

VDX v VDY and another appeal
[2021] SGHCF 2

Case Number : District Court Appeal Nos 115 and 116 of 2019
Decision Date : 07 January 2021
Tribunal/Court : High Court (Family Division)
Coram : Debbie Ong J
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Parties : VDX — VDY

Family Law – Variation – Care and control

7 January 2021

Debbie Ong J:

Introduction

1 The matters before me were the parents’ cross-appeals against the variation of a care and control order made by the district judge (“the DJ”) in relation to the youngest child of the marriage, “C”. HCF/DCA 115/2019 (“DCA 115”) was the appeal filed by C’s mother (“the Mother”) and HCF/DCA 116/2019 (“DCA 116”) was the appeal filed by C’s father (“the Father”).

2 These appeals revolved around two narrow issues: first, which parent would have care and control of C during dinner time on Chinese New Year’s Eve and second, when the Father should return C to the care and control of the Mother after the end-of-year school holidays (referred to as the “December holidays”). These detailed arrangements were not specified in the original order sought to be varied and it was not disputed that in the seven years since the divorce, the parents had worked out such practical and specific arrangements themselves. Each parent filed separate applications seeking a variation of the original order; the conflict between them had escalated recently such that they were no longer able to agree on these two matters (apart from others in separate proceedings).

Background

3 The Mother and the Father were married on 10 January 1987 and the final judgment of divorce was granted on 28 September 2012. The divorce proceedings were uncontested and the parties entered into a settlement deed on the ancillary matters on 23 April 2012 that was incorporated into the interim judgment of divorce granted on 25 June 2012 as a consent order (“the Consent Order”).

4 The parties had four children together (“the Children”). Their oldest child has passed away. Their older daughter is 22 years old and has been studying in Australia since 2016, while their younger daughter is 21 years old and has been studying in Ireland since 2018. The younger daughter was 20 years old at the time the applications were filed and turned 21 just prior to the hearing of these appeals. At the hearing on 1 October 2020, both parents’ counsel agreed that no custody orders were

applicable to the daughters as both had reached the age of majority. Thus, the appeals only related to orders concerning their son, C, who is presently 13 years old. For convenience I will refer to the orders as relating to the "Children" as the parents have framed their applications as a variation of the original terms of the Consent Order, which was entered into when the Children were all minors.

5 The relevant parts of the Consent Order in relation to custody, care and control of the Children are set out below:

- (a) The parents shall have joint custody, care and control of the Children.
- (b) The Children shall reside in and attend school in Singapore unless otherwise agreed between the parents.
- (c) The Father is to have care and control of the Children for at least the following periods:-
 - (i) From 6.00 pm on Friday to 8.00 pm on Sunday each week during school terms, regardless of whether Monday is a public holiday or a school holiday during the school term;
 - (ii) In the event that Friday is a public holiday or a school holiday during a school term, from 10.00 pm on Thursday to 9.00 pm on Sunday;
 - (iii) The Children's school holidays at the end of the last term of each school year;
 - (iv) Whenever the Mother is not in Singapore, subject to another provision providing for overseas travel with the Children.
- (d) The Mother is to have care and control of the Children for the rest of the time.

6 To summarise, during the school term the Mother had care and control of the Children on weekdays while the Father had care and control of the Children on weekends. During the school holidays, the Mother had care and control of the Children except for the December holidays, when the Father had care and control of them. These arrangements might be viewed as maintaining parity between the parents and they appeared to have worked relatively smoothly for a significant number of years after the divorce. Until as recently as 2018, the parents were still communicating directly with each other to sort out care arrangements for the Children with cooperation and flexibility.

7 The relationship between the parents deteriorated somewhat in 2019. Both parents blame the other for this decline in their relationship. The Mother claimed it was because of a statutory demand she had served on the Father on 7 December 2018 for his failure to pay her the sum they had agreed upon under the Consent Order (which totalled \$60 million), while the Father claimed it was due to the Mother's deliberate non-communication on certain matters involving the Children. Since 2019, the parents have largely communicated through their counsel.

The proceedings below

8 On 6 May 2019, the Mother filed FC/SUM 1510/2019 seeking a variation of the existing care and control order on, *inter alia*, the following terms:

- (a) While the Father shall continue to have care of the Children for the December holidays, the Children shall be returned to the Mother by no later than 9.00 pm on 31 December.
- (b) The Mother shall have care of the Children from 6pm on the eve of Chinese New Year to

10.00 am on the first day of Chinese New Year and the Father shall have care of the Children from 10am on the first day of Chinese New Year to 10.00 am on the second day of Chinese New Year on even-numbered years, while the Father shall have care of the Children from 6.00 pm on the eve of Chinese New Year to 10.00 am on the second day of Chinese New Year on odd-numbered years.

9 On 14 June 2019, the Father filed his own application in FC/SUM 1967/2019 also seeking a variation of existing order on, *inter alia*, the following terms:

(a) The Father shall have care of C for the December holidays, and C shall be returned to the Mother by 9.00 pm on 1 January.

(b) The Father shall have care of the Children from 5.00 pm on the eve of Chinese New Year to 9.00 am on the 2nd day of Chinese New Year.

10 Both parents also sought various other orders, including orders related to the care of the Children on special occasions such as the Mother's Day and Father's Day weekends and on birthdays. They eventually reached an agreement on most of the prayers sought and as the only issues on appeal involved the care of C on Chinese New Year's Eve and New Year's Eve, the other orders are not set out here.

11 The Mother submitted that her position was intended to promote sharing and joint parenting. She claimed that there had been no fixed arrangements in relation to the Children's care over Chinese New Year's Eve; now that the Children were older and the daughters were studying overseas, she had less quality time with them and she believed it was important to spend quality time as a family on Chinese New Year's Eve. She submitted that the handover after the December holidays was best done on 31 December so that C could spend the whole day on 1 January settling in for school, which usually started on 2 January, and he would be too tired if he returned late on 1 January.

12 On the other hand, the Father claimed that the status quo was that the Children always had dinner with their paternal relatives on Chinese New Year's Eve. He submitted that the Children should be permitted to maintain their ties with their extended family, and the dinner the Mother planned did not involve any extended maternal relatives. He also submitted that the Mother could spend time with the Children during lunch on Chinese New Year's Eve. The Father also claimed that the previous arrangement and status quo was that the Children usually spent New Year's Eve with him. The Father explained that he made extravagant preparations for New Year's Eve celebrations with the Children, and submitted that depriving them of these events was not in their welfare.

13 The DJ heard the parties on 3 September 2019 and varied the orders in the following manner:

(a) The Father shall continue to have care of the Children during the December Holidays, with the Children to be returned to the Mother by no later than 10.00 am on 1 January; and

(b) The Mother shall have care of the Children from 3.00 pm to 8.30 pm on the eve of Chinese New Year, while the Husband shall have care of the Children thereafter to 10.00 am on the second day of Chinese New Year, after which the Wife shall have care of the Children for the remainder of the day.

14 In his grounds of decision (see *VDX v VDY* [2019] SGFC 144 ("GD")), the DJ observed that it was not disputed that there had been a material change in circumstances. The previous amicable manner in which the parties had cooperated to sort out care arrangements had broken down, and it

would be in the best interests of the Children to set out the details on care arrangements to avoid further dispute (GD at [15]). In assessing whether and how to vary a custody order under s 128 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Charter"), the paramount consideration was the welfare of the child as set out in s 125(2) (GD at [16]). The DJ further observed that in applying the welfare principle to the question of care over public holidays, the courts have generally favoured equal treatment of both parents as far as reasonably practicable (GD at [25]).

15 In relation to the handover after the December holidays, the DJ agreed with the Mother that a reasonable time was needed for C to settle down before the start of the school year, but also accepted that the Father had a genuine intent to celebrate New Year's Eve with the Children as he had done for several years. The DJ was of the view that both objectives could be met with a measure of compromise where the Father handed C over to the Mother at 10.00 am on 1 January, so as to maximise C's time with both parents over the New Year, and balance the objectives of work and play as he transited from the holidays to the start of the school term (GD at [30]).

16 As for dinner time on Chinese New Year's Eve, the DJ acknowledged the cultural significance of the reunion dinner for the family and observed that the question was whether parity between the two families was best achieved by alternating or sharing access to the Children over the occasion (GD at [35]). The DJ took a pragmatic view and directed that the Children could have an earlier dinner with their Mother, before joining the dinner at their Father's home at 8.30 pm (GD at [36]).

The appeals

17 Both parents filed their appeals against the DJ's decision on 17 September 2019.

18 The parents were both of the view that the DJ's order splitting the care of C at dinner time on Chinese New Year's Eve was not workable. Both submitted that the Children should not commute between two dinners and that the DJ failed to give due weight to the acrimony between the parents that made this arrangement untenable. However, they differed on the appropriate order and both argued that their respective proposed order was in C's best interests. The Mother submitted that alternating arrangements for dinner on Chinese New Year's Eve every year was the best way to achieve parity, while the Father submitted that the status quo should be maintained which is that the Children should have dinner with their paternal relatives.

19 As for the handover after the December holidays, the Mother submitted that the DJ had failed to apply the principle of parity because under the order, the Mother would never have the chance to spend New Year's Eve (31 December) with the Children. On the other hand, the Father argued that the 10.00 am handover time on 1 January was too early and not in the Children's interests as they would be tired after the New Year's Eve celebrations the night before, and C did not need the time to get ready for school.

20 On 20 December 2019, while the appeals were pending, the Father filed FC/SUM 4377/2019 to vary the DJ's order on C's handover. The variation that the Father sought was for the handover date to be "the day before the first day of school". The Father argued that there was a change in circumstances justifying variation as C would be enrolled in an international school from 2020, and his school calendar would no longer be aligned with the Ministry of Education ("MOE") school calendar. During the period in which the application was still pending, the Father did not return C to the Mother's care on 1 January 2020 as stipulated in the DJ's order, and the Mother had to take C from the Father's residence on 5 January 2020. On 29 January 2020, the Mother filed FC/SUM 281/2020 seeking make-up access for the period of 1 January to 5 January 2020, when she argued that the Father disregarded the DJ's order by failing to return C to her care. Her counsel submitted that the

Father was in contempt of the earlier court order and make-up access was required to purge this contempt.

21 The DJ dismissed the Father's application to vary the existing order on the basis that it was improper to vary an order that was under appeal as that would materially affect the parameters of the appeal and prejudice the Mother's position. The DJ also granted the Mother make-up access of an entire weekend.

22 On 10 March 2020, the Father filed an application for leave to adduce fresh evidence in his appeal. This evidence related to the change in the dates of the school term after C enrolled in an international school. The Father submitted that given that the international school term started about one week after the MOE school term (and not on 2 January), the handover time should be the eve of the first day of school rather than 1 January so that he would continue to have the entire December holidays with C. The Father was prepared to return C at 5.00 pm on the eve of the first day of the school term. The Father also sought leave to adduce evidence of what he claimed was the family's negative experience implementing the DJ's order on Chinese New Year's Eve in 2020. According to the Father, the Children were too full to eat a second reunion dinner with his family and their paternal relatives were upset.

23 The Mother did not object to the introduction of the new evidence in the international school's calendar but submitted that the change in the start of the school term should not affect the handover date. She pointed out that the Father's case before the DJ was that C should be returned at 9.00 pm on 1 January, and submitted that the Father was changing his case on appeal. She also highlighted that the DJ had indicated that the order would allow C to maximise his time with both parents over the New Year (1 January). The Mother agreed with the Father that the Chinese New Year's Eve arrangements were unworkable but maintained that alternating arrangements each year was the best way forward.

My decision

24 I first make a note that in matters such as which days and for how many hours a child should be with one or the other parent, the court may have to make a decision that involves a compromise between the parents if their preferences are not aligned. Where there is an appeal against decisions involving the welfare of children, an appellate court will be slow to intervene, as decisions in such cases often involve choices between imperfect solutions (*TSF v TSE* [2018] 2 SLR 833 at [49], citing *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 ("*CX v CY*") at [15] and *BG v BF* [2007] 3 SLR(R) 233 at [12]). In reaching my decision in respect of these appeals, I considered whether the DJ had made any errors in the exercise of his discretion (*CX v CY* at [17]). I examined the legal principles that he had applied and his reasoning underlying the orders made.

25 The relevant legal principles were not in dispute and are set out in the DJ's decision (GD at [14]–[26]). Pursuant to s 128 of the Charter, the court has the power to vary any order for the care and control of a child where it is satisfied that there has been any material change in the circumstances. The material change in the present case was the breakdown of the previously cooperative relationship between the parents, necessitating the court's involvement in setting out the details of some aspects of the care arrangements of C. The welfare of the child is the court's paramount consideration in applications involving care and control (see s 125(2) of the Charter). The judicial task necessarily involves a fact-specific inquiry, having regard to all the circumstances of the case and of that particular child.

26 I understood the parents to be submitting that the court ought to apply the legal principle of

deciding in accordance with what was in the welfare of the child. While both parents argued that the arrangements they proposed promoted C's welfare, in the present case, it is doubtful whether any decision on specific arrangements made in these appeals would materially affect the welfare of C. The issues before the court in the present appeals were very narrow. They concerned, at most, a few *days* of care of C with either parent every *year*. In fact, prior to the introduction of the new evidence on the starting date of the school term, the appeals concerned a matter of *hours* – how and with whom C should spend the evenings of Chinese New Year's Eve and New Year's Eve.

27 The parties were parents who could co-parent amicably even when circumstances were much more challenging in previous years after the divorce. For example, they made joint decisions to send their two daughters overseas for their studies. They were able to communicate directly with each other and compromise on when they would travel to see their daughters and when they would take the Children on holidays. They willingly swapped care time on weekends and weekdays that had been specifically provided for in the original Consent Order. Seven years of cooperation later, they now find themselves unable to work out arrangements for these two very narrow issues. I think that something had recently occurred or evolved in the parents' own relationship that hindered their ability to work together for the Children. The root cause of this change does not have to be traced as the point is not to assign blame, and I make this point only to observe that the shared spirit of give and take that had carried the family for many years had been replaced by a refusal to compromise even for the sake of the Children.

28 These appeals were not about any fundamental difficulties or unworkability in finalising appropriate practical arrangements on Chinese New Year's Eve and New Year's Eve, for the parties had no difficulty making these arrangements in the past. These two issues were far more minor than what the parents had to deal with over the past seven years. They related to practical decisions that the parents, who knew C the best, were best placed to make. In functioning families, disagreements about how holidays are spent would be resolved by compromise, graciousness and flexibility. The High Court observed in *UYT v UYU and another appeal* [2020] SGHCF 8 at [5]:

Family Law is a misnomer for a happy family generally has no need for law nor does law need to intrude into a happy family. Decisions such as sending a child of the family for tertiary education, whether at home or abroad, are discussed and settled within the family, sometimes with a tinge of regret, sometimes with great sacrifice, but always with the comforting feel of give and take. By the time the [Charter] is invoked to resolve domestic problems, it usually means that the family can no longer mediate within itself. Section 69 [of the Charter] directs how such problems are to be resolved, but it is not a complete guide for the court to make these kinds of decisions in a way that a happy family would make them. *It is one thing for a family to give and take within itself, and another for a third party to determine how they should do it.*

[emphasis added]

29 These observations are highly pertinent. The present issues, whether resolved in the way the Mother proposed, or in the manner the Father sought, would not significantly affect the welfare of C. What *would* significantly *affect C's welfare* is the *parents' conflicts* and the *spirit* in which they carry out the orders. If the arrangements are carried out by each parent with the intent to ruin the time that the other parent has with C, then C's welfare is being undermined. On the other hand, either of the arrangements proposed by the parents, if carried out with a *supportive and cooperative spirit*, could and would go well, and *promote C's welfare*.

Dinner on Chinese New Year's Eve

30 The Father has care of the Children on the first day of Chinese New Year, while the Mother has care of the Children on the second day of Chinese New Year. The issue of which parent should have care of C at dinner time on Chinese New Year's Eve was a practical parenting issue. Some families may enjoy two reunions dinners on that night, one with maternal relatives and another with paternal relatives; as the DJ pointed out (GD at [36]), in functioning families, it is neither uncommon nor unthinkable that families accommodate one another's obligations and eat dinner twice on the same night. Other families might reach a different arrangement where a reunion dinner with one set of relatives may be held on the weekend before Chinese New Year's Eve. The arrangement chosen will be specific to the comfort level of particular families.

31 The arrangements proposed by both parents in the present case were not in themselves unreasonable. The Mother suggested alternating dinner time on Chinese New Year's Eve every year, while the Father suggested that the Children have reunion lunch with the Mother and reunion dinner with his extended family every Chinese New Year's Eve. Is one arrangement in C's welfare while the other is not (or less so)? Whether one arrangement might be more comfortable than the other for C on Chinese New Year's Eve may in fact depend on C's particular circumstances on that day, such as his parents' support, his mood, his school schedule, or as he gets older, his plans with his friends. What is important to note is that the arrangements proposed by the parents and the final arrangements in the DJ's order would not, between them, *significantly affect C's welfare in a fundamental way*. The Father alleged that the Mother did not limit how much the Children ate when they had an early reunion dinner with her and the Children were too full to eat a second dinner. Such issues go into *how* the broad care arrangements are carried out and the point made above that it is the *spirit* in which the parents carry out the arrangements that matters. How each parent *supports their children and their time with the other parent* is part of discharging *parental responsibility*.

32 While I gave the parents time after the hearing to reach an agreement, they simply could not agree, and so I proceeded to make a decision. In my view, it could not be said that the DJ had applied the wrong legal principle or erred in the exercise of discretion reaching his decision. The DJ recognised that having dinner together on Chinese New Year's Eve has cultural significance. The arrangement chosen was a practical and forward-looking approach given the constraints and allowed C to spend time with both sides of the family. I affirmed the DJ's order for C to be brought to the Father at his residence by 8.30 pm on Chinese New Year's Eve. Since this is the arrangement in place, the responsibility is on the parents to be reasonable in their conduct with each other and they must endeavour to do their best to make this arrangement work. Every parent must recognise that it is his or her *personal responsibility* to promote the child's wellbeing.

Handover after December holidays

33 While the DJ had observed that a handover on 1 January would allow C to maximise his time with both parents over the New Year (GD at [30]), this was in the context of the MOE school term beginning on 2 January. Following the terms of the original Consent Order, C should be in the care of the Father for the entire December holidays. I allowed the Father's application to adduce fresh evidence, which was not challenged by the Mother, and I accepted that C now began his school year later than those in schools following the MOE school term. The December holidays therefore included New Year's Eve and New Year's Day.

34 The question of the handover date mainly involved how much time C should have in the Mother's care before he started school in the new school year. The amount of time a child might need to prepare for the first day of school and how that time should be used is a decision best made by the parents, who know their child best. Unfortunately, the parents in the present case could not agree on this matter. Both parents were keen to help C prepare for the new school term, and I did

not doubt that both parents desired to do their best to support C. I thought it reasonable for C to have at least a full day in the residence of the parent with care of control of him during the school term (here, the Mother), before the first day of the new school year.

35 Where C would start his new school year on a Monday, I held that he should return to the Mother's care by 9.00 pm on the Saturday of the weekend just before the first day of the new school term. Where C would start his new school year on a different weekday, he should return to the Mother's care by 9.00 pm on the day before the eve of his first day of school (as an example, he should return on 9.00 pm on Sunday if the first day of school was Tuesday). This largely conformed to the term that the Father should have time with C for the entire December holidays. C would have been in the Father's care for many weeks during the entire December holidays. This arrangement allowed C a full day to settle back into the routine of the new school term after having had more than a month of school holidays.

36 As the handover date would occur after New Year's Day, the Mother also separately raised the issue of C spending New Year's Eve (31 December) with her. While C is to be in the care of the Father for the entire December holidays, which includes New Year's Eve and New Year's Day, I reminded the parents to be reasonable in making arrangements for C. C may express a wish to be with the Mother or his sisters for a New Year's Eve celebration, or as he grows older as a teenager, may even wish to celebrate that evening with his friends. The parents should have regard to C's wishes, but they should not place him in a position of choosing between parents which may cause him to suffer a conflict of loyalty.

37 The Mother sought further clarification on what it meant for the parents to be "reasonable" with each other. I would think that they had largely cooperated reasonably in the past seven years and that experience would be an indication of what it would take to be "reasonable" in co-parenting. For one thing, they should not use inflammatory language in their communications. If there are solicitors involved, counsel should be mindful of the language used in communications. It is unnecessary and unhelpful to say "our client is shocked" by certain alleged nasty conduct. These parents had co-parented successfully prior to the recent deterioration of the relationship and I commend them for having done so. They are at liberty now to agree to arrangements that might differ from the existing court orders, having regard to C's wishes, but if no agreement is reached then the existing orders will apply.

Conclusion

38 As neither party fully succeeded in their respective appeals, I ordered the parties to bear their own costs.

39 I highlighted above (at [26]) that these appeals concerned a matter of a few days and, at one time, only a few hours with C. Litigation over these issues spanned nearly one and a half years. There were many opportunities for the parties to mediate and reach an agreement on these narrow issues. The lower court had heard the parties and provided a sensible arrangement for the parties. While the appeals arose from both parties' dissatisfaction with that decision, this was also an opportunity for counsel to take a more active role in advising their clients on the likely scope of appellate intervention in such matters (see [24] above). The Court of Appeal remarked in *BOI v BOJ* [2018] 2 SLR 1156 at [3]:

... [C]ounsel are not the mere "mouthpieces" of their clients. They are not mere automatons, executing every instruction of the client, especially where the client wants each and every point to be taken in order to inflict maximum "damage" on the other party, and where the taking of

such points is – in a word – pointless and would not only engender a wastage of the other party's, but also the court's, time and resources. There is a reason why lawyers are also known as "counsel" – in such situations, lawyers must *counsel* their clients

40 Family law practitioners must be aware of the ways, both overt and subtle, in which they can influence the parenting dispute – these include the language used in correspondence and the mindset they bring to the proceedings. If both parties' counsel can work as a team in problem-solving their clients' parenting matters, they would have played a critical role in the delivery of therapeutic justice in our family justice system.

41 I urge the parents to reflect on their communications with each other and the positions they have taken in litigation. The evidence before the court demonstrated that the parties' post-divorce co-parenting journey was far more successful than many cases that have come before this court; they must love the Children very much to have overcome any initial anger and resentment that commonly ensue upon divorce. Yet this long co-parenting relationship recently fell apart in a matter of months. The parents have both witnessed how the ongoing conflict has affected the children – perhaps the recent conflict has tainted their children's experiences of what ought to be joyful celebrations on Chinese New Year's Eve and New Year's Day.

42 Parental responsibility is a personal responsibility. The Court is the last resort for the resolution of parenting matters, for parents should intentionally endeavour to make these decisions for their children themselves. They should strive hard not to mire the family, including the children, in litigation, nor should their resources and the court's resources be spent on litigation to deal with an emotionally-driven conflict. This will involve some measure of compromise; it may involve being bigger, wiser and kinder – which must be very difficult when relationships have broken down, yet this is the legal responsibility placed on all parents. Parenting is not perpetual, and such sacrifices, painful as they may be, are not demanded of parents indefinitely for children do grow up to be adults – their chance to have a normal childhood should not be lost due to their parents' conflict.