JBE *v* JBF and others
[2015] SGHC 68

Case Number	: Registrar's Appeal from the State Courts No [X] (Summons No [Y])
Decision Date	: 05 May 2015
Tribunal/Court	: High Court
Coram	: Valerie Thean JC
Counsel Name(s)	: P Suppiah and K Elangovan (P Suppiah & Co) for the appellant; Kee Lay Lian and Vidhya M (Rajah & Tann Singapore LLP) for the respondents.
Parties	: JBE — JBF and others

Family Law – Guardianship

5 May 2015 Judgment reserved.

Valerie Thean JC:

Introduction

1 Two children, whose father ("the Father") is deceased, are at the centre of this contest between their mother ("the Mother"), on the one hand, and their grandmother ("the Grandmother") and testamentary guardians ("the Testamentary Guardians"), on the other.

2 The present application is for leave to appeal to the Court of Appeal against my decision on an appeal arising out of custody, care, control and access orders made by a District Judge ("the Judge") in originating summonses brought under the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("GIA"). The Judge issued his grounds in *JBE v JBF, JBG, JBH, JBI and JBJ* [2014] SGDC 423 ("the GD").

Background

3 The Mother and the Father married on 26 March 2004. Thereafter, they lived with the first respondent (the Grandmother), together with the second and third respondents (the Testamentary Guardians, the brother and sister-in-law of the Father). A daughter and son were born to the Mother and the Father in 2007 and 2009 respectively ("the Children").

4 The Mother and the Father appeared to have had a difficult marriage. This worsened in June 2012, when the Father was diagnosed with cancer. The Mother, unknown to the rest of the family and herself, was suffering from acute stress. Continued unhappiness in the household came to a head on 4 October 2012 when a quarrel between the Father and Mother escalated into a household incident involving the Children and the Grandmother. The police were called. [note: 1] They arrested the Mother and escorted her to the police station, where they took statements from her. Thereafter, the Mother was sent to the Institute of Mental Health ("IMH") for treatment. There, she was diagnosed with Acute Stress Reaction and given medication. IMH contacted the second respondent who informed them that she could not return home because the Children were afraid of her. She was later discharged on 8 October 2012 to the care of her brother and a friend. [note: 2] Subsequently, on 20 December 2012, she was issued a stern warning by the police in relation to the events of 4 October 2012. [note: 3]

5 The Father passed away on 17 November 2012 leaving a will dated 8 October 2012, appointing the Testamentary Guardians.

6 Arising out of the incident on 4 October 2012, the Grandmother applied for a personal protection order ("PPO") for herself and the Children on 19 November 2012. [note: 4] The PPO application was subsequently withdrawn on the Mother's undertaking not to commit any violence against the Grandmother and the Children. [note: 5]

7 On 13 December 2012, the Mother commenced Originating Summons (Family) No [AA] ("OSF [AA]") to have the respondents deliver up the Children to her custody, care and control, together with all documents and properties belonging to the children. The Mother joined, as fourth and fifth respondents, the Father's two other siblings, neither of whom resided at the Grandmother's house.

8 On 9 January 2013, the Testamentary Guardians filed a cross application in Originating Summons (Family) No [BB] ("OSF [BB]"), for themselves to be appointed joint guardians of the Children, and to have joint custody, care and control of the Children until they attain 21 years of age or until a further order. They also prayed for the Mother to be declared unfit to have custody, care and control, not to have access to the Children, and to contribute reasonable maintenance for the Children.

The decision below

9 The Judge first heard parties on 16 July 2013. As the Mother had not had contact with the Children since the 4 October 2012 incident, he first ordered assisted access. Four sessions at the Centre for Family Harmony ("CFH") were ordered. A Social Welfare Report was requested.

10 The first round of assisted access sessions did not go well as there was no interaction or bonding between the Children and the Mother. The Children reacted adversely to the Mother's presence. On 12 December 2013, when parties next appeared before the Judge, [note: 6] the Judge referred the matter to the Child Guidance Clinic ("CGC"). The Judge also ordered further supervised access at the CFH. [note: 7]

11 In his GD, the Judge summarised the CGC's findings in its report dated 27 March 2014 as follows (the GD at [29]):

(a) The Children got along with each other and were close to the Grandmother.

(b) The Children have a reasonable relationship with the Testamentary Guardians, with the elder child being closer to her aunt and the younger child to his uncle.

(c) The Children did not react well with the Mother. In particular, the elder child screamed and cried when she saw the Mother in the room. Assisted access with the younger child was on-going. The child showed some interest but largely ignored her.

(d) The elder child would benefit from on-going treatment to help with her issues with the Mother.

The Judge also noted that the second tranche of assisted access sessions at the CFH were unsuccessful (the GD at [30]).

12 On 8 May 2014, the Judge referred the matter to counselling. Unfortunately, the counselling sessions proved ineffective. Parties appeared before the Judge again on 19 September 2014 when the Judge decided in respect of both OSF [AA] and OSF [BB], as follows:

(a) The Mother and Testamentary Guardians are granted joint custody of the Children.

(b) The Testamentary Guardians are granted care and control of the Children, with supervised access to the Mother at the CFH.

(c) The access is to be conducted separately for each child without the Grandmother's presence. Either one of the Testamentary Guardians or a third party, is to facilitate the access. The supervised access for the elder child shall not commence until certification from the specialist presently managing the child's therapy that she is ready to interact with the Mother.

(d) Both the Testamentary Guardians are appointed joint guardians of the Children for the purposes of schooling and childcare arrangements. Nevertheless, they shall consult the Mother and seek her concurrence on decisions affecting the Children's education, religion and medical emergencies. In the event of disagreement, in the Children's best interest, the Testamentary Guardians can make the final decision.

(e) Nevertheless, the Testamentary Guardians shall not influence the religion of the Children.

(f) The Testamentary Guardians shall inform the Mother of the Children's progress in school by providing her copies of their school report cards.

(g) The elder child shall continue with her therapy sessions to help her cope with her fear of the Mother. The Testamentary Guardians shall also provide updates on the progress of the elder child's therapy sessions through the specialist's memo every six months.

(h) The Children's passports shall be kept by the Testamentary Guardians. In the event that the Children are to be taken out of Singapore, the Mother's prior consent must be obtained. Otherwise, an application to the court must be made.

(i) The Mother shall be at liberty to open savings accounts for the Children and deposit such amounts as their savings and/or for their maintenance.

(j) No order on costs.

The appeal against the Judge's order

13 The Mother's appeal came for hearing before me on 15 January 2015. Counsel for both sides consented to me interviewing their clients in their presence and speaking to the psychiatrist who was treating both children, Associate Professor John Wong Chee Meng ("A/P Wong"). Separate interviews were conducted with the Mother, Grandmother and Testamentary Guardians on 28 January 2015, with their respective counsel assisting. The Mother also agreed to furnish an updated report on her mental health, which was filed and served on the respondents on 16 February 2015. I was also updated by A/P Wong.

14 On 23 February 2015, after hearing counsel, I dismissed the Mother's appeal, at the same time making enhancements to her access and setting a date for a review. I pause here to explain my decision to dismiss the appeal.

Grounds of decision for RAS [X]

The statutory context

15 Competing claims to custody by the Mother and the Testamentary Guardians are governed by the GIA. Section 6(1) of the GIA provides that on the death of the father, the mother shall be guardian of the infant either alone or jointly with any guardian appointed by the father. Section 7(1) provides that the father may, by will, appoint any person to be the guardian of the infant after his death. Where complications arise, as in this case, s 7(4) allows the court to decide the matter. When so doing, s 3 mandates that the court shall regard "the welfare of the infant as the first and paramount consideration".

The Mother's position

16 The Mother took the position that she was fit to take care of her children. After her admission to the IMH, she was found to be mentally sound and was discharged on 8 October 2012. She had also sought treatment for her acute caregiver's syndrome and is now recovered.

17 At the time of the hearings before me, the Mother was employed as a Mandarin teacher at an international school. Counsel for the Mother submitted that as the Mother was a school teacher and had young children under her charge, she could not be construed as an unfit person to take care of her own children.

18 Counsel further submitted that the Mother was financially stable. She was drawing a monthly salary of $4,700. The school provided her with accommodation, which was said to be sufficient to house the Children should they be returned to her custody and care.

The respondents' position

19 The respondents' case rested upon the difficult relationship that the Children and the Mother have. In particular, counsel for the respondents submitted, the events on 4 October 2012 "left a permanent psychological scar" on the Children from which they had yet to recover. [note: 8] In this regard, counsel relied on the reports by the CFH and CGC that the Judge referred to in the GD (at [29]–[30]) in support of the lingering psychological effects on the Children.

20 Counsel emphasised that since birth, the Children's primary caregiver had been the Grandmother, even prior to the Mother leaving the home. The Testamentary Guardians also had a good relationship with the Children as they had been living at the Grandmother's house since the time the Children were born. Counsel submitted that the Children were living in a loving environment conducive for their growth, and it was in their best interests to maintain this *status quo*.

The best interests of the Children

21 Counsel for the Mother contended that the best interests of the Children were served by giving the Mother care and control. Relying on the Court of Appeal decision of *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 ("*Soon Peck Wah*") at [45] which emphasised the maternal bond between a mother and her child, counsel's submission was that the Children, as infants, would be better off if they were cared for by their natural mother.

22 The respondents countered with two points. First, *Soon Peck Wah* simply stood for the proposition that where all things were equal, the child should not be deprived of his mother's love and

care. [note: 9] Second, the case before this court was not such a case where "all things were equal", and as such, the mere fact of parenthood should neither raise any presumption in the Mother's favour nor override the court's paramount consideration of the welfare of the Children. [note: 10] The respondents relied upon several UK authorities in support of their second point: *In re K D (A Minor) (Ward: Termination of Access*) [1988] 1 AC 806, *J and another v C and others* [1970] AC 668 and *Re H (A Minor) (Custody: Interim care and control)* [1991] FCR 985.

23 The short answer to the submission based on *Soon Peck Wah* was that it was plain this case was not one where things were equally balanced. On the facts, the Mother did not have, at present, a good relationship with the Children. The Grandmother and Testamentary Guardians, on the other hand, had been the Children's essential source of comfort and wellbeing since the passing of their Father.

24 The Mother also relied upon the Court of Appeal decision of *Re C (an infant)* [2003] 1 SLR(R) 502 ("*Re C*"), where it was observed (at [15]) that a surviving parent had a *prima facie* right to the custody of the child. In this regard, I found it useful to refer to the relevant paragraph in *Re C*. It reads as follows:

> 15 We accept the principle advanced that, *prima facie*, a surviving parent should have the right to custody of his child. This follows naturally from the settled rule that both parents of a child have equal rights over the child and if one parent should die, then the surviving parent would ordinarily have the sole right over the child. This is substantially provided in s 6 of the [GIA]. …

25 I should make two points about *re C*. The first is that the Court of Appeal there went on to acknowledge at [15] that the welfare of the child remains the overriding consideration:

> 15 … However, this right is *subject to the overriding power of the court*, in exercise of the jurisdiction conferred under the [GIA], of either removing that parent as a guardian over the child, i*f it is established to the satisfaction of the court that it is not in the welfare of the child to be in the custody, care and control of that parent*; or appointing another person as an additional guardian to act jointly with the surviving parent. [emphasis added]

26 The second point is that in *Re C*, the court was dealing with a dispute between the husband and his mother against the maternal grandparents. In that context the court was doing no more than explaining the rubric of s 6 of the GIA. Here, the dispute involved a surviving parent and a deceased parent's testamentary guardians. In such cases, s 7 of the GIA makes clear that on application by a testamentary guardian, the court may make an order that the testamentary guardian be the sole guardian of the infant. Section 7 is clear that the court is to make the final determination in the context of a conflict between a parent and testamentary guardian/s, with the welfare of the infant being the first and paramount consideration.

27 *What is in the welfare of the Children?* The Court of Appeal in *Re C* (at [16]) observed that the term "welfare" was a very wide word and that no court should seek to circumscribe it. Referring to the earlier High Court decision of *Tan Siew Kee v Chua Ah Boey* [1987] SLR(R) 725, the Court of Appeal stated that "welfare" obviously covered "both the material and non-material aspects relating to the well-being of the child". The court further observed (also at [16]) that:

> ... greater emphasis must be placed on "stability and security, the loving and understanding, care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents": see *Walker v Walker &*

Harrison [1981] NZ Recent Law 257. *Ultimately, the court must decide based on the child's best interest.* [emphasis added]

28 In the subsequent Court of Appeal decision of *IW v IX* [2006] 1 SLR(R) 135 ("*IW v IX*"), the court reiterated that the term "welfare" should be taken in its widest sense and that it is neither possible nor desirable to define it (at [26]).

29 The recent Court of Appeal decision of *BNS v BNT* [2015] SGCA 23, which concerned a mother seeking to relocate her children to Canada, highlighted "the golden thread that runs through *all* proceedings directly affecting the interests of children" (at [19]). This "golden thread" is that " ***the welfare of the child is paramount and this principle ought to override any other consideration*** " [emphasis in original].

30 *Turning back to the facts of the present case*, the Grandmother and Testamentary Guardians have a loving relationship with the Children, who have been living in the Grandmother's house since they were born. These are factors highlighted in *Re C* as important to a child's welfare. As for the Mother, the Judge tried various forms of intervention to facilitate the Children's access with her, referring the matter to different counsellors and counselling centres. Those efforts were in vain. A/P Wong, who had been treating the elder child since July 2013 and had also recently started treating the younger child, indicated in his report of 19 March 2015 that the elder daughter, in particular, had serious psychiatric issues arising from her past interaction with the Mother, which had to be overcome first. My view, formed from my conversation with him regarding the Children, is that the Children require a stable platform in order to move forward with their Mother. In that respect, preserving the *status quo* and allowing the Children continuity of care with the Grandmother and Testamentary Guardians, would provide the required platform of stability upon which the Children could be encouraged to build a new bond with their Mother.

31 Given these circumstances, which the Judge had described most aptly as "special and unfortunate", the specific orders made by the Judge were appropriate and well-considered. The Judge awarded joint custody to *both* the Testamentary Guardians and the Mother. This affirmed the Mother's role in the Children's lives and her parental responsibilities toward them. The Testamentary Guardians were appointed guardians for the purposes of schooling and childcare, with the duty to consult and keep the Mother informed. These arrangements gave the Children stability and continuity of care. At the same time, access was given to the Mother in order to improve their relationship, although the elder child's access was suspended while her psychiatric issues were being treated.

32 The crux of the Mother's appeal was her wish to have care and control of the Children. In view of the absence of a good relationship between the Children (even on the part of the younger son) and the Mother, and the elder daughter's mental state, a switch of care and control at this stage would be too traumatic for the Children. The inescapable fact was that the Children were not yet ready to live permanently with the Mother; in fact, they needed the assurance of a stable platform from which to start to repair their relationship with her. I therefore dismissed the appeal.

33 That said, I added two further orders in order to improve the Mother's relationship with the Children. The first was for assisted access with the Mother facilitated by A/P Wong, with whom the Children were already comfortable, with a report to be tendered thereafter. A/P Wong agreed with this approach. The second was for counselling with a court counsellor to enable the Mother and the Testamentary Guardians to rebuild their relationship, which is key to enhancing the Children's relationship with the Mother. A review has been scheduled for 4 June 2015 after A/P Wong's report is ready. Having regard to the features of the case, no order was made on the costs of the appeal from the Judge.

The application for leave to appeal to the Court of Appeal

34 On 27 February 2015, the Mother applied, through Summons No [Y], for leave to appeal to the Court of Appeal against my decision. I heard parties on 6 April 2015 and reserved judgment.

The legal context

35 Under s 34(5) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), leave is required for an appeal to the Court of Appeal. In this regard, the principles governing when leave ought to be granted are set out in the Court of Appeal decision of *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 ("*Lee Kuan Yew v Tang Liang Hong*") at [16]. Leave to appeal may be granted where a party can show: (a) a *prima facie* case of error; (b) a question of general principle decided for the first time; or (c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

36 In *IW v IX*, the Court of Appeal affirmed that the same principles apply in custody cases.

My decision on the application for leave to appeal

37 In the present application for leave to appeal against my decision, the Mother relied on the second and third limbs in *Lee Kuan Yew v Tang Liang Hong*. Counsel for the Mother defined the issue of law as: "whether custody, care and control can be given to third parties when the natural mother is still alive and capable of looking after her children". [note: 11]

38 In my judgment, neither the second nor the third limb of *Lee Kuan Yew v Tang Liang Hong* was satisfied. The GIA and *Re C* clearly allow guardians to be appointed while the natural mother is still alive. The sole object of the court's inquiry is ascertaining the best interests of the child. This involves the exercise of the court's discretion within a settled legal framework. The paramount consideration in guardianship proceedings is the welfare of the child. This is a factual inquiry which, in the present case, has been undertaken twice: first by the Judge, and then at an appellate level.

39 I find it useful, at this juncture, to refer to the Court of Appeal decision of *IW v IX*, where the wife had applied for leave to appeal against the High Court's decision to reverse the District Court's decision on a custody matter involving a child aged nine. In dismissing the wife's application, the Court of Appeal made the following observations on why issues involving custody do not usually satisfy the second and third limbs in *Lee Kuan Yew v Tang Liang Hong*:

> 2 7 *What would be in the interests of the child must necessarily depend on all the circumstances of the case.* The court, where appropriate, will have regard to the factors the wife had mentioned, *ie*, maintaining status quo, preservation of mother-child bond and that siblings should not be separated. Other factors will include the home environment and care arrangements made for the child, the conduct of the parties and the wishes of the child. We must reiterate that this enumeration is not meant to be exhaustive. *The court will have to carry out a balancing exercise to determine, as between the two parents, to whom custody should be given in the best interests of the child. A factor which may be determinant in one case may not necessarily be so in another. So the weight to be given to each factor may vary from case to case. No precise formulation is possible. This is not a scientific exercise but one of judgment.* [emphasis added]

Although the observations were made in the context of a custody dispute after divorce proceedings and not guardianship proceedings under the GIA, I am of the view that the considerations are the

same given that the overriding consideration in both frameworks is the welfare of the child.

40 For the reasons set out above, the application for leave to appeal to the Court of Appeal is dismissed.

Conclusion

41 This was a difficult case in that it involved rather exceptional and unfortunate facts. The points of law, however, are well-established. A mother has no inherent inalienable right to her children, as the Mother's counsel was attempting to suggest. Rather, the law mandates that a parent's – indeed, also a guardian's – responsibility, is to look to the best interests of the children at the heart of the dispute. In each case, in deciding whose care and control is best able to address that paramount consideration, it is the specific facts of the case that must determine the decision of the Court.

42 I would mention that, while the orders I made in the appeal reflect what I believe to be in the best interests of the Children *for the present*, these orders include the potential for the Mother to take on a wider role in the lives of the Children in *the future*, if sufficient endeavour and understanding is invested. Securing A/P Wong's assistance to bring parties back together in a safe way for the Children was something of a breakthrough. If the Mother and Testamentary guardians work on their relationship with the aid of a court counsellor, this will help as well. I issue these written grounds in the hope that the parties will take hold of the opportunity to work towards the welfare of the Children in the longer term.

43 No order is made on the costs of this application.

[note: 1] Record of Appeal ("ROA") at p 110.

[note: 2] ROA at p 66.

[note: 3] ROA at p 140.

[note: 4] ROA at p 99.

[note: 5] The respondents' written submissions dated 5 December 2014 at para 13.

[note: 6] Counsel appeared before the Judge on 21 November 2013; the matter was adjourned to 12 December 2013 (ROA at pp 23–24).

[note: 7] ROA at pp 26–27.

[note: 8] The respondents' written submissions dated 5 December 2014 at para 32.

[note: 9] The respondents' written submissions dated 5 December 2014 at para 40.

[note: 10] The respondents' written submissions dated 5 December 2014 at para 42.

[note: 11] The appellant's written submissions dated 6 April 2015 at para 13 and the Mother's affidavit dated 27 February 2015 at para 13.

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