contact with the Husband. However, Mr Bajwa sought to downplay this consideration by highlighting that the Husband had several options at his disposal to keep alive his close relationship with the children – he could have frequent access to them with the aid of modern communication tools, he had the means to travel to Canada to visit them, and he could even relocate permanently to Canada if he wished.

34 However, we were not persuaded by these suggestions. To begin with, we did not think that it was realistic for Mr Bajwa to suggest that the Husband could seamlessly relocate back to Canada when, as the Judge had noted, he has been practising in this part of the world for more than a decade and, as a result, has acquired a depth of regional expertise that is not readily transferable to his home country (see GD(HC) at [56]). We also pointed out to Mr Bajwa during the course of oral submissions that whilst technology was (in addition to physical visits) available to all concerned to stay in touch with one another on a regular basis, it was preferable, given the very nature of the relationship, for *the children* to continue to have ***personal*** contact with the Husband. This point was eloquently made by the Judge at [35(c)] of GD(HC):

> … With younger children, closeness is promoted by physical contact and frequent interaction in routine activities. Telephone and internet access are frequently unsatisfactory due to technical difficulties and generally permit only one type of interaction: conversation. Normal family life consists of much more than conversations between parent and child – there are joint activities, routines, projects, discipline and learning from the examples set by the parents in all sorts of situations.

On the other hand, we also pointed out that the Wife could (in addition to visits to Canada) avail herself of technology in order to not only keep in touch but also receive the requisite support from her family in Canada. Indeed, it should also be noted that the time differences that are necessarily experienced when communicating overseas would be more easily accommodated in any event by an adult (here, the Wife) compared to the children. This was also a point noted by the Judge in emphasising the "children's young ages" (see GD(HC) at [35(c)]).

35 It is clear, in our view, that the Judge had paid close – indeed, meticulous – attention to all the relevant facts and not only balanced them but also did so with the overarching (and fundamental as well as critical) principle constantly at the forefront of her analysis as well as decision (*viz*, that *the welfare of the child is paramount*). In the circumstances, we dismissed the Wife's appeal together with the usual consequential orders.

36 We did, however, observe during the hearing and now reiterate in the present judgment that it is imperative that both the Husband and the Wife should focus on setting aside their differences as well as their legal claims against each other and focus, instead, on continuing to develop as well as maintain a good and strong relationship with their children and ensure that their best interests are the paramount consideration. It was for this reason that – despite the Husband's strong protestations to the contrary – we made no order as to costs.