Re G (custody of an infant)
[2003] SGHC 57

Case Number : OS 1094/1995

Decision Date : 17 March 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Jason Peter Dendroff (Dhillon Dendroff and Partners) for plaintiff; Jamilah Ibrahim (KC Abu Bakar and Partners) for defendant

Parties : —

Family Law – Custody – Access – Application to vary order on access – Relevant considerations – Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ss 5 and 11

The background

1 In January 1994, the plaintiff married the defendant. A son ("the child") was born (prematurely) of the union on 11 July 1994. The parties were divorced on 6 November 1996 by the Syariah Court at the defendant's initiative and, with the plaintiff's consent (he had just then been released from jail), she was awarded sole custody, care and control of the child, while access was granted to the plaintiff every Saturday from 2.30pm to 9.00pm.

2 On 10 June 2002, the defendant applied *vide* Summons-in-Chambers No 600986 of 2002 (the defendant's application) for *inter alia*, the following orders:

(a) the defendant be granted leave to vary the order of court dated 21 March 1997 ("the Order of Court"), which gave the plaintiff unsupervised access to the child every Saturday from 2.30pm to 9.00pm;

(b) the plaintiff be denied access to the child and that an independent social welfare officer be appointed by this Honourable Court to assess the child's wishes;

(c) alternatively, that the plaintiff be granted access hours from 3.30pm to 8.00pm every Saturday and that the handing over location to be at the void deck of Block 268, Pasir Ris Street 21;

(d) that the plaintiff comply with the said order herein;

(e) that the defendant be at liberty to commence committal proceedings against the plaintiff in the event that the plaintiff breaches the said order of court.

3 On 8 August 2002, the plaintiff filed a cross-application in Summons-in-Chambers No 601300 of 2002 ("the plaintiff's application") praying *inter alia* for the following orders:

(a) the plaintiff be granted leave to vary the Order of Court;

(b) the plaintiff be granted weekly overnight access to the child with access for the first week being from Fridays 8.00pm to Saturdays 8.00pm, for the second week being from Saturdays 8.00pm to Sundays 8.00pm and alternating thereafter;

(c) that the plaintiff be granted additional access to the child:

(i) during the school holidays for terms II and LLJ;

(ii) on the first days of Hari Raya Puasa and Hari Raya Haji from 7.00am to 1.00pm;

(iii) on Father's Day between 1.00pm and 5.00pm;

(d) the handing over of the child be varied to Pasir Ris Neighbourhood Police Centre;

(e) the plaintiff be given access to the child's progress reports/records from his school and madrasah.

4 After social welfare authorities had been directed to investigate into the background of both parties, I dismissed the plaintiff's application with costs and granted the defendant's application as follows:

(a) the Order of Court was varied and the plaintiff was granted access to the child from 3.00pm to 8.00pm every Saturday;

(b) handing over of the child to the plaintiff would be at the void deck of Block 268, Pasir Ris Street 21;

(c) the defendant was given liberty to commence committal proceedings against the plaintiff in the event the plaintiff breaches the order made herein.

The plaintiff has now appealed against my decision (in Civil Appeal No 14 of 2003).

5 After the Order of Court was made but before the two applications herein were filed, the plaintiff applied (*ex parte*) and obtained on 10 February 1999 ("the Second Order of Court"), the following orders:

(a) the plaintiff be given additional access to the child;

(b) the defendant to hand over the child to the plaintiff on Sunday 14 February 1999 at 10.30am at the neighbourhood police post located at Pasir Ris Street 12;

(c) the plaintiff to return the child to the defendant on Sunday 14 February 1999 at 5.30pm at the aforesaid neighbourhood police post.

The affidavits

6 In the affidavit filed in support of the defendant's application, the defendant deposed that the plaintiff initially complied with the Order of Court. However, there were many occasions thereafter where the plaintiff disregarded the same, causing her stress and undue worries over the child's safety. The defendant cited 11 occasions between 13 February 1999 and 15 December 2001, where the plaintiff kept the child overnight or, he returned the child to her after the stipulated access hours. She lodged numerous police reports (which she exhibited in her affidavit) in that connection. She accused the plaintiff of taking advantage of her kindness in accommodating his request for additional access by unilaterally extending the access period, even on those occasions where she did not consent.

7 The defendant complained that on each occasion the plaintiff exercised overnight access to

the child, the latter would return to her in a frightened state so much so that the child would be hesitant about meeting the plaintiff again. The child had also told her that he did not want to see the plaintiff; hence, the defendant's application.

8 In the event the defendant's (main) application (that the plaintiff be denied access) was rejected, the defendant requested that her alternative prayer be granted. The defendant explained that the access hours needed to be varied because the child was attending religious classes at a madrasah every Saturday between 12.15pm and 2.15pm. That gave her only 15 minutes to hand the child over to the plaintiff which was too rushed, even though she had so far managed to be on time but, it meant she had to take the child out of his class at 2.15pm sharp. As she did not want to engage in arguments with the plaintiff in the event she was late, the defendant requested that the starting time for access be delayed one hour later until 3.30pm.

9 In the affidavit which he filed in reply to the defendant's, the plaintiff revealed that he had obtained the Second Order of Court without being represented by any solicitor; he had filed his own affidavit and appeared in person before the court (Tay Yong Kwang JC) when the order was granted. The Second Order of Court was prompted by his sister's marriage on 14 February 1999 and, his desire to have the child attend the wedding. He alleged that he was unsuccessful in serving the Second Order of Court on the defendant on 12 February 1999 as, she was out when he called at her home and, her sister refused to accept service on her behalf. Contrary to her allegation that he had no respect for orders of court, the plaintiff countered that it was the defendant who defied the Second Order of Court; she had also threatened him if he failed to return the child to her. Because of her breaches, he had applied to court (twice) for committal proceeding against the defendant. Indeed, it was on the second occasion (namely 21 March 1997) that the court (Lim Teong Quee JC) granted the Order of Court and gave the plaintiff unsupervised access at the current hours of Saturdays 2.00pm to 9.00pm.

10 The plaintiff justified his failure to return the child after access hours on the basis that the incidents involved special or festive occasions (such as his sister's wedding, Hari Raya Puasa or Haji); even then, it was only *after* the defendant had refused his request to extend access overnight. He denied she had been given no opportunity to object as she had alleged. He deposed there were occasions when the defendant had consented to his having extended access to the child, which she appeared to have forgotten. At other times, he had collected the child late from and correspondingly returned the child late to, the defendant because, he had returned late from overseas trips. She herself had been late in handing over the child to and in collecting the child from him. He had also filed police reports regarding his difficulties in having access to the child (which he exhibited to his affidavit).

11 The plaintiff denied the child was frightened of him, alleging it was a desperate attempt on the defendant's part to separate him from the child. Indeed, the child looked forward to spending time with him and at the end of each access period, the child would make the plaintiff promise that he would see the child during school recess time on weekdays. The defendant had also deprived the child of mixing with his (favourite) cousin, other relatives as well as the child's half-brother (the plaintiff's son by his second marriage). The plaintiff alleged it was the defendant who had coaxed the child to say he did not want to see the plaintiff, causing more stress to the child. The plaintiff pointed out that the child was already performing below average in school and at the madrasah. The defendant's request for an independent social welfare officer to interview the child would only add pressure to the child and would not be in the child's interests.

12 The plaintiff objected to the change of venue for access, pointing out that the designated place was stipulated under the Order of Court; there were problems when access was fixed at Block

268 Pasir Ris, previously. Indeed, he had issued several private summons (ten charges) against the defendant for resorting to violence and assaulting him on those occasions. The defendant had asked him to withdraw the summonses which he agreed, culminating in a settlement agreement between the parties dated 12 December 1996 (wherein the defendant agreed to pay him $500). On the other hand, the defendant's application to the Family Court for a Personal Protection Order alleging the plaintiff had assaulted her, was dismissed.

13 The plaintiff also complained that not only was he kept in the dark by the defendant on the child's progress in school but, she had gone further to prevent him from finding out, by informing the child's school he should not be told.

14 Before the defendant's application could be heard, the plaintiff's application was filed. Further affidavits were filed by both parties in relation to the plaintiff's application, each denying the other party's allegations and accusing the other side of lying and, making further accusations against the other. It was impossible for the court to make a fair determination on the merits of either application without an objective evaluation by an independent third party. The relationship between the parties was/is acrimonious, to say the least.

15 Consequently, another court adjourned both applications, pending investigations by the social welfare authorities. After the social welfare officer tasked with the investigations had rendered a report last December, hearing of both applications was restored before me; I then made the orders which are now under appeal. I had informed counsel for the parties that my decision was based on the confidential report. They were aware in that regard that their respective clients had been visited at home and interviewed by the reporting welfare officer, along with the child.

The decision

16 The applications herein were made under s 5 of the Guardianship of Infants Act (Cap 122) ("the Act") which states:

> 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.

The court, in considering the applications is guided by s 11 of the Act which states:

> The court or a judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant, and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

17 From the conflicting affidavits filed by the parties, the following additional facts or information emerged:

> (a) the defendant divorced the plaintiff while he was still serving a prison sentence (six months) for a cheating offence; he had been made a bankrupt in 1991. However, to his credit, the plaintiff has turned over a new leaf and has also remarried. He is self-employed and his job requires him to travel frequently especially to Jakarta, Indonesia. In his own words, the plaintiff travelled 100 times within the last two-and-a-half years;

(b) at the time the Order of Court was made, the child was barely three years old whereas he turned eight last year; he was in primary two last year and (I would assume) is now in primary three;

(c) the child is dyslexic, a condition which is undoubtedly a factor in his poor academic performance (including his own mother tongue). However, the child is not enrolled full-time at the special school run by the Dyslexia Association of Singapore ("the Association") but studies in an ordinary school, although he attends twice-weekly classes at the Association. Whether the reason is due to the steep fees ($450 per term) charged by the Association could not be determined as, the defendant alleged she informed the plaintiff of the fees (which he denied) but he said nothing. A report dated 5 January 2001 from the Association was exhibited in the defendant's third affidavit filed on 6 September 2002 explaining the meaning and impact, of dyslexia;

(d) the child was apparently diagnosed as hyperactive by the Child Guidance Clinic, when the defendant sought the department's assistance on his behaviour;

(e) the child's academic performance has since improved with tuition.

18 It cannot be disputed that the defendant has been the primary if not sole, caregiver of the child from birth; whether it was by choice (according to the defendant) or by circumstances (as the plaintiff contended) is not relevant; it is a fact. Understandably therefore, the child is very attached to the defendant. The child did not get to know the plaintiff as his father until well after the latter's release from prison. Based on the Order of Court, that would have been after 21 March 1997, when the child was a three-year-old toddler. It is highly unlikely that the child would in 1997, have taken to the plaintiff, who would have appeared to him as a complete stranger. The Second Order of Court was obtained when the child was five years old. The child was older and could express his wishes then, more so now when he is almost nine years of age. Indeed, in his affidavit filed on 4 September 2002 (para 4), the plaintiff himself recognised that fact. The plaintiff should understand that it will take time and patience, for the child to get to know and bond with him; it cannot be achieved overnight by merely lengthening the hours of weekend access. I doubted that the defendant's influence with the child was/is so strong (as the plaintiff claimed) such that the plaintiff's relationship with the child (which the defendant contended is negative) reflects the defendant's own animosity towards the plaintiff, let alone that she instigated the child when he said he did not want to see the plaintiff.

19 Whatever her faults may be (as alleged by the plaintiff), there is no question that the defendant is a devoted and caring mother, whose primary concern is the well-being of the child. The defendant, although a working mother, had taken pains to find out about dyslexia, to help the child cope with the disability (for which there is no cure) and his resultant learning difficulties. It cannot have been an easy task for the defendant, first to cope with the birth of a premature child, to bring him up alone and then to find out and have to deal with, his dyslexia. What she has done for his personal and scholastic development is commendable and should continue. Hopefully, her efforts will come to fruition and the child will overcome his disability with time.

20 Another fact which cannot be disputed is, that the child has very little spare time, what with attending school, the madrasah and classes at the Association, not to mention tuition. I would emphasise however, this was not a case of an overzealous parent attempting to "hothouse" her child and having to have her enthusiasm curbed by the court. The child's daily activities from Mondays to Fridays are not out of the ordinary for a Muslim school-going child in Singapore, whilst his disability required him to attend additional special classes. That is not to say that the defendant as the parent

having his custody, should not now re-look those activities with a view to assessing whether the child's routine can be made less intensive, in view of his learning difficulties. The plaintiff's desire for more access to the child if granted, could only have been accommodated on weekends as the child's weekday routine was full. Unfortunately, the plaintiff's frequent travels sometimes prevented or delayed his having access to the child on Saturdays.

21 I had reduced the plaintiff's existing access hours by one-and-a-half hours, commencing half an hour later (3.00pm instead of 3.30pm as the defendant requested) and ending an hour earlier at 8.00pm instead of 9.00pm, in the hope it would lessen the friction between the warring parties. I would point out that whilst the hours were shortened, it would not/should not prevent the plaintiff from spending quality time with the child. It would still enable the plaintiff to have one meal (dinner) with the child before returning him to the defendant; mealtime is as good as any other activity for a father and son to get to know each other better, over time.

22 One of the grouses which prompted the plaintiff's application was the fact that he did not have enough time to engage in activities with the child. The plaintiff had complained (para 15 of his affidavit filed on 4 September 2002) that sometimes, in order to meet the 9.00pm deadline to return the child, he had to stop the child's play activities suddenly (or even arouse him from sleep). If the child was asleep (or spends the time he has with the plaintiff sleeping), it did not matter whether the access hours were shortened or lengthened, since there would be no meaningful interaction between father and son during the shorter or longer hours, as the case may be. If indeed the plaintiff wanted to spend quality time with his son, he and the child should engage in some activity together even if it meant only talking or, the plaintiff watching the child play with toys and or with his infant half-brother or with the child's favourite cousin/other relatives. It made no sense for the child to be left to his own devices during the plaintiff's access period, as it defeated the very purpose of access. Otherwise, the child might as well be at home and or, with the defendant. That, however, was the impression I gained from an objective assessment of the plaintiff's affidavits, leaving aside his denials, histrionics, and accusations against the defendant. The plaintiff should also realise that being a proper parent/father does not only mean providing the money to pay for toys, books, clothes and entertainment. A child's emotional needs cannot also be fulfilled by trying to buy his affection.

23 It bears remembering that a child's welfare is the court's first and paramount consideration in such disputes regarding access and or custody. I was equally conscious of the fact that neither parent has a superior right over the other, when it concerns a child's welfare. Unfortunately, the warring parties did not make my task any easier. There had to be a fine balancing act (which I tried to achieve) between allowing the plaintiff to see the child (so that over time as the child grew older, he would want to spend more time with his father voluntarily) and, ensuring that the child did not feel he was being forced to see the plaintiff, against his own wishes. I was of the opinion that the child was not yet ready to spend more time with the plaintiff, let alone overnight every week and for longer periods during the school holidays.

24 It was wrong of the plaintiff to obtain an *ex parte* order ("the second Order of Court") on 10 February 1999 for overnight access to the child, without the knowledge of the defendant and her presence (or her solicitors' presence) in court, so that her views could be heard. Consequently, that application not having been dealt with on the merits, prayer 1 of the second Order of Court should not be given the due weight which is normally accorded to orders of court.

25 Consequently, I dismissed the plaintiff's application and granted the defendant's application instead. Hopefully (although it would appear to be a forlorn hope at this stage) with time, the parties will bury their differences for the sake of the child, their relationship will improve and along with it a desire to ensure that the child grows up knowing and spending time with, both parents. Meanwhile,

each side should attempt to be more accommodating and flexible towards the other; there should be some grace period either in handing over the child or, collecting him back, for access. The hours fixed by the court are not cast in stone, which unfortunately is the stand each party seems to have adopted.

26 It goes without saying that the dismissal of the plaintiff's application does not mean that the doors are permanently shut against him; the plaintiff is not precluded from filing a similar application afresh at some future date, when change of circumstances warrant it. Generally speaking, as a boy grows older, he needs a father's guidance more than a mother's, however devoted the latter may be to him.

Defendant's application granted. Plaintiff's application dismissed.