TQ v TR
[2007] SGHC 106

Case Number : DT 829/2004

Decision Date : 11 July 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Foo Siew Fong (Harry Elias Partnership) for the petitioner; Quek Mong Hua SC and Tan Siew Kim (Lee & Lee) for the respondent

Parties : TQ — TR

Conflict of Laws – Domicile – Whether wife acquired domicile of choice

Family Law – Custody – Joint custody order – Whether joint custody order appropriate where parents not in same jurisdiction

Family Law – Matrimonial assets – Division – Principles governing division of matrimonial assets – Whether prenuptial agreement that there be no community of marital property should be enforced

[EDITORIAL NOTE: The details of this judgment have been changed to comply with the Children and Young Persons Act and/or the Women's Charter]

11 July 2007 Judgment reserved.

Choo Han Teck J:

1 Counsel appeared before me for the determination of the ancillary matters of custody, care and control of the children, maintenance for the petitioner and the children, and the division of matrimonial assets. The decree nisi was made on 19 April 2005 on an uncontested basis. The petitioner is 42 years old and is a Swedish national. She presently earns a net pay of $3,225 a month. The respondent husband is 46 years old and is a Dutch national. He was born in Wassenaar, in the Netherlands, and received his education in the Netherlands and graduated with a Masters degree in economics from the University of Rotterdam. He is presently a director of a group of companies. The group has its head office in Singapore with branches in various other Asian countries. Prior to this the respondent was employed by XYZ and deployed in Singapore. His employment with XYZ ended in July 2002. It is not clear whether he resigned or was dismissed. The petitioner and the respondent met in London in 1988 and cohabited there until they married in Wassenaar, in the Netherlands on 13 September 1991. They executed a prenuptial agreement on 26 August 1991 before a notary public in the Netherlands. The prenuptial agreement provided that there was to be no community of marital property, and each was to keep his or her own assets. The couple lived in Wassenaar for a while after their marriage but returned to London where the respondent was employed. They visited Wassenaar regularly during their vacation. The petitioner set up an *au pair* agency in London and ran that business until 1997. The respondent came to Singapore in September 1997 to work. The petitioner and the three children of the marriage arrived a month later to join him. The petitioner left the matrimonial home and rented a flat on her own on 1 October 2003. She filed for divorce here on 15 March 2004 and the respondent cross-petitioned on 14 April 2004. Both parties applied for interim care and control and the court below ordered interim care and control to be given to the respondent with liberal access to the petitioner. An order for interim maintenance was also made on 8 November 2004 that the petitioner be paid $800 a month. On appeal, the amount was increased to $1,600.

2 There are three children to the marriage. The eldest, a son ("B"), born on 1 June 1992, is presently 15 years old. The second, a daughter ("C") was born on 20 Dec 1995, and would be 12 years old this year. The third, also a daughter ("D") was born on 17 July 1997, and would be 10 years old this year. The children are presently attending school in Singapore. C is a handicapped child and is in need of constant care and attention. She was born with a chromosome disorder and as a result, has low muscle tone and delayed speech. She can only manage with simple English. She is presently registered in a school for the mentally disabled. B is confident and matured for his age. He expressed fondness for both parents but prefers to return to Holland to complete his education there. D is a pleasant, intelligent young girl who is also fond of both parents. She seemed happy to be wherever her parents are. Both B and D adore their sister, C. They seemed to get along extremely well, and all three also seemed to be attached to both parents.

3 The major issue in the present case is the question as to what would constitute the best interests of the children for the purposes of determining custody, care and control. The respondent wishes to have the interim care and control order made permanent, and to have B sent to the Netherlands to complete his education there. The respondent is of the view that his parents who are resident in the Netherlands can take care of the children when he is at work. Mr Quek, counsel for the respondent, submitted that that was not only the personal desire of the son, but it is also in his interests that he is schooled in a jurisdiction and environment where he is happiest. To rule any other way would be to subvert the best interests of the child to the best interests of the parents. It is necessary to consider the circumstances of each parent and what he or she can provide in determining how that will contribute to the best interests of the children. The respondent believes that the children are best integrated back to Dutch life in the Netherlands and he had begun a programme to that end but that had been hindered by what he claimed were interferences from the petitioner. He deposed that the children, being Dutch, would benefit from free education because the Dutch government bears almost the entire costs for it. He also claimed that there would be additional benefits for single parents such as "Social Support Payments" and "Child Benefit Payments". He said that on the whole, he and the children would receive about S$26,251.96 a year from the Dutch welfare system. On the other hand, the costs of educating B and D in Singapore is about $15,000 each in 2006, and about $17,000 in 2007. C's education costs about $12,000 a year.

4 Mr Quek submitted that the petitioner did not start off as a caring parent when she left the home and the children to the care of the maid. Subsequently, after divorce was filed, she took the children away from the respondent's home and denied him access. The respondent claimed that it was the intention of the parties to spend only a few years in Asia and return to the Netherlands after B had completed his primary education which would have been about 2004, but the petitioner reneged on this agreement. He deposed that after the petitioner left him and the children in 2004 he took care of the home and children and managed very well without her. The petitioner disputes this and claimed that after a brief absence she had returned home in the evenings to look after the children.

5 The petitioner appeared to have been the primary caregiver of the children, and for much of B's early years, the petitioner did not engage in fulltime work until 2002. She looked after the home and the children during that time and continued to do so after she moved out of the matrimonial home. She continued to bring C to the special school. She would return to their home in the evenings to have dinner with them and help them in their school work. She returned to her flat only after the children had gone to bed. The petitioner is a Permanent Resident in Singapore and expressed her desire to remain in Asia. She says that the children have been in Singapore from a very young age and have friends here. Only B received pre-schooling in the United Kingdom; his sisters were both schooled entirely in Singapore. The children have Dutch as well as Swedish nationalities but their *lingua franca* is English. The petitioner's five-day week job does not require her to travel. Miss Foo, counsel for the petitioner, submitted that the respondent travels frequently, and the children would

be neglected if they were left in the Netherlands, where he has planned to take them. She not only argued that the respondent is unsuited to look after three young children because he is kept away from home by work, but also suggested that he might not be a good role model because he goes on the internet to 'chat' with young girls in various Asian countries and he also goes to visit them in their countries. She also submitted that the respondent makes unilateral decisions and has no regard for court orders. She said that he was in breach of seven orders for costs made between 6 April 2005 and10 October 2005. He also had his security bond of $50,000 forfeited when he failed to return the children after taking them to Europe for holiday. Miss Foo submitted that the respondent has ulterior motives for wishing to take the children to the Netherlands. First, the prenuptial agreement is enforceable there. Secondly, he might think that his chances of getting custody of the children would be increased. She submitted that by isolating the wife from the children he would be unimpeded in his movements and activities, and he can still travel to Asia. Counsel maintained that there is no reason for the respondent to move to the Netherlands himself since he does not have a job there. He has been here for 10 years and his current work is also outside the Netherlands; he had only thought about returning to the Netherlands when this petition for divorce was filed.

6 The petitioner is worried that the education system in the Netherlands falls below the general European standards and that country, she maintained, has the highest rate of early school leavers. On the other hand, there are well established international schools in Singapore which are also internationally integrated so that the children will have little difficulty adjusting back to Europe eventually should they require. She claimed that the respondent had not thought through the children's education carefully. After taking them to Europe in 2005 with the intention of not returning here, he had not enrolled the children in any school. Eventually, the petitioner obtained an order from the Hague Court for the children to be returned to her. She then got them places back in their old schools except for B because the respondent insisted that he be home-schooled – even against B's wish to return to his former school.

7 The issue of custody, care and control of children after a divorce between their parents must be made with the best interests of the children as the primary and most important criterion for the court. What would be their best interests is a complex question that differs from family to family. In this case, both parents have strong claims as well as shortcomings, and the circumstances not just of the parents but those of *all* three children (not just each of them in isolation) must be taken into account. One clear factor is the desire of B to live in the Netherlands, a desire he had communicated to me as well as to the child psychologist Dr Lee who saw the children. One must, however, not place too much weight on the personal preference of a 15-year old boy, mature as he might appear to be. One has also to consider what the parents think would be best for him, after all, they know the child better than the psychologist and the court. Here, the parents have divergent views and one therefore has to look at the overall circumstances. In my view, the children's interests would be best looked after by a parent who is caring, as both the petitioner and respondent are, but also one who would be physically present. In this regard, I am of the view that the petitioner is better placed than the respondent. Furthermore, she has the advantage of being a better role model as well. The evidence adduced showed that the respondent had, as early as February 2003 (some time before the petitioner left him), engaged in internet correspondence with a view of establishing "discreet relations" and finding "occasional lovers". He signed up under the first name of his son, and left a series of correspondence and telephone conversations with females in various countries. He had also made various inconsistent descriptions of himself, sometimes stating that he was 5 foot 7 inches tall, sometimes, 5 foot 8 inches, and sometimes 5 foot 9 inches and his weight varied between 80 lbs to 150 lbs. Mr Quek explained on the respondent's behalf that he was "merely looking for love". It is not the court's business to express its approval or even attempt to regulate what an adult could or should do with his private romantic life. The respondent's amorous correspondence in the internet may not be illegal, and may not be harmful to the children if they were kept out of it. The relationships he

sought did not appear to be for long term or of a deep nature as the recorded conversations showed that they were of a superficial rather than an intellectual nature. It is uncertain what the ages of the women were, but from the conversations, they were not very mature ones. That there might be a wide age gap between the respondent and the women he corresponded with is not an adverse factor in itself otherwise it would be an unfair condemnation of all the couples who have found a deep and lasting intimate relationship in spite of a wide age gap. I have no criticism for the respondent even if he prefers a physical rather than a metaphysical relationship with women. However, the question I have to determine is that as between him and the petitioner, which of the two would be more suitable for providing the care and attention that is best for their three young children. Hence, it is only in that specific context that I would take the respondent's internet activities into account and on the balance between them, the petitioner appears to be a better role model.

8 Furthermore, on the respondent's own account, should the children be sent back to the Netherlands as he had preferred, they would be left to the care of his parents. It is a situation that is not suitable because the children's contact with their grandparents had been intermittent, and the respondent's history, having spent the past 20 years away from the Netherlands, his present business commitment in Asia as well as his private interests in this part of the world seemed to me an indication that the petitioner has a more realistic plan for the children. It is probably true that the respondent is financially better off than the petitioner is but in the context of the overall circumstances, that is not a decisive advantage. There is also no advantage or fairness to the children or the petitioner to split the care and control of the children giving the son to the respondent and the daughters to the petitioner, especially when there is a great deal of care and attention to be given to C. If the petitioner is better placed to look after C, as I think she is, it would be unfair for her to spend her time doing that while the respondent has the easier role with the more mature and able child. It also appeared to me that the three children are close to one another and that is also a strong reason to keep them together. Further, the son is already 15 and he might be able to fend for himself should he still wish to return to the Netherlands later on. I am not convinced that the delay would be detrimental to his assimilation into the Dutch community back in Holland as the respondent suggests it might. Mr Quek submitted that a taped conversation between the parties in May 2005 shows that the petitioner had agreed to let the children go to the Netherlands. The transcript of the tape was not that explicit. In any event the petitioner had expressly said that "*yes, but I want them to stay with me* …" Given that the petitioner and respondent may not be in the same country all the time, they should have joint legal custody of the children, but the care and control of the children should be placed in the responsibility of the petitioner, and I so order. I also grant the respondent access between 7 pm and 10 pm three times a week on week days and from 8 am to 8 pm on weekends, alternating Saturdays and Sundays with liberty to apply.

9 In respect of the question of maintenance, I am of the view that the respondent is sufficiently well to do even though he has said that he was "retrenched" since 2002. The circumstances of his departure from XYZ were not clearly made known except for a letter of termination given to him. I am left with no clear knowledge as to why his employment was terminated. The respondent did not seem to have provided the full account of what his business is and how well he is doing financially and given the documents about the group of companies that he is, to use a neutral phrase, associated with, it seems to me that he is probably doing as well as before. I am of the view that he would be able to provide at least $1,200 a month towards the maintenance of each of the children. This may not be sufficient to cover all their expenses, but I think that the petitioner should provide the remainder. The parties have a prenuptial agreement which I shall revert shortly, but that agreement was in respect of the preservation of each party's personal assets so that there would be no claim made in the event of a divorce. It does not concern the question of maintenance. So far as maintenance for the petitioner is concerned, I am of the view that the respondent ought to provide at least $2,000 a month. The petitioner has asked for a lump sum payment of $150,000. I am of the

view that this would be a fair order and would spare the petitioner the trouble of seeking the respondent for the enforcement of periodic payments. Mr Quek pointed out that the petitioner had saved almost all the $8,800 that the respondent had paid her as interim maintenance and therefore it meant that she did not require the money, or at least, not as much as the $1,600 ordered by Justice Lai Kew Chai previously. I hesitate to form that conclusion because it was for a short term of a year and the petitioner might have to conserve as much money as she could as the prospects of generosity looked dim given the situation she was in. Both parties might not have kept their individual accounts as neatly and honestly as the pre-nuptial agreement required them to do but there is little point in drawing adverse inferences that neutralize each other. The respondent will thus pay $1,200 a month to each of the children and a lump sum of $150,000 to the petitioner in maintenance.

10 I now come to the question of the division of matrimonial property. The main issue is whether the prenuptial agreement should be enforced. If that agreement is enforced, the petitioner will receive nothing by way of a division of the matrimonial assets. The prenuptial agreement was executed under Dutch law and the preliminary question I need to determine is the place of domicile of the parties. The law of the domicile, a concept that may be growing outdated, determines the issue of matrimonial assets. The domicile of a person is determined by the intention of the person's choice, not of the place where he chooses to live, but the place where he chooses to die. In modern times, it is sufficient to include the place where the person intends to return permanently at the end of his or her sojourn elsewhere in the world. On the evidence available before me, I do not think that the respondent has sufficiently proved that the petitioner has evinced any such intention. The petitioner's personal history indicates otherwise. She is a Swedish national with no ties to the Netherlands save for her marriage to the respondent. It seems obvious to me, therefore, that the Netherlands is neither her domicile of origin nor domicile of choice. She might have spoken of returning to the Netherlands with the family, but she was entitled to change her mind. Domicile is, after all, a place of convenience. It is not the same as one's nationality or citizenship. I am thus of the view that the petitioner's domicile is not that of the Netherlands. That being so, I may still consider whether this court ought to give effect to the prenuptial agreement as a document between the parties that ought to be enforced irrespective of where their domicile might be.

11 It will be convenient first to set out s 112 of the Women's Charter:

Power of court to order division of matrimonial assets

112. —(1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

(2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters:

(a) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;

(b) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;

(c) the needs of the children (if any) of the marriage;

(d) the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;

(e) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;

(f) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

(g) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and

(h) the matters referred to in section 114 (1) so far as they are relevant.

...

This court is entitled therefore to take into account the prenuptial agreement and give effect to it if the circumstances permit. In this case, the parties entered into the agreement voluntarily, as mature adults, and in the presence of a notary public who had explained the content and effect of it to the petitioner. And since the maintenance of the petitioner and the children has been provided as ordered above, I am of the view that the prenuptial agreement should be upheld and take effect accordingly. There will be no order for the division of assets.

12 I will hear the question of costs at a later date if parties are unable to agree on costs between themselves.

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