

Post separation & Co-parenting: What really matters

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Recent Judgments/ Decisions

FCMC 1062/2013 LMM v. LKKV

FCMC 7109/2012 湯對湯

FCMC 10298/2012 蔡對魏

etc

Show:

Trend-

Courts direct joint custody

What is Custody?

Right to make major decisions on welfare & upbringing of children

Court consider following:

- Medical issues
- Educational issues
- Religious issues

What is Joint Custody?

- Both parents retain right to decide on important matters affecting upbringing of child
- Physical care and control granted to only one parent
- Both parents should discuss and co-operate on concerned matters

What is Joint Custody?

- Major decisions for child be made by parents jointly
- Both parents must agree on decisions made
- Can apply to court for determination if cannot agree

What is Sole Custody?

Custodial parent has:

- right of daily care & control of child
- power to make important decisions of child

Non-custodial parent :

- retains access right
- effectively excluded from making important decisions affecting upbringing of child

What is Sole Custody?

- One parent to make major decisions without the agreement of the other parent
- These days, Court although grant sole custody order sometimes includes order that custodial parent must consult the other parent on specified matters

'Custody' & 'Care & Control'

Concepts of **'custody'** & **'care and control'** not defined

In PD v KWW, Civil Appeal No 188 of 2008, 9 June 2010
Hon Mr Justice Hartmann, JA, said :

... when a marriage breaks down and the court must ensure the best interests of any child of the union, it will invariably do so by bringing into play the dual concepts of **'custody'** – and **'care and control'**. Neither concept is defined in our statute books.

PD v KWW, Civil Appeal No 188 of 2008

Cont.

empirical evidence suggests a large measure of **misunderstanding** as to the **nature and extent of the two concepts.....**

a convenient way of understanding the 2 concepts : compare nature of decision-making required to put them into practice.

PD v KWW, Civil Appeal No 188 of 2008

- The decisions by a **custodial parent : consequence in safeguarding and promoting child's health, development and general welfare.**
- include whether should **undergo medical operation**
 - **religion**
 - **school**
 - **extracurricular activities**
- Parent vested with custody act as **child's legal representative.**

PD v KWW, Civil Appeal No 188 of 2008

misunderstanding exists as to nature and extent of 2 concepts

misperception :

if sole custody is given to one parent,

that parent 'wins' right to determine all matters big and small in the upbringing of that child

while the parent not given custody 'loses' right to have any say in child's upbringing

PD v KWW, Civil Appeal No 188 of 2008

mother seeks **sole custody** because she wants to leave behind the conflict with father

wants to be left in peace to raise child as she thinks best, to **determine matters free of any disturbance from father**

happy to let child spend time with father

happy to keep father informed of matters relevant to the child's well-being

but wishes to **reserve absolutely to herself manner of her child's upbringing**

PD v KWW, Civil Appeal No 188 of 2008

Father fears being deprived of joint custody , view society will perceive he has **forfeited rights & responsibilities** of a father

left only with residual right to spend time with daughter & residual responsibility of making a financial contribution to cost of her upbringing

PD v KWW, Civil Appeal No 188 of 2008

A non-custodial parent has right to be consulted in respect of all matters of consequence that relate to the child's upbringing.

It is not merely a right to be informed =a right to be able to confer on the matter in issue, to give advice and to have that advice considered

PD v KWW, Civil Appeal No 188 of 2008

parent given **sole custody** is given the **authority,**

in event of **disagreement with non-custodial parent, make final decision, only made after due consultation & if final decision** that is made is **considered** by the non-custodial parent to be **inimical to the child's best interests, court** may be called upon to **determine** the matter.

PD v KWW, Civil Appeal No 188 of 2008

it is often said that there is a **thin line** between sole custody and joint custody.

PD v KWW, Civil Appeal No 188 of 2008

emphasised when a court awards **care and control to one parent** but **rights of access to the other**

court is awarding a **form of shared care & control** because when a parent **exercises rights of access, especially staying access**, that parent assumes **care & control of the child**

Rights of access, are given in the interests of the child – to ensure continued **bonding** between parent and child.

PD v KWW, Civil Appeal No 188 of 2008

Previously the father had almost **absolute authority over child. no longer** the case.

best interests of the child – not the authority of the parents – must be the paramount consideration universally recognized. As Lord Fraser said in *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 at 170:

“... parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child.”

PD v KWW, Civil Appeal No 188 of 2008

In the past:

roles of mother and father in the raising of their child viewed with **equal rigidity**.

mother best left to **care for child** (esp. when **young**)

father best left to **provide financial support** and exercise **rights of guardianship**.

As for his contact with the child, **visitation was deemed sufficient**.

Today, such **sexist views are obsolete**.

PD v KWW, Civil Appeal No 188 of 2008

Social imperatives change.

When important and lasting,
common law can & should **keep pace**
with that change.

PD v KWW, Civil Appeal No 188 of 2008

widely recognized **today** long-term best interests of a child invariably best protected if, despite the breakdown, **both** parents **able to continue to play an equal role in making important decisions** that will determine child's upbringing.

PD v KWW, Civil Appeal No 188 of 2008

In the **United States**, **shared custody** is common.

The courts **routinely grant joint custody orders unless** one parent is clearly found to be unfit.

PD v KWW, Civil Appeal No 188 of 2008

In England and Wales, the Children Act 1989 emphasised continuing parental responsibility of both parents even if order made that child will reside with only one of them.

PD v KWW, Civil Appeal No 188 of 2008

**Other common law jurisdictions –
Australia – legislative changes to
similar effect, where appropriate,
ensure continued active
involvement of both parents in
upbringing of child**

PD v KWW, Civil Appeal No 188 of 2008

The Hong Kong Law Reform Commission Report on Child Custody and Access of 2005 recommended changes in line with the Children Act 1989 regrettably, little appears to have been done to give the Commission's recommendations legislative form.

PD v KWW, Civil Appeal No 188 of 2008

**effect of divorce on the children of the marriage, especially children of tender years, is deeply felt
children desire that continue to be protected and guided by both parents.**

PD v KWW, Civil Appeal No 188 of 2008

relations between the parents are strained is not of itself a reason to refuse to make a joint order or custody.

Nor fact that parent to be given care & control does not agree.

Such orders look to the future

PD v KWW, Civil Appeal No 188 of 2008

issue for the judge is whether with court proceedings concluded, reasonably anticipated parents will be able to agree on the questions of importance that will determine upbringing of their child, process of co-operation is in the best interests of the child.

PD v KWW, Civil Appeal No 188 of 2008

At all times, welfare of child remains first & paramount consideration

occasions when ability of parents to reach any rational accord deeply undermined to compel attempts at co-operation **will not protect interests of the child but leave child more vulnerable.**

Split-Custody Order

- on very rare occasions
- Court may grant custody of different child to different parent

NB court is reluctant to do so

No Custody Order by Court?

In suitable cases, I think it is an excellent idea.

“If the law allowed, I would not made any order for custody in this case. Given that it is not possible I will make an order for joint custody.” (by HH Judge Sharon D. Melloy in FCMC 1062/2013)

Share Rev John Chynchen’s story at SJC

Why insists on Sole Custody?

Misunderstanding/ Misconception of
meaning of Sole Custody

Deem Children as Chattels

Child used as a “pawn” to squeeze \$

Or as “Tool” against the other party

Should the terminology of custody be changed?

Yes,

“custody” outmoded,

focused on parental rights

International trend:

towards parental responsibilities

Parents helping children by insisting their legal rights?

No.

Share cases of what children
want.

Parental Responsibility

UK:

- Children Act 1989 emphasized continuing parental responsibility of both parents even if ordered child to reside with one parent

Parental Responsibility

Australia:

- Ensure continued active involvement of both parents in upbringing children

Parental Responsibility

- Emphasizes continuing responsibilities of both parents towards children (rather than own parental rights)
- Abolish Custody Order & access Order
- Introduce “Residence Order”
- Introduce “Contact Order”

Residence Order

“an order settling the arrangements as to the person with whom a child is to live & who has responsibility for the day-to-day care & best interests of the child” (Recommendation 21 of LRC Report on Child Custody & Access)

Contact Order

“An order regulating the arrangements for maintaining personal relations & direct contact between a child under that age & a person with whom the child is not, or will not be, living”

(Recommendation 24 of LRC Report on Child Custody & Access)

What matters to children faced with separation of their parents?

Feel loved by both parents

Assured they did not cause their
parents' separation

Can meet with both parents

Can meet with grandparents

Are children able to express their wishes?

No. Young age, don't know how
Older ones, learned not to take side
Risk losing both parents if cannot
express correctly

Any reform needed to enable children's voices be better heard?

Yes. Implement “Parental Responsibility Model by Legislative Means”

Consultation Paper issued in Dec 2011

High time to implement some recommendations.

Parental Responsibility

New concept requires cultural mindset

Can only be achieved by new legislation

Need extensive education campaign to assist
the public to adopt the new paradigm

Look forward to working with

Government departments, women
groups/ associations/ clubs, Youth
associations etc

Mediation

Judiciary's 3 years pilot scheme on
Family Mediation (2000 to 2003)

Report showed mediation works well
in Family disputes.

Share real cases



Thank You

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