Re G (guardianship of an infant)
[2003] SGHC 265

Case Number : OS 650238/2002, RAS 720030/2003

Decision Date : 29 October 2003

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : S Magintharan (Netto Tan and S Magin) for appellant; Christopher Gill (Chris Gill and Co) for respondent

Parties : —

Family Law – Custody – No order made – Whether joint custody order appropriate – Whether court should make no order as to custody

1. The appellant, ("E"), who contended that he and his wife, the respondent, Ms O ("O"), should have joint custody of their son ("K"), appealed against the District Judge's decision to grant his wife sole custody of K. I ruled that while O should have care and control of K, it was not necessary at the present moment for any custody order to be made. As such, the District Judge's order on custody was set aside. The reasons for my decision are set out below.

Background

2. E, a Singaporean, and O, an Indian national and a permanent resident of Singapore, were married on 3 November 1997. Their only child, K, was born on 19 January 2002. After the birth of K, the relationship between E and O soured to such an extent that the latter left the matrimonial home with K on 12 November 2002 and went to stay with her brother. Shortly thereafter, on 10 December 2002, E, who accepted that his wife should be granted care and control of K, filed an originating summons for the purpose of obtaining, among other things, an order that joint custody of K be granted to him and his wife. He also applied for the right of access to his child.

3. Neither E nor O have instituted divorce proceedings. O, who wanted to have sole custody of K, had a host of complaints about her husband. She claimed that E denied that he was K's father during the fourth month of her pregnancy and she took him to task for failing to ferry her to the hospital for the delivery of their child. She also alleged that E has not been a good father. Apart from showing no interest in organising the customary prayers for a Sikh child when K was 40 days old, he often returned to the matrimonial home between 3 to 4 am in the morning, and insisted on waking up K whenever he was drunk. O also said that E had an affair with a woman, named Dipti, and that when confronted, he told her to leave the house with K if she was not happy. She added that on one occasion when they had a quarrel over Dipti, E punched her while she was carrying K in her arms and twisted her left wrist so badly that the child fell down.

4. E painted a totally different picture of his relationship with his son. He claimed that he was happy and excited when he learnt that his wife was pregnant and that his brother-in-law had driven his wife to hospital for the delivery of their child because it was unsafe for her to climb onto the seat of the delivery van that he owned. He said that he was a teetotaller and that he had returned home late at night because of the nature of his work. He denied being uninterested in K's 40th day celebrations at the Sikh temple and complained that it was his wife who tried to keep K away from him. E also asserted that his wife was a negligent mother and said that she had left K's plastic feeding bottle to boil in an unattended saucepan, which eventually caught fire. He also noticed that she often put K on the dining table while she was cooking in the kitchen. Notwithstanding all these allegations, E agreed that as K is quite young, he should be looked after by his mother. However, he said that he

sought a joint custody order so that he would be able to "monitor and look after the welfare of [K] and make all arrangements for him to be properly brought up".

The District Judge's decision

5. After considering the parties' affidavits and the submissions of their counsel, the District Judge had no doubt that the relationship between E and his wife was rather acrimonious. This led her to grant O care and control of K as well as sole custody of the child. E, who was granted the right of access for stated periods, was ordered to pay costs, amounting to $400, to O.

The appeal

6. When considering E's appeal against the District Judge's decision to grant O sole custody of K, it ought to be noted at the outset that as a general rule, it is preferable that joint parental responsibility for a child's welfare be maintained. In *Principles of Family Law in Singapore*, Professor Leong Wai Kum, who took the view that an order for sole custody is losing favour, rightly pointed out at p 537 that a joint custody order of both parents is theoretically ideal because it maintains a non-resident parent's parenting role.

7. While joint parental responsibility for a child's upbringing is to be preferred, in *Jussa v Jussa* [1972] 1 WLR 881, Wrangham J, with whom Watkins J and Sir George Baker P agreed, said that a joint order for custody with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties will co-operate. A similar approach has been echoed in Singapore. In *Ho Quee Neo Helen v Lim Pui Heng* [1972-74] SLR 249, Winslow J, who delivered the judgment of the Court of Appeal, accepted that a joint custody order was inappropriate where the parents' relationship is acrimonious. The District Judge, who took note of the acrimonious relationship between E and O, relied on these two cases to justify her decision to grant O sole custody of K.

8. 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. *Jussa v Jussa* must be viewed in the 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. One must be mindful of the fact that section 3 of the Guardianship of Infants Act (Cap 122) provides that in any proceedings relating to custody or the upbringing of an infant, the infant's welfare is "the first and paramount consideration" and save in so far as such welfare otherwise requires, neither the father nor the mother shall have any right superior to the other.

9. In the present case, while a joint custody order may not be appropriate in view of the state of E's relationship with his wife, granting O sole custody of K would result in the unnecessary severing of the joint parental responsibility for his upbringing far too early in the day. At the moment, neither E nor O face serious problems relating to the upbringing of K, who is less than two years of age. All that is presently required is an order for care and control of the child. There is no urgent need for him to be placed under the sole custody of his mother, who should be quite satisfied with the order granting her care and control of the child. Hopefully, the parents will realise in due course that it is best if they can co-operate in matters in relation to their child's upbringing. If they do not and it becomes necessary in the future to deal with the question of custody, the parties can come to court to settle the issue. Such an approach is in the best interest of this child.

10. This is not the first time that courts have declined to make an order for custody. In a paper on *Child Legislation Custody: Its Judicial Interpretation and Statutory Definition* (1982) Statute Law Review 71, 73, Mrs Justice Booth wrote as follows:

> It has not been unknown for the court in matrimonial proceedings, while making an order for care and control in favour of one parent, to refuse to make a custody order … in an attempt to avoid litigation over what was seen as an empty legal concept, preferring to adopt a device in which it could be said that custody should remain vested in the court with no order in favour of either parent, as, of course, is the situation in wardship proceedings.

11. In *Re Aliya Aziz Tayabali* [2000] 1 SLR 754, the court also declined to make an order for custody. In this case, the divorced parents of a female infant, who was then less than 30 months old, were both Muslims but from different sects. The child's mother was a Sunni Muslim while her father was a Shia Muslim. The mother wanted to have sole custody of the child while the father sought an order for joint custody. Michael Hwang JC, who agreed that care and control of the child should be given to the mother, took the view that it was inappropriate for him to make any order as to custody of the child as he did not want to give any party "a prima facie advantage of deciding any serious matters relating to the child's upbringing". While he recognised that the child's father should have some rights over her upbringing, he expressed some concern about the psychological effect of a joint custody order on the parties. He added that if, in due course, this proves to be unworkable, the court could then review the position and make a formal order for custody.

12. For reasons already stated, I set aside the District Judge's order granting sole custody of K to O and made no order in relation to custody.