IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2020] SGHCF 4

Originating Summons (Guardianship of Infants Act) No 1 of 2019

Between

VET

… *Plaintiff*

And

VEU

… *Defendant*

GROUNDS OF DECISION

[Family Law] — [Guardianship] — [Welfare of child]

VET
v
VEU

[2020] SGHCF 4

High Court (Family Division) — Originating Summons (Guardianship of Infants Act) No 1 of 2019
Debbie Ong J
27 November 2019; 29 November 2019

14 February 2020

Debbie Ong J:

Introduction and background facts

1 The key issue raised in the present case is whether and if so when, having regard to the philosophy and nature of parental responsibility, a fit parent may voluntarily delegate or share parental responsibility over her child with a non-parent through the appointment of the latter as a guardian.

2 The plaintiff and the defendant are a same-sex couple. The plaintiff is the biological father of two children. He sought to have the defendant appointed guardian of the children and also to share custody, and care and control with him. The defendant, who has no biological links with the two children, consented to the application and indeed desired to be so appointed.

3 The parties were married in the United States (the "US") in 2018.

Sometime during the course of their relationship, they desired to have children. A boy was conceived through in-vitro fertilisation and birthed in the US in 2013 by a surrogate mother. The plaintiff is the biological father of the boy. In a bid to obtain Singapore citizenship for the boy, the plaintiff applied to adopt the boy. His application was granted by a three-judge coram of the High Court (Family Division) in December 2018: *UKM v Attorney-General* [2019] 3 SLR 874 ("*UKM v Attorney-General*"). With the adoption order, the plaintiff successfully applied for a student pass for the boy.

4 Not long after the boy was born, the parties decided that they wanted to raise another child. To this end, they entered into another surrogacy agreement. In early 2019, a girl was born through a surrogate mother, who was based in California. The plaintiff, who is the biological father of the girl, legally adopted her in the US. The parties are now living with the two children in Singapore. The plaintiff intends to apply for some form of a visa to enable his daughter to reside in Singapore in the long term.

5 The parties provide care for both children, with assistance from a domestic helper. The defendant had resigned from his previous employment to care for them. The plaintiff pointed out that the defendant had faced or would face difficulties caring for the children given that the defendant is neither the biological or legal parent of either child. For instance, the plaintiff highlighted that the defendant is unable to provide consent for medical procedures on behalf of the children.

6 The plaintiff applied to the Family Court for the defendant to be appointed a guardian of both children under s 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("GIA"). He also applied for both parties to have

joint custody and shared care and control of the children. As indicated above, the defendant did not contest the plaintiff's application, and so the parties submitted a draft consent order to the court. However, since the application raised important questions of law, the matter was transferred to this Court for determination.

7 I heard the oral arguments on 27 November 2019 and reserved judgment. Having considered the evidence and the legal submissions, I dismissed the application with brief written grounds. As this matter raises a number of thought-provoking legal issues, I now furnish fuller grounds of my decision.

The parties' submissions

8 The plaintiff strenuously emphasised that in taking out this application, he was not seeking to remove himself as a parent of the children. He intended to retain his parental rights and obligations but wished to clothe the defendant with similar rights and obligations to enable the defendant to co-parent with him. He submitted that this was important because the defendant, who has no legal relationship with either child, was unable to undertake his role as day-to-day caregiver of the children. The plaintiff thus had to be present for the children's medical procedures (such as vaccinations for the baby girl), and had to personally accompany the girl through immigration during their quarterly "visa-runs", *ie*, leaving and returning to Singapore to have the girl's tourist visa renewed. The plaintiff also cited cases and academic work in support of his argument that appointing the defendant as the children's guardian would not, as a matter of law, displace or undermine his parental responsibility towards the children.

9 The defendant, who was unrepresented, essentially echoed the plaintiff's submissions. At the hearing, he emphasised the possibility of the children falling sick when the plaintiff is away. He explained that in such a situation, he would not be able to make decisions concerning medical treatment. The defendant further emphasised that he and the plaintiff collaborate in caring for the children, and that "adding [him] to the picture" would be a "very natural thing".

Applying the law to present facts

Application under the GIA: general

10 The statutory basis for the plaintiff's application is s 5 of the GIA, which provides:

> **Power of court to make, discharge or amend orders for custody and maintenance of infants**
>
> **5.** The court may, upon the application of either parent or of any guardian appointed under this Act, make orders as it may think fit regarding the custody of such infant, the right of access thereto and the payment of any sum towards the maintenance of the infant and may alter, vary or discharge such order on the application of either parent or of any guardian appointed under this Act.

11 In *UMF v UMG and another* [2019] 3 SLR 640 ("*UMF v UMG*"), I explained that s 5 is an enabling provision through which parents and court-appointed guardians may apply for custody of, access to and maintenance of a child. The plaintiff in the present case, being the biological parent of both children (and having adopted the boy in Singapore), had the *locus standi* to invoke s 5.

12 In determining any application under s 5, the welfare of the infant is the court's paramount consideration. This is clear from s 3 of the GIA, which states:

> **Welfare of infant to be paramount consideration**
>
> **3.** Where in any proceedings before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father.

13 In *TAU v TAT* [2018] 5 SLR 1089 ("*TAU v TAT*"), I held that parental responsibility is one of the most fundamental obligations in family law. A parent must provide and care for her child. A parent must safeguard and promote the child's best interests. She must exercise parental authority for the welfare of the child.

14 A child's welfare refers to her well-being in every aspect, that is, her well-being in the most exhaustive sense of that word. It refers to her physical, intellectual, psychological, emotional, moral and religious well-being. It refers to her well-being both in the short term and in the long term: *UKM v Attorney-General* at [45]; *TSF v TSE* [2018] 2 SLR 833 at [51] and [52]. Also relevant to a child's welfare is the need to enable parents to carry out their parental responsibility without unnecessary interference from third parties: *UMF v UMG* at [28] and [33].

Parental responsibility

15 Parental responsibility is encapsulated in s 46(1) of the Women's Charter (Cap 353, 2009 Rev Ed), which provides:

> **Rights and duties**

> **46**. — (1) Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.

16 This applies to all parents, whether married or unmarried: see *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018) ("*Elements*") at para 7.053. Professor Leong Wai Kum ("Professor Leong") illustrates this with two Court of Appeal decisions. In the first case of *L v L* [1996] 2 SLR(R) 529, Professor Leong comments that the court "imposed the same demand on the divorced mother to continue to co-operate with her divorced husband when it came to something as significant to their young daughter as to whether to change her surname" (*Elements* at footnote of para 7.050). In the other case of *Lim Chin Huat Francis and another v Lim Kok Chye Ivan and another* [1999] 2 SLR(R) 392, the court held that it must "advocate the underlying premise that parents, *natural or potential*, must care for their children" [emphasis added] (at [91]). These cases demonstrate that the parental responsibility to safeguard the welfare of children is not dependent on the married or unmarried status of her parents. In the present case, it is clear that the plaintiff, as a parent of the children, has parental responsibility over them.

17 Parental responsibility is not a voluntarily delegable responsibility, unless the parent gives the child up for adoption in which case that parent is no longer the parent of the child, while the new adoptive parents have parental responsibility instead. In fact, severe breaches of parental responsibility by parents may even constitute offences under the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA").

18 This is *not* to say that decisions on day-to-day matters — matters such as what the child can eat for lunch and whether she can spend time at the playground — can never be delegated. Indeed parents often entrust their child to the physical care of another adult, such as the child's grandparent or child's aunt or uncle, or to school teachers during school hours. Such persons are thus also delegated the authority to make day-to-day decisions while the child is in their physical care.

19 The plaintiff's position was that the defendant cares for his two children and makes such day-to-day decisions for them. However, the orders which the plaintiff sought went much further than giving the defendant authority to make day-to-day decisions for the children. While the instrument of appointment can set out limitations on the authority of the guardian, the parties did not suggest or seek any restrictions on the defendant's authority. When the guardian's authority is not limited, the appointment of a guardian over children results in the guardian stepping into the shoes of a parent to exercise the authority that the parent naturally possesses over the child: see *Elements* at para 9.045. This would include the delegation of long-term decision-making authority to that guardian, even if the parent of the child still retains responsibility and authority as a parent. Such authority includes making decisions on important matters with long-term consequences such as education (*eg*, primary school registration and subsequent school choices) and whether the child should undergo major and serious medical treatment including consenting to organ donation.

20 Where there are parents responsible for the child, the consequence of appointing a guardian is to share the parental responsibility amongst more persons – this in itself is not necessarily always in the welfare of the child. To

confer on another non-parent the broad authority to make decisions for one's child in issues such as those stated above is a very serious matter. One obvious observation is that having more adults wield the same authority over a child will require sturdy cooperation amongst them. A non-parent being brought into the child's life when there are *no fit parents* is a quite different matter – this is addressed below at [24] and [32].

Whether the court may appoint a guardian when there is a fit parent present

21 At the hearing, I asked the plaintiff's counsel to satisfy the Court that there is jurisdiction and power to appoint a guardian in the factual matrix of the present case. The plaintiff relied on s 5 of the GIA as giving the Court unlimited powers to appoint a guardian. Section 5 provides:

> **Power of court to make, discharge or amend orders for custody and maintenance of infants**
>
> 5. The court may, upon the application of either parent or of any guardian appointed under this Act, make orders as it may think fit regarding the custody of such infant, the right of access thereto and the payment of any sum towards the maintenance of the infant and may alter, vary or discharge such order on the application of either parent or of any guardian appointed under this Act.

22 I observe that s 5 does not expressly provide for the appointment of a guardian. It provides for the application for orders on custody, access and maintenance.

23 Statutes must be interpreted purposively and in determining the purpose, "primacy should be accorded to the text of the provision and its statutory context over any extraneous material": *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [43]; see also s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed).

The other provisions in the GIA are therefore relevant to the interpretation of s 5.

24 Only two provisions in the GIA expressly empower the Court to appoint guardians. They are ss 6(3) and 10 of the GIA, which provide:

> **Rights of surviving parent as to guardianship**
>
> **6.** …
>
> (3) Where an infant has no parent, no guardian of the person and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the infant.
>
> …
>
> **Removal of guardian**
>
> **10.** The court may remove from his guardianship any guardian, and may appoint another guardian in his place.

25 In *UMF v UMG*, I observed that (at [36] and [38]):

> Section 10 applies when there is a guardian appointed whom the court may remove from guardianship if appropriate. The English courts have terminated guardianship appointments on the grounds of "actual or threatened misconduct of the guardian" and "a change of circumstances which rendered it for some reason better for the child to have a new guardian" … in these cases cited, the courts contemplated the removal of guardians who had earlier been appointed by will or under the applicable legislation. *Section 10 does not envisage the removal of a natural parent as a guardian of the child.* … [emphasis added]

26 While s 10 refers to the removal of a guardian, the use of the term "guardian" in the section and in the GIA does not encompass the parents of a child. While it has been said that a parent is a "natural guardian" of her child, Professor Leong suggests that it is not useful to continue to use such a description: *Elements* at para 9.083. I agree; indeed the description may confuse

rather than clarify. As a parent has all the parental authority over her child which a guardian would also have, it is understandable that a parent has been described as a natural guardian. But this should not allow us to go so far as to use this understanding to interpret the GIA which intentionally uses the words "parent" and "guardian" distinctly.

27 While ss 6(1) and (2) of the GIA appear to refer to either parent as "guardian of the infant", the legislative history of these provisions show that they were not enacted to equate parents with guardians. They provide:

> **Rights of surviving parent as to guardianship**
>
> **6**.—(1) On the death of the father of an infant*, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the infant*, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the mother.
>
> (2) On the death of the mother of an infant*, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the infant*, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the father.
>
> [emphasis added]

28 The earlier local statute, Guardianship of Infants Ordinance (No 11 of 1934) ("the 1934 Ordinance") preserved the common law pre-eminence of the father. This changed in 1965 when several provisions, including s 6, were enacted. Through these amendments, Parliament abandoned the notion that fathers were superior to mothers and mandated the welfare of the child as the primary concern of the court: Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 429–431. Thus, the purpose of s 6

was to entrench the equal parental responsibility of both parents in the law; it did not seek to equate parents with guardians. Hence, notwithstanding the wording of s 6, "guardian" in s 10 should not be interpreted as including parents.

29 This interpretation of s 10 finds support in its English equivalent – s 6 of the UK Guardianship of Minors Act 1971 (c 3) (UK) ("UK GMA 1971"). Section 10 was first enacted in the 1934 Ordinance, which was based on the UK Guardianship of Infants Act 1886 (c 27) (UK) ("UK GIA 1886"): Chan Wing Cheong, "Applications under the Guardianship of Infants Act" [1998] Sing JLS 182 at p 185. The UK GMA 1971 then consolidated a number of Acts of Parliament, including the UK GIA 1886: Stephen Cretney, *Principles of Family Law* (Sweet & Maxwell, 4th edn, 1984) ("Cretney's *Principles of Family Law*") at p 363. It is therefore useful to refer to the UK GMA 1971 when considering the interpretation of the GIA. In this regard, it is pertinent that s 6 of the UK GMA 1971 stated that only "any testamentary guardian or any guardian appointed or acting by virtue of [the UK GMA 1971]" could be removed; it did not envisage the removal of parents as guardians:

> **6. Power of High Court to remove or replace guardian.**
>
> The High Court may, in its discretion, on being satisfied that it is for the welfare of the minor, remove from his office any *testamentary guardian or any guardian appointed or acting by virtue of this Act*, and may also, if it deems it to be for the welfare of the minor, appoint another guardian in place of the guardian so removed. [emphasis added]

30 I hasten to add that while an unfit parent cannot be removed as a guardian under s 10 of the GIA, the courts are not powerless when faced with a case involving an unfit parent. An unfit parent can lose custody and care and control of her child. The consequence of loss of custody is similar to that of a

guardian losing guardianship. I clarify further the meanings of custody and care and control in the next section: see [49] below.

31 Aside from the court's powers to appoint guardians in ss 6 and 10, it is also important to note that under s 7 of the GIA, while a parent may by deed or will appoint a testamentary guardian, such appointments can only take effect after that parent's death. Section 7 provides:

> **Power of father and mother to appoint testamentary guardians**
>
> **7**.—(1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death.
>
> (2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death.
>
> (3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive, unless the mother or father objects to his so acting.
>
> (4) If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the later case may make such order regarding the custody of the infant and the right of access thereto of the mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.
>
> (5) Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.
>
> (6) If a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian

> after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

The purpose of s 7 is to ensure that a parent can make legal arrangements for the care of her children (by appointing a guardian) after her death, *but not before*. It enables a parent to appoint a guardian to replace herself upon death, so to speak.

32 It appears that there is no provision in the GIA for the appointment of a guardian outside of the circumstances in ss 6, 7 and 10. Thus, court intervention for the appointment of a guardian is warranted only where there is no parent (see s 6(3) of the GIA) or in replacing a guardian (see s 10 of the GIA). It is evident from the statutory regime that the purpose of the GIA is to enable the courts to make orders for the welfare of the children without intervening unnecessarily in a parent's parental responsibility. I note that a similar approach to parenting underpins the child protection regime in the CYPA, under which the state may intervene in the parenting of children only as a last resort: *UNB v Child Protector* [2018] 5 SLR 1018 at [37]. In the light of the statutory regime of the GIA, s 5 ought *not* to be interpreted in the way suggested by the plaintiff, which is to confer on the courts a general and broad discretion to appoint guardians.

33 This interpretation of s 5 is also supported by the legislative history of the GIA. When s 5 was enacted in 1965, the Guardianship of Infants Act 1925 (c 45) (UK) was used as a model. The relevant English provisions were later consolidated by the UK GMA 1971; s 9 of the UK GMA 1971 then became the

closest provision to s 5 of the GIA: *UMF v UMG* at [27]. Section 9 of the UK GMA 1971, as originally enacted, provided:

> **9.— Orders for custody and maintenance on application of mother or father.**
>
> (1) The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding—
>
> (a) the custody of the minor; and
>
> (b) the right of access to the minor of his mother or father,
>
> as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.
>
> (2) Where the court makes an order under subsection (1) of this section giving the custody of the minor to the mother, the court may make a further order requiring the father to pay to the mother such weekly or other periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the father.
>
> (3) An order may be made under subsection (1) or (2) of this section notwithstanding that the parents of the minor are then residing together, but—
>
> (a) no such order shall be enforceable, and no liability thereunder shall accrue, while they are residing together; and
>
> (b) any such order shall cease to have effect if for a period of three months after it is made they continue to reside together.
>
> (4) An order under subsection (1) or (2) of this section may be varied or discharged by a subsequent order made on the application of either parent or (in the case of an order under subsection (1)) after the death of either parent on the application of any guardian under this Act.

34 Like s 5 of the GIA, s 9 of the UK GMA 1971 empowered the court to "make such order regarding … the custody of the minor as the court thinks fit". This provision was not interpreted to encompass the appointment of guardians.

The authorities which pre-date the Children Act 1989 (c 41) (UK) ("Children Act 1989") (which overhauled the law on children) are helpful in this regard. For instance, in Cretney's *Principles of Family Law* at pp 317–319, the author stated that under the UK GMA 1971, the courts had the power to appoint guardians in the following circumstances:

> (a) On the application of the intended guardian, if the child has no parent, guardian of the person and no other person having parental rights with respect to him … [under s 5 of the UK GMA 1971]
>
> …
>
> (b) If either parent dies without having appointed a guardian. A guardian so appointed will act jointly with the surviving parent. [under s 3 of the UK GMA 1971]
>
> (c) If either parent dies, and the guardian whom he or she has appointed dies, or refuses to act … [under s 3 of the UK GMA 1971]
>
> (d) If the court removes a guardian, it may appoint another to act in his place. [under s 6 of the UK GMA 1971]

It was not envisaged that a parent could apply under s 9 for the appointment of a guardian outside of these circumstances.

35 Similarly, in PM Bromley and NV Lowe, *Bromley's Family Law* (Butterworths, 7th edn, 1987) at pp 353–355, the authors cited only ss 3 and 5 of the UK GMA 1971 when discussing the court's powers to appoint guardians. Those sections of the UK statute, which are similar to s 6 of the GIA, provided (as originally enacted):

> **3.— Rights of surviving parent as to guardianship.**
>
> (1) On the death of the father of a minor, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the minor either alone or jointly with any guardian appointed by the father; and—

> (a) where no guardian has been appointed by the father; or
>
> (b) in the event of the death or refusal to act of the guardian or guardians appointed by the father,
>
> the court may, if it thinks fit, appoint a guardian to act jointly with the mother.
>
> (2) On the death of the mother of a minor, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the minor either alone or jointly with any guardian appointed by the mother; and—
>
> (a) where no guardian has been appointed by the mother; or
>
> (b) in the event of the death or refusal to act of the guardian or guardians appointed by the mother,
>
> the court may, if it thinks fit, appoint a guardian to act jointly with the father.
>
> …
>
> **5.— Power of court to appoint guardian for minor having no parent etc.**
>
> (1) Where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the minor.

36 The English Law Commission also stated in their report titled "Family Law: Review of Child Law, Guardianship and Custody", Law Commission No 172 (1988) at para 2.30:

> … the courts' powers to appoint guardians mirror those of parents. They may make appointments when a parent could have done so but has not or when a guardian appointed by a parent has died or refused to act.

Worthy of note is that the Law Commission cited only ss 3 and 5 of the UK GMA 1971 in the above extract.

37 It is clear from these authorities that s 9 of the UK statute was not regarded as a provision through which the court could appoint guardians. In the light of the statutory context of the GIA, the legislative history of the GIA and the similarities between that provision and s 9 of the UK GMA 1971, I am of the view that s 5 of our GIA does not empower the courts to appoint guardians outside of the circumstances in ss 6 and 10.

38 I was thus not satisfied that, based on the submissions advanced on behalf of the plaintiff by his counsel, s 5 of the GIA may be interpreted so broadly as to permit the court to grant the reliefs which the plaintiff sought. Simply saying that an order is in the welfare of the child is insufficient. A particular relief must first be provided by the law before a court can grant it. In my view, there is no provision in the GIA on which the plaintiff could rely for the appointment of the defendant as guardian of the children in the circumstances of the case.

39 This does not however mean that the court may appoint guardians only in the limited circumstances set out in ss 6 and 10 of the GIA. The court may also appoint guardians when exercising its wardship jurisdiction, provided that it is necessary for the protection of the child (for example, where there is no fit parent having parental responsibility over her). Adults other than parents or court-appointed guardians may invoke wardship jurisdiction in limited circumstances where the child is in need of protection: see *UMF v UMG* at [59]–[61]; [64]–[65].

40 I recognise that in the UK, appointing a guardian would be inconsistent with the continuation of wardship: *Re C (minors) (wardship: adoption)* [1989] 1 All ER 395; *Clarke Hall & Morrison on Children vol 1 (Butterworths,*

Looseleaf Ed, November 2016 release) at Division 6, paras 120-125. A UK court exercising wardship jurisdiction retains custody over the ward. The court's consent must be obtained before an important step can be taken in the life of the child, even though the day-to-day care and control of the child is given to an individual or a local authority: Practice Direction 12D Inherent Jurisdiction (Including Wardship) Proceedings at para 1.3, also see Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (OUP, 11th edn, 2015) at pp 743–744. This appears to be different from what was envisaged in *UMF v UMG*, where I accepted that guardians appointed under the court's wardship jurisdiction may be granted custody of the child.

41 Family law in Singapore has developed differently from the UK. The advent of the UK Children Act 1989 marked a huge shift in the law on children. As part of this sea change, the GMA 1971 was repealed. In contrast, there is no equivalent of the Children Act 1989 in Singapore; the law on guardianship is still encapsulated in the GIA. Given the different legal landscape in Singapore, the contours of wardship jurisdiction here may not necessarily be identical to that in the UK. Further, as I explained in *UXH v UXI* [2019] SGHCF 24, parents know their child best and are the most suitable persons to make decisions and bear responsibility for their child. As a result, parenting decisions should, as far as possible, be made by the parents and not the court. Similarly, the adult who has been entrusted with care of the child is better placed than the court to make decisions for the children in her care. I agree with Professor Leong that (*Elements* at para 9.101, cited with approval in *UMF v UMG* at [59]):

> … it should be possible for a court exercising its wardship jurisdiction to appoint a person as the guardian of the child instead of appointing the child a ward of the court. This is especially so since the power of the court in wardship

> proceedings is unlimited in order that it can do everything needed for a child. …

42 An example of the use of wardship jurisdiction may be found in the recent applications made in HCF/OSG 2/2019 and HCF/OSG 3/2019. In those applications, the grandaunt ("the applicant") of three children, whom I refer to as K, P and W, sought to be appointed guardian of those children. The applicant was the aunt of the children's mother, whom I refer to as "the respondent". The respondent had left all three children in the care of the applicant since their births. The father of the children was unknown; there was no record of who their father was in their birth certificates. The respondent was subsequently married in 2016 and had three children from this marriage. Thus the respondent had altogether three older children born out of wedlock (K, P and W) and three younger children born during her marriage. The applicant stated that she had raised the children since they were born, while the respondent was an absent parent throughout their lives. The applicant had encountered difficulties obtaining the respondent's consent for matters necessary for the children's welfare. For example, the applicant stated that she had to seek assistance from the KK Hospital's medical social worker to obtain the respondent's consent for P's operation for respiratory problems. There was no evidence that the respondent was willing to be, or capable of, being a responsible parent to these children. The respondent was notified of but did not at all participate in the guardianship proceedings commenced by the applicant. The facts were in practical effect somewhat analogous to that envisaged in s 6(3) of the GIA which provides that the court may appoint a guardian where there are no parents or any person with parental responsibility over the child. I found that the children in HCF/OSG 2/2019 and HCF/OSG 3/2019 were in need of the Court's protection as, without the applicant's involvement in their lives, they would not

have had any adult who would care and provide for them. The wardship jurisdiction of the court was appropriately invoked. The facts justified the appointment of the applicant as guardian of the children; custody, care and control were also granted to her. Those orders were necessary for the welfare of the children. The applicant, who raised the children from the time they were born, should be supported in having the authority to make decisions required for their best interests without running into unnecessary obstacles in carrying out these responsibilities. I also ordered the respondent to pay maintenance for the three children. Providing maintenance for the children is a core aspect of parental responsibility and protection of the children's welfare. It was clear that the respondent as a parent has the legal obligation to maintain her children and she needs to discharge this responsibility.

43 I return to the present case. The defendant in the present case could not have been appointed guardian pursuant to the Court's wardship jurisdiction because there was no evidence that the plaintiff's children were in such need of the Court's protection.

44 I make an important note here regarding parental responsibility. The interpretation of the law that I have reached in respect of the Court's jurisdiction and power to appoint guardians under the GIA ought not to be misperceived as suggesting that the law is helpless in protecting children from parents who are clearly unfit to parent their children. On the contrary, the law firmly holds parents to their fundamental obligations to discharge their parental responsibility to their children. When parents fail gravely in their parental responsibility, court intervention is justified; depending on the precise circumstances of each case, such parents may lose custody and care and control

of the children, or may even face the possibility of adoption proceedings where their unfitness to parent is severe, persistent and recalcitrant for the long term.

Whether appointing the defendant as guardian would be in the children's welfare

45 Apart from the question of the court's jurisdiction and power to appoint a guardian in this factual matrix, there is also the question of whether a guardian should be so appointed on the facts of this case. I am of the view that this application fails on both aspects, that is, the Court has no jurisdiction and power to appoint a guardian and it is not in the children's welfare to appoint a guardian.

46 Notwithstanding my decision on the issue of jurisdiction and power, I explain further why, even if the Court had such jurisdiction, the appointment of the defendant as a guardian would not be necessary for or in the children's welfare. In determining an application such as the present, the welfare of the child is the court's paramount consideration. The defendant submitted at the oral hearing that the main reason for the application was to enable him to provide consent for medical treatment for the children during emergencies when the plaintiff is not present. However, necessary, urgent, life-saving medical treatment will not be withheld and where the need is not too urgent, a parent's consent can be obtained through various means of modern communication. I also remarked at the hearing that it is not uncommon for parents to entrust their children to caregivers, such as grandparents, when they are overseas. These caregivers need not be clothed with the heavy legal instrument of a guardianship appointment. Thus, I do not find it necessary for the defendant to be appointed guardian in order to care for the children when the plaintiff is not present.

47 As mentioned above, the plaintiff had submitted that the defendant is unable to take his daughter on her "visa runs" without him being present as well. Further, the plaintiff's consent is required even when the defendant takes her for medical check-ups and vaccinations. Indeed, becoming a parent comes with heavy responsibilities; the plaintiff as a parent, has these important responsibilities.

48 I note that the plaintiff already plans to apply for a long-term visa for the daughter. Thus, the "visa runs" may no longer be necessary. In addition, the plaintiff stated in his affidavit that the parties have thus far not had an incident where the defendant was prevented from making a decision which would have required his consent, as they would make plans to pre-empt such difficulties. I also note the defendant's confirmation at the hearing that he did not face any issues when he brought the plaintiff's daughter for the first visit for vaccinations. It appears that the plaintiff's application was driven by convenience, not necessity. Convenience alone is not a reason for a friend, cousin or grandmother to be appointed a guardian. Thus the reasons provided for the appointment of the defendant as a guardian were insufficient for the court to make such an order, even if there was the jurisdiction and power to do so. The appointment of a guardian results in highly significant changes in the balance of parental authority and responsibility; the court will be circumspect in making such appointments (see also [20] above).

Whether orders for guardianship, custody and care and control were necessary

49 Aside from the guardianship application, the plaintiff had sought joint custody and shared care and control of the children for himself and the

defendant. As I explained in *TAU v TAT*, "custody" pertains to decision-making over the major aspects of a child's life, such as the child's education and major healthcare issues. Where joint or no custody orders are made, both parents must consult each other and co-operate to make the major decisions for the child: at [8]. A sole custody order granted to one parent thus deprives the other parent of all authority over the major aspects of the child's life. "Care and control", on the other hand, relates to which parent the child should live with primarily, with that parent as the daily caregiver. Consequently, that parent is generally responsible for making day-to-day decisions for the child, such as how the child is to dress or what the child is to eat: at [9]. Where care and control is shared, the child will effectively have two primary caregivers: at [11].

50 It has been said elsewhere in Debbie Ong Siew Ling & Lim Hui Min, "Custody and Access: Caring or Controlling?" in *Developments in Singapore Law Between 2001 and 2005* (Singapore Academy of Law, 2006) (Teo Keang Sood gen ed) ch 15 at p 581 that custody, care and control and access "instruments which allow the parents to continue caring for the child after the breakdown of their relationship"; they "are the constructs used by the court to make arrangements for who the child will live with, who he/she will visit, and who will have authority over [him]/her in matters great and small". In similar vein, Professor Leong writes (*Elements* at para 9.014):

> … While parents live together in a functioning family, there is little reason for them to turn to the law of guardianship and custody. It is, only, when parents separate or divorce that they turn to the law of guardianship and custody to sort out the continued care for their child. …

In other words, guardianship, custody, care and control are legal constructs used only when it is necessary for the court to intervene in the balance of parental

authority and responsibility arising from natural relationships between parent and child.

51 Not making a custody order can also be in the welfare of the child. In the decision of the High Court in *Re Aliya Aziz Tayabali* [1992] 3 SLR(R) 894 ("*Re Aliya Aziz Tayabali*"), the mother sought an order of sole custody in relation to their child, while the father sought an order of joint custody. The court made no order as to custody for the following reasons:

> 12 My best reading of the situation is that there will continue to be niggling differences between the parents in the access arrangements (but this would be entirely normal in a post-divorce situation in any event). There will inevitably be serious differences in the choice and practice of the child's religion, and possibly her education, given the respective sects to which the parents belong.
>
> 13 My conclusions are as follows.
>
> (a) I accept that the father is a devoted (and in his own eyes) a conscientious parent. In time, he will no doubt improve his care-giving skills, but I have no reason to doubt his genuine love and concern for the child.
>
> (b) My impression of the mother is in similar terms except that there is no reason to doubt her parenting skills.
>
> …
>
> 14 While therefore I recognise that the father should have some rights over the upbringing of the child, I do not wish to encourage unnecessary dissension between the parties. I am concerned about the psychological effect of a joint custody order, particularly as the law is unclear as to what this means. In the circumstances, I believe that the appropriate decision is to make no order as to custody, thereby leaving neither party the *prima facie* advantage of deciding any serious matters relating to the child's upbringing. Hopefully, the parties will have enough sense to resolve important matters affecting the child by mutual agreement, given their knowledge that any disagreements will have to be resolved by litigation. If, in due course, the order I have made proves unworkable because of a

> plethora of applications to court, the court may then review the situation and make a formal order for custody.

52 Similarly, in *Re G (guardianship of an infant)* [2004] 1 SLR(R) 229, the High Court made no order as to custody. The court explained at [7]:

> … Where there is no immediate or pressing need for the question of custody to be settled, one should seriously consider whether an order for sole custody is in the best interest of a child, who should, without more, be entitled to the guidance of both parents. …

53 This line of cases culminated in the seminal decision of the Court of Appeal in *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690, where it observed at [18] that the courts do not "intervene unnecessarily in the parent-child relationship where there is no actual dispute between the parents over any serious matters relating to the child's upbringing".

54 Where the relationship between parents or guardians have broken down (*eg*, a divorce), such orders are usually necessary to ensure that appropriate care arrangements are in place following the breakdown. Where orders are necessary, they should be made after full consideration is given to the impact such orders will have on the welfare of the child. The cases remind us that the court should be slow to make orders that disturb the balance of parental authority and responsibility.

55 Turning back to the facts of this case, the parties had been caring for the children without any order for guardianship, custody or care and control. Indeed, on the plaintiff's own evidence, the children were thriving under their care, an assertion which I saw no reason to doubt. I therefore did not see why it was necessary for the Court to make the orders sought by the plaintiff.

56 I note the defendant's point that since the parties had both been caring for the children, "adding [the defendant] to the picture" by granting the orders sought would be a "very natural thing". The plaintiff has parental responsibility and authority to decide how best to raise the children. If the plaintiff wishes to consult the defendant on how best to care for the children, he has the autonomy to do so. Indeed, as noted in the previous paragraph, the plaintiff had been doing so. There is no need for a court order.

Conclusion and law reform

57 I dismissed the plaintiff's application.

58 I had earlier observed in *UMF v UMG* that (at [69]–[70]):

> … resorting to the court's wardship jurisdiction could lead to uncertainty and involve a more cumbersome regime of protection, and hence it is preferable to provide a clearly-defined statutory regime through which non-parents may apply for the necessary orders for the welfare of children. …. Having the GIA statutorily provide for Singapore courts to make such specific orders or orders for specific powers has been recommended by the Family Law Review Working Group in its report on guardianship reform: Report of the Family Law Review Working Group: Recommendations for Guardianship Reform in Singapore (23 March 2016) … It may also be apt for Singapore to make specific provision for non-parents with some connection to a child to make applications for custody, care and control and access in appropriate cases. One such group of adults could be the child's grandparents for instance. To protect the parent-and-child relationship from unmeritorious interference, the law could provide that the leave of court is required for such applications, setting out clearly the classes of persons who may apply for the court's leave. …

Provision in the law that enables certain adults (such as grandparents or relatives who have cared for the children) to seek specific and limited authority to make important and necessary decisions for the children, such as enrolling the

children in school, will protect the children's welfare in instances where the parents fail to discharge such responsibility.

Debbie Ong
Judge

Koh Tien Hua and Shaun Ho (Eversheds Harry Elias LLP) for the plaintiff;
The defendant in person.
