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## THE FUNDAMENTAL QUESTION WHEN APPLYING THE WELFARE PRINCIPLE: “WHO WILL BE THE BETTER PARENT OR GUARDIAN”?

CHEN SIYUAN\*

The welfare principle – that is, when making a custody-related decision, the best interests of the child form the first and paramount consideration – is probably one of the cardinal principles of family law in many common law jurisdictions. While the welfare principle is generally considered a wide concept with no exhaustive definition or list of factors, it is submitted that there is an important question – sometimes neglected or misunderstood – that should actually feature most prominently when applying the welfare principle, particularly when joint or no order custody orders seem impossible. The question is simply that of “who will be the better parent or guardian?” The reason for this is that the most important aspects of the welfare of the child (*e.g.*, education, material comfort, moral guidance, stable and secure environment, and spiritual well-being) are provided by none other than the parent or guardian who is eventually awarded custody. The question of “who will be the better parent or guardian” is invariably connected to “what is in the best interests of the child”, for the former simply serves to logically guide and shape the inquiry of the latter, and counters arbitrary weightage accorded to arbitrary factors. Moreover, it is submitted that this line of inquiry also rightly factors the rights and interests of the parent or guardian into the equation. While a few cases will be examined to illustrate the thesis, this piece is also intended to be a comprehensive restatement of the welfare principle in Singapore.

### I. A WELL-ENTRENCHED PRINCIPLE VERSUS THE CRUX OF THIS PIECE

If there was ever a cardinal principle in Singapore family law,<sup>1</sup> it would probably be the welfare principle, as expressed principally in s. 3 of the Guardianship of Infants Act: “[w]here in any proceedings before any court the custody or upbringing of an infant... is in question, the court... shall regard the welfare of the infant as the first and paramount consideration”.<sup>2</sup> Section 125(2) of the Women’s Charter alludes to the same principle, albeit in slightly different terms,<sup>3</sup> *viz.*, that “in deciding whose custody a child should be placed, the paramount consideration shall be the welfare of the child”.<sup>4</sup>

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<sup>1</sup> That is, non-Muslim family law.

<sup>2</sup> Guardianship of Infants Act (Cap. 122, 1985 Rev. Ed.) [Guardianship of Infants Act]. See also s. 11 of the same statute: “The court or a judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant, and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.” It should be added that it appears that neither the statute nor the Interpretation Act (Cap. 1, 2002 Rev. Ed.) has a definition of “infant”, although s. 122 of the Women’s Charter (Cap. 353, 2009 Rev. Ed.) [Women’s Charter] defines a “child” as “a child of the marriage as defined in section 92 but who is below the age of 21 years.” It has been said that “a child under the law in Singapore is a person who is under the age of 21 years unless for the particular matter at hand there is statutory provision that provides for a lower age of legal competence”: Leong Wai Kum, *Elements of Family Law in Singapore*, (2007) at p. 300 [*Elements of Family Law in Singapore*].

<sup>3</sup> It is submitted that the difference between those two provisions is immaterial: see Leong Wai Kum, *Principles of Family Law in Singapore*, (1997) at p. 569 [*Principles of Family Law in Singapore*]; and *Elements of Family Law in Singapore*, *ibid.*, at p. 361.

<sup>4</sup> The welfare of the child is also mentioned in, ss. 124 and 129 of the Women’s Charter, *supra* note 2: the former states that in divorce, judicial separation or nullity of marriage proceedings, the court

That the welfare of the child shall be the paramount consideration (at least in custody-related matters) has been expressly and consistently acknowledged by our Court of Appeal over the years. In *TQ v. TR*, a 2009 case involving a prenuptial agreement executed in the Netherlands, the court said: “Turning to the next broad category, *viz*, prenuptial agreements relating to the custody (as well as the care and control) of children... There ought, in our view, to be a *presumption* that such agreements are unenforceable... such agreements focus on the will of the parents rather than on *the welfare of the child* which has (and always will be) *the paramount consideration* for the court in relation to such issues”.<sup>5</sup> In *CX v. CY*, a 2005 case concerning a custody dispute between a Dutch national working Thailand and a Singapore national residing in Singapore, the court said that “[i]t is trite law that in deciding custody and upbringing issues, the court must regard the welfare of the child as the first and paramount consideration”.<sup>6</sup> To cite one final example, in *Re C*, a 2003 case about a convicted criminal (who had killed his wife) contesting his parents-in-laws’ application to relocate the child to another country, the court said that “the paramount consideration is the welfare of the child.”<sup>7</sup> The position taken by our Court of Appeal is hardly surprising, given that “the law of guardianship and custody in Singapore could not be easier to state. It is simply that every decision must be guided as its ‘first and paramount consideration’ by the welfare of the child... The principle of the welfare of the infant as the primary guiding principle has long been the pivot of the law regulating children in Singapore.”<sup>8</sup>

The views of local family law academics and practitioners reinforce the consensus surrounding the acceptance of the welfare principle and its paramount importance<sup>9</sup> – there is even the suggestion that the welfare principle applies to all areas of child law (*i.e.*, of “ubiquitous” application), and not just in relation to

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may “make such orders as it thinks fit with respect to the welfare of any child”; and the latter states that the court may vary the terms of any agreement relating to the custody of a child, “notwithstanding any provision to the contrary in that agreement, where it is satisfied that it is reasonable and for the welfare of the child to do so.” The other Charter provisions relating to the welfare of the children are ss. 123 (arrangements for the welfare of children) and 130 (court to have regard to advice of child welfare officers). See also s. 5(b) of the Adoption of Children Act (Cap. 4, 1985 Rev. Ed.): “The court before making an adoption order shall be satisfied... that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant” [Adoption of Children Act]; and s 6 of the Children and Young Persons Act (Cap. 38, 2001 Rev. Ed.).

<sup>5</sup> *TQ v. TR* [2009] 2 S.L.R.(R) 961 at paras. 69-70 (emphasis in original).

<sup>6</sup> *CX v. CY (minor: custody and access)* [2005] 3 S.L.R. 690 at para. 15 [*CX v. CY*].

<sup>7</sup> *Re C (an infant)* [2003] 1 S.L.R.(R) 502 at para. 22 [*Re C*].

<sup>8</sup> *Elements of Family Law in Singapore*, *supra* note 2 at p. 360. See also Leong Wai Kum, “Restatement of the Law of Guardianship and Custody in Singapore”, [1999] S.J.L.S. 432 at 469-470: “The Straits Settlements Supreme Court in Penang... in *In re Sinyak Rayoon* [1888 case]... [decided that] consideration of the welfare of the children outweighed any prior right under religious law... The Straits Settlements Supreme Court in Singapore in *In the Matter of the Intended Marriage between Lee Keng Gin and Catherine Wong Kim Lan*... [held that the court was charged with safeguarding the interests of infants].” [Restatement of the Law of Guardianship and Custody in Singapore].

<sup>9</sup> See *e.g.*, Debbie Ong, “Parental Relocation Across Borders: Is Relocation in the Child’s Welfare?”, *Law Gazette*, July 2009 (3): “The welfare of the child, not the parent, is paramount.”; Debbie Ong and Valerie Thean, *Family Law Annual Review of Singapore Cases*, Singapore Academy of Law Annual Review, 2004 (5) at para. 13.4: “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.”; and KS Rajah, “Access: Rights and Duties”, *Law Gazette*, July 2005 (2).

custody-related or guardianship matters.<sup>10</sup> The consensus is also reflected in (although perhaps less importantly) the family law in several other major common law jurisdictions. For instance, in the United Kingdom, where a significant part of our family law is derived,<sup>11</sup> “[w]hen a court determines any question with respect to the upbringing of a child... the child’s welfare shall be the court’s paramount consideration.”<sup>12</sup> In Australia, “[i]n deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”<sup>13</sup> In New Zealand, “[t]he welfare and best interests of the child must be the first and paramount consideration in... proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.”<sup>14</sup>

Indeed, in a broader stroke, art. 3(1) of the United Nations Convention on the Rights of the Child – to which Singapore is committed to – states that “the best interests of the child shall be a primary consideration” in all actions concerning children, including those undertaken by courts of law and legislative bodies.<sup>15</sup> It is apposite at this juncture to note that “best interests of the child” and “welfare of the child” are assumed to be synonymous: certain cases discussed in the latter part of this article will confirm this. Art. 18(1) also requires states parties to “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child... The best interest of the child will be their basic concern.” It is noteworthy that the United Nations Children’s Fund (more commonly known as U.N.I.C.E.F.) considers the C.R.C. to be “[b]uilt on varied legal systems and cultural traditions”, “a universally agreed set of non-negotiable standards and obligations” and “basic [human rights standards that] set minimum entitlements and freedoms that should be respected by governments.”<sup>16</sup>

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<sup>10</sup> See *e.g.*, Leong Wai Kum, “The Family Law Story”, Law Gazette, April 2000 (4): “the first and paramount consideration of a judge in resolving any issue which involves a child should be achieve the ‘welfare of the infant’. This equitable principle has spread its wings well beyond guardianship proceedings to pervade all areas of child law. Parental authority must always be exercised to achieve the child’s well being because an exercise that contravenes this ubiquitous principle runs the risk of being condemned should it ever come to a court’s attention. The welfare of the child overtaking the idea of parental rights affirms the new view of parenthood as a moral commitment to the well being of the child.”; and *Elements of Family Law in Singapore*, *supra* note 2 at p. 361. However, Professor Leong’s claim that *Lim Chin Huat Francis v. Lim Kok Chye Ivan* [1999] 2 S.L.R.(R) 392 [*Lim Chin Huat Francis*] had affirmed the welfare principle as ubiquitous in all areas of child law (see Restatement of the Law of Guardianship and Custody in Singapore, *supra* note 8 at 466) may require corroboration, in that the case was dealing with Guardianship of Infants Act, *supra* note 2, s. 14, *viz.*, a custody-related issue, and only elevated the application of the principle to a wider range of caregivers, rather than a wider range of child-related issues.

<sup>11</sup> *Infra*, note 21.

<sup>12</sup> Children’s Act 1989, Chapter 41, s. 1(a). See also s. 1(2) of the same statute: “In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.”

<sup>13</sup> Family Law Act 1975, s. 60CA. The choice of the term “best interests” over “welfare” is noted, but as can be gleaned from various subsequent parts of this article, there is no discernible material difference between the two terms.

<sup>14</sup> Care of Children Act No 2009, s. 4(1)(b).

<sup>15</sup> United Nations Convention on the Rights of the Child (1989), 1577 U.N.T.S. 3 [C.R.C.]. See also art. 21 of the same convention: states parties that “recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration”. Almost 200 states have ratified this convention.

<sup>16</sup> U.N.I.C.E.F., Convention on the Rights of the Child: Introduction, available online: <[http://www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html)> [U.N.I.C.E.F.].

Yet, in spite of the overwhelming support for the welfare principle as a legitimate principle in family law, have we really expended sufficient effort to explain *why* the child's interests are paramount, and on a distinct matter, have we considered how and why this principle can be *misapplied*? We thus arrive at the crux of this piece. While (as will be seen below) the welfare principle is generally considered a wide concept with no exhaustive definition or list of factors, it is submitted that there is an important question – sometimes neglected, effectively discarded, or even misunderstood in custody proceedings – that should actually feature most prominently when applying the welfare principle, *particularly when joint or no order custody orders seem impossible*.<sup>17</sup> The question simply is that of “who will be the better parent or guardian?” The reason for this is that most of the typical (and most crucial) aspects of the welfare of the child (*e.g.*, education, material comfort, moral guidance, stable and secure environment, and spiritual well-being) are provided by *none other* than the parent or guardian who is eventually awarded custody. Asking “who will be the better parent or guardian” simply serves to *logically guide and shape* the inquiry as to what is best for the child, and counters arbitrary weightage accorded to arbitrary factors. Moreover, it is submitted that this line of inquiry also rightly factors the *rights and interests of the parent or guardian* into the equation, which is only appropriate, because the “child's best interests are bound up with the interests of all those about it.”<sup>18</sup> As such, the question of “what is in the best interests of the child” is *invariably connected* to the question of “who will be the better parent or guardian”.<sup>19</sup> Before proceeding further, however, it is necessary to better understand certain preliminaries.

## II. BEFORE THE EXPLICATION OF THE CRUX: A RE-VISITATION OF THE WELFARE PRINCIPLE AND ITS PARAMETERS

### A. *The Roots of the Welfare Principle*

As with any other imported legal doctrine or principle, it is appropriate to first identify how the welfare principle came about. A search on the local Hansard reveals that Singapore had adopted the principle from the United Kingdom in 1965 – 1965 of course being best known to us as the year Singapore gained its independence:<sup>20</sup>

The existing Guardianship of Infants Ordinance (Chapter 16 of the Revised Edition), is based on the United Kingdom Guardianship of Infants Act, 1885, and is out of line with modern trends in family law, as exemplified, for example, in our Women's Charter, 1961, in that it gives the father a superior right to the mother in the matter of the guardianship and custody of children. The Ordinance applies to Muslims but would appear to be contrary to the Muslim law which, in this respect, gives equal rights to the father and the mother of the child; and in fact, in many cases, gives the mother a prior right to the care and the custody of very young children. It is, therefore, proposed to

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<sup>17</sup> In Singapore at least, joint custody or no custody orders remain the preferred orders of the day insofar as preserving the welfare of the child is concerned: *Elements of Family Law in Singapore*, *supra* note 2 at pp. 357-359. In this piece, we deal mostly with situations where such orders seem impossible, because if joint custody orders are feasible, then that is obviously the most ideal for the child.

<sup>18</sup> *Per* Lord Denning in *W v. W* [1970] 1 W.L.R. 682 at 685.

<sup>19</sup> See also *In re W (an infant)* [1971] 1 A.C. 682 at 685-690.

<sup>20</sup> Restatement of the Law of Guardianship and Custody in Singapore, *supra* note 8 at 468-470.

adopt the provisions of the more recent Guardianship of Infants Act, 1925, of the United Kingdom, which makes the welfare of the infant the paramount consideration in making orders for the guardianship and custody of children and *gives the mother an equal right with the father in applying for such guardianship and custody.*<sup>21</sup>

Indeed, in terms of the larger context, it has been noted that “there is a fair degree of uniformity, not only between us and England, but in much of the world, on good legal regulation of the relationship of a child with his or her parent. Details may vary and practical application may be unique to individual countries but we share the same vision... we should be ready to compare and pick from the best developments whether in England, the common law countries we traditionally look towards... or any other from whom we may learn.”<sup>22</sup> Accordingly, it will make sense for us to occasionally refer to English cases when discussing the welfare principle.

### B. What the Welfare Principle Entails

Next, we need to know what “welfare of the child” actually entails.<sup>23</sup> Locally, the Court of Appeal in *Soon Peck Wah v. Woon Che Chye*, relying on an academic description from the United Kingdom,<sup>24</sup> provided some guidance on what “welfare of the child” entails, but stopped short of providing a definitive explication. Pertinent for present purposes is that the *role, rights and interests* of the parents (and guardians) remain a *highly relevant factor* in the court’s prescription – and not just in this case but others (as will be seen) as well:

[T]he welfare of the child is only to be regarded as the court’s paramount consideration where the child’s upbringing or proprietary interests are directly in issue... The word “welfare” must be taken in its widest sense. It has been said that the welfare of the child is not to be measured by money only nor by physical comfort only; the moral and religious welfare of the child must be considered as well as his physical well-being; nor can the ties of affection be disregarded. *The rights and wishes of parents must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relative to that issue.* The question for the judge is not what the essential justice of the case requires but what the best interests of the child require.<sup>25</sup>

The same court espoused the following in *Re C* (although without referring to *Soon Peck Wah*):

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<sup>21</sup> Parliamentary Debates Singapore (1965), Official Report, First Session of the First Parliament, Volume 24, (Second Reading of the Guardianship of Infants (Amendment) Bill by Minister for Law and National Development Mr EW Barker), at column 689 (emphasis added). Note, parenthetically, that the speech alluded to *parents’* rights as well. See also *Soon Peck Wah*, *infra*, note 25.

<sup>22</sup> *Principles of Family Law in Singapore*, *supra* note 3 at p. 487.

<sup>23</sup> Note s. 123(3) of the Women’s Charter, *supra* note 2: “In this section and section 124, “welfare”, in relation to a child, includes the custody and education of the child and financial provision for him.”

<sup>24</sup> Margaret Booth (ed.), *Rayden and Jackson’s Law and Practice in Divorce and Family Matters* (1991), at p. 1004.

<sup>25</sup> *Soon Peck Wah v. Woon Che Chye* [1998] 1 S.L.R. 234 at para. 25 (emphasis added) [*Soon Peck Wah*]; see also *Lim Chin Huat Francis*, *supra* note 10 at para. 78. Professor Leong Wai Kum does not appear to object to this definition: see *Elements of Family Law in Singapore*, *supra* note 2 at p. 362.

The word “welfare” is not defined in the [Guardianship of Infants] Act. It is a very wide word and no court should seek to circumscribe it. It obviously covers both the material and non-material aspects relating to the well-being of the child: see *Tan Siew Kee v Chua Ah Boey* [1987] SLR(R) 725 per Chan Sek Keong JC at [12]. However, in our view, *greater emphasis must be placed on “stability and security, the loving and understanding, care and guidance, the warm and compassionate relationships, that are essential for the full development of the child’s own character, personality and talents”*: see *Walker v Walker & Harrison* [1981] NZ Recent Law 257. Ultimately, the court must decide based on the child’s best interest.<sup>26</sup>

And yet another take was offered by the apex court in *IW v. IX* (although without referring to either *Soon Peck Wah* or *Re C*):

It is clear to us that the paramount consideration in every case where custody is in issue is the welfare of the child. That is the immutable principle. The term “welfare” should be taken in its widest sense and we do not think it is possible or desirable to define it... What would be in the interests of the child must necessarily depend on all the circumstances of the case. The court, where appropriate, will have regard to... maintaining status quo, preservation of mother-child bond and that siblings should not be separated. *Other factors will include the home environment and care arrangements made for the child, the conduct of the parties and the wishes of the child.* We must reiterate that this enumeration is not meant to be exhaustive. The court will have to carry out a balancing exercise to determine, as between the two parents, to whom custody should be given in the best interests of the child. A factor which may be determinant in one case may not necessarily be so in another. So the weight to be given to each factor may vary from case to case. No precise formulation is possible. This is not a scientific exercise but one of judgment.<sup>27</sup>

What can we make of these cases? First of all, these cases confirm that “welfare of the child” ultimately means the same thing as “best interests of the child”. And based on these cases, the welfare principle, while being a wide concept, includes (but is not limited to) the physical, material, moral, and spiritual well-being of the child, perhaps marked best by the existence (and perpetuation) of stable, secure, and loving relationships in the child’s life – all of which the parents/guardians play the most important role. In addition, the rights and interests of parents/guardians cannot simply be disregarded, even if they can be subordinated. Be that as it may, on the basis of the cases presented, the judicial application of the welfare principle is ultimately a

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<sup>26</sup> *Re C*, *supra* note 7 at para. 16 (emphasis added). In *Tan Siew Kee v. Chua Ah Boey* [1987] S.L.R.(R) 725, the judge had said at para. 12: “The expression “welfare” is to be taken in its widest sense. It means the general well-being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not to be measured in monetary terms.” [*Tan Siew Kee v. Chua Ah Boey*].

<sup>27</sup> *IW v. IX* [2006] 1 S.L.R.(R) 135 at paras. 26-27 (emphasis added) [*IW v. IX*]. See also *Chan Kah Cheong Kenneth v. Teoh Kheng Yau* [1994] 2 S.L.R.(R) 595 at para. 21 [*Chan Kah Cheong Kenneth*]; *Wong Phila Mae v. Shaw Harold* [1991] 1 S.L.R.(R) 680 at paras. 21-22; and KS Rajah, “Access: Rights and Duties”, Law Gazette, July 2005 (2).

judgment call based on discretion and an examination of all the relevant factors in the case at hand. The main problem of course with broad and fluid tests like this one is that of (the lack of) predictability and consistency, which is why I have alluded to earlier and in the latter half of this article, I will be advocating the asking of the imperative and adjunctive question (“who will be the better parent or guardian”) that will help significantly in arriving at the best answer to the question of what is in the best interests of the child.

Parenthetically, it should be noted that in determining what is in the best interests of the child (*i.e.*, in deciding a matter along the lines of the welfare principle), apart from its own evaluation of the facts and the subjects, the court may have recourse to the advice of persons “trained or experienced in child welfare”.<sup>28</sup> The court may interview the child either in lieu or in addition to welfare reports,<sup>29</sup> and may further ask for a series of reports prepared by the Family Court and Family Service Centre.<sup>30</sup> Generally, the use of psychiatric assessments of children involved in custody disputes is treated with caution.<sup>31</sup>

### *C. Some Inferences and Assumptions of the Welfare Principle*

Now that we have established some of the contours of the welfare principle, we need to dig deeper into some of its theoretical underpinnings. Indeed, the welfare principle, as interpreted by our courts (see the preceding sub-section), seems to lend itself to a number of inferences and implies certain assumptions, of which we can list at least six points here.

First, the parents’ or guardians’ rights, interests, wishes or plans are supposed to be subordinate to the best interests of the child, even if the final decision made by the court may seem inequitable or unfair to one of the parents or guardians,<sup>32</sup> and even if only by sheer virtue of the fact that the welfare of the child is of “paramount consideration”.<sup>33</sup> This is not to say that only the child has rights or interests, or that

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<sup>28</sup> Women’s Charter, *supra* note 2, s. 130.

<sup>29</sup> See *e.g.*, *THG v. LGH* [1996] 2 S.L.R. 568 at paras. 5-6; and *Ng Wai Leng v. Lee Yew Khiang* [1998] S.G.H.C. 404 at para. 3. See also Women’s Charter, *supra* note 2, s. 125(2); and Adoption of Children Act, *supra* note 4, s. 5(b).

<sup>30</sup> See Yap Teong Liang, “Child’s Voice in Court Proceedings: An Effective Voice or a Silent Voice?”, *Law Gazette*, January 2010 (1).

<sup>31</sup> See *e.g.*, *L v. J* [1999] S.G.H.C. at para. 6. See also Women’s Charter (Matrimonial Proceedings) Rules 2005, r 41(1): “After proceedings have been commenced under Part X of the Act, a party shall not, without the leave of the court, cause a child to be examined or assessed by any psychologist, psychiatrist, counsellor or other social work professional or mental health professional for the purpose of the preparation of expert evidence for use in the proceedings for ancillary relief involving the custody and welfare of the child.”

<sup>32</sup> *Supra*, note 25. See also Restatement of the Law of Guardianship and Custody in Singapore, *supra* note 8 at 471: “the fairness of the result to the parents may be noted but should never determine the outcome. Where the adults quarrel over the upbringing of a child to the extent it becomes referred to court, the court should only focus on the well-being of the child. There is nothing better the court can do.”; and *infra*, note 77. But see *S (an infant, By Her Guardian Ad Litem The Official Solicitor To The Supreme Court)* [1972] 1 A.C. 24 which states at 31 that “the interests of the child can never be completely divorced from the interests of justice”.

<sup>33</sup> Women’s Charter, *supra* note 2, s. 125(2), in full, states that: “In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard (a) to the wishes of the parents of the child; and (b) to the wishes of the child, where he or she is of an age to express an independent opinion.” See also U.N.I.C.E.F., *supra* note 16: “[The welfare principle as conceived in the C.R.C. is] founded on respect for the dignity and worth of each individual, regardless of race, colour, gender, language, religion, opinions,



those rights or interests will, only in certain situations, potentially trump the rights or interests of the parents/guardians, but that *at all times*, the child's rights and interests cannot be dislodged from its paramount status. Thus, when a custody dispute is submitted for adjudication before a court, the court is (first and foremost) asked to make a decision that will best protect the child and advance the child's welfare, and not (as the first priority) to make a decision that will best serve the parents or even the interests of justice.<sup>34</sup>

The second and third points are conceivably corollaries of the previous point. Beginning with the second point: unlike an adult, any given child should be considered or presumed to be a vulnerable individual;<sup>35</sup> more so, it seems, in times of turmoil such as a custody battle (and even before that, divorce-related proceedings would likely have taken a toll on the child). Because of this vulnerability, the child's interests must be protected even if it is at the expense of the rights and interests of others involved in a custody dispute. There is simply little room for mistake or poor judgment when the child's future is at stake. It will not be unreasonable to posit that when a child has less to worry about food, shelter, education, and emotional support *et cetera*, that child has a better chance to flourish later on in life since there was the best possible opportunity (in the circumstances) to build the foundations of a secure future. Indeed, as was said emphatically in *Lim Chin Huat Francis*: "A child is not a thing or an animal one must simply take for granted and discard at one's convenience, to pick up again later when circumstances become pressing. A child is a living being, dependent on adults from birth and must be cherished with genuine love *from the outset*."<sup>36</sup>

The third point is that but for the marriage breaking down (and thus resulting in the custody dispute), the spouses would have been morally exhorted to share the responsibility of raising the child equally.<sup>37</sup> As has been opined: "[s. 46 of] the Women's Charter, in providing that spouses, as parents, are mutually bound to co-operate with each other in caring and providing for their children, has been described... to emphasize to parents that their parenthood is equal co-operative responsibility owed to their child."<sup>38</sup> When the marriage breaks down, however, this joint responsibility becomes fractured, and selfish (parental) interests may intervene to contaminate this moral responsibility (and thus affect the welfare of the child). Perhaps in a bid to elevate the child above such situations, "[under the Women's Charter], it is... more appropriate to conceive of parents as *owing responsibilities towards*, rather than *having rights over*, their child. Parental responsibility has eclipsed, and to a significant extent, *displaced parental rights*."<sup>39</sup>

Fourth, the most crucial manifestations of the welfare of a child are inextricably linked to the quality of the parenting or guardianship.<sup>40</sup> Most so in the

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origins, wealth, birth status or ability... devotion to the best interests of the child [is one of the] four core principles [of the C.R.C.]..."

<sup>34</sup> *Supra*, note 32.

<sup>35</sup> See *e.g.*, *Elements of Family Law in Singapore*, *supra* note 2 at p. 300.

<sup>36</sup> *Lim Chin Huat*, *supra* note 10 at para. 91 (emphasis added).

<sup>37</sup> Women's Charter, *supra* note 2, s. 46(1): "Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children."

<sup>38</sup> *Elements of Family Law in Singapore*, *supra* note 8 at p. 249.

<sup>39</sup> *Ibid* at p. 251.

<sup>40</sup> See *e.g.*, *Elements of Family Law in Singapore*, *supra* note 2 at pp. 293 and 313: "A parent naturally possess authority over his or her child which the law in Singapore recognizes and

formative years, when a child is not able to (nor can it be expected to) provide basic essentials like food, shelter education, moral and spiritual leadership by himself or herself – *somebody else* who has the *capability and willingness* must do so. And sometimes, it is not just about capability or willingness but also the natural inclination – thus, the tendency for courts to perceive mothers as the (more) natural caregivers.<sup>41</sup> Past conduct may also be a factor worth considering. For instance, a negative inference may be made against a parent who has disappeared for the larger part of the child’s life but has suddenly reappeared (solely) for the custody dispute. A more complex instance will be if one of the parents has demonstrated poor behaviour *vis-à-vis* the other parent in the marriage, but has not necessarily neglected the child directly. Even more complex is when a parent turns out not to be the biological parent (*i.e.* the other parent in the marriage had secretly committed adultery), but was the far better parent of the child.

Fifth, it will be undesirable to reduce the enquiry (of what is the in the best interests of the child) to a single or penultimate question. Indeed, Dunn L.J. in *Poutney v. Morris* – as have our Court of Appeal in almost the cases discussed in this piece – once warned: “There is only one rule, that rule is that, in a consideration of the future of the child, the interests and welfare of the child are the first and paramount consideration. But within that rule, the circumstances of each individual case are so infinitely varied that it is unwise to rely upon any rule of thumb, or any formula, to try to resolve the difficult problem which arises on the facts of each individual case.”<sup>42</sup> In other words, the enquiry is a dynamic one, and all facts and factors have to be carefully weighed and considered. It will be remiss to consider the best interests of the child along *solitary* lines such as what is the *status quo*, what the child prefers, *et cetera*. This will apply equally to the question of “who will be the parent or guardian” as well.

Sixth, it has been argued that in pursuing the welfare of the child, trying to predict or envision what is in the best interests for the child in the long-term, as opposed to focusing on the established facts that are immediately available for the court’s consideration, will be “overly ambitious”,<sup>43</sup> because the future will always be “imponderable”, and therefore speculation is likely to be counter-productive and detrimental to the child.<sup>44</sup> Cases often cited in support of this proposition<sup>45</sup> include *Re Maria Huberdina Hertogh*,<sup>46</sup> *Tan Siew Kee v. Chua Ah Boey*,<sup>47</sup> and *Lim Chin Huat Francis*.<sup>48</sup> Even so, there is still the question of what is the level of immediacy (of facts) that is ideal, something which we will return to later in this piece.

In view of the aforementioned inferences and assumptions, there is no question that a child is usually more vulnerable than an adult (and should be presumed to be), and that a child’s rights and interests are perched on the apex. However, problems arise when we focus *disproportionately* on the child’s interests, place little or no weight on the (arguably lesser but nevertheless important) *rights and interests*

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protects... A child is entitled to be nurtured into adulthood optimally, namely, to the extent which the parents are capable of.”

<sup>41</sup> See *e.g.*, *supra*, note 27.

<sup>42</sup> *Poutney v. Morris* [1984] F.L.R. 381 at 384.

<sup>43</sup> *Elements of Family Law in Singapore*, *supra* note 8 at p. 362.

<sup>44</sup> Restatement of the Law of Guardianship and Custody in Singapore, *supra* note 8 at 479.

<sup>45</sup> *Elements of Family Law in Singapore*, *supra* note 2 at pp. 362-364.

<sup>46</sup> *Re Maria Huberdina Hertogh; Adrianus Petrus Hertogh v. Amina binte Mohamed* [1951] M.L.J. 12 [Re Maria Hertogh].

<sup>47</sup> *Tan Siew Kee v. Chua Ah Boey*, *supra* note 26.

<sup>48</sup> *Lim Chin Huat Francis*, *supra* note 10.

of the other parties in the guardianship dispute, turn a blind eye to the other issues (including relevant past and likely future conduct) at hand, and become overly apprehensive to even contemplate the long-term consequences of the various courses of action. That is to say, while different perspectives (*i.e.* according different weight to different factors in different situations) may all be undergirded by the welfare principle, there may be different and arbitrary outcomes if the application of the principle does not have a concrete and overarching guide.

#### D. A Re-Injection of a Perspective

We return then to the crux of this piece, *viz.*, the asking of the question “who will be the better parent or guardian” when applying the welfare principle, particularly when joint or no order custody orders seem impossible. I do not believe that this is a totally fresh perspective or new focal point but simply one that should be re-injected and emphasised in conjunction with asking “what is in the best interests of the child”. The cases will (soon) demonstrate what I mean.

Let us be clear about something at this point, however. In terms of the (normative) correctness of the welfare principle, when each aspect or inference/assumption of the principle is examined in isolation, there is really (or ought to be) no quarrel or controversy: a child is very important; a child’s rights or interests should indeed be paramount; a child’s wishes should be respected if possible; a child is more vulnerable (than an adult) in a variety of ways; in many situations it is likely to be difficult to predict what is in the best interests of the child in the long term; and a child’s welfare may involve many different considerations and aspects. But huge problems arise when the court, cognisant of the non-exhaustive content of the welfare principle, loses focus in the midst of all the myriad facts and factors, and the whole balancing exercise becomes arbitrary. In some situations, the spotlight shines disproportionately on the child, away from other key parties in the dispute, and away from other bigger interests at stake. The upshot in such situations is that decisions and analyses begin to build *exclusively* around the child, sometimes with an unnecessary resistance and aversion to the resultant unfairness of one of the parents or guardians, but all in all with little foresight afforded to the *larger picture of the child’s future* (in which the cases have shown that attention to the latter is actually demanded).<sup>49</sup>

It is submitted, therefore, that the welfare principle will be best served if we realise that *in the final analysis*, a fundamentally important and indispensable question to ask, most so in acrimonious custody-related disputes, is “who will be the better parent or guardian?” As mentioned earlier, this question’s chief function is to guide and shape the decision process in a custody dispute amidst all the facts and factors presented for the court’s consideration. It is further submitted that asking the question is doing no more than building upon one of the most undisputable and immutable tenets of family law: it is always desirable, if possible, that a child is provided good parenting – one may even suggest that the parent awarded custody should be the better role model of the two.<sup>50</sup> This is because if there is to be somebody or some people to safeguard the basic interests of the child – and the presumption is that the “somebody” or “some people” refer to the people who are best placed to have a

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<sup>49</sup> Indeed, as it stands, the welfare principle suffers from too many distracting questions and variables – despite, ironically, the ostensibly narrow and unambiguous mandate that the child’s welfare or best interests shall be the first and paramount consideration in any custody-related dispute.

<sup>50</sup> See *e.g.*, *TQ v. TR* [2007] 3 S.L.R.(R) 719 at paras. 5-7. Obviously, the preferred default is still joint parenting: see *e.g.*, *Re G, infra*, note 54 at para. 8; and *BG v. BF* [2007] 3 S.L.R. 233 at para. 13.

natural or strong bond with the child (*i.e.*, the parent(s) or guardian(s)) – then we are invariably led to the conclusion that a child should be provided good parenting where possible.<sup>51</sup> It can also safely be said that good parents have an undeniably important role to play in the upbringing of children, and children are desirous of good parenting,<sup>52</sup> most so because of the special and natural bond between child and parent.<sup>53</sup>

If we hold the foregoing premises to be true in almost all cases, and precisely because the most common manifestations of the “welfare” of the child are principally (if not solely) provided by the older caregivers in his or her life (*e.g.*, material needs, moral leadership, and stable environment), then the guiding question of “who will be the better parent or guardian” is eminently sensible. Even though one may consider “better parent or guardian” to be vague, it is not only no vaguer than “best interests” (such is the inescapable nature of many strands of family law discourse), but “better parent or guardian” helps us focus on a wider range of imperatives, and is indeed compatible with the six underlying assumptions of the welfare principle enumerated above.<sup>54</sup> Let us concretise all of what I have said above with some case-law illustrations.

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<sup>51</sup> See *e.g.*, *Elements of Family Law in Singapore*, *supra* note 2 at pp. 357-358: “A custody order that picks one parent over the other should only be made in the exceptional circumstance where it is decidedly against the interests of the child for both parents to retain parental responsibility. This must be highly exceptional... Of whether we need to overhaul our law of guardianship and custody... the writer has suggested that Singapore can achieve the same substantive improvements simply by putting in place a new approach whereby the courts give primacy to the principle of joint co-operative responsibility as they decide what order to make in guardianship applications”. In other words, while the premium placed on joint co-operative parental responsibility implies that it is the best possible ideal for a child’s upbringing, when this is not possible jointly, it should at least be possible unilaterally, although it is definitely acknowledged that this should be an outcome of last resort. See also *Goodfellow v. Goodfellow* (1968) 112 S.J. 332; and *Jeffrey v. Jeffrey* (1962) 106 S.J. 686 for the proposition that it is better to give a child one good parent than none at all.

<sup>52</sup> See *e.g.*, Parliamentary Debates Singapore (2010), Official Report, Part I of Second Session of the Eleventh Parliament, Volume 86; Parliamentary Debates Singapore (2009), Official Report, Part IV of First Session of the Eleventh Parliament, Volume 85; Parliamentary Debates Singapore (2008), Official Report, Part III of First Session of the Eleventh Parliament, Volume 84; Parliamentary Debates Singapore (2008), Official Report, Part II of First Session of the Eleventh Parliament, Volume 84; *Elements of Family Law in Singapore*, *supra* note 2 at pp. 246-270 and 313; and Ministry of Community, Youth and Sports, Healthy Families, Happy Families, online: <<http://www.mcys.gov.sg/MCDSFiles/CorpBook/html/healthyfamilies.htm>>.

<sup>53</sup> See *e.g.*, *Lim Chin Huat Francis*, *supra* note 10; *Tan Siew Kee v. Chua Ah Boey*, *supra* note 26; and *Chan Kah Cheong Kenneth*, *supra* note 27.

<sup>54</sup> In reference to a previous point (*supra*, note 51), it should be added that by asking the question of who makes the better parent, one is only being consistent with a certain larger (and admirable) trend in other common law jurisdictions, and that is, adopting a more holistic view to custody-related matters. For instance, the United Kingdom and Australia have already abolished the concept of custody, and reformulated the issue as parental responsibility for children (See Review of Child Custody Law (October 2005), Attorney-General’s Chambers of Singapore at para. 3.) This practice has picked up some pace in Singapore, most notably in some of our joint custody/no custody cases, which promote the concept of joint parental responsibility. And the whole concept of joint parental responsibility implicitly recognises that it is largely down to the parents (especially if they do it jointly) to make it right for the children, and that parents are the primary facilitators of their children’s welfare: see *e.g.*, *CX v. CY*, *supra* note 6; *Re G (guardianship of an infant)* [2004] 1 S.L.R.(R) 229 [*Re G*]; *VD v. VE* [2007] S.G.D.C. 318; *AAC (m.w.) v. AAD* [2009] S.G.D.C. 23; *XG v. XH* [2008] S.G.D.C. 88; and *XX v. XY* [2008] S.G.D.C. 253.

### III. SOME ILLUSTRATIONS

#### A. A Case of Negligence

A good place to start is the humble case of *Tan Siew Kee v. Chua Ah Boey*.<sup>55</sup> This is a classic example of a parent who is not only irresponsible towards the other parent, but (egregiously) irresponsible towards the child *as well*. The nexus between the welfare principle and the question of “who is the better parent or guardian” is the most palpable and uncontroversial here. Perhaps, as we explore more cases we may question if the nexus is still as strong in other contexts.<sup>56</sup>

In *Tan Siew Kee*, when P (the father) first met D (the mother), D was still married but living separately from her husband. P and D cohabited and a son was born. As a result of frequent quarrels between P and D, D left P after three years and took their son with her. D was unable to look after her son personally and tried to get her sister to look after him. Half a year after D left him, P took his son back. P was able to look after his son, and got his aunt to take over whenever he left the house. While P claimed that D was a gambling addict, D claimed that P once offered to buy his son for \$5000 from her. The judge’s matrix of reasons for coming to his decision to grant custody and care and control to P, are noteworthy:<sup>57</sup>

... On my part, I am not sure that such an inference should be made or that it is reprehensible or wrong for a father to want to obtain custody of his own son, even if he has to pay money for it, when he believes that his welfare had not been looked after by the natural mother.

Perhaps the episode is intended to suggest that the plaintiff was so desperate to obtain custody that he forcibly took the son away from the care of the defendant’s sister. Not having heard the parties, I am, of course, unable to make a specific finding on this point. In any case, even if it were true, the plaintiff probably did it because he really cared for his son.

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In the present case, the facts show that on the father’s side, there is little doubt that he loves his son and that he can provide a stable home. Apart from an allegation by the defendant that the plaintiff would beat the child when he was drunk, which allegation the plaintiff has denied, there is no allegation by the defendant that the child’s welfare would suffer if he were given into the custody of the plaintiff or would be enhanced if given into the custody of the defendant.

On the side of the mother, she also says she loves the son. But it is also true she has no time to look after the son but seeks custody so that he can be looked after by her sister... The sister, who has a four-year-old daughter, has... said that she would be unable to look after even her child and that her sister-in-law, who has three children aged 15, 12 and 10, would be able to look after

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<sup>55</sup> *Tan Siew Kee v. Chua Ah Boey* [1987] S.L.R.(R) 725 [*Tan Siew Kee*].

<sup>56</sup> To reiterate, we remain concerned only with contexts wherein joint or no order custody orders seem impossible.

<sup>57</sup> Restatement of the Law of Guardianship and Custody in Singapore, *supra* note 8 at 477 to 479.

her daughter as well as the child in question. No evidence has been produced as to whether the transfer of the care of the child to his sister-in-law is conducive to the welfare of the child. There is evidence to show that the defendant is a mahjong gambler and that she keeps company with a number of single women (mostly divorcees) in order to talk, exchange video tapes and sometimes to have a game of mahjong. There is also evidence that she has been borrowing money from moneylenders. These habits of the defendant will obviously reduce her capacity or her ability or even desire to look after the child or to contribute to his welfare.

The matrimonial history of the defendant shows that she is more concerned with her own welfare than that of her children. Custody of her son by her marriage, born on 12 September 1981, was given to her former husband in consideration of his not contesting the divorce petition, an allegation made by the plaintiff which she has denied. But the grounds of her petition for divorce were that, *inter alia* her husband had failed to maintain her and the son and had behaved in such a way that she could not be reasonably expected to live with him. She should never have surrendered the custody of her son on these grounds.

In my view, the strongest evidence of her lack of interest in the child, and therefore his welfare, is the fact that although it has been alleged that the plaintiff had forcibly taken his son away, from her (or her sister), the defendant took no steps to resume custody of the child. It is the plaintiff who has taken the initiative to regularise his position vis-à-vis his son by making this application for custody. This, to me, is a clear indication that he cares more for his son and his welfare than his mother.<sup>58</sup>

Maybe *Tan Siew Kee* is too straightforward. The mother was self-absorbed, being both a bad spouse and a bad parent at the same time. Therefore, the relevance and utility of asking whether she was a good parent was simply a coincidence; accordingly, this conclusion and its antithesis must be further tested in other decisions.

#### B. A Case of Betrayal

In *Re A*,<sup>59</sup> while A and R were still married, A had a daughter (“C”) with a man she was secretly having an affair with. When C was about two years old, A informed R that C was not his biological child. A took C and left R. A was later granted custody of C, while R had right of access. A applied to have the custody order rescinded, arguing that because R was not C’s biological father, he should not have right of access. This application was disallowed on the ground that it was in C’s best interest to maintain contact with R as he loved her, and could provide her stability and security. A appealed. The judge allowed the application for the following reasons:

... The more important, and incontrovertible, facts are that the child is now in the custody of her mother who is cohabiting with her (the child’s) natural father. The relationship between the appellant and the respondent had been and still is a bitter and acrimonious one, and it is a fair inference that the

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<sup>58</sup> *Tan Siew Kee*, *supra* note 55 at paras. 9-10 and 13-16.

<sup>59</sup> *Re A (an infant)* [2002] 1 S.L.R.(R) 165 [*Re A*].

respondent harbours some animosity towards the child's natural father. The child is only five years old. In these circumstances, I do not think that it is in her best interest to be exposed to the inevitable conflict of ideas, attitudes, and demands between the natural father and the respondent. This is a totally different situation from one in which the natural father of a child is seeking access to his child who is residing with her mother and stepfather. I accept that a person in the respondent's circumstances may be pained by a forced separation but I believe that in the long run, that is a much better option for the child than to encourage the maintenance of an intimate relationship with a man who she knows, or will inevitably know, is not the natural father, and who after the divorce will have no connection whatsoever with her family. There is therefore little to be gained in such circumstances for the child to continue that contact with the respondent.

... The true and meritorious considerations to be weighed, in my view, is the fact of the years spent by the respondent with the child, regarding her as his daughter, against the prospect of the cohesion and stability of the child's life henceforth. I have borne in mind the well-known *dictum* of Sir George Baker P in *M v J (Illegitimate Child: Access)* (1977) 3 FLR 19 at 21 where he said: "Where there has been a substantial period of cohabitation there must be positive and compelling evidence to shut out the non-custodial parent from access." The child and the appellant in this case moved out in June 1999 (when the child was just under three years of age). Given these circumstances, the period of bonding between the respondent and the child is not sufficiently substantial. I do not by this view, take the position that the length of the bonding period is more relevant than the strength of the bond itself.<sup>60</sup>

What we can infer from *Re A*, insofar as the qualification of the custodian is concerned, is that choosing an adulterous biological parent over an innocent husband *can be* in the best interests of the child. Even if we take the point that R had yet to develop a strong bond with C,<sup>61</sup> the fact remains that C was awarded to an adulterous couple. The possibility of an adulterer being a good parent is not ignored, but it should be rigorously questioned in every case if it can be the probable outcome.<sup>62</sup> When a person, having pledged unequivocally to be the ultimate companion to another, goes on to break it in deceit and self-righteousness, what is to prevent that person from doing the same in all other relationships, such as with the child? There is then every chance that the child emulates such behaviour or considers it to be correct. There is also every chance that the unfaithful parent diverts his or her love and resources to the adulterer, and the result is a radial and systematic erosion of the other

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<sup>60</sup> *Ibid* at paras. 3-4.

<sup>61</sup> It seemed though that by emphasising on the substantiality of the bonding, the court was simply looking for a way out of the moral quandary.

<sup>62</sup> But see Debbie Ong and Valerie Thean, *Family Law Annual Review of Singapore Cases*, Singapore Academy of Law Annual Review, 2008 (9) at para. 14.8: "good parenting is not necessarily inconsistent with less common lifestyles or habits [in reference to a case (*YN v YO* [2008] SGDC 286) in which a father was given joint custody even though the mother accused him of engaging in "bisexual activities"]. Likewise, adultery, which was previously a matrimonial offence, has not in itself been a reason for suggesting that one cannot be a good parent." But if this is true, then to be principled, a parent who is violent towards the other parent – or guilty of any other crime for the matter, however serious – should never be impeachable *vis-à-vis* his or her ability to take care of the children either.

facets of the welfare of the child. Adultery is unequivocally an act of cowardice and an abject abdication of responsibility. There is little reason not to *very strongly presume* that the same attitude will be applied to the children at some later point, especially if no departure from further flagrant immorality is forthcoming.<sup>63</sup>

Indeed, when a parent commits adultery (usually a premeditated and protracted series of acts), he or she has not forsaken just the spouse, *but the family as a whole*. Moreover, while it is possible that one can be unfaithful to a spouse but still love the child,<sup>64</sup> at the end of the day, the parent is supposed to be the paradigm role model and by committing the major transgression of adultery, he or she should be considered to have forfeited the right to be *the* lifelong role model and *moral guide* for the child – more so, when there is a *competing and superior claim by the innocent spouse* to custody. This is not to say that a parent who has committed *a wrong in general* is incapable of being a role model to the children; there are wrongs that have no direct relation to one's *capacity to be loyal and loving* (e.g., theft), and then there are wrongs that reveal one's inability to be loyal and loving towards others. This is also not to say that an adulterer cannot be given a second chance if there is *genuine contrition* or resolution to forsake the previous path of immorality – but when none is forthcoming, and when one perpetuates deceit, the court should be very slow to presume that the adulterous parent in question is in a good position to fulfil the best interests of the child.

So although a biological parent is the default ideal candidate to raise the child, surely this sort of right can be revoked or forfeited in certain instances (otherwise, we might as well abolish the concepts of adoption, wardship, and the like),<sup>65</sup> such as when the parent refuses to turn his or her back on acts related to his or her infidelity, and continues to commit flagrant immoral acts.<sup>66</sup> The elimination of the parent's moral leadership (or lack of) from the equation should never be contemplated. In this case, given that parents are often (or expected by the children to be) the primary role models for their children, and that A and C's biological "father" were both likely to indoctrinate C into believing R was a bad person (or something along those lines), it is

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<sup>63</sup> This is quite a different proposition from saying the adultery will be repeated. See e.g., *Allen v. Allen* [1948] 2 All E.R. 413: "It does not follow from the mere fact of a [parent's] adultery, in the absence of any other evidence against [the parent], that [the parent] is not a proper person to have the custody or the care and control of [the parent's] child. In particular, there is no justification for the supposition that a [parent] who has once committed adultery will always repeat it"; and *Willoughby v. Willoughby* [1951] 1 P. 184. See also *infra*, note 64.

<sup>64</sup> The observations of the court in *Chastain v. Chastain* 381 S.C. 295, 672 S.E. 2d 108 (2009) are fascinating in this respect: "A parent's morality, while a proper consideration in custody disputes, is limited in its force and effect to the relevance it has, either directly or indirectly, on the welfare of the child... However, flagrant promiscuity inevitably affects the welfare of the child and establishes "a watershed in the court's quest to protect the best interests of a minor child."

<sup>65</sup> But see Debbie Ong, "A Grandparent's 'Right' to Guardianship, Custody, and Access?", *Law Gazette*, June 2005(1): "Retaining a distinction between the authority of parents (and guardians) and the authority of non-parents over the child gives recognition that parents have the primary responsibility and authority over the child. It is in the child's welfare that parents be enabled to carry out their parental responsibilities without unnecessary interference from third parties and the law. Upon an application under s 5 of the GIA, the court will hear the applications of these adults and make orders in accordance with the welfare principle... On the other hand, non-parents and non-guardians should not be accorded the same *locus standi* to seek orders regarding the child. They may, however, seek the court's wardship jurisdiction to make orders required for the child's welfare. The wardship jurisdiction will only be exercised in appropriate cases. The distinction in the processes used by the two groups of adults preserves the balance of power between parents and non-parents."

<sup>66</sup> See *supra*, note 64.



impossible to fathom how C's best interests and welfare were served whether in the short term or long term.

If only the court had asked the question "who will be the better parent", instead of focusing on the *status quo*, it would *also* have ensured that there were less losers in the suit,<sup>67</sup> and acknowledged that R had some rights that should not have been so easily extinguished. Chances are, A, R, C, and C's biological father all emerged as losers from this suit. R for obvious reasons; C because her values would go on to be shaped by an adulterating pair; A because her self-righteous belief that R should be eliminated from C's life was vindicated by the court; and C's biological father because like A, he would go on in life with the illusion that it is entirely possible to profit greatly from a grave wrongdoing. Conversely, if the court had questioned the suitability of A and her illicit lover as parents to C, R may have been availed of his rights and given full custody and he would (more likely than A) have sought to bring up C the right way,<sup>68</sup> while A and C's biological father would very equitably have been left with nothing but their own irresponsibility to reflect upon. No doubt A would probably have lodged an appeal and the matter would have dragged on for a while more, but this was the smaller price to pay. And even if C were to realise that R was not her biological father, how is this worse than realising one day – having been "cared for" by them – what A and her biological father had done? Even assuming that A and the biological father behave as responsible parents to C, all trust reposed in them may be destroyed when C realises she is the product of an affair, and the spoils of an inequitable outcome (to R).<sup>69</sup>

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<sup>67</sup> *Supra*, note 51.

<sup>68</sup> There is nothing precluding the court from awarding custody to non-biological parents: see Women's Charter (Matrimonial Proceedings) Rules 2005, r. 55(1): "The plaintiff or the defendant spouse or guardian, or any person who has obtained leave to intervene in the action, for the purpose of applying for custody or who has the custody or control of any child of the marriage under an order of the court, may, after entering an appearance (where applicable) to the writ for this purpose, apply at any time either before or after final judgment to a Judge for an order relating to the custody or education of the child or for directions that proper proceedings be taken for placing the child under the protection of the court." See also Debbie Ong and Valerie Thean, *Family Law Annual Review of Singapore Cases*, Singapore Academy of Law Annual Review, 2005 (6) at para. 13.23.

<sup>69</sup> In relation to how treating one guardian unfairly is not in the best interests of the child, see *CX v. CY*, *supra* note 6 at paras. 18-19: "*Prima facie*, a parent of a child, by the fact of parenthood, has a right of custody over the child. That continues to be true even when the marriage of the parents has been dissolved because the parent-child relationship is not dissolved. When the question of custody is raised and has to be determined by the courts, the child's welfare, which is the paramount consideration, is not best advanced by removing the rights and responsibility of custodianship from the parents, or by depriving one parent of his or her rights. When a parent has care and control over a child, and the other parent has access to the child, and is also obliged to pay or contribute towards his or her maintenance, it is appropriate for the child to be placed in their joint custody. If the relationship between the parents is acrimonious, granting the custody of the child to one parent to the exclusion of the other, or denying both of them custody, will add to the unhappiness between them. As in this case, most disputes over the custody of children arise from the parents' concern over the welfare and upbringing of the child. It would be ironic that one or both parents should then forfeit custody because of that..." See also the observation of Lord Sands in *Hume v Hume* (1926) S.L.T. 706: "The welfare of the child is to be the paramount consideration, but it is not prescribed that it shall be the sole consideration. If this view is sound, then, as it appears to me, the advantage to the child of being entrusted to the one parent rather than to the other must be obvious and substantial in order to qualify as being the paramount consideration."

### C. A Case of Unceasing Deceit

The relevance of asking the right questions becomes even more pronounced in cases where the parent openly perpetuates deceit to secure custody. In *AD v. AE*,<sup>70</sup> A and R had two daughters and a son. Divorce was granted after R committed adultery. Although R took the children away from A, A remained close to his children. During subsequent custody proceedings, reports were tendered by the Family Conciliation Resolution Centre (or FAMCARE). When R discovered that the first report was overwhelmingly in favour of A, she disclosed, for the first time, that the two daughters were not fathered by A, but fathered by *two* other men. By the time the second report (which was prompted by R's revelation) was made, the two daughters were prompted by R and claimed, contrary to before, that they preferred to live with R, and treated A like a stranger. The court, in affirming the order giving custody of the daughters to R, opined as follows:

The sudden revelation [by the mother] prompted the second FAMCARE report. The officer noted that, unlike the first report, the two girls now expressed their desire to live with the respondent and the reason was that she had told them that the petitioner was not their real father. The FAMCARE officer reported that the girls were greatly affected and confused. This was in sharp contrast to their attitudes reported by the first FAMCARE officer. There is little doubt that in the time that the respondent was given interim custody of the two girls, namely from 29 October 2001 to the time of the respondent's revelation on 4 July 2002, the girls were still very much attached to the petitioner. However, from that time on until I saw them in chambers on 28 January 2005, *the girls seemed to regard the petitioner as a stranger because they had, in my view, been thoroughly and comprehensively influenced by the respondent to adopt that attitude...*

...

... Although the wife took the children away from August 2001 onwards, the girls were still attached to the husband whenever he had access to them. The boy, who had since been returned to the custody of the husband, had always been close to and fond of the husband, and remains so. However, the girls' attitude to the husband changed almost completely after their mother disclosed to them that the husband was not their natural father, and *taught them to be chary of him*. By the time I made the orders here, the girls appeared settled and it would not be in their interests to create any major change in their lives. Similarly, their brother seemed happy and settled with the husband and his new wife.

The wife sent a letter through her counsel, attaching a copy of a note written by the daughters to this court. The note was written to persuade me to rescind the access order I had made. *While I am satisfied with the custody orders made, I am of the view that they were obtained through much manipulation by the wife*. The attached note is, in my view, the wife's latest effort at psychological manipulation. *I am of the opinion that the daughters would very likely not*

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<sup>70</sup> *AD v. AE (minors: custody, care, control and access)* [2005] 2 S.L.R.(R) 180 [*AD v. AE*].

have changed their attitude to the husband had custody been granted to him in the first place, although some damage to the relationship might still have occurred once the wife were to tell the girls that the husband was not their natural father. This observation is academic except that it might serve as a reminder that events take turns that one might not detect at a cursory glance. I formed these views after reminding myself that in matrimonial matters, nobility, honesty, love, and all the virtues that one can imagine, are often lost to that one simple vice – selfishness. That, I believe, is the only explanation as to why a mother, like the wife in the present case, would destroy the loving relationship between the husband and the two daughters. The decision to disclose that the husband was not their father was a questionable one because there was no pressing need for it. The natural father, whoever that may be, is not known, except to the wife. The husband had hitherto been a good father to the daughters. He had deposed that he did not see the necessity to provide a DNA sample for testing because it did not matter to him that he might not be the girls' natural father. He stated that he had loved them from birth and continues to do so. The disclosure by the wife had wrecked the girls psychologically. This was the similar impression that the second FAMCARE officer formed. It was, in my view, a nasty way to get custody.<sup>71</sup>

The court, despite extolling the virtues of A and condemning the unceasing instances of manipulative behaviour of R, was nonetheless willing to award custody of the daughters to R. One of the main motivations behind its decision was that it was apprehensive about introducing so-called major changes to the children's lives. One notable difference between this case and *Re A* is that the court was convinced that the children here were happy with the *status quo*.<sup>72</sup> Even so, the question is whether this was alone a good enough reason to displace the interests and rights of A, ignore the longer-term ramifications, and effectively reward the immorality of R.<sup>73</sup> If the objection is that it will be overly ambitious of the court to predict the child's welfare or best interests in the long-term, the counter is courts are often tasked to make decisions on a medium- or long-term basis on all manner of disputes – including custody disputes. It will be recalled, after all, that two of the manifestations of the welfare principle are a stable and secure environment for the child, and moral leadership; surely, both manifestations require the court to look beyond the near future. While it may be inappropriate to speculate too deeply about the future, it is unrealistic to “freeze” events at a certain point in time and pretend nothing else matters, or that prior behaviour of certain parties is *totally* not indicative of the likelihood of certain

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<sup>71</sup> *Ibid* at paras. 5 and 9-10 (emphasis added).

<sup>72</sup> See also *C v. O* [1957] W.L. 17993. There, the parents of an infant had been divorced on the ground of M's adultery; M later remarried. A judge had ordered custody and care and control to be given to F, but on appeal, M was allowed care and control. Although F was an *exemplary parent*, a report of a welfare officer showed that the infant had greater affection for M. If the court had not been fixated by a single welfare report but had instead asked itself the broader question of “who will be the better parent”, the outcome would surely have been different.

<sup>73</sup> Moreover, the sort of “*status quo*” envisioned by courts usually relates to that of preserving maternal bonds, avoiding the separation of the siblings, maintaining continuity in stable home environments, and not exactly allowing an immoral state of affairs to persist and flourish: see *e.g.*, *IW v. IX*, *supra* note 27 at paras. 26-27. It has also been said that the most effective means of deterring and punishing adultery is by way of ancillary orders after the dissolution of the marriage, especially if the marginal expected loss is larger than the marginal net benefit from being adulterous: see *e.g.*, Liu Xuemei, “An effective punishment scheme to reduce extramarital affairs” (2008) Euro. J.L.E. 167.

courses of behaviour in the future. And ultimately, it is submitted that the outcome of *AD v. AE* may have been different if the court directed its mind to the question “who will be the better parent” – something which the court itself hinted to.<sup>74</sup>

It appears we are not alone in ignoring parental behaviour, however. *In re F*,<sup>75</sup> F had an affair with X; X had sexual relations with many men throughout her life. F was also violent towards his wife, M. F and M separated when the child was five. However, M soon passed away and the child was taken care of by M’s mother, G, for several years. In the meantime, F had been convicted of offences involving violence and dishonesty, and he had also married X and had a daughter with her. The court awarded custody and care and control to F instead of G, principally on the basis that F and X appeared to provide the paradigm tandem of husband-and-wife. Again, the outcome would probably have been very different (and better for the child) if the court thought carefully about who would be the better parent.<sup>76</sup>

There are many more cases which illustrate the thesis of this piece<sup>77</sup> – those highlighted here merely show how far the court is willing to see past certain conduct.<sup>78</sup> Ultimately, we see arbitrary weightage accorded to different factors in different cases, which contradicts the six underlying assumptions of the welfare principle as discussed above. Indeed, as said, the welfare of the child is typically manifested in the physical, material, moral, and spiritual well-being of the child, perhaps marked best by the existence of stable, secure, and loving relationships in the child’s life. By juxtaposing the enquiry with *the other overarching* question of “who will be the better parent or guardian”, the enquiry becomes more focused and certain, providing an acceptable conception of the long-term consequences of the decision. Without knowing who makes the better parent or guardian, it is extremely difficult to see how the physical, material, moral, and spiritual well-being of a child can be fulfilled; likewise, the better parent is more likely to ensure stability and security in the child’s life. In certain situations, the court should not place undue weight on where the natural parent-child bond lies, on who is the actual biological parent, and on what the child prefers.

#### IV. CONCLUDING THOUGHTS

I have attempted to show that certain assumptions and applications of one of the cardinal principles in family law ought to be revisited. In addition, when the simple question of “who will be the better parent or guardian” is forgotten, when it is forgotten that it is largely the parent or guardian who is instrumental in bringing up the child properly (in all senses of the word), when the rights and interests apart from the child’s are largely written off, and when one is too cautious in contemplating the

<sup>74</sup> *AD v. AE*, *supra* note 70 at para. 10.

<sup>75</sup> *In re F (a minor) (wardship: appeal)* [1976] 1 Fam. 238.

<sup>76</sup> It would of course be a different story if the court was concerned about G’s old age or ability to be a guardian – but this was not the case.

<sup>77</sup> See e.g., *In re K (Minors)* [1977] 1 Fam. 179 (the mother had committed adultery and taken the children away from the father. The court found the father to be a perfect role model and very close to the children, but denied him custody on the sole ground (at 189) that “the dictates of nature that the mother is the natural guardian, protector and comforter of very young children... had not been displaced.”). Cf. *S (BD) v. S (DJ)* [1977] 2 W.L.R. 44, where the court was willing to look past the wife’s adultery only after a very thorough investigation of all the surrounding facts, such as the husband’s role in the breakdown of the marriage, and the husband’s plan in relocating the children.

<sup>78</sup> Cf. *Re F (an infant)* [1969] 2 All E.R. 766 at 767: “The welfare of the ward is to be the pre-eminent or superior consideration; but that does not mean that I should leave out of account the conduct of the parties.”

long-term effects of the decision, the child's welfare can actually be jeopardised rather than be promoted.<sup>79</sup> Indeed, we have already seen how the courts occasionally place arbitrary emphasis on arbitrary factors. In an ideal world, the child should have a pair of loving parents who can sacrifice themselves for the good of the family.<sup>80</sup> However and unfortunately, many times the battle lines are drawn and parent is pitted against parent, or parent against guardian, as the case may be. If so, then this only reinforces the validity of the question to ask when considering what is in the best interests of the child: "who will be the better parent or guardian?"

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<sup>79</sup> Although our courts have long held and studies have long proven – and I agree – that under the normal run of things, the mother usually is a better caregiver *vis-à-vis* the child (maternal instincts, natural bond *et cetera.*), the whole point is that when a mother abdicates her duty to her family, then the room for the father being a superior parent becomes much larger. The cases also seem to show a heavier emphasis on maternal bonds, natural parental bonds (*i.e.*, biological parents over non-biological parents and other guardians), and the preferences of the child. See also *AAV v. AAW* [2009] 4 S.L.R.(R). 488.

<sup>80</sup> As they are asked to by the Women's Charter: *supra*, note 37.