Published on e-First 26 April 2018

16. FAMILY LAW

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16.1 While previous chapters of this work were divided into the four customary main parts – custody, division of matrimonial assets, divorce and validity of marriage, and maintenance – the chapter this year only comprises cases concerning custody and division of matrimonial assets.

Custody

16.2 This part is divided into two subparts. In the first Part,[1] we examine two cases in which our courts had the opportunity to clarify the law regarding shared care and control. In the second Part,[2] we again examine two cases, but this time concerning the issue of child abduction, with one engaging the Hague Convention on the Civil Aspects of International Child Abduction[3] ("Hague Convention"), and the other not engaging the treaty. These two cases show how the welfare principle is treated differently in the treaty context from the non-treaty context.

Applicable principles for shared cared and control

16.3 *BNS v BNT*[4] was yet another episode in a long-running dispute.[5] The parties were married in Canada in 2002 and divorced in 2012. They had a daughter aged 10 and a son aged 9. Following the Court of Appeal's rejection of the wife's previous application to relocate the children to their home country,[6] the issue before the High Court here was whether care and control should remain with the wife or be shared between the parties – after the divorce, the children had been shuttling between the parents' respective households even though the husband had fairly liberal access.

1 See paras 16.3–16.6 below.
2 See paras 16.7–16.13 below.
3 Convention on the Civil Aspects of International Child Abduction (concluded 25 October 1980).
4 [2017] 4 SLR 213.
5 See (2014) 15 SAL Ann Rev 354 at 362–365, paras 16.31–16.39 and (2015) 16 SAL Ann Rev 464 at 469–471, paras 16.17–16.21.
6 *BNS v BNT* [2015] 3 SLR 973.

16.4 The husband cited English jurisprudence[7] for the notion that both parents are equal in the eyes of the law and therefore have equal duties and responsibilities – a shared care and control order would send a strong signal to the wife on the importance of co-operation towards securing what is in the best interests of the children, and mandate that each parent would have an equal right to make decisions about the children. The wife's position was essentially that under Singapore law, shared care and control was only exceptionally granted,[8] and sole care and control should be awarded in her favour. The court denied the application for shared care and control for the following reasons:[9]

> (a) The English jurisprudence cited were pursuant to a different statutory scheme that recognised the concept of shared residence orders. Care and control concerned a broader basket of duties relating to the day-to-day decision-making of all matters related to the child.
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> (b) The courts here are far more concerned with issues of workability and potentiality for stress on the children when dealing with care and control than when dealing with custody, since a court order cannot, without more, create the behavioural and mindset changes in specific individual parents necessary for them to co-parent well together. However, the courts have to tread a fine line between the perverse incentive of artificial acrimony and an unworkable order.
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> (c) The parties had serious disagreements within the joint custodial sphere to work out between themselves and with the children, including the daughter's choice of middle school, as well as the husband's wish for the children to take up permanent residence in Singapore and for the son to do national service. These disagreements mirrored the contentions the parties had for day-to-day matters. Putting in place shared care and control would probably result in gridlocks and further conflict that would be prejudicial to the welfare of the children.

16.5 This decision provides a timely reminder that while awarding joint custody has a signalling effect, the same may not apply to care and control even though long-term decisions (which is what custody entails) obviously has trickle-down effects on short-term decisions (which is what care and control, and to a lesser extent, access, entails). Aligning custody with care and control is not an inexorable consequence once

7 See *D v D* [2001] 1 FLR 495, *A v A* [2004] All ER (D) 54 and *Re A* [2008] 2 FLR 1593.

8 See (2010) 11 SAL Ann Rev 368 at 375, para 15.20, (2011) 12 SAL Ann Rev 298 at 301, para 15.9 and (2012) 13 SAL Ann Rev 299 at 304, para 16.17.

9 *BNS v BNT* [2017] 4 SLR 213 at [72] and [75]–[79].

joint custody is awarded. For instance, in this case, the court noted that the children were at a particular stage in their lives where consistency and stability were paramount objectives if their welfare were to be advanced in any meaningful way.

16.6 Further, as the husband already had fairly liberal access, imposing a shared care and control order would probably only create more disruptions to the children's lives. These circumstances were similar to *AUA v ATZ*,[10] where the Court of Appeal also declined to order shared care and control. Ultimately, a parent can still fulfil his duty and take an active interest in the child without insisting on absolute equality *vis-à-vis* the other parent in all matters concerning the child.

Child abduction

16.7 *TSH v TSE*[11] revolved around M, a five-year-old Singaporean who was born in London. His parents brought him to Singapore in 2013 to be temporarily cared for by his paternal grandparents, but the relationship between the parents broke down in 2014 while he was still in Singapore. The husband sued the wife for divorce in Singapore, while the wife initiated her own proceedings in England.

16.8 The English court found that M remained habitually resident in England and ordered the father to return M to England. Shortly after, the Singapore court granted interim judgment in respect of the husband's application for divorce. When M was not returned to England, the wife hired a mercenary to abduct M, but this attempt was foiled by the local authorities. What followed was a long and complex series of applications and decisions in both jurisdictions, in addition to two attempts by M's grandparents to be granted guardianship and immigration offences committed by the husband, but suffice to say for current purposes that the English court held, pursuant to a welfare enquiry, that M was to return to England to live with the wife.[12]

16.9 The principal issue, therefore, before the Singapore High Court was whether it was in M's best interests to be returned to England. Preliminarily, this case did not fall within the Hague Convention because at the time M was wrongfully retained, Singapore had not gazetted the UK as a contracting state under s 4(2) of the International Child Abduction Act.[13] However, there was still the English judgment to be grappled with, since it had already determined that it was in M's best

10 [2016] 4 SLR 674.
11 [2017] SGHCF 21.
12 *MB v GK (No 2) Wardship (Welfare)* [2017] EWHC 16 (Fam).
13 Cap 143C, 2011 Rev Ed.

interests to be returned. In the end, the High Court decided that M should be returned to the wife's care for the following reasons:[14]

> (a) Section 3 of the Guardianship of Infants Act[15] ("GoIA") mandates that the welfare of the child shall be the first and paramount consideration when the court is deciding, in any proceedings, any question on the custody or upbringing of an infant. This applies to applications to relocate a child as well. Where multiple jurisdictions are involved, the court receives evidence and submissions afresh, and the doctrine of issue estoppel does not apply strictly.
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> (b) In England, any court answering the question with respect to the upbringing of a child – including whether to order a return to a foreign country – is statutorily obligated to regard the child's welfare as its paramount consideration. This is essentially the same as what s 3 of the GoIA requires. In answering the question, the court would consider factors such as the legal system of the other country in question. The court must form an independent judgment and not blindly follow an order made by a foreign court. However, it has the power to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.
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> (c) Although the wife argued that the determination of M's habitual residence at the time of his wrongful retention was dispositive, this was the wrong approach. The question before the court was not which of two courts was the more appropriate forum. Cases that have decided that staying proceedings in favour of the forum with the strongest connection is consistent with the welfare principle because that forum is generally best placed to determine a child's best interests[16] do not stand for the proposition that a court, in deciding whether to make mirror orders in respect of orders made by the natural forum, abdicates consideration of the welfare principle on the assumption that orders made by the natural forum would be in the best interests of the child.
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> (d) The welfare enquiry was full and proper and did not involve any breach of natural justice. But as the Singapore court cannot rely on the factual findings in the welfare enquiry as proof of what they assert, it had to consider all the

14 *TSH v TSE* [2017] SGHCF 21 at [38], [43]–[47], [50], [54]–[57], [78]–[108] and [111]–[124].

15 Cap 122, 1985 Rev Ed.

16 See *TDX v TDY* [2015] 4 SLR 982 at [51] and *TGT v TGU* [2015] SGHCF 10 at [61].

circumstances of the case, including what had transpired after the enquiry.

(e) Although M had settled in a stable environment in Singapore for four years, the wife had the capacity to meet all of his material, emotional, and developmental needs (he had Autism Spectrum Disorder). Further, M still has strong feelings of affection and longing towards the wife and there was also evidence that she was not an uncaring person.

(f) While the husband and his parents took excellent care of M, M felt he had a warmer relationship with the wife. The fact that the husband was overly tactical in his litigation and that his parents and he had little intention of involving the wife in M's life did not assist his case. All things considered, it was better in the long run for M's stable care environment to be overridden by his reunion with the wife.

16.10 *TSH v TSE* provides a useful clarification on how to apply the welfare principle as between a state that has ratified the Hague Convention and another that has not. Under the Hague Convention, as between contracting states, upon proof of the wrongful removal of a child, the court of the state in which the application is filed is only concerned with the return of the child to his country of habitual residence, and is generally not concerned with the merits of any dispute over the custody or care and control of the child. As between non-contracting states, each state would apply their own law. At the same time, however, the court reviewing the foreign court's family law system would no doubt be constrained by considerations of international comity, and not lightly dismiss the extensive findings made by the foreign court, even if the welfare principle is to assume paramount importance.

16.11 *TSH v TSE* also addressed briefly the concept of habitual residence, which is relevant if the Hague Convention is engaged. This concept was substantially clarified by a three-member High Court bench in *TUC v TUD*.[17] There, the husband sought an order for his two children to be returned from Singapore to the US, which he claimed was the children's place of habitual residence. This order was sought on the ground that the children had been wrongfully retained in Singapore by the wife in breach of his rights of custody under US law. The grant of the order would turn on whether the children were in fact habitually resident, or in the alternative, whether the husband had consented to the retention of the children in Singapore.

17 [2017] 4 SLR 877.

16.12 The court held that habitual residence was to be determined by having regard to all the circumstances of the case, including the joint intentions of the parents, the child's reasons for and perceptions of being in the new jurisdiction, and the objective indicia of integration into the social and family environment in the new jurisdiction.[18] Further, generally, in the case of the relocation of younger children and in the case of relatively short periods of residence in the new jurisdiction, the joint or shared intentions of the parents could be a significant factor in pointing towards whether there was any change in the habitual residence of the child; the longer the period of residence in the new jurisdiction, and the greater the evidence of integration into the social and family environment there, the less relevant would be the parents' original reasons, purposes, and intentions for the relocation in determining whether the child's habitual residence had changed.[19]

16.13 Notably, the analysis surrounding habitual residence (and concomitantly, whether consent has been given for a child's removal or retention from the habitual residence) in this case did not involve the operation of the welfare principle – or at least expressly so. When leave was sought to appeal against this decision, the court dismissed the application.[20] The wife argued on appeal that the habitual residence test gave primacy to parental intention and departed from the "child-centric hybrid approach" endorsed by courts in other jurisdictions, and therefore further guidance from the Court of Appeal was necessitated. However, the application was denied, mainly on the basis that the court had already given clear and comprehensive guidance. In the final analysis, one has to bear in mind the main objective of the Hague Convention, which is to secure the prompt return of children wrongfully removed or retained.[21] This means that in many, if not most, cases, the welfare principle would not be factored in the same way as a domestic guardianship dispute would.

Division of matrimonial assets

16.14 This part is divided into two subparts. In the first Part,[22] we consider the issue of how matrimonial homes may lose their character as divisible matrimonial assets. In the second Part,[23] we consider the issue of whether the "structured approach" to the division of matrimonial assets should apply differently in different types of

18 *TUC v TUD* [2017] 4 SLR 877 at [74].
19 *TUC v TUD* [2017] 4 SLR 877 at [74].
20 *TUC v TUD* [2017] 4 SLR 1360.
21 See *BDU v BDT* [2014] 2 SLR 725 at [28]–[33].
22 See paras 16.15–16.19 below.
23 See paras 16.20–16.25 below.

marriages – in this instance, single-income or non-dual-income marriages.

Matrimonial homes losing their character

16.15 In *TXW v TXX*,[24] the parties were married for 22 years (from 1992 to 2014) and had several properties. One such property, 1C Mayfield, was disputed by the husband not to be a matrimonial asset because even though the parties had resided there for 12 years of their marriage (from 1992 to 2004), it was acquired before the marriage (in 1989), was not intended as a matrimonial home, and was not substantially improved by the efforts of the wife or their joint efforts. Further, even if it was a matrimonial asset at some point, it did not retain this character because the parties had moved out to another property, Casuarina Cove, as their matrimonial home thereafter.

16.16 On the other hand, the wife argued that the parties had only intended to move out temporarily so that renovations could be carried out at 1C Mayfield, but plans changed along the way. In any case, the property was acquired during the marriage as the husband continued to make mortgage repayments during the marriage.

16.17 The High Court held that the objective circumstances of the case pointed towards 1C Mayfield as the parties' matrimonial home for the greater part of their married lives for the following reasons:[25]

> (a) Section 112(10)(*a*)(i) of the Women's Charter[26] defines a matrimonial asset to include "any asset acquired before the marriage by one party or both parties to the marriage … ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter … or for household … purposes".
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> (b) A party's unilateral subjective intentions do not alone determine whether something is a matrimonial asset under s 112(10) of the Women's Charter. Thus, even if the property was not substantially improved by the wife or their joint efforts as was the case here, 1C Mayfield would still have been transformed into a matrimonial asset by virtue of s 112(10)(*a*)(i).

24 [2017] 4 SLR 799.
25 *TXW v TXX* [2017] 4 SLR 799 at [11]–[18].
26 Cap 353, 2009 Rev Ed.

(c) Although *BGT v BGU*[27] suggested that a matrimonial property may lose its character as a matrimonial asset if its use ceases during the period when the parties are residing together for a reason that has nothing to do with the end of the marriage, each case had to be determined on its own facts. Further, Parliament could not have intended that s 112(10)(*a*)(i) of the Women's Charter was to treat only the parties' last place of residence as a matrimonial asset while a prior property used as the cradle of the marriage for a substantial period of time was not such an asset.

(d) This was also not a situation in which a pre-marriage property should be considered a non-quintessential matrimonial asset. Further, the property was not fully acquired before the marriage since payments towards the property were also made during the marriage. At minimum, it could not be wholly excluded from the pool of matrimonial assets. But given the circumstances of the case, it should be considered the matrimonial home.

16.18 A similar issue arose before the Court of Appeal in *TND v TNC*,[28] where the court noted that in light of *BGT v BGU* and *TXW v TXX*, "[different] approaches to this issue have been taken".[29] The apex court favoured the latter, stating the following:[30]

> [Since the purpose of s 112(10)(*a*)(i)] is to expand the pool of matrimonial assets to cover those which the parties have treated as part of their domestic lives together, irrespective of when the same were acquired, the approach taken … in *TXW v TXX* commends itself to us as being both principled and flexible …

Although the court also noted that endorsing the *TXW v TXX* approach effectively meant "once a matrimonial asset always a matrimonial asset", this would not lead to arbitrariness or unfairness.

16.19 This is correct, because that maxim "in itself would not mandate that such an asset has to be divided in exactly the same way as assets acquired during the marriage … would be".[31] Specifically, a court dealing with assets that have become matrimonial assets by virtue of s 112(10) of the Women's Charter "would have the discretion to divide it in such manner as may be most equitable bearing in mind the nature of the asset, how it was paid for … and the length of time during which the

27 [2013] SGHC 50.
28 [2017] SGCA 34.
29 *TND v TNC* [2017] SGCA 34 at [31].
30 *TND v TNC* [2017] SGCA 34 at [35].
31 *TND v TNC* [2017] SGCA 34 at [35].

parties ordinarily used or enjoyed it during the marriage".[32] This is also consistent with the court's mandate to perform the entire division exercise in broad strokes, while at the same time making adjustments to weight and proportion where necessary.[33] Ultimately, common sense prevailed over an unnecessary insistence on technicality.

Structured approach and single-income marriages

16.20 In *UBM v UBN*,[34] the parties were married for 37 years and had four children. The husband was the breadwinner throughout the marriage, while the wife was the homemaker. The main question before the court was whether the "structured approach" should be adopted when dividing the matrimonial assets in long marriages. Specifically, the Court of Appeal had clarified in *ANJ v ANK*[35] that generally, the division exercise would comprise the following steps:

> (1) Ascribe a ratio that represents each party's direct financial contributions.
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> (2) Ascribe a ratio that represents each party's indirect contributions (this would include financial and non-financial contributions).
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> (3) Derive the average percentage contribution based on the preceding two ratios.
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> (4) Adjust the overall ratio based on factors in s 122(2) of the Women's Charter so as to arrive at a just and equitable outcome.[36]

16.21 The pool of matrimonial assets in this case was valued at around $9m. There was no dispute that the husband's direct contributions relative to the wife was 100:0. As for indirect contributions, since the husband was also involved in the children's lives, the ratio arrived at was 65:35 in favour of the wife. The average of both sets of ratios at this juncture translated to 67.5:32.5 in favour of the husband. However, the wife argued that indirect contributions should not assume equal weightage as direct contributions, and should instead assume 70%

32 *TND v TNC* [2017] SGCA 34 at [35].
33 *ANJ v ANK* [2015] 4 SLR 1043 at [17].
34 [2017] 4 SLR 921.
35 [2015] 4 SLR 1043.
36 *ANJ v ANK* [2015] 4 SLR 1043 at [22]. These factors include the improvement of assets, the needs of the children, and any agreement between the parties.

weightage. The High Court declined to adopt the wife's suggestion,[37] but increased her overall share to 40% for the following reasons:[38]

> (a) Although a sole breadwinner would almost never be considered to have contributed 0% in terms of indirect contributions for long marriages and the Court of Appeal has in certain situations accorded unequal weightage to direct and indirection contributions,[39] there was no reason to make the wife's indirect contributions a pre-eminent factor.
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> (b) It is always open to the court to adjust the overall ratio and this would be more consistent with its mandate to look at the division exercise in broad strokes rather than with mathematical restriction. Given that marriage is an equal partnership of different efforts and that indirect contributions tend to feature more prominently in long marriages, an adjustment to the overall ratio ought to be made to reflect the equal recognition the law accords to homemaking and breadwinning.
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> (c) The final ratio in this case was consistent with recent cases bearing similar facts and also consistent with the avoidance of the "uplift" methodology used in older cases. Further, there is no need to distinguish between long single-income marriages and long dual-income marriages in light of the philosophy of marriage as an equal partnership.

16.22 The Court of Appeal in *TNL v TNK*[40] also faced the question of whether the structured approach should be adopted for single-income marriages. The marriage here lasted 35 years, with the husband being the breadwinner and the wife being the main child-carer of their three children. The pool of matrimonial assets was valued at around $6m and the court below had decided on a 50:50 division. The features of this marriage thus made it highly analogous to *UBM v UBN*. And, like the court in *UBM v UBN*, the Court of Appeal rejected the notion that the second step of the structured approach should be broken down into two steps.[41]

16.23 But unlike the court in *UBM v UBN*, the Court of Appeal was of the view that the structured approach was better suited for marriages in which both spouses were working and had made both direct and

37 See *TRS v TRT* [2017] SGHCF 3 at [13]–[19].
38 *UBM v UBN* [2017] 4 SLR 921 at [23]–[47] and [66].
39 See *Twiss, Christopher James Hans v Twiss, Yvonne Prendergast* [2015] SGCA 52 at [21] and *ATE v ATD* [2016] SGCA 2 at [21]–[23].
40 [2017] 1 SLR 609.
41 *TNL v TNK* [2017] 1 SLR 609 at [46].

indirect financial contributions (otherwise known as dual-income marriages).[42] In contrast, for marriages in which only one spouse was the breadwinner, such an approach would tend to "unduly favour the working spouse over the non-working spouse … financial contributions are given recognition under *both* Steps 1 and 2" [emphasis in original].[43] Critically, the court observed that it did not think that "such an outcome is at all consistent with the courts' philosophy of marriage being an equal partnership"; if the court were to apply the structured approach to single-income marriages, it would "either have to award the non-working spouse a very high percentage in Step 2 … or accord a very high weightage to Step 2 at Step 3. In some, if not most, cases, the court would have to do both".[44]

16.24 The Court of Appeal, in upholding the decision below to split the division evenly, also made the following points.[45] First, in long single-income marriages, the precedents generally show that the court would award an equal division of matrimonial assets.[46] While different considerations may apply in short single-income marriages, the court said it would only address this in an appropriate case. Different considerations may also apply when the size of the asset pool is exceptionally large.[47]

16.25 Conspicuously omitted in the Court of Appeal's judgment, however, is how the structured approach should be modified or departed from in single-income marriages, regardless of whether they are short or long.[48] It seems one has to make educated guesses based on established outcomes. In long single-income marriages, one can say with some confidence that the division would be close to 50:50, especially if the homemaker also had to look after the children and/or neither spouse was derelict in their duties of either a breadwinner or homemaker. In long dual-income marriages, as stated by the Court of Appeal, the structured approach would address the nuances as to who had made more direct and indirect contributions, which in turn affects the final ratio.[49] What about short single-income marriages? It seems extremely

42 *TNL v TNK* [2017] 1 SLR 609 at [41]; see also *UJF v UJG* [2018] SGHCF 1 at [50].
43 *TNL v TNK* [2017] 1 SLR 609 at [43].
44 *TNL v TNK* [2017] 1 SLR 609 at [44].
45 *TNL v TNK* [2017] 1 SLR 609 at [47]–[51].
46 See *Yow Mee Lan v Chan Kai Buan* [2000] 2 SLR(R) 659 at [43]–[46], *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 520 at [3]–[4] and *Tan Hwee Lee v Tan Cheng Guan* [2012] 4 SLR 785 at [85]; see also *UBD v UBE* [2017] SGHCF 14 at [42]; *UJF v UJG* [2018] SGHCF 1 at [50].
47 See *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [82].
48 See *TRS v TRT* [2017] SGHCF 3 at [13]–[19] and *UFE v UFF* [2017] SGHCF 28 at [51]–[59].
49 See *TYY v TYZ* [2017] SGHCF 6.

unlikely that 50:50 is the default, if one assumes that indirect contributions is a variable that increases in importance over time – direct financial contributions on the other hand, seem to be considered more of a constant even if the spouse in question is greatly skilled in making money and growing the pool of matrimonial assets.[50] In the final analysis, one might say that while equality of statuses and roles is the ideal, direct contributions create a head start, even if the lead is not an insurmountable one.[51]

50 See *UFU (MW) v UFV* [2017] SGHCF 23.
51 See *UGG v UGH (MW)* [2017] SGHCF 25.