

Of care and control

Getting parents to act in their children's best interests will remain a challenge in the courts and in society

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HOW to minimise the impact of a relationship breakdown and separation on children is a concern of family judges the world over. Research shows that children do better if they have regular contact with both parents and if they witness as little conflict as possible. This is of course easier said than done, and even when parents believe they are acting in the best interests of their children, conflict and arguments over how much time and the quality of time each parent then enjoys with their children, continue to be a source of contention. This has recently been highlighted by the High Court in Singapore in the case of *BNS v BNT*.

This case involved an expatriate couple and their children, aged 10 and 11 at the time of the hearing. In Singapore the court can make orders for custody, care and control and access in respect of children. In this case, the parties were able to agree on joint custody, which reflected the fact that both parents had and wanted to continue to have, an active role in the children's lives, and which gave effect to the principle in Singaporean legislation of joint and enduring parental responsibility. The question before the court was whether the order should be made for sole care and control and defined access as requested by the mother, or shared care and control as requested by the father. Care and control means the day-to-day care of the children and generally defines with whom they live with.

Although there are some differences with Hong Kong and England and Wales, the comments made by the High Court in this case reflect sentiments which are very familiar in all three jurisdictions and some comparison was made with English jurisprudence in support of the father's position. The court in each jurisdiction has the best interest of the children at the heart of their considerations. All three jurisdictions also grapple with the problems that arise from parents feeling as if they have "lost" or "won" the children. Terminology, therefore, has become an important element of the law relating to children in order to reduce this negative sentiment. Courts in all three jurisdictions often try to explain to the parties that each play an important role in raising their children, despite the fact that court orders have to be made on their behalf.

This is very evident in the judgement in *BNS v BNT* where the judge says "as a practical matter, it is inevitable that each parent, loving and concerned, comes into the parenting space with different skills, thought processes, values and approaches". "It is thus their common responsibility to ensure that their children benefit from the full measure of their differentiated abilities."

Therefore, the modern approach in the three jurisdictions is to recognise the benefits of both parents and thus to provide as much time with both as possible, within reason and within the practical limits of the children's schedules, but with the benefit of the child in mind at all times.

In this case, the father was successful in his application for a greater degree of access, which included more time during the week, including staying access. Thus, in real terms the week was divided between them, as were the weekends and the holidays. However, the court did not go so far in this case to make an order for shared care and control.

The father argued that shared care would send a message to the mother that his time was as important and that she should not do anything to undermine this. The mother on the other hand argued that this was a case where the parties had not been able to agree on anything in respect of the children and therefore an order for shared care was simply unworkable and impractical.

The judge agreed with the mother in this respect. Note was duly given to the fact that this mother had been the primary carer of the children under an interim order for the last six years. It was in the context of the mother's primary care that increased access was allowed by the court. The parties did not have "de facto" shared care and control, but rather this was a case where it was more appropriate to give care and control to one parent and liberal access to the other.

Where, as here, there were significant and palpable dislike and disagreement, the court found that arguments over day-to-day issues could have potentially a significant and negative longer-term impact on the children. Shared care and control would not aid the father as he thought it may and in fact could be disruptive to the children's sense of stability.

Terminology

In Hong Kong, the terminology of custody, care and control and access is the same, but there is no concept of parental responsibility enshrined in the legislation, and disputes as to custody are regularly before the courts as well as arguments as to care and control. As in Singapore, care and control means the day-to-day care of a child and involves the mundane but important aspects of a child's life including a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. The law in relation to children in Hong Kong is under review.

In one case before the Family Court, the mother sought joint custody with joint care and control, and the father sought sole custody with defined access to the mother. During the hearing the parties agreed that "care" of the children should vest in whichever parent was looking after the children at that time which reflected the wishes of the children that whoever had them at any given time "had the go". The final order was sole custody to the father (so he made final decisions for the children) with "an order that the care of the boys be shared between the parents". The order then set out the manner in which the care should take place. There was no separate order for access.

With joint care and control, both parents would be in-

volved in the schooling and extracurricular activity schedule, and time would be shared, although not necessarily on a 50/50 basis. Such an order would normally denote a high level of cooperation between the parents.

Family Court judges have considerable discretion when it comes to children and a variety of orders can be made, but a judge is unlikely to give joint custody or shared care where there is significant conflict, unless giving an order which did not denote a party winning or losing is in fact in the best interests of the children. Then an order setting out the arrangements can be made without reference to care and control and access in an attempt to avoid emotive terminology.

Family law in England and Wales has taken consideration of terminology in children's matters to another level in an effort to encourage parents to adopt less rigid positions. The Children's Act in 1989 did away with the old terminology of custody, care and control and access and replaced it with parental responsibility, residence and contact.

As it was found that parents still viewed themselves as winners and losers even after the change in terminology, this was in turn amended in 2014 by the Children and Families Act (CFA) with the introduction of Care Arrangement Orders. The origin of this was from the Family Justice Review in 2011 which was commissioned to review family law as a whole in an attempt to reduce delays in court. It was recognised that one of the most contentious areas was in respect of shared parenting.

The review concluded with the warning that any future legislation should not give the impression in respect of a particular amount of time with the child – the point was quality not quantity of time. There is therefore no presumption of shared care in the CFA and the Children's Act was amended to specifically reflect that.

The new law set out that there was a presumption of parental involvement: not shared care but a message that each parent has a valuable role to play in the child's life, and the introduction of care arrangement orders which specified with whom the child was to live and when the child was to live with any other person. These orders should be made following compulsory mediation which came in at the same time.

Therefore, the judge in *BNS v BNT* was right to state that English cases reflect a different statutory context, but in real terms parents behave in similar ways the world over and the difficulties faced by the judiciary in Singapore, Hong Kong and England have much in common. Terminology is helpful where it reduces emotive language, but persuading parents to truly act in their children's best interests is likely to continue to be a challenge in the courts and in society as a whole. ■

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