

## Case Note

### LESS PAYNE IN THE INTERNATIONAL RELOCATION OF CHILDREN?

*BNS v BNT*  
[2015] 3 SLR 973

The best interests of a child dictate the question of whether international relocation should be granted by the court. This note examines the Court of Appeal decision in *BNS v BNT* and suggests that the manner in which the welfare principle is applied increasingly seeks to protect parental relationships, which are viewed as something valuable and which go toward the child's welfare.

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#### I. Introduction

1 The international relocation of children is governed by one principle above all else – that of the child's best interests.<sup>1</sup> It is also known as the welfare principle, and has been accepted in many other jurisdictions both from the common law and civil law traditions.<sup>2</sup> Its application, however, has been and is inconsistent, not least due to the

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1 *Re C (an infant)* [2003] 1 SLR(R) 502 at [22].

2 Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.2; Permanent Bureau, Hague Conference on Private International Law, "Preliminary Note on International Family Relocation" (Preliminary Document No 11, January 2012) at para 38 observes that Art 3 of the United Nations Convention on the Rights of the Child (20 November 1989) (General Assembly Resolution No 44/25) states:

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.

In England, see *Payne v Payne* [2001] EWCA Civ 166 at [18]; in Australia, see s 60B of the Australian Family Law Act 1975.

myriad of factual situations that can arise before the courts. Indeed, it has been commented that without more, application is difficult.<sup>3</sup>

2 What, however, are the major considerations that the Singapore courts consider in evaluating a parent's application to relocate under the umbrella of the welfare principle? This is an important question to consider, given that globalisation means more marriages straddling different jurisdictions in two ways: (a) the parties to a marriage may originate from different countries, meeting and marrying in a neutral country or in either party's home country; and (b) families may relocate from one jurisdiction to another for career opportunities or lifestyle changes.<sup>4</sup> Singapore is especially affected by globalisation – as of 2013, marriages between citizens and non-citizens made up 39.2% of all marriages and as of 2014, Singapore's non-resident population, defined as "foreigners who are working, studying or living in Singapore but not granted permanent residence, excluding tourists and short-term visitors"<sup>5</sup> made up about 30% of the resident population.<sup>6</sup> This article will seek to examine the legal developments in this area of law especially with the advent of the Family Justice Courts ("FJC").

## II. The welfare principle in Singapore

3 The welfare principle is paramount in Singapore.<sup>7</sup> *Re C (an infant)*<sup>8</sup> ("Re C") held that:<sup>9</sup>

... [i]t is the reasonableness of the party having custody to want to take the child out of jurisdiction which will be determinative, and always keeping in mind that the *paramount consideration is the welfare of the child*. If the motive of the party seeking to take the child out of jurisdiction was to end contact between the child and the other parent, then that would be a very strong factor to refuse the application. Therefore, if it is shown that the move abroad by the person or parent having custody is not unreasonable or done in bad faith, then the court should only disallow the child to be taken out of jurisdiction if it

3 Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.2 commented that the principle is "difficult in application".

4 Permanent Bureau, Hague Conference on Private International Law, "Preliminary Note on International Family Relocation" (Preliminary Document No 11, January 2012) at para 1.

5 National Population and Talent Division, Prime Minister's Office, Government of Singapore, "Our Population, Our Future" <<http://population.sg/resources/#footnote1>> (accessed 23 March 2015).

6 National Population and Talent Division, Prime Minister's Office, Government of Singapore, "Our Population, Our Future" <<http://population.sg/resources/#footnote1>> (accessed 23 March 2015).

7 *Re C (an infant)* [2003] 1 SLR(R) 502.

8 [2003] 1 SLR(R) 502.

9 *Re C (an infant)* [2003] 1 SLR(R) 502 at [22].

is shown that the interest of the child is incompatible with the desire of such person or parent living abroad. [emphasis added]

4 Recent developments have seen a shift in the manner of application of the welfare principle. This is in part due to the English decisions of *Poel v Poel*<sup>10</sup> (“*Poel*”) and *Payne v Payne*<sup>11</sup> (“*Payne*”) which were referred to and followed by Singapore in *Re C* and *AZB v AYZ*<sup>12</sup> (“*AZB*”) respectively and in which the relocating parent’s wishes were strongly deferred to. That position of deferring strongly to the relocating parent’s wishes is now increasingly doubtful in light of the Singapore High Court’s latest two decisions in *BNT v BNS*<sup>13</sup> (“*BNT*”) and *TAA v TAB*<sup>14</sup> (“*TAA*”), as well as the Court of Appeal’s decision of *BNS v BNT*<sup>15</sup> (“*BNS (CA)*”), which upheld *BNT*.

### III. The facts of *BNT*

5 *BNT* concerned an expatriate couple who left their native country, Canada, and relocated to Singapore initially so that the father could work as a lawyer. Subsequently, they moved to Thailand for four years. That was where their two children were born as well. In 2008, the family returned to Singapore, where the mother filed for divorce proceedings in 2011 on the grounds of the father’s unreasonable behaviour. The interim divorce was granted on an uncontested basis, with care and control granted to the mother and fairly liberal access granted to the father. She had worked part-time as a meeting and conference planner since the return to Singapore.

6 In 2012, the mother asked for permission to permanently relocate back to Canada with her two children. The District Judge allowed the application and the father appealed the decision to the High Court. His appeal was allowed by the High Court, and the High Court’s decision was affirmed by the Court of Appeal.

10 [1970] 1 WLR 1469, where it was held by Sachs LJ that the court should not lightly interfere with the way of life chosen by the custodial parent. Later, in *Chamberlain v De La Mare* [1983] 4 FLR 434, Ormrod LJ held that the reason was because the custodial parent would continue to be responsible for the child and would be bitter if the court interfered.

11 [2001] Fam 473.

12 [2012] 3 SLR 627.

13 [2014] 4 SLR 859.

14 [2015] 2 SLR 879.

15 [2015] 3 SLR 973.

#### IV. The Court of Appeal decision

7 The Court of Appeal held that there was only one fundamental principle upon which everything else hinged – the welfare of the child is paramount and must override all other considerations.<sup>16</sup> It held that:

(a) while the relocating parent's wish to relocate was an important factor,<sup>17</sup> it was only relevant in so far as he or she would transfer insecurity and negative feelings to the children;<sup>18</sup>

(b) there was no fixed hierarchy among the different factors which informed the court's decision as to where the child's best interests might lie;<sup>19</sup> and

(c) it was unfortunate that the child's loss of relationship with the left-behind parent had not received much consideration in the local case law – a strong bond between the non-custodial parent and the child would weigh in against relocation.<sup>20</sup>

8 The Court of Appeal viewed that the children's welfare in this case lay in favour with denying relocation as they enjoyed a meaningful relationship with their father, who took active steps to be involved in their lives; it was thus preferable for them to have personal contact with their father.<sup>21</sup> Moreover, the wife could communicate with the children or receive support from her family in Canada with the help of technology.<sup>22</sup> Finally, it was unrealistic for the father to seamlessly relocate back to Canada as he had acquired a depth of regional expertise in his job as a corporate lawyer which was not transferable back to Canada.<sup>23</sup>

#### V. Comments

9 *BNS (CA)* has affirmed the paramount position of the welfare principle in relocation cases. But what is important is the manner in which the welfare principle has been applied. Moving forward, it is suggested that the importance of preserving a child's relationship with both parents would feature in the court's consideration prominently. This is reflected in the tenor of *BNS (CA)* – the court acknowledged that it was unfortunate that the child's loss of relationship with the

16 *BNS v BNT* [2015] 3 SLR 973 at [19].

17 *BNS v BNT* [2015] 3 SLR 973 at [21].

18 *BNS v BNT* [2015] 3 SLR 973 at [20].

19 *BNS v BNT* [2015] 3 SLR 973 at [22].

20 *BNS v BNT* [2015] 3 SLR 973 at [25].

21 *BNS v BNT* [2015] 3 SLR 973 at [5] and [34].

22 *BNS v BNT* [2015] 3 SLR 973 at [34].

23 *BNS v BNT* [2015] 3 SLR 973 at [34].

non-custodial parent had not receive much consideration in local case law before *BNT*.<sup>24</sup> This might be attributed to the court's adoption of *Poel* and *Payne*, which some commentators suggest give greater regard to the wishes of the relocating parent against the child's loss of relationship with the non-custodial parent.<sup>25</sup>

10 By affirming *BNT*, it is submitted that the Court of Appeal views the preservation of the parental bond between the child and both parents, as well as educational arrangements for the child, as extremely important.

### A. *The relevance of Payne*

#### (1) *The adoption of Payne in Singapore*

11 *AZB* was the first local High Court decision following *Payne*. The father, who was the son of a Malaysian tycoon, had had an extremely acrimonious divorce with the mother, who was an American. The mother gave evidence that she had been extremely unnerved as the father had verbally abused her and put her under constant fear.<sup>26</sup> She also said that the father had also shown a propensity to disregard the daughter's welfare just to spite the mother. Given the extreme acrimony between them, the isolated and alienated American mother sought to relocate herself and the daughter to the US where they would have the support of her extended family. Andrew Ang J followed *Payne* and allowed the mother's application, holding that:<sup>27</sup>

... [w]hat the cases do suggest ... is that the welfare of the child is often *so inextricably* intertwined with the general well-being and happiness of the primary caregiver that the court is loath to interfere with important life decisions of the primary caregiver, so long as they are reasonably made and are not against the interests of the child. [emphasis added]

Importantly, Ang J also qualified his reliance on *Payne* by relying on a passage from a later case which held that the *ratio decidendi* in *Payne* was that the welfare principle was of paramount importance and the rest

24 *BNS v BNT* [2015] 3 SLR 973 at [25]. See Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.5 and *ATC v ATD* [2011] SGDC 254 at [60], where it was observed that the law in Singapore is that the custodial parent would normally be allowed to move abroad with the children if the reasons for moving abroad are reasonable and taken in good faith.

25 In Debbie Ong, "Family Law" (2012) 13 SAL Ann Rev 299 at 304, it was noted that the dominant factor is the reasonable wishes and intentions of the primary caregiver desiring to relocate with the child.

26 *AZB v AYZ* [2012] 3 SLR 627 at [24]–[25].

27 *AZB v AYZ* [2012] 3 SLR 627 at [14].

was simply guidance from the courts. He also held that the reasonable wishes of the primary caregiver were not an insurmountable factor.<sup>28</sup> Since the father had not managed to convince the court that the wishes of the mother should not be given effect as (a) he had not been a good role model for the daughter;<sup>29</sup> and (b) there was nothing to show that the relocation would cut off contact with the father,<sup>30</sup> relocation was allowed.

12 Ang J's holding must be considered together with the Court of Appeal's holding in *Re C*.<sup>31</sup> Taken together, it is submitted that they led to the position where as long as the primary caregiver's request is reasonable and not made in bad faith (generally taken to mean a motive to deprive the other parent of access rights), the court would allow relocation to take place. This appears to have been the approach of the pre-*BNT* cases, and Debbie Ong JC also observed as much in *TAA*:<sup>32</sup>

... [i]n the majority of decisions, by applying *Re C*, the courts seemed to have focused more on the reasonableness of the custodial parent's reasons for relocation and less on the loss of the relationship with the other parent, resulting in orders allowing relocations.

## (2) *Criticisms of Payne*

13 *Payne* has been criticised. First, there is a growing trend towards joint parental responsibility post-separation – the Permanent Bureau of the Hague Convention on Private International Law has observed that legislative reforms have already taken place in several states where there is now a presumption of joint parental responsibility. Some jurisdictions have even gone ahead with joint care through the child alternating residences with either parent.<sup>33</sup> Australia, for example, has a statutory provision which sets out that the best interests of a child includes “ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives”, to the maximum extent consistent with their best interests.<sup>34</sup> There have been comments that *Payne* detracts from this mission and overemphasises the emotions of the custodial parent, thus promoting selfishness and detracting from the

28 *AYB v AYZ* [2012] 3 SLR(R) 627 at [17].

29 *AYB v AYZ* [2012] 3 SLR(R) 627 at [40]–[44].

30 *AYB v AYZ* [2012] 3 SLR(R) 627 at [39].

31 *Re C (an infant)* [2003] 1 SLR(R) 502 at [22].

32 *TAA v TAB* [2015] 2 SLR 879 at [9].

33 Permanent Bureau, Hague Conference on Private International Law, “Preliminary Note on International Family Relocation” (Preliminary Document No 11, January 2012) at paras 24–27.

34 Family Law Act 1975 (Cth) s 60B.

importance of co-parenting.<sup>35</sup> Indeed, it was as a result of *Payne* that England came to be seen as a pro-relocation country with a presumption in favour of the custodial parent.<sup>36</sup> Nevertheless, it is worth noting that in *BNS (CA)*, the Court of Appeal highlighted that there is no presumption in favour of relocation in Australia, Scotland and New Zealand, and the prevailing English approach also appears to be the same.<sup>37</sup>

14 Secondly, *Payne* has been criticised by both judges and academics. The decision has been said to be detrimental to the non-relocating parent (who is often the non-custodial parent). Janeen M Carruthers commented:<sup>38</sup>

Should a relocating parent be able to dictate the extent to which, in practice, the non-relocating parent can participate in their child's life? If it should be the case that, after disintegration of the family unit, the right to a family life is a right only to a fragmented family life ... should not the primary carer's right to mobility also be proportionately curtailed, or qualified, and is it not arguable that his (or more likely her) travel plans and ambition should suffer some disruption or postponement until the child is older?

15 Carruthers also criticises *Payne* for failing to investigate into the possible impact upon the psychological and emotional stability of the non-relocating parent, should the relocation be allowed.<sup>39</sup> In her view, *Payne* disregarded the need for the primary caregiver to sacrifice for the child's needs.<sup>40</sup> Further, it has been commented that the *Payne* approach has been, rightly or wrongly, seen as a "bias towards the mother" since the vast majority of relocation applications are taken out by mothers.<sup>41</sup>

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35 Ghislaine Lanteigne, "Parenting Arrangements and Relocation Law in England and Wales, and Canada" (2014) 4(1) *Irish Journal of Legal Studies* 39 at 42, citing the criticisms of Mostyn J in *Re AR (a child: relocation)* [2010] 2 FLR 1577 at [8].

36 Alison Perry, "*Payne v Payne*: Leave to Remove Children from the Jurisdiction" [2001] CFLQ 455 at 459; Ann Thomas, "International Relocation: Gain a New Country but Lose a Child" [2010] Fam Law 982 at 984, where it was noted that the analysis in *Payne v Payne* [2001] Fam 473 means that a judge never starts the enquiry with an open mind and is requested to prefer an analysis which favours the mother's emotional and psychological well-being.

37 *BNS v BNT* [2015] 3 SLR 973 at [24].

38 Janeen M Carruthers, "International Family Relocation: Recent UK Experience" (2012) 3 Jur Rev 187 at 190.

39 Janeen M Carruthers, "International Family Relocation: Recent UK Experience" (2012) 3 Jur Rev 187 at 198.

40 Janeen M Carruthers, "International Family Relocation: Recent UK Experience" (2012) 3 Jur Rev 187 at 200.

41 Mary Hayes, "Relocation Cases: Is the Court of Appeal Applying the Correct Principles?" (2006) 18(3) CFLQ 351 at 362, where the author comments that the relocating parent is nearly always the mother.

Furthermore, the “distressed moms” argument has been doubted,<sup>42</sup> and in a world where fathers are encouraged more and more to assume day-to-day responsibilities of a child’s upbringing, it is questionable whether such an approach should still be taken.<sup>43</sup>

16 While Thorpe LJ characterised *Payne* as merely laying down guidelines for subsequent courts to follow, his comments in *Re B (removal from jurisdiction)*<sup>44</sup> (“*Re B*”) suggest otherwise. *Re B* concerned a relocation application by a mother who had formed a relationship with K, an affluent South African businessman. She had applied for the children to be relocated to South Africa, with their biological father remaining in England. The trial judge had denied the mother relocation as he was concerned about the security of the mother and the children should the relationship with K fail. In allowing the mother’s appeal, Thorpe LJ commented that:<sup>45</sup>

Once the judge had recognised the mother as plainly the primary carer he had *no option* but to recognise the reality that her future lay with Mr K and that necessarily meant a South African future. [emphasis added]

17 *Re B* has been criticised on the basis that Thorpe LJ’s decision to allow the relocation was also based on a “mere hope” that their relationship would not fail. He was not in a position to assess the impact of leave being denied when substituting his judgment for that of the trial judge, and relied on “generalisations derived from earlier cases that denial of leave was bound to be harmful to the mother and therefore the children”.<sup>46</sup>

18 Thirdly, Andrew Bainham has questioned the consistency of *Payne* with a State’s international law obligations, given that Arts 7 and 8 of the United Nations Convention on the Rights of the Child<sup>47</sup> (“UNCRC”) states that a child has the *right* to know and be *cared for* by

42 United Kingdom, The Reunite Research Unit, *Relocation: The Reunite Research* (by Marilyn Freeman) (July 2009) at p 17.

43 Paul Howard, “International Relocation: A Modern Australian Perspective on the Tyranny of Distance” at paras 34–36 <<http://www.austlii.edu.au/au/journals/FedJSchol/2008/25.pdf>> (accessed 8 January 2016); Debbie Ong, “Parental Relocation across Borders: Is Relocation in the Child’s Welfare?” *Singapore Law Gazette* (July 2009) at p 34, where the author advocates for greater importance to be given to the child’s loss of relationship with the non-relocating parent. See also Loh Soon How, “Getting Fathers More Involved in Raising Children” *Today* (23 March 2015).

44 [2003] EWCA Civ 1149.

45 *Re B (removal from jurisdiction)* [2003] EWCA Civ 1149 at [15].

46 Mary Hayes, “Relocation Cases: Is the Court of Appeal Applying the Correct Principles?” (2006) 18(3) CFLQ 351 at 361.

47 Entry into force 2 September 1990.

his or her parent and the right to preserve his family relations.<sup>48</sup> *Payne* thus appears dissonant with the UNCRC provisions.<sup>49</sup>

(3) *The erosion of Payne's application in Singapore*

19 It has been commented that England has since retreated from the *Payne* position.<sup>50</sup> Similarly, it is suggested that *BNS (CA)* shows that increasingly, there is a reluctance to follow the premise that if a primary caregiver's unhappiness, sense of isolation and depression would be exacerbated to a degree that it would be damaging to a child, relocation would be permitted. In *BNT*, Judith Prakash J held that in deciding whether a child should be relocated:<sup>51</sup>

... the court must bear in mind that, in general, it is in the child's interests for him to continue to have a meaningful relationship with *both his mother and father* notwithstanding that the relationship between the parents has broken down. [emphasis added]

Similarly, Ong JC held that:<sup>52</sup>

*BNT v BNS* serves as an important reminder *not to focus on the reasonable wishes of the primary carer to the extent that there is practically a presumption in favour of relocation once it is found that the primary carer's decision is not unreasonable*. [emphasis added]

20 The preceding discussion shows that in evaluating what the best interests of a child are, the court appears to place greater weight on the reasonableness of the relocating parent's application than the risk that the other parent would lose contact with their child.<sup>53</sup> This is apparent from the court's holding in *AYD v AYE*<sup>54</sup> ("*AYD*"), where Woo Bih Li J held that:<sup>55</sup>

48 Andrew Bainham, "Taking Children Abroad: Human Rights, Welfare and the Courts" (2001) 60(3) *Camb LJ* 489 at 492.

49 Mary Hayes, "Relocation Cases: Is the Court of Appeal Applying the Correct Principles?" (2006) 18(3) *CFLQ* 351 at 368.

50 Timothy Scott, "The Retreat from *Payne*: *MK v CK*" [2011] 41 *Fam Law* 886; David Hodson, *The International Family Law Practice: 2013–2014* (Jordan Publishing, 3rd Ed, 2013) at pp 488–489, where it is observed that some post-*Payne* cases will have to be differently decided following *K v K (children: permanent removal from jurisdiction)* [2012] 2 *WLR* 941. See also *Re AR (a child: relocation)* [2010] 2 *FLR* 1577 at [10], where Mostyn J preferred a multifactorial analysis which provides a more balanced and neutral approach to relocation cases. Finally, see *BNS v BNT* [2015] 3 *SLR* 973 at [24].

51 *BNT v BNS* [2014] 4 *SLR* 859 at [21].

52 *TAA v TAB* [2015] 2 *SLR* 879 at [9].

53 Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.5. See also Debbie Ong, "Parental Relocation across Borders: Is Relocation in the Child's Welfare?" *Singapore Law Gazette* (July 2009) at p 34.

54 [2012] *SGHC* 42.

55 *AYD v AYE* [2012] *SGHC* 42 at [20].

It was also undisputed that the wife was the primary care giver of the two sons. It would only be reasonable for her to want to bring the two sons with her and for them to want to be with her. If the move made it more difficult for the husband to have access, that was a separate matter.

A similar observation was also made in *AZB* where Ang J held that:<sup>56</sup>

... [w]hat the cases do suggest ... is that the welfare of the child is often so inextricably intertwined with the general well-being and happiness of the primary caregiver that the court is loath to interfere with important life decisions of the primary caregiver, so long as they are reasonably made and are not against the interests of the child. The decision might be difficult for the *parent without care and control to accept* but, while one is not without sympathy for a parent in such a situation, the outcome is one of the unfortunate consequences of divorce and ultimately made in the best interests of the child. [emphasis added]

21 After *BNT*, the application of the welfare principle seems to have moved heavily in favour of preserving parental bonds with both parents. It has been commented that *BNT* brought the consideration of a loss of relationship between a non-relocating parent and a child to the fore, and the debate in law as well as in the social sciences indicates that this factor is the most significant impediment to a successful relocation application.<sup>57</sup> This could be indicative of a shift towards the concept of joint parental responsibility, and is something which lawyers may wish to consider in framing their case; the point is evident from the facts of *BNT*, which concerned an involved non-custodial parent. In *BNT*, the court found that the father had made good use of his access rights to bond with his children and spend meaningful time with them. The efforts of the father were listed as follows:<sup>58</sup>

- (a) While the father had moved out of the matrimonial home, he moved into an adjacent condominium to effect easy access to the children.
- (b) The father agreed to share the use of his car with the mother so that whoever had the children could use the car.
- (c) The father had breakfast with the children on Tuesdays and Thursdays and returned home early on those days from work so that he could do homework, read books, do art and craft, and tell stories to the children before changing them into their pyjamas and driving them to the mother's apartment.

<sup>56</sup> *AZB v AYZ* [2012] 3 SLR 627 at [14].

<sup>57</sup> Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.36.

<sup>58</sup> *BNT v BNS* [2014] 4 SLR 859 at [25]–[26].

(d) The father took his son to weekly football practice on Saturday mornings and occasionally, the children out on Sunday afternoons to various locations.

(e) The father played a serious role in the children's education by doing significant research and visiting 11 schools and pre-schools in 2011 before deciding that it would be in their best interests to attend a particular school together.

22 It is pertinent also to note that the same generosity has been extended to parents who might not have a good relationship with their children but who are actively seeking and trying to rebuild their relationship with them. TAA was a relocation application by a father who had remarried a Spanish lady and wanted to move to Spain with his three children from a previous marriage of whom he was granted sole custody and care and control. Ong JC observed that the father's main reasons for relocation appeared to be prompted by the new wife's circumstances and plans and his relocation plans seemed to indicate that despite his family and career being in Singapore, he wanted to move to Spain to try and find a job and accommodate his new wife.<sup>59</sup> One of the reasons that his relocation application was denied was because the mother of the three children had had a close relationship with her children, and while there was some evidence to suggest that they were no longer as close due to her leaving Singapore with the youngest of the three, she had returned and was fighting to spend time with them and rebuild her relationship with them.<sup>60</sup>

23 Ong JC's decision was made as even though the mother's relationship with her children had somewhat been estranged as a result of her leaving Singapore with the youngest child, she had returned and shown evidence that she was trying to make use of her access rights in order to rebuild her previously close relationship with her children.<sup>61</sup> This was evident from the questions posed by Ong JC, namely:<sup>62</sup>

(a) "Does this then mean that the mother-and-children relationship should *never be supported any further?* [emphasis added]"

(b) "Are the children to simply live without their mother in their lives from now on, erase the earlier childhood memories of their relationship with her and move on without their mother in their lives?"

59 TAA v TAB [2015] 2 SLR 879 at [22].

60 TAA v TAB [2015] 2 SLR 879 at [23].

61 TAA v TAB [2015] 2 SLR 879 at [23].

62 TAA v TAB [2015] 2 SLR 879 at [23].

In posing those questions, Ong JC noted that should relocation to Spain be allowed, the mother would find it even harder to have access to the children especially since the father did not appear to be supportive of access.<sup>63</sup> She held that “relocation to Spain is likely to sound a death knell to the relationship between the mother and the children”.<sup>64</sup>

24 It is submitted that the increased importance given by the Singapore courts to the non-custodial parent’s use of the access rights is both principled and consistent – it is principled since the courts now regard the parental bond as important in both divorce cases where relocation is not an issue, and divorce cases where relocation is an issue – there has been a renewed emphasis on preserving the child’s parental bond with both the parents. It is of especial significance to note that in arriving at her decision in *BNT*, Prakash J cited her previous decision *ABW v ABV*,<sup>65</sup> where in a domestic divorce context, care and control of the children was switched so that the mother was given care and control instead of the father because of evidence that the children were being alienated from the mother – in *BNT*, given the mother’s hostility towards the father, Prakash J took the view that there was a real likelihood of the father being alienated from the children if relocation was granted.<sup>66</sup> This is consistent as it respects the philosophy of granting access to the non-custodial parent, which is for that parent to spend meaningful time and bond with the child as involvement from both parents in a child’s life is seen as beneficial for the child.<sup>67</sup> The burden of proof is thus placed on the relocating parent to prove to the court that relocation is in the child’s best interests. Chen Siyuan notes:<sup>68</sup>

... Relocation has long-term ramifications, much more than any other order relating to the child. The most sensible approach may be to ask if there are any obvious long-term negative ramifications for not relocating that override the positive status quo. The burden of proof will naturally fall on the relocating parent to demonstrate this.

## **B. Educational arrangements**

25 *BNS (CA)* also reveals that Singapore views the proposed plans for relocation very seriously – the threshold for whether a plan is “reasonable” or not is a high one which the court will scrutinise

63 *TAA v TAB* [2015] 2 SLR 879 at [23].

64 *TAA v TAB* [2015] 2 SLR 879 at [23].

65 [2014] 2 SLR 769 at [27].

66 *BNT v BNS* [2014] 4 SLR 859 at [35].

67 *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 at [26]. It has been commented that it has become common to expect that a parent would be granted reasonable access to the child if the parent does not live with the child: Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2nd Ed, 2013) at p 339.

68 Chen Siyuan, “Family Law” (2014) 15 SAL Ann Rev 354 at 365.

carefully.<sup>69</sup> Particular attention is paid to the educational and housing needs of the child in this regard.

26 It is suggested that the Singapore courts pay serious attention to the child's educational needs in a *stable* environment; if there is evidence of the child being well settled in school, that factor will not be lightly disregarded by the Singapore courts. In *BNT*, the court held that the mother's relocation plan was inadequate as the mother (a) had only made enquiries as to the educational facilities in Canada long after the relocation application had been brought; and (b) did not appear to show any serious effort in identifying properties which she and the children could possibly stay in.<sup>70</sup> Prakash J remarked that besides being able to have a meaningful relationship with their father, the relocation application was denied as the children had led stable and comfortable lives in Singapore since they were infants and were enrolled in school in Singapore. Relocating them when they were less than ten years of age would not be in their best interests as they would face a sense of displacement should they be relocated at that stage of their lives.<sup>71</sup> This is contrasted with *BX v BY*,<sup>72</sup> in which the court observed that the child's needs appeared to be well taken care of as the child to be relocated to Shanghai, China, was to be sent to Shanghai Kindergarten, which was a respectable kindergarten, and a helper who had been helping to take care of the child would also travel with him to Shanghai.<sup>73</sup> In *AZL v AZM*,<sup>74</sup> the court found that the mother had taken much care to choose a school which had a curriculum similar to that of the school which the child was then attending. That school also had a similar student mix and with that in place, the court was satisfied that the mother's plans for relocation were sufficiently considered.<sup>75</sup>

27 The decisions are sensible both legally and factually. Legally, they are consistent with the Court of Appeal's decision in *Re C*, which followed Ormrod LJ's holding in *Chamberlain v de la Mare*,<sup>76</sup> where he commented that if a child was well settled in a boarding school and a relocation application was sought, it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system. Ormrod LJ's observations were also followed in *TAA*, where relocation was denied as the father's application for the children to be relocated to Spain did not seem to be a long-term

69 *BNT v BNS* [2014] 4 SLR 859 at [45].

70 *BNT v BNS* [2014] 4 SLR 859 at [48]–[49].

71 *BNT v BNS* [2014] 4 SLR 859 at [54].

72 [2003] SGDC 29.

73 *BX v BY* [2003] SGDC 29 at [32].

74 [2012] SGDC 150.

75 *AZL v AZM* [2012] SGDC 150 at [50].

76 (1983) 4 FLR 434.

one, but rather seemed to be experimental in nature. There was also no evidence that he had seriously considered their schooling needs, especially for the oldest child, who was studying in a Singapore polytechnic.<sup>77</sup> In reaching her decision, Ong JC considered the children's educational needs and held that the factor was an independent one from the loss of relationship with the other parent.<sup>78</sup> Factually, since the children had a stable life in Singapore and had spent the majority of their formative years in Singapore, she saw no reason to uproot the children from a "very stable living environment" with "routine day to day activities with the father and weekly access to the mother and [who] are settled in schools in Singapore".<sup>79</sup> Relocation would uproot them into an unfamiliar environment and schooling system in which English would not be the medium of instruction.<sup>80</sup>

28 It is worth noting that there appears to be some difficulty in resolving some underlying assumptions regarding a child's fortune.<sup>81</sup> *AZB* and *BNT* exemplify this. In *AZB*, Ang J commented that while the daughter was well settled in Singapore with many friends, "one should not underestimate the adaptability and resilience of young children generally" and while "relocation to an entirely new country is going to involve some degree of adjustment ... what is important here is the stabilising influence of the wife in [the daughter's] life".<sup>82</sup> Similarly in *AZL v AZM*,<sup>83</sup> the court did not consider the fact that the child's friends were in Singapore to be a very strong factor in favour of dismissing relocation applications.<sup>84</sup> Both can be contrasted to *BNT* where a much softer view was taken of the children's adaptability – Prakash J found that it would not be in the children's best interests to face even a short period of displacement if they were to be relocated to Canada.<sup>85</sup>

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77 *TAA v TAB* [2015] 2 SLR 879 at [27].

78 *TAA v TAB* [2015] 2 SLR 879 at [25].

79 *TAA v TAB* [2015] 2 SLR 879 at [5] and [27].

80 *TAA v TAB* [2015] 2 SLR 879 at [27].

81 Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.17 comments that it is possible that a judge's lack of knowledge and understanding of social scientific studies may result in a custody decision based on his or her personal experience and beliefs. See also Joan B Kelly, "The Best Interests of the Child: A Concept in Search of Meaning" (1997) 35 Fam & Concil Cts Rev 377.

82 *AZB v AYZ* [2012] 3 SLR 627 at [52].

83 [2012] SGDC 150.

84 *AZL v AZM* [2012] SGDC 150 at [47].

85 *BNT v BNS* [2014] 4 SLR 859 at [53].

## VI. Future possible directions

29 What then, for the courts moving forward? Since *AYD*, Singapore family law has moved towards a less adversarial process with the advent of the FJC.<sup>86</sup> First, it is suggested that the child's views will be given more weight with the advent of the child representative. Children's views have previously been considered before in *AYD*, where Woo J allowed a relocation application from the mother as she had an American fiancé and she wished to move to America to be with him, bringing the children along with her. In allowing the relocation application, Woo J considered that both the sons "begged" her to take them with her,<sup>87</sup> which he considered was a weightier factor than any hindrance to the father's access which might be borne out by the relocation application.<sup>88</sup> Nevertheless, the wishes of the children did not appear to be decisive – the father had shown that he wanted the children to remain in Singapore only for the purposes of his access rights while he himself was not in the jurisdiction most of the time. That appeared to be a significant "push" factor in the court's analysis.

30 Secondly, provisions have been made for the court to appoint experts to assess the case where the custody or welfare of the child is in question,<sup>89</sup> and under the Family Justice Rules 2014,<sup>90</sup> a child representative can be appointed by the court to assist in assessing matters concerning the custody or welfare of the child.<sup>91</sup> A child representative's role is to ensure that the child's perspective is accounted for in the proceedings,<sup>92</sup> and his primary role is to represent the child's view and best interests in court proceedings.<sup>93</sup> Such a representative has a duty to give an independent view on what he believes to be the best interests of the child, to act in a manner which he believes to be in the best interests of the child,<sup>94</sup> to ensure that the child's views are fully and accurately presented to the court,<sup>95</sup> to ensure that the child has the opportunity to be advised about significant developments in the proceedings<sup>96</sup> and to

86 For a general overview of the changes to the family justice process, see Chen Siyuan, "An Overview of the Impending Changes in the Family Justice Landscape" *Singapore Law Blog* (10 August 2014).

87 *AYD v AYE* [2012] SGHC 42 at [15].

88 *AYD v AYE* [2012] SGHC 42 at [20].

89 Family Justice Act 2014 (Act 27 of 2014) s 28.

90 S 813/2014.

91 Family Justice Rules 2014 (S 813/2014) r 30.

92 Committee for Family Justice, *Recommendations of the Committee for Family Justice on the Framework of the Family Justice System* (4 July 2014) at para 50.

93 Committee for Family Justice, *Recommendations of the Committee for Family Justice on the Framework of the Family Justice System* (4 July 2014) at para 163.

94 Family Justice Rules 2014 (S 813/2014) rr 31(1)(a) and 31(1)(b).

95 Family Justice Rules 2014 (S 813/2014) r 31(2)(c).

96 Family Justice Rules 2014 (S 813/2014) r 31(2)(d).

inform the court on matters which are relevant to advancing the interests of the child, including informing the court as to the relationship between the child and any party to the proceedings.<sup>97</sup> His views would undoubtedly be considered by the courts, and it is suggested that given the developments to place the child at the centre of the process, moving forward, the views of the child would be given even greater consideration than they already have by the court in deciding whether or not to allow relocation.

31 However, one should note that the wishes of a child are *not* overriding, in the sense that the child representative is still obliged to act in the child's best interests; in so far as the child's wishes go against what the child representative deems as his best interests, the child's wishes which the child protector might not agree with will have to be brought to the court's attention.<sup>98</sup> Such a development would, for example, lend a louder voice to the children involved in *AZB* and *BNT*, where the children's fortitude appeared to have been in issue where relocation was concerned.<sup>99</sup> In this respect, it remains to be seen how the various parties involved under the more collaborative practice being developed work together on the specific issue of the child's welfare – it is entirely conceivable that the child representative forms a view that relocation is not in the child's best interests but the child expresses his or her wish to relocate with the custodial parent. In such an instance, how far should the child representative's views be that of the child's views? What if a situation emerges where the child representative and an expert appointed to evaluate the child come to different opinions on whether relocation is in the child's best interests? These raise difficult questions for courts, and will have to be addressed in time to come when the appropriate cases arise.

32 Thirdly, given the cross-border nature of child relocation cases, the Singapore courts should consider the use of mirror orders in future cases where relocation is allowed and the interests of the non-custodial parent are sought to be preserved. The phenomenon of respecting the non-custodial parent's right to bond with the child is not just seen in Singapore, but also in Hong Kong where the Hong Kong Court of Appeal allowed a relocation application by the mother *conditionally* in *SMM v TWM (child: relocation)*<sup>100</sup> – the mother had to ensure that contact arrangements would be registered as a “mirror order” in the court nearest to the territory in which the child would be relocated to.<sup>101</sup> Such a practice does not seem common in Singapore, and it is suggested

97 Family Justice Rules 2014 (S 813/2014) r 31(2)(e).

98 Family Justice Rules 2014 (S 813/2014) rr 31(2)(c) and 31(3)(a).

99 See para 28 above.

100 [2010] 4 HKLRD 37.

101 *SMM v TWM (child: relocation)* [2010] 3 HKLRD 37 at [50].

that such a practice can be considered in future relocation applications where relocation is granted so as to protect the rights of the non-custodial parent in that jurisdiction.

## VII. Conclusion

33 The upshot from the Court of Appeal's decision in *BNS (CA)* shows that Singapore increasingly seeks to give effect to the welfare principle by preserving the parental bond between the child and both parents. This is perhaps reflective of a subtle shift in the court's underlying philosophy to one of joint parental responsibility. Together with the move towards a less acrimonious family justice process, this approach could ameliorate the undesirable consequences that might result otherwise, where parents fight tooth and nail over care and control, being afraid of the custodial parent applying (and most likely getting) a relocation order from the court.<sup>102</sup> A more collaborative process seeking to give the child a louder voice in the process and keep the child updated on the legal developments would also mean that greater weight would be placed on the child's wishes; should relocation be permitted, the child would be better prepared for the major changes to his or her life. All in all, the decision in *BNS (CA)* augurs well for the future of international family relocation, which will increasingly be in issue moving forward.

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102 This observation was made in Debbie Ong, *International Issues in Singapore Family Law* (Academy Publishing, 2014) at para 9.11.