

CLI v CLJ
[2021] SGHC(A) 3

Case Number : Originating Summons No 20 of 2021
Decision Date : 10 June 2021
Tribunal/Court : Appellate Division of the High Court
Coram : Woo Bih Li JAD; Quentin Loh JAD
Counsel Name(s) : Low Hong Quan and Tan Hoe Shuen (Silvester Legal LLC) for the applicant; Yeo Khee Chye Raymond (Raymond Yeo) for the respondent.
Parties : CLI — CLJ

Civil Procedure – Appeals – Leave

10 June 2021

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 This was a matrimonial dispute. The husband applied for leave to appeal against a decision of a judge of the High Court (General Division) (“the HC Judge”). The husband’s appeal arose from an initial decision by a District Judge (“the DJ”) which was affirmed on appeal by the HC Judge in respect of the care and control of the elder of two sons (“A”) of the marriage.

2 Before divorce proceedings were commenced by the husband, orders for the custody, care and control of A had already been made. The DJ had granted joint custody of A to both parties, and sole care and control of A to the wife. The husband was granted access to A from the week of 13 November 2017. Starting from the week of 4 December 2017, the husband’s access was specified to be as follows:

(a) Wednesday 6.30pm to 8.30pm; and

(b) Friday 6.30pm to Saturday 9.30pm.

3 Subsequently, the husband applied to vary this order so as to reverse care and control of A to him, with the wife having supervised access to A. On 27 December 2018, the DJ dismissed this application and the husband’s appeal to a High Court Judge was dismissed on 31 July 2019.

4 On 30 April 2018, the husband commenced divorce proceedings. Interim Judgment was granted on 8 October 2018.

5 The parties reached agreement on various ancillary matters. They agreed to have joint custody of A but disagreed on the care and control of A. The husband sought shared care and control in the sense that one parent was to have A from Friday evening to Monday morning and the other parent was to have A from Monday morning to Friday evening. The husband was happy to take either option.

6 The DJ described the husband’s suggestion as effectively a 5:2 day split where one parent would be a weekday parent and the other a weekend parent. The DJ was of the view that it was not conceptually accurate for the husband to describe his suggestion as a shared care and control arrangement. This was because shared care and control meant that the child would have two homes and two caretakers and would spend more or less an equal amount of time with each parent. In

effect, the husband's suggestion was either that (a) care and control would be reversed, if the husband got weekday access; or (b) the husband's weekend access would be increased, if he got the enlarged weekend.

7 The DJ was of the view that there was no good reason to reverse care and control from the wife to the husband. There was also no good reason to increase the husband's weekend access as both parents worked on weekdays. When this quandary was drawn to the attention of the husband's counsel, the counsel said that the husband actually wanted sole care and control but was willing to have shared care and control as a compromise. The DJ expressed concern at this "creative and extremely flexible approach to shared care and control" as, in his view, facts which supported sole care and control were very unlikely to support shared care and control.

8 On 16 October 2020, the DJ made final ancillary orders. As regards A's custody, care and control and access, the DJ made similar orders as before (see [2] above), with elaboration on other sub-issues like school holiday access and overseas access. The DJ also made orders for the maintenance of the two sons and the wife.

9 On 29 October 2020, the husband filed an appeal on some aspects of the DJ's decision, including the DJ's orders regarding A. The husband's appeal in respect of the DJ's decision to grant sole care and control of A to the wife was dismissed by the HC Judge on 21 April 2021. We will elaborate later on the decision of the HC Judge, as the husband's application for leave to appeal appeared to arise solely from what the DJ said about shared care and control. For reasons that will become clear below, it was significant that the HC Judge did not mention that shared care and control would necessarily mean that the child would spend more or less an equal amount of time with each parent.

10 The written submissions from the husband for leave to appeal alleged that his appeal raised the following questions of importance upon which further argument and a decision of a higher tribunal would be to the public advantage:

(a) Whether shared care and control necessarily meant that the child was to spend approximately equal time with both parents, or whether shared care and control was possible in a situation where a child spent most of his time with a parent for pure convenience but still spent a significant period of time with the other parent who was willing and able to be the child's primary caregiver?

(b) Whether shared care and control referred to the status of conferring parental authority and privileges on both parents who were found to be similarly competent to protect, nurture and care for a child rather than just a label to refer to a living arrangement in which the child spent equal time at two places of residence?

11 The husband submitted that it was important to clarify whether shared care and control necessarily meant that a child was to spend approximately equal time living with both parents. According to the husband, there was no decision of the Court of Appeal on this point and thus a decision of a court higher than the High Court (General Division) would be to the public advantage. A related argument was that an order for shared care and control should not be premised on the duration of time spent with the child. For example, a child might spend more time with a parent because of convenience but otherwise have minimal interaction with that parent. Instead, the child might have more interaction with the other parent whom he had less time with. The focus should be on a parent's competence and willingness to care for a child.

12 We were of the view that while it is true that a higher court has not clarified whether shared care and control necessarily means that a child must share approximately equal time with both parents, the outcome of such a clarification would not affect the substantive outcome of the proceedings below. It is important to bear in mind that it is not sufficient for an applicant seeking leave to appeal to say that there is an important question for which a decision by a higher court would be to the public advantage. The applicant has also to show that the outcome he seeks in relation to that question also has a material bearing on the outcome of the main hearing of the appeal (see *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [82]).

13 Here, it seemed to us that although the DJ had considered that the husband's characterisation of his suggestion was premised on a flawed understanding of the concept of shared care and control, the ultimate reason for the DJ's decision was not that the husband's suggestion had not met the meaning of shared care and control, but that it was not in the best interest of A. Therefore, even if the concept of shared care and control was broad enough to include the husband's suggestion of a 5:2 day split, this would not have affected the eventual outcome of the DJ's decision as the DJ did not think that it was in the interests of A to make such a split. Likewise, the focus of the DJ's analysis was not so much the question as to whether A's parents were equally capable and willing to care for him, but whether the husband's suggestion was in the best interest of A. The husband's argument that a parent should have care and control if he had more interaction with the child than the other parent also did not assist the husband because on the facts before the court, there was no suggestion that the husband had had more interaction with A than the wife had.

14 It was also important to bear in mind the reasons for the decision of the HC Judge. The HC Judge was also of the view that under a shared care and control arrangement, a child would have two homes and two primary caregivers. However, as mentioned above, he did not say that the concept entailed the child spending approximately equal time with each parent. Rather, he emphasised that the paramount consideration in deciding whether to grant a shared care and control arrangement is whether such an arrangement is the interest of the child. Indeed, this was undisputed.

15 The HC Judge noted the following arguments of the husband:

- (a) Both parents share a strong love for A.
- (b) Under the husband's suggested arrangement, A would see the younger child more as the husband planned to have the younger child move from a public hospital to stay with him.
- (c) The husband is a good parent.

16 However, the HC Judge was of the view that bearing in mind that A was still young at eight years of age, the husband's suggestion of shared care and control would destabilise and unnecessarily disrupt the child's life. Also, the husband's suggestion required greater cooperation between the parents. While the husband submitted that there were no real instances of acrimony between him and the wife, the HC Judge was of the view that, from the evidence, there was acrimony between the parents which rendered questionable their ability to show the level of cooperation required by the husband's suggestion. In summary, the appeal was dismissed regardless of whether the husband's suggestion came within the concept of shared care and control and regardless of whether the husband was equally capable of caring for A. As mentioned, there was no suggestion that the husband had more interaction with A than the wife had.

17 Accordingly, the outcome of both the DJ's and the HC Judge's decisions did not depend on the answer to the questions which the husband sought to be addressed. It seemed to us that the

husband was using those questions to seek leave to appeal against the decision of the HC Judge when leave would otherwise not have been available. We therefore dismissed the husband's application for leave to appeal.

18 Taking into account the costs submissions, we awarded costs of \$2,600 inclusive of disbursements to the wife.