

HONG KONG / JUDGMENT

AA v. BB

[2021] HKCFI 1401

COURT

Court of First Instance

DECIDED

21 May 2021

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HCMP 2342/2020

[2021] HKCFI 1401

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2342 OF 2020

IN THE MATTER OF X, born on x and Y, born on x , both minors

and

IN THE MATTER of Section 26 of the High Court Ordinance (Cap 4) and Order 90 of the Rules of the High Court (Cap 4A)

and

IN THE MATTER Section 10 of the Guardianship of Minors Ordinance (Cap 13)

BETWEEN

AA

Applicant

and

BB

Respondent

Before: Hon B Chu J in Chambers (Not Open to Public)

Date of Hearing: 8 March 2021

Date of Social Welfare Report: 30 April 2021

Date of Judgment: 21 May 2021

JUDGMENT

Introduction

These wardship proceedings concern two children X and Y who have been under the joint care of a same-sex couple namely the Applicant and the Respondent.

In the originating summons, the Applicant seeks the following orders:

X and Y be made wards

the Respondent be made a guardian of X and Y

the Applicant and the Respondent to have joint custody and joint
care and control of X and Y

The Respondent has through her solicitors indicated in the acknowledgement of service that she does not intend to contest the proceedings.

The 1st hearing of the original summons took place on 8 March 2021. Counsel Mr Azan Marwah represented the Applicant at the hearing and Counsel Ms Isabel Tam represented the Respondent.

Notwithstanding the proceedings being uncontested, this Court decided to call for a social welfare report and directed the originating summons to be dealt with on paper.

Subsequent thereto, a social welfare report was submitted on 30 April 2021 (“SWR”).

Brief background

The Applicant was born and brought up in the United Kingdom and graduated from a university there. She is now aged 44 and has since 2018 worked as a .

The Respondent was born and brought up in Australia and completed university education there. She is now 47 years old and has since 2010 worked in the field.

The parties met in 2003 in Australia and started cohabiting as a couple about 7 to 8 months thereafter. In about 2007 they moved to Hong Kong.

In around 2009, they started to plan for a family. The Applicant became pregnant through insemination of donated sperm by a good friend of the Respondent's. As a result, the Applicant gave birth to X in Australia in . On X's birth certificate issued by Australian authorities, the Applicant and the Respondent are both stated to be his mother. Later, in 2011, the Applicant became pregnant through insemination of donated sperm by the same donor and in , she gave birth to Y in Hong Kong at Queen May Hospital. On Y's birth certificate issued by the Registrar of Births in Hong Kong, only the Applicant is stated to be his mother.

The Applicant, the Respondent, the donor and his partner have entered into a "Donor Insemination and Parenting Agreement" on 21 March 2009, pursuant to which the donor has agreed to have no parental rights with regard to any child conceived and born as a result of the insemination of his sperm.

X and Y are now respectively 11 and 9 years old. They call the Applicant "Mum" or "Mummy" and they call the Respondent "Mamma", and they regard both the Applicant and the Respondent as their parents.

The Applicant and the Respondent started to have difficulties in their relationship and in 2019 they had attended counselling which unfortunately did not work. In March 2020, they separated after 17 years of cohabitation.

The parties reached a co-parenting agreement in March 2020 upon the end of their cohabitation. X and Y would stay with either the Applicant or the Respondent on alternate weeks with handovers on Fridays after school. X and Y presently are attending the same school but for the next academic term commencing in August 2021, X will be attending a new school. X and Y have a close relationship with both their Mummy and their Mamma. To facilitate the children to overcome the separation of their parents psychologically, the parties have arranged

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Custody, care and control

Section 3(1)(a) of our Guardianship of Minors Ordinance, Cap 13 ("GMO") sets out that in any proceedings before the court in relation to the custody or upbringing of a minor, the Court shall regard the best interests of the minor as the first and paramount consideration and shall not take into consideration whether, from any other point of view, the claim of the father is superior to that of the mother, or the claim of the mother is superior to that of the father.

Section 3(1)(b) provides that a mother shall have the same and equal rights and authority as a father, save where a minor is illegitimate, in which case, under section 3(1)(c), a mother shall have the same rights and authority as she would have if the minor were legitimate but a father shall only have such rights and authority, if any, as may have been ordered by a court on his application.

In *Re G (Children)* [2006] UKHL 43, a case which involved a same-sex couple CG and CW who had parted ways and who had disputes over the contact and residence order of two children conceived by CG as a result of insemination by a donor, the House of Lords had to consider two issues of principle, one of which was the weight to be attached to the fact that one party was both the natural and legal parent of the child and the other was not.

Baroness Hale had set out the “welfare principle” and the “welfare checklist” in section 1 of the Children Act 1989, the statutory ancestor of which was section 1 of the Guardianship of Infants Act 1925 (later consolidated with minor changes of terminology in section 1 of the Guardianship of Minors Act 1972) upon which our section 3 of the GMO is based. Baroness Hale pointed out that the 1925 Act was passed at a time when the father was sole guardian of his legitimate child and the mother the only person with parental rights over her illegitimate child, and that section 1 of the 1925 Act clearly meant that, in future, such legal claims were to be ignored and the child’s welfare was to prevail. Baroness Hale had further referred to the landmark case of *J and Another v C and Others* [1970] AC 668, (1969) FLR Rep 360 in which the House of Lords had held that this was equally applicable to disputes between parents and non-parents.

In *J v C*, the House of Lords had rejected the proposition that there was any presumption in favour of the natural parents of the child. Baroness Hale further considered various cases and also the coming into effect of the Children Act 1989. She concluded that the statutory position was plain, and that the welfare of the child was the paramount consideration and there was no question of a parental right.

Although there was no presumption in favour of natural parents of the child, Baroness Hale went on to say that none of this meant that the fact of parentage was irrelevant. She then considered the significance of the fact of parenthood and that it was worthwhile picking apart what was meant by ‘natural parent’ in the context. She explained the difference between ‘natural’ parents and ‘legal’ parents.

As stated by her, there are at least three ways in which a person may be or become a natural parent, each of which may be a very significant factor in the child’s welfare, depending upon the circumstances of the particular case. The three ways are briefly, (i) genetic parenthood: the provision of the gametes which produce the child; (ii) gestational parenthood: the conceiving and bearing of the child; (iii) social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child’s needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socializing, educating and protecting.

It was then held by the House of Lords in *Re G (Children)* amongst other things that whilst CW was the psychological and social parent, CG was their biological parent as well as their psychological and social parent and that the significance of these facts must be considered and assessed as part of the overall welfare judgment.

Turning back to the present case, both the Applicant and the Respondent are recorded as X's mother on his birth certificate and I understand under the Australian law, both are "parents" of X. It is not possible to record both the Applicant and the Respondent as Y's mother on Y's birth certificate under the laws of Hong Kong and there is an issue as to whether the Respondent is legally or in law a parent of either X or Y under the laws of Hong Kong even though she may be a "natural" parent in the third way as described by Baroness Hale. However, there is no issue that the Applicant is both the legal and natural parent of X and Y who were conceived with her gametes. She is the birth mother of X and Y.

Being a legal parent of X and Y, the Applicant has the right to apply under section 10 (1)(a) of the GMO, and on such application being made, this Court has the power to make custody orders as the Court thinks fit as set out under section 10(1). As seen in *Re R (an infant) (custody to non parent)* [1974] 1 All ER 1033 and *M v H* [2006] HKFLR 196, [2006] HKCU 746, the power of the court to make a custody order under section 10(1) is not limited to an order made in favour of a parent only and may extend to a non parent or a third party having a non biological relationship with the minor. However, it would appear that to invoke such powers of the court under section 10(1), the application would have to be made by either a parent of a minor, or by the minor, or by the Director of Social Welfare.

In any event, the court has a wide inherent jurisdiction over its ward, and in the case of a minor who is a ward of the court, as seen in *Ong Constantino Erminda v Chau Shui Hing (No 2)* [1989] 1 HKC 246, the court may order the care and control of its ward to a non parent if such order is in the ward's best interests.

Having regard to the above, I am of the view that in the present proceedings, whether under section 10(1) of GMO or under inherent jurisdiction, this Court has the power to make orders for custody, care and control and the upbringing of X and Y, whether in favour of the Applicant or the Respondent, or jointly, and in doing so, this Court shall regard the best interests of X and Y as the first and paramount consideration.

In the present case, as seen in the SWR, the parties were able to share the parental responsibilities towards their children amicably and the children have been benefitting from both their parents' love and care throughout their upbringing. The children expressed their love towards their Mommy and their Mamma and have no preference over either of them and according to the social work officer, collateral information from the Respondent's domestic helper and the current tenant at the Respondent's home indicated the parents' proper arrangement on joint care towards the children in the past year.

Having considered the contents of the SWR and the views of X and Y, and also the “Welfare Checklist” as set out in the Children Proceedings (Parental responsibility) Bill, I am satisfied that it is in the best interests of X and Y for the Applicant and the Respondent to have their joint custody and joint care and control.

Guardianship

In the originating summons, the Applicant is also seeking an order for the Respondent to be made a guardian of X and Y.

In so far as statutory provisions are concerned, Part 3 of GMO provides for the appointment, removal and powers of guardians. The entire Part 3 came into effect 9 years ago on 13 April 2012, some 10 years after the Law Reform Commission Hong Kong issued its report on Guardianship of Children on 18 January 2002 (“LRC Report”).

As stated in 1.2 of Chapter 1 the LRC Report, the focus of the report is in relation to the law relating to testamentary guardianship and to guardians appointed by the court.

Section 6(1) of GMO provides that a parent of a minor may appoint any person to be a guardian of the minor after that parent dies and section 6(2) sets out that a guardian of a minor may appoint any person to be a guardian of the minor after that guardian dies. Section 6(3) then set outs the mode of how the appointment can be made by a parent, namely an appointment must be in writing, dated and signed either by the person making the appointment or by another person at the direction and in the presence of the person making and attested by 2 witnesses. Under section 6(4), the appointment of a guardian may be by will executed in accordance with section 5 of the Wills Ordinance. As further seen in section 6(6), an appointment of a guardian has no effect unless the appointed person accepts the office either expressly or impliedly by conduct. Section 8B further provides for the revocation of guardian appointment.

The power of the court to appoint a guardian of a minor under the GMO is provided under section 8D which is limited to 3 situations, namely (i) no guardian has been appointed by the deceased parent or deceased guardian under section 6; (ii) the guardian appointed by the deceased parent or deceased guardian under section 6 or by the court under section 8D or section 8E dies; or (iii) the guardian appointed by the deceased parent or deceased guardian under section 6 has disclaimed the appointment.

None of the above situations is applicable in the present case. In any event, I understand from Mr Marwah’s submissions that both parties have already by will made the other the testamentary guardian of the children. The provisions in Part 3 of the GMO are not applicable and not relied on.

What this Court is asked instead is to exercise its inherent jurisdiction in making the Respondent a guardian of the children during the Applicant’s lifetime.

It was submitted that as a result of X's birth in Australia, the Respondent is already his legal parent/guardian, and that it is clearly in the best interests for both of the parties to continue as the guardians of both X and Y.

The concept of "guardianship" has been set out in 1.3 to 1.4 under Chapter 1 of the LRC Report:

"Historical context

1.3

"Natural guardianship" is a very old legal concept that appears to have been the original legal concept of parenthood. Significantly, the concept was based more upon the protection of family landholdings than upon the protection of children. As noted by the English Law Commission:

"[Guardianship] developed as a means of safeguarding a family's property and later became an instrument for maintaining the authority of the father over his legitimate minor children. Hence he was recognised as their 'natural' guardian. While he was alive the mother had no claims as natural guardian and was originally in no better position than a stranger. Nineteenth century legislation gave her limited rights to apply to the courts for custody and access and, in 1886, made her automatically guardian after the father's death. The Guardianship of Infants Act 1925 provided that the father should be guardian on the mother's death. It also gave the mother 'like powers' to those of the father to apply to the court in any matter affecting the child but deliberately stopped short of making her a joint guardian during his lifetime."

The concept of guardianship today

1.4

In modern times, this concept of natural guardianship has evolved to the point where, as we have noted above, the term "guardian" is often used synonymously with "parent". In this sense, "guardianship" implies the bundle of rights, duties and authority of a parent towards a child. These aspects of the parent-child relationship include the right to make decisions and to be consulted on decisions about the upbringing of a child and generally on all aspects of his welfare."

In Australia, both parties are the legal parents and therefore legally joint guardians of X, whereas in Hong Kong, only the Applicant, being the legal and natural parent of X and Y, is their guardian. Although not legally a parent under the laws of Hong Kong, as said earlier, the Respondent is a "natural" parent of X and Y being the psychological and social parent in the third way as described by Baroness Hale in *Re G (Children)*. Although the Respondent is a guardian of X in Australia, it is not clear whether she would be a guardian of Y, and if not, it would create an anomaly. Further in Hong Kong, it would seem the Respondent, not being a legal parent, is not a guardian to X nor to Y. It would be difficult for the children to understand why there is to be such a differentiation and/or discrimination, in particular when the children are close to each other and to both their parents, and such differentiation and/or discrimination cannot be in their interests.

Having considered the above, the contents of the SWR and the “Welfare Checklist”, I have come to the conclusion that it is in the best interests of X and Y that Respondent is to be appointed a guardian of both X and Y, to act and exercise any guardianship rights jointly with the Applicant.

Wardship

It was submitted that upon making the orders, X and Y can then be de-warded.

It is stated at 1.49 of Chapter 1 of the LRC Report under the heading “Guardianship and wardship” that :

“In wardship proceedings, the court becomes the guardian and has responsibility for all matters affecting the upbringing of the child”.

In light of there being no dispute between the parties in their co-parenting, I am satisfied that upon this Court granting the orders as sought it is no longer necessary for X and Y to continue to be wards of this Court and I order they do cease to be wards.

Finally, I make no order as to costs.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Azan Marwah, instructed by Patricia Ho & Associates, for the Applicant

Ms Isabel Tam, instructed by Withers, for the Respondent

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