

Review of Child Custody Law

Executive Summary

(In 2005, the Law Reform and Revision Division of the Attorney-General's Chambers conducted a review of child custody law in Singapore. The enclosed discussion paper, which was prepared in October 2005, sets out the issues that were considered and the conclusions reached.)

Child custody refers to the bundle of rights, duties, obligations and responsibilities or parental authority that a person may exercise over a child. In a normal, stable family, a child is cared for by the parents, and the question of custody does not arise. But when a family breaks down, for example when the parents divorce, the future custody and care of the child becomes a central issue decided by the courts in the course of the matrimonial proceedings.

Under the Women's Charter (Cap. 353), the court may make custody orders relating to the child. However, there are perceived shortcomings to the concept of custody, such as the fact that it interferes with the natural parent-child relationship. There have been calls for reform in this area of law and for greater focus on parental responsibility. These issues are discussed in Chapter One.

Chapter Two discusses how the concept of "custody" has been abolished and replaced with "parental responsibility" in legislation in England (the Children Act 1989) and Australia (the Family Law Reform Act 1995). These legislation provide for matters such as the scope of parental responsibility, the persons bearing parental responsibility, the types of parenting orders that may be made by the court, the exercise of parental responsibility, and the ending of parental responsibility. The discussion underlines the importance of ensuring that the best interests of the child remains paramount, as is required under Article 3 of the UN Convention on the Rights of the Child 1989.

Chapter Three discusses whether legislative changes, such as those in England and Australia, are necessary in order to promote parental responsibility. It considers the important judicial pronouncements on custody made by the Singapore Court of Appeal in the landmark case of *CX v CY (minor: custody and access)*, decided in July 2005. The Court advocated the promotion of joint parental responsibility through the use of *joint custody* or *no custody* orders. With this decision, the conclusion of the paper is that legislative amendments are not necessary, at this juncture, for the purpose of promoting joint parental responsibility. This is a matter that can be left to judicial development by the courts under the concept of custody in existing legislation.



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Introduction

- 1 Child “custody” refers to the “bundle of rights, duties, obligations and responsibilities”¹ or parental authority that a person may exercise over a child. In a normal, stable family, a child is cared for by the parents, and the question of custody does not arise. But when a family breaks down, for example when the parents divorce, the future custody (and care) of the child becomes a central issue, which will have to be decided by the court in the course of the matrimonial proceedings.
- 2 The court may make custody orders relating to the child. The most common type of custody order is an order for *sole custody*. When sole custody of a child is given to a parent, that parent will have the legal right to decide all questions relating to the upbringing of the child. The other parent, who is not given custody, is deprived of such right. Given its legal significance, custody often becomes a very contentious issue in matrimonial proceedings.
- 3 England and Australia have sought to remove this source of contention by abolishing the concept of custody. They now emphasize in their family laws the importance of “parental responsibility” for children. In England this was done by way of the Children Act 1989 (relevant extracts of which are reproduced in **Annex A**); and in Australia by way of the Family Law Reform Act 1995 (relevant extracts of which are reproduced in **Annex B**). Australia is now considering the Family Law Amendment (Shared Parental Responsibility) Bill 2005 to refine their law on parental responsibility even further.

¹ Professor Leong Wai Kum, *Principles of Family Law in Singapore*, Butterworths, 1997, pages 536 to 538. Child custody has also been described as “the right to or responsibility for a child's care and control, carrying with it the duty of providing food, shelter, medical care, education and discipline.”: www.utcourts.gov/resources/glossary.htm. “Child custody and guardianship are the legal terms used to describe the legal and practical relationship between a parent and child, including e.g. the right of the parent to make decisions for the child and the duty to care for it; it comes into question in proceedings involving dissolution of marriage, annulment and other legal proceedings where the residence and care of children are concerned.”: en.wikipedia.org/wiki/Custody.

- 4 Singapore's law on custody is contained primarily in the Women's Charter (Cap. 353) (relevant extracts of which are reproduced in **Annex C**). The Women's Charter had its origins in English law, particularly the UK Matrimonial Causes Act 1973. With England now emphasizing parental responsibility in their family laws, the same could be considered in Singapore. In the recent landmark decision of *CX v CY (minor: custody and access)*² (reproduced in **Annex D**), the Singapore Court of Appeal advocated the promotion of joint parental responsibility through the use of *joint custody* or *no custody* orders.
- 5 This paper considers child custody in Singapore, its perceived shortcomings, the reforms in England and Australia, and possible reforms to our laws. Finally, it considers whether legislative changes are necessary. The conclusion of this paper is that, with the decision of *CX v CY*, it would not be necessary to amend the Women's Charter in order to promote joint parental responsibility.

² [2005] 3 SLR 690, [2005] SGCA 37, Court of Appeal (Yong Pung How CJ, Chao Hick Tin JA, Lai Siu Chiu J), 19 July 2005.

Chapter One: Custody

Custody orders

- 6 In any matrimonial proceedings relating to divorce, nullity of marriage or judicial separation, which come within the purview of our Family Courts, the court may make such orders as it thinks fit with respect to the welfare of any child.³ Among the matters considered for the welfare of the child is the issue of custody.⁴
- 7 The court may by order place the child in the sole custody of the father or the mother, and this is often the case in practice.⁵ Where the parents are able and willing to cooperate on the future upbringing of the child, the court may also place the child in the joint custody of both parents.⁶ In exceptional circumstances where it is undesirable to entrust the child to either parent, the child may be placed in the custody of any other relative of the child, any child welfare organisation or association, or any other suitable person.⁷
- 8 In deciding in whose custody a child should be placed, the court will give paramount consideration to the welfare of the child.⁸ The court will

³ Women's Charter, section 124.

⁴ Women's Charter, section 123(3).

⁵ According to the Subordinate Courts, the most common type of custody order is the sole custody order. Orders for joint custody are sometimes made, but less frequently. Another possible approach is to make no custody order. This latter approach was advocated by Justice Tan Lee Meng in the case of *Re G (Guardianship of an infant)* [2004] 1 SLR 229; [2003] SGHC 265 (High Court) where His Honour held that: "While it is true that a joint custody order may be unrealistic where the parents of a child have an acrimonious relationship, it does not always follow that the alternative in such a situation is to grant sole custody of the child to one parent. Where there is no immediate or pressing need for the question of custody to be settled, one should seriously consider whether an order for sole custody is in the best interest of a child, who should, without more, be entitled to the guidance of both parents." (paragraph 8 of his judgment). But it appears that, even after *Re G*, sole custody orders are still being made by the courts. ("Insisting On a Custody Order? A Year After *Re G*", Debbie Ong, Singapore Law Gazette, January 2005, page 14.)

⁶ For example, *IQ v IR* [2005] SGDC 46.

⁷ Women's Charter, section 125(1).

⁸ Women's Charter, section 125(2). This principle of regarding the welfare of the child as the paramount consideration is also applicable in guardianship proceedings: Guardianship of Infants Act (Cap. 122), section 3.

give regard to the wishes of the parents, and also the wishes of the child if the child is of an age to express an independent opinion.

- 9 An order for custody may be made on such conditions as the court may think fit to impose.⁹ For example, it may—
- a) contain conditions as to the place where the child is to reside, the manner of the child’s education and the religion in which the child is to be brought up;
 - b) provide for the child to be temporarily in the care and control of some person other than the person given custody;
 - c) provide for a child to visit a parent deprived of custody or give a parent deprived of custody the right of access to the child, at such times and for such period as the court may consider reasonable; and
 - d) prohibit the person given custody from taking the child out of Singapore.¹⁰
- 10 There are a number of important concepts related to custody, such as residence, “care and control” and “access”. When making a custody order, the court will generally give care and control of the child to one parent. The child will reside with that parent, and that parent will be entitled to decide all questions relating to the upbringing and education of the child, subject to any conditions that the court may impose.¹¹ The other parent, who is not given care and control, will have only rights of access to the child at specified times. In a sole custody order, care and control is generally given to the custodial parent, while the non-custodial parent is given access. In a joint custody order, care and control, similarly, is usually given to one of the parents, while the other gets access.

⁹ Women’s Charter, section 126(1).

¹⁰ Women’s Charter, section 126(2).

¹¹ Women’s Charter, section 126(1).

Shortcomings

- 11 There are several perceived shortcomings with the concept of custody.

Focus on parental rights rather than parental responsibilities

- 12 One criticism is that custody is an outmoded concept which had its origins in property and parental rights. It “does not adequately recognise that parenthood is a matter of responsibility rather than rights”¹², and that the interests of the child should be paramount.

- 13 Article 18(1) of the UN Convention on the Rights of the Child 1989, which Singapore signed and ratified in 1995, provides that:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.¹³

- 14 The Court of Appeal in *CX v CY* emphasized that:

[T]he child has a right to the guidance of both his parents. Parenthood is a lifelong responsibility and does not end at a particular age of the child, but continues until the child reaches adulthood. The question we have to answer will always be what is best for the child in the future.

(paragraph 38 of the judgment)

Interferes with natural parent-child relationship

- 15 Another criticism, which is a strong one, is that a sole custody order, which is the most common form of custody order currently made by the courts¹⁴, may interfere unnecessarily in the natural parent-child

¹² Report of the English Law Commission (Law Com No. 172), paragraph 2.1.

¹³ The full text of the Convention is available at <http://www.unicef.org/crc/crc.htm>.

¹⁴ See footnote 5 above.

relationship, and that such interference is not be in the best interests of the child.

16 Under a sole custody order, the custodial parent is entitled to make all future decisions relating to the child, and the parental relationship with the child is maintained. But the matter is quite different for the non-custodial parent. At best, the non-custodial parent would have access to the child and little, if any, involvement in future decisions affecting the child. The relationship between the non-custodial parent and the child is severely curtailed, and this can be particularly difficult where the parent and child had enjoyed a close and loving relationship before the marital break-up. Could such a curtailment of the parent-child relationship really be in the best interests of the child?

17 As Professor Leong Wai Kum has commented:

The authority of parents should, as far as possible, not be completely undermined by an order of custody. An order giving one parent sole custody is unattractive precisely because it undermines the authority of the other parent.¹⁵

18 The social impact of a sole custody order is tremendous. It affects not only the parents of the child, but also other close relatives and caregivers, such as grandparents. Numerous letters on the anguish caused by sole custody orders have been published from time to time in the forum pages of the Straits Times. One letter earlier this year summarises, poignantly, the social impact:

When a couple divorces, the entire family suffers when custody is given to one party.... In many divorce cases, the child is at a very young age and the least prepared to handle the emotional trauma. The emotional bonding, support and caring the child enjoys after years of close family contact can be broken abruptly by awarding sole custody to one party. Such close relations form an integral part of a child's upbringing and should continue after divorce. Such ties should not be prematurely cut just because the other party does not have custody. It is the child's right to have access to both parents. The emotional

¹⁵ *Principles of Family Law in Singapore*, Butterworths, 1997, at page 542.

benefits are immeasurable, especially if the child has to deal with a traumatic experience such as a divorce. I, as a grandfather, miss my grandsons very much but I have limited access to them and vice versa.¹⁶

Divisive issue in matrimonial proceedings

- 19 This point is related to the previous one. The legal effect and social impact of a sole custody order is tremendous as it can fundamentally alter the parent-child relationship. The “winner” of the custody battle takes the child home, and the “loser” gets only limited access. Given such high emotional stakes, it is not surprising that custody disputes are often hotly contested. This adds heat to what may already be an emotionally charged and acrimonious matrimonial dispute. Removing the divisive element of custody out of the equation in a matrimonial dispute would enable matrimonial proceedings to be resolved more amicably, or at least less acrimoniously, in the best interests of the child.

Calls for reform

- 20 In a law journal in January 2005, Associate Professor Debbie Ong observed that:

[The] notions of ‘custody’ and ‘care and control’ ... have been replaced in England. The Children Act 1989 in England abolished the concept of ‘custody’. English courts today grant limited orders to organise the child’s living arrangements such as residence orders and specific issues orders. The change in law followed the English Law Commission’s recommendations that both parents should retain parental power to act for the benefit of the child subject to any court orders on residence, contact or other specific issues.¹⁷ Australian law has also discarded the concept of custody. In 1996, the Family Law Reform Act 1995 came into force providing for ‘parenting orders’

¹⁶ Adaikalam Keresenan, “Joint custody: Kids benefit the most”, *Straits Times*, 4 Jun 2005. In *CX v CY*, one of the matters that the Court of Appeal took into account was “the interests of the child to maintain his bond with his paternal grandparents.” (Paragraph 47 of the judgment.)

¹⁷ Law Com. No. 172, on “Family Law, Review of Child Law, Guardianship and Custody”.

which cover issues concerning the child's residence, contact between the child and parents and other specific issues.¹⁸

- 21 More recently, in a keynote address at the LawAsia Conference on “Children & the Law”, held from 27 to 28 May 2005, the Honourable Justice Lai Siu Chiu said:

[I]t may be timely for a comprehensive review of this area of law to be undertaken in Singapore. For example, I understand that the concept of custody has been abolished in England. In its place, greater emphasis is placed on shared parental responsibilities and the courts only step in to make orders on residence, contact and other specific issues. Similarly, in Australia, ‘parenting orders’ are made encompassing residence and contact orders. Hong Kong has also just released a Law Reform Commission Report, which recommends that a new “joint parental responsibility model” be adopted. I would suggest that we study the experience of other jurisdictions in this area in detail and consider if the welfare of children can be promoted with a reform of this area of family law.¹⁹

Reforms in other Commonwealth jurisdictions

- 22 As has been noted, the English Children Act 1989 abolished the concept of custody. It now provides that every parent has “parental responsibility” for the child.²⁰ For the welfare of the child the court may make four types of orders: residence orders, contact orders, prohibited steps orders and specific issues orders.²¹ These will be considered in more detail later.²²
- 23 The Australian Family Law Reform Act 1995 similarly abolished the concept of custody in Australia. Applying concepts similar to the

¹⁸ Debbie Ong, “Insisting on a custody order? A year after *Re G*”, Singapore Law Gazette, January 2005, pages 13 to 16.

¹⁹ At paragraph 13 ([http://www.lawsociety.org.sg/lawasia/speech_keynote%20address%20\(JL\).pdf](http://www.lawsociety.org.sg/lawasia/speech_keynote%20address%20(JL).pdf).)

²⁰ English Children Act 1989, section 2(1).

²¹ English Children Act 1989, section 8.

²² At paragraphs 34 to 38.

English Children Act 1989 and expressed in plainer language, the Australian Family Law Reform Act 1995 also provides that each parent has “parental responsibility” for the child.²³ The court may make “parenting orders”, such as residence orders, contact orders, and specific issues orders.²⁴

24 The changes introduced in England by the Children Act 1989 and in Australia by the Family Law Reform Act 1995 are discussed in detail in a report by the Law Reform Commission of Hong Kong, entitled “Child Custody and Access”, dated March 2005.²⁵ Hong Kong is considering similar reforms to its custody laws.

25 Recently, in June 2005, Australia published an exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.²⁶ This amendment seeks to refine further the concept of parental responsibility by introducing, among other things, even more contemporary terms to replace “residence” and “contact”.

Need for emphasis on parental responsibility

26 Consistent with these developments in other jurisdictions and the calls for reform, it is submitted that our family laws should place primary emphasis on joint parental responsibility rather than custody.

²³ Australian Family Law Reform Act 1995, section 61C(1).

²⁴ Australian Family Law Reform Act 1995, section 61D read with section 64B.

²⁵ Available at <http://www.hkreform.gov.hk/en/publications/raccess.htm>.

²⁶ This draft is available at <http://www.dadsindistress.asn.au/downloads/Family%20Law%20Amendment.pdf>, and its Explanatory Memorandum at <http://www.dadsindistress.asn.au/downloads/explanatorymemorandum.pdf>.

Chapter Two: Parental responsibility

Scope of parental responsibility

- 27 The introduction of “parental responsibility” in England and Australia is consistent with the UN Convention on the Rights of the Child 1989.²⁷ In Singapore, the expression is not used in the Women’s Charter, but it does appear in the Women’s Charter (Matrimonial Proceedings) Rules.²⁸
- 28 The English Children Act 1989 defines “parental responsibility” to mean “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.²⁹ The Australian Family Law Reform Act 1995 similarly defines it to mean “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”³⁰
- 29 Applying these broad definitions, parental responsibility in Singapore would include matters such as:
- a) the duty to maintain or contribute to the maintenance of the child (including an illegitimate child) by providing or paying for the child’s accommodation, clothing, food and education;³¹
 - b) the power to make decisions relating to the upbringing of the child, such as choice of school, medical treatment, religion³²;

²⁷ In particular, Article 18(1) of the Convention, which is reproduced at paragraph 13 of this paper.

²⁸ Cap. 353, R 4. In Rule 2(1), “arrangements for the welfare of every dependent child” is defined to include “arrangements in relation to — (a) the custody, care and control of, and access to, the child; (b) financial provision for the child; (c) the education of the child; and (d) any other parental responsibility for the child.” (emphasis added)

²⁹ English Children Act 1989, section 3(1).

³⁰ Australian Family Law Reform Act 1995, section 61B. Note that the Australian definition does not include parental “rights” within the meaning of parental responsibility.

³¹ Women’s Charter, section 68.

³² Article 16(4) of the Constitution provides that: “... the religion of a person under the age of 18 years shall be decided by his parent or guardian”.

- c) the responsibility to ensure the proper upbringing and education of the child, such as ensuring that the child attends primary school;³³ and
- d) the authority to give consent on matters that under the law require parental consent, such as marriage³⁴ and adoption³⁵.

30 It would be ideal if a list could be compiled of every aspect of parental responsibility under our laws, and defined in legislation. However, such an exercise is likely to be difficult, considering the dynamic nature of parental responsibility. Both the English Children Act 1989 and Australian Family Law Reform Act 1995 do not apply a list approach. A broad definition of parental responsibility is used instead. It is submitted that the concept of parental responsibility should be broadly construed and, as has been defined in the Australian Act, it should encompass all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

Persons bearing parental responsibility

31 In England, the Children Act 1989 provides that where a child's father and mother were married to each other at the time of birth, they each shall have parental responsibility for the child.³⁶ Where a child's father and mother were not married to each other at the time of his birth, the mother shall have parental responsibility for the child, and the father shall not have parental responsibility for the child unless he subsequently acquires it,³⁷ for example by order of the court or by way of a parental responsibility agreement with the mother.³⁸ In Australia,

³³ Compulsory Education Act (Cap. 51), section 3.

³⁴ A person has the legal capacity to marry from the age of 18 years (Women's Charter, section 9). A person below the age of 21 years will require parental consent to marry (Women's Charter, section 17). Where the parents are divorced or separated, consent will be required of the parent to whom the custody of the minor is committed, or of both parents if custody is committed to both parents (Women's Charter, Second Schedule, Part I).

³⁵ Adoption Act (Cap. 4), section 4(1).

³⁶ English Children Act 1989, section 2(1).

³⁷ English Children Act 1989, section 2(2).

³⁸ English Children Act 1989, section 4.

the Family Law Reform Act 1995 similarly provides that each of the parents of a child has parental responsibility for the child.³⁹

- 32 In the Women’s Charter, for the purpose of provisions relating to matrimonial proceedings, including custody, the reference point is the child. “Child” is defined to mean “a child of the marriage ... who is below the age of 21 years.”⁴⁰ A “child of the marriage” means

“any child of the husband and wife, and includes any adopted child and any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and wife at the time when they ceased to live together or at the time immediately preceding the institution of the proceedings, whichever first occurred; and for the purposes of this definition, the parties to a purported marriage that is void shall be deemed to be husband and wife.”⁴¹

- 33 By this definition of “child”, the legislative policy under the Women’s Charter is that a person below the age of 21 years is to be cared for and provided for by the parents, which includes natural parents and adoptive parents, as well as married couples with whom the child lives as a “member of the family”. It is submitted that, by extension, parental responsibility should similarly attach to such persons in respect of every child of the marriage.

Court orders affecting parental responsibility (parenting orders)

- 34 Both in England and Australia, it is possible for aspects of parental responsibility to be affected or allocated between persons by way of court orders.⁴²

³⁹ Australian Family Law Reform Act 1995, section 61C(1).

⁴⁰ Women’s Charter, section 122.

⁴¹ Women’s Charter, section 92.

⁴² Australian Family Law Reform Act 1995, section 61C(3).

35 The English Children Act 1989 provides for four types of orders that a court can make with respect to children:⁴³

- a) “Residence order”, which means “an order settling the arrangements to be made as to the person with whom a child is to live”;
- b) “Contact order”, which means “an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other”;
- c) “Prohibited steps order”, which means “an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court”; and
- d) “Specific issue order”, which means “an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child”.

36 The Australian Family Law Reform Act 1995 empowers the courts to make orders similar to those under the English Children Act 1989. These orders are called “parenting orders”, and may be one or more of the following:⁴⁴

- a) “Residence order”, which decides the person or persons with whom a child is to live;
- b) “Contact order”, which decides contact between a child and another person or other persons;
- c) “Child maintenance order”, which provides for the maintenance of a child;

⁴³ English Children Act 1989, section 8(1).

⁴⁴ Australian Family Law Reform Act 1995, section 64B.

d) “Specific issues order”, which deals with any other aspect of parental responsibility for a child.⁴⁵

37 In proceedings for a parenting order, the court may make such parenting order as it thinks proper. The court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.⁴⁶ Any order given by the court may contain directions about how it is to be carried into effect, impose conditions to be complied with, and be made to have effect for a specified period.⁴⁷

38 Court orders under the English Children Act 1989 and the Australian Family Law Reform Act 1995 could serve two functions. The orders could confer on a person (other than the parents) some parental responsibility for a child.⁴⁸ The orders could also serve to limit parental responsibility by allocating the responsibility between the parents and other persons. But a parenting order does not take away or diminish any aspect of the parental responsibility of a parent except to the extent (if any) expressly provided for in the order or necessary to give effect to the order.⁴⁹

39 Australia is now considering a further step, which is to remove the use of terms such as “residence” and “contact” from its legislation. These changes are being proposed by way of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. The reason for the proposed change is that the terms “residence” and “contact”, introduced under the Family Law Reform Act 1995 to replace “custody” and “access” in order to eliminate any sense of ownership of children, did not achieve the intended change of culture. The new emphasis under the 2005 Bill will be on “parenting orders”. References to “residence” will be replaced

⁴⁵ The Australian Family Law Reform Act 1995, unlike the English Children Act 1989, does not provide for a “prohibited steps order”. But the specific issues order under the Australian Act appears broad enough to cover matters within the scope of the English prohibited steps order.

⁴⁶ Australian Family Law Reform Act 1995, section 65D.

⁴⁷ English Children Act 1989, section 11(7).

⁴⁸ Australian Family Law Reform Act 1995, section 61D(1).

⁴⁹ Australian Family Law Reform Act 1995, section 61D(2).

with “lives with”, and references to “contact” will be replaced with “spends time with” and “communicates with”.⁵⁰

40 Comparing the orders in England and Australia with orders made under the Women’s Charter, it would appear that:

- a) “residence” orders are analogous to orders relating to “care and control”;
- b) “contact” orders are analogous to orders relating to “access”; and
- c) “specific issues” orders and “prohibited steps” orders (under the English Children Act 1989) are analogous to the conditions that our courts may impose in respect of custody orders.⁵¹

41 These orders under the Women’s Charter remain relevant for the purpose of promoting joint parental responsibility.⁵² The wide discretion of the courts to make orders relating to “care and control” and “access”, and to impose conditions, does enable the courts to allocate parental responsibility where necessary.

Welfare of the child remains paramount

42 Article 3 of the UN Convention on the Rights of the Child 1989 requires that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

43 Consistent with this, our family laws emphasise that the welfare of the child is to be regarded by the court when making any decision affecting

⁵⁰ The exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 can be found at <http://www.dadsindistress.asn.au/downloads/Family%20Law%20Amendment.pdf>. See also the Explanatory Statement of the Bill at <http://www.dadsindistress.asn.au/downloads/explanatory memorandum.pdf>, particularly at page 21.

⁵¹ Women’s Charter, section 126(1). See discussion at paragraphs 6 to 10 of this paper.

⁵² Debbie Ong, “Insisting on a custody order? A year after *Re G*”, Singapore Law Gazette, January 2005, at page 14.

the child.⁵³ The English Children Act 1989 begins by stating that: “When a court determines any question with respect to—(a) the upbringing of a child; ... the child’s welfare shall be the court’s paramount consideration.”⁵⁴ The Australian Family Law Reform Act 1995 provides that “[i]n deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”⁵⁵

44 When deciding on a child’s welfare, the court is to have regard to “the wishes of the child, where he or she is of an age to express an independent opinion”.⁵⁶ The English Children Act 1989 provides, similarly, that the court shall have regard to “the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)”.⁵⁷

45 Any development of our family laws should therefore retain, as the central pillar, the promotion of the welfare of the child as the paramount consideration. This principle should also form the basis of all decisions affecting the child, having due regard to the wishes of the child. In any decision on the allocation of parental responsibility, the welfare of the child should remain the paramount consideration.

Exercise of parental responsibility

46 More than one person may have parental responsibility for a child at the same time.⁵⁸ A person who has parental responsibility for a child at any time does not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.⁵⁹

⁵³ See, for example, Guardianship of Infants Act (Cap. 122), sections 3, 7, 8; Women’s Charter sections 70(1), 123, 124, 125, 129, 130.

⁵⁴ English Children Act 1989, section 1(1)(a).

⁵⁵ Australian Family Law Reform Act 1995, section 65E.

⁵⁶ Women’s Charter, section 125(2)(b).

⁵⁷ English Children Act 1989, section 1(3)(a).

⁵⁸ English Children Act 1989, section 2(5).

⁵⁹ English Children Act 1989, section 2(6).

- 47 The English Children Act 1989 provides that where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.⁶⁰
- 48 This is a very wide provision. It would mean that a parent, particularly the parent with whom the child resides, may make important decisions affecting the child without consulting or even informing the other parent. Conceivably, this may lead to disputes between the parents when each takes decisions unilaterally without involving the other parent.
- 49 The Hong Kong Law Commission was not in favour of such a wide provision. They suggested that, apart from routine day-to-day matters, there are some decisions for which the consent of both parents should be required, and some for which a parent should at least notify the other. The Hong Kong Commission suggests that the decisions that should require the consent of both parents include:
- a) change of child's surname;
 - b) adoption;
 - c) removal of the child out of jurisdiction for more than one month; and
 - d) permanent removal of the child out of the jurisdiction.
- 50 The decisions for which notification to the other parent should suffice include:
- a) a major operation or long-term medical or dental treatment for the child;
 - b) major change in the child's schooling;
 - c) bringing the child up in a particular religion;
 - d) consent to marriage;

⁶⁰ English Children Act 1989, section 2(7).

- e) moving house with the child;
- f) removing the child from the jurisdiction temporarily but for less than one month; and
- g) changes in the child's domicile or nationality.⁶¹

51 In our view, it will be helpful to have a list of the types of decisions that require mutual consultation or notification between persons having parental responsibility, as suggested by the Hong Kong Law Commission. However, it must also be recognised that such a list can never be definitive or conclusive. It may not suit the unique circumstances of every family. Hence, while such a list can provide a useful starting position which would apply in most cases, the court should ultimately be given the discretion to modify the arrangement as circumstances require. The court hearing the matter would be in the best position to balance competing interests and determine what sorts of issues really matter to the parties and the child, and for which mutual consultation should be a requirement in the best interests of the child.

52 In short, it is submitted that generally, parental responsibility should be exercisable by each parent independently. However, important decisions affecting the child should not be taken by one parent without the consent or notification of the other parent. The court should be given full discretion to determine what these decisions are and to modify arrangements for the exercise of parental responsibility as necessary.

Ending of parental responsibility

53 The Australian Family Law Reform Act 1995 provides that a parenting order is not to be made in relation to a child who (a) is 18 years or over; (b) is or has been married; or (c) is in a “de facto” relationship. Likewise, a parenting order in relation to a child stops being in force if the child

⁶¹ Report of the Law Reform Commission of Hong Kong on “Child Custody and Access”, March 2005 (available at <http://www.hkreform.gov.hk/en/publications/raccess.htm>), at paragraphs 9.95 and 9.96.

turns 18, marries or enters into a de facto relationship.⁶² Parental responsibility also ends on the adoption of the child.⁶³ A parenting order in force in relation to the child stops being in force on the adoption of the child.⁶⁴

- 54 Under the Women's Charter, custody may be granted of children below the age of 21 years.⁶⁵ Consistent with this legislative policy, parental responsibility should generally end when the child reaches 21 years of age, unless the child is adopted or married before that age, or there is other express provision in the law for specific aspects of parental responsibility to continue beyond that age.⁶⁶

⁶² Australian Family Law Reform Act 1995, section 65H(1) to (2). The court may make a declaration to the effect that the child is in, or has entered into, a de facto relationship. (section 65H(3)).

⁶³ Australian Family Law Reform Act 1995, section 61E.

⁶⁴ Australian Family Law Reform Act 1995, section 65J.

⁶⁵ Women's Charter, section 123(1) read with section 122.

⁶⁶ For example, a parent may be required to continue to provide maintenance for a child above 21 years of age who is undergoing full-time national service or who is "receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation" (Women's Charter, section 69(5)).

Chapter Three: Whether legislative changes required

Legislation making reference to “custody”

- 55 If the Women’s Charter is to be amended to replace the concept of custody with parental responsibility, similar to that which has been done in England or Australia, corresponding amendments will have to be made to other legislation, since parental responsibility will be relevant in a much wider context than matrimonial proceedings under the Women’s Charter. A list of the legislation that make reference to the word “custody” is set out in **Annex E**.
- 56 Until recently, “custody” did not have a settled legal meaning.⁶⁷ But the Court of Appeal has, in *CX v CY*, now given an authoritative opinion on what a custody order involves. Custody is a general concept that is divided into two smaller packages, namely, “care and control” and “residual custody”. The grant of a care and control order dictates which parent shall be the daily caregiver of the child and with whom the child shall live. Residual custody is the package of residual rights that remains after the grant of a care and control order. Residual custody essentially concerns the long-term decision-making for the welfare of the child. The court acknowledged that it was impossible to lay down an exhaustive list of matters which will fall under the concept of residual custody, but it would include decisions pertaining to religion, education and major healthcare issues.⁶⁸
- 57 Depending on its context, the word “custody” may connote one of several meanings when used in legislation. In relation to matrimonial proceedings under the Women’s Charter, it may refer to “care and

⁶⁷ “[T]he term ‘custody’ does not have a settled legal meaning. It is not defined in the Singapore legislation, either in the Guardianship of Infants Act or in the Women’s Charter ... The law of custody is ... in a state of confusion.” *Re Aliya Aziz Tayabali* [2000] 1 SLR 754; [1992] SGHC 319, High Court (Michael Hwang, JC), at paragraphs 6 and 11 of the judgment.

⁶⁸ Paragraphs 30 to 35 of the court’s judgment. On the point of residual custody, see also the views of the Hong Kong Law Commission, as summarised at paragraphs 49 and 50 of this paper.

control” or residual custody, as discussed in the previous paragraph. It is also used in this sense in other legislation.⁶⁹ But sometimes the word is used in the sense of mere physical possession,⁷⁰ or in the sense of detention, as in custody by the police.

- 58 For each occurrence of the word “custody”, its different senses must be distinguished. Where the word is used in the sense of care and control, or residual custody, a more contemporary expression could be used to replace it.

Parental responsibility within the ambit of custody

- 59 But a fundamental question remains. Is it necessary to amend legislation in order to promote the concept of parental responsibility? Can parental responsibility be emphasized within the custody order?

- 60 Professor Leong Wai Kum, while observing the developments in England brought about by the Children Act 1989, has suggested that parental responsibility can work within the current ambit of the law:

[W]e can just as well retain the law of guardianship and custody and the kinds of orders our courts have always made, and still align the exercise of their powers to preserve parental responsibility. It may not be necessary to revamp the law to achieve this.

She suggested that this could be achieved through the use of care and control orders, no custody orders, or joint custody orders, as appropriate.⁷¹

⁶⁹ For example, Children and Young Persons Act (Cap. 38), section 25(1): “Where an order has been made by a protector under section 16 committing a child or young person to a place of safety or to the custody of a relative or other fit person, the protector may at the time of or subsequent to the making of such order make a further order (referred to in this section as a protector’s contribution order) requiring the parent or guardian or the person having the custody of the child or young person at the time of the making of the order to contribute such weekly or monthly sum in respect of the maintenance of the child or young person as the protector having regard to his means thinks fit.”

⁷⁰ For example, Guardianship of Infants Act (Cap. 122), section 14: “Where an infant leaves, or is removed from, the custody of his lawful guardian, the court or a judge may order that he be returned to such custody, and for the purposes of enforcing such order, may direct the Sheriff to seize the person of the infant and deliver him into the custody of his lawful guardian.”

⁷¹ “Restatement of the Law of Guardianship and Custody in Singapore”, Singapore Journal of Legal Studies [1999] 432 to 493, especially at pages 490 to 492.

61 This view has been endorsed by the Court of Appeal in their landmark decision of *CX v CY*. In the judgment of the court, delivered by the Honourable Justice Lai Siu Chiu, it was declared that:

24 ... To our minds, the notion that joint custody should only be made where there is a reasonable prospect that the parties will co-operate is no longer appropriate in this day and age. Instead, we felt that in line with the outlook that parental responsibility is for life, the time was right for us to expressly endorse the concept of joint parenting. We believe that, generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule. ...

How the law of custody can support joint parenting

...

26 This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women's Charter (Cap. 353, 1997 Rev Ed) ("the Charter") exhorts both parents to make equal co-operative efforts to care and provide for their children. Article 18 of the United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory, also endorses the view that both parents have common responsibilities for the upbringing and development of their child. Similarly, jurisdictions like England and Australia have adopted approaches that impose on both parents the concept of life-long parental responsibility. With parliamentary intervention in these jurisdictions, the very concept of custody orders was abolished as it was acknowledged that it was in the interests of the child to have both parents involved in his life. There can be no doubt that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents. The needs of a child do not change simply because his parents no longer live together. Thus, in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.

27 We note that local academic opinion has long advocated using the law of custody to preserve joint parental responsibility....

28 More significantly, we feel that the making of joint or no custody orders reminds the parents that the law expects both of them to co-operate to promote the child's best interest. With the grant of joint or no custody orders, the likelihood of the non-custodial parent being excluded from the child's life is much reduced. It also encourages the parent who does not reside with the child to continue to play his or her role in joint parenthood.

(Emphasis added)

- 62 The court explained that the legal implications of a no custody order and a joint custody order were similar, and both parents could continue to exercise joint custody of the child. There was no unnecessary intervention in the parent-child relationship:

18 ... We should make it clear from the outset that a “no custody order” is not tantamount to depriving both parents of custody. It is generally accepted that the practical effects of a “no custody order” and a “joint custody order” are similar where a “care and control order” has been made. In the normal course of events, the parents of a child will have joint custody over him. We thus agree with Prof Leong Wai Kum's comments in *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 538–539 that the making of a “no custody order” should be seen as leaving the law on parenthood to govern the matter, as both parents continue to exercise joint custody over the child. Such an order also affirms the approach of the courts not to intervene unnecessarily in the parent-child relationship where there is no actual dispute between the parents over any serious matters relating to the child's upbringing (see *Re Aliya Aziz Tayabali* [2000] 1 SLR 754 and *Re G (guardianship of an infant)* [2004] 1 SLR 229 (“*Re G*”).

(Emphasis added)

- 63 In certain circumstances, a no custody order is to be preferred over a joint custody order:

19 Since the practical effects of a “no custody order” and “joint custody order” are similar, the more important question to address is: Under what circumstances should a “no custody order” be preferred over a “joint custody order”? As mentioned earlier, where there is no actual

dispute between the parents over any serious matters relating to the child's upbringing, it may be better to leave matters at status quo, and not to make any custody order. As was suggested by Assoc Prof Debbie Ong in her article "Making No Custody Order: *Re G (Guardianship of an Infant)*" [2003] SJLS 583 at 587–588, in other circumstances where there is a need to prevent parties from drawing the child into the battle over the extent of their custodial powers, or where there is a need to avoid any possibly negative psychological effect that comes about when one parent "wins" and the other parent "loses" in a custody suit, it may also be appropriate not to make any custody order.

(Emphasis added)

- 64 In the case of *CX v CY* itself, the court was of the view that it was appropriate for a joint custody order to be made:

20. ... This is because the symbolism of such an order may be used to remind the mother that the father has an equal say in more significant matters concerning the child's upbringing. Upon an examination of the affidavit evidence, it appeared to us that there had been previous attempts by the mother to exclude the father from the child's life altogether by denying him access rights. Since the mother, who had been given care and control, appeared to be so inclined, it was necessary to make a "joint custody order" instead of making a "no custody order", to send a signal to the mother that she should be more co-operative with the father.

(Emphasis added)

- 65 The Court of Appeal took the view that a sole custody order should be made only in exceptional cases, for example, where one parent physically, sexually, or emotionally abuses the child, or where the relationship of the parties is such that co-operation is impossible even after the avenues of mediation and counselling have been explored, and the lack of co-operation is harmful to the child.⁷²

⁷² Paragraph 38 of the judgment.

- 66 In short, the following principles can be gleaned from the Court of Appeal's decision in *CX v CY*:
- a) Parental responsibility for a child continues until the child reaches adulthood. Both parents continue to have joint parental responsibility even after their marital relationship is severed in a divorce.
 - b) Joint parental responsibility (or joint custody) can be maintained when the court makes no custody order or a joint custody order, and this would be in the interests of the child.
 - c) There should be minimal intervention in the parent-child relationship. A "no custody" order is to be preferred if there is no actual dispute between the parents over any serious matters relating to the child's upbringing, or where there is a need to avoid the negative psychological effect that a custody battle may have on a child.
 - d) A joint custody order should be made in other cases. A joint custody order could be useful for symbolic or signalling purposes, to remind both parties of their joint parental responsibility.
 - e) Only in exceptional cases should a sole custody order be made.
- 67 *CX v CY* is a significant declaration of judicial policy on custody, coming from the highest court in Singapore. It can be expected that the lower courts will abide by the approach established by the Court of Appeal and will make more joint custody orders or no custody orders, with sole custody orders confined only to exceptional cases. This future development may well lead to the desired emphasis on parental responsibility within the current ambit of custody law.

Current legislative provisions relating to parental responsibility

- 68 In fact, the concept of parental responsibility is not entirely new. Reference has been made to it in the Women's Charter (Matrimonial Proceedings) Rules.⁷³
- 69 Under the Rules, where a petition for a decree of divorce, presumption of death, judicial separation or nullity of marriage discloses that there is a child of the marriage, the petitioner must file, together with the petition, (a) an agreed parenting plan; or (b) a proposed parenting plan.⁷⁴ The Rules require the parties to try to agree on the arrangements for the welfare of every dependent child of the marriage⁷⁵ and file an agreed parenting plan. If the parties are unable to agree on the arrangements for the welfare of every dependent child of the marriage, the parties may seek counseling or mediation to try to resolve their disagreements harmoniously. In reaching an agreement on the arrangements for the welfare of every dependent child of the marriage, the parties must regard the welfare of the child as the paramount consideration.⁷⁶ The "arrangements for the welfare of every dependent child" include arrangements in relation to —
- a) the custody, care and control of, and access to, the child;
 - b) financial provision for the child;
 - c) the education of the child; and
 - d) any other parental responsibility for the child.⁷⁷

⁷³ Cap. 353, R 4.

⁷⁴ Rule 8.

⁷⁵ Under Rule 2(1), "dependent child of the marriage" means a child of the marriage who is — (a) below the age of 21 years; or (b) of or above the age of 21 years but who —
(i) suffers from any mental or physical disability;
(ii) is or will be serving full-time national service; or
(iii) is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment.

⁷⁶ Rule 8(2) to (4).

⁷⁷ Rule 2(1).

70 As has been noted earlier in this paper,⁷⁸ a custody order may be made on such conditions as the court may think fit to impose. This means that, in practice, our courts today do have the power to allocate parental responsibility among the parties. The orders may be as broad or as specific as necessitated by the circumstances of each case. To illustrate, orders such as the following may be made by a court when making a custody order:

- (1) ... care and control of the child be granted to the wife;
- (2) there be liberal access by the husband to the child including,
 - a) every alternate weekend – Wednesday 7 pm to Sunday 8 pm;
 - b) every alternate public holiday from 9 am to 6 pm;
 - c) in alternate years, Chinese New Year eve or Chinese New Year first day from 10 am to 9 pm;
 - d) first half of the mid-year and year-end school holidays.
- (3) the husband is to be consulted on matters relating to the child's education and religion;
- (4) the husband is to pick up and return the child from and to the wife's residence for access;
- (5) the husband is to pay maintenance of \$2,000 per month for the child with effect from 31 December 03, and thereafter on the last day of each month;
- ...
- (10) liberty to apply, including terms of access when the child begins formal schooling; ...⁷⁹

(Emphasis added)

⁷⁸ Paragraph 9.

⁷⁹ These were some of the court orders made in the case of *EY v EZ*, [2004] SGDC 91 (District Judge Hoo Sheau Peng), at paragraph 1 of the judgment.

No pressing impetus for legislative change

- 71 Considering that it is possible for the courts to emphasize joint parental responsibility by making joint custody or no custody orders, and that such an approach has now received the endorsement of the Court of Appeal in *CX v CY*, there appears to be no pressing impetus to amend the Women's Charter and other related legislation in order to emphasize parental responsibility. A radical legislative change at this stage might create more confusion and uncertainty and dilute the positive impact of *CX v CY*. The law on parental responsibility can be left to be developed by the courts under existing legislation.
- 72 It may be significant to note that in Australia, the reforms brought about by the Family Law Reform Act 1995 did not meet their objectives in a number of significant respects.⁸⁰ For example, the meaning of joint parental responsibility, and how joint parental responsibility should be exercised after the making of court orders, was not clearly stated in the legislation and was not well enough understood by the legal profession and the public. The new terminology for court orders was also not well understood, with separating parents continuing to think in terms of custody and access. Australia is now considering further reforms by way of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.⁸¹
- 73 It does appear, therefore, that it would take much more than a modernisation of legislative terms and expressions to change deep-seated conceptions about custody. A semantic change in legislative expressions may help to bring about some psychological or cultural change, but such an outcome is by no means certain, as the Australian experience has shown. Indeed, a semantic change of English expressions can be expected to have far less effect in multi-lingual Singapore, compared with native English-speaking states such as England and Australia.

⁸⁰ Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: The first three years*, 2000, summarised by the Hong Kong Law Commission at pages 164 to 165 of their report (citation at footnote 61, above).

⁸¹ Discussed at paragraph 39 of this paper.

- 74 Hence, rather than abolishing and replacing the language of custody completely, a better approach for Singapore would be to allow the courts to develop the concept further. The word “custody” is familiar to the public. Although it may have had its origins in property and parental rights over children, it is not understood in that sense today. Parents fight for custody of a child not because they seek to own the child as property, or to exercise rights over them, but because of their strong emotional bonds to the child. The custody battle can be seen as a contest for the “right” to continue to be a parent to the child. The way to avoid such a contest, as the Court of Appeal in *CX v CY* has advocated, is to use joint custody (or no custody) orders to preserve joint parental responsibility.⁸²
- 75 Whether joint parental responsibility will indeed develop through the use of joint custody and no custody orders remains to be seen. With the Court of Appeal having usefully clarified the concept, future judicial development in the area can be expected, and should be monitored. To discard “custody” now and introduce new expressions in the legislation would, in our view, be unnecessary and potentially confusing. There is the risk that the new expressions may introduce new ambiguities, and be counter-productive to the development of the law.
- 76 For these reasons, it is submitted that legislative amendments are not required, at this juncture, for the purpose of promoting joint parental responsibility. This can be left to judicial development by the courts under the concept of custody in existing legislation.



⁸² Discussed at paragraphs 61 to 67 of this paper.