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16. FAMILY LAW

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16.1 In 2018, the Singapore courts chartered new waters when it considered issues such as whether an adoption order should be granted to a gay man who fathered a child through gestational surrogacy, and whether a child should be returned to his mother in the UK when he had been wrongfully abducted from her. There were also cases that provided principles on key areas of family law (such as guardianship applications by non-parents) while others continued the application of well-established family law principles.

16.2 Collectively, these decisions represent a continued maturation and an increasing sophistication of Singapore family law jurisprudence. In this edition of the Ann Rev, the following broad areas will be discussed: (a) the jurisdiction of the Family Justice Courts; (b) adoption; (c) custody, care and control, and access; (d) division of matrimonial assets; and (e) spousal and child maintenance.

Jurisdiction of the Family Justice Courts

16.3 The Family Justice Courts were established in October 2014 under the auspices of the Family Justice Act 2014[1] ("FJA") to provide:[2]

> … jurisdiction over family proceedings to a dedicated court system which could design the best processes and approaches to deal with an area of law which has wide-ranging society and personal impact.

They comprise the Family Division of the High Court, the Family Courts, and the Youth Courts. The jurisdiction of these courts is specifically provided for under the Supreme Court of Judicature Act,[3] the FJA, and other subsidiary legislation.

1 Act 27 of 2014.
2 *UDA v UDB* [2018] 1 SLR 1015 at [1].
3 Cap 322, 2007 Rev Ed.

16.4 One aspect of matrimonial proceedings concerns the division of matrimonial assets between husband and wife. In *UDA v UDB*[4] ("*UDA*"), the Court of Appeal considered the extent of the family court's jurisdiction to divide matrimonial assets where third-party interests are claimed. In *UDA*, the wife's mother had intervened in the matrimonial proceedings to dispute the husband's claim that an immovable property held in her name was held on trust for the husband and the wife.

16.5 It is a "fundamental tenet" of statutory interpretation that subsidiary legislation like rules of procedure cannot confer substantive rights and are merely facilitative.[5] An application to intervene could not create a new cause of action outside of s 112 of the Women's Charter[6] or confer substantive jurisdiction and power on it to make orders against an intervener who was not a party to the marriage.[7] Thus, the Court of Appeal held that the Family Court cannot make orders directly impacting the property rights of a third party, even though these parties may have intervened in the matrimonial proceedings. Specifically, the Family Court has no jurisdiction to do so because, while s 112 of the Women's Charter bestows on the Family Court the power to divide matrimonial assets, this power is situated in the specific context of matrimonial proceedings.[8]

16.6 However, the Court of Appeal's ruling does not mean third-party interests would never be entertained by the court where they related to potential matrimonial assets – the court's jurisdiction to adjudicate on such interests must be properly engaged. There are four possible situations where property ownership issues might arise out of ancillary ongoing proceedings:

(a) First scenario: The property is accepted as a matrimonial asset and the only question is its division. In this scenario, the Family Court has complete jurisdiction to divide the asset under s 112 of the Women's Charter.[9]

(b) Second scenario: The property is in the name of a divorcing spouse and the issue is whether the circumstances of its acquisition render it a matrimonial asset. In this scenario, the Family Court would have complete jurisdiction to divide the asset under s 112 of the Women's Charter.[10]

4 [2018] 1 SLR 1015.
5 *UDA v UDB* [2018] 1 SLR 1015 at [48].
6 Cap 353, 2009 Rev Ed.
7 *UDA v UDB* [2018] 1 SLR 1015 at [48].
8 *UDA v UDB* [2018] 1 SLR 1015 at [28]–[29].
9 *UDA v UDB* [2018] 1 SLR 1015 at [52].
10 *UDA v UDB* [2018] 1 SLR 1015 at [52].

(c) Third scenario: The property is legally held in the name of one spouse who claims to be holding it on trust for a third party, while the other spouse disputes this and claims that the property is a matrimonial asset.[11] If the property is legally held in the name of a spouse and a third-party interest is asserted in respect of that property, the court may make an order under s 112 of the Women's Charter because the only parties affected are the parting spouses and no order is sought by or against a third party.[12] If no order is sought for the property rights *vis-à-vis* the third party to be determined, there remains a possibility that the spouse in whom the property legally vests may be made to account to the third party for such value of the property interest as may be claimed, and subsequently found to be owned by such third party.[13]

(d) Fourth scenario: The property is legally held in the name of a third party, but it is alleged that the property is held on trust for one or both of the divorcing spouses such that it forms part of the matrimonial asset pool.[14] If the property is legally owned by the third party, then the ownership issues can be resolved in the following ways:

(i) The spouse who asserts the property is a matrimonial asset may obtain a legally binding confirmation from the third party that the property is a matrimonial asset and that the third party would respect and enforce any order that the court may make in relation to the property.[15] If the status of the property is contested, a separate legal action would have to be commenced to determine the property rights at hand while putting on hold any s 112 proceedings until the property rights are determined.[16]

(ii) The spouse could drop the claim that the property is a matrimonial asset and allow the s 112 proceedings to continue without the property forming part of the matrimonial asset pool.[17]

(iii) The spouse may ask the court to determine whether the asset is a matrimonial asset without involving the third party's participation or making an

11 *UDA v UDB* [2018] 1 SLR 1015 at [51(c)].
12 *UDA v UDB* [2018] 1 SLR 1015 at [58].
13 *UDA v UDB* [2018] 1 SLR 1015 at [58].
14 *UDA v UDB* [2018] 1 SLR 1015 at [51(d)].
15 *UDA v UDB* [2018] 1 SLR 1015 at [56(a)].
16 *UDA v UDB* [2018] 1 SLR 1015 at [56(b)].
17 *UDA v UDB* [2018] 1 SLR 1015 at [56(c)].

> order directly affecting the property.[18] This should only be undertaken if both spouses agree to this course of action, as proceeding in this manner could result in the disputed asset being treated as a matrimonial asset and adjustments being made to other aspects of property division.[19] If both spouses do not agree to so proceed, then directions would have to be taken for separate legal proceedings to be commenced to determine the property rights in respect of the property's ownership while s 112 proceedings are stayed.[20]

16.7 Based on the above framework, the Court of Appeal considered that since the husband claimed that the wife's mother legally held the immovable property on trust for him and his wife, the Family Court would have to make an order against the wife's mother which they had no jurisdiction to do. The Court of Appeal thus halted the s 112 proceedings and ordered the husband to commence any civil action he might have in respect of the property against the wife and her mother within 30 days.[21] In conclusion, the Court of Appeal emphasised that the jurisdiction of the family justice courts was "governed by statute and [it could] not arrogate jurisdiction to [itself] where the legislature [had] not conferred it".[22]

16.8 The relationship between the Youth Court and the Family Court was considered in *UNB v Child Protector*[23] ("*UNB*"). Divorce proceedings had been commenced between the father and mother pursuant to which a consent order was made that granted both parents joint custody of their children, with care and control going to the mother and access granted to the father. However, the children were referred to the Child Protection Service ("CPS") on allegations of ill-treatment by the mother towards them. The children then began to live with the father and their contact with the mother ceased. In a subsequent application, the Family Court varied its ancillary orders and granted joint custody of the children to the parents, with care and control going to the father and Skype access granted to the mother. Overnight access to the mother was to begin once the school holidays started, but when the children were scheduled to have overnight access with the mother, they refused to leave the father's car. They were admitted by the father to KK Women's and Children's Hospital where

18 *UDA v UDB* [2018] 1 SLR 1015 at [56(d)].
19 *UDA v UDB* [2018] 1 SLR 1015 at [57].
20 *UDA v UDB* [2018] 1 SLR 1015 at [57].
21 *UDA v UDB* [2018] 1 SLR 1015 at [19].
22 *UDA v UDB* [2018] 1 SLR 1015 at [66].
23 [2018] 5 SLR 1018.

they were observed to be displaying post-traumatic stress symptoms. Thereafter, they were referred to the CPS for a second time.

16.9 The CPS applied to the Youth Court for care and protection orders. Interim orders were granted for the children to be placed under the supervision of an approved welfare officer while they resided with the father. On review, the Youth Court found that the children were suffering from "emotional injury" and so held that the threshold for state intervention under s 4(*g*) of the Children and Young Persons Act[24] ("CYPA") was established, and access was subject to the approval and review of the approved welfare officer.[25] On appeal, the High Court emphasised that the children's welfare was at the forefront of its consideration in family proceedings even without a care and protection order and that it had the power to direct updated independent reports on the children, make counselling orders and well-calibrated care and access orders.[26] After an analysis of the evidence, the appeal was allowed for the following reasons.

16.10 First, Debbie Ong J held that the starting point in determining whether the children needed care and protection must be the words of the relevant provisions in the CYPA. While the purpose of s 4 is to "ensure that children are protected and well cared for", it also recognises that parents play a primary role in the parenting process and the State has a more limited role in this regard. Hence, the CPS has to be sensitive to the context in which a child's "emotional injury" was suffered;[27] this was clear from a speech from the then Minister for Community Development, Youth and Sports, Dr Vivian Balakrishnan, where he had emphasised that removing a child from his family is the last resort. The morally right thing to do was to raise a child within the context of an intact family.[28]

16.11 Secondly, the professional assessment was largely unanimous that while the children were anxious, fearful, and frustrated, they were not suffering from any serious psychiatric or psychological disorders. In

24 Cap 38, 2001 Rev Ed.

25 *UNB v Child Protector* [2018] 5 SLR 1018 at [4]. Section 4(*g*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) states that a child or young person is in need of care and protection if there is such a serious and persistent conflict between the child or young person and his parent or guardian, or between his parents or guardians, that family relationships are seriously disrupted, thereby causing the child or young person emotional injury.

26 *UNB v Child Protector* [2018] 5 SLR 1018 at [19].

27 *UNB v Child Protector* [2018] 5 SLR 1018 at [24].

28 *Singapore Parliamentary Debates, Official Report* (10 January 2011) vol 87 at col 2129 (Vivian Balakrishnan, Minister for Community Development, Youth and Sports).

this context, state intervention was not the only solution to the children's emotional difficulties, which stemmed from difficulties in effecting the access orders between the children and their mother. This was not abnormal for children caught in the throes of divorce. Therefore, s 4(*g*) of the CYPA was not satisfied as Ong J was not persuaded that the children were at such risk of being ill-treated by the mother.[29]

16.12 Thirdly, Ong J found that the orders made by the Youth Court were not in the children's welfare and best interests and in fact carried a risk of negative effects – the orders made which granted the father care and control while limiting access to the mother might aggravate the acrimony between the parties and had the potential to severely undermine the children's relationship with the wife.[30] Moreover, the CPS had determined the husband to be a sufficiently fit parent with whom the children were to reside. In these circumstances, state intervention would rarely be warranted unless the fit parent was unable to protect the children from being harmed further by the unfit parent.[31]

16.13 As can be seen in *UNB*, the primacy of the family unit continues to remain a cornerstone of Singapore family law. Such a consideration is evident from Ong J's acknowledgement that the CYPA recognises the parents' primary role in raising their children. Examples cited to buttress Ong J's point that state intervention would not be appropriate were where a child was exposed to a parent's habitual smoking and second-hand smoke or where a child felt her parents did not understand her emotional troubles after a failed boy–girl relationship. This was also the position taken in *UMF v UMG*[32] ("*UMF*"), where the High Court stressed that parents should be allowed to parent their children without unnecessary interference from third parties.[33]

16.14 *UNB*, however, features symptoms of parental alienation since it appears that the children's difficulties in interacting with their mother started surfacing only after they started residing with their father. In a previous case where there was evidence of parental alienation, the court switched care and control from the father to the mother.[34] Lawyers should hence be sensitive to the possibility of symptoms of alienation and the possible remedies available.

29 *UNB v Child Protector* [2018] 5 SLR 1018 at [48]–[49].
30 *UNB v Child Protector* [2018] 5 SLR 1018 at [59]–[60].
31 *UNB v Child Protector* [2018] 5 SLR 1018 at [59].
32 [2019] 3 SLR 640.
33 See para 16.40 below.
34 *ABW v ABV* [2014] 2 SLR 769 at [27]–[29].

16.15 Having said this, the authors note that specialists have raised doubts about the validity of parental alienation syndrome in custody battles and cautioned against the use of parental alienation syndrome in the adversarial legal system.[35] Given the paucity of judicial pronouncements in this area, it is perhaps sensible for courts to approach any allegations of parental alienation with some circumspection and in concert with the appropriate experts. The authors believe this is what the Family Court is well placed to do with its powers to obtain reports and appoint suitable experts to assist in the legal proceedings to safeguard the children's welfare.

Adoption

16.16 2018 saw the High Court issue its landmark decision of *UKM v Attorney-General*[36] ("*UKM*"). This decision was situated in the novel context of an applicant who lived with his homosexual partner and had fathered a child in the US through a procedure known as gestational surrogacy.

16.17 Soon after the child's birth, the applicant brought the child back to Singapore and applied for Singapore citizenship for the child. However, the child's citizenship application was rejected by the Immigration and Checkpoints Authority ("ICA"). Later, the applicant applied for an adoption order after he was informed by the Ministry of Social and Family Development ("MSF") that the chances of his child obtaining Singapore citizenship or permanent residence would be improved if the child was adopted (although the final decision on the grant of Singapore citizenship lay with the ICA).

16.18 A few key facts must be noted. The applicant appeared to have the financial means to meet the child's basic needs. The home environment was comfortably furnished and child-safe. The applicant and his partner also appeared committed to parenting the child as two fathers. The applicant also stated on affidavit that his goal in seeking to adopt the child was not to circumvent national laws against same-sex marriage but to secure the child's long-term residence in Singapore.

35 Jennifer Teoh, Grace Chng & Chu Chi Meng, "Parental Alienation Syndrome: Is It Valid?" (2018) 30 SAcLJ 727 at 734–736, paras 17–20. The authors also said that:

> … courts, judges, medical and mental health professionals should never ignore abuse allegations based on [parental alienation syndrome], but instead give due diligence to carefully examine each claim in order that an effective plan and structure for legal, judicial and therapeutic interventions can be carried out.

36 *UKM v Attorney-General* [2018] SGHCF 18.

However, the MSF had recommended against allowing the adoption as to do so would be contrary to public policy.

16.19 The applicant thus brought an application under s 3 of the Adoption of Children Act[37] ("Adoption Act") for an adoption order. He was unsuccessful in his application in the Family Court even though the surrogate mother had given her consent to the adoption application. On appeal, a three-member bench of the Family Division of the High Court granted the adoption order and set out the court's views on the relevance of the child's welfare in adoption proceedings and how the consideration of public policy is to be applied in subsequent cases.

16.20 The court noted that s 5(*b*) of the Adoption Act states that the court should be satisfied that the adoption order if made will be for the "welfare of the infant". After a historical survey of the origins of this principle, Sundaresh Menon CJ upheld an expansive understanding of "welfare" which referred to the child's physical, intellectual, psychological, emotional, moral, and religious well-being both in the short term and long term.[38] This meant that the court had to look at both the satisfactoriness of a child's parenting arrangement and the environment within which his sense of identity, purpose, and morality would be cultivated.[39]

16.21 The court also noted that s 3 of the Guardianship of Infants Act[40] ("GIA") states that:

> … [w]here in any proceedings before any court the custody or upbringing of an infant … is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration …

Menon CJ held that this section applied to adoption proceedings as they concerned the upbringing of an infant. At the same time, he recognised the welfare of the child was not the exclusive consideration in adoption proceedings.[41] This was because adoption involved the severing of natural bonds and the forming of new ones, and consent from the relevant persons was necessary unless dispensed with.[42]

16.22 Having said this, Menon CJ held that there was no reason why the welfare of a child should not be the first or paramount

37 Cap 4, 2012 Rev Ed.
38 *UKM v Attorney-General* [2018] SGHCF 18 at [38] and [45].
39 *UKM v Attorney-General* [2018] SGHCF 18 at [47].
40 Cap 122, 1985 Rev Ed.
41 *UKM v Attorney-General* [2018] SGHCF 18 at [50].
42 *UKM v Attorney-General* [2018] SGHCF 18 at [52].

consideration.[43] He adopted Lord MacDermott's concept of paramountcy in *J v C*[44] and held that "first and paramount" connotes a process whereby all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are accounted for and weighed so that the course to be followed will be that which is most in the interests of the child's welfare.[45] Put another way, the welfare of the child ought to significantly define the criteria for and the trajectory of the court's analysis of an application's merits. When a certain outcome was shown to be for the welfare of the child, the court should generally make an order which achieved that outcome unless there were compelling reasons to do otherwise.[46]

16.23 On the facts, Menon CJ considered that granting the adoption order would be in the child's welfare as it would increase his chances of acquiring Singapore citizenship or long-term residence in Singapore, which in turn would enhance his prospects of remaining here with his existing caregivers.[47] This would significantly promote his welfare as it would enable his caregivers to plan on a long-term basis.[48] Further, giving the child the legal status of a legitimate child would confer some positive social, psychological and emotional benefit.[49] Notably, the respondent did not claim that the applicant would be a poor parent by dint of his sexual orientation alone.

16.24 *UKM* is also significant for its nuanced treatment of what is a divisive issue in Singapore society – the morality of a person's sexual orientation. Just over a decade prior, the repeal of s 377A of the Penal Code[50] (a provision which criminalises the commission of acts of gross indecency between two males) was fiercely debated in Parliament. The eventual decision was to retain the provision with an observation that the Government did not proactively enforce it.[51] A challenge was later made against the constitutionality of s 377A, but failed.[52] In *UKM*, the court held that there were both statutory and common law bases for public policy to be a consideration in adoption proceedings.

43 *UKM v Attorney-General* [2018] SGHCF 18 at [53].
44 [1970] 1 AC 668.
45 *UKM v Attorney-General* [2018] SGHCF 18 at [54], citing *J v C* [1970] 1 AC 668 at 710–711.
46 *UKM v Attorney-General* [2018] SGHCF 18 at [56]–[57].
47 *UKM v Attorney-General* [2018] SGHCF 18 at [60].
48 *UKM v Attorney-General* [2018] SGHCF 18 at [65].
49 *UKM v Attorney-General* [2018] SGHCF 18 at [75].
50 Cap 224, 2008 Rev Ed.
51 *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at col 2397 (Lee Hsien Loong, Prime Minister and Minister for Finance).
52 *Lim Meng Suan v Attorney-General* [2015] 1 SLR 26.

16.25 On the first basis, the court noted that s 3 of the Adoption Act conferred judicial discretion to grant the adoption order once the relevant statutory conditions are satisfied.[53] It opined that the discretion served two main purposes: first, to enable the court to account for any consideration which was not provided for in the Adoption Act but which might be relevant to assessing the propriety of the transaction between the two sets of parents involved in an adoption; and secondly, to allow the court to consider any public policy which may be relevant to any aspect of the institution of adoption, especially since the Adoption Act regulates the establishment of new families and relationships.[54]

16.26 As for the common law basis, Parliament is presumed to intend that any statutory discretion conferred is exercised in a way that is reasonable, fair and just. This presumption is distinct from the principle that a statutory discretion should be exercised in accordance with the object of the statute and the provision conferring that discretion.[55]

16.27 The court then gave a framework within which public policy considerations were to be assessed – first, it would consider whether the specific area of law concerned judge-made law (for example, contract and tort law) or statutory law (for example, land law) and whether the public policy being asserted is of a socio-economic or legal nature.[56] This was expressed in the form of the following table:

Matrix of legal contexts		**Type of public policy**	
		Socio-economic	Legal
Type of law	Judge-made law	Category 1A	Category 1B
	Statutory law	Category 2A	Category 2B

16.28 Menon CJ provided an explanation on how courts should analyse public policy in the four categories of situations:

> (a) Categories 1A and 1B: The court may as a general rule rightly consider itself able to rest its decision on public policy subject to the constraints of precedent, established principles,

53 *UKM v Attorney-General* [2018] SGHCF 18 at [89]–[94].
54 *UKM v Attorney-General* [2018] SGHCF 18 at [96]–[97].
55 *UKM v Attorney-General* [2018] SGHCF 18 at [100].
56 *UKM v Attorney-General* [2018] SGHCF 18 at [111].

and the analogical reasoning of the common law.[57] For Category 1A in particular, the court should be restrained in resting its decision on public policy in this category because it lacks the necessary expertise or information to properly assess public policy, although it would be appropriate for the court to rest its decision on public policy to some degree.[58]

(b) Categories 2A and 2B: The court should ordinarily not rest its decision on public policy even with assistance from counsel, *amici*, and expert witnesses because in such cases it is not the role of the court to decide the merits of any implicated policy.[59] Parliament would have already spoken and the court has the responsibility to interpret and faithfully apply the legislative regime which had been deliberated and passed in Parliament.[60]

16.29 Here, Menon CJ held that the case fell under Category 2A as the Adoption Act embodied a set of policy decisions already made by the elected Legislature.[61] The policy considerations were socio-economic in nature as they concerned issues such as the proper conception of the family, the appropriateness of parenthood by persons of homosexual orientation, and the ethics of alternative reproduction techniques, specifically, surrogacy.[62] In such a case:

(a) The court has to first identify whether the alleged public policy exists by considering the criteria of authority, clarity, and relevance. Specifically for authority, the court will examine the appropriate authoritative sources which express long-held values concerning the fundamental purpose for which the law exists and which reasonable persons may be presumed to agree.[63] If the alleged public policy exists, then the court must consider whether the policy would be violated if the claimed right were given effect. If the policy would be violated, then the concern not to violate it enters the second step of the analytical framework as a competing element to be weighed against any value that would be promoted by giving effect to the claimed right.

(b) Secondly, the court will apply a balancing exercise in which the weight to be given to the value underlying the

57 *UKM v Attorney-General* [2018] SGHCF 18 at [112].
58 *UKM v Attorney-General* [2018] SGHCF 18 at [113].
59 *UKM v Attorney-General* [2018] SGHCF 18 at [113].
60 *UKM v Attorney-General* [2018] SGHCF 18 at [115].
61 *UKM v Attorney-General* [2018] SGHCF 18 at [128].
62 *UKM v Attorney-General* [2018] SGHCF 18 at [128].
63 *UKM v Attorney-General* [2018] SGHCF 18 at [162(a)(i)(A)]–[162(a)(i)(D)].

> claimed right and the countervailing public policy consideration is considered.[64] In this regard, the more rationally connected or proximate the public policy is to the legal issue that the court is being asked to decide, the greater the weight it should be given.[65] Further, a public policy or value that emanates from the applicable statutory regime should be given significant weight, and the greater the degree to which the countervailing public policy consideration would be violated if the claimed right were given effect, the less willing the court should be to give effect to that right.[66]

16.30 On the facts of *UKM*, Menon CJ held that the evidence showed the public policy position on surrogacy was unclear, and given the complexities surrounding surrogacy, it was not the role of the court to articulate a public policy against surrogacy and give it weight.[67] Further, there was no clear public policy against planned and deliberate parenthood by individuals through the use of assisted reproductive technology or surrogacy.[68] Menon CJ, however, accepted that there was a public policy in favour of parenthood within marriage in the context of a family unit comprising a married heterosexual couple having and raising children.[69] Nonetheless, the Adoption Act does contemplate adoption orders made in favour of single applicants and no mention was made of such applicants having to have a partner of the opposite gender at the time of the adoption.[70] For this reason, Menon CJ turned to the second stage of the promulgated test after sanctioning the payment made by the applicant to the surrogate mother for having the child,[71] and granted the adoption order for the following reasons:

> (a) The applicant did not set out to violate the public policy against the formation of same-sex family units and only contemplated adoption proceedings after encountering difficulties in obtaining Singapore citizenship for his child.[72]
>
> (b) The respondent had struggled to articulate the precise content of the public policies which would be violated by making an adoption order and this evidenced the difficulty with

64 *UKM v Attorney-General* [2018] SGHCF 18 at [162(b)].
65 *UKM v Attorney-General* [2018] SGHCF 18 at [162(b)(i)].
66 *UKM v Attorney-General* [2018] SGHCF 18 at [162(b)(ii)]–[162(b)(iii)].
67 *UKM v Attorney-General* [2018] SGHCF 18 at [185].
68 *UKM v Attorney-General* [2018] SGHCF 18 at [195].
69 *UKM v Attorney-General* [2018] SGHCF 18 at [191].
70 *UKM v Attorney-General* [2018] SGHCF 18 at [192].
71 *UKM v Attorney-General* [2018] SGHCF 18 at [241].
72 *UKM v Attorney-General* [2018] SGHCF 18 at [246].

finding that the applicant had deliberately set out to violate such public policies.[73]

(c) It was in the interests of the child for the adoption order to be granted because his prospects of acquiring Singapore citizenship could be significantly enhanced by making an adoption order which would in turn lead to an overall increase in the stability of his life in Singapore.[74]

16.31 It may be observed that the High Court's treatment of public policy displays the restraint with which the court will carry out its constitutional role. This flows from the court's recognition that it is not the best placed to deal with multifaceted considerations inherent in public policy – Parliament would be best placed to pass laws embedding such public policies, and the court's role is not to overstep its constitutional mandate but to interpret and faithfully apply what has been passed into law.

16.32 On such an understanding of the court's role, it is crucial for Parliament to consider thoroughly the complex issues surrounding the use of alternative reproduction techniques and their consequences on the family unit. First, advances in modern science will continue to change the way people live and form family units. It is imperative that laws are kept up to date to deal with such advances in science after considering what the policy position should be in relation to such advances in science. In so far as surrogacy is concerned, it is a process that fragments the concept of motherhood by separating gamete contributor, gestational carrier, and life-giver, and regards these roles as links in a supply chain for the on-demand production of human life.[75] It promotes a world of private ordering in which family relations are less a matter of circumstance and more a matter of choice. A public policy position is clearly required on surrogacy,[76] especially since the Status of Children (Assisted Reproduction Technology) Act[77] does not seem to allow the commissioning parents in respect of a surrogacy to displace the gestational mother as the legal parents of the child.[78]

73 *UKM v Attorney-General* [2018] SGHCF 18 at [246].
74 *UKM v Attorney-General* [2018] SGHCF 18 at [247].
75 *UKM v Attorney-General* [2018] SGHCF 18 at [180].
76 See also *UKM v Attorney-General* [2018] SGHCF 18 at [180]:

> Surrogacy prompts us to examine our values and decide which of them, if any, we are prepared to surrender if we decide to embrace technology's promise of ultimate self-determination.

77 Cap 317A, 2015 Rev Ed.
78 *UKM v Attorney-General* [2018] SGHCF 18 at [186].

16.33 Secondly, to the extent that Parliament sees value in maintaining the orthodox definition of a family unit (a man and woman married to each other and having children), the authors suggest that any law reform effort will also have to account for the continuing effect of alternative reproduction technologies in potentially redefining the meaning of family unit. Indeed, it is not far-fetched to imagine a second applicant for an adoption order who may also have fathered a child through gestational surrogacy overseas and then seek to raise the child with his partner in Singapore, who may be infertile. Absent a clearly articulated policy on surrogacy, it seemed likely that the courts would be compelled to take the child as he is and give significant weight to his welfare in determining the proper course for his future.[79]

16.34 Thirdly, even as Singapore continues to maintain its public policy of encouraging parenthood within marriage and discouraging the formation of same-sex family units, the impact of science and other jurisdictions with a more liberal attitude towards alternative reproduction techniques and unconventional family structures may continue to challenge these policies.[80] Regardless of what Parliament desires, individual citizens will be able to procure reproduction services overseas that may not be available in Singapore to fulfil certain wishes of their own to have a child. The consequences of such choices (applying for citizenship for the child and obtaining adoption orders from the court being two potential consequences) will have to be faced by Singapore as a society and Parliament would need to have a policy position on such consequences. The question may be asked thus: To what extent will Parliament go to uphold the policy of parenthood within marriage and/or the policy of going against the formation of same-sex family units?[81] Is it Parliament's intent to penalise a violator (deliberate or otherwise) of these policies even though the decision made may significantly compromise the welfare of a child? The facts of *UKM* come to mind since the withholding of an adoption order could have had significant ramifications on the child's life and future in Singapore.

16.35 Finally, as mentioned, a not insignificant factor in the court's eventual decision in *UKM* to grant the adoption order was the lack of evidence that the applicant was deliberately trying to circumvent the public policy against the formation of same-sex family units and the

79 See also *UKM v Attorney-General* [2018] SGHCF 18 at [186]:

> Indeed, it is difficult to imagine a set of circumstances in which, by the time the case comes to court, the welfare of any child would not be gravely compromised by a refusal to make an adoption order granting parental rights to the parties who intend to care for the child.

80 *UKM v Attorney-General* [2018] SGHCF 18 at [187].

81 *UKM v Attorney-General* [2018] SGHCF 18 at [202].

presence of evidence that showed that the applicant only applied for the adoption order after encountering difficulties with obtaining Singapore citizenship for the child.[82] However, Menon CJ observed that "[w]ith the publication of this decision … it may be more defensible to draw such a conclusion in an appropriate future case".[83] In the aftermath of *UKM*, Desmond Lee, Minister for Social and Family Development, also commented: "After the publication of this judgment … it may be harder for future applicants doing the same to argue that they did not intentionally set out to do so."[84] All things considered, the authors would encourage the relevant ministries to articulate a clear policy position as soon as possible. The courts should not unnecessarily be put in a position to resolve (whether directly or by implication) highly contentious moral debates.

Custody, care and control, and access

16.36 The aforementioned welfare principle ensures that a child's interests are not sidelined while his or her parents litigate over what they subjectively perceive to be their respective rights and entitlements.[85] Custody, care and control, and access are the constructs adopted by the court in making arrangements for how the child's life is structured in the aftermath of the breakdown of his or her parents' marriage.[86]

16.37 In 2018, the Singapore courts were faced with questions regarding the grant of guardianship to parents and non-parents and the grant of shared care and control. The Court of Appeal also had the final word on a long-running saga concerning a family caught up in divorce proceedings spanning the judicial systems of England and Singapore. In the midst of all these, the Singapore courts reaffirmed their commitment to listening to the views of children where appropriate.

Guardianship between parents and non-parents

16.38 *UMF*[87] addressed the important issue of how guardianship issues should be considered between parents *vis-à-vis* non-parents. In this case, the grandaunt of a four-year-old child had cared for him since

82 See para 16.30(a) above.
83 *UKM v Attorney-General* [2018] SGHCF 18 at [246].
84 Rahimah Rashith, "Minister Desmond Lee Addresses Concerns over Ruling in Gay Man's Adoption Case" *The Straits Times* (20 December 2018).
85 *TAU v TAT* [2018] 5 SLR 1089 at [10].
86 Debbie Ong & Lim Hui Min, "Custody and Access: Caring or Controlling?" in *Developments in Singapore Law between 2001 and 2005* (Teo Keang Sood gen ed) (Singapore Academy of Law, 2006) at p 581.
87 See para 16.13 above.

he was seven days old. Eventually, she filed legal proceedings seeking custody and care and control of the child. At the same time, the parents filed a separate application for the child to be returned to them.

16.39 The Family Court considered the grandaunt did not have standing under s 5 of the GIA to make the application. As only parents or guardians appointed under the GIA can make such an application under s 5 of the GIA, the Family Court held that the grandaunt had no standing to apply for custody and control of the boy under s 5 of the GIA.[88] She appealed.

16.40 On appeal, Debbie Ong J upheld the lower court's decision. She commented that while it had the jurisdiction to appoint and control guardians of infants, this jurisdiction must be invoked through an enabling provision or other law.[89] The grandaunt did not have standing to apply for custody and control because s 5 of the GIA was the relevant enabling provision for invoking such jurisdiction and it limited the right to bring such applications to only parents or guardians appointed under the GIA.[90] Ong J stressed that parents were the only adults with parental rights and parental responsibility of their child, and the standing requirements in s 5 of the GIA served the child's welfare by allowing parents to raise their child without unnecessary and unmeritorious interference from third parties (barring exceptional cases).[91]

16.41 Ong J went on to elaborate that even if the grandaunt did have standing to apply for relief, it would have dismissed her application and ordered a return of the child to the parents. The child's welfare did not necessarily involve entrenching the present arrangement simply because the boy was presently closer to the grandaunt than his parents and there was no dispute in this case that his parents were fit parents.[92] Since it was acknowledged that the parents were fit to parent and desired to reunite with the boy, Ong J considered that it would be in the boy's interests to fully reunite with his parents.[93]

16.42 *UMF* reinforces the fact that parents are at the apex of the relationships children form with adults and should be allowed to parent without unnecessary interference with third parties, related or otherwise. This attitude represents a continued acknowledgement of the primary parental caregiving role. Indeed, Ong J commented that

88 *UMF v UMG* [2019] 3 SLR 640 at [13].
89 *UMF v UMG* [2019] 3 SLR 640 at [26].
90 *UMF v UMG* [2019] 3 SLR 640 at [31].
91 *UMF v UMG* [2019] 3 SLR 640 at [33].
92 *UMF v UMG* [2019] 3 SLR 640 at [39].
93 *UMF v UMG* [2019] 3 SLR 640 at [39].

parenthood is for life and parents are not able to unilaterally renounce his or her relationship with the child.[94] The latitude given to parents also coheres with what happened in *UNB*;[95] in that case, the court stressed it would be cautious in intervening with parents' rights to raise their children even if objectively some aspects of their parenting may leave much to be desired.

16.43 The court's position shows a healthy recognition that parenting is not an exact science and may often be imperfect. In such instances, the court should not be seen as offering a panacea for all instances of bad parenting. Notably, Ong J held that even if a child is in need of care or protection under s 4 of the CYPA, the child's parents do not fall out of the picture completely; re-integration of a child to the family is still a desired goal unless the parents are persistently unfit to parent, and the long-term prognosis of their fitness to do so was bleak.[96]

16.44 What should also be borne in mind is that while continuity of care may be an important consideration, it is not necessarily an overriding one. The Court of Appeal has previously held in *Wong Phila Mae v Shaw Harold*[97] that while taking a child from an environment he is used to is not necessarily against his long-term interest, the circumstances of each case would determine whether a switch is in the best interest of a child.[98] Put another way, the factor of status quo is always a secondary consideration and should always be subject to the paramount interest of the child.[99]

16.45 Here, given the court's emphasis on parental responsibility and the acknowledgement that the parents were fit parents, it is unsurprising that the court ordered the child to be reunified with his parents even though he had spent a significant portion of the first four years of his life with his grandaunt, who was granted access to the child to facilitate the transition process.[100] Having said that, Ong J observed that having the GIA statutorily provide for Singapore courts to make specific orders or orders for specific powers has been recommended by the Family Law Review Working Group in its report on guardianship reform.[101] She also suggested that Parliament could consider legislation to provide for

94 *UMF v UMG* [2019] 3 SLR 640 at [42].
95 See para 16.8 above.
96 *UMF v UMG* [2019] 3 SLR 640 at [49].
97 [1991] 1 SLR(R) 680.
98 *Wong Phila Mae v Shaw Harold* [1991] 1 SLR(R) 680 at [26].
99 *Law and Practice of Family Law in Singapore* (Foo Siew Fong gen ed) (Sweet & Maxwell, 2016) at para 10.5.19.
100 *UMF v UMG* [2019] 3 SLR 640 at [73].
101 *Report of the Family Law Review Working Group: Recommendations for Guardianship Reform in Singapore* (23 March 2016) at paras 49–50.

non-parents with some connection to the child to apply for custody, care and control, and access in appropriate circumstances, possibly subject to leave of court to do so.[102]

16.46 For now, even if non-parents have very limited opportunities and rights to care for and have control over the child, the court will adopt a healthy attitude in its assessment of a child's circumstances in so far as custodial proceedings are concerned. Such an attitude was made manifest in *TSF v TSE*[103] ("*TSF*").

Shared care and control and international relocation

16.47 The Court of Appeal had previously observed that barring exceptional circumstances, courts should make orders granting joint custody of children to parents.[104] Joint custodial orders are typically followed by an order for one parent to have sole care and control of the children with the other being granted access (liberal or otherwise).[105] In suitable cases, shared care and control orders may be granted instead. *TAU v TAT*[106] ("*TAU*") discussed some of the principles that might govern the grant of shared care and control orders.

16.48 *TAU* involved a husband and wife who were foreign nationals married in the UK in 2005. They moved to Singapore in 2011. Divorce proceedings were commenced against the husband by the wife in the UK in 2014 and a decree absolute was granted in 2016. An application came before the Singapore High Court for a decision on the care arrangements over the parties' daughter, Emma.

16.49 The High Court first reiterated the paramount consideration of the child's welfare in custodial proceedings.[107] This meant that the court would remain vigilant to ensure that custody, care and control, and access were not used by one parent as "instruments of control" over the

102 *UMF v UMG* [2019] 3 SLR 640 at [70]. This is further discussed at paras 16.63–16.70 below.

103 [2018] 2 SLR 833. This is further discussed at paras 16.63–16.70 below.

104 *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 at [24]. See also Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2nd Ed, 2013) at p 338, where it was opined that shared care and control orders require a "unique set of conditions before a court is persuaded it is in the welfare of a child that she be required to live at different times with each parent under a shared care and control order".

105 *Law and Practice of Family Law in Singapore* (Foo Siew Fong gen ed) (Sweet & Maxwell, 2016) at para 10.4.23.

106 [2018] 5 SLR 1089.

107 *TAU v TAT* [2018] 5 SLR 1089 at [10].

child and the other parent.[108] On this basis, the High Court held that while it was common for a parent to be granted sole care and control of a child with the other parent being granted access to him or her, the court might grant both parents shared care and control if it was feasible and served the child's welfare.[109] This would mean that a child effectively has two homes and two primary caregivers.[110]

16.50 In this respect, the authors note that Singapore has not gone as far as Australia, where judges approach custodial applications from the starting presumption that it is in the child's best interests for his or her parents to have equal shared parental responsibility and for the child to spend equal time with each parent.[111]

16.51 In granting shared care and control orders, Debbie Ong J emphasised that the court would not be able to ignore the realities of the home situation, which may involve parental conflict, the parties' emotional baggage, and the new dynamics of the various relationships in the child's life.[112] It would be imperative for the court to consider factors such as the child's needs at that stage of life, the extent to which the child's parents are able to co-operate, and whether it is easy for the child to live in two homes within a week when granting shared care and control orders.[113]

16.52 It has been commented that shared care and control orders may be encouraged to assist parties in preserving the notion of joint parental responsibility since both parents will now be responsible for different parts of a child's day-to-day living experience.[114] Such orders have been perceived to increase the longevity and quality of the relationship between a child and each of his or her parents and wider kin, create opportunities for both parents to maintain or establish meaningful relationships in all aspects of the child's life, encourage long-term and deeper relationships between parents and children and reduce the likelihood of non-resident parents being disengaged from their children's lives.[115] On the other hand, divorcing parties are often

108 *TAU v TAT* [2018] 5 SLR 1089 at [10].
109 *TAU v TAT* [2018] 5 SLR 1089 at [11].
110 *TAU v TAT* [2018] 5 SLR 1089 at [11].
111 Elizabeth Keogh, Bruce Smyth & Alexander Masardo, "Law Reform for Shared-Time Parenting After Separation: Reflections from Australia" (2018) 30 SAcLJ 518 at 523, para 13.
112 *TAU v TAT* [2018] 5 SLR 1089 at [12].
113 *TAU v TAT* [2018] 5 SLR 1089 at [12].
114 *Law and Practice of Family Law in Singapore* (Foo Siew Fong gen ed) (Sweet & Maxwell, 2016) at para 10.4.26.
115 Elizabeth Keogh, Bruce Smyth & Alexander Masardo, "Law Reform for Shared-Time Parenting After Separation: Reflections from Australia" (2018) 30 SAcLJ 518 at 537, para 45.

acrimonious to, and distrust, each other,[116] so there is wisdom in the court's consideration of parental acrimony and the ease with which the child may live in two homes within a week.

16.53 This approach is not dissimilar to the one in Australia, which enquires whether a shared care and control order would be in the child's best interest and whether such an arrangement would be reasonably practicable.[117] In this connection, it is perhaps worthwhile to examine Australia's experience with shared-time arrangements (their equivalent of shared care and control orders) due to the extensive empirical data available. On analysis, shared-time parenting arrangements were most common among children between five and 11 years of age (26%) and least common among children aged between zero and two (8%), and 15 and 17 (11%).[118] The empirical data suggests that such orders tend to work best when children are neither too young nor teenagers.

16.54 There are some indications that a similar approach may be taken by the Singapore courts. Based on the existing commentaries and case law, the following two factors appear to be of great importance:

(a) First, since shared care and control orders require a high level of co-operation between the parties (who would be shouldering the day-to-day logistics and administrative arrangements for the upbringing of their child),[119] the level of acrimony between parents is a major factor influencing the court's grant of a shared care and control order.

(b) Secondly, the needs of the child are a significant consideration. In *AQL v AQM*,[120] for instance, Woo Bih Li J was faced with an application for shared care and control of a three-year-old child whose parents' relationship had grievously deteriorated. Woo J declined to grant the order sought and held that the child was too young for a shared care and control arrangement.[121] In his view, young children required consistency in their routine and a familiar and secure place to

116 Elizabeth Keogh, Bruce Smyth & Alexander Masardo, "Law Reform for Shared-Time Parenting After Separation: Reflections from Australia" (2018) 30 SAcLJ 518 at 538–542, paras 48–58.

117 Elizabeth Keogh, Bruce Smyth & Alexander Masardo, "Law Reform for Shared-Time Parenting After Separation: Reflections from Australia" (2018) 30 SAcLJ 518 at 523–524, para 14.

118 Elizabeth Keogh, Bruce Smyth & Alexander Masardo, "Law Reform for Shared-Time Parenting After Separation: Reflections from Australia" (2018) 30 SAcLJ 518 at 532, para 33.

119 *Law and Practice of Family Law in Singapore* (Foo Siew Fong gen ed) (Sweet & Maxwell, 2016) at para 10.4.28.

120 [2012] 1 SLR 840.

121 *AQL v AQM* [2012] 1 SLR 840 at [17]–[19].

> grow up in. Uprooting a young child every three to four days to a new home would be overly disruptive and result in the child having a sense of being dislocated.[122] At the same time, a child's needs may change over time; for instance, a parent may be better placed than the other parent to have care and control if the child is very young, whereas if the child is already a teenager, this concern may diminish in importance.[123]

16.55 On the facts of *TAU*,[124] Ong J declined to grant shared care and control to both parents since the parties had joint custody of Emma and already had to consult each other and jointly make major decisions for her.[125] Further, the parties had an acrimonious relationship and very different parenting styles while Emma had a fixed schooling routine and would be commencing primary school later in the year.[126] In these circumstances, Ong J held that a shared care and control order would not be practical.[127]

16.56 In contrast, the High Court granted a shared care and control order in respect of two out of three siblings in *UJP v UJQ*[128] ("*UJP*"). There, the eldest child (who was 17) categorically stated that she did not wish to see her father. As she appeared sufficiently mature to express an independent opinion and to decide what was best for herself, Choo Han Teck J awarded care and control of this child to the mother; this was in contrast to her two younger siblings aged 15 and 10, who had been alternating between the homes of the father and mother during the proceedings and seemed well adjusted to their living arrangements. Thus, based on similar factors to those stated above,[129] the High Court thought it appropriate to grant a shared care and control order in respect of the two younger children.

16.57 The views of children were also of significant weight in *UFZ v UFY*[130] ("*UFZ*"), a case concerning the relocation of children. The husband was originally a British citizen who became a Singapore citizen in 2013. His wife was a British citizen and a Singapore Permanent Resident. Their three children had dual British and Singapore citizenship. The wife wished to relocate to the UK and Debbie Ong J had to consider whether the children should be allowed to relocate with her.

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122 *AQL v AQM* [2012] 1 SLR 840 at [17]–[19].
123 *TAU v TAT* [2018] 5 SLR 1089 at [14].
124 See para 16.47 above.
125 *TAU v TAT* [2018] 5 SLR 1089 at [26].
126 *TAU v TAT* [2018] 5 SLR 1089 at [28].
127 *TAU v TAT* [2018] 5 SLR 1089 at [31].
128 [2018] SGHCF 9.
129 See para 16.51 above.
130 [2018] 4 SLR 1350.

The husband asked for the relocation application to be denied and for a shared care and control order of the three children to be made.

16.58 Ong J underscored the important point that while past precedents may reveal which factors are significant and weighty in the court's assessment of what are in a child's best interests, counsel should not be slavish in their use of precedents.[131] Ong J ultimately granted the wife's wish even though she acknowledged at the same time that the husband had made "substantial efforts" in building up his relationship with the children to the extent that he even rented a separate apartment within the same condominium to ensure he had as much access and interaction with the children as possible.[132] What appeared to be significant in Ong J's decision were the views of the children; they had expressed strong desire to move to the UK, particularly the eldest child. This was even though he and his sister had lived in Singapore for the past nine years.[133]

16.59 To mitigate the effects of relocation on the relationship between the children and the husband, Ong J upheld the liberal access orders for the husband to continue building his relationship with the children.[134] Ong J recognised the husband travelled frequently to Europe for business, and it would be feasible for him to travel to the UK to meet the children while on these trips.[135]

16.60 Ong J's analysis of past precedents reveals what are major considerations in a relocation application, which appear to be non-exhaustive:

(a) whether relocation would ensure children could enjoy a normal family life to the fullest extent possible with frequent personal physical contact with both parents;[136]

(b) whether children would be uprooted from stable living and education arrangements in Singapore;[137]

(c) whether the relocating parent had the support of friends and family in the proposed destination country;[138]

131 *UFZ v UFY* [2018] 4 SLR 1350 at [8].
132 *UFZ v UFY* [2018] 4 SLR 1350 at [21].
133 *UFZ v UFY* [2018] 4 SLR 1350 at [31] and [34].
134 *UFZ v UFY* [2018] 4 SLR 1350 at [38].
135 *UFZ v UFY* [2018] 4 SLR 1350 at [45].
136 *BNS v BNT* [2015] 3 SLR 973.
137 *TAA v TAB* [2015] 2 SLR 879.
138 *TCI v TCJ* [2015] SGFC 58.

(d) whether the children themselves wished to relocate to the proposed destination country;[139] and

(e) whether proposed access plans for the non-custodial parent would address the loss of the children's relationship with that parent.[140]

16.61 It is worth emphasising that relocating children will always result in significant changes to their lives. In such situations, a healthy perspective to adopt is to recognise that family law cannot be the panacea for all familial issues arising out of a divorce – the court can only do what is possible to mitigate the ill-effects of divorce on the lives of all parties involved.

16.62 It is thus imperative for all relevant stakeholders to carefully evaluate the pros and cons of any proposed relocation. Lawyers play a valuable role in assisting clients to "reality-test" their proposed relocation plans and ensure that the welfare of the children is served.[141] This is not only in line with their duty to assist the court but also consistent with the principle that in any proposed relocation, it is the welfare of the children which is of paramount importance.

16.63 The chapter in the 2018 edition of the Ann Rev[142] had summarised the Singapore High Court decision in *TSH v TSE*,[143] which dealt with a family caught in the throes of family and criminal litigation between the Singapore and English courts. This year's chapter will analyse the decision of the Court of Appeal judgment, which disagreed with the High Court. As the facts are fairly complex, they are worth setting out in some detail.[144]

16.64 M, the child of the marriage, was born in London in 2012 with a congenital lung condition and brought to Singapore in July 2013, where he has remained ever since. The husband is Singaporean, while the mother is a national from another Asian country. M's grandparents had been involved in caring for him for a substantial part of his life and M was due to enrol in primary school in early 2019.

16.65 In 2013, the husband commenced divorce proceedings in Singapore. The wife commenced proceedings in the UK which led to

139 HCF/DT 4196/2012.
140 *UFZ v UFY* [2018] 4 SLR 1350 at [16].
141 The importance of family law lawyers being wise counsellors was also stressed in *BOR v BOS* [2018] SGCA 78 at [32].
142 (2018) 18 SAL Ann Rev 477.
143 [2017] SGHCF 21.
144 The criminal aspects of the case will not be touched upon here.

(a) M being made a ward of the English court; (b) the husband's passport being impounded; and (c) the husband being ordered to return M to the UK.[145] The wife applied for mirror orders from the Singapore court. In 2015, the husband applied for sole custody, as well as care and control with supervised access. The Family Court granted the mirror order sought by the wife and stayed the Singapore proceedings on the basis that the UK was the more appropriate forum for M's custody proceedings. The husband's custody application was dismissed.[146]

16.66 The husband appealed. In the High Court, the issue considered was whether it was in M's best interests for the mirror order to be made so that M would be returned to the UK.[147] In this regard, the English High Court had found M to be habitually resident in the UK and had made an order for his return. The Singapore High Court held that even though M had settled in a stable environment, the wife remained the best person to care for M daily because she had a stronger emotional bond with M and was more than capable of meeting M's developmental and material needs. The High Court opined that the wife's role in M's life would be diminished under the influence of the husband and his parents while it appeared that the converse would not be true.[148] Ultimately, the need to ensure that a stable care environment did not override the need for M to be reunited with the wife.[149] The Singapore High Court granted the mirror order and ordered M to be returned to the UK.[150] The husband appealed again.

16.67 The Court of Appeal disallowed M's relocation to the UK. It adopted the recommendations made by the 2016 Family Law Review Working Group in its report titled *Recommendations for Guardianship Reform in Singapore*[151] and considered that the factors proposed provided a sound starting basis for any court concerned with the issue of a child's welfare.[152]

16.68 On the facts, the court noted that a child's need for stability in his relationships and his environment is a deep-rooted one long recognised by the courts; the High Court's order for M to be relocated back to the UK would mean M would be placed under the care of a parent with whom he has had little daily or personal contact for the past

145 *TSF v TSE* [2018] 2 SLR 833 at [11].
146 *TSF v TSE* [2018] 2 SLR 833 at [25]–[26].
147 *TSF v TSE* [2018] 2 SLR 833 at [31].
148 *TSF v TSE* [2018] 2 SLR 833 at [34].
149 *TSF v TSE* [2018] 2 SLR 833 at [34(d)].
150 *TSF v TSE* [2018] 2 SLR 833 at [31].
151 Family Law Review Working Group, *Recommendations for Guardianship Reform in Singapore* (23 March 2016) (Chairman: Valerie Thean).
152 *TSF v TSE* [2018] 2 SLR 833 at [51].

five years and separated from all other aspects of his familiar and settled daily life.[153] The husband and M's grandparents had also been co-operative in giving the wife liberal physical access when she visited Singapore recently and facilitated Skype sessions between her and M; the husband was also willing to undertake to preserve M's relationship with the wife if he was granted care and control of M.[154] Most importantly, evidence showed that M had developed successfully despite his congenital lung condition, and such progress could be severely compromised if there was a drastic change to M's life – this factor militated heavily in favour of maintaining the status quo even though the English court had ordered for M's return to the UK.[155]

16.69 It must be appreciated that this case did not attract the application of the Convention on the Civil Aspects of International Child Abduction[156] ("Convention") because the UK had yet to accept Singapore's accession to the Convention.[157] In the absence of the Convention applying, courts must apply the principle of the individual child's welfare as the paramount consideration.[158] All things considered, it is likely that the outcome in this case was achieved in part because of the husband's tactical manoeuvres in the litigation, which resulted in M's prolonged stay in Singapore such that he had settled into his new environment with which he was now familiar. This case also reveals the tension between principle and pragmatism that family court judges must balance. Indeed, it would not be surprising that the English courts would have determined what was in M's interests afresh had its position been reversed. The Privy Council in *McKee v McKee*[159] has held that the welfare principle would be negated if it does not to enter into the merits

153 *TSF v TSE* [2018] 2 SLR 833 at [86].

154 *TSF v TSE* [2018] 2 SLR 833 at [81] and [84].

155 *TSF v TSE* [2018] 2 SLR 833 at [90].

156 25 October 1980; entry into force 1 December 1983, accession by Singapore 28 December 2010.

157 *TSH v TSE* [2017] SGHCF 21 at [30].

158 Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) at para 8.97. The same author also said (at para 8.98):

> Custody disputes are unique because the paramount consideration is the welfare of the child. This means that the welfare of the child prevails over all other interests. It is not surprising that despite a prior foreign custody order, the court, guided by the welfare principle, will re-open a custody dispute and determine the case on its merits afresh even if a foreign court had already made an order. On the one hand, the welfare of the child is considered paramount so that, theoretically, it should override considerations of international comity and *forum non conveniens* if the child's welfare is better served by a fresh determination of the custody issue. On the other hand, proceeding this way could encourage or at least fail to discourage parental child abduction and could undermine the comity of nations and respect for the laws, religion and culture of other countries.

159 [1951] AC 352.

of the custody question afresh. The House of Lords has also remarked in *Re J (a child) (custody rights: jurisdiction)*[160] that the court is bound in every case to treat the welfare of the child as being the paramount consideration regardless of what orders are made by the courts of any other country. A similar position is taken in Australia.[161]

16.70 Returning to *TSF*, in assessing M's welfare, the Court of Appeal showed that it was willing to adopt a fairly practical assessment of M's lived experience and circumstances by giving significant consideration to the relationship M had with his grandparents, observing that "there is no doubt as to [M]'s closeness to [his grandparents] and the warmth of his relationship with them".[162] One contrasts this to *UMF*,[163] which held that the rights of non-parents to a child are limited as compared to the parents, and *TQ v TR*[164] ("*TQ*"). There, the court had held that the role of grandparents cannot override the consideration of ensuring that parents continue to play their role in the upbringing of the children.[165]

16.71 How does one reconcile the seemingly different treatment of the role of grandparents in *TSF*, *UMF*, and *TQ*? Perhaps there is a judicial recognition that in the modern age where dual-income families are increasingly prevalent and families increasingly transnational, parental responsibility in the welfare inquiry should be viewed in the context of other significant caregivers in a child's life who may be contributing to the child's welfare. Notably, one of the major considerations in the Court of Appeal's decision in *TSF* was M's development in the care of his grandparents and the husband – the Court of Appeal observed that M's grandparents had been "in *loco parentis*" to him for much of his life and M had developed successfully in their care despite his congenital lung condition.[166]

16.72 Grandparents are undoubtedly a category of people who often step up to undertake heavy caregiving responsibilities for the child in the absence of the parents. When this happens, significant and strong bonds are formed between grandparents and their grandchildren, and such relationships may well be given significant weight by the court. Indeed, the literature also speaks positively of the benefits of stability for a child's development at a young age.[167] M was only about six years old,

160 [2006] 1 AC 80.
161 *ZP v ZS* [1994] HCA 29.
162 *TSF v TSE* [2018] 2 SLR 833 at [62].
163 See para 16.13 above.
164 [2009] 2 SLR(R) 961.
165 *TQ v TR* [2009] 2 SLR(R) 961 at [18].
166 *TSF v TSE* [2018] 2 SLR 833 at [67].
167 See, for instance, Paula Fomby & Andrew Cherlin, "Family Instability and Child Well-Being" (2007) 72 *American Sociological Review* 181.

and the case for stability and the meeting of his emotional needs (see also the discussion on *TAU*[168] above) would be extremely strong especially given his congenital lung condition.[169]

Division of matrimonial assets

Whether dual- or single-income marriage

16.73 Previously, *ANJ v ANK*[170] ("*ANJ*") had set out the approach for matrimonial asset division for dual-income marriages while *TNL v TNK*[171] had set out the approach to be used for single-income marriages. Before embarking on the process of dividing matrimonial assets, it is necessary for the court to first characterise the marriage as either dual-income or single-income. In the context of a marriage from 1987 to 2016, wherein the wife had stopped working in 2006 to assume the role of a homemaker for the last ten years of the marriage, the High Court held that the marriage could not be characterised as a single-income marriage, which meant that the *ANJ* structured approach was preferred over other approaches.[172]

Weight given to post-nuptial deed

16.74 It is not uncommon for couples to sign post-nuptial deeds to provide some indication as to how the matrimonial assets should be divided upon divorce. It is established law that the court is not bound to enforce any such agreement but will determine the weight to ascribe to the agreement after considering all the circumstances of the case.[173] This power is set out in s 112(2)(*e*) of the Women's Charter which entitles the court to have regard to any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce. A relevant factor in this enquiry is whether any pressure was exerted by one spouse on the other in the signing of such agreements.[174]

16.75 In *UKA v UKB*[175] ("*UKA*"), prior to the divorce proceedings, the husband was coerced into signing a post-nuptial document by his

168 See para 16.47 above.
169 See also *TSF v TSE* [2018] 2 SLR 833 at [67].
170 [2015] 4 SLR 1043.
171 [2017] 1 SLR 609 at [43].
172 *UNE v UNF* [2018] SGHCF 12 at [62].
173 *TQ v TR* [2009] 2 SLR(R) 961.
174 *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284 at [53].
175 [2018] 4 SLR 779.

wife, who controlled the finances of a company that they jointly owned. The terms of this document effectively stated that the husband acknowledged that assets amounting to a significant amount of money belonged to the wife and that he would not contest this in the event of divorce or separation. The document also stated that the husband had signed the document in a clear and good state of mind. The husband contended that in coercing him to sign the post-nuptial document, the wife had threatened to disrupt the company's operations and force its closure among other things. The wife did not deny these contentions. Besides the post-nuptial document, there was evidence that the husband had signed nine other documents, the terms of which were quite clearly in the wife's favour. In the circumstances, the High Court held the wife had exploited her dominant position to secure an unreasonable advantage and so accorded minimal weight to the post-nuptial document.[176]

16.76 The decision in *UKA* is similar to the Court of Appeal's decision in *BOM v BOK*[177] ("*BOM*") which involved an application to set aside a declaration of trust signed by a husband that effectively left him a pauper and his infant son a millionaire. The declaration of trust was eventually set aside by the court on the grounds of undue influence, fraudulent misrepresentation, mistake, and unconscionability.

16.77 What is interesting to observe are the avenues for redress available to aggrieved persons where they have been victims of the other party's exploitative actions. In *UKA*, the aggrieved party submitted that the post-nuptial document should be accorded minimal weight in the division of matrimonial assets, while in *BOM*, the aggrieved party chose instead to file a separate application for the setting aside of the declaration of trust which vested the beneficial interest in the assets under the declaration of trust in the infant son. While different in procedure, they have the effect of ensuring that the assets rightfully belonging to the pool of matrimonial assets are apportioned pursuant to the matrimonial jurisdiction of the court to achieve fair and equitable results. They also prevent an exploitative party from taking advantage of unbecoming conduct that would have deprived the exploited party of a significant portion of the matrimonial assets.

Damages as matrimonial assets

16.78 *UMU v UMT*[178] addressed the issue of whether damages awarded to a husband for a road traffic accident could constitute part of

176 *Cf UMM v UML* [2018] SGHCF 13.
177 [2019] 1 SLR 349.
178 [2019] 3 SLR 504.

the matrimonial assets. It was argued by the husband that the damages awarded to him should be excluded from the pool of matrimonial assets because it was paid to him to compensate him for his loss and thus personal to him – it was not acquired through the efforts of either party.[179] Debbie Ong J held that compensation for pain and suffering was not an asset acquired by the efforts of a spouse during marriage.[180] As for the wife's effort in caring for the husband after his accident, this factor was relevant towards the division of matrimonial assets, but not the identification of what is a matrimonial asset.[181] On this basis, only the proportion of the compensation corresponding to special damages and the husband's past loss of earnings until the date of interim judgment were included in the matrimonial assets while special damages to reimburse the victim for expenses incurred (where paid out from the matrimonial pool earlier) should be placed back into the pool.[182]

Interim mortgage payments

16.79 In *TIC v TID*,[183] the Court of Appeal held that the party responsible for paying interim mortgage payments on a property would be *prima facie* the eventual owner of the property.[184] Interim mortgage payments refer to mortgage payments made during the interim period between the date of the order and the date of completion of the transfer.[185] The Court of Appeal held that since the eventual owner of the property would be the sole beneficiary of any payments made towards the outstanding mortgage between the date of the court order and the date of completion, it was only fair that the eventual owner will bear the payments during the interim period unless circumstances required otherwise.[186]

16.80 The Court of Appeal further emphasised the need for a distinction to be made between mortgage payments and other payments such as property tax payments which did not stand on the same footing because they did not affect the net equity of the property.[187] For property taxes, these payments should be borne by the eventual owner of the property as the tax is levied on property ownership subject to a power to

179 *UMU v UMT* [2019] 3 SLR 504 at [6].
180 *UMU v UMT* [2019] 3 SLR 504 at [9].
181 *UMU v UMT* [2019] 3 SLR 504 at [13].
182 *UMU v UMT* [2019] 3 SLR 504 at [16].
183 [2019] 1 SLR 180.
184 *TIC v TID* [2019] 1 SLR 180 at [1].
185 *TIC v TID* [2019] 1 SLR 180 at [1].
186 *TIC v TID* [2019] 1 SLR 180 at [9] and [20].
187 *TIC v TID* [2019] 1 SLR 180 at [21].

make a contrary order if the circumstances required so.[188] Where the party given the option to purchase the property did not do so immediately, it was open to the court to make an order on the basis that the option would be taken up, but with liberty to the other party to apply for a reapportionment of the liabilities should the option not be taken up and the property sold on the open market.[189] The Court of Appeal also remarked it would be useful, as a practical matter, for the court to identify the different types of payments involved and to state whether the *prima facie* position was being applied or whether there were special circumstances which justified a contrary order.[190] This would assist the appellate court in determining whether the relevant considerations were taken into account when the orders were made.[191]

Maintenance

16.81 In *UEB v UEC*[192] ("*UEB*"), the High Court reiterated the longstanding principle that the purpose of maintenance is to "ensure that needs proved in the present are met".[193] Specifically, expenses would not be reasonable if they were made to accumulate wealth or acquire usable assets, although the court would not draw an overly artificial distinction between rental moneys and mortgage payments on a property in assessing the quantum of maintenance payable; for maintenance purposes, it would not be appropriate to make distinctions merely by the way the property being resided in was being held.[194] The exception to this would be where mortgage payments are being made – in that scenario, the court retains the discretion to award maintenance with the wife's ownership of the property and financial resources in the form of that asset taken into account.[195]

16.82 On *UEB*'s facts, Debbie Ong J held that it was reasonable for the monthly instalment made by the wife to be considered in ordering the husband to pay maintenance.[196] Ultimately, however, the court refused to grant spousal maintenance as the wife's income was greater than the monthly expenses found to be reasonably incurred.[197] In a related vein, the Court of Appeal in *BOR v BOS*,[198] in underscoring that the court's

188 *TIC v TID* [2019] 1 SLR 180 at [21].
189 *TIC v TID* [2019] 1 SLR 180 at [26].
190 *TIC v TID* [2019] 1 SLR 180 at [25].
191 *TIC v TID* [2019] 1 SLR 180 at [25].
192 [2018] SGHCF 5.
193 *UEB v UEC* [2018] SGHCF 5 at [6].
194 *UEB v UEC* [2018] SGHCF 5 at [6].
195 *UEB v UEC* [2018] SGHCF 5 at [7].
196 *UEB v UEC* [2018] SGHCF 5 at [10].
197 *UEB v UEC* [2018] SGHCF 5 at [16].
198 [2018] SGCA 78.

power to grant maintenance was supplementary to its power to divide matrimonial assets, held that there was no need to award spousal maintenance where the wife had been awarded matrimonial assets over $9m and there was an expectation that a proper management of those assets would yield an income sufficient for maintenance.[199]

16.83 The theme of reasonableness also came up with regard to child maintenance. *BON v BOQ*[200] concerned a mother's obligation to pay for her children's university education. The mother contended that she should not pay any maintenance to her sons as she regarded their university education as their "second tertiary education". The Court of Appeal held that not only do parents have a duty to maintain their children even if they are above 21 years of age, but the children's wishes were also reasonable in this case as their pursuit of more than one degree would improve their employment prospects.[201]

16.84 This must be correct, since certain professions in fields such as architecture and psychology may require more than a basic university education to be employable, though the burden of proof will have to remain on the party seeking maintenance. As it were, in a world increasingly characterised by fast-moving economic cycles, economic gyrations, and technological disruption, one wonders if the first university degree should be assumed as the basic limit of parental responsibility towards a child's education. More and more employees would be expected to seek advanced tertiary education and continuous training to remain relevant and employable,[202] and the question is when exactly children should begin assuming financial responsibility over their career trajectories.

199 *BOR v BOS* [2018] SGCA 78 at [118]–[119]. See also *ADB v ADC* [2014] SGHC 76 at [10].

200 [2018] 2 SLR 1370.

201 *BON v BOQ* [2018] 2 SLR 1370 at [15]–[17]. See also *UNE v UNF* [2018] SGHCF 12 at [109]–[110].

202 In the context of law, it would not be inconceivable to take the cue from some other jurisdictions and require a prior degree before a law degree can be obtained.