AD v AE (minors: custody, care, control and access)
[2005] SGHC 30

Case Number : D 3849/2000, RAS 720041/2003

Decision Date : 04 February 2005

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Nicholas Cheong Fook Hing (Lim Soo Peng and Co) for the petitioner; David Rasif and Michelle Woodworth (David Rasif and Partners) for the respondent

Parties : AD — AE (minors; custody, care, control and access)

Evidence – Admissibility of evidence – Opinion and belief – DNA report containing results of paternity test tendered as proof petitioner not father of children – DNA report not tendered by way of affidavit from maker of report – Whether DNA report wrongly admitted into evidence – Section 47(1) Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Proof of evidence – Presumptions – DNA report containing results of paternity test tendered as proof petitioner not father of children – DNA report conflicting with presumption of paternity under s 114 Evidence Act – Whether DNA report overriding presumption of paternity – Section 114 Evidence Act (Cap 97, 1997 Rev Ed)

Family Law – Custody – Care and control – District court ordering respondent to have custody, care and control of children with no access to petitioner after respondent disclosed petitioner not father of children – Whether each child considered "child of the marriage" – Whether court having jurisdiction and power to determine question of custody – Section 92 Women's Charter (Cap 353, 1997 Rev Ed)

4 February 2005

Choo Han Teck J:

1 This is an appeal by the petitioner, the husband, against the orders regarding custody and access of the three children of the marriage. The petitioner and the respondent, the wife, both now 40 years of age, were married on 25 September 1991. The daughters, X and Y, were born on 5 January 1995 and 14 November 1996 respectively. The son, C, was born on 6 May 1998.

2 The petitioner was granted a divorce based on the respondent's adultery and the decree *nisi* was granted on 20 March 2001. The district court judge made the following orders in respect of the custody and control of the children in [2003] SGDC 176:

(a) The wife shall have custody, care and control of the daughters, X and Y, with no access to the husband.

(b) The husband shall have custody, care and control of the son, C, with access to the wife as follows:

(i) weekly overnight access from Saturday 10.00am to Sunday 10.00pm;

(ii) during half of the school holidays with overnight access;

(iii) on alternate public holidays starting from the Labour Day public holiday on 1 May 2003 from 9.00am to 8.00pm;

(iv) C is to be picked up by the wife at the husband's residence and returned at the same place.

(c) The custody, care and control of C shall be handed to the husband at the wife's residence on Saturday 3 May 2003 at 2.00pm.

(d) The wife and the wife's counsel undertake to hand over C's passport, medical booklet and birth certificate to the husband.

(e) The husband shall hand over C's passport to the wife for the purpose of travel with the child within 48 hours' notice and the wife shall hand over the passport to the husband immediately after the trip.

(d) There shall be no maintenance for the wife.

(e) The wife shall ensure that the two daughters are sent for counselling at the Child Guidance Clinic to deal with their new identity;

(f) Each party is to bear its own costs.

3 The petitioner appealed against the orders under sub-para (a) in [2] above and also in respect of the access order under sub-para (b)(i) above. The chief issue in the appeal before me concerned the order that the petitioner was not to have access to the daughters. This issue brings the certainty of science into a head-on clash with an unamended law drafted before the advancements made in science in the field of DNA testing. The district court judge's decision was founded on the scientific evidence from a DNA sampling ("the DNA report") which indicated that the petitioner was probably not the father of the two girls. The judge referred to ss 9 and 47(1) of the Evidence Act (Cap 97, 1997 Rev Ed) in support of the admissibility of the DNA report. She also referred to ss 81 and 114 of the Evidence Act. It is useful to set out ss 9, 47(1) and 81 here but I shall set out s 114 shortly at a more appropriate point.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

47.—(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to the identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity or genuineness of handwriting or finger impressions, are relevant facts.

81.—(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any public officer in Singapore or any officer in Malaysia who is duly authorised thereto, if such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.

4 The custody proceedings that began on 4 July 2002 before the district judge were protracted and highly contentious. There were two social welfare reports by officers of the Family Conciliation and Resolution Centre ("FAMCARE"). One was dated 16 April 2002 and one the other, 3 March 2003. Before the district judge, counsel were told that the first FAMCARE report was overwhelmingly in favour of the petitioner. I have since read both reports, and the two reports favoured the petitioner. Mr Cheong, counsel for the husband, submitted that when the respondent realised that the first report was against her, she then disclosed, for the first time, that both daughters were fathered by someone other than the petitioner. The co-respondent was not the girls' natural father either. It was a third, unnamed man. The respondent deposed that she brought the semen of the unidentified man and had her gynaecologist perform an in-vitro fertilisation that successfully produced her first daughter. The second daughter was fathered by the same man through natural sexual relations.

5 The sudden revelation prompted the second FAMCARE report. The officer noted that, unlike the first report, the two girls now expressed their desire to live with the respondent and the reason was that she had told them that the petitioner was not their real father. The FAMCARE officer reported that the girls were greatly affected and confused. This was in sharp contrast to their attitudes reported by the first FAMCARE officer. There is little doubt that in the time that the respondent was given interim custody of the two girls, namely from 29 October 2001 to the time of the respondent's revelation on 4 July 2002, the girls were still very much attached to the petitioner. However, from that time on until I saw them in chambers on 28 January 2005, the girls seemed to regard the petitioner as a stranger because they had, in my view, been thoroughly and comprehensively influenced by the respondent to adopt that attitude. However, in a moment of reflection, the elder girl expressed a willingness to see the petitioner once a month.

6 After seeing all members of that erstwhile family, including the son, I varied the custody orders and gave the petitioner access to the two daughters once a month for a trial period of six months, after which I will review the order if necessary. I reduced the overnight access of the respondent to the son from once a week to once a fortnight. I am of the view that the previous order giving the respondent overnight access from 10.00am on Saturday to 10.00pm on Sunday gave the respondent access during "the prime time" of every week, leaving none for the petitioner. The petitioner ought to have some weekends to enjoy his son's company.

7 However, in respect of the daughters, I am of the view that the order giving custody to the respondent should not be disturbed primarily for the sake of the daughters' well-being. I need, however, to expand on this aspect of my decision here. Counsel for the petitioner, Mr Cheong, argued that the evidence in the DNA report was irrelevant in this case because s 114 of the Evidence Act provides that:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Counsel further submitted that the DNA report was inadmissible because it was not properly proved. Thirdly, counsel pointed out that the report merely showed that the two daughters were full siblings in that they had common parents, but the son was a half-sibling in that he shared a common mother with his sisters. The fact that the husband had not provided his DNA sample means that it is also possible that he is the father of the daughters but not the father of the son. This is a less likely possibility (assuming that the DNA report and the doctor's evidence were properly proved, and are true) because the husband had no recollection of letting his semen be used for artificial insemination,

and appeared genuinely surprised at the claim that he was not the girls' natural father. Of course, the artificial insemination was done a long time ago.

8 Section 114 of the Evidence Act was promulgated at a time when it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%. It was intended to avoid bastardising children and the social stigma that attached to it, more so in the past than today, perhaps. Although some changes to this section might be necessary to avoid more serious problems than the one before me, it is still useful to have a provision that presumes paternity, provided that it is not, as presently so, an irrebuttable or conclusive presumption. A conflict between a DNA report and the s 114 presumption of paternity in a succession dispute is an example of a more difficult legal problem. In respect of a custody battle, there is an escape valve in the form of s 92 of the Women's Charter (Cap 353, 1997 Rev Ed). This section provides the legal definition of a "child of the marriage" to mean:

> 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.

There is no doubt that the two daughters and the son are all "children of the marriage" between the husband and wife, within the meaning of s 92 of the Women's Charter. Consequently, the court need not be troubled by the conflict between the DNA report, assuming it was validly proved, which in my view, it was not, and the presumption under s 114 of the Evidence Act. Under the Women's Charter, the court would have jurisdiction and power to determine the question of custody, and either parent, including the husband whose role in the paternity of a child is challenged, is entitled to gain custody of the child of the marriage if the court is of the opinion that he or she is fit to do so. Section 92 of that Act does not discriminate between natural and non-natural parents of the child. The DNA report ought to have been proved on oath by the doctor who had made it. What I had before me was a report from a laboratory on the DNA results, and a note under the letterhead of a doctor stating:

> [The wife] first consulted me on 4 Feb 1994 for trying to conceive since July 1993. Medicines were prescribed to induce ovulation. On 25 April 1994, an artificial insemination was performed using semen specimen brought by [the wife]. [The wife] became pregnant and delivered a baby girl on 5 January 1995.

The laboratory report and the medical note, unless agreed, must be tendered in evidence by way of affidavit from the relevant person, namely, the maker and not the recipient, if they are to be given their full weight in court. Section 47 of the Evidence Act provides that if the court is required to form an opinion on a point of science, then the evidence of experts in the field will be relevant. Hence, such evidence has to be proved by the maker, that is the expert himself, and not merely a layperson who has a copy of the scientific report. In the event, these documents were admitted in evidence, and probably taken into consideration in the court below.

9 The implications of the DNA report, assuming that it was properly proved, and further assuming that the husband was not the natural father of the two daughters, have become of minimal importance by subsequent events. Although the wife took the children away from August 2001 onwards, the girls were still attached to the husband whenever he had access to them. The boy, who had since been returned to the custody of the husband, had always been close and fond of the husband, and remains so. However, the girls' attitude to the husband changed almost completely after their mother disclosed to them that the husband was not their natural father, and taught them

to be chary of him. By the time I made the orders here, the girls appeared settled and it would not be in their interests to create any major change in their lives. Similarly, their brother seemed happy and settled with the husband and his new wife.

10 The wife sent a letter through her counsel, attaching a copy of a note written by the daughters to this court. The note was written to persuade me to rescind the access order I had made. While I am satisfied with the custody orders made, I am of the view that they were obtained through much manipulation by the wife. The attached note is, in my view, the wife's latest effort at psychological manipulation. I am of the opinion that the daughters would very likely not have changed their attitude to the husband had custody been granted to him in the first place, although some damage to the relationship might still have occurred once the wife were to tell the girls that the husband was not their natural father. This observation is academic except that it might serve as a reminder that events take turns that one might not detect at a cursory glance. I formed these views after reminding myself that in matrimonial matters, nobility, honesty, love, and all the virtues that one can imagine, are often lost to that one simple vice – selfishness. That, I believe, is the only explanation as to why a mother, like the wife in the present case, would destroy the loving relationship between the husband and the two daughters. The decision to disclose that the husband was not their father was a questionable one because there was no pressing need for it. The natural father, whoever that may be, is not known, except to the wife. The husband had hitherto been a good father to the daughters. He had deposed that he did not see the necessity to provide a DNA sample for testing because it did not matter to him that he might not be the girls' natural father. He stated that he had loved them from birth and continues to do so. The disclosure by the wife had wrecked the girls psychologically. This was the similar impression that the second FAMCARE officer formed. It was, in my view, a nasty way to get custody.

11 This case is, therefore, not the same as *Re A (an infant)* [2002] 1 SLR 310 in many ways. In that case, the husband claiming custody was not the biological father. The court granted custody of the child to the wife, who, by that time, had been separated from the husband and was co-habiting with the daughter's biological father. The wife obtained a court order for custody of the child with access to the husband. The wife appealed before me for an order rescinding the right of access to the husband. I allowed the appeal on the ground that the child was only two years old and, unlike the present case, the bond between the husband and the daughter had not yet become mutually strong; furthermore, the biological parents and the child had by then formed a close family unit.