

TAA v TAB
[2015] SGHCF 1

Case Number : Divorce No 3130 of 2009 (Registrar's Appeal from State Courts No 204 of 2014)
Decision Date : 10 February 2015
Tribunal/Court : High Court
Coram : Debbie Ong JC
Counsel Name(s) : Geralyn Danker (Veritas Law Corporation) for the Appellant; Amerjeet Singh s/o Jaswant Singh (Crossborders LLC) for the Respondent.
Parties : TAA — TAB

Family Law – Custody – Care and control – Relocation

10 February 2015

Debbie Ong JC:

Background facts:

1 The Appellant (referred to here also as the Father), a Singapore citizen, and the Respondent (referred to here also as the Mother), an American citizen, were married in 1997. They had three children from this marriage.

2 The Respondent Mother had left Singapore in June 2009 with the youngest child, without the consent of the husband at that time, and had not participated in the divorce proceedings which had concluded in an interim judgment of divorce granted in November 2009. The Father was awarded sole custody, care and control of the children while the Mother was given access to them. The Mother returned with the youngest child in November 2010. The three children have remained in the care and control of the Father since then, while the Mother has had weekly access to the children.

3 The Mother made an application in June 2014 seeking increased access to the children. In July 2014, the Father sought an order to bring the children to Spain to live with him. The Father had, in February 2013, married his current wife Marta, who is from Spain, and who had been in Singapore on a sabbatical programme. They have a child born in October 2013. The District Court heard both applications in August 2014, declined to vary the custody order and dismissed the Father's application to relocate with the three children to Spain. The Father appealed to this Court against the District Judge's order refusing to allow the relocation. However, the Father left Singapore for Spain in September 2014 taking with him the two younger children before this appeal was heard.

Decision of the District Court

4 The District Judge thought that the Father's reasons for relocation were not reasonable. She said ([2014] SGDC 411 at [26]–[28]):

26 ... All in the month of June, it appears that a decision was made to relocate the family to Spain, a house was found, the Husband signed a three (3) year lease and arrangements for the children to move to a new school were made. The timing and speed of all this leads me to question the Defendant's motives in making the decision to move and whether he had actually

considered the interests of the 2 younger children in arriving at his decision. ...

27 ...[T]his was not a situation where the Husband was moving back to his home country or where he had no job in Singapore and had to relocate because that was the only place he could find employment. In this case, there was no real need for him to move to Spain and I noted that he was moving as a matter of choice. ... The Husband who has custody, care and control of the children is obliged to consider the interests and circumstances of the children, including whether it would be in their interest to have a continuing relationship with their mother.

28 ...I noted that Marta had applied and obtained Permanent Residence status in Singapore, suggesting her intention of making Singapore her home in the longer term. I also found it odd that the Husband had not tendered a copy of his employment contract in support of his contention that he had been offered a fund manager job in Spain, but instead had tendered a copy of his business card which reflected a gmail account rather than an office email address and which also did not specify the designation or position of the Husband in his proposed new role. His inconsistent and insufficient evidence suggests that his relocation application was driven by his desire to minimise contact between the Wife and the 2 younger children and I was of the view that the Husband's reasons for relocation were not reasonable in the circumstances and were made in bad faith.

5 The District judge also found that the Mother had made attempts to rebuild her relationship with the children and the children had a stable life in Singapore, having spent the majority of their formative years in Singapore.

My decision

6 After a careful consideration of the relevant facts and circumstances of this case and applying the law to the facts, I dismissed the Father's Appeal. I set out my reasons below.

The law on parental relocation of children

7 The law governing parental child relocation has been the subject of many learned articles in scholarly journals. The legal principle guiding the courts in relocation applications in Singapore is similar to that in many countries: the welfare of the child is the paramount consideration. This principle itself is simple enough in concept but very challenging in its application to each unique case. The main difficulty rests in the tension between upholding the primary carer or custodial parent's freedom to relocate and the child's interest in maintaining a relationship with both parents within the same country.

Landmark Court of Appeal decision in Singapore

8 In Singapore, the Court of Appeal in *Re C (an infant)* [2003] 1 SLR(R) 502 ("*Re C*"), has given these guiding principles in determining relocation issues:

22 ... It 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 is shown that the interest of the

child is incompatible with the desire of such person or parent living abroad. As quoted by Ormrod LJ in *Chamberlain v de la Mare* (1983) 4 FLR 434 from his decision in *Moodey v Field* (unreported judgment dated 13 February 1981):

The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible. One might postulate a situation where a boy or girl is well settled in a boarding school, or something of that kind, and it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system. I merely take that as an example. Short of something like that, the court in principle should not interfere with the reasonable decision of the custodial parent.

Decisions applying Re C

9 It appears that the recent reported decisions in Singapore on parental child relocation, except for a most recent High Court decision, have allowed the child or children to be relocated. In the majority of the 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. It was only in the most recent High Court decision of *BNT v BNS* [2014] 4 SLR 859 ("*BNT v BNS*") that a relocation was not permitted. *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.

10 In *BNT v BNS*, Judith Prakash J explained the principle in *Re C* (at [16]– [17]):

16 In my view, the only applicable principle of law in relocation cases is that the welfare of the child is the paramount and overriding consideration: *AZB v AYZ* at [20]. *Re C* should not be understood as suggesting anything contrary. In fact, it expressly accepts this principle. The suggestion that the reasonable wishes of the primary caregiver are "determinative" must be understood within this context.

17 The reasonable wishes of the primary caregiver are important because a child's welfare is closely linked to the happiness and well-being of the primary caregiver. ... It is for this reason that courts are reluctant to refuse a relocation application, so long as it has been reasonably made and is not against the interests of the child. Reluctance does not mean that the wishes of the primary caregiver will always be decisive. There are cases where it would be necessary to deny an application to relocate in order to advance the welfare of the child: *AZB v AYZ* at [17].

11 The Judge further held (at [20]–[21]):

20 ... First, there is no *legal presumption* in favour of allowing relocation when the primary caregiver's desire to relocate is not unreasonable or founded in bad faith. By this, I mean that this is not a situation where the burden of proof shifts to the party challenging the application upon the applicant proving the reasonableness of his or her desire to relocate, nor is it a situation where the presumption is decisive of the outcome unless displaced.

21 Second, 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. The Court of Appeal in *CX v CY* [2005] 3

SLR(R) 690 observed at [26] that “that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents”. ...

12 On the facts of *BNT v BNS*, the learned Judge found that “the good and close relationship that currently exists between the children and their father will be undermined and become distant if the relocation application were to be granted” (at [35]). The court thought that the hostility that the mother had displayed towards the father suggested that she would not actively facilitate contact with the father once she was out of Singapore. Further, the mother’s plans for relocation were not well thought through, suggesting that her true motivation for the application was to avoid the unpleasantness of having to deal with the father in Singapore. The Judge also observed that the children’s young ages and the difference in time zones between Canada and Singapore would make it difficult for the father to sustain the closeness of their relationship (at [35]):

35 ... With younger children, closeness is promoted by physical contact and frequent interaction in routine activities. Telephone and internet access are frequently unsatisfactory due to technical difficulties and generally permit only one type of interaction: conversation. Normal family life consists of much more than conversations between parent and child – there are joint activities, routines, projects, discipline and learning from the examples set by the parents in all sorts of situations.

Therefore relocation would have seriously undermined the children’s relationship with the father.

Examples of important factors used in previous cases

13 In many cases where relocation has been permitted, the relocating parent’s need to relocate seemed rather dire. A number involved a divorced parent who wished to return to his or her pre-marriage home country. In *Tran Jeannie v Chioy Kok Leong* [2002] SGDC 22, the mother had brought the children up from birth. She had no extended family in Singapore and her parents were in the US. The Court found that she was financially insecure in Singapore whereas in the US, her parents could provide her and the children a roof, childcare assistance and financial support. The court granted her application to relocate.

14 In *AZB v AYZ* [2012] 3 SLR 627 (“*AZB v AYZ*”), the High Court noted that the primary carer-mother’s decision to relocate back to Illinois in the US would enable her to get the support she needed, to “be comforted by the nurturing company of her close, supportive and loving family” and that she would find it easier to find a job and retain her independence in the US than in Singapore after divorce.

15 *ATC v ATD* [2011] SGDC 254 involved parties who were American citizens, born and raised in America, who married in America with relatives residing in America. The parties moved to Singapore in 2008 and were divorced in 2009. The wife was designated as the children’s “primary residential parent” under their Joint Parenting Agreement. She was granted leave to relocate to the US with the children.

16 Other cases involved remarriage to a new spouse who was already settled in that other country with a stable job and had no connection to Singapore. In *AYD v AYE* [2012] SGHC 42, the mother had quit her job in Singapore and wished to migrate permanently to the US with her American fiancé. In *BX v BY* [2003] SGDC 29, the mother sought leave to relocate as her new husband was located in Shanghai. The court held that it was reasonable to take the child with her but ordered that she had to bear the expenses of bringing the child back for access with the other parent.

Balancing the factors

17 It is imperative that the court is not constrained by any guiding principles that have the practical effect of moving it towards a certain presumption, since the paramount consideration is the welfare of the child and not the wishes of either parent. The court is obliged to consider all the relevant facts and circumstances in each individual case in determining what is in the welfare of that particular child. Of course, the wishes of parents may have a bearing on the welfare of the child, but it is for the court to determine if their wishes are compatible with the interests of the child. The law expects parents to put the interests of the children before their own. A decision to relocate itself may not be made in bad faith nor be unreasonable because one can understand that a parent may have a need to relocate for genuine personal reasons. But that decision is not necessarily the same as a decision that is in the best interests of the child. The High Court in *BNT v BNS* (at [17]) and *AZB v AYZ* (at [14]) have noted that the reasonable wishes of the primary caregiver are important because a child's welfare is closely linked to the happiness and well-being of the primary caregiver. But there is a caution that they must be "reasonably made and [are] not against the interests of the child" (see *BNT v BNS* at [17] and *AZB v AYZ* at [14]).

18 While one should not underestimate the risk of the negative effects on the child arising from frustrating the plans of the parent who is the child's primary carer, this must be balanced against the law's expectations that parents must place the needs of their children before their own. A parent with care of the children is no longer as free to live life as he or she may have been had he or she been single or divorced without children. Parents in functional families make sacrifices in their lifestyles all the time for their children. One may have to decline an attractive overseas job posting because of the needs of the children. Raising children requires heavy commitment. The law expects no less from parents in post-divorce circumstances. This is not to say that the law does not recognise the difficulties and pain parents may have to bear, but children do grow up and such sacrifice is not demanded endlessly of a parent. Sacrifices may have to be made temporarily in the years when the children require them. The law chooses to place the welfare of the child above all else.

Underlying concerns and aims

19 A relocation of children to another jurisdiction is a serious matter. It would mean a fundamental change in whom the children would see as their close family and the children would lose the experience of hands-on parenting from both their mother and their father (see *K v K* [2011] EWCA Civ 793). The court must give sufficient weight to the loss of the children's relationship with the left-behind parent and also give appropriate weight to the genuine difficulties of the parent wishing to relocate.

20 A refusal to allow relocation at the time of application does not necessarily mean that a future relocation can never be possible. In *K v K* [2011] EWCA Civ 793, Moore-Bick LJ noted the advice of an officer of the Children and Families Court Advisory Support Service (at [89]):

... [The officer] accepted that if in three to four years' time the mother still wished to return to Canada that was likely to be in the best interests of the children, but she proposed that they should remain in this country for the time being under the shared care arrangements and therefore recommended that the application be refused.

The law will not permit hastily made unilateral plans that fail to consider the welfare of the children. But well made plans that promote both the common interests of the parent and the children can be supported. Well made plans may require robust and extensive discussions between both parents exploring various options and setting in place clear access plans while the families are in two different countries. Some left behind parents may even be willing to move to or nearer to the new country.

The law expects at least such efforts to have been made as cooperative parents of the children whose welfare is being threatened.

Analysis of the relevant facts in the present case

Father's reasons for relocation

21 In the present case, the Father's main reasons for relocating to Spain appear to be prompted by his current wife's circumstances and plans. The Father's counsel has emphasised that the current wife cannot practice as a doctor in Singapore. The Father thought that they would try living in Spain. It is not that his wife cannot remain in Singapore, for she is a Permanent Resident of Singapore. There were also suggestions made by counsel that the relocation was not intended to be permanent. It was conveyed to the Court that the Father remains a Singapore citizen, he has family and relatives in Singapore and he is still very much connected to Singapore. In fact, the eldest child is studying in a Polytechnic in Singapore and intends to continue to live in Singapore and make holiday visits to be with her Father and siblings. So it would seem that his decision to move to Spain was prompted by his current wife's circumstances. This is not a case where the relocating parent is returning to his or her country of origin where his or her home used to be before the marriage. The Father had a job in Singapore, his family and relatives are in Singapore and the children were settled in schools in Singapore. His plans to give living in Spain a try entails him having to find a new job in Spain and uprooting the two younger children from Singapore to an environment they are unfamiliar with, where English is not the main language of communication.

Children's loss of relationships

22 *BNT v BNS* has highlighted the importance of taking the loss of relationship with the left-behind parent into account when deciding whether to grant an application to relocate. The Father's counsel submitted that the facts of *BNT v BNS* are different from the present, because the father in *BNT v BNS* was very close to the children and had fully exercised the liberal access given to him. Relocation would have undermined the relationship and be detrimental to the children. It was submitted that, in contrast, the children were not close to the Mother in the present case, and in fact, did not want to spend time with the Mother. While I agree that the facts are different, I note two main circumstances which militate against relocation. First, both counsels agreed that before the breakdown of the marriage, the Mother was an involved parent who had a close relationship with the children. The Mother's position was that she had left Singapore with the youngest child because she was in fear of the Father. She then thought that she could live with the children when she returned with the youngest child to Singapore but alleged that she was prevented from having access to the children, save for weekly 2-hour sessions at the swimming pool area of the condominium where the children lived. The Father alleged that access was always offered and that the children did not want to spend time with the Mother.

23 The Mother is now fighting to spend time with the children and rebuilding her relationship with them. She had been an involved parent until the marriage broke down. Whatever may have been the true state of the circumstances during the years 2009 to 2014, the difficulties during that time had caused issues between the Mother and the children such that they are no longer as close as they were prior to the marriage breakdown. In fact, there is tension in their relationship. Does this then mean that the mother-and-children relationship should never be supported any further? 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? The reality here is that when the Father and children relocate to Spain, the Mother's access to the children will be more difficult than ever before. The Father's position appeared to be that he could not do anything

more to facilitate access if the children themselves did not want to see or talk to their Mother. There was no evidence of any discussion between the parents on the proposed move to Spain, nor on any arrangements on how access could continue when the children left for Spain in September. It is doubtful anything will improve in terms of greater encouragement and support for access by the Father when they live in Spain for the longer term. There is no evidence of efforts by the Father to be supportive of access; instead, there appears to be support for the children to write letters that they do not wish to spend time with the Mother. Thus, relocation to Spain is likely to sound a death knell to the relationship between the Mother and the children. If the children remain in Singapore, their relationship with their Mother could get better, or it might not. Life is not predictable. But relationships are dynamic and it would be a disservice not to give the children the opportunity of building a positive relationship with their mother. The father is also obliged by the law to be a cooperative parent, to actively support the building of the relationship, for this is in the welfare of the children.

24 There is also another fact here on the loss of the children's relationship with a significant family member: the eldest child is living in Singapore and continuing her studies in a Polytechnic in Singapore. Relocation breaks the siblings up.

Uprooting the children

25 Apart from the factor of the loss of relationship between the children and their Mother and eldest sister, there is another crucial factor. The children have been settled in Singapore and in schools in Singapore. Is uprooting them to a country they are unfamiliar with, placing them in a different education system where English is not the main language medium used, in their welfare? The Court of Appeal in *Re C* cited Ormrod LJ that "[o]ne might postulate a situation where a boy or girl is well settled in a boarding school, or something of that kind, and it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system." This factor is independent from the one on the loss of relationship with the other parent. It is a relevant one here in the present case. The relocation in this case may even be temporary, since it seemed clear that the Father still considers Singapore his home. He may be exploring what living in Spain is like but during this period, he would have uprooted the children from Singapore and their education here and reduced their contact with the Mother. This move did not appear to be planned with the children's welfare in mind. The Father had other personal reasons to move to Spain and had to bring the children along because of these plans. Thus, for a possibly non-permanent relocation, the children are uprooted to an entirely different educational system, and a substantial negative effect on the relationship with their Mother and oldest sister ensues. The years of bonding lost between the children and their Mother cannot be easily made up for, particularly under such challenging circumstances.

How the balance should be struck in the present case

26 In the present case, it may be understandable why the father had personal reasons to move to Spain, but the move is incompatible with the children's interests. This court has given weight to the difficulties of the Father who is desirous of building a new family with his new wife and their child, while caring for the children from his previous marriage. The urgency of the situation and the options available to him have been taken into account. I find that, on balance, the need to relocate is not as strong as the need for the family to remain in Singapore at this time.

27 First, the children are being uprooted from a very stable living environment with routine day to day activities with the Father and weekly access with the Mother and are settled in schools in Singapore. A relocation will uproot them to an environment and educational system that is unfamiliar

to them and where English is not the language medium used. Further, they may be uprooted for a future that is not for the long-term and may have to readjust to Singapore should the Father decide to return to Singapore, where his roots remain.

28 *BNT v BNS* has highlighted that closeness of relationship is promoted by physical contact and frequent interaction in routine activities whereas telephone and internet access generally permit only one type of interaction, which is conversation. Children would lose out on other aspects of family life such as enjoying activities together with the left behind parent and their sister as well as the closeness which comes only with face-to-face interactions, hugs and loving touches. In the present case, the two younger children are 14 and 11 years of age; they still need the guidance of both parents in their lives and should be afforded the opportunity to have a healthy relationship with both parents.

29 The counsel for the Father also highlighted that the youngest child is not a Singapore citizen and so this fact would weigh in favour of relocation. I cannot see why this would necessarily be so, since the Father can apply for the status necessary for him to live in Singapore. The Father is a citizen, as are the other two children.

30 It is noted that the Father disregarded the District Court's order below and left for Spain before this Appeal could be heard. Counsel for the Father explained that there were interviews that the children had to attend in Spain and so they could not wait and had to leave for Spain. I do not see how this justifies keeping the children in Spain after the interviews are over. The children could have gone for the interviews, returned to Singapore and remained in their current Singapore schools until all these matters are resolved.

31 The undisputed facts of their absence from Singapore give rise to a situation of breach of s 126(3) of the Women's Charter (Cap 353, 2009 Rev Ed) which provides:

... where an order for custody is in force, no person shall take the child who is the subject of the custody order out of Singapore except with the written consent of both parents or the leave of the court.

32 The Father did not have the leave of the court nor the Mother's consent when he left with the children in September 2014. He has left the jurisdiction with the children despite having been refused the order allowing him to take the children to Spain. The Father and the two younger children had not returned to Singapore at the time of the hearing of this appeal.

33 My decision is based on the welfare of the children and is in no way meant to penalise the Father for the conduct mentioned. What has happened is not compatible with the welfare of the children. The Father decided to take the children out of Singapore during their school term although there was always the possibility that his appeal would be dismissed.

Conclusion

34 The appeal is dismissed. The Appellant shall pay costs covering the Respondent's disbursements fixed at \$500.