IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2018] SGHCF 20

HCF/District Court Appeal No 44 of 2018

Between

UMF

… *Appellant*

And

(1) UMG
(2) UMH

… *Respondents*

GROUNDS OF DECISION

[Family Law] — [Guardianship] — [Section 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed)] — [Locus standi] — [Non-parents]
[Family Law] — [Wardship]

UMF
v
UMG and another

[2018] SGHCF 20

High Court — HCF/District Court Appeal No 44 of 2018
Debbie Ong J
11 September 2018

12 December 2018

Debbie Ong J:

Introduction

1 The present case raised the important question of how the law of guardianship should be applied to parents and non-parents and how the appropriate balance of authority can be preserved between both groups of adults.

2 The appellant in this case is the grand-aunt of a four-year-old child, whom I shall refer to as "H". As the appellant was the plaintiff in the proceedings below, I shall refer to her as "the Plaintiff". The first and second respondents are the child's parents, whom I shall refer to individually as "the Mother" and "the Father", and collectively as "the Parents". It was undisputed that the Plaintiff had been caring for H since he was seven days old.

3 In the court below, the Plaintiff applied for custody and care and control of H. The Parents filed a separate application for the return of H, their biological child. The District Judge ("DJ") dismissed the Plaintiff's application and ordered that H be returned to the Parents. To facilitate the transfer of care, the DJ further ordered that the Parents were to have access to H every weekend from Saturday 10am to Sunday 7pm until 18 June 2018, after which he was to be returned to the Parents. The Plaintiff appealed against the DJ's orders. By the parties' consent, the order that H was to be returned to the Parents by 18 June 2018 was stayed pending the determination of this appeal.

4 After considering the parties' submissions and the evidence, I dismissed the appeal. As this case raised novel legal issues, I now provide fuller grounds of my decision.

Background facts

5 The Parents were married in Singapore sometime around November 2010. Prior to the marriage, the Mother had one child from another relationship. The Parents subsequently had five children together. H, who was born on 26 July 2014, is the third of their five children.

6 On 3 August 2014, when H was around seven days old, the Plaintiff met with the Father at the residence of his parents, *ie*, H's paternal grandparents. The Plaintiff stated that the Father "was in tears and appeared lost". At that meeting, the Father handed H over to the Plaintiff, who then brought H home. The reason behind the Father's decision was disputed – the Father claimed that he was under "duress" and experiencing "marital problems", while the Plaintiff claimed that the Parents had abandoned H or were unable to care for him.

7 The Plaintiff and the Father met again on the following day, *ie*, 4 August 2014. During that meeting, the Father then signed a "Letter of Guardianship" ("the Letter"), which was drafted by the Plaintiff. It stated:

> Letter of Guardianship
>
> (Personal)
>
> BEFORE ME, the undersigned authority, personally came and appeared:
>
> [The Father] who did say that they are the parent of [H] who is a minor. They do hereby give permission to [the Plaintiff] commencing on [3 August 2014], Sunday 11:52:08 to have full rights of guardianship, including such matters as to authorize medical treatment of any necessary nature, sign documents of any type, obtain lodging and do all things that I as a parent and/or legal guardian may do.
>
> [Witness's signature] [The Father's signature]

Pertinently, while the Letter alluded to the consent of both parents, the Mother did not sign it. The Mother only found out later that the Father had signed the Letter.

8 On the next day, *ie*, 5 August 2014, the Mother appeared at the Plaintiff's residence with police officers, demanding that the Plaintiff return H. Through the Plaintiff's sister-in-law, the Mother was informed that the Father had consented to entrusting H to the Plaintiff, and that the Plaintiff intended to "adopt" H. The Mother eventually left without H. The following day, *ie*, 6 August 2014, the Father requested that the Plaintiff return H to him, but she refused.

9 H remained in the Plaintiff's care until 12 August 2017, when he was handed over to the Mother. The Plaintiff had thought that H would be returned to her on the same day, but the Mother did not do so. Aggrieved, the Plaintiff

filed her application for custody and care and control of H on 25 August 2017. Thereafter, the Mother returned H to the Plaintiff's care on 6 September 2017.

Decision below

10 The Plaintiff applied for custody and care and control of H. The DJ dismissed her application on the sole ground that she had no *locus standi* to make the application under s 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("GIA"), which provides:

> **Power of court to make, discharge or amend orders for custody and maintenance of infants**
>
> **5**. The court may, upon the application of either *parent* or of *any guardian appointed under this Act*, make orders as it may think fit regarding the custody of such infant, the right of access thereto and the payment of any sum towards the maintenance of the infant and may alter, vary or discharge such order on the application of either parent or of any guardian appointed under this Act.
>
> [emphasis added]

11 The DJ held that on a literal reading, only parents or guardians appointed under the GIA may apply under the above provision. She noted that the Plaintiff did not belong in either category of adults. The DJ also relied on the decision of the High Court in *CZ v DA and another* [2004] 4 SLR(R) 784 ("*CZ*"), where it was held that "a grandmother is, without more, not entitled to apply for an order for access to her grandchild": at [8].

12 The DJ was further of the view that she was not bound by the decision of the High Court in *Lim Kok Chye Ivan and another v Lim Chin Huat Francis and another* [1996] 3 SLR(R) 83 ("*Lim Chin Huat Francis (HC)*") and the decision of the Court of Appeal in *Lim Chin Huat Francis and another v Lim Kok Chye Ivan and another* [1999] 2 SLR(R) 392 ("*Lim Chin Huat Francis (CA)*"). *Lim Chin Huat Francis (CA)* defined "guardian" as "a person who has

charge of or control over a child at the material time", and held that the label "lawful" is "simply tagged onto a guardian who has been adjudged and recognised by law as entitled to care and custody of the child and who had, at some point of time in the child's life, care and custody of the child": at [54] and [55]. The DJ noted that that case concerned the definition of "lawful guardian" under s 14 of the GIA. While s 14 has since been amended from the time of the decision in *Lim Chin Huat Francis (CA)*, there is no material difference in the substance of the provision. Section 14, as it stands today, provides:

> **Placing infant in custody of guardian**
>
> **14**. Where an infant leaves, or is removed from, the custody of his *lawful guardian*, the court may order that he be returned to such custody, and for the purposes of enforcing such order, may direct the bailiff to seize the person of the infant and deliver him into the custody of his lawful guardian.
>
> [emphasis added]

13 The DJ held that *Lim Chin Huat Francis (CA)* was inapplicable because the relevant provision in the present case was s 5 of the GIA, which does not refer to a "lawful guardian" but instead refers specifically to "any guardian appointed under this Act [*ie*, the GIA]". Therefore, since the Plaintiff was not a court-appointed guardian, she had no *locus standi* to make an application under s 5.

Parties' arguments

14 The Plaintiff's arguments in this appeal largely resembled those which had been rejected by the DJ. She reiterated that she was "entitled to seek relief under GIA generally and under Section 5 GIA specifically by reason of her status as a lawful guardian of [H]". She argued, citing *Lim Chin Huat Francis (HC)*, that "Section 5, and by extension GIA as a whole, do not inform of the nature or form of the application to be made under it" [original emphasis

omitted]. She submitted that both *Lim Chin Huat Francis (CA)* and *Lim Chin Huat Francis (HC)* were authorities for the proposition that the GIA "does not impose *locus standi* requirements for applications under it" [original emphasis omitted].

15 The Plaintiff further submitted that s 17(1)(*d*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") confers on the High Court "jurisdiction over the appointment of guardians and property and persons of infants". Section 17(1)(*d*) provides:

> **Civil jurisdiction — specific**
>
> **17.**—(1) Without prejudice to the generality of section 16, the civil jurisdiction of the High Court shall include —
>
> …
>
> (d) jurisdiction to appoint and control guardians of infants and generally over the persons and property of infants;
>
> …

She pointed out that the above provision does not set out the manner in which the court's jurisdiction is to be invoked and exercised. She submitted that the court's jurisdiction under this provision "can only be excluded by clear words in GIA and exclusion of jurisdiction will not be inferred when the statute is silent". She further argued that where the welfare of a child is engaged, "the Court's power is actuated by the primacy and paramountcy of the welfare of the child and no other, least of all the form the action takes" [original emphasis omitted]. She concluded, therefore, that the DJ was wrong to dismiss her application on the ground that she had no *locus standi* to make the application.

16 I note that the Plaintiff cited a New Zealand case on the court's wardship jurisdiction in support of her submissions on s 17(1)(*d*) of the SCJA. However,

no submission was made on whether the Singapore courts possess such jurisdiction or how such jurisdiction can be invoked.

17 The Plaintiff accepted that she was not a court-appointed guardian under the GIA. However, she highlighted that H had been in her care for almost his entire life, and was close to her. She emphasised that the Father had willingly given him up by signing the Letter, and pointed out that prior to June 2018, the Parents had only met H four times. However, the Plaintiff accepted that the Parents were *not unfit* parents.

18 The Parents, who appeared in person for this appeal, were understandably unable to engage in the legal arguments. However, the counsel who represented them in the proceedings below had cited a line of English cases for the proposition that "[t]he Court starts from the position that the natural parents have the primary right to have custody of their child", and that this starting position would only be displaced if "the circumstances show that there are compelling factors such that it is in the best interests of the [child] to remove him from his parents' custody". It was further submitted that no such compelling factors existed, because there were no allegations that the Parents had abused or wilfully neglected H.

19 At the hearing, the Parents explained that while H had been in the Plaintiff's care for the past four years, they had wanted him back but were not "given [a] chance". They further pointed out that other family members had interfered with their relationship with H. For instance, the Plaintiff's brother published an expletive-filled and threatening post on Facebook, accusing the Parents of being ungrateful to the Plaintiff. The Father also explained that he was "pressured" by his father, *ie*, H's paternal grandfather, to sign the Letter, and that, in any event, the Mother had never consented to the Plaintiff having

custody of H, whether by a similar letter or by agreeing to hand H over when he was only days old.

Issues

20 Having regard to the evidence and the parties' submissions, the following issues arose for discussion:

(a) Did the Plaintiff have *locus standi* to apply for custody and care and control of H under the GIA?

(b) If so, would it be in H's welfare to be placed indefinitely in the care of the Plaintiff?

(c) If the Plaintiff had no *locus standi*, would this have been an appropriate case where the court should exercise its wardship jurisdiction to place H in the Plaintiff's care?

Decision

Jurisdiction under the GIA

21 The relevant provisions of the GIA have been set out above. As the Plaintiff relied substantially on *Lim Chin Huat Francis (HC)* and *Lim Chin Huat Francis (CA)* (collectively, "the *Lim Chin Huat Francis* cases"), I will begin my discussion by analysing those cases.

Overview of the Lim Chin Huat Francis *cases*

22 I set out in brief the facts of the *Lim Chin Huat Francis* cases. A baby, Esther, was given to a couple ("the first couple") for their adoption three days after she was born. From January 1993 to February 1994, Esther was in the care

of a lady named Helen. While the first couple visited Esther, the couple did not bring her home. In January 1996, the first couple applied to adopt Esther. However, in the midst of the application, Helen entrusted another couple ("the second couple") with the care of Esther, and the second couple filed their own adoption application in October 1996. The first couple then filed an application under the GIA for Esther to be returned to the first couple.

23 The second couple raised a preliminary objection as to whether the first couple had *locus standi* to apply for relief under ss 13 and 14 of the GIA. This objection was upheld by a district judge, whose decision was however reversed by the High Court in *Lim Chin Huat Francis (HC)*. The High Court held that the district judge was wrong to proceed on the basis that the application was one made under s 5 of the GIA, because while the provision "empowers the court to make the orders spelt out when a parent or guardian makes an application, … it is not an enabling provision and does not say what or any application is to be made under it": at [10]. Thus, s 5 did not impose the *locus standi* requirements for seeking relief under ss 13 and 14. The High Court then considered the term "lawful guardian" under s 14, and referred to the definition of "lawful guardian" in other pieces of legislation, and concluded that Parliament had "broadened guardianship … to cover persons who are lawfully entrusted with the care and custody of a child as a lawful guardian, without such persons being appointed by the court or by testamentary process": at [21]. Further, since s 14 allowed an application by a "lawful guardian", the first couple had *locus standi* to apply for the return of Esther, and the matter was remitted to the district judge to be heard on the merits.

24 The district judge declined to order that the child be returned, and his order was affirmed by the Court of Appeal in *Lim Chin Huat Francis (CA)*. For the purposes of this appeal, it is pertinent to note that the Court of Appeal agreed

with the High Court in *Lim Chin Huat Francis (HC)* that the concept of "guardian" in Singapore covers more than the types expressly catered for under the GIA, and that the Court of Appeal accepted the definition of a "guardian" as being "a person who has charge of or control over a child at the material time": at [55]. As mentioned at [12] above, the Court of Appeal in *Lim Chin Huat Francis (CA)* was concerned with the definition of "lawful guardian" under s 14; the Court of Appeal was not concerned with and did not consider s 5 in its decision.

Is s 5 of the GIA an enabling provision?

25 The first point of note is the High Court's view in *Lim Chin Huat Francis (HC)* that s 5 is not an "enabling" provision and thus (generally) does not impose *locus standi* requirements. In other words, one need not invoke s 5 to apply for orders in respect of a child. I observe that where an applicant is seeking the return of a child, an argument can be made that s 14 is the provision under which the application can be brought, while an applicant seeking custody of a child would fall within an application in s 5. The former position appears to have been accepted by the courts in the *Lim Chin Huat Francis* cases, which in any case, were of the view that no limitation on *locus standi* requirements was imposed by s 5. The courts also held that the definition of "lawful guardian" in s 14 was broad enough to apply to the couple who were neither the child's parents nor court-appointed guardians: see [24] above. The definition of "guardian" given by the courts in the *Lim Chin Huat Francis* cases has been respectfully suggested to be too broad (see Leong Wai Kum, "Restatement of the Law of Guardianship and Custody in Singapore" [1999] Sing JLS 432; Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) ("*International Issues*") at para 7.12).

26 But even applying the decision in *Lim Chin Huat Francis (CA)* and these aforesaid distinctions between s 14 and s 5, where the applicant is seeking instead the custody or care and control of the child, as is the case here, there is no provision in the GIA which the applicant may invoke other than s 5. As I had held in *UDA v UDB and another* [2018] 3 SLR 1433, while the High Court has jurisdiction to "appoint and control guardians of infants and generally over the persons and property of infants" under s 17(1)(*d*) of the SCJA, the jurisdiction must be appropriately invoked through an enabling provision or other law: see [32].

27 The view that s 5 of the GIA is not an enabling provision for the application of custody, access and maintenance under the GIA is inconsistent with the legislative history of s 5: see Chan Wing Cheong, "Applications under the Guardianship of Infants Act" [1998] Sing JLS 182 at pp 185–187. This provision was enacted in 1965, along with other amendments to give "the mother an equal right with the father in applying for … guardianship and custody [of children]". The Guardianship of Infants Act 1925 (c 45) (UK) was used as a model. The relevant English provisions were later consolidated by the Guardianship of Minors Act 1971 (c 3) (UK), and s 9 of this legislation was then the closest provision to s 5 of the GIA. Section 9 of the Guardianship of Minors Act 1971 was regarded as an enabling provision, regulating the persons who could apply under that Act. (The Guardianship of Minors Act 1971 has since been repealed.)

28 There is a rationale underlying the need to limit the persons who can apply for orders in respect of a child. A parent is at the apex, ahead of all other adults, in his or her relationship with the child (Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018) ("*Elements*") at para 7.039):

> Between all the adults who might become involved in the parenting and upbringing of a child, then, the parents are at the apex, formally appointed guardians follow and, then, any other adult interested in the child (including the step-parent) is in an even lower position. It is best for the child for this ranking order to be appreciated so that legal regulation of the adults involved in a child's life (and, therefore, legal protection of the child) may operate optimally.

The law must endeavour to strike the optimal balance between enabling parents to carry out their parental responsibility without unnecessary interference from third parties and protecting children from harm caused by unfit parents.

29 I am of the view that s 5 of the GIA is an enabling provision through which parents and court-appointed guardians may apply for custody of, access to and maintenance of a child. The DJ was therefore correct to premise her decision on s 5. Exceptionally, when there are no parents, no guardians and no persons with parental rights with respect to the child, s 6 of the GIA may be used by any person to make an application to be the guardian of the child. Section 6 makes express reference to "the application of any person". This is discussed further below.

Does the Plaintiff have locus standi *under s 5 of the GIA?*

30 I now come to the key issue in this appeal. As the Plaintiff submitted, the Court of Appeal in *Lim Chin Huat Francis (CA)* appeared to expand the definition of "guardian" to include a person who was entrusted with the care of a child. However, as the DJ pointed out, that case could be distinguished. The question before the Court of Appeal was whether Esther should be returned to the first couple. As mentioned, the Court of Appeal did not refer to s 5 of the GIA but to s 14. The definition of "guardian" was examined in the context of s 14. Further, neither of Esther's parents was interested in her custody or care, or in being her parent.

31 In the present case, the Plaintiff had been caring for H since he was seven days old. She was seeking orders for custody and care and control of H. Thus, leaving aside the court's wardship jurisdiction (which will be discussed below), her application could only have been made under s 5, but that only refers to applications by parents and court-appointed guardians. The Plaintiff, being neither, had no *locus standi* to apply under that provision.

32 There is support for this position in *CZ*, where the High Court held that a grandmother, without more, is not entitled to apply for access to her grandchild: see [11] above. In so doing, the court appeared to have accepted the view that a grandmother, being neither a parent nor a court-appointed guardian, has no *locus standi* to apply for access orders under s 5.

33 I will also address below the Plaintiff's argument that the welfare of the child should in some way override any *locus standi* requirements: see [15] above. As I pointed out at the hearing, leaving issues of statutory interpretation aside, one can appreciate why only certain persons can make the applications under s 5. Parents are the only adults with parental rights with respect to and parental responsibility of their child without any court order. The *locus standi* requirements in s 5 serve the child's welfare by allowing parents to raise the child without unnecessary and unmeritorious interference from third parties. There are of course cases of child abuse and neglect where the Director of Social Welfare or the Child Protector may seek an order of care and protection under the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA") to remove a child from the custody of unfit parents. I will elaborate below.

Sections 6 and 10 of the GIA

34 For completeness, it is useful to note that guardians may also be appointed under ss 6(3) and 10 of the GIA, which provide:

> **Rights of surviving parent as to guardianship**
>
> **6.** …
>
> …
>
> (3) Where an infant has no parent, no guardian of the person and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the infant.
>
> …
>
> **Removal of guardian**
>
> **10.** The court may remove from his guardianship any guardian, and may appoint another guardian in his place.

35 Section 6 applies where the child has "no parent, no guardian of the person and no other person having parental rights with respect to him", which was not the case in the present appeal. The section expressly provides for "the application of any person". The child to which s 6 applies does not have the usual adults "at the apex" – *ie*, the parents – having parental rights with respect to and exercising parental responsibility over him or her. There is no risk of interference with parental responsibility; on the contrary, there is a need for this child to be protected by the appointment of an adult who can care for him or her.

36 Section 10 applies when there is a guardian appointed whom the court may remove from guardianship if appropriate. The English courts have terminated guardianship appointments on the grounds of "actual or threatened misconduct of the guardian" and "a change of circumstances which rendered it for some reason better for the child to have a new guardian": N V Lowe &

G Douglas, *Bromley's Family Law* (Oxford University Press, 11th Ed, 2015) ("*Bromley's*") at p 292. Thus, in *The Duke of Beaufort v Berty* [1721] 1 P Wms 703, it was held that guardians appointed by will are trustees, on whose misbehaviour, or giving occasion of suspicion, the Court of Chancery would interpose. Similarly, the Court of First Instance of the Hong Kong High Court held at [11]–[12] of *SLWE and others v CTT and another* [2010] HKCFI 713 that while "section 8 of the [Guardianship of Minors Ordinance (Cap 13) (HK)] does give this court the power to remove a guardian appointed pursuant to the Guardianship of Minors Ordinance", the power to remove a guardian should only be exercised when the appointment is no longer suitable like when "due to change of circumstances, the guardian becomes no longer fit and suitable to act as guardian for the minor in question".

37 An example where this power was exercised is *F v F (1)* [1902] 1 Ch 688, where the testamentary guardian converted to Roman Catholicism while her ward was a Protestant, although it should be noted that this case was decided at a time and in a context where a guardian had a legal duty to bring her ward up in the ward's religion, "protected against disturbing influences by persons holding the tenets of a different faith": see 689.

38 I observe that in these cases cited, the courts contemplated the removal of guardians who had earlier been appointed by will or under the applicable legislation. Section 10 does not envisage the removal of a natural parent as a guardian of the child. In any case, leaving aside the question of whether s 10 allows the court to remove a natural guardian (*ie*, a parent), there was no allegation of misconduct on the part of the Parents in this case, nor was there any suggestion that the Parents were not fit to care for H.

Welfare of the child

39 Even if the Plaintiff did have *locus standi* to apply for relief, I would still have dismissed her application and ordered that H be returned to the Parents. As I explained at the hearing, the parties must have in mind the "end goal" which we seek to achieve for H – protecting the welfare of this young child did not necessarily involve entrenching the current arrangement just because H was *presently* closer to the Plaintiff than to the Parents. Of importance here was that there was no question that the Parents were fit parents; the Plaintiff's counsel made clear that there was no allegation of unfitness. With fit parents desiring to fully reunite with H together with their family with their other children, it would be in H's welfare to be returned to the Parents. I observed that when H was just days old in August 2014, the Plaintiff knew that the Mother desired H's return and that the Father also sought his return, seemingly changing his mind after he had signed the Letter and entrusted the Plaintiff with H just a few days earlier. Yet the Plaintiff took a "legalistic" view, relying on the Letter signed by just one parent, to take away the Parents' baby.

40 A baby is not a chattel to be passed around or 'owned'; a child is the responsibility of both his or her parents. Parental responsibility is a serious legal obligation not to be taken lightly.

41 As I had noted elsewhere (*International Issues* at para 7.5):

> … There will, of course, possibly be other people who are important in the child's life. Grandparents, step-parents, aunts and uncles may form emotional bonds with the child. For such 'non-parents', their opportunities and rights to care for and have control over the child are very limited compared to that of parents. They may love the child as their own, but the child is not theirs. They do not have the primary obligation, privilege and responsibility as parents to raise the child as they see fit.

42 Unless a child is adopted by another set of parents, parenthood is for life: see *Elements* at paras 7.037 and 7.042. As the Court of Appeal has put it in *TDT v TDS and another appeal and another matter* [2016] 4 SLR 145 ("*TDT*") at [111]:

> … the relationship between a biological parent and a child is special, in that it is a relationship created naturally without legal process. The relationship between adoptive parents and children also deserves a higher status as the process of adoption 'irrevocably severs the relationship between the biological parents and their child', replacing it simultaneously with a relationship between a new set of parents and a child … Parents are therefore in unique positions *vis-à-vis* a child. In this regard, we endorse the views of Assoc Prof Debbie Ong (as she then was) in "Family Law" (2011) 12 SAL Ann Rev 298 … where she stated (at para 15.6):
>
> > … Parents stand in an exalted position with respect to having authority over the upbringing of their children. They are also expected to bear the greatest responsibility for the protection, nurture and maintenance of the children. …

43 In *TDT*, the issue at hand was the duty of a non-parent to maintain a child. The court noted that while a parent is obliged to maintain his or her child (s 68 of the Women's Charter (Cap 353, 2009 Rev Ed)), a non-parent would only be so obliged if he or she had accepted a child (who is not his or her child) as a member of his or her family: s 70(1) of the Women's Charter. Significantly, a non-parent could claim for such expenditure from the child's biological parents under s 70(3). The court recognised s 70(1) as a "recognition of the primacy of parental liability to a child": see *TDT* at [111]–[117]. In ordinary circumstances, it would be in a child's welfare to be brought up by the child's parents.

44 This position is neither novel nor unprecedented. It is also consistent with a line with English cases. In *Re H (A Minor) (Custody: Interim Care and Control)* [1991] 2 FLR 109, the English Court of Appeal held at 113 that in a

dispute over whether the child should live with a natural parent or some other family member (in that case, the grandmother), the applicable test is the child's welfare, and "there is a strong supposition that, other things being equal, it is in the interests of the child that it shall remain with its natural parents".

45 This statement was endorsed by a subsequent decision of the English Court of Appeal in *Re W (A Minor) (Residence Order)* [1993] 2 FLR 625 at 633. Similarly, in *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 134 ("*Re D*"), a case where the English Court of Appeal had to determine whether a child should live with his grandmother or his father, the court held that the correct approach was to first consider the father as a potential carer for the child, and whether there were "good grounds to reject the supposition in his favour": at 144. The court held that the judge below erred in carrying out a "balancing exercise between the two households" instead.

46 Our Court of Appeal has explained in *Re C (an infant)* [2003] 1 SLR(R) 502 ("*Re C*"):

> 14 The appellant's point here was that being a natural parent, and the other parent having passed away, he should automatically be entitled to the custody, care and control of the child. In this regard, he relied upon the English case of [*Re D*] which concerned a custody tussle between the father and the maternal grandmother. The English Court of Appeal said that the question for the court in a case such as this was whether there were any compelling factors which override the *prima facie* right of a child to an upbringing by its surviving natural parent. It held that the judge below had adopted the wrong test in reaching his decision by performing a balancing exercise as though the question was which of the households would provide the better home. The correct approach was first to consider whether the father was a potential carer for his son.
>
> 15 We accept the principle advanced that, *prima facie*, a surviving parent should have the right to custody of his child. This follows naturally from the settled rule that both parents of a child have equal rights over the child and if one parent should

> die, then the surviving parent would ordinarily have the sole right over the child …

47 Returning to the facts of this case, there was nothing in the evidence which suggested that it would be contrary to H's welfare to be brought up by his parents. As stated above, the Plaintiff accepted that the Parents were not unfit. The Parents also stated that they were able to provide for H. I further noted that the Parents had been having weekly overnight access to H with no significant issues.

48 I noted that even if a child is determined to be in need of care or protection under s 4 of the CYPA, the child's parents do not fall out of the picture completely. While the state may intervene in such situations to remove the child from the parents' care at the relevant time, re-integration of the child to his or her family will still remain a desired goal. There may of course be cases where the unfitness of parents is so persistent and the long term prognosis of fitness so bleak that other goals are pursued instead. The welfare of the child remains the paramount consideration in all cases.

49 Finally, I turn to the Letter, on which the Plaintiff placed significant reliance. To recapitulate, through this Letter, the Father (but not the Mother) consented to granting the Plaintiff "full rights of guardianship" over H. However, as I explained at the hearing, the law does not permit a parent to appoint a guardian outside the testamentary process (which takes effect after the parent's death) or without a court order. I was of the view that the Letter did not have the legal effect of relieving a parent of his or her entire parental responsibility and conferring it wholly on another adult. In any event, it was doubtful whether the Father's consent was irrevocable as there was no formal adoption of H by the Plaintiff. As I stated above at [42], parenthood is for life – a parent cannot unilaterally renounce his or her relationship with his or her child.

Indeed, s 5(1) of the CYPA read with ss 5(2)(*c*) and 5(3) makes it a criminal offence for a parent to neglect his or her child by failing to provide the child with "adequate food, clothing, medical aid, lodging, care or other necessities of life", and s 5(4)(*a*) provides that the parent may be convicted of the offence even if any actual or likelihood of suffering or injury on the part of the child was obviated by the action of another person.

50 Thus, even if the Plaintiff had *locus standi* to make her application, it would have been in H's welfare to be returned to the Parents.

Wardship jurisdiction

51 I now turn to the issue of the court's wardship jurisdiction, which the Plaintiff alluded to in her submissions.

Source and nature of the jurisdiction

52 To understand the source and ambit of this jurisdiction, it would be useful to trace its origins, which lie in feudal England, when all land was considered to be the property of the Crown. In those times, the Crown would grant land to lords, who would in turn dole out their portions to lesser tenants. An incident of tenure was that upon a tenant's death, the lord became guardian of the surviving infant heir's land and body. There was a protective element in that the lord was supposed to protect the ward by maintaining, educating and looking after him. In return, the lord was entitled to keep the profits of the land until the heir reached his majority. The Crown, whose rights arose from the death of a tenant-in-chief, benefited from this system, and the Court of Wards was created to enforce the sovereign's rights and the execution of his duties in connection with wardship. While these rights and the Court of Wards were abolished in 1660, wardship jurisdiction survived in the Court of Chancery. By

the 19th century, it became accepted that the real basis of the jurisdiction was the concept that the sovereign had a duty to protect all minor children living within the sovereign's area of control. This duty was delegated to the Lord Chancellor, and through him to the Court of Chancery: *Bromley's* at pp 742–743; *International Issues* at para 7.31.

53 This jurisdiction was first introduced into Singapore by the Second Charter of Justice 1826, which established the Court of Judicature of Prince of Wales Island, Singapore and Malacca, and invested with it all the powers of the Court of Chancery. Although the relevant provisions and court have changed over the years, s 17(1)(*d*) of the SCJA confirms that the High Court retains wardship jurisdiction: see *Elements* at para 9.98 and Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) ("*Principles*") at pp 476–478. As set out previously, s 17(1)(*d*) provides:

> **Civil jurisdiction — specific**
>
> **17.**—(1) Without prejudice to the generality of section 16, the civil jurisdiction of the High Court shall include —
>
> …
>
> (*d*) jurisdiction to appoint and control guardians of infants and generally over the persons and property of infants;
>
> …

54 The Family Justice Courts, comprising the Family Division of the High Court ("the Family Division"), the Family Court and the Youth Court were established in 2014. Section 22(1)(*a*) of the Family Justice Act 2014 (Act 27 of 2014) ("FJA") provides that the Family Division may exercise part of the civil jurisdiction of the High Court, which consists of, *inter alia*, the jurisdiction conferred on the High Court by s 17(1)(*d*) of the SCJA. In exercising this jurisdiction, the Family Division has all the powers of the High Court in the exercise of its original civil jurisdiction: s 22(2) of the FJA. This includes the

inherent powers of the court: see *International Issues* at para 7.31. It has also been said that "the power of the court in wardship proceedings is unlimited in order that it can do everything needed for a child": *Elements* at para 9.101.

55 Section 26(2)(*a*) of the FJA provides that the Family Court has all the civil jurisdiction of the High Court referred to in s 22(1)(*a*) of the FJA, while s 26(2)(*b*) provides that the Family Court shall have "all the powers of the High Court in the exercise of the original civil jurisdiction of the High Court" when "exercising any jurisdiction referred to in section 22(1)(*a*)". It follows from this that the Family Court may also exercise wardship jurisdiction, and in so doing, it possesses all the necessary powers to make orders for the child's welfare.

56 There is reference to such wardship jurisdiction being available in the Singapore courts. In *Re C* ([46] above), the Court of Appeal stated:

> **Ward of court**
>
> 27 Finally, before we conclude, we should mention that in the court below, counsel for the maternal grandparents had asked the court to exercise its jurisdiction to make the child a ward of court. The judge below did not refer to this jurisdiction in her grounds of decision, presumably because she did not think it was necessary.
>
> 28 In the Appellant's Case, the appellant did not elaborate on how the wardship jurisdiction should be exercised other than a bare statement that:
>
> > … in the event the infant is not made a ward of the court, safeguards should be put in place to prevent the [maternal grandparents] from either adopting or allowing the said infant to be adopted by a third or related person or persons.
>
> …

57 Consistent with the position that wardship jurisdiction may be exercised by the courts, r 18(2)(*b*) of the Family Justice Rules 2014 (S 813/2014) ("FJR") refers to "proceedings by reason of which the infant is a ward of the Court".

58 The Court of Appeal has also made reference to wardship jurisdiction in in *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 ("*Soon Peck Wah*") at [32]. It took a similar position as Lord Scarman in *In Re E (SA) (A Minor) (Wardship: Court's Duty)* [1984] 1 WLR 156 at 159, and stated that when a child becomes a ward of the court, the court takes over ultimate responsibility for the child and in effect becomes the child's parent: *Soon Peck Wah* at [32]. Following from this, "no important step in the child's life can be taken without the court's consent": *In re S (Infants)* [1967] 1 WLR 396 at 407.

59 However, at a practical level, the courts (and judges) are unable to care for children on a day-to-day basis. Thus, it has been suggested by Prof Leong Wai Kum that (see *Elements* at para 9.101):

> … it should be possible for a court exercising its wardship jurisdiction to appoint a person as the guardian of the child instead of appointing the child a ward of the court. This is especially so since the power of the court in wardship proceedings is unlimited in order that it can do everything needed for a child. It is suggested that is preferable for an adult person to be appointed guardian whenever possible so that the child has a person to look towards for protection …

60 In England, in *In re W (An Infant)* [1964] 1 Ch 202 at 210, the English Court of Appeal held that in wardship cases "the court retains the custody of the infant and only makes such orders in relation to that custody as may amount to a *delegation* of certain parts of its duties" [emphasis added]. The Court of Appeal of the Hong Kong High Court held at [7.1] of *CLP v CSN (formerly known as HTY or HTYZ) and another* [2016] HKCA 515 ("*CLP*") that "[t]he Court as the protector of the child has the power to make the child a ward of Court and confer the necessary rights of custody and care of the child on the [child's grandmother] who has been looking after the child."

61 Indeed, it would not be in the child's welfare to require that child to be brought to the court every time a decision needs to be made on his or her behalf. This does not however mean that the court is completely removed from the picture. On the contrary, the appointed guardian is ultimately accountable to the court, and is expected to always act in the child's welfare.

Applications to court

62 First, how may applications to invoke the court's wardship jurisdiction be commenced? The modes of commencement for various family proceedings are set out in Part 2 of the FJR. While there is no provision which specifically sets out how wardship proceedings should be commenced, r 18(1) states:

> **Proceedings which must be begun by originating summons**
>
> **18**.—(1) Unless otherwise provided in these Rules, proceedings by which an application is to be made to the Court or a Judge of the Court under any written law must be begun by originating summons.
>
> …

63 As the court's wardship jurisdiction can be traced to s 17(1)(*d*) of the SCJA, which is written law, applications to invoke such jurisdiction must be commenced by originating summons. The general provisions on originating summons procedure in Part 18, Division 24 of the FJR will also apply.

64 Second, who may apply to invoke the court's wardship jurisdiction? It is notable that in England, anyone with a genuine interest may apply. For instance, in *Re D (a minor) (wardship: sterilisation)* [1976] 1 All ER 326, the applicant was an educational psychologist attached to a local authority who sought to prevent a child from being sterilised: *Bromley's* at p 749. Indeed, it has even been accepted in a line of English cases that a court can make a child a ward on its own motion: see *Bromley's* at p 749. The Court of Appeal of the

Hong Kong High Court similarly held that where a grandmother of a child had no *locus standi* to apply to be appointed as a guardian under the relevant legislation, she could apply for relief by invoking the court's wardship jurisdiction: see *CLP* at [7.1]–[7.2].

65 These decisions are consistent with the local academic view that adults other than parents or court-appointed guardians may invoke wardship jurisdiction, as s 17(1)(*d*) of the SCJA does not specify who may do so. It has been suggested that wardship is "the means whereby a stranger seeks the care and custody of children in place of their parents": Tan Yock Lin, *Conflicts Issues in Family and Succession Law* (Butterworths Asia, 1993) at p 480. Prof Leong has also remarked that "[i]t would be most unfortunate if the power of the superior court were closed to an infant whose parents are unable or unwilling to pursue his or her well-being in this regard": *Principles* at p 565.

66 Third, what is the threshold to be satisfied before the court's wardship jurisdiction can be invoked? I have said earlier that parents and court-appointed guardians may apply under s 5 of the GIA, while other interested adults (such as the Plaintiff) will need to invoke the court's wardship jurisdiction. If such jurisdiction could be easily invoked, the underlying rationale for the distinction between these two different groups of adults, *ie*, parents and court-appointed guardians on the one hand and other interested adults on the other, would be undermined. Indeed, such an approach would render the *locus standi* requirements in s 5 otiose. Therefore, to preserve the balance of authority between these groups of adults, the threshold for invoking the court's wardship jurisdiction must necessarily be a high one.

67 One should start from the premise that wardship jurisdiction is protective in nature: see [52] above. It therefore follows that the jurisdiction

should only be invoked where a child is in some need of protection. Thus, Baroness Hale of Richmond and Lord Toulson held in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606 that the "real question" was whether the child required "protection": at [60]. And as Lam VP put it in *CLP*, the "crucial consideration" is whether there is "any real need" for the court to exercise its jurisdiction "in the interest of the child": at [1.2]. One example would be where both parents of a child are alive but do not wish to care for him or her. In such circumstances, a grandparent may invoke the court's wardship jurisdiction and seek to be appointed the child's guardian. The facts in the *Lim Chin Huat Francis* cases could and would support the invocation of the court's wardship jurisdiction, as neither of Esther's parents wanted to parent or care for her.

Application to the facts

68 In the present case, H was not alleged to be in need of protection. His parents, who were seeking his return, were fit to care for him, and there was nothing which indicated that his welfare would be harmed if he was placed in their care. This was not an appropriate case for the court to exercise its wardship jurisdiction.

Law reform

69 It may be argued that resorting to the court's wardship jurisdiction could lead to uncertainty and involve a more cumbersome regime of protection, and hence it is preferable to provide a clearly-defined statutory regime through which non-parents may apply for the necessary orders for the welfare of children. For instance, in England, s 10 of the Children Act 1989 (c 41) (UK) sets out in detail the classes of persons who may apply for certain orders. Further, the English courts may also make an order known as "a specific issue

order" (see s 8(1) of the Children Act 1989), which enables a specific question which has arisen or may arise in connection with any aspect of parental responsibility for a child to be brought before the court to be determined. In this way, the court may grant powers to individuals to do only what is necessary for the purpose of safeguarding the child's welfare, without granting orders on guardianship and custody which have more far-reaching impact on the relationship between the child and his or her parents. Having the GIA statutorily provide for Singapore courts to make such specific orders or orders for specific powers has been recommended by the Family Law Review Working Group in its report on guardianship reform: *Report of the Family Law Review Working Group: Recommendations for Guardianship Reform in Singapore* (23 March 2016) at paras 49–50.

70 It may also be apt for Singapore to make specific provision for non-parents with some connection to a child to make applications for custody, care and control and access in appropriate cases. One such group of adults could be the child's grandparents for instance. To protect the parent-and-child relationship from unmeritorious interference, the law could provide that the leave of court is required for such applications, setting out clearly the classes of persons who may apply for the court's leave. The court, in any event, has wardship jurisdiction to make orders for the child's welfare where necessary.

Conclusion

71 I dismissed the appeal. I was well aware that the Plaintiff was very disappointed with this decision, for she cared for and loved H since he was seven days old, and wanted to continue caring for him. The Parents also acknowledged that the Plaintiff had been caring for H and H was close to her. I hope there can

be a positive future where H can be raised by his own parents but remain close to his grand-aunt, especially as they are all part of the same extended family.

72 At the conclusion of the hearing, I gave the parties a week to discuss how a supportive transition could be made. Unfortunately, they were unable to agree. I therefore ordered as follows:

(a) Prior to and including 30 November 2018, the Plaintiff shall have access to H from Monday 1.00pm to Friday 5.00pm.

(b) From 1 December 2018 to 31 December 2018, the Plaintiff shall have access to H from Monday 1.00pm to Thursday 1.00pm.

(c) From 1 January 2019 to 31 December 2019, the Plaintiff shall have access to H every Friday after school or 5pm (whichever is later) to Saturday 8pm.

73 While I had allowed the Plaintiff "access" to H, this was to ease H's transition into the Parents' care. Still, though I provided for the Plaintiff to have access up to 31 December 2019 only, I encouraged the parties to make their own arrangements after that date, so that H can remain close to the Plaintiff, his grand-aunt. For this to happen, however, all parties must have the will to make it happen. They should not allow this decision to cause further relationship difficulties within the extended family.

Debbie Ong
Judge

Mohamed Hashim bin Abdul Rasheed (A Mohamed Hashim)
for the appellant;
The respondents in person.
