

Review of Child Custody Law

Executive Summary

(In 2005, the Law Reform and Revision Division of the Attorney-General's Chambers conducted a review of child custody law in Singapore. The enclosed discussion paper, which was prepared in October 2005, sets out the issues that were considered and the conclusions reached.)

Child custody refers to the bundle of rights, duties, obligations and responsibilities or parental authority that a person may exercise over a child. In a normal, stable family, a child is cared for by the parents, and the question of custody does not arise. But when a family breaks down, for example when the parents divorce, the future custody and care of the child becomes a central issue decided by the courts in the course of the matrimonial proceedings.

Under the Women's Charter (Cap. 353), the court may make custody orders relating to the child. However, there are perceived shortcomings to the concept of custody, such as the fact that it interferes with the natural parent-child relationship. There have been calls for reform in this area of law and for greater focus on parental responsibility. These issues are discussed in Chapter One.

Chapter Two discusses how the concept of "custody" has been abolished and replaced with "parental responsibility" in legislation in England (the Children Act 1989) and Australia (the Family Law Reform Act 1995). These legislation provide for matters such as the scope of parental responsibility, the persons bearing parental responsibility, the types of parenting orders that may be made by the court, the exercise of parental responsibility, and the ending of parental responsibility. The discussion underlines the importance of ensuring that the best interests of the child remains paramount, as is required under Article 3 of the UN Convention on the Rights of the Child 1989.

Chapter Three discusses whether legislative changes, such as those in England and Australia, are necessary in order to promote parental responsibility. It considers the important judicial pronouncements on custody made by the Singapore Court of Appeal in the landmark case of *CX v CY (minor: custody and access)*, decided in July 2005. The Court advocated the promotion of joint parental responsibility through the use of *joint custody* or *no custody* orders. With this decision, the conclusion of the paper is that legislative amendments are not necessary, at this juncture, for the purpose of promoting joint parental responsibility. This is a matter that can be left to judicial development by the courts under the concept of custody in existing legislation.



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Introduction

- 1 Child “custody” refers to the “bundle of rights, duties, obligations and responsibilities”¹ or parental authority that a person may exercise over a child. In a normal, stable family, a child is cared for by the parents, and the question of custody does not arise. But when a family breaks down, for example when the parents divorce, the future custody (and care) of the child becomes a central issue, which will have to be decided by the court in the course of the matrimonial proceedings.
- 2 The court may make custody orders relating to the child. The most common type of custody order is an order for *sole custody*. When sole custody of a child is given to a parent, that parent will have the legal right to decide all questions relating to the upbringing of the child. The other parent, who is not given custody, is deprived of such right. Given its legal significance, custody often becomes a very contentious issue in matrimonial proceedings.
- 3 England and Australia have sought to remove this source of contention by abolishing the concept of custody. They now emphasize in their family laws the importance of “parental responsibility” for children. In England this was done by way of the Children Act 1989 (relevant extracts of which are reproduced in **Annex A**); and in Australia by way of the Family Law Reform Act 1995 (relevant extracts of which are reproduced in **Annex B**). Australia is now considering the Family Law Amendment (Shared Parental Responsibility) Bill 2005 to refine their law on parental responsibility even further.

¹ Professor Leong Wai Kum, *Principles of Family Law in Singapore*, Butterworths, 1997, pages 536 to 538. Child custody has also been described as “the right to or responsibility for a child's care and control, carrying with it the duty of providing food, shelter, medical care, education and discipline.”: www.utcourts.gov/resources/glossary.htm. “Child custody and guardianship are the legal terms used to describe the legal and practical relationship between a parent and child, including e.g. the right of the parent to make decisions for the child and the duty to care for it; it comes into question in proceedings involving dissolution of marriage, annulment and other legal proceedings where the residence and care of children are concerned.”: en.wikipedia.org/wiki/Custody.

- 4 Singapore's law on custody is contained primarily in the Women's Charter (Cap. 353) (relevant extracts of which are reproduced in **Annex C**). The Women's Charter had its origins in English law, particularly the UK Matrimonial Causes Act 1973. With England now emphasizing parental responsibility in their family laws, the same could be considered in Singapore. In the recent landmark decision of *CX v CY (minor: custody and access)*² (reproduced in **Annex D**), the Singapore Court of Appeal advocated the promotion of joint parental responsibility through the use of *joint custody* or *no custody* orders.
- 5 This paper considers child custody in Singapore, its perceived shortcomings, the reforms in England and Australia, and possible reforms to our laws. Finally, it considers whether legislative changes are necessary. The conclusion of this paper is that, with the decision of *CX v CY*, it would not be necessary to amend the Women's Charter in order to promote joint parental responsibility.

² [2005] 3 SLR 690, [2005] SGCA 37, Court of Appeal (Yong Pung How CJ, Chao Hick Tin JA, Lai Siu Chiu J), 19 July 2005.

Chapter One: Custody

Custody orders

- 6 In any matrimonial proceedings relating to divorce, nullity of marriage or judicial separation, which come within the purview of our Family Courts, the court may make such orders as it thinks fit with respect to the welfare of any child.³ Among the matters considered for the welfare of the child is the issue of custody.⁴
- 7 The court may by order place the child in the sole custody of the father or the mother, and this is often the case in practice.⁵ Where the parents are able and willing to cooperate on the future upbringing of the child, the court may also place the child in the joint custody of both parents.⁶ In exceptional circumstances where it is undesirable to entrust the child to either parent, the child may be placed in the custody of any other relative of the child, any child welfare organisation or association, or any other suitable person.⁷
- 8 In deciding in whose custody a child should be placed, the court will give paramount consideration to the welfare of the child.⁸ The court will

³ Women's Charter, section 124.

⁴ Women's Charter, section 123(3).

⁵ According to the Subordinate Courts, the most common type of custody order is the sole custody order. Orders for joint custody are sometimes made, but less frequently. Another possible approach is to make no custody order. This latter approach was advocated by Justice Tan Lee Meng in the case of *Re G (Guardianship of an infant)* [2004] 1 SLR 229; [2003] SGHC 265 (High Court) where His Honour held that: "While it is true that a joint custody order may be unrealistic where the parents of a child have an acrimonious relationship, it does not always follow that the alternative in such a situation is to grant sole custody of the child to one parent. 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." (paragraph 8 of his judgment). But it appears that, even after *Re G*, sole custody orders are still being made by the courts. ("Insisting On a Custody Order? A Year After *Re G*", Debbie Ong, Singapore Law Gazette, January 2005, page 14.)

⁶ For example, *IQ v IR* [2005] SGDC 46.

⁷ Women's Charter, section 125(1).

⁸ Women's Charter, section 125(2). This principle of regarding the welfare of the child as the paramount consideration is also applicable in guardianship proceedings: Guardianship of Infants Act (Cap. 122), section 3.

give regard to the wishes of the parents, and also the wishes of the child if the child is of an age to express an independent opinion.

- 9 An order for custody may be made on such conditions as the court may think fit to impose.⁹ For example, it may—
- a) contain conditions as to the place where the child is to reside, the manner of the child’s education and the religion in which the child is to be brought up;
 - b) provide for the child to be temporarily in the care and control of some person other than the person given custody;
 - c) provide for a child to visit a parent deprived of custody or give a parent deprived of custody the right of access to the child, at such times and for such period as the court may consider reasonable; and
 - d) prohibit the person given custody from taking the child out of Singapore.¹⁰
- 10 There are a number of important concepts related to custody, such as residence, “care and control” and “access”. When making a custody order, the court will generally give care and control of the child to one parent. The child will reside with that parent, and that parent will be entitled to decide all questions relating to the upbringing and education of the child, subject to any conditions that the court may impose.¹¹ The other parent, who is not given care and control, will have only rights of access to the child at specified times. In a sole custody order, care and control is generally given to the custodial parent, while the non-custodial parent is given access. In a joint custody order, care and control, similarly, is usually given to one of the parents, while the other gets access.

⁹ Women’s Charter, section 126(1).

¹⁰ Women’s Charter, section 126(2).

¹¹ Women’s Charter, section 126(1).

Shortcomings

- 11 There are several perceived shortcomings with the concept of custody.

Focus on parental rights rather than parental responsibilities

- 12 One criticism is that custody is an outmoded concept which had its origins in property and parental rights. It “does not adequately recognise that parenthood is a matter of responsibility rather than rights”¹², and that the interests of the child should be paramount.

- 13 Article 18(1) of the UN Convention on the Rights of the Child 1989, which Singapore signed and ratified in 1995, provides that:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.¹³

- 14 The Court of Appeal in *CX v CY* emphasized that:

[T]he child has a right to the guidance of both his parents. Parenthood is a lifelong responsibility and does not end at a particular age of the child, but continues until the child reaches adulthood. The question we have to answer will always be what is best for the child in the future.

(paragraph 38 of the judgment)

Interferes with natural parent-child relationship

- 15 Another criticism, which is a strong one, is that a sole custody order, which is the most common form of custody order currently made by the courts¹⁴, may interfere unnecessarily in the natural parent-child

¹² Report of the English Law Commission (Law Com No. 172), paragraph 2.1.

¹³ The full text of the Convention is available at <http://www.unicef.org/crc/crc.htm>.

¹⁴ See footnote 5 above.

relationship, and that such interference is not be in the best interests of the child.

16 Under a sole custody order, the custodial parent is entitled to make all future decisions relating to the child, and the parental relationship with the child is maintained. But the matter is quite different for the non-custodial parent. At best, the non-custodial parent would have access to the child and little, if any, involvement in future decisions affecting the child. The relationship between the non-custodial parent and the child is severely curtailed, and this can be particularly difficult where the parent and child had enjoyed a close and loving relationship before the marital break-up. Could such a curtailment of the parent-child relationship really be in the best interests of the child?

17 As Professor Leong Wai Kum has commented:

The authority of parents should, as far as possible, not be completely undermined by an order of custody. An order giving one parent sole custody is unattractive precisely because it undermines the authority of the other parent.¹⁵

18 The social impact of a sole custody order is tremendous. It affects not only the parents of the child, but also other close relatives and caregivers, such as grandparents. Numerous letters on the anguish caused by sole custody orders have been published from time to time in the forum pages of the Straits Times. One letter earlier this year summarises, poignantly, the social impact:

When a couple divorces, the entire family suffers when custody is given to one party.... In many divorce cases, the child is at a very young age and the least prepared to handle the emotional trauma. The emotional bonding, support and caring the child enjoys after years of close family contact can be broken abruptly by awarding sole custody to one party. Such close relations form an integral part of a child's upbringing and should continue after divorce. Such ties should not be prematurely cut just because the other party does not have custody. It is the child's right to have access to both parents. The emotional

¹⁵ *Principles of Family Law in Singapore*, Butterworths, 1997, at page 542.

benefits are immeasurable, especially if the child has to deal with a traumatic experience such as a divorce. I, as a grandfather, miss my grandsons very much but I have limited access to them and vice versa.¹⁶

Divisive issue in matrimonial proceedings

- 19 This point is related to the previous one. The legal effect and social impact of a sole custody order is tremendous as it can fundamentally alter the parent-child relationship. The “winner” of the custody battle takes the child home, and the “loser” gets only limited access. Given such high emotional stakes, it is not surprising that custody disputes are often hotly contested. This adds heat to what may already be an emotionally charged and acrimonious matrimonial dispute. Removing the divisive element of custody out of the equation in a matrimonial dispute would enable matrimonial proceedings to be resolved more amicably, or at least less acrimoniously, in the best interests of the child.

Calls for reform

- 20 In a law journal in January 2005, Associate Professor Debbie Ong observed that:

[The] notions of ‘custody’ and ‘care and control’ ... have been replaced in England. The Children Act 1989 in England abolished the concept of ‘custody’. English courts today grant limited orders to organise the child’s living arrangements such as residence orders and specific issues orders. The change in law followed the English Law Commission’s recommendations that both parents should retain parental power to act for the benefit of the child subject to any court orders on residence, contact or other specific issues.¹⁷ Australian law has also discarded the concept of custody. In 1996, the Family Law Reform Act 1995 came into force providing for ‘parenting orders’

¹⁶ Adaikalam Keresenan, “Joint custody: Kids benefit the most”, *Straits Times*, 4 Jun 2005. In *CX v CY*, one of the matters that the Court of Appeal took into account was “the interests of the child to maintain his bond with his paternal grandparents.” (Paragraph 47 of the judgment.)

¹⁷ Law Com. No. 172, on “Family Law, Review of Child Law, Guardianship and Custody”.

which cover issues concerning the child's residence, contact between the child and parents and other specific issues.¹⁸

- 21 More recently, in a keynote address at the LawAsia Conference on “Children & the Law”, held from 27 to 28 May 2005, the Honourable Justice Lai Siu Chiu said:

[I]t may be timely for a comprehensive review of this area of law to be undertaken in Singapore. For example, I understand that the concept of custody has been abolished in England. In its place, greater emphasis is placed on shared parental responsibilities and the courts only step in to make orders on residence, contact and other specific issues. Similarly, in Australia, ‘parenting orders’ are made encompassing residence and contact orders. Hong Kong has also just released a Law Reform Commission Report, which recommends that a new “joint parental responsibility model” be adopted. I would suggest that we study the experience of other jurisdictions in this area in detail and consider if the welfare of children can be promoted with a reform of this area of family law.¹⁹

Reforms in other Commonwealth jurisdictions

- 22 As has been noted, the English Children Act 1989 abolished the concept of custody. It now provides that every parent has “parental responsibility” for the child.²⁰ For the welfare of the child the court may make four types of orders: residence orders, contact orders, prohibited steps orders and specific issues orders.²¹ These will be considered in more detail later.²²
- 23 The Australian Family Law Reform Act 1995 similarly abolished the concept of custody in Australia. Applying concepts similar to the

¹⁸ Debbie Ong, “Insisting on a custody order? A year after *Re G*”, Singapore Law Gazette, January 2005, pages 13 to 16.

¹⁹ At paragraph 13 ([http://www.lawsociety.org.sg/lawasia/speech_keynote%20address%20\(JL\).pdf](http://www.lawsociety.org.sg/lawasia/speech_keynote%20address%20(JL).pdf).)

²⁰ English Children Act 1989, section 2(1).

²¹ English Children Act 1989, section 8.

²² At paragraphs 34 to 38.

English Children Act 1989 and expressed in plainer language, the Australian Family Law Reform Act 1995 also provides that each parent has “parental responsibility” for the child.²³ The court may make “parenting orders”, such as residence orders, contact orders, and specific issues orders.²⁴

24 The changes introduced in England by the Children Act 1989 and in Australia by the Family Law Reform Act 1995 are discussed in detail in a report by the Law Reform Commission of Hong Kong, entitled “Child Custody and Access”, dated March 2005.²⁵ Hong Kong is considering similar reforms to its custody laws.

25 Recently, in June 2005, Australia published an exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.²⁶ This amendment seeks to refine further the concept of parental responsibility by introducing, among other things, even more contemporary terms to replace “residence” and “contact”.

Need for emphasis on parental responsibility

26 Consistent with these developments in other jurisdictions and the calls for reform, it is submitted that our family laws should place primary emphasis on joint parental responsibility rather than custody.

²³ Australian Family Law Reform Act 1995, section 61C(1).

²⁴ Australian Family Law Reform Act 1995, section 61D read with section 64B.

²⁵ Available at <http://www.hkreform.gov.hk/en/publications/raccess.htm>.

²⁶ This draft is available at <http://www.dadsindistress.asn.au/downloads/Family%20Law%20Amendment.pdf>, and its Explanatory Memorandum at <http://www.dadsindistress.asn.au/downloads/explanatorymemorandum.pdf>.

Chapter Two: Parental responsibility

Scope of parental responsibility

- 27 The introduction of “parental responsibility” in England and Australia is consistent with the UN Convention on the Rights of the Child 1989.²⁷ In Singapore, the expression is not used in the Women’s Charter, but it does appear in the Women’s Charter (Matrimonial Proceedings) Rules.²⁸
- 28 The English Children Act 1989 defines “parental responsibility” to mean “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.²⁹ The Australian Family Law Reform Act 1995 similarly defines it to mean “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”³⁰
- 29 Applying these broad definitions, parental responsibility in Singapore would include matters such as:
- a) the duty to maintain or contribute to the maintenance of the child (including an illegitimate child) by providing or paying for the child’s accommodation, clothing, food and education;³¹
 - b) the power to make decisions relating to the upbringing of the child, such as choice of school, medical treatment, religion³²;

²⁷ In particular, Article 18(1) of the Convention, which is reproduced at paragraph 13 of this paper.

²⁸ Cap. 353, R 4. In Rule 2(1), “arrangements for the welfare of every dependent child” is defined to include “arrangements in relation to — (a) the custody, care and control of, and access to, the child; (b) financial provision for the child; (c) the education of the child; and (d) any other parental responsibility for the child.” (emphasis added)

²⁹ English Children Act 1989, section 3(1).

³⁰ Australian Family Law Reform Act 1995, section 61B. Note that the Australian definition does not include parental “rights” within the meaning of parental responsibility.

³¹ Women’s Charter, section 68.

³² Article 16(4) of the Constitution provides that: “... the religion of a person under the age of 18 years shall be decided by his parent or guardian”.

- c) the responsibility to ensure the proper upbringing and education of the child, such as ensuring that the child attends primary school;³³ and
- d) the authority to give consent on matters that under the law require parental consent, such as marriage³⁴ and adoption³⁵.

30 It would be ideal if a list could be compiled of every aspect of parental responsibility under our laws, and defined in legislation. However, such an exercise is likely to be difficult, considering the dynamic nature of parental responsibility. Both the English Children Act 1989 and Australian Family Law Reform Act 1995 do not apply a list approach. A broad definition of parental responsibility is used instead. It is submitted that the concept of parental responsibility should be broadly construed and, as has been defined in the Australian Act, it should encompass all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

Persons bearing parental responsibility

31 In England, the Children Act 1989 provides that where a child's father and mother were married to each other at the time of birth, they each shall have parental responsibility for the child.³⁶ Where a child's father and mother were not married to each other at the time of his birth, the mother shall have parental responsibility for the child, and the father shall not have parental responsibility for the child unless he subsequently acquires it,³⁷ for example by order of the court or by way of a parental responsibility agreement with the mother.³⁸ In Australia,

³³ Compulsory Education Act (Cap. 51), section 3.

³⁴ A person has the legal capacity to marry from the age of 18 years (Women's Charter, section 9). A person below the age of 21 years will require parental consent to marry (Women's Charter, section 17). Where the parents are divorced or separated, consent will be required of the parent to whom the custody of the minor is committed, or of both parents if custody is committed to both parents (Women's Charter, Second Schedule, Part I).

³⁵ Adoption Act (Cap. 4), section 4(1).

³⁶ English Children Act 1989, section 2(1).

³⁷ English Children Act 1989, section 2(2).

³⁸ English Children Act 1989, section 4.

the Family Law Reform Act 1995 similarly provides that each of the parents of a child has parental responsibility for the child.³⁹

- 32 In the Women’s Charter, for the purpose of provisions relating to matrimonial proceedings, including custody, the reference point is the child. “Child” is defined to mean “a child of the marriage ... who is below the age of 21 years.”⁴⁰ A “child of the marriage” means

“any child of the husband and wife, and includes any adopted child and any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and wife at the time when they ceased to live together or at the time immediately preceding the institution of the proceedings, whichever first occurred; and for the purposes of this definition, the parties to a purported marriage that is void shall be deemed to be husband and wife.”⁴¹

- 33 By this definition of “child”, the legislative policy under the Women’s Charter is that a person below the age of 21 years is to be cared for and provided for by the parents, which includes natural parents and adoptive parents, as well as married couples with whom the child lives as a “member of the family”. It is submitted that, by extension, parental responsibility should similarly attach to such persons in respect of every child of the marriage.

Court orders affecting parental responsibility (parenting orders)

- 34 Both in England and Australia, it is possible for aspects of parental responsibility to be affected or allocated between persons by way of court orders.⁴²

³⁹ Australian Family Law Reform Act 1995, section 61C(1).

⁴⁰ Women’s Charter, section 122.

⁴¹ Women’s Charter, section 92.

⁴² Australian Family Law Reform Act 1995, section 61C(3).

35 The English Children Act 1989 provides for four types of orders that a court can make with respect to children:⁴³

- a) “Residence order”, which means “an order settling the arrangements to be made as to the person with whom a child is to live”;
- b) “Contact order”, which means “an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other”;
- c) “Prohibited steps order”, which means “an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court”; and
- d) “Specific issue order”, which means “an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child”.

36 The Australian Family Law Reform Act 1995 empowers the courts to make orders similar to those under the English Children Act 1989. These orders are called “parenting orders”, and may be one or more of the following:⁴⁴

- a) “Residence order”, which decides the person or persons with whom a child is to live;
- b) “Contact order”, which decides contact between a child and another person or other persons;
- c) “Child maintenance order”, which provides for the maintenance of a child;

⁴³ English Children Act 1989, section 8(1).

⁴⁴ Australian Family Law Reform Act 1995, section 64B.

d) “Specific issues order”, which deals with any other aspect of parental responsibility for a child.⁴⁵

37 In proceedings for a parenting order, the court may make such parenting order as it thinks proper. The court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.⁴⁶ Any order given by the court may contain directions about how it is to be carried into effect, impose conditions to be complied with, and be made to have effect for a specified period.⁴⁷

38 Court orders under the English Children Act 1989 and the Australian Family Law Reform Act 1995 could serve two functions. The orders could confer on a person (other than the parents) some parental responsibility for a child.⁴⁸ The orders could also serve to limit parental responsibility by allocating the responsibility between the parents and other persons. But a parenting order does not take away or diminish any aspect of the parental responsibility of a parent except to the extent (if any) expressly provided for in the order or necessary to give effect to the order.⁴⁹

39 Australia is now considering a further step, which is to remove the use of terms such as “residence” and “contact” from its legislation. These changes are being proposed by way of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. The reason for the proposed change is that the terms “residence” and “contact”, introduced under the Family Law Reform Act 1995 to replace “custody” and “access” in order to eliminate any sense of ownership of children, did not achieve the intended change of culture. The new emphasis under the 2005 Bill will be on “parenting orders”. References to “residence” will be replaced

⁴⁵ The Australian Family Law Reform Act 1995, unlike the English Children Act 1989, does not provide for a “prohibited steps order”. But the specific issues order under the Australian Act appears broad enough to cover matters within the scope of the English prohibited steps order.

⁴⁶ Australian Family Law Reform Act 1995, section 65D.

⁴⁷ English Children Act 1989, section 11(7).

⁴⁸ Australian Family Law Reform Act 1995, section 61D(1).

⁴⁹ Australian Family Law Reform Act 1995, section 61D(2).

with “lives with”, and references to “contact” will be replaced with “spends time with” and “communicates with”.⁵⁰

40 Comparing the orders in England and Australia with orders made under the Women’s Charter, it would appear that:

- a) “residence” orders are analogous to orders relating to “care and control”;
- b) “contact” orders are analogous to orders relating to “access”; and
- c) “specific issues” orders and “prohibited steps” orders (under the English Children Act 1989) are analogous to the conditions that our courts may impose in respect of custody orders.⁵¹

41 These orders under the Women’s Charter remain relevant for the purpose of promoting joint parental responsibility.⁵² The wide discretion of the courts to make orders relating to “care and control” and “access”, and to impose conditions, does enable the courts to allocate parental responsibility where necessary.

Welfare of the child remains paramount

42 Article 3 of the UN Convention on the Rights of the Child 1989 requires that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

43 Consistent with this, our family laws emphasise that the welfare of the child is to be regarded by the court when making any decision affecting

⁵⁰ The exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 can be found at <http://www.dadsindistress.asn.au/downloads/Family%20Law%20Amendment.pdf>. See also the Explanatory Statement of the Bill at <http://www.dadsindistress.asn.au/downloads/explanatory memorandum.pdf>, particularly at page 21.

⁵¹ Women’s Charter, section 126(1). See discussion at paragraphs 6 to 10 of this paper.

⁵² Debbie Ong, “Insisting on a custody order? A year after *Re G*”, Singapore Law Gazette, January 2005, at page 14.

the child.⁵³ The English Children Act 1989 begins by stating that: “When a court determines any question with respect to—(a) the upbringing of a child; ... the child’s welfare shall be the court’s paramount consideration.”⁵⁴ The Australian Family Law Reform Act 1995 provides that “[i]n deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”⁵⁵

44 When deciding on a child’s welfare, the court is to have regard to “the wishes of the child, where he or she is of an age to express an independent opinion”.⁵⁶ The English Children Act 1989 provides, similarly, that the court shall have regard to “the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)”.⁵⁷

45 Any development of our family laws should therefore retain, as the central pillar, the promotion of the welfare of the child as the paramount consideration. This principle should also form the basis of all decisions affecting the child, having due regard to the wishes of the child. In any decision on the allocation of parental responsibility, the welfare of the child should remain the paramount consideration.

Exercise of parental responsibility

46 More than one person may have parental responsibility for a child at the same time.⁵⁸ A person who has parental responsibility for a child at any time does not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.⁵⁹

⁵³ See, for example, Guardianship of Infants Act (Cap. 122), sections 3, 7, 8; Women’s Charter sections 70(1), 123, 124, 125, 129, 130.

⁵⁴ English Children Act 1989, section 1(1)(a).

⁵⁵ Australian Family Law Reform Act 1995, section 65E.

⁵⁶ Women’s Charter, section 125(2)(b).

⁵⁷ English Children Act 1989, section 1(3)(a).

⁵⁸ English Children Act 1989, section 2(5).

⁵⁹ English Children Act 1989, section 2(6).

- 47 The English Children Act 1989 provides that where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.⁶⁰
- 48 This is a very wide provision. It would mean that a parent, particularly the parent with whom the child resides, may make important decisions affecting the child without consulting or even informing the other parent. Conceivably, this may lead to disputes between the parents when each takes decisions unilaterally without involving the other parent.
- 49 The Hong Kong Law Commission was not in favour of such a wide provision. They suggested that, apart from routine day-to-day matters, there are some decisions for which the consent of both parents should be required, and some for which a parent should at least notify the other. The Hong Kong Commission suggests that the decisions that should require the consent of both parents include:
- a) change of child's surname;
 - b) adoption;
 - c) removal of the child out of jurisdiction for more than one month; and
 - d) permanent removal of the child out of the jurisdiction.
- 50 The decisions for which notification to the other parent should suffice include:
- a) a major operation or long-term medical or dental treatment for the child;
 - b) major change in the child's schooling;
 - c) bringing the child up in a particular religion;
 - d) consent to marriage;

⁶⁰ English Children Act 1989, section 2(7).

- e) moving house with the child;
- f) removing the child from the jurisdiction temporarily but for less than one month; and
- g) changes in the child's domicile or nationality.⁶¹

51 In our view, it will be helpful to have a list of the types of decisions that require mutual consultation or notification between persons having parental responsibility, as suggested by the Hong Kong Law Commission. However, it must also be recognised that such a list can never be definitive or conclusive. It may not suit the unique circumstances of every family. Hence, while such a list can provide a useful starting position which would apply in most cases, the court should ultimately be given the discretion to modify the arrangement as circumstances require. The court hearing the matter would be in the best position to balance competing interests and determine what sorts of issues really matter to the parties and the child, and for which mutual consultation should be a requirement in the best interests of the child.

52 In short, it is submitted that generally, parental responsibility should be exercisable by each parent independently. However, important decisions affecting the child should not be taken by one parent without the consent or notification of the other parent. The court should be given full discretion to determine what these decisions are and to modify arrangements for the exercise of parental responsibility as necessary.

Ending of parental responsibility

53 The Australian Family Law Reform Act 1995 provides that a parenting order is not to be made in relation to a child who (a) is 18 years or over; (b) is or has been married; or (c) is in a “de facto” relationship. Likewise, a parenting order in relation to a child stops being in force if the child

⁶¹ Report of the Law Reform Commission of Hong Kong on “Child Custody and Access”, March 2005 (available at <http://www.hkreform.gov.hk/en/publications/raccess.htm>), at paragraphs 9.95 and 9.96.

turns 18, marries or enters into a de facto relationship.⁶² Parental responsibility also ends on the adoption of the child.⁶³ A parenting order in force in relation to the child stops being in force on the adoption of the child.⁶⁴

- 54 Under the Women's Charter, custody may be granted of children below the age of 21 years.⁶⁵ Consistent with this legislative policy, parental responsibility should generally end when the child reaches 21 years of age, unless the child is adopted or married before that age, or there is other express provision in the law for specific aspects of parental responsibility to continue beyond that age.⁶⁶

⁶² Australian Family Law Reform Act 1995, section 65H(1) to (2). The court may make a declaration to the effect that the child is in, or has entered into, a de facto relationship. (section 65H(3)).

⁶³ Australian Family Law Reform Act 1995, section 61E.

⁶⁴ Australian Family Law Reform Act 1995, section 65J.

⁶⁵ Women's Charter, section 123(1) read with section 122.

⁶⁶ For example, a parent may be required to continue to provide maintenance for a child above 21 years of age who is undergoing full-time national service or who is "receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation" (Women's Charter, section 69(5)).

Chapter Three: Whether legislative changes required

Legislation making reference to “custody”

- 55 If the Women’s Charter is to be amended to replace the concept of custody with parental responsibility, similar to that which has been done in England or Australia, corresponding amendments will have to be made to other legislation, since parental responsibility will be relevant in a much wider context than matrimonial proceedings under the Women’s Charter. A list of the legislation that make reference to the word “custody” is set out in **Annex E**.
- 56 Until recently, “custody” did not have a settled legal meaning.⁶⁷ But the Court of Appeal has, in *CX v CY*, now given an authoritative opinion on what a custody order involves. Custody is a general concept that is divided into two smaller packages, namely, “care and control” and “residual custody”. The grant of a care and control order dictates which parent shall be the daily caregiver of the child and with whom the child shall live. Residual custody is the package of residual rights that remains after the grant of a care and control order. Residual custody essentially concerns the long-term decision-making for the welfare of the child. The court acknowledged that it was impossible to lay down an exhaustive list of matters which will fall under the concept of residual custody, but it would include decisions pertaining to religion, education and major healthcare issues.⁶⁸
- 57 Depending on its context, the word “custody” may connote one of several meanings when used in legislation. In relation to matrimonial proceedings under the Women’s Charter, it may refer to “care and

⁶⁷ “[T]he term ‘custody’ does not have a settled legal meaning. It is not defined in the Singapore legislation, either in the Guardianship of Infants Act or in the Women’s Charter ... The law of custody is ... in a state of confusion.” *Re Aliya Aziz Tayabali* [2000] 1 SLR 754; [1992] SGHC 319, High Court (Michael Hwang, JC), at paragraphs 6 and 11 of the judgment.

⁶⁸ Paragraphs 30 to 35 of the court’s judgment. On the point of residual custody, see also the views of the Hong Kong Law Commission, as summarised at paragraphs 49 and 50 of this paper.

control” or residual custody, as discussed in the previous paragraph. It is also used in this sense in other legislation.⁶⁹ But sometimes the word is used in the sense of mere physical possession,⁷⁰ or in the sense of detention, as in custody by the police.

- 58 For each occurrence of the word “custody”, its different senses must be distinguished. Where the word is used in the sense of care and control, or residual custody, a more contemporary expression could be used to replace it.

Parental responsibility within the ambit of custody

- 59 But a fundamental question remains. Is it necessary to amend legislation in order to promote the concept of parental responsibility? Can parental responsibility be emphasized within the custody order?

- 60 Professor Leong Wai Kum, while observing the developments in England brought about by the Children Act 1989, has suggested that parental responsibility can work within the current ambit of the law:

[W]e can just as well retain the law of guardianship and custody and the kinds of orders our courts have always made, and still align the exercise of their powers to preserve parental responsibility. It may not be necessary to revamp the law to achieve this.

She suggested that this could be achieved through the use of care and control orders, no custody orders, or joint custody orders, as appropriate.⁷¹

⁶⁹ For example, Children and Young Persons Act (Cap. 38), section 25(1): “Where an order has been made by a protector under section 16 committing a child or young person to a place of safety or to the custody of a relative or other fit person, the protector may at the time of or subsequent to the making of such order make a further order (referred to in this section as a protector’s contribution order) requiring the parent or guardian or the person having the custody of the child or young person at the time of the making of the order to contribute such weekly or monthly sum in respect of the maintenance of the child or young person as the protector having regard to his means thinks fit.”

⁷⁰ For example, Guardianship of Infants Act (Cap. 122), section 14: “Where an infant leaves, or is removed from, the custody of his lawful guardian, the court or a judge may order that he be returned to such custody, and for the purposes of enforcing such order, may direct the Sheriff to seize the person of the infant and deliver him into the custody of his lawful guardian.”

⁷¹ “Restatement of the Law of Guardianship and Custody in Singapore”, Singapore Journal of Legal Studies [1999] 432 to 493, especially at pages 490 to 492.

61 This view has been endorsed by the Court of Appeal in their landmark decision of *CX v CY*. In the judgment of the court, delivered by the Honourable Justice Lai Siu Chiu, it was declared that:

24 ... To our minds, the notion that joint custody should only be made where there is a reasonable prospect that the parties will co-operate is no longer appropriate in this day and age. Instead, we felt that in line with the outlook that parental responsibility is for life, the time was right for us to expressly endorse the concept of joint parenting. We believe that, generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule. ...

How the law of custody can support joint parenting

...

26 This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women's Charter (Cap. 353, 1997 Rev Ed) ("the Charter") exhorts both parents to make equal co-operative efforts to care and provide for their children. Article 18 of the United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory, also endorses the view that both parents have common responsibilities for the upbringing and development of their child. Similarly, jurisdictions like England and Australia have adopted approaches that impose on both parents the concept of life-long parental responsibility. With parliamentary intervention in these jurisdictions, the very concept of custody orders was abolished as it was acknowledged that it was in the interests of the child to have both parents involved in his life. There can be no doubt that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents. The needs of a child do not change simply because his parents no longer live together. Thus, in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.

27 We note that local academic opinion has long advocated using the law of custody to preserve joint parental responsibility....

28 More significantly, we feel that the making of joint or no custody orders reminds the parents that the law expects both of them to co-operate to promote the child's best interest. With the grant of joint or no custody orders, the likelihood of the non-custodial parent being excluded from the child's life is much reduced. It also encourages the parent who does not reside with the child to continue to play his or her role in joint parenthood.

(Emphasis added)

- 62 The court explained that the legal implications of a no custody order and a joint custody order were similar, and both parents could continue to exercise joint custody of the child. There was no unnecessary intervention in the parent-child relationship:

18 ... We should make it clear from the outset that a “no custody order” is not tantamount to depriving both parents of custody. It is generally accepted that the practical effects of a “no custody order” and a “joint custody order” are similar where a “care and control order” has been made. In the normal course of events, the parents of a child will have joint custody over him. We thus agree with Prof Leong Wai Kum's comments in *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 538–539 that the making of a “no custody order” should be seen as leaving the law on parenthood to govern the matter, as both parents continue to exercise joint custody over the child. Such an order also affirms the approach of the courts not to 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 (see *Re Aliya Aziz Tayabali* [2000] 1 SLR 754 and *Re G (guardianship of an infant)* [2004] 1 SLR 229 (“*Re G*”).

(Emphasis added)

- 63 In certain circumstances, a no custody order is to be preferred over a joint custody order:

19 Since the practical effects of a “no custody order” and “joint custody order” are similar, the more important question to address is: Under what circumstances should a “no custody order” be preferred over a “joint custody order”? As mentioned earlier, where there is no actual

dispute between the parents over any serious matters relating to the child's upbringing, it may be better to leave matters at status quo, and not to make any custody order. As was suggested by Assoc Prof Debbie Ong in her article "Making No Custody Order: *Re G (Guardianship of an Infant)*" [2003] SJLS 583 at 587–588, in other circumstances where there is a need to prevent parties from drawing the child into the battle over the extent of their custodial powers, or where there is a need to avoid any possibly negative psychological effect that comes about when one parent "wins" and the other parent "loses" in a custody suit, it may also be appropriate not to make any custody order.

(Emphasis added)

- 64 In the case of *CX v CY* itself, the court was of the view that it was appropriate for a joint custody order to be made:

20. ... This is because the symbolism of such an order may be used to remind the mother that the father has an equal say in more significant matters concerning the child's upbringing. Upon an examination of the affidavit evidence, it appeared to us that there had been previous attempts by the mother to exclude the father from the child's life altogether by denying him access rights. Since the mother, who had been given care and control, appeared to be so inclined, it was necessary to make a "joint custody order" instead of making a "no custody order", to send a signal to the mother that she should be more co-operative with the father.

(Emphasis added)

- 65 The Court of Appeal took the view that a sole custody order should be made only in exceptional cases, for example, where one parent physically, sexually, or emotionally abuses the child, or where the relationship of the parties is such that co-operation is impossible even after the avenues of mediation and counselling have been explored, and the lack of co-operation is harmful to the child.⁷²

⁷² Paragraph 38 of the judgment.

- 66 In short, the following principles can be gleaned from the Court of Appeal's decision in *CX v CY*:
- a) Parental responsibility for a child continues until the child reaches adulthood. Both parents continue to have joint parental responsibility even after their marital relationship is severed in a divorce.
 - b) Joint parental responsibility (or joint custody) can be maintained when the court makes no custody order or a joint custody order, and this would be in the interests of the child.
 - c) There should be minimal intervention in the parent-child relationship. A "no custody" order is to be preferred if there is no actual dispute between the parents over any serious matters relating to the child's upbringing, or where there is a need to avoid the negative psychological effect that a custody battle may have on a child.
 - d) A joint custody order should be made in other cases. A joint custody order could be useful for symbolic or signalling purposes, to remind both parties of their joint parental responsibility.
 - e) Only in exceptional cases should a sole custody order be made.
- 67 *CX v CY* is a significant declaration of judicial policy on custody, coming from the highest court in Singapore. It can be expected that the lower courts will abide by the approach established by the Court of Appeal and will make more joint custody orders or no custody orders, with sole custody orders confined only to exceptional cases. This future development may well lead to the desired emphasis on parental responsibility within the current ambit of custody law.

Current legislative provisions relating to parental responsibility

- 68 In fact, the concept of parental responsibility is not entirely new. Reference has been made to it in the Women's Charter (Matrimonial Proceedings) Rules.⁷³
- 69 Under the Rules, where a petition for a decree of divorce, presumption of death, judicial separation or nullity of marriage discloses that there is a child of the marriage, the petitioner must file, together with the petition, (a) an agreed parenting plan; or (b) a proposed parenting plan.⁷⁴ The Rules require the parties to try to agree on the arrangements for the welfare of every dependent child of the marriage⁷⁵ and file an agreed parenting plan. If the parties are unable to agree on the arrangements for the welfare of every dependent child of the marriage, the parties may seek counseling or mediation to try to resolve their disagreements harmoniously. In reaching an agreement on the arrangements for the welfare of every dependent child of the marriage, the parties must regard the welfare of the child as the paramount consideration.⁷⁶ The "arrangements for the welfare of every dependent child" include arrangements in relation to —
- a) the custody, care and control of, and access to, the child;
 - b) financial provision for the child;
 - c) the education of the child; and
 - d) any other parental responsibility for the child.⁷⁷

⁷³ Cap. 353, R 4.

⁷⁴ Rule 8.

⁷⁵ Under Rule 2(1), "dependent child of the marriage" means a child of the marriage who is — (a) below the age of 21 years; or (b) of or above the age of 21 years but who —
(i) suffers from any mental or physical disability;
(ii) is or will be serving full-time national service; or
(iii) is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment.

⁷⁶ Rule 8(2) to (4).

⁷⁷ Rule 2(1).

70 As has been noted earlier in this paper,⁷⁸ a custody order may be made on such conditions as the court may think fit to impose. This means that, in practice, our courts today do have the power to allocate parental responsibility among the parties. The orders may be as broad or as specific as necessitated by the circumstances of each case. To illustrate, orders such as the following may be made by a court when making a custody order:

- (1) ... care and control of the child be granted to the wife;
- (2) there be liberal access by the husband to the child including,
 - a) every alternate weekend – Wednesday 7 pm to Sunday 8 pm;
 - b) every alternate public holiday from 9 am to 6 pm;
 - c) in alternate years, Chinese New Year eve or Chinese New Year first day from 10 am to 9 pm;
 - d) first half of the mid-year and year-end school holidays.
- (3) the husband is to be consulted on matters relating to the child's education and religion;
- (4) the husband is to pick up and return the child from and to the wife's residence for access;
- (5) the husband is to pay maintenance of \$2,000 per month for the child with effect from 31 December 03, and thereafter on the last day of each month;
- ...
- (10) liberty to apply, including terms of access when the child begins formal schooling; ...⁷⁹

(Emphasis added)

⁷⁸ Paragraph 9.

⁷⁹ These were some of the court orders made in the case of *EY v EZ*, [2004] SGDC 91 (District Judge Hoo Sheau Peng), at paragraph 1 of the judgment.

No pressing impetus for legislative change

- 71 Considering that it is possible for the courts to emphasize joint parental responsibility by making joint custody or no custody orders, and that such an approach has now received the endorsement of the Court of Appeal in *CX v CY*, there appears to be no pressing impetus to amend the Women's Charter and other related legislation in order to emphasize parental responsibility. A radical legislative change at this stage might create more confusion and uncertainty and dilute the positive impact of *CX v CY*. The law on parental responsibility can be left to be developed by the courts under existing legislation.
- 72 It may be significant to note that in Australia, the reforms brought about by the Family Law Reform Act 1995 did not meet their objectives in a number of significant respects.⁸⁰ For example, the meaning of joint parental responsibility, and how joint parental responsibility should be exercised after the making of court orders, was not clearly stated in the legislation and was not well enough understood by the legal profession and the public. The new terminology for court orders was also not well understood, with separating parents continuing to think in terms of custody and access. Australia is now considering further reforms by way of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.⁸¹
- 73 It does appear, therefore, that it would take much more than a modernisation of legislative terms and expressions to change deep-seated conceptions about custody. A semantic change in legislative expressions may help to bring about some psychological or cultural change, but such an outcome is by no means certain, as the Australian experience has shown. Indeed, a semantic change of English expressions can be expected to have far less effect in multi-lingual Singapore, compared with native English-speaking states such as England and Australia.

⁸⁰ Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: The first three years*, 2000, summarised by the Hong Kong Law Commission at pages 164 to 165 of their report (citation at footnote 61, above).

⁸¹ Discussed at paragraph 39 of this paper.

- 74 Hence, rather than abolishing and replacing the language of custody completely, a better approach for Singapore would be to allow the courts to develop the concept further. The word “custody” is familiar to the public. Although it may have had its origins in property and parental rights over children, it is not understood in that sense today. Parents fight for custody of a child not because they seek to own the child as property, or to exercise rights over them, but because of their strong emotional bonds to the child. The custody battle can be seen as a contest for the “right” to continue to be a parent to the child. The way to avoid such a contest, as the Court of Appeal in *CX v CY* has advocated, is to use joint custody (or no custody) orders to preserve joint parental responsibility.⁸²
- 75 Whether joint parental responsibility will indeed develop through the use of joint custody and no custody orders remains to be seen. With the Court of Appeal having usefully clarified the concept, future judicial development in the area can be expected, and should be monitored. To discard “custody” now and introduce new expressions in the legislation would, in our view, be unnecessary and potentially confusing. There is the risk that the new expressions may introduce new ambiguities, and be counter-productive to the development of the law.
- 76 For these reasons, it is submitted that legislative amendments are not required, at this juncture, for the purpose of promoting joint parental responsibility. This can be left to judicial development by the courts under the concept of custody in existing legislation.



⁸² Discussed at paragraphs 61 to 67 of this paper.



Children Act 1989

1989 CHAPTER 41

An Act to reform the law relating to children; to provide for local authority services for children in need and others; to amend the law with respect to children's homes, community homes, voluntary homes and voluntary organisations; to make provision with respect to fostering, child minding and day care for young children and adoption; and for connected purposes.

[16th November 1989]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

INTRODUCTORY

- 1.—(1) When a court determines any question with respect to—
- (a) the upbringing of a child; or
 - (b) the administration of a child's property or the application of any income arising from it,

Welfare of the child.

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;

PART I

- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

- (a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
- (b) the court is considering whether to make, vary or discharge an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

Parental
responsibility for
children.

2.—(1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth—

- (a) the mother shall have parental responsibility for the child;
- (b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act.

(3) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act 1987 (which extends their meaning).

1987 c. 42.

(4) The rule of law that a father is the natural guardian of his legitimate child is abolished.

(5) More than one person may have parental responsibility for the same child at the same time.

(6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

(7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

(8) The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act.

PART I

(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned.

3.—(1) In this Act “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

Meaning of
“parental
responsibility”.

(2) It also includes the rights, powers and duties which a guardian of the child’s estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

- (a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or
- (b) any rights which, in the event of the child’s death, he (or any other person) may have in relation to the child’s property.

(5) A person who—

- (a) does not have parental responsibility for a particular child; but
- (b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare.

4.—(1) Where a child’s father and mother were not married to each other at the time of his birth—

- (a) the court may, on the application of the father, order that he shall have parental responsibility for the child; or
- (b) the father and mother may by agreement (“a parental responsibility agreement”) provide for the father to have parental responsibility for the child.

Acquisition of
parental
responsibility by
father.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—

- (a) it is made in the form prescribed by regulations made by the Lord Chancellor; and
- (b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.

PART I

(3) Subject to section 12(4), an order under subsection (1)(a), or a parental responsibility agreement, may only be brought to an end by an order of the court made on the application—

- (a) of any person who has parental responsibility for the child; or
- (b) with leave of the court, of the child himself.

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

Appointment of guardians.

5.—(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if—

- (a) the child has no parent with parental responsibility for him; or
- (b) a residence order has been made with respect to the child in favour of a parent or guardian of his who has died while the order was in force.

(2) The power conferred by subsection (1) may also be exercised in any family proceedings if the court considers that the order should be made even though no application has been made for it.

(3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.

(4) A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death.

(5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or—

- (a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of section 9 of the Wills Act 1837; or
- (b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.

(6) A person appointed as a child's guardian under this section shall have parental responsibility for the child concerned.

(7) Where—

- (a) on the death of any person making an appointment under subsection (3) or (4), the child concerned has no parent with parental responsibility for him; or
- (b) immediately before the death of any person making such an appointment, a residence order in his favour was in force with respect to the child,

the appointment shall take effect on the death of that person.

(8) Where, on the death of any person making an appointment under subsection (3) or (4)—

- (a) the child concerned has a parent with parental responsibility for him; and

PART I

(b) subsection (7)(b) does not apply,
the appointment shall take effect when the child no longer has a parent who has parental responsibility for him.

(9) Subsections (1) and (7) do not apply if the residence order referred to in paragraph (b) of those subsections was also made in favour of a surviving parent of the child.

(10) Nothing in this section shall be taken to prevent an appointment under subsection (3) or (4) being made by two or more persons acting jointly.

(11) Subject to any provision made by rules of court, no court shall exercise the High Court's inherent jurisdiction to appoint a guardian of the estate of any child.

(12) Where rules of court are made under subsection (11) they may prescribe the circumstances in which, and conditions subject to which, an appointment of such a guardian may be made.

(13) A guardian of a child may only be appointed in accordance with the provisions of this section.

6.—(1) An appointment under section 5(3) or (4) revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.

Guardians:
revocation and
disclaimer.

(2) An appointment under section 5(3) or (4) (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by a written and dated instrument which is signed—

- (a) by him; or
- (b) at his direction, in his presence and in the presence of two witnesses who each attest the signature.

(3) An appointment under section 5(3) or (4) (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it—

- (a) destroys the instrument by which it was made; or
- (b) has some other person destroy that instrument in his presence.

(4) For the avoidance of doubt, an appointment under section 5(3) or (4) made in a will or codicil is revoked if the will or codicil is revoked.

(5) A person who is appointed as a guardian under section 5(3) or (4) may disclaim his appointment by an instrument in writing signed by him and made within a reasonable time of his first knowing that the appointment has taken effect.

(6) Where regulations are made by the Lord Chancellor prescribing the manner in which such disclaimers must be recorded, no such disclaimer shall have effect unless it is recorded in the prescribed manner.

- PART I
- (7) Any appointment of a guardian under section 5 may be brought to an end at any time by order of the court—
- (a) on the application of any person who has parental responsibility for the child;
 - (b) on the application of the child concerned, with leave of the court; or
 - (c) in any family proceedings, if the court considers that it should be brought to an end even though no application has been made.

Welfare reports.

7.—(1) A court considering any question with respect to a child under this Act may—

- (a) ask a probation officer; or
- (b) ask a local authority to arrange for—
 - (i) an officer of the authority; or
 - (ii) such other person (other than a probation officer) as the authority considers appropriate,

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.

(2) The Lord Chancellor may make regulations specifying matters which, unless the court orders otherwise, must be dealt with in any report under this section.

(3) The report may be made in writing, or orally, as the court requires.

(4) Regardless of any enactment or rule of law which would otherwise prevent it from doing so, the court may take account of—

- (a) any statement contained in the report; and
- (b) any evidence given in respect of the matters referred to in the report,

in so far as the statement or evidence is, in the opinion of the court, relevant to the question which it is considering.

(5) It shall be the duty of the authority or probation officer to comply with any request for a report under this section.

PART II

ORDERS WITH RESPECT TO CHILDREN IN FAMILY PROCEEDINGS

General

8.—(1) In this Act —

“a contact order” means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other;

“a prohibited steps order” means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;

“a residence order” means an order settling the arrangements to be made as to the person with whom a child is to live; and

Residence, contact and other orders with respect to children.

“a specific issue order” means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(2) In this Act “a section 8 order” means any of the orders mentioned in subsection (1) and any order varying or discharging such an order.

(3) For the purposes of this Act “family proceedings” means any proceedings—

- (a) under the inherent jurisdiction of the High Court in relation to children; and
- (b) under the enactments mentioned in subsection (4),

but does not include proceedings on an application for leave under section 100(3).

(4) The enactments are—

- (a) Parts I, II and IV of this Act;
- (b) the Matrimonial Causes Act 1973; 1973 c. 18.
- (c) the Domestic Violence and Matrimonial Proceedings Act 1976; 1976 c. 50.
- (d) the Adoption Act 1976; 1976 c. 36.
- (e) the Domestic Proceedings and Magistrates’ Courts Act 1978; 1978 c. 22.
- (f) sections 1 and 9 of the Matrimonial Homes Act 1983; 1983 c. 19.
- (g) Part III of the Matrimonial and Family Proceedings Act 1984. 1984 c. 42.

9.—(1) No court shall make any section 8 order, other than a residence order, with respect to a child who is in the care of a local authority.

Restrictions on making section 8 orders.

(2) No application may be made by a local authority for a residence order or contact order and no court shall make such an order in favour of a local authority.

(3) A person who is, or was at any time within the last six months, a local authority foster parent of a child may not apply for leave to apply for a section 8 order with respect to the child unless—

- (a) he has the consent of the authority;
- (b) he is a relative of the child; or
- (c) the child has lived with him for at least three years preceding the application.

(4) The period of three years mentioned in subsection (3)(c) need not be continuous but must have begun not more than five years before the making of the application.

(5) No court shall exercise its powers to make a specific issue order or prohibited steps order—

- (a) with a view to achieving a result which could be achieved by making a residence or contact order; or
- (b) in any way which is denied to the High Court (by section 100(2)) in the exercise of its inherent jurisdiction with respect to children.

(6) No court shall make any section 8 order which is to have effect for a period which will end after the child has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.

PART II

(7) No court shall make any section 8 order, other than one varying or discharging such an order, with respect to a child who has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.

Power of court to make section 8 orders.

10.—(1) In any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if—

- (a) an application for the order has been made by a person who—
 - (i) is entitled to apply for a section 8 order with respect to the child; or
 - (ii) has obtained the leave of the court to make the application; or
- (b) the court considers that the order should be made even though no such application has been made.

(2) The court may also make a section 8 order with respect to any child on the application of a person who—

- (a) is entitled to apply for a section 8 order with respect to the child; or
- (b) has obtained the leave of the court to make the application.

(3) This section is subject to the restrictions imposed by section 9.

(4) The following persons are entitled to apply to the court for any section 8 order with respect to a child—

- (a) any parent or guardian of the child;
- (b) any person in whose favour a residence order is in force with respect to the child.

(5) The following persons are entitled to apply for a residence or contact order with respect to a child—

- (a) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family;
- (b) any person with whom the child has lived for a period of at least three years;
- (c) any person who—
 - (i) in any case where a residence order is in force with respect to the child, has the consent of each of the persons in whose favour the order was made;
 - (ii) in any case where the child is in the care of a local authority, has the consent of that authority; or
 - (iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child.

(6) A person who would not otherwise be entitled (under the previous provisions of this section) to apply for the variation or discharge of a section 8 order shall be entitled to do so if—

- (a) the order was made on his application; or
- (b) in the case of a contact order, he is named in the order.

PART II

(7) Any person who falls within a category of person prescribed by rules of court is entitled to apply for any such section 8 order as may be prescribed in relation to that category of person.

(8) Where the person applying for leave to make an application for a section 8 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 8 order.

(9) Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant's connection with the child;
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
- (d) where the child is being looked after by a local authority—
 - (i) the authority's plans for the child's future; and
 - (ii) the wishes and feelings of the child's parents.

(10) The period of three years mentioned in subsection (5)(b) need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application.

11.—(1) In proceedings in which any question of making a section 8 order, or any other question with respect to such an order, arises, the court shall (in the light of any rules made by virtue of subsection (2))—

- (a) draw up a timetable with a view to determining the question without delay; and
- (b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(2) Rules of court may—

- (a) specify periods within which specified steps must be taken in relation to proceedings in which such questions arise; and
- (b) make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay.

(3) Where a court has power to make a section 8 order, it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings.

(4) Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.

(5) Where—

- (a) a residence order has been made with respect to a child; and
- (b) as a result of the order the child lives, or is to live, with one of two parents who each have parental responsibility for him,

the residence order shall cease to have effect if the parents live together for a continuous period of more than six months.

General principles and supplementary provisions.

PART II

(6) A contact order which requires the parent with whom a child lives to allow the child to visit, or otherwise have contact with, his other parent shall cease to have effect if the parents live together for a continuous period of more than six months.

(7) A section 8 order may—

- (a) contain directions about how it is to be carried into effect;
- (b) impose conditions which must be complied with by any person—
 - (i) in whose favour the order is made;
 - (ii) who is a parent of the child concerned;
 - (iii) who is not a parent of his but who has parental responsibility for him; or
 - (iv) with whom the child is living,
 and to whom the conditions are expressed to apply;
- (c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
- (d) make such incidental, supplemental or consequential provision as the court thinks fit.

Residence orders
and parental
responsibility.

12.—(1) Where the court makes a residence order in favour of the father of a child it shall, if the father would not otherwise have parental responsibility for the child, also make an order under section 4 giving him that responsibility.

(2) Where the court makes a residence order in favour of any person who is not the parent or guardian of the child concerned that person shall have parental responsibility for the child while the residence order remains in force.

(3) Where a person has parental responsibility for a child as a result of subsection (2), he shall not have the right—

- (a) to consent, or refuse to consent, to the making of an application with respect to the child under section 18 of the Adoption Act 1976;
- (b) to agree, or refuse to agree, to the making of an adoption order, or an order under section 55 of the Act of 1976, with respect to the child; or
- (c) to appoint a guardian for the child.

(4) Where subsection (1) requires the court to make an order under section 4 in respect of the father of a child, the court shall not bring that order to an end at any time while the residence order concerned remains in force.

1976 c. 36.

Change of
child's name or
removal from
jurisdiction.

13.—(1) Where a residence order is in force with respect to a child, no person may—

- (a) cause the child to be known by a new surname; or
- (b) remove him from the United Kingdom;

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.

PART II

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.

14.—(1) Where—

Enforcement of residence orders.

(a) a residence order is in force with respect to a child in favour of any person; and

(b) any other person (including one in whose favour the order is also in force) is in breach of the arrangements settled by that order, the person mentioned in paragraph (a) may, as soon as the requirement in subsection (2) is complied with, enforce the order under section 63(3) of the Magistrates' Courts Act 1980 as if it were an order requiring the other person to produce the child to him.

1980 c. 43.

(2) The requirement is that a copy of the residence order has been served on the other person.

(3) Subsection (1) is without prejudice to any other remedy open to the person in whose favour the residence order is in force.

Financial relief

15.—(1) Schedule 1 (which consists primarily of the re-enactment, with consequential amendments and minor modifications, of provisions of the Guardianship of Minors Acts 1971 and 1973, the Children Act 1975 and of sections 15 and 16 of the Family Law Reform Act 1987) makes provision in relation to financial relief for children.

Orders for financial relief with respect to children.
1975 c. 72.
1987 c. 42.

(2) The powers of a magistrates' court under section 60 of the Magistrates' Courts Act 1980 to revoke, revive or vary an order for the periodical payment of money shall not apply in relation to an order made under Schedule 1.

Family assistance orders

16.—(1) Where, in any family proceedings, the court has power to make an order under this Part with respect to any child, it may (whether or not it makes such an order) make an order requiring—

Family assistance orders.

(a) a probation officer to be made available; or

(b) a local authority to make an officer of the authority available, to advise, assist and (where appropriate) befriend any person named in the order.

(2) The persons who may be named in an order under this section ("a family assistance order") are—

(a) any parent or guardian of the child;

(b) any person with whom the child is living or in whose favour a contact order is in force with respect to the child;

(c) the child himself.

(3) No court may make a family assistance order unless—

(a) it is satisfied that the circumstances of the case are exceptional; and

PART II

(b) it has obtained the consent of every person to be named in the order other than the child.

(4) A family assistance order may direct—

(a) the person named in the order; or

(b) such of the persons named in the order as may be specified in the order,

to take such steps as may be so specified with a view to enabling the officer concerned to be kept informed of the address of any person named in the order and to be allowed to visit any such person.

(5) Unless it specifies a shorter period, a family assistance order shall have effect for a period of six months beginning with the day on which it is made.

(6) Where—

(a) a family assistance order is in force with respect to a child; and

(b) a section 8 order is also in force with respect to the child,

the officer concerned may refer to the court the question whether the section 8 order should be varied or discharged.

(7) A family assistance order shall not be made so as to require a local authority to make an officer of theirs available unless—

(a) the authority agree; or

(b) the child concerned lives or will live within their area.

(8) Where a family assistance order requires a probation officer to be made available, the officer shall be selected in accordance with arrangements made by the probation committee for the area in which the child lives or will live.

(9) If the selected probation officer is unable to carry out his duties, or dies, another probation officer shall be selected in the same manner.

PART III

LOCAL AUTHORITY SUPPORT FOR CHILDREN AND FAMILIES

Provision of services for children and their families

Provision of services for children in need, their families and others.

17.—(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs.

(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.



Family Law Reform Act 1995

No. 167 of 1995

An Act to amend the *Family Law Act 1975*, and for related purposes

[Assented to 16 December 1995]

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Family Law Reform Act 1995*.

(2) In this Act, “**Principal Act**” means the *Family Law Act 1975*¹.

5 Commencement

2.(1) Sections 1, 2 and 54 commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.

10 (3) If a provision to which subsection (2) applies does not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

Repeal of Part VII and substitution of new Part

31. Part VII of the Principal Act is repealed and the following Part is substituted:

“PART VII—CHILDREN

“Division 1—Introductory

“Subdivision A—What this Division does

What this Division does

“60A. This Division contains:

- (a) a statement of the object of this Part and the principles underlying it, and an outline of this Part (Subdivision B); and
- (b) provisions relevant to the interpretation and application of this Part (Subdivision C); and
- (c) provisions relevant to how this Act applies to certain children (Subdivision D).

Note: The extension and application of this Part is also dealt with in Subdivision F of Division 12.

“Subdivision B—Object, principles and outline

Object of Part and principles underlying it

“60B.(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

“(2) The principles underlying these objects are that, except when it is or would be contrary to a child’s best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.

Outline of Part

“60C. An outline of this Part is set out below.

OUTLINE OF PART	
Item	Divisions and coverage
1	<p><i>Division 1—Introductory</i></p> <ul style="list-style-type: none"> • object of Part and principles underlying it, and outline of Part • interpretation and application of this Part • how this Act applies to certain children <p>Note: The extension and application of this Part is also dealt with in Subdivision F of Division 12.</p>
2	<p><i>Division 2—Parental responsibility</i></p> <ul style="list-style-type: none"> • the concept of parental responsibility
3	<p><i>Division 3—Counselling etc.</i></p> <ul style="list-style-type: none"> • counselling of people in relation to matters affecting children • preparation of reports for use in proceedings relating to children under 18 • provision of documents about counselling and welfare
4	<p><i>Division 4—Parenting plans</i></p> <ul style="list-style-type: none"> • what parenting plans are and their registration in courts
5	<p><i>Division 5—Parenting orders—what they are</i></p> <ul style="list-style-type: none"> • what parenting orders are
6	<p><i>Division 6—Parenting orders other than child maintenance orders</i></p> <ul style="list-style-type: none"> • applying for and making parenting orders, other than child maintenance orders • general obligations created by residence orders, contact orders and specific issues orders • dealing with people who have been arrested • obligations under parenting orders, other than child maintenance orders, relating to taking or sending children from Australia

OUTLINE OF PART—continued

7	<p><i>Division 7—Child maintenance orders</i></p> <ul style="list-style-type: none"> • objects and principles relevant to the making of child maintenance orders • the relationship between Division 7 and the <i>Child Support (Assessment) Act 1989</i> • applying for and making child maintenance orders • other aspects of courts' powers in relation to child maintenance orders • when child maintenance orders stop being in force
8	<p><i>Division 8—Other matters relating to children</i></p> <ul style="list-style-type: none"> • liability of a father to contribute towards child bearing expenses if he is not married to the child's mother • orders for the location and recovery of children • reporting of allegations of child abuse • other orders about children
9	<p><i>Division 9—Injunctions</i></p> <ul style="list-style-type: none"> • proceedings for injunctions in relation to children
10	<p><i>Division 10—The best interests of children and the representation of children</i></p> <ul style="list-style-type: none"> • determining what is in a child's best interests (including in situations of family violence) • separate representation of children
11	<p><i>Division 11—Family violence</i></p> <ul style="list-style-type: none"> • the relationship between certain contact orders etc. and family violence orders
12	<p><i>Division 12—Proceedings and jurisdiction</i></p> <ul style="list-style-type: none"> • institution of proceedings and procedure • jurisdiction of courts • presumptions of parentage • parentage evidence • places and people to which this Part extends and applies
13	<p><i>Division 13—State, Territory and overseas orders</i></p> <ul style="list-style-type: none"> • registration of State and Territory orders dealing with children • registration of overseas orders dealing with children • transmission of Australian orders to overseas jurisdictions
14	<p><i>Division 14—Miscellaneous</i></p> <ul style="list-style-type: none"> • miscellaneous matters relating to children

*“Subdivision C—Interpretation and application of Part***Defined expressions**

“60D.(1) In this Part:

‘abuse’, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or 5
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person; 10

‘adopted’, in relation to a child, means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children;

‘artificial conception procedure’ includes: 15

- (a) artificial insemination; and
- (b) the implantation of an embryo in the body of a woman;

‘birth’ includes stillbirth;

‘child’ includes an adopted child and a stillborn child;

‘childbirth maintenance period’, in relation to the birth of a child, means the period: 20

(a) commencing:

(i) in a case where the mother:

- (A) works in paid employment; and
- (B) is advised by a medical practitioner to stop working for medical reasons related to her pregnancy; and 25
- (C) stops working after being so advised and more than 2 months before the child is due to be born;

on the day on which she stops working; or

(ii) in any other case—2 months before the child is due to be born; 30
and

(b) ending 3 months after the child’s birth;

‘child maintenance order’ has the meaning given by subsection 64B(5);

‘child maintenance provisions’, in relation to a parenting plan, has the meaning given by subsection 63C(5); 35

‘child welfare law’ means a law of a State or Territory prescribed, or included in a class of laws of a State or Territory prescribed, for the purposes of this definition;

‘child welfare officer’, in relation to a State or Territory, means:

- (a) a person who, because he or she holds, or performs the duties of, a prescribed office of the State or Territory, has responsibilities in relation to a child welfare law of the State or Territory; or
- 5 (b) a person authorised in writing by such a person for the purposes of this Part;

‘child welfare provisions’, in relation to a parenting plan, has the meaning given by subsection 63C(4);

‘contact order’ has the meaning given by subsection 64B(4);

10 **‘de facto relationship’** means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other;

‘education’ includes apprenticeship or vocational training;

15 **‘family violence’** means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well being or safety;

20 **‘family violence order’** means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence;

‘guardian’, in relation to a child, includes a person who has been granted (whether alone or jointly with another person or other persons) guardianship of the child under the law of the Commonwealth or of a State or Territory;

25 **‘has’**, in relation to a residence order, a contact order or a specific issues order, has the meaning given by subsection 64B(8);

‘interests’, in relation to a child, includes matters related to the care, welfare or development of the child;

‘made in favour’, in relation to a residence order, a contact order or a specific issues order, has the meaning given by subsection 64B(7);

30 **‘medical expenses’** includes medical, surgical, dental, diagnostic, hospital, nursing, pharmaceutical and physiotherapy expenses;

‘medical practitioner’ means a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners;

35 **‘member of the Court personnel’** means:

- (a) a court counsellor; or
- (b) a court mediator; or
- (c) an approved arbitrator; or
- (d) a welfare officer; or

40 (e) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or

(f) the Registrar or a Deputy Registrar of the Family Court of Western Australia;

'member of the family', in relation to a person, has, for the purposes of this section, paragraphs 68F(2)(i) and (j) and section 68J, the meaning given by subsection (2);

'parent', in relation to a child who has been adopted, means an adoptive parent of the child;

'parentage testing order' has the meaning given by subsection 69W(1);

'parentage testing procedure' means a medical procedure prescribed, or included in a class of medical procedures prescribed, for the purposes of this definition;

'parental responsibility' has the meaning given by section 61B;

'parenting order' has the meaning given by subsection 64B(1);

'parenting plan' has the meaning given by subsection 63C(1);

'prescribed adopting parent', in relation to a child, means:

(a) a parent of the child; or

(b) the spouse of, or a person in a de facto relationship with, a parent of the child; or

(c) a parent of the child and either his or her spouse or a person in a de facto relationship with the parent;

'prescribed child welfare authority', in relation to abuse of a child, means:

(a) if the child is the subject of proceedings under this Part in a State or Territory—an officer of the State or Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person; or

(b) if the child is not the subject of proceedings under this Part—an officer of the State or Territory in which the child is located or is believed to be located who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person;

'professional ethics' includes:

(a) rules of professional conduct; and

(b) rules of professional etiquette; and

(c) a code of ethics; and

(d) standards of professional conduct;

'residence order' has the meaning given by subsection 64B(3);

'specific issues order' has the meaning given by subsection 64B(6);

'step-parent', in relation to a child, means a person who:

(a) is not a parent of the child; and

(b) is or has been married to a parent of the child; and

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- (c) treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.

“(2) For the purposes of this section, paragraphs 68F(2)(i) and (j) and section 68J, a person (the ‘**first person**’) is a **member of the family** of another person (the ‘**second person**’) if:

- 5 (a) the first person is or has been married to, or in a de facto relationship with, the second person; or

- (b) the first person is or has been a relative of the second person (as defined in subsection (3)); or

- 10 (c) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:

- (i) a residence order, contact order or specific issues order that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;

- 15 (ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or

- (d) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:

- 20 (i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;

- (ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or

- 25 (e) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or

- 30 (f) the first person is or has been a member of the family of a child of the second person.

“(3) For the purposes of this section, a **relative** of a person is:

- (a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or

- 35 (b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or

- (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or

- (d) an uncle or aunt of the person; or

- (e) a nephew or niece of the person; or

- 40 (f) a cousin of the person; or

- (g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or
- (h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

5

Application of Part to void marriages

“60E. This Part applies in relation to a purported marriage that is void as if:

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- (a) the purported marriage were a marriage; and
- (b) the parties to the purported marriage were husband and wife.

“Subdivision D—Interpretation—how this Act applies to certain children

Certain children are children of marriage etc.

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“60F.(1) A reference in this Act to a child of a marriage includes, subject to subsection (3), a reference to each of the following children:

- (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- (b) a child of the husband and wife born before the marriage;
- (c) a child who is, under subsection 60H(1), the child of the husband and wife.

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“(2) A reference in this Act to a child of a marriage includes a reference to a child of:

- (a) a marriage that has been dissolved or annulled, in Australia or elsewhere; or
- (b) a marriage that has been terminated by the death of one party to the marriage.

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“(3) A child of a marriage who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act.

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“(4) The following provisions apply in relation to a child of a marriage who is adopted by a prescribed adopting parent:

- (a) if a court granted leave under section 60G for the adoption proceedings to be commenced—the child ceases to be a child of the marriage for the purposes of this Act;
- (b) in any other case—the child continues to be a child of the marriage for the purposes of this Act.

35

Family Court may grant leave for adoption proceedings by prescribed adopting parent

5 “60G.(1) Subject to subsection (2), the Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent.

10 “(2) In proceedings for leave under subsection (1), the court must consider whether granting leave would be in the child’s best interests, having regard to the effect of paragraph 60F(4)(a) and of sections 61E and 65J.

Note: Division 10 deals with how a court determines a child’s best interests.

Children born as a result of artificial conception procedures

“60H.(1) If:

15 (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to a man; and

(b) either of the following paragraphs apply:

(i) the procedure was carried out with their consent;

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man;

20 then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.

“(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

25 (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

“(3) If:

30 (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

35 then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

“(4) If a person lives with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not legally married to that person, subsection (1) applies in relation to them as if:

(a) they were married to each other; and

40 (b) neither person were married to any other person.

“(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

“Division 2—Parental responsibility

What this Division does

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“61A. This Division deals with the concept of parental responsibility including, in particular:

- (a) what parental responsibility is; and
- (b) who has parental responsibility.

Meaning of “parental responsibility”

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“61B. In this Part, ‘parental responsibility’, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

Each parent has parental responsibility (subject to court orders)

“61C.(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

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“(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child’s parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

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“(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Parenting orders and parental responsibility

“61D.(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

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“(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

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- (a) expressly provided for in the order; or
- (b) necessary to give effect to the order.

Effect of adoption on parental responsibility

“61E.(1) This section applies if:

- (a) a child is adopted; and
- (b) immediately before the adoption, a person had parental responsibility for the child, whether in full or to a limited extent and whether because of section 61C or because of a parenting order.

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“(2) The person’s parental responsibility for the child ends on the adoption of the child, unless the adoption is by a prescribed adopting parent and leave was not granted under section 60G for the adoption proceedings to be commenced.

5

“*Division 3—Counselling etc.*”

What this Division does

“62A. This Division deals with:

- (a) the counselling of people in relation to matters affecting children; and
- 10 (b) the preparation of reports for use in proceedings relating to children who are under 18; and
- (c) the provision of documents about counselling and welfare.

Obligations to consider advising people about counselling for Part VII orders

15 “62B.(1) In this section, **counselling for Part VII orders** is counselling to assist children and parties to proceedings under this Part to adjust to the consequences of orders under this Part.

20 “(2) A court exercising jurisdiction in proceedings under this Part must consider whether or not to advise parties to the proceedings about counselling for Part VII orders available through courts exercising jurisdiction under this Part and through approved counselling organisations.

25 “(3) A legal practitioner acting in proceedings under this Part, or consulted by a person considering commencing such proceedings, must consider whether or not to advise the parties to the proceedings, or the person considering commencing proceedings, about counselling for Part VII orders available through courts exercising jurisdiction under this Part and through approved counselling organisations.

Request for counselling—request made through court

30 “62C.(1) A party to proceedings under this Part, or a person representing a child under an order made under section 68L, may file in the Family Court or a Family Court of a State a notice stating that he or she wishes to have the assistance of the counselling facilities of that Court.

35 “(2) On the filing of the notice, the Principal Director of Court Counselling of the Family Court or an appropriate officer of the Family Court of the State, as the case may be, must arrange for parties to the proceedings (with or without the child) to be interviewed by a family and child counsellor or welfare officer to assess whether counselling is appropriate in all the circumstances, and if it is:

- (a) to discuss the care, welfare and development of the child; and
- (b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child, to try to resolve those differences.

Request for counselling—where made direct to a family and child counsellor 5

“62D. A person may at any time request a family and child counsellor to provide counselling about a matter relating to a child.

Court counselling facilities to be made available

“62E.(1) A parent of a child, a child or a party to proceedings under this Part may seek the assistance of the counselling facilities of the Family Court or a Family Court of a State. 10

“(2) The Principal Director of Court Counselling of the Family Court or an appropriate officer of the Family Court of the State, as the case may be, must, as far as practicable, make those facilities available. 15

Conferences with family and child counsellors or welfare officers

“62F.(1) This section applies if, in proceedings under this Act, the care, welfare and development of a child who is under 18 is relevant.

“(2) The court may, at any stage of the proceedings, make an order directing the parties to the proceedings to attend a conference with a family and child counsellor or welfare officer: 20

- (a) to discuss the care, welfare and development of the child; and
- (b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child—to try to resolve those differences. 25

“(3) The court may make an order under subsection (2):

- (a) on its own initiative; or
- (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a person representing the child under an order made under section 68L. 30

“(4) The court may, in an order under subsection (2):

- (a) fix a place and time for the conference to take place; or
- (b) direct that the conference is to take place at a place and time to be fixed by a family and child counsellor or welfare officer. 35

“(5) If a person fails to attend a conference in respect of which the court has made an order under subsection (2), the counsellor or welfare officer must report the failure to the court.

“(6) On receiving a report under subsection (5), the court may give such further directions in relation to the conference as it considers appropriate.

“(7) The court may make further directions under subsection (6):

(a) on its own initiative; or

5 (b) on the application of:

(i) a party to the proceedings; or

(ii) a person representing the child under an order made under section 68L.

10 “(8) Evidence of anything said, or of any admission made, at a conference that takes place pursuant to an order under subsection (2) is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

15 (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by consent of the parties, to hear evidence.

Reports by family and child counsellors and welfare officers

“62G.(1) This section applies if, in proceedings under this Act, the care, welfare and development of a child who is under 18 is relevant.

20 “(2) The court may direct a family and child counsellor or welfare officer to give the court a report on such matters relevant to the proceedings as the court thinks desirable.

“(3) If the court makes a direction under subsection (2), it may, if it thinks it necessary, adjourn the proceedings until the report has been given to the court.

25 “(4) A counsellor or welfare officer may include in a report prepared pursuant to a direction under subsection (2), in addition to the matters required to be included in it, any other matters that relate to the care, welfare or development of the child.

30 “(5) For the purpose of the preparation of a report pursuant to a direction under subsection (2), the court may make such orders, or give such further directions, as it considers appropriate, including orders or directions for the attendance on the counsellor or welfare officer of a party to the proceedings or of the child.

35 “(6) If a person fails to comply with an order or direction under subsection (5), the counsellor or welfare officer must report the failure to the court.

“ (7) On receiving a report under subsection (6), the court may give such further directions in relation to the preparation of the report as it considers appropriate.

“(8) A report given to the court pursuant to a direction under subsection (2) may be received in evidence in any proceedings under this Act.

Provision of certain documents

“62H. The Rules of Court must provide for people proposing to institute proceedings under this Part in relation to children, and in appropriate cases to other persons who may be interested in the care, welfare and development of children, to be given documents setting out:

- (a) the legal and possible social effects of the proposed proceedings; and
- (b) the counselling and welfare facilities available within the Family Court and elsewhere.

“Division 4—Parenting plans

What this Division does

“63A. This Division explains what parenting plans are and provides for their registration in courts.

Parents encouraged to reach agreement

“63B. The parents of a child are encouraged:

- (a) to agree about matters concerning the child rather than seeking an order from a court; and
- (b) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

Meaning of “parenting plan” and related terms

“63C.(1) A **parenting plan** is an agreement that:

- (a) is in writing; and
- (b) is or was made between the parents of a child; and
- (c) deals with a matter or matters mentioned in subsection (2).

“(2) A parenting plan may deal with one or more of the following:

- (a) the person or persons with whom a child is to live;
- (b) contact between a child and another person or other persons;
- (c) maintenance of a child;
- (d) any other aspect of parental responsibility for a child.

“(3) An agreement may be a parenting plan:

- (a) whether made before or after the commencement of this section; and
- (b) whether made inside or outside Australia; and
- (c) whether other persons as well as a child’s parents are also parties; and
- (d) whether it deals with other matters as well as matters mentioned in subsection (2).

“(4) Provisions of a parenting plan that deal with any of the matters mentioned in paragraphs (2)(a), (b) and (d) are **child welfare provisions**.

“(5) Provisions of a parenting plan that deal with the matter mentioned in paragraph (2)(c) are **child maintenance provisions**.

5 **Parenting plan may not be varied, but may be revoked, by further agreement**

“63D.(1) An agreement, in whatever form and however expressed, is not effective to vary a parenting plan for the purposes of this Act. An agreement purporting to vary a parenting plan cannot be registered under
10 section 63E.

“(2) Subject to subsection (3), a parenting plan may be revoked by agreement in writing between the parties to the plan.

“(3) An agreement revoking a registered parenting plan:

- 15 (a) may, subject to the Rules of Court, be registered under section 63E as if it were a parenting plan; and
(b) does not have effect to revoke the plan until it is so registered.

Registration in a court

“63E.(1) Subject to this section, a parenting plan may be registered in a court having jurisdiction under this Part.

20 “(2) To apply for registration of a parenting plan:

- (a) an application for registration of the plan must be lodged in accordance with the Rules of Court; and
(b) the application must be accompanied by a copy of the plan, the information required by the Rules of Court, and:
25 (i) a statement, in relation to each party, that is to the effect that the party has been provided with independent legal advice as to the meaning and effect of the plan and that is signed by the practitioner who provided that advice; or
30 (ii) a statement to the effect that the plan was developed after consultation with a family and child counsellor (as defined in section 4) and that is signed by the counsellor.

“(3) The court may register the plan if it considers it appropriate to do so having regard to the best interests of the child to which the plan relates. In determining whether it is appropriate to register the plan, the court:

- 35 (a) must have regard to the information accompanying the application for registration; and
(b) may, but is not required to, have regard to all or any of the matters set out in subsection 68F(2).

“(4) The Rules of Court:

- (a) must prescribe what information is to accompany an application for registration of a parenting plan; and
- (b) may prescribe other matters relating to the procedures for registration.

Child welfare provisions of registered parenting plans

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“63F.(1) This section applies if a parenting plan that contains child welfare provisions is registered in a court under section 63E.

“(2) The court may, by order, vary the child welfare provisions in the plan if it considers the variation is required in the best interests of a child.

“(3) The child welfare provisions have effect, subject to subsections (5) and (6), as if they were:

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- (a) to the extent they deal with the person or persons with whom the child is to live—a residence order made by the court; and
- (b) to the extent they deal with contact between the child and another person or other persons—a contact order made by the court; and
- (c) to the extent they deal with any other aspect of parental responsibility for the child—a specific issues order made by the court.

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Note: Provisions of this Act relevant to the child welfare provisions having effect as provided in this subsection include:

- (a) Subdivisions C, D and E of Division 6 of this Part (dealing with obligations created by residence orders, contact orders and specific issues orders); and
- (b) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (c) subsection 65D(2) (providing for discharge, variation, suspension and revival of parenting orders other than child maintenance orders); and
- (d) other provisions of this Act (including subsections 64B(7) and (8)) that refer to parenting orders, or to residence orders, contact orders or specific issues orders.

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“(4) If provisions of the plan have effect under subsection (3) as a court order, a person who is a party to the plan is taken (for example, for the purposes of section 65Y) to be a party to the proceedings in which the order was made.

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“(5) Subsection (3) does not apply to the plan (whenever registered) to the extent (if at all) that the plan purports to determine that the child concerned is to live with a person who is not a parent of the child.

“(6) Even though the plan is registered, the court, or another court having jurisdiction under this Part, must not enforce the child welfare provisions if it considers that to do so would be contrary to the best interests of a child.

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Note: Division 10 deals with how a court determines a child’s best interests.

Child maintenance provisions of registered parenting plans— where not enforceable as maintenance agreements

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“63G.(1) This section applies if:

- (a) a parenting plan that contains child maintenance provisions is registered in a court under section 63E; and
- (b) the plan is not a maintenance agreement, or, if it is a maintenance agreement, the child concerned is not a child of the relevant marriage.

“(2) The child maintenance provisions have effect, subject to subsections (3), (4) and (5), as if they were a child maintenance order made by the court.

Note: Provisions of this Act relevant to the child maintenance provisions having effect as a child maintenance order include:

- (a) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (b) section 66S (providing for discharge, variation, suspension and revival of child maintenance orders); and
- (c) other provisions of this Act that refer to parenting orders, or to child maintenance orders.

“(3) Unless the plan provides otherwise, the child maintenance provisions (other than provisions for the periodic payment of maintenance) continue to operate in spite of the death of a party to the plan and operate in favour of, and are binding on, the legal personal representative of that party.

“(4) If the child maintenance provisions include provisions (the ‘**periodic provisions**’) for the periodic payment of maintenance:

- (a) the periodic provisions continue to operate, if the plan so provides, in spite of the death of a party to the plan who is liable to make the periodic payments, and are binding on the legal personal representative of that party; but
- (b) the periodic provisions do not continue to operate, in spite of anything in the plan, after the death of the person entitled to receive the periodic payments.

“(5) The child maintenance provisions have no effect, and are not enforceable in any way, at any time when an application could properly be made under the *Child Support (Assessment) Act 1989* by one of the parties to the plan for administrative assessment of child support (within the meaning of that Act) for the child concerned seeking payment of child support by the other party to the plan.

“(6) Subsection (5) has effect whether or not an application for administrative assessment of child support for the child has in fact been made by a party to the plan.

Court’s powers to set aside, discharge, vary, suspend or revive registered parenting plans

“63H.(1) The court in which a parenting plan is registered under section 63E may set aside the plan, and its registration, if the court is satisfied:

- (a) that the concurrence of a party was obtained by fraud, duress or undue influence; or
- (b) that the parties want the plan set aside; or
- (c) that it is in the best interests of a child to set aside the plan.

“(2) In proceedings under subsection (1), to the extent that they are proceedings on the ground mentioned in paragraph (1)(c), the best interests of the child concerned are the paramount consideration. 5

Note: Division 10 deals with how a court determines a child’s best interests.

“(3) Other provisions of this Act under which provisions of the parenting plan may be set aside or otherwise affected are: 10

- (a) subsection 63F(2)—under that subsection a court may vary child welfare provisions in the plan; and
- (b) subsection 65D(2)—under that subsection a court may make a parenting order that discharges, varies, suspends or revives provisions of the plan that have effect as if they were a parenting order (other than a child maintenance order); and 15
- (c) section 66S—under that section a court may discharge, vary, suspend or revive provisions of the plan that have effect as if they were a child maintenance order.

“(4) Except as permitted by subsection (1) or by a provision mentioned in subsection (3), a court must not set aside, discharge, vary, suspend or revive the whole or a part of the parenting plan. 20

“*Division 5—Parenting orders—what they are*”

What this Division does

“64A. This Division explains what parenting orders are. 25

Meaning of “parenting order” and related terms

“64B.(1) A **parenting order** is:

- (a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or
- (b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a). 30

“(2) A parenting order may deal with one or more of the following:

- (a) the person or persons with whom a child is to live;
- (b) contact between a child and another person or other persons;
- (c) maintenance of a child; 35
- (d) any other aspect of parental responsibility for a child.

“(3) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(a), the order is a **residence order**.

“(4) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(b), the order is a **contact order**.

“(5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(c), the order is a **child maintenance order**.

5 “(6) To the extent (if at all) that a parenting order deals with any other aspect of parental responsibility for a child, the order is a **specific issues order**. A specific issues order may, for example, confer on a person (whether alone or jointly with another person) responsibility for the long-term care, welfare and development of the child or for the day-to-day
10 care, welfare and development of the child.

“(7) For the purposes of this Act:

- (a) a residence order is **made in favour** of a person, or the person, with whom the child concerned is supposed to live under the order; and
- 15 (b) a contact order is **made in favour** of a person, or the person, with whom the child concerned is supposed to have contact under the order; and
- (c) a specific issues order is **made in favour** of a person, or the person, on whom the order confers duties, powers, responsibilities or authority in relation to the child concerned.

20 “(8) For the purposes of this Act:

- (a) a person **has a residence order** in relation to a child if a residence order made in favour of the person is in force in relation to the child; and
- 25 (b) a person **has a contact order** in relation to a child if a contact order made in favour of the person is in force in relation to the child; and
- (c) a person **has a specific issues order** in relation to a child if a specific issues order made in favour of the person is in force in relation to the child.

Parenting orders may be made in favour of parents or other persons

30 “64C. A parenting order in relation to a child may be made in favour of a parent of the child or some other person.

“Division 6—Parenting orders other than child maintenance orders

“Subdivision A—Introductory

What this Division does

35 “65A. This Division deals with:

- (a) applying for and making parenting orders, other than child maintenance orders (Subdivision B); and
- (b) the general obligations created by residence orders, contact orders and specific issues orders (Subdivision C); and

- (c) dealing with people who have been arrested (Subdivision D); and
- (d) the obligations under parenting orders, other than child maintenance orders, relating to taking or sending children from Australia (Subdivision E).

Division does not apply to child maintenance orders 5

“65B. This Division does not apply to parenting orders to the extent that they consist of child maintenance orders. Child maintenance orders are dealt with in Division 7.

“Subdivision B—Applying for and making parenting orders

Who may apply for a parenting order 10

“65C. A parenting order in relation to a child may be applied for by:

- (a) either or both of the child’s parents; or
- (b) the child; or
- (c) any other person concerned with the care, welfare or development of the child.

15

Court’s power to make parenting order

“65D.(1) In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper.

“(2) Without limiting the generality of subsection (1) and subject to this Division, a court may make a parenting order that discharges, varies, 20
suspends or revives some or all of an earlier parenting order.

Child’s best interests paramount consideration in making a parenting order

“65E. In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. 25

Note: Division 10 deals with how a court determines a child’s best interests.

General requirements for counselling before parenting order made

“65F.(1) In proceedings for a parenting order in relation to a child, the court may order the parties to the proceedings to attend a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate. 30

“(2) Subject to subsection (3), a court must not make a parenting order in relation to a child unless:

- (a) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate; or 35

(b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

“(3) Subsection (2) does not apply to the making of a parenting order if:

(a) it is made with the consent of all the parties to the proceedings; or

(b) it is an order until further order.

Special conditions for making residence order or specific issues order by consent in favour of non-parent

“65G.(1) This section applies if:

(a) a court proposes to make:

(i) a residence order; or

(ii) a specific issues order under which a person will be responsible for a child’s long-term or day-to-day care, welfare and development; and

(b) the court proposes to make that order:

(i) otherwise than in favour of a parent, or of persons who include a parent, of the child concerned; and

(ii) with the consent of all the parties to the proceedings.

“(2) The court must not make the proposed order unless:

(a) these conditions are satisfied:

(i) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to be determined by the proposed order; and

(ii) the court has considered a report prepared by the counsellor or officer about that matter; or

(b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.

Children who are 18 or over or who have married or entered de facto relationships

“65H.(1) A parenting order must not be made in relation to a child who:

(a) is 18 or over; or

(b) is or has been married; or

(c) is in a de facto relationship.

“(2) A parenting order in relation to a child stops being in force if the child turns 18, marries or enters into a de facto relationship.

“(3) A court having jurisdiction under this Part may make a declaration to the effect that the child is in, or has entered into, a de facto relationship.

“(4) A declaration under subsection (3) has effect for the purposes of this Act but does not have effect for any other purpose (including, for example, other laws of the Commonwealth or laws of the States and Territories).

Effect of adoption on parenting order

“65J.(1) This section applies if:

- (a) a child is adopted; and
- (b) immediately before the adoption, a parenting order was in force in relation to the child.

“(2) The parenting order stops being in force on the adoption of the child, unless the adoption is by a prescribed adopting parent and leave was not granted under section 60G for the adoption proceedings to be commenced.

What happens when parenting order that is or includes residence order does not make provision in relation to death of parent with whom child lives

“65K.(1) This section applies if:

- (a) a parenting order that is or includes a residence order is in force determining that a child is to live with one of the child’s parents; and
- (b) that parent dies; and
- (c) the parenting order does not provide for what is to happen on that parent’s death.

“(2) The surviving parent cannot require the child to live with him or her.

“(3) The surviving parent, or another person (subject to section 65C), may apply for the making of a residence order in relation to the child.

“(4) In an application under subsection (3) by a person who does not, at the time of the application, have any parental responsibility for the child, any person who, at that time, has any parental responsibility for the child is entitled to be a party to the proceedings.

Counsellors may be required to supervise or assist compliance with parenting orders

“65L.(1) If a court makes a parenting order in relation to a child, the court may also, subject to subsection (2), make either or both of the following orders:

- (a) an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family and child counsellor or a welfare officer;
- (b) an order requiring a family and child counsellor or a welfare officer to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order.

“(2) In deciding whether to make a particular order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Division 10 deals with how a court determines a child’s best interests.

“Subdivision C—General obligations created by residence orders, contact orders and specific issues orders

General obligations created by residence order

“65M.(1) This section applies if a residence order is in force in relation to a child.

“(2) A person must not, contrary to the order:

- (a) remove the child from the care of a person; or
- (b) refuse or fail to deliver or return the child to a person; or
- (c) interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.

General obligations created by contact order

“65N.(1) This section applies if a contact order is in force in relation to a child.

“(2) A person must not:

- (a) hinder or prevent a person and the child from having contact in accordance with the order; or
- (b) interfere with the contact that a person and the child are supposed to have with each other under the order.

General obligations created by specific issues orders that confer responsibility for a child’s care, welfare and development

“65P.(1) This section applies if a specific issues order:

- (a) is in force in relation to a child; and
- (b) confers responsibility on a person (the ‘carer’) for the child’s long-term or day-to-day care, welfare and development.

“(2) A person must not hinder the carer in, or prevent the carer from, discharging that responsibility.

Court may issue warrant for arrest of alleged offender

“65Q.(1) This section applies if:

- (a) a residence order or a contact order is in force in relation to a child; and
- (b) a court having jurisdiction under this Part is satisfied, on application by a person in whose favour the order was made, that there are reasonable grounds for believing that a person (the ‘**alleged offender**’) has contravened section 65M or 65N in relation to the order; and
- (c) there is an application before the court for the alleged offender to be dealt with under section 112AD for the alleged contravention; and
- (d) the court is satisfied that the issue of a warrant is necessary to ensure that the alleged offender will attend before a court to be dealt with under section 112AD for the alleged contravention.

“(2) The court may issue a warrant authorising a person to whom it is addressed to arrest the alleged offender.

“(3) A warrant stops being in force:

- (a) if a date not later than 6 months after the issue of the warrant is specified in the warrant as the date when it stops being in force—on that date; or
- (b) otherwise—6 months after the issue of the warrant.

“Subdivision D—Dealing with people who have been arrested**Situation to which Subdivision applies**

“65R.(1) This Subdivision applies if a person:

- (a) is arrested under a warrant issued under subsection 65Q(2); or
- (b) is arrested without warrant under a recovery order.

“(2) In this Subdivision:

‘**alleged contravention**’ means the alleged contravention because of which the alleged offender is arrested;

‘**alleged offender**’ means the person who is arrested;

‘**arresting person**’ means the person who arrests the alleged offender.

Arrested person to be brought before a court

“65S.(1) The arresting person must:

- (a) ensure that the alleged offender is brought before a court having jurisdiction under this Part before the end of the holding period applicable under subsection (4); and
- (b) take all reasonable steps to ensure that, before the alleged offender is brought before a court, the person who applied for the warrant or recovery order is aware:

- (i) that the alleged offender has been arrested; and
- (ii) of the court before which the alleged offender is to be brought.

“(2) The alleged offender must not be released before the end of the holding period except under an order of a court having jurisdiction under this Part.

“(3) This section does not authorise the holding in custody of the alleged offender after the end of the holding period.

“(4) The **holding period** is:

(a) if a Saturday, Sunday or public holiday starts within 24 hours after the arrest of the alleged offender—the longer of the following periods:

- (i) the period starting with the arrest and ending 48 hours later;
- (ii) the period starting with the arrest and ending at the end of the next day after the day of the arrest that is not a Saturday, Sunday or public holiday; or

(b) in any other case—the period starting with the arrest and ending 24 hours later.

Obligation of court—where application before it to deal with contravention

“65T.(1) This section applies if:

- (a) the alleged offender is brought before a court under section 65S; and
- (b) there is an application before the court for the alleged offender to be dealt with under section 112AD for the alleged contravention.

“(2) The court must, without delay, proceed to hear and determine the application.

Obligation of court—where no application before it, but application before another court, to deal with contravention

“65U.(1) This section applies if:

- (a) the alleged offender is brought before a court under section 65S; and
- (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under section 112AD for the alleged contravention; and
- (c) the court is aware that there is an application before another court for the alleged offender to be dealt with under section 112AD for the alleged contravention.

“(2) The court must, without delay:

- (a) order that the alleged offender is to be released from custody on his or her entering into a recognizance (with or without surety or security) that he or she will attend before the other court on a date, at a time and at a place specified by the court; or

- (b) order the arresting person to arrange for the alleged offender to be brought before the other court on such date and at such time as the court specifies, being a date and time such that the alleged offender is to be brought before the other court as soon as practicable, and in any event not more than 72 hours, after the order is made. 5

“(3) If a court makes an order under paragraph (2)(b) for the alleged offender to be brought before another court:

- (a) subject to paragraph (c), the alleged offender may be kept in custody until he or she is brought before the other court; and
 (b) if the alleged offender is brought before the other court as required by the order, the other court must, without delay, proceed to hear and determine the application mentioned in paragraph (1)(c); and 10
 (c) if the alleged offender is not brought before the other court as required by the order, he or she must be released without delay.

Obligation of court—where no application before any court to deal with contravention 15

“65V.(1) This section applies if:

- (a) the alleged offender is brought before a court under section 65S; and
 (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under section 112AD for the alleged contravention; and 20
 (c) so far as the court is aware, there is no application, or no longer any application, before any other court for the alleged offender to be dealt with under section 112AD for the alleged contravention.

“(2) The court must, without delay, order the release of the alleged offender. 25

Applications heard as required by subsection 65T(2) or paragraph 65U(3)(b)

“65W.(1) If a court hearing an application as required by subsection 65T(2) or paragraph 65U(3)(b) adjourns the hearing, the court must: 30

- (a) order the alleged offender to be kept in such custody as the court considers appropriate during the adjournment; or
 (b) order that the alleged offender is to be released from custody, either on his or her entering into a recognizance (with or without surety or security) that he or she will attend before the court on the resumption of the hearing or otherwise. 35

“(2) This section does not authorise the holding in custody of the alleged offender during an adjournment of proceedings that:

- (a) is expressed to be for a period of more than 24 hours; or
 (b) continues for more than 24 hours. 40

“Subdivision E—Obligations under parenting orders relating to taking or sending children from Australia

Interpretation

“65X.(1) In this Subdivision:

5 ‘**captain**’, in relation to an aircraft or vessel, means the person in charge or command of the aircraft or vessel;

‘**care order**’ means a specific issues order under which a person is responsible for a child’s long-term or day-to-day care, welfare and development;

10 ‘**child**’ means a person who is under 18;

‘**pending**’ has a meaning affected by subsection (2).

“(2) For the purposes of this Subdivision, if an appeal against a decision of a court in proceedings has been instituted and is pending, the proceedings are taken to be pending and sections 65Z and 65ZB (rather than sections 65Y and 65ZA) apply.

15

Obligations if residence order, contact order or care order has been made

“65Y.(1) If a residence order, a contact order or a care order (the ‘**Part VII order**’) is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not, intentionally or recklessly, take or send, or attempt to take or send, the child concerned from Australia to a place outside Australia except as permitted by subsection (2).

20

Penalty: Imprisonment for 3 years.

25 “(2) Subsection (1) does not prohibit taking or sending, or attempting to take or send, the child from Australia to a place outside Australia if:

(a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Part VII order was made; or

30 (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order.

Obligations if proceedings for the making of residence order, contact order or care order are pending

“65Z.(1) If proceedings (the ‘**Part VII proceedings**’) for the making of a residence order, a contact order or a care order are pending, a person who is a party to the proceedings, or who is acting on behalf of, or at the request of, a party, must not, intentionally or recklessly, take or send, or attempt to take or send, the child concerned from Australia to a place outside Australia except as mentioned in subsection (2).

35

40 Penalty: Imprisonment for 3 years.

“(2) Subsection (1) does not prohibit taking or sending, or attempting to take or send, the child from Australia to a place outside Australia if:

- (a) it is done with the consent in writing (authenticated as prescribed) of each other party to the Part VII proceedings; or
- (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings. 5

Obligations of owners etc. of aircraft and vessels if residence order, contact order or care order made

“65ZA.(1) This section applies if: 10

- (a) a residence order, a contact order or a care order (the ‘**Part VII order**’) is in force; and
- (b) a person in whose favour the Part VII order was made has served on the captain, owner or charterer of an aircraft or vessel a statutory declaration made by the person not earlier than 7 days before the date of service that: 15
 - (i) relates to the order; and
 - (ii) complies with subsection (4).

“(2) The person on whom the declaration is served must not, intentionally or recklessly and without reasonable excuse, permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3). 20

Penalty: 60 penalty units.

“(3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if: 25

- (a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the person who made the statutory declaration; or
- (b) the child leaves in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order. 30

“(4) The statutory declaration must contain:

- (a) full particulars of the Part VII order, including: 35
 - (i) the full name and the date of birth of the child to whom the order relates; and
 - (ii) the full names of the parties to the proceedings in which the order was made; and
 - (iii) the terms of the order; and
- (b) such other matters (if any) as are prescribed. 40

Obligations of owners etc. of aircraft and vessels if proceedings for the making of residence order, contact order or care order are pending

“65ZB.(1) This section applies if:

- 5 (a) proceedings (the ‘**Part VII proceedings**’) for the making of a residence order, a contact order or a care order are pending; and
- (b) a party to the proceedings has served on the captain, owner or charterer of a vessel a statutory declaration made by the party not earlier than 7 days before the date of service that:
- 10 (i) relates to the proceedings; and
- (ii) complies with subsection (4).

“**(2)** The person on whom the declaration is served must not, intentionally or recklessly and without reasonable excuse, permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

15

Penalty: 60 penalty units.

“**(3)** Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:

- 20 (a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the party who made the statutory declaration; or
- (b) in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.
- 25

“**(4)** The statutory declaration must contain:

- (a) full particulars of the Part VII proceedings, including:
- (i) the full name and the date of birth of the child to whom the proceedings relate; and
- 30 (ii) the full names of the parties to the proceedings; and
- (iii) the name of the court, the nature of the proceedings and the date of institution of the proceedings; and
- (iv) if an appeal has been instituted in the proceedings—the name of the court in which the appeal was instituted and the date on which it was instituted; and
- 35 (b) a statement that the Part VII proceedings are pending at the date of the declaration; and
- (c) such other matters (if any) as are prescribed.

General provisions applicable to sections 65ZA and 65ZB

“65ZC.(1) A declaration under section 65ZA or 65ZB may be served on the owner or charterer of an aircraft or vessel, or on the agent of the owner of an aircraft or vessel, by sending the declaration by registered post addressed to the owner, charterer or agent at the principal place of business of the owner, charterer or agent. 5

“(2) The captain, owner or charterer of an aircraft or vessel, or the agent of the owner of an aircraft or vessel, is not liable in any civil or criminal proceedings in respect of anything done in good faith for the purpose of complying with section 65ZA or 65ZB. 10

“(3) If an act or omission by a person that constitutes an offence against subsection 65ZA(2) or 65ZB(2) is also an offence against any other law, the person may be prosecuted and convicted under that other law, but nothing in this subsection makes a person liable to be punished twice in respect of the same act or omission. 15

State or Territory laws stopping children leaving Australia not affected

“65ZD. Nothing in this Subdivision prevents or restricts the operation of any law of a State or Territory under which:

- (a) action may be taken to prevent a child from leaving Australia or being taken or sent outside Australia; or 20
- (b) a person may be punished in respect of the taking or sending of a child outside Australia.

“Division 7—Child maintenance orders

“Subdivision A—What this Division does 25

What this Division does

“66A. This Division:

- (a) contains statements of objects and principles relevant to the making of child maintenance orders (Subdivision B); and
- (b) deals with the relationship between this Division and the *Child Support (Assessment) Act 1989* (Subdivision C); and 30
- (c) deals with applying for and making child maintenance orders (Subdivision D); and
- (d) deals with other aspects of courts’ powers in relation to child maintenance orders (Subdivision E); and 35
- (e) deals with when child maintenance orders stop being in force (Subdivision F).

THE STATUTES OF THE REPUBLIC OF SINGAPORE

WOMEN'S CHARTER

(CHAPTER 353)

1970 Ed. Cap. 47
1985 Ed. Cap. 353
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18 of 1961

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9 of 1967

14 of 1969

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16 of 1993

2 of 1994

30 of 1996

20 of 2001

REVISED EDITION 1997

(30th May 1997)

CHAPTER 5 — WELFARE OF CHILDREN

Meaning of "child"

122. In this Chapter, wherever the context so requires, "child" means a child of the marriage as defined in section 92 but who is below the age of 21 years.

[116

[26/80]

Arrangements for welfare of children

123.—(1) Subject to this section, the court shall not make absolute any decree for divorce or nullity of marriage or pronounce a decree of judicial separation unless the court is satisfied as respects every child —

- (a) that arrangements have been made for the welfare of the child and that those arrangements are satisfactory or are the best that can be devised in the circumstances; or
- (b) that it is impracticable for the party or parties appearing before the court to make any such arrangements.

[26/80]

(2) The court may if it thinks fit proceed without observing the requirements of subsection (1) if it appears that there are circumstances making it desirable that the decree nisi be made absolute or, as the case may be, that the decree for judicial separation should be pronounced without delay, and if the court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the child before the court within a specified time.

[26/80]

(3) In this section and in section 124, "welfare", in relation to a child, includes the custody and education of the child and financial provision for him.

[117

[26/80]

Custody of children

124. In any suit for divorce, or for nullity of marriage, or for judicial separation, the court may, at any stage of the proceedings, or after a decree absolute has been pronounced, make such orders as it thinks fit with respect to the welfare of any child and may vary or

discharge the said orders, and may, if it thinks fit, direct proceedings to be taken for placing the child under the protection of the court.

[118]

[26/80]

Paramount consideration to be welfare of child

125.—(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or (where there are exceptional circumstances making it undesirable that the child be entrusted to either parent) of any other relative of the child or of any organisation or association the objects of which include child welfare, or to any other suitable person.

[26/80]

(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard —

- (a) to the wishes of the parents of the child; and
- (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

[119]

[26/80]

Orders subject to conditions

126.—(1) An order for custody may be made subject to such conditions as the court may think fit to impose and, subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

[26/80]

(2) Without prejudice to the generality of subsection (1), an order for custody may —

- (a) contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;
- (b) provide for the child to be temporarily in the care and control of some person other than the person given custody;
- (c) provide for the child to visit a parent deprived of custody, or any member of the family of a parent who is dead or has

been deprived of custody, at such times and for such periods as the court may consider reasonable;

- (d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonable; or
- (e) prohibit the person given custody from taking the child out of Singapore.

[26/80]

(3) Notwithstanding subsection (1) but subject to any condition imposed under subsection (2) (e), where an order for custody is in force, no person shall take the child who is the subject of the custody order out of Singapore except with the written consent of both parents or the leave of the court.

[30/96]

(4) Subsection (3) does not prevent the taking out of Singapore for a period of less than one month of the child by the person given custody of the child or by any other person who has the written consent of the person given custody of the child to take the child out of Singapore.

[30/96]

(5) Any person who contravenes subsection (3) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding one year or to both.

[120

[30/96]

Power of court to order maintenance for children

127.—(1) During the pendency of any matrimonial proceedings or when granting or at any time subsequent to the grant of a decree of divorce, judicial separation or nullity of marriage, the court may order a parent to pay maintenance for the benefit of his child in such manner as the court thinks fit.

[30/96]

(2) The provisions of Parts VIII and IX shall apply, with the necessary modifications, to an application for maintenance and a maintenance order made under subsection (1).

[122

[30/96]

Power of court to vary order for custody

128. The court may at any time vary or rescind any order for the custody of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[126

[28/80; 30/96]

Power of court to vary agreement for custody

129. The court may, at any time and from time to time, vary the terms of any agreement relating to the custody of a child, whether made before or after 1st June 1981, notwithstanding any provision to the contrary in that agreement, where it is satisfied that it is reasonable and for the welfare of the child to do so.

[127

[26/80; 30/96]

Court to have regard to advice of welfare officers, etc.

130. When considering any question relating to the custody of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

[129

[26/80; 30/96]

Power of court to restrain taking of child out of Singapore

131.—(1) The court may on the application of the father or mother of a child —

- (a) where any matrimonial proceeding is pending; or
- (b) where, under any agreement or order of court, one parent has custody of the child to the exclusion of the other,

issue an injunction restraining the other parent from taking the child out of Singapore or may give leave for such child to be taken out of Singapore either unconditionally or subject to such conditions or such undertaking as the court may think fit.

[26/80]

(2) The court may, on the application of any interested person, issue an injunction restraining any person, other than a person having custody of a child, from taking the child out of Singapore.

[26/80]

(3) Failure to comply with an order made under this section shall be punishable as a contempt of court.

[130

[26/80]

Power of court to set aside and prevent dispositions intended to defeat claims to maintenance

132.—(1) Where —

- (a) any matrimonial proceeding is pending;
- (b) an order has been made under section 112 and has not been complied with;
- (c) an order for maintenance has been made under section 113 or 127 and has not been rescinded; or
- (d) maintenance is payable under any agreement to or for the benefit of a wife or former wife or child,

the court shall have power on application —

- (i) if it is satisfied that any disposition of property has been made by the husband or former husband or parent of the person by or on whose behalf the application is made, within the preceding 3 years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his wife or former wife of any rights in relation to that property, to set aside the disposition; and
- (ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

[26/80]

(2) In this section —

“disposition” includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money's worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made;

“property” means property of any nature, movable or immovable, and includes money.

[131

[26/80]

CHAPTER 6 — GENERAL PROVISIONS

Procedure

133. Subject to the provisions of this Part, all proceedings under this Part shall be regulated by the Rules of Court.

[132

[26/80]

Evidence

134.—(1) In suits under this Part, the parties and the husbands and wives of such parties shall be competent and compellable to give evidence.

[26/80]

(2) No witness whether a party to the suit or not shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless such witness has already given evidence in the same suit in disproof of his or her alleged adultery.

[26/80]

Sittings in camera

135. The whole or any part of any proceedings under this Part may be heard, if the court thinks fit, in camera.

[26/80]

Power to rescind decree nisi in certain cases

136. Where the court on granting a decree of divorce held that the only fact mentioned in section 95 (3) on which the petitioner was

CX v CY (minor: custody and access) [2005] SGCA 37

Suit No: CA 104/2004
Decision Date: 19 Jul 2005
Court: Court of Appeal
Coram: Chao Hick Tin JA, Lai Siu Chiu J, Yong Pung How CJ
Counsel: S Radakrishnan and Deepak Natverlal (Bernard Rada and Lee Law Corporation) for the appellant, Joyce Fernando and Krishnan Nadarajan (Robert Wang and Woo LLC) for the respondent

Family Law - Custody - Access - Parties living in different jurisdictions - Father granted right to bring child overseas - Whether overseas access order should be varied

Family Law - Custody - Care and Control - Distinction between custody and care and control orders

Family Law - Custody - Joint Orders - Circumstances where sole custody orders should be made instead of making joint or no custody orders - Circumstances where no custody orders should be made instead of making joint custody orders - Whether joint custody order should be varied

Facts

The respondent (“the father”) was a Dutch national working in Thailand. The appellant (“the mother”) was a Singapore national residing and working in Singapore. After their child was born, the parties continued to live together in Thailand, but separated subsequent to the mother’s discovery of the father’s extramarital affair. The mother then left the family home with the child, went to Phuket first and later returned to Singapore.

Subsequently, the father came to Singapore to apply for custody, as well as care and control of the child. The application was contested by the mother. The Family Court made no order on custody, but gave care and control of the child to the mother. The father was also allowed to bring the child out of jurisdiction once every six months for not more than 14 days so that the child could visit his paternal grandparents (“overseas access order”).

Both parties, being dissatisfied with the decision, appealed to the judge in chambers in the High Court, each seeking *inter alia*, sole custody of the child. The judge awarded the parties joint custody of the child. The care and control and overseas access orders were not varied.

Dissatisfied with this decision, the mother filed an appeal against the judge’s orders. She sought sole custody of the child on the basis that the inability of the parties to co-operate rendered the joint custody order unworkable. She argued that joint custody orders should only be made where there was a reasonable prospect the parties would co-operate. She also sought the variation of the overseas access order on the basis that once the child was taken out of Singapore, there was a real risk that the father might not return the child.

Held, dismissing the appeal:

(1) The principles governing appellate intervention in custody cases were the same as those that applied to general appellate intervention. The appellate court should only reverse or vary a decision made by the judge below if it was exercised on wrong principles, or if the decision was plainly wrong, as would be the case if the judge had exercised his discretion wrongly: at [15] to [17].

(2) The practical effects of a “no custody order” and a “joint custody order” were similar where a “care and control order” had been made. A “no custody order” might be preferred over a “joint custody order” in the following circumstances: (a) where there was no actual dispute between the parents over any serious matters relating to the child’s upbringing; (b) where there was a need to prevent parties from drawing the child into the battle over the extent of their custodial powers; and (c) where there was a need to avoid any negative psychological effect that came about when one parent “won” and the other “lost” in a custody suit: at [18] and [19].

(3) In the light of the fact that the mother, who had been given care and control, appeared to be inclined to exclude the father from the child’s life altogether by denying him access rights, it was necessary to make a “joint custody order” to remind the mother that the father had an equal say in more significant matters concerning the child’s upbringing, and that she should be more co-operative with him: at [20].

(4) In any custody proceedings, it was crucial that the courts recognised and promoted joint parenting so that both parents could continue to have a direct involvement in the child’s life. The making of joint or no custody orders was very much in the welfare of the child, and it reminded the parents that the law expected both of them to co-operate to promote the child’s best interest: at [26] to [28].

(5) There was an important distinction between “care and control orders” and “custody orders”. Care and control concerned the right to take care of a child and to make day-to-day, short-term decisions concerning the child’s upbringing and welfare. Custody without care and control (that is, custody in its narrow sense) concerned the right to make the more important, longer-term decisions concerning the upbringing and welfare of a child: at [31] and [32].

(6) The notion that joint custody should only be made where there was a reasonable prospect that the parties would co-operate was no longer appropriate in this day and age. Instead, in line with the outlook that parental responsibility was for life, the concept of joint parenting had to be expressly endorsed. Generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule. Exceptional circumstances where sole custody orders were made might be where one parent had physically, sexually or emotionally abused the child, or where the relationship of the parties was such that co-operation was impossible even after the avenues of mediations and counselling had been explored, and the lack of co-operation was harmful to the child: at [24] and [38].

(7) The judge was not plainly wrong in granting joint custody. The parties’ allegations against each other arose from their unhappiness with one another rather than from the fact that they did not care for the child and would be unable to co-operate for the child’s welfare. In this situation where both parents clearly loved the child, one could not rule out the possibility that the parties could eventually co-operate for the benefit of the child: at [39], [41] and [42].

(8) The overseas access order was upheld because it was in the interests of the child to maintain his bond with his paternal grandparents. The mother’s fear that the father might never return the child appeared exaggerated in the light of the fact that the father had always complied with the local courts’ orders and that he had consistently professed that he would never take the child away from the mother: at [47].

Case(s) referred to

AD v AE [2004] 2 SLR 505 (refd)

Aliya Aziz Tayabali, Re [2000] 1 SLR 754 (folld)

Bellenden v Satterthwaite [1948] 1 All ER 343 (folld)
Chan Teck Hock David v Leong Mei Chuan [2002] 1 SLR 177 (folld)
CJ v CK [2004] SGDC 135 (refd)
EY v EZ [2004] SGDC 91 (refd)
G (guardianship of an infant), Re [2004] 1 SLR 229 (folld)
G v G [1985] 2 All ER 225 (folld)
Ho Quee Neo Helen v Lim Pui Heng [1972-1974] SLR 249 (distd)
L v L [1997] 1 SLR 222 (refd)
Soon Peck Wah v Woon Che Chye [1998] 1 SLR 234 (refd)
T v C [2003] SGDC 304 (distd)
Yeap Albert v Wong Elizabeth [1998] SGHC 97 (refd)

Legislation referred to

Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ss 3, 5

Women's Charter (Cap 353, 1997 Rev Ed) ss 46(1), 126(1)

Women's Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2004 Rev Ed) s 8(1)(b), Form 27 of the Schedule

19 July 2005

Lai Siu Chiu J (delivering the judgment of the court):

1 This appeal arose out of various orders made by Kan Ting Chiu J ("the judge"), whereby joint custody of a child was given to his parents, with limited overseas access to the respondent ("the father"). Being dissatisfied with the judge's orders, the appellant ("the mother") appealed to this court. After considering the submissions for both sides, we decided to dismiss the appeal. We now give our reasons.

Background facts

2 At the centre of this appeal lies the fate of a young boy ("the child") who is just about four years old. His parents are still married to one another but their marriage has already broken down. On 11 May 2005, prior to the hearing of this appeal, the mother filed a divorce petition in the Family Court. Currently, the parties' relationship is severely strained. For more than a year, they have been fighting over the custody, care and control of the child. They have also been unable to agree on the terms of access. The pertinent facts are set out below.

3 The father is a Dutch national working in Thailand. The mother is a Singapore national residing and working in Singapore. Since 1999, they had been staying together in Bangkok. They were married in Singapore on 23 June 2001, and the child was born on 2 October 2001 in

Thailand. The child is both a Dutch national and a Singapore citizen. After the child was born, the parties continued to live together in Bangkok, but separated in May 2003 subsequent to the mother's discovery of the father's extramarital affair. The mother left the family home with the child and moved to Phuket before returning to Singapore in July 2003. Since then, the child has been residing with his mother and maternal grandmother in Singapore.

4 Sometime in October 2003, the father made an application to the Family Court under s 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("the GIA"), and sought sole custody, as well as care and control of the child, with reasonable access to the mother. This application was contested by the mother, who succeeded in persuading the district judge to dismiss the father's application. No order was made on custody, but care and control of the child was given to the mother. The father was effectively granted daytime access twice a month for five days each time in Singapore. He was also entitled to bring the child out of Singapore once every six months for not more than 14 days each time.

5 Both parties, being dissatisfied with the decision, appealed to a judge in chambers in the High Court. The father wanted sole custody, as well as care and control of the child. Alternatively, he sought joint custody, with increased access to the child. As for the mother, she wanted the district judge's orders set aside, and substituted with an order that she should have sole custody of the child, with reasonable access being granted in Singapore to the father.

6 The judge heard arguments and further arguments from both parties. Apart from some other minor amendments to the district judge's orders, the judge ordered that:

- (a) The parties were to have joint custody of the child.
- (b) The mother would have care and control of the child.
- (c) The child would not be removed out of jurisdiction by either party without the prior written consent of the other party. However, the father would be entitled to bring the child out of jurisdiction once every six months for not more than 14 days each time, provided that he furnished the mother with an itinerary and flight details at least 14 days in advance. The mother would hand over the child's passport to the father when handing over the child for trips.
- (d) The father would have daytime access to the child twice a month for five days each time. The father would collect from, and return the child to, the mother's residence and give the mother two days' advance notice of his intended visit.
- (e) Each party would inform the other in writing of any change of residential address or employment within five days of its taking place.
- (f) There would be liberty to apply for variation of the orders.

7 In this appeal, the mother's main contentions were against the grant of joint custody to the parties and of overseas access to the father.

The decision below

8 The judge disagreed with the district judge on the issue of custody. The district judge had thought it appropriate not to make a joint custody order on the basis that the acrimony between the parties would result in constant battles over the extent of their custodial powers. A sole custody order to the mother was also deemed inappropriate because the mother had not made out her case that she should have the *prima facie* advantage of determining long-term decisions about the child's upbringing. Accordingly, the district judge declined to make any orders as to custody.

9 The judge, on the other hand, ordered joint custody as he felt that “passivity [was] not necessarily the best course”. He did not find it advantageous to keep the matter in suspension even if there was some apprehension that the parties might not be prepared to exercise custody rights together. Instead, he was of the view that the making of a custody order, which could subsequently be varied, would allow the parties and the court to know if the parties could really work together. If they could not, it was still open to the court to make the necessary changes. He elaborated at [18] and [19] of his grounds of decision (see *CX v CY (minor: custody, care, control and access)* [2005] 1 SLR 724) that:

Prima facie, a parent of a child, by the fact of parenthood, has a right of custody over the child. That continues to be true even when the marriage of the parents has been dissolved because the parent-child relationship is not dissolved. When the question of custody is raised and has to be determined by the courts, the child’s welfare, which is the paramount consideration, is not best advanced by removing the rights and responsibility of custodianship from the parents, or by depriving one parent of his or her rights. When a parent has care and control over a child, and the other parent has access to the child, and is also obliged to pay or contribute towards his or her maintenance, it is appropriate for the child to be placed in their joint custody. If the relationship between the parents is acrimonious, granting the custody of the child to one parent to the exclusion of the other, or denying both of them custody, will add to the unhappiness between them.

As in this case, most disputes over the custody of children arise from the parents’ concern over the welfare and upbringing of the child. It would be ironic that one or both parents should then forfeit custody because of that. When there is *apprehension* that the parties may be unable to agree on what is good for the child, or may misuse the right of joint custodianship to draw the child into the conflict between them, to the detriment of his or her welfare, a joint custody order can and should still be made. It is only when it is evident that joint custody will not work that an alternative order should be made. For the reasons I have stated, it would then be preferable for the custody to be given to one parent than to make no custody order at all, unless both parents are unworthy of that responsibility.

[emphasis in original]

10 As for the issue of care and control, the judge agreed with the district judge that it was in the welfare of the child not to upset the current care arrangements and that the child would be better looked after by his mother and grandmother rather than by his father and a nanny. As neither party appealed against this order, we need not comment further on this issue.

11 On the question of access, the judge concurred with the district judge that, in the light of the child’s tender age, it would not be advisable, at least for the initial period, to grant overnight access or to allow the father to take the child to Bangkok. This was because it would not be in the child’s interest to be taken away from his familiar surroundings in Singapore into the company of the father who had had little contact with him since the separation. Nevertheless, the judge did not rule out the possibility that the terms of access could subsequently be varied when the bond between the father and child strengthened. The judge also affirmed the district judge’s observation that it was reasonable to grant overseas access once every six months for not more than 14 days each time so that the child, together with his father, could visit his paternal grandparents who resided in the Netherlands. The mother argued that the father should be ordered to provide security whenever he should take the child out of Singapore, but the judge found it inappropriate to order the provision of security because there were inadequate arguments and information on this issue.

The appeal

12 Initially, the mother raised three issues in this appeal. However, in her case, the mother did

not make any submission on the issue of whether the judge erred in failing to order the father to provide security when taking the child out of Singapore. In the course of the appeal, it appeared that the mother had dropped her contentions altogether concerning this requirement. As such, we dismissed this ground of appeal.

13 That left us with two main issues for determination:

- (a) Whether the judge erred in granting joint custody to the parties instead of sole custody to the mother; and
- (b) Whether the judge erred in allowing the father to bring the child out of Singapore once every six months for not more than 14 days each time.

14 In the course of the appeal, the mother raised another peripheral issue. She asked us to vary the judge's orders (see [6(e)] above) such that she need not reveal her employment address, as she did not want the father and his girlfriend to harass her at her workplace. This issue was not stated in her case. In any event, we decided not to disturb this order, as the employment address may be relevant in determining the whereabouts and financial position of the parties.

Principles governing appellate intervention in cases involving the welfare of children

15 At this juncture, it would be useful for us to revisit the principles governing appellate intervention in cases involving the welfare of children. A pertinent question that we had to answer was whether the principles in such cases are the same as those that apply to general appellate intervention. It is trite law that in deciding custody and upbringing issues, the court must regard the welfare of the child as the first and paramount consideration: s 3 of the GIA. We must stress that it does not always follow that the only way in which an appellate court can assess whether the judge below has exercised his discretion correctly is to carry out the same balancing exercise as the judge below did, and to allow the appeal if it were to reach a different conclusion as to what is in the welfare of the child. The House of Lords in *G v G* [1985] 2 All ER 225 has clarified that the principles governing appellate intervention are the same even in custody cases involving the welfare of children. Lord Fraser of Tullybelton opined (at 228):

The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion ...

16 Subsequently (*ibid*), Lord Fraser approved of Asquith LJ's observations in *Bellenden v Satterthwaite* [1948] 1 All ER 343 at 345:

We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.

17 Having regard to the fact that in such cases, there are often no right answers and the judge below was faced with the task of choosing the best of two or more imperfect solutions, we were in agreement with the above approach. We must stress that an appeal should not automatically succeed simply because the appellate court preferred a solution which the judge had not chosen. In other words, similar to the principles that apply to general appellate intervention, the appellate court should only reverse or vary a decision made by the judge below if it was exercised on wrong principles, or if the decision was plainly wrong, as would be the case if the judge had exercised his

discretion wrongly. This approach is consistent with this court's previous decision in *AD v AE* [2004] 2 SLR 505 at [21] where it was decided that although the substantive appeal involved custody of children, the discretionary powers to extend time should not be exercised differently from those in typical cases.

Whether the judge erred in granting joint custody to the parties instead of sole custody to the mother

18 As a preliminary point, we noted that both parties did not take issue with the judge's variation of the district judge's "no custody order" to that of a "joint custody order". We should make it clear from the outset that a "no custody order" is not tantamount to depriving both parents of custody. It is generally accepted that the practical effects of a "no custody order" and a "joint custody order" are similar where a "care and control order" has been made. In the normal course of events, the parents of a child will have joint custody over him. We thus agree with Prof Leong Wai Kum's comments in *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 538–539 that the making of a "no custody order" should be seen as leaving the law on parenthood to govern the matter, as both parents continue to exercise joint custody over the child. Such an order also affirms the approach of the courts not to 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 (see *Re Aliya Aziz Tayabali* [2000] 1 SLR 754 and *Re G (guardianship of an infant)* [2004] 1 SLR 229 ("Re G")).

19 Since the practical effects of a "no custody order" and "joint custody order" are similar, the more important question to address is: Under what circumstances should a "no custody order" be preferred over a "joint custody order"? As mentioned earlier, where there is no actual dispute between the parents over any serious matters relating to the child's upbringing, it may be better to leave matters at status quo, and not to make any custody order. As was suggested by Assoc Prof Debbie Ong in her article "Making No Custody Order: *Re G (Guardianship of an Infant)*" [2003] SJLS 583 at 587–588, in other circumstances where there is a need to prevent parties from drawing the child into the battle over the extent of their custodial powers, or where there is a need to avoid any possibly negative psychological effect that comes about when one parent "wins" and the other parent "loses" in a custody suit, it may also be appropriate not to make any custody order.

20 However, in the present case, it was our view that it was appropriate for a joint custody order to be made. This is because the symbolism of such an order may be used to remind the mother that the father has an equal say in more significant matters concerning the child's upbringing. Upon an examination of the affidavit evidence, it appeared to us that there had been previous attempts by the mother to exclude the father from the child's life altogether by denying him access rights. Since the mother, who had been given care and control, appeared to be so inclined, it was necessary to make a "joint custody order" instead of making a "no custody order", to send a signal to the mother that she should be more co-operative with the father.

21 We now turn to the substantive issue raised by the mother, that is, whether the judge erred in granting joint custody to the parties instead of sole custody to her. The mother argued that the judge had erred in making a joint custody order on the premise that it was only when it was evident that joint custody would not work that an alternative order should be made. The mother termed this an experimental joint custody order, which was definitely not in the interest of the child. She submitted that the joint custody order was unworkable as the parties had been unable to make any major decisions for the child from the time the order was made up to the day the present appeal was heard by us. In support of her case, the mother relied on the decision of Winslow J in *Ho Quee Neo Helen v Lim Pui Heng* [1972–1974] SLR 249 ("*Helen Ho*"), that joint custody orders should only be made where there was a reasonable prospect that parties would co-operate. She also cited various cases such as *CJ v CK* [2004] SGDC 135, *EY v EZ* [2004] SGDC 91 and *T v C*

[2003] SGDC 304 which had applied the principle in *Helen Ho*.

22 The mother argued that similar to these cases, the relationship between the parties in the present appeal had totally broken down and they could not work things out. It was undisputed that there was acute acrimony between the parties. They no longer communicated with each other directly, but only through their respective solicitors. The parties had also made various allegations and counter-allegations against one another in their affidavits. In view of the deep-seated hostility between them, the mother submitted that the judge went against the weight of authorities by making a joint custody order, which was both impractical and unrealistic. Instead, the mother relied on the authority of *Soon Peck Wah v Woon Che Chye* [1998] 1 SLR 234 (“*Soon Peck Wah*”) to argue that all things being equal, she, as the natural mother, should be granted sole custody of the child who was of tender years. Moreover, she had always been regarded as the primary caregiver of the child as compared to the father, who often travelled and had an uncertain residence status in Thailand.

23 In response, the father asked for the judge’s decision on joint custody to be affirmed because he believed that with the passage of time, there was a possibility that the parties would have moved on with their lives and would be able to make joint decisions in the child’s best interests. Besides, in the light of the child’s tender age, there was no need for the immediate determination of any important decisions relating to him. The father argued that the judge was not merely making an experimental order, but that his reasoning was consistent with the idea that as parents, the parties must take their joint parental responsibilities seriously and act in the child’s best interests. The father then relied on *Re G* to submit that cases like *Helen Ho* must be viewed in their proper perspective, and that a mere apprehension that the parties would not be able to exercise custody rights together was insufficient to warrant a grant of sole custody. It was further argued that acrimony alone was not enough to justify a sole custody order and that courts should be slow to deprive a parent of his natural parental rights of custody.

24 It was apparent to us from his judgment that the judge below was generally inclined towards the idea of joint custody. He opined that the child’s welfare, which was the paramount consideration, was not best advanced by removing the rights and responsibility of custodianship from the parents or by depriving one parent of his or her rights. We accepted the father’s submission that the judge’s view on the law of custody was consistent with the notion that acrimony alone was not sufficient to justify a sole custody order. We were of the view that the decision of *Helen Ho* should be clarified. *Helen Ho* was decided more than 30 years ago, and in our view, it has been given too much weight not only by practitioners but also by subsequent judicial decisions. To our minds, the notion that joint custody should only be made where there is a reasonable prospect that the parties will co-operate is no longer appropriate in this day and age. Instead, we felt that in line with the outlook that parental responsibility is for life, the time was right for us to expressly endorse the concept of joint parenting. We believe that, generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule. We will now elaborate on our views.

How the law of custody can support joint parenting

25 This court had previously said in *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR 177 at [12]:

[I]t is our opinion that the interest of the children demands that both parents should be involved in determining what is best for them in that regard. While as between the parties there is bitterness, it does not necessarily follow that this would spill over in determining the educational needs of the children. The court should not decree an arrangement which gives an impression to a child that either the father or mother does not care about his welfare. As we have no doubt that both parents have and will continue to have the children’s interest at

heart, we do not think that there would be any insurmountable difficulties. In the unlikely event that an impasse should arise, the assistance of the court could always be sought.

26 This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Charter") exhorts both parents to make equal co-operative efforts to care and provide for their children. Article 18 of the United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory, also endorses the view that both parents have common responsibilities for the upbringing and development of their child. Similarly, jurisdictions like England and Australia have adopted approaches that impose on both parents the concept of life-long parental responsibility. With parliamentary intervention in these jurisdictions, the very concept of custody orders was abolished as it was acknowledged that it was in the interests of the child to have both parents involved in his life. There can be no doubt that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents. The needs of a child do not change simply because his parents no longer live together. Thus, in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.

27 We note that local academic opinion has long advocated using the law of custody to preserve joint parental responsibility. The making of joint or no custody orders is very much in the welfare of the child. As was aptly put by Debbie Ong in her article, "Parents and Custody Orders – A New Approach" [1999] SJLS 205 at 223:

When a marriage breaks up, the child is in fear of losing his parents, his siblings and his familiar home. Joint custody protects the child from the reality and the fear of losing a parent. A child who can understand that both his parents have custody of him and be assured that both parents continue to be involved in his life may feel more secure. He will feel less abandoned even though family life has to undergo some changes. If the child believes that both his parents are still cooperating and raising him together despite the breakdown of their own relationship, he may be spared from suffering "from a conflict of loyalties". Further, in granting joint custody, parents are expected to consult each other regarding important matters and it is beneficial that the perspectives from a mother and a father are brought together in a decision.

28 More significantly, we feel that the making of joint or no custody orders reminds the parents that the law expects both of them to co-operate to promote the child's best interest. With the grant of joint or no custody orders, the likelihood of the non-custodial parent being excluded from the child's life is much reduced. It also encourages the parent who does not reside with the child to continue to play his or her role in joint parenthood.

29 Accordingly, we agree with the recognition by the judge below that joint custody can still be ordered even if there is an apprehension that the parties may be unable to agree. This is a move in the right direction in support of joint parenting. Recent cases have revealed an emerging trend where the courts are no longer inclined to assume that sole custody orders should be made simply because parents display animosity towards each other in the midst of litigation. As Tan Lee Meng J rightly observed in *Re G* ([18] *supra*) at [8], even where the parents have an acrimonious relationship at the time of the custody proceedings, making a sole custody order is not the only possible outcome. We have mentioned earlier that cases like *Helen Ho* must be viewed in their proper perspective and should not always be relied on to justify an order for sole custody merely because the child's parents have an acrimonious relationship. *Helen Ho* was a unique case in itself where there was cruelty on the part of the father. Moreover, Winslow J made the statement in response to a request for joint custody, as well as care and control orders. It is obvious that a joint care and control order, requiring the parties to agree on every day-to-day decision relating to the child, is unworkable where the parties have a bitter relationship with each other. However, a joint

custody order is of a different nature.

“Custody and “care and control” orders

30 It would be appropriate at this juncture to define what “custody” and “care and control” orders entail. The lack of an authoritative opinion on what each order involves has contributed largely to the constant “custody” disputes, and the law of custody in Singapore is in a state of confusion because the demarcation between the two orders has not been made clear. Often, in an attempt to limit the powers of the custodial parent, which is indicative of a trend towards joint or no custody orders in support of joint parenting, the definition of “custody orders” has been muddled with that of “care and control orders” (see *L v L* [1997] 1 SLR 222 at [21]). The statutes are also of little assistance in the definition of either order. The GIA is silent as to the definition of “custody orders”, and the closest definition we have is in s 126(1) of the Charter, which states that the person given custody shall be entitled to decide all questions relating to the upbringing and education of the child. The reference to “non-custodial parent” in Form 27 of the Schedule, pursuant to s 8(1)(b) of the Women’s Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2004 Rev Ed), as the “parent who does not live with the child” also does not help to clarify the law. It appears to give the impression that the non-custodial parent is the parent who does not live with the child and conversely, the custodial parent is the one who lives with the child. This leaves out the possibility that a custodial parent, who is not granted a care and control order, may also not live with the child.

31 To understand what each order entails, we must first realise that, where parties are splitting up, custody as a general concept is divided into two smaller packages, *ie*, “care and control” and residual “custody”. In this context, residual “custody” is no longer the same concept as our general understanding of custody. Instead, residual “custody” is the package of residual rights that remains after the grant of a care and control order that dictates which parent shall be the daily caregiver of the child and with whom the child shall live. To put it simplistically, “care and control” concerns day-to-day decision-making, while residual “custody” concerns the long-term decision-making for the welfare of the child.

32 As was appropriately summarised by Anthony Dickey in *Family Law* (LBC Information Services, 3rd Ed, 1997) at pp 326–327:

[A]t common law, care and control concerns the right to take care of a child and to make day-to-day, short-term decisions concerning the child’s upbringing and welfare. Custody without care and control (that is, custody in its narrow sense) concerns the right to make the more important, longer-term decisions concerning the upbringing and welfare of a child.

33 In other words, a “custody order” only gives the parent the *residual* right to decide on long-term matters affecting the child’s welfare. For instance, the right to decide on the type of education resides with the parent(s) with custody as it concerns the more important and long-term aspects of a child’s upbringing. The right to decide the particular school may also reside with the custodian(s) depending on the importance of this decision to the child’s education. However, the right to decide how a child should dress or travel to school, what sport he should take up or musical instrument he should play and similar ordinary day-to-day matters, resides with the parent who has care and control. Such a demarcation between the two types of orders proposed by Dickey is generally consistent with our local jurisprudence where matters such as choice of schools, tutors or healthcare have been regarded as matters for the custodian(s) to decide (for example, see *Yeap Albert v Wong Elizabeth* [1998] SGHC 97 at [16]).

34 For the development of the law of custody, we deem it necessary to lay down a general definition detailing the scope of each order. Our observation is that in most *custody* cases, parties are simply concerned over which parent has *care and control* and access. Parties labour under the mistaken impression that if they are denied custody, they will be unable to see their child anymore

and will lose all contact with the child. We regret to say that some family law practitioners further muddy the waters by failing to advise their clients adequately as to what “custody orders” actually entail. If parties are assured of their respective rights to care and control and access, we foresee lesser tension and acrimony in disputes over custody issues.

35 Adopting this narrow definition of “custody”, it appears that there will be relatively few occasions where significant and longer-term decisions need to be made for the child. Hence, parties will seldom need to come together to make a joint decision even if joint or no custody orders were granted. We should add that it is an almost impossible task for us to lay down an exhaustive list of matters which will fall under the concept of residual custody. The line is not always clear as to what matters would be considered the important and longer-term decisions concerning the upbringing and welfare of a child. It suffices to say that decisions pertaining to religion, education and major healthcare issues would fall into such a category.

Joint or no custody orders to be preferred

36 In this day and age, we feel that the preferable position in the law of custody is that advocated by the father, *ie*, to preserve the concept of joint parental responsibility, even if the parties may harbour some acrimony towards each other. Often, advocates of the *Helen Ho* position rely on the acrimonious relationship of the parties to argue that joint custody will be detrimental to the welfare of the child. However, they fail to appreciate the fact that some degree of acrimony is to be expected when parties are undergoing the stresses of a marital breakdown. As allegations of wrongdoings and breaches of fidelity can be hurtful, the time when the marriage breaks down may not be the best time to assess whether both parents can co-operate for the rest of the child’s life. We believe that the fear that parties cannot co-operate may be overstated. It is a quantum leap in logic to assume that the parties’ inability to co-operate during the period of divorce or custody proceedings equates to an inability to agree on the future long-term interests of the child.

37 To begin with, most custody cases arise over each parent’s concern for his or her child’s welfare. We agree with the judge’s observation that the parties’ relationship may be currently strained but there is room for hope that they will act in the best interests of the child in future. With the passage of time, emotions would have quietened down, the parties would have moved on with their respective lives and they should be able to make joint decisions objectively in the child’s best interests. We were therefore inclined towards the grant of either joint or no custody orders in support of joint parenting. Consequently, the judge was right in granting a joint custody order so as to send a message to the parties to co-operate with one another. Such an order would also remind the mother that she should consult the father on long-term and significant matters concerning the child’s welfare and upbringing.

38 We would emphasise that recent decisions have been inclined towards making joint or no custody orders due to the need to ensure that the child becomes attached to both parents. The idea behind joint or no custody orders is to ensure that neither parent has a better right over the child and that both have a responsibility to bring the child up in the best way possible. Similarly, the child has a right to the guidance of both his parents. Parenthood is a lifelong responsibility and does not end at a particular age of the child, but continues until the child reaches adulthood. The question we have to answer will always be what is best for the child in the future. We agree with Assoc Prof Debbie Ong that the exceptional circumstances where sole custody orders are made may be where one parent physically, sexually, or emotionally abuses the child (see Debbie Ong, “Making No Custody Order” ([19] *supra*) at 586), or where the relationship of the parties is such that co-operation is impossible even after the avenues of mediation and counselling have been explored, and the lack of co-operation is harmful to the child (see Debbie Ong, “Parents and Custody Orders” ([27] *supra*) at 222–223).

Whether exceptional circumstances exist to warrant sole custody

39 Adopting the view that joint or no custody orders should be granted unless there are exceptional circumstances, we were of the opinion that the judge was not plainly wrong in granting joint custody, notwithstanding the allegations and counter-allegations made by each party. The mother had made various allegations about the father's failure to pay for the child's maintenance and medical expenses. It was also alleged that the father used foul language and abused her in the presence of the child. Not only was there a communication breakdown between the parties, the geographical distance made it even harder for the parties to communicate. It was argued that the father had failed to discharge his parental duty as he scarcely visited the child during periods of access and often placed his personal interest over the child's welfare. The mother also relied on the sexual misconduct of the father to argue that the father's lifestyle would have a negative influence on the child if the father were to be part of the decision-making process.

40 On the other hand, the father alleged that the mother was trying to prevent him from contacting the child. The father had sent various e-mails explaining his desire to maintain contact with the child. He also professed that he was always willing to maintain the child and his failure to pay maintenance was due to the fact that he did not know the whereabouts of the mother and child.

41 We had reviewed the affidavit evidence of the parties as exhibited in their respective cases. An examination of the various allegations would reveal that most of them arose from the parties' unhappiness with one another rather than from the fact that they did not care for the child and would be unable to co-operate for the child's welfare. The mother's concerns that the father was irresponsible and had compromised the child's welfare, have not been borne out. Instead, the allegations and cross-allegations were likely due to differences in the parties' parenting expectations and lack of trust in one another. It must be kept in mind that in hotly contested custody cases such as the present one, where both parents love their child dearly, there is often a tendency to exaggerate the wrongdoings of the other party.

42 In this situation where both parents clearly love the child, we agreed with the judge that we could not rule out the possibility that the parties could eventually co-operate for the benefit of the child. We appreciate the mother's concerns that communication will be difficult as the father is based in Bangkok. However, with modern-day technology, we do not think that it will be an insurmountable task for both parties to keep in contact and for the mother to consult the father on longer-term decisions concerning the child's upbringing. We therefore concluded that the judge, having had the opportunity to assess the parties in person, was not plainly wrong in coming to a decision that a joint custody order would be in the welfare of the child.

43 Since we had decided to dismiss the mother's appeal, it was not strictly necessary for us to deal with her submissions for sole custody. We would however add a word of caution that the case of *Soon Peck Wah* should not be taken beyond its context. Within that case itself, this court had taken pains to make it clear that the decision was not intended to revive the old presumption of maternal custody. Parliament has also mandated that neither parent should have a better claim to the custody of the child. At the time of the decision, there was no proper delineation between "custody" and "care and control" orders, so one should not be quick to jump to a presumption that *Soon Peck Wah* equates to a judicial preference for mothers to have custody of young children where all things are equal. At most, *Soon Peck Wah* is helpful in the determination of who should be granted care and control; it cannot be denied that a young child requires a mother's daily care.

Whether the judge erred in allowing the father to bring the child out of Singapore once every six months for not more than 14 days each time

44 The mother submitted that the judge had made an experimental access order by granting the father overseas access. It was argued that, for the child to maintain contact with his father and paternal grandparents, it was sufficient for access within Singapore because there was a real risk that once the child was taken out of jurisdiction, the father might not return the child, especially in

the light of the uncertainty of the father's residential status in Thailand. Moreover, Singapore was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 so there would be no avenue for the child to be returned to Singapore. The mother also relied on the judge's observation in denying overnight access at least for the initial period (*viz* it would not be in the child's interest to be taken away from his familiar surroundings in Singapore into the company of his father who had had little contact with him since the separation), to argue that the same reasoning should apply to overseas access. As an alternative, the mother suggested that the paternal grandparents could visit the child in Singapore, as overseas travel was unsuitable for the young child who often fell ill.

45 Initially, the father contended that the mother had failed to comply with the current access orders, and that in any event, the access orders should be varied. However, we did not entertain this submission because the father did not file a cross-appeal as required.

46 In response to the mother's arguments, the father argued that there was no real risk that he would not return the child to the mother. The father professed that he would not take the child away from the mother. In fact, if he had wanted to do so, he would have done so a long time ago during his periods of access. Instead, he had always complied with the access orders. He had also submitted to the local courts' jurisdiction by making the first application under the GIA seeking custody, care and control, complying with the maintenance orders made by the local courts, as well as attending each and every court hearing. The father denied that he had an uncertain residence status and clarified that the paternal grandparents were no strangers to the child.

47 Where parties are in different jurisdictions, the grant of overseas access is always an issue due to the perennial fear of each party that he or she may not get the child back. In our opinion, the mother had failed to show that the judge, having had the opportunity to assess both parties in person, was plainly wrong in allowing overseas access. We felt that it was in the interests of the child to maintain his bond with his paternal grandparents. The mother's fear that the father may never return the child appeared exaggerated in the light of the fact that the father had always complied with our courts' orders and that he had consistently professed that he would never take the child away from the mother. The father seemed to be a responsible parent in this respect.

48 The mother also relied on the authority of *T v C* ([21] *supra*) to argue that overseas access should only be granted when the child reaches 12 years old and is better able to take care of himself. In *T v C*, after the parties began to live separately, the husband went back to live in the US, while the wife and the child remained in Singapore. Both parties sought sole custody, care and control of the child, with the husband seeking joint custody in the alternative. On the issue of access, the husband sought liberal access to the child, including overseas access in the US in June and December every year. However, the wife argued that overseas access should only be granted from the time the child turned 13 years old. The district judge agreed with the wife and considered it prudent to wait till the child was of an older age before he was to travel to the US for overseas access. This was because the husband and the child had not really been in contact for the past few years. The child, being only six years old, would need time to forge a bond with his father, and to feel comfortable about leaving home to be with the father. He would also need time to grow up a little more, to be able to take care of himself while away from home, before he commenced travelling to the USA for overseas access. Thus, overseas access was granted only when the child turned 12 years old.

49 In our view, the present case was distinguishable from *T v C* because in the latter, the father and child had not been in contact for the past few years so there was the fear that the child would need some time to bond with his father. In contrast, in the present case, the father and child had only lost contact for over half a year. Since then, the father had at times exercised his access rights. Thus, there was no question of the child's level of comfort with his father being an obstacle to overseas access for only twice a year, and for not more than 14 days each time. We therefore

upheld the overseas access order because we found it beneficial for the paternal grandparents to be involved in the child's upbringing. The fact that the paternal grandparents were present in court for the appeal testified to their concern and interest in their grandson.

Conclusion

50 This was a situation where the court was faced with a difficult decision concerning the fate of a young child. The child is inevitably the unseen and unheard victim of the breakdown in the parents' marital relationship. In furtherance of the child's welfare, we wanted to send a signal that joint parenting is to be preferred.

51 It is hoped that by setting out the proper guidelines to be applied in custody cases as well as defining the general scope of "care and control" and "custody" orders, practitioners will be better equipped to advise their clients.

52 For the foregoing reasons, we dismissed the appeal. Accordingly, no variation was made to the judge's orders. We also made no orders on costs and ordered the security deposit to be returned to the mother.

Appeal dismissed.

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ANNEX E: REFERENCES TO “CUSTODY”

Acts of Parliament

- 1 Administration of Muslim Law Act (Cap. 3): sections 35A, 52, 53, 55.
- 2 Adoption of Children Act (Cap. 4): sections 4, 7, 8.
- 3 Children and Young Persons Act (Cap. 38): sections 5, 6, 9, 12, 14, 16, 24, 25, 49, 81, 83, 84, 88.
- 4 Children Development Co-Savings Act (Cap. 38A): section 4.
- 5 Compulsory Education Act (Cap. 51): section 2.
- 6 Guardianship of Infants Act (Cap. 122): sections 3, 5, 7, 8, 13, 14.
- 7 Maintenance Orders (Reciprocal Enforcement) Act (Cap. 169): section 4.
- 8 Supreme Court of Judicature Act (Cap. 322), section 17A.
- 9 Women’s Charter (Cap. 353): sections 68 to 70, Part X Chapter 5, 145, 156, 158, Second Schedule.

Subsidiary legislation

- 10 Muslim Marriage and Divorce Rules (Cap. 3, Rule 1): rules 14, 25.
- 11 Children Development Co-Savings Regulations (Cap. 38A, Regulation 2): regulations 8.
- 12 Rules of Court (Cap. 322, Rule 5): O 52 r 5; O 68 r 4; Appendix A, Forms 148 to 151, 153.
- 13 Women’s Charter (Matrimonial Proceedings) Rules (Cap. 353, Rule 4): rules 2, 26A, 29, 40.