

GRANDPARENTING IN DIVORCED FAMILIES

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I. INTRODUCTION

It is evident in current legal literature that the potentially vital role played by grandparents in the lives of children affected by parental divorce is not given serious consideration in court decisions on the custody, care and control of children since parents are recognized as the only persons with parental authority. The law is slow to intervene with the natural authority accorded to parents over their child. A central issue in this article is this: what place should grandparents occupy when a child is undergoing the trauma of parental divorce? In particular, when a judge adjudicates or conducts mediation in a case where two parents are seeking care and control of a child, should he or she also have regard to, or even seek out more information on the support that the grandparents can give to the child? We present a three-fold argument in this article: (a) the grandparent's role does not inevitably interfere with the rights of natural parents protected by the common law; (b) grandparents can contribute significantly to the well-being of the child when parents face serious crises and/or are unable to perform their normal role obligations; and (c) the court should take on a more inquisitorial role in cases involving children of divorced parents and have regard to the presence of grandparents in determining what is the welfare of the child. We discuss this three-fold argument in the light of findings from studies in several countries with particular attention to the situation in Singapore.

Our discussion develops in three parts. The first part provides a brief background on the Singapore family justice system and a critical review of the key legal concepts of parental rights, child custody, and care and control. The second part focuses on the role of grandparents in divorced families based on reported court cases, interviews with 50 divorced parents, studies of representative samples of the Singapore population, qualitative interviews with four divorced parents and interviews with four specialist family lawyers. We discuss the findings and their implications in the final section where we suggest that the grandparents' role is so significant that

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their contribution to the child's welfare should be given legal recognition as a critical factor when the court determines in whose care and control the child should be placed.

II. THE FAMILY JUSTICE SYSTEM AND THE ALLOCATION OF RESPONSIBILITY AND AUTHORITY OVER A CHILD

A. *The Family Justice System in Singapore*

A succinct definition of the family justice system was provided by the Senior District Judge of the Subordinate Courts of Singapore, who presides over the subordinate courts. He sees the family justice system in Singapore as comprising five entities:¹ the Family Court; the Legislature and the Attorney-General's Chambers, making "legislative provisions in family law"; the government, through ministries dealing with finance, community development, education, and health, and the Police Force; voluntary and non-governmental welfare organizations (NGOs); the legal profession and other professional organizations. In the most general sense, in any country the laws of the land governing family life are the expression of the prevailing values and traditions of the community and, consequently, all major institutions and groups in the country help in various ways to shape its family justice system.²

The Family Court, together with the other four constituents, shapes family law and practice in Singapore.³ Established on 1 March 1995, it is a subordinate court designated as a specialized court dealing with family proceedings. It consists of the Family Court itself, the Family Court Registry and the Family Justice Centre.⁴ In May 2006, the Family Relations Centre was established as a unit of the Family Court to provide opportunities for families and couples to resolve their disputes in a non-litigious setting. The Family Court holds regular dialogues with the Law Society and various government departments and non-governmental organizations to obtain feedback and proposals for reform or improvements.⁵ As a customized court focused on family cases, it has encouraged and enjoyed a close working relationship with experienced specialist family practitioners as well as law academics who also serve as volunteer court mediators at the court.⁶ In this customized area of family practice, more than in other general areas of legal practice, experienced family lawyers greatly

¹ Richard Magnus, "The Citizenship of the Family Justice Process" (Paper presented to the International Society of Family Law 10th World Conference, Brisbane, Australia, 9-13 July 2000); available at The Subordinate Courts of Singapore, online: <<http://app.subcourts.gov.sg/Data/Files/File/eJustice/Archives/brisbane.pdf>>.

² See S.R. Quah, *Home and Kin: Families in Asia* (Singapore: Marshall Cavendish Academic, 2005) [S.R. Quah, *Home and Kin*].

³ See D.S.L. Ong, "The Singapore Family Court: Family Law in Practice" (1999) 13 Int'l J.L. Pol'y & Fam. 328 for an earlier description of the Singapore Family Court.

⁴ The Family Court and Family Court Registry manage cases for divorce and ancillary relief, custody, adoption, family violence and maintenance. The Family Justice Centre is a body that implements and coordinates various services and programmes of the Family Court. See Subordinate Courts, *Justice: Building the Clock* (Singapore, Subordinate Courts, 2001), at 61-64 [*Justice: Building the Clock*].

⁵ *Supra* note 1.

⁶ See *Justice: Building the Clock*, *supra* note 4 at 62-63.

influence and shape the family justice system.⁷ Thus, in this article, data is also obtained from interviews with four specialist family law practitioners.

While the Family Court is an institution created within the Western legal framework, there are significant Asian cultural precedents in the Chinese, Malay and Indian traditions, particularly among immigrants and settlers in colonial Singapore in the 19th and early 20th centuries. Chinese, Malay and Indian immigrants scrapping a living under harsh conditions found themselves in need of a reliable system to put right injustices and to help them resolve conflicts, including conflicts related to family matters. The Chinese Protectorate is the best historical illustration of such a reliable system and a historical precursor to the Family Court in Singapore.⁸

B. Responsibility and Authority over a Child

1. Legal Concepts of Custody, Care and Control and Access in Singapore

Like many other jurisdictions, the courts in Singapore are empowered to make orders for the best interests of the child. In Singapore the principle applicable to all proceedings involving children is expressed in the *Guardianship of Infants Act*⁹ as follows:

Where in any proceedings before the court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration...¹⁰

Where children are concerned, orders of “custody”, “care and control” and “access” may be obtained in the courts under the *Women’s Charter*¹¹ and the *GIA*.¹² Section 126 of the *Women’s Charter*¹³ provides that an order of custody entitles the person given custody to “decide all questions relating to the upbringing and education of the child”. In Singapore, “custody” generally¹⁴ embodies the control over the important aspects of the child’s life, such as his or her education, health and religion. The concept of “custody” has been abolished in England and Australia.¹⁵

⁷ For example, in 2001, the Family Court, together with representative specialist family practitioners from the Law Society and the Legal Aid Bureau, embarked on a major project of making detailed recommendations on reforms to the *Women’s Charter (Matrimonial Proceedings) Rules* (2006 Rev. ed. Sing.), r. 4, which are specialized rules governing family proceedings. The work led to substantial amendments which simplified court procedures, reducing costs for parties and provided increased opportunities for the harmonious settlement of disputes.

⁸ See S.R. Quah, *Home and Kin*, *supra* note 2 at 175-181.

⁹ (Cap. 122, 1985 Rev. ed. Sing.) [*GIA*].

¹⁰ *GIA*, *ibid.*, s. 3. The principle is also prescribed in the *Women’s Charter* (Cap. 353, 1997 Rev. ed. Sing.), s. 125 [*Women’s Charter*].

¹¹ *Ibid.*, ss. 124, 125.

¹² *Supra* note 9, s. 5.

¹³ *Supra* note 10. The court has jurisdiction to make such an ancillary order under the *Women’s Charter* in the course of proceedings for divorce, nullity and judicial separation.

¹⁴ For the concept of “custody”, see further D.S.L. Ong, “Parents and Custody orders - A New Approach” [1999] Sing. J.L.S. 205 [D.S.L. Ong, “Parents and Custody orders”].

¹⁵ See D.S.L. Ong, “Parents and Custody orders”, *ibid.*

In these jurisdictions, both parents always retain parental responsibility and control over major aspects of their child's life. In the United States of America, it may be fair to say that by and large, "legal" custody has a similar meaning to "custody" in Singapore.

The child resides with the parent awarded "care and control" of him or her. Such orders are similar to "residence" orders in England and Australia.¹⁶ In the U.S., references to "physical" custody may connote such control over the child. A court order of "access" enables the parent without care and control of the child to spend time with the child, usually on a regular basis, such as one day during the weekends and part of a weekday or two. Jurisdictions such as England and Australia have similar orders called "contact" orders.¹⁷ In the U.S., such orders are commonly referred to as "visitation" orders.

The Singapore Court of Appeal, the highest appellate court in Singapore, has summarized Singapore's position in *CX v. CY (minor: custody and access)*.¹⁸ "Care and control" concerns day-to-day decision-making, while residual "custody" concerns the long-term decision-making for the welfare of the child.¹⁹

2. Parent-Child and Grandparent-Child Relationships

The preceding legal concepts of custody, care, control and access reflect the unconditional responsibility of the natural parents for the wellbeing of the child proclaimed in modern complex societies. However, in traditional societies and often in the intimacy of contemporary homes in Asia, Africa and Latin America, natural parents and their children are treated as members of a larger extended family network where parental roles are shared whenever needed and children receive love and attention from the family network of caring adults who may or may not share the same family household but often reside in the same neighbourhood.²⁰ Today's urban communities in many countries display the protection offered by the extended family network through the regular care provided by grandparents in intact families.²¹ The presence and care offered by grandparents is vital in families affected by divorce. In addition to the affective bond that exists between children and their grandparents, there is

¹⁶ See the English *Children Act 1989* (U.K.), 1989, c. 41, s. 8 [*Children Act 1989*]; the Australian *Family Law Act 1975* (Cth.), s. 64B [*Family Law Act 1975*] (substantial revisions were made by the *Family Law Reform Act 1995* (Cth.)).

¹⁷ *Ibid.*

¹⁸ [2005] SGCA 37. District Court decision reported at [2004] SGDC 166; High Court decision reported at [2005] SGHC 16.

¹⁹ *Ibid.* at para 31.

²⁰ S.R. Quah, *Home and Kin*, *supra* note 2 at 16-45 and 193-219.

²¹ See e.g. A.J. Cherlin, *Public and Private Families: An Introduction*, 3rd ed. (Boston: McGraw-Hill, 2002), at 331 and 354-55; S.R. Quah, *Home and Kin*, *ibid.* at 16-45; B. Sorj, *Reconciling work and family: Issues and policies in Brazil (2004)*, *Conditions of Work and Employment Series No. 8* (Geneva: ILO, 2004), online: [Conditions of Work and Employment Series: Publications <http://www.ilo.org/public/english/protection/condtrav/publ/8cwe.htm>](http://www.ilo.org/public/english/protection/condtrav/publ/8cwe.htm); Catherine Hein, *Reconciling work and family responsibilities: Practical ideas from global experience* (Geneva: International Labour Organization, 2005) ['Hein'].

usually instrumental support as well; without help from the grandparent the typical single custodial parent would be unable to deal effectively with the simultaneous but opposite demands of childcare and income earning.²²

In Singapore, in spite of the regular care provided by grandparents,²³ the legal perspective on the parent-child relationship emphasizes the singular responsibility of the natural parents when the marriage fails. The former Chief Justice, in a decision of the Court of Appeal, asserted the child's need for care and "genuine love" from birth.²⁴ Family law in Singapore expects parents to cherish and nurture their child and places a legal obligation on married parents to cooperate to care and provide for their child. "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."²⁵ The *Women's Charter* further imposes an obligation on every parent, whether married or unmarried, to provide for his or her child, whether legitimate or illegitimate.²⁶

More importantly, apart from parents and legally appointed guardians, no other adult in Singapore is given the same extent of parental responsibility and authority over a child. Parents, natural or adoptive, may seek custody under the *Women's Charter* and under the *GIA*. Testamentary guardians appointed by parents and guardians appointed by the court under the *GIA*²⁷ may also seek custody, care and control under section 5 of the Act. In contrast, the law does not give grandparents parental responsibility or authority over their grandchild.

What place should grandparents occupy when a child is undergoing the trauma of parental divorce? We examine next whether grandparents should be placed on the same footing as parents when deciding if custody, care and control should be awarded to them.

C. Does a Grandparent Have the Same Legal Right as a Parent to Seek Custody, Care and Control of a Child?

As countries vary in their approach, it is useful to survey briefly the general perspectives from England, the United States, Australia, and Singapore on this issue.

²² See e.g. U.A. Falk & G. Falk, *Grandparents: A New Look at the Supporting Generation* (Amherst, New York: Prometheus Books, 2002); Esme Fuller-Thomson, "Canadian first nations grandparents raising grandchildren: A portrait of resilience" (2005) 60(4) *International Journal of Aging and Human Development* 331; E. Fuller-Thomson & M. Miller, "American Indian/Alaskan native grandparents raising grandchildren: Findings from the Census 2000 supplementary survey" (2005) 50(2) *Social Work* 131.

²³ See S.R. Quah, *Family in Singapore: Sociological Perspectives*, 2nd ed. (Singapore: Times Academic Press, 1998) [S.R. Quah, *Family in Singapore*]; S.R. Quah, *Study on Singapore Families* (Singapore: Ministry of Community Development, 1999) [S.R. Quah, *Study on Singapore Families*].

²⁴ *Lim Chin Huat Francis v. Lim Kok Chye Ivan*, [1999] 3 S.L.R. 38 (C.A.) at 62 [*Lim Chin Huat Francis* [CA]].

²⁵ *Women's Charter*, *supra* note 10, s. 46(1).

²⁶ *Women's Charter*, *ibid.*, s. 68.

²⁷ *Supra* note 9.

1. England

The concept of “custody” has been abolished in England. Under section 8 of the *Children Act 1989*,²⁸ a contact order, prohibited steps order, residence order and specific issues order may be made.²⁹ A grandparent who wishes to seek a section 8 order may do so with the leave of the court.³⁰ A grandparent can also seek a residence or contact order without leave if he or she is a person with whom the child has lived for a period of at least three years.³¹ If a grandparent succeeds in obtaining a residence order and has care of the child, then even though he or she does not have full parental responsibility for the child, he or she has the authority to “do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare.”³²

A grandparent who wishes to obtain parental responsibility may do so by being appointed a special guardian of the child. He or she may apply for a special guardianship order under section 14A-G of the *Children Act* with the leave of court.³³

2. United States of America

In the U.S., legislation varies from state to state. Generally, American grandparents are not precluded from seeking custody of their grandchild. For example, in the State of Pennsylvania, there is legislative provision for such a right. In *Martinez v. Baxter*,³⁴ the Superior Court of Pennsylvania held that “legislative intent in enacting the new statute is obviously to provide a basis and procedure for a grandparent to obtain physical and legal custody of a grandchild in the unfortunate circumstances

²⁸ *Supra* note 16.

²⁹ Section 8(1) of the *Children Act 1989* states:

8.—(1) In this Act —

“a contact order” means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other;

“a prohibited steps order” means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;

“a residence order” means an order settling the arrangements to be made as to the person with whom a child is to live; and

“a specific issue order” means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

³⁰ See s. 10(2)(b) of the *Children Act 1989*, *supra* note 16. For a study on grandparenting in England, see Gillian Douglas & Neil Ferguson, “The Role of Grandparents in Divorced Families” (2003) 17 Int’l J.L. Pol’y & Fam 41 [Douglas & Ferguson].

³¹ *Children Act 1989*, *ibid.*, s. 10(5).

³² *Children Act 1989*, *ibid.*, s. 3(5).

³³ The *Adoption and Children Act 2002* (U.K.), 2002, c. 38, s. 115, has amended s. 14 of the *Children Act 1989* by the insertion of ss. 14A-G.

³⁴ 725 A.2d 775 (Pa. Super. Ct. 1999) at 778.

confronting many grandparents today: when their own children or individuals in their children's households are abusive or neglectful to their grandchildren.”

3. Australia

In Australia, “parenting orders” may be granted by the court under the *Family Law Act 1975*.³⁵ Section 64B provides that a parenting order may deal with the person or persons with whom a child is to live, contact between a child and the person or other persons, maintenance of a child and any other aspect of parental responsibility for a child.

Under section 65C of the *Family Law Act 1975*, a parenting order in relation to a child may be applied for by a grandparent of the child or any other person concerned with the care, welfare or development of the child. Thus grandparents have the legal right in Australia to apply for parenting orders.

4. Singapore

In Singapore, a grandparent's legal right is affected by whether the child's parents are still married, and whether the marriage is terminated under the *Women's Charter*.

(a) *Where the child's parents are still married:* Section 5 of the *GIA* provides that the court may make orders concerning custody, access and maintenance “upon the application of either parent or of any guardian appointed under this Act”.³⁶ Can a grandparent who is neither a “parent” nor a “guardian appointed under [the] Act” make an application under the *GIA* for custody of the child? If section 5 is the only enabling provision for applications under the *GIA*, grandparents will have no legal right to bring any application under the Act. Is section 5 the only enabling provision? Academic and judicial views differ on this issue. Academics have argued that section 5 should be the only enabling provision and that other interested adults should only be able to ask the court to invoke its wardship jurisdiction over a child in whom they are interested. However, the High Court and Court of Appeal in the case of *Lim Chin Huat Francis v. Lim Kok Chye Ivan*³⁷ held a different view.

In *Lim Chin Huat Francis*, two couples wanted to adopt a little girl named Esther. The mother of Esther had given her up for adoption shortly after her birth. Thus in this case, there were no parents interested in the child's guardianship. The only adults interested in obtaining guardianship rights over her were the two couples who had spent some time caring for her. One couple sought the physical return of Esther from the other, using an originating summons under section 14 of the *GIA* which enabled an application when “an infant leaves or is removed from, the custody of his lawful guardian”. The district court held that section 5 of the Act was the only enabling provision in the Act. It held that the appellants were not the parents nor the guardians appointed under the Act and had no legal right to bring an application under the Act. The High Court, however, held that section 14 also enabled a person

³⁵ *Family Law Act 1975*, *supra* note 16.

³⁶ *Supra* note 9.

³⁷ *Lim Chin Huat Francis [CA]*, *supra* note 24; High Court decision reported at [1997] 3 S.L.R. 1042 (H.C.).

to seek the return of a child removed from the custody of his lawful guardian. Section 14 provides:

Where an infant leaves, or is removed from, the custody of his lawful guardian, the court or a judge may order that he be returned to such custody, and for the purposes of enforcing such order, may direct the Sheriff to seize the person of the infant and deliver him into the custody of his lawful guardian.³⁸

The High Court defined “lawful guardian” to be any person who has charge of or control over the child. The Court of Appeal added a time factor into the definition of “guardian” and held that a lawful guardian is a person who has charge of or control over a child *at the material time*. Thus, according to the Court of Appeal, non-parents like the couple in the case were “guardians” with the legal right to make an application under the *GIA*.

The definition of “guardian” given by the Court of Appeal has been criticised as being too broad.³⁹ A “guardian” is authorised to make major decisions for the child, such as authorise the removal of the child’s kidney. The casual child-minder or kindergarten school teacher would be the guardians of the child within the definition given in *Lim Chin Huat Francis [CA]* during the times when they have physical possession of the child and would consequently be authorised to make decisions with drastic consequences for the child. Academics have argued that the definition gives more authority to the casual minder than is desirable and that “family law’s settled meaning of ‘guardian’ seeks out the adult who stands in the position of parent in relation to a child” so that “the adult in this position is rightly in a status more exalted and responsible than other adults who may also temporarily have care and control of the child.”⁴⁰ Thus interested persons such as the couples in *Lim Chin Huat Francis* should not be considered “guardians” but may instead seek the court’s wardship jurisdiction to settle matters for the child. Academics have argued that wardship jurisdiction is vested in the Supreme Court of Singapore and may appropriately be invoked under the circumstances existing in *Lim Chin Huat Francis*.⁴¹

In the light of this legal backdrop in Singapore, grandparents who are not substantially involved in the daily care of the child are unlikely to have the legal right to seek custody, care and control of the child where the parents remain in a subsisting marriage and have control of the child. However, if grandparents have charge or control of the child in the manner envisaged by the Court of Appeal decision in *Lim Chin Huat Francis [CA]*, they could be considered guardians who may have the right to seek those orders in court. It is argued here that the academic view should be adopted, that is, grandparents who only help out with babysitting should not be considered “guardians” and should not be given the same right as parents to seek custody, care and control of the child where the parents are in a subsisting marriage. Our research reveals that it is not necessary to provide such a legal right to grandparents, who, in our studies, are clearly contributing to the welfare of the family

³⁸ *Supra* note 9.

³⁹ Leong Wai Kum, “Restatement of the Law of Guardianship and Custody in Singapore” [1999] Sing. J.L.S. 432 [Leong Wai Kum].

⁴⁰ *Ibid.* at p. 462.

⁴¹ See Leong Wai Kum, *ibid.*; Chan Wing Cheong, “Application under the Guardianship of Infants Act” [1998] Sing. J.L.S. 182.

without being clothed with any further ‘rights’. This stance preserves the balance of parental authority between parents and other people, including grandparents, and has not deterred grandparents from continuing to play a vital role in supporting their children and grandchildren.

(b) *Where the parents’ marriage is terminated under Part X, Women’s Charter*:⁴² A different scenario is presented when the parents of the child are undergoing divorce or nullity proceedings. When the parents seek termination of their marriage under Part X of the *Women’s Charter*, the court is empowered to make orders as it thinks fit with respect to the welfare of any child of the marriage. Section 125, under Part X of the *Women’s Charter*, provides that the court may place the child in the custody of the parents or a relative of the child or any other person. Since the welfare of the child is the paramount consideration, the court is not restricted to awarding custody to only his or her parents. It is possible that a non-parent and non-guardian, such as a grandparent, could obtain custody. In a sense, a parent’s petition for divorce has the effect of inviting the court to assume jurisdiction over the child to make any order for his or her welfare. Under these circumstances, the parents are separating and new arrangements must be made for the child who is directly affected by the breakdown of that household.

Rule 55 of the *Women’s Charter (Matrimonial Proceedings) Rules*⁴³ provides that 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 ... apply ... for an order relating to the custody or education of the child”. It is possible for a grandparent to intervene during the parents’ divorce proceedings to seek an order of custody of the child. A grandparent under these limited circumstances is not starting a new application to bring the child before the court for resolution of matters. The court is already possessed of jurisdiction and power to make orders for the child’s welfare.

5. *Comparing Perspectives*

The following picture emerges from this brief survey. A grandparent has a right to seek custody, care and control in England, Australia and in some U.S. states. However, the courts in these jurisdictions are unlikely to grant grandparents such parental control unless the parents are unavailable or unfit to care for the child. In Singapore, the law seems to permit grandparents a similar right to seek custody or control over a child, but academic exposition on the issue suggests that no such right exists when the parents are in a subsisting marriage. However, a grandparent in Singapore can seek custody in limited circumstances when parents are involved in divorce or nullity proceedings.

We argue here that the courts in Singapore, when determining custody, care and control under Part X of the *Women’s Charter*, should always give consideration to the support of grandparents in post-divorce families whether or not the parents initiate

⁴² *Supra* note 10. Part X provides for matrimonial proceedings and ancillary matrimonial reliefs.

⁴³ *Women’s Charter*, *supra* note 10, ss. 139(1), 139(2); *Women’s Charter (Matrimonial Proceedings) Rules*, *supra* note 7 [emphasis added].

this consideration. However, this argument does not go so far as to advocate that grandparents should be given the same legal recognition as parents, even those in divorced families. No change needs to be effected on the legal rights of grandparents to their grandchildren. What should be changed is the level of consideration the courts ought to give to grandparenting support in divorced families. This argument is developed in the next part.

III. THE ROLE OF GRANDPARENTS IN DIVORCED FAMILIES

We turn now to the principal subject of our discussion, the role of grandparents in divorced families in Singapore. We examine the grandparent's role from two perspectives, the legal perspective and the social role grandparents play in the lives of grandchildren whose parents are divorced.

A. *The Legal Position of Parents vis-à-vis Grandparents and Other Non-parents*

Where a court has jurisdiction to determine in whose custody, care and control a child should be placed, what principles should guide it when it searches for arrangements which are in the child's best interest? Suppose grandparents who have formed an emotional bond with children contest against parents for custody, care and control of the children, what principles and factors should guide the court in determining what is best for the child?

1. *Perspectives from Other Jurisdictions*

(a) *England*: In England, the law generally takes the view that it is in the interests of the child that he or she should remain with his or her natural parents. In *In Re K.D. (A Minor) (Ward: Termination of Access)*,⁴⁴ Lord Templeman said, "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered." In *In Re K. (A Minor) (Ward: Care and Control)*,⁴⁵ Waite J. instructed that the question for a judge faced with a contest between a parent and non-parent is this: "Are there any compelling factors which require me to override the prima facie right of this child to an upbringing by its surviving natural parent?"⁴⁶

An example of when the supposition could be displaced is where a parent is found to be "unfit" to raise the child. In *In Re J (A minor)*,⁴⁷ although the father of the child had taken steps to reduce his use and abuse of drugs, he had not completely stopped the activities. The court found that the continued drug abuse presented a significant risk to the child.

⁴⁴ [1988] A.C. 806 (H.L.) at 812.

⁴⁵ [1990] 1 W.L.R. 431 (C.A.) at 438.

⁴⁶ Similarly in *In Re D (A Child) (Residence: Natural Parent)*, [2000] 1 F.C.R. 97 (Fam. D.) the High Court held that the lower court's decision was flawed because the judge did not consider the strong supposition that it was in the best interests of a child to live with his natural parents, which is a supposition not to be lightly displaced.

⁴⁷ [1997] EWCA Civ 1335.

Thus for a grandparent to obtain custody of a child, it must be demonstrated that the welfare of the child positively demands the displacement of the parental right. This involves the unfitness of the parents and not merely a demonstration that a grandparent can provide a better home than the parents.

(b) *United States of America*: While the laws in the United States of America vary from state to state, it is fair to say that the courts have generally been guided by two basic principles or doctrines: the “parental right” doctrine, which “stands for the proposition that the parent or parents are entitled to the custody of their children unless it clearly appears that they are unfit or have abandoned their right to the custody or unless there are some extraordinary circumstances which require that they be deprived of custody” and the concept of the “best interests of the child” which states that “the welfare and interest of the child is the primary test to be applied in awarding the custody of children”.⁴⁸

It is significant that the “parental right” doctrine “is based on the universal concept that the parents are the natural guardians and custodians of the child and that there is no substitute for their love, affection, and guidance.”⁴⁹ An illustration of these principles is found in a case from North Dakota, *In re D.P.O.*⁵⁰ which held that the biological father, as opposed to the maternal grandparents, was entitled to custody of the child, even though the grandparents had established a clear psychological parent bond with the child. There was no evidence that suggested that the child would suffer serious harm if placed in the custody of her natural parent.⁵¹ In *In re the Guardianship of B.H. & S.H., minor children*⁵² the Indiana courts held that the presumption that custody should lie with the natural parent will not be overcome merely because a third party could provide the better things in life for the child.

In the landmark decision of *Troxel v. Granville*,⁵³ the Supreme Court of the United States reiterated that the law should be slow to intervene in the parent and child relationship and should instead respect the right of the parents to raise their child in the way they see fit: “... so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”⁵⁴

However, where a parent is unfit, the state may intervene, albeit with great caution. In *Re Phillip B.*,⁵⁵ Caldecott J. said that “(p)arental autonomy is not ... absolute ... the State has a right indeed, a duty, to protect children ... However, since the state should usually defer to the wishes of the parents, it has a serious burden of justification before abridging parental autonomy by substituting its judgment for that of the parents”. An example is found in *Owenby v. Young*.⁵⁶

⁴⁸ D.E. Ytreberg, “Award of custody of child where contest is between child’s parents and grandparents” 31 A.L.R.3d 1187 at § 5 [Ytreberg].

⁴⁹ *Ibid.* at § 4.

⁵⁰ 667 N.W.2d 590 (N. Dak. Sup. Ct. 2003).

⁵¹ See also “Family Law in Fifty States 2002-2003: Case Digests” (2003-2004) 37 Fam. L.Q. 585 at 647.

⁵² 770 N.E.2d 283 (Ind. Sup. Ct. 2002).

⁵³ 530 U.S. 57, 120 S.Ct. 2054.

⁵⁴ *Ibid.* at 2061.

⁵⁵ 92 Cal. App. 3d 796 (1979) at 801-802.

⁵⁶ 150 N.C. App. 412 (2002), 563 S.E.2d 611. The grandmother of two children alleged that their father was unfit to have custody, care and control of the children. The court found evidence that the divorced

(c) *Australia*: In *In the Marriage of R*,⁵⁷ the Family Court of Australia was similarly of the view that the court should be slow to intervene in the authority of parents. “We think it is a sound principle that the Court, when determining issues of parental responsibility, should avoid unnecessary interference with the powers delegated to each of the parents”. This parental right is, of course, subject to the welfare of the child. The *Family Law Act 1975* states that “children have the right to know and be cared for by both their parents ... children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development”.⁵⁸

From this brief survey in the three jurisdictions, it is fair to say that when parents and grandparents contest for custody, care and control of the child, the approach is that it is in the welfare of the child to be with his or her natural parents and the law should not intervene unnecessarily in the parent and child relationship. Generally, this presumption may only be rebutted if the parents are demonstrated to be clearly unfit to care for and bring up the child or are not available to care for the child. This “parental right” concept recognizes that the welfare of the child is best served by having his or her natural parents care and parent him or her. Thus while these jurisdictions have given grandparents the right to seek parenting orders, they do not place grandparents on the same level as parents.

Singapore has also adopted the same approach. Grandparents, while given some legal status and right to participate in contributing to the child’s welfare, are still not placed on the same level as parents.

2. *Legal Perspectives from Singapore*

Six aspects stand out regarding the legal role of grandparents in divorced families in Singapore: the understated presence of grandparents in divorce proceedings; the significance of grandparents’ involvement with the child in family proceedings; the recognition of the parents’ reliance on grandparents’ help; the recognition of the working parent’s active role in caregiving; the recognition of the natural mother’s bond with a young child; the recognition of the role of grandparents’ care where a parent lacks commitment to the child’s interests; and the recognition of the possibility of bad influence of a grandparent on a child under his or her care. Each of these aspects requires elaboration.

(a) *Reported court cases:*

[i] Few grandparents seek or are granted custody, care and control:

Our search for relevant records suggests there are very few cases in Singapore of grandparents seeking custody of their grandchild. They do so only if there are no living parents or under exceptional circumstances such as where a sole living parent is serving a prison sentence and is unable to care for the child. There is one reported decision in the past decade where a grandmother sought custody and guardianship

father drank beer while driving his sons during visitation and also allowed his brother to do the same. Such behaviour was evidence of the father’s unfitness to have custody of children following the death of their mother in a plane crash.

⁵⁷ 167 F.L.R. 385 at 390.

⁵⁸ *Family Law Act 1975*, *supra* note 16, s. 60B.

of a child when both parents were alive and married to each other. In *CZ v. DA*,⁵⁹ the Family Court denied custody to a grandmother who sought it when the parents were in a functioning marriage. The only reported Court of Appeal decision on the issue is that of *Re C (an infant)*,⁶⁰ where the sole surviving parent was serving a prison sentence.

In *CZ v. DA*,⁶¹ the grandmother of the child alleged that the parents had neglected, ill-treated and mentally abused the child. She applied to the district court under the *GIA*⁶² to be appointed the guardian of the child. Her application was dismissed by the district judge who adopted the English position and held that the court starts from the position that it is the basic right of the child to be brought up by the persons who gave him life. As long as the parents were suitable caregivers, the court will not compare whether the parents or grandmother could provide a better home for the child.

Thus unless there are compelling reasons which positively demand displacement of the natural parents' authority over the child, the welfare of the child⁶³ includes the right to have his natural ties to his parents preserved. Apart from this principle, there is a related point which should have prevented the grandmother from obtaining guardianship. An issue which was not raised in the case was whether the grandmother had the legal right to make the application for guardianship in the first place. It has already been argued earlier that only parents, testamentary guardians and court-appointed guardians should have the legal right to make applications under the *GIA*.⁶⁴ This view preserves the balance of authority between parents (and legal guardians) and other adults who are neither parents nor guardians of the child.

In *Re C (an infant)*,⁶⁵ the father of a 2-year old child was sentenced to 10 years' imprisonment for the culpable homicide of his wife, the child's mother. The court held that the maternal grandparents should have custody, care and control of the child, and also granted limited access to the paternal grandmother. The father of the child argued that as the sole surviving parent, he should automatically be entitled to custody of the child. The Court of Appeal held that *prima facie*, a surviving parent should have the right to custody of his child. However, this right is subject to the overriding power of the court who must have in mind the welfare of the child. As the father of the child was in prison, he was not in the position to care for the child. The tussle lay between the maternal grandparents and the paternal grandmother. The maternal grandparents were held to be the more suitable guardians as they had been effectively taking care of the child who was very attached to them. The court added that as "kinship is a vital aspect of human life"⁶⁶ contact by the paternal grandmother will be useful to enable the child to know, as he grows up, that his father is still around. As such, the paternal grandmother was granted access twice a year in Australia. The

⁵⁹ High Court decision reported in [2004] 4 S.L.R. 784 (H.C.); subordinate court decision reported at [2004] SGDC 192.

⁶⁰ [2003] 1 S.L.R. 502 (C.A.).

⁶¹ See district court decision at [2004] SGDC 192.

⁶² *Supra* note 9.

⁶³ The welfare of the child prevails over all other considerations. This principle has been explained in Part II.B.1, above.

⁶⁴ See Leong Wai Kum, *supra* note 38 at 464-466.

⁶⁵ [2003] 1 S.L.R. 502 (C.A.).

⁶⁶ *Ibid.* at 509.

father is at liberty to apply for custody or access to his child when he is released from prison.

These two reported cases demonstrate that the law considers the parent to have a superior 'right' to his or her child. A more child-orientated description of the same principle is that a child's welfare is best served by placing him or her in the custody, care and control of his or her parents. It would therefore be rare for a grandparent to seek custody of a grandchild where the parents can care for the child.

[ii] Significance of grandparents' involvement with the child in family proceedings:

In the large majority of cases where the grandparents' suitability as caregivers of children is presented in court, the battle is in fact pitted between the maternal grandparents and the paternal grandparents as daily carers of the child of the divorced parents. These grandparents are not seeking custody or care and control of the child for themselves. However, their support in care giving can constitute a good reason for the court to grant care and control to the parent to whom they provide parenting support. In many cases, a divorced parent attempts to persuade the court that the child should live with him or her. If a parent can show that his or her parents (the child's grandparents) are close to the child and are able to provide care for him or her while the parent is at work, the court may find that it is in the child's welfare for that parent to have care and control.

This observation from the cases we have examined, some of which are described below, is important to our main argument. In the light of our research findings from interviews with family members, it is submitted that the courts should always consider whether there are any grandparents who can provide support to the children of divorced families. While the cases noted involved parents who initiated the presentation of facts on how the grandparents could contribute to the daily care of the children, we argue that the court should consider such support even where the parents do not present it. This requires the court to undertake a more inquisitorial role in such proceedings.

[iii] Recognition that both parents rely on grandparents to provide daily care for the child:

In contrast to the dearth of reported decisions on the award of custody to grandparents, there are numerous reported cases recognizing the care giving support that grandparents provide to the children of divorced parents. Where both parents work, the courts have remarked that both parents will rely on third parties, usually the grandparents, to provide care giving for the child. Much weight will then be placed on which grandparent has provided care in the past, which is close to the child and which is able to continue to provide care for him or her.

In *Wan Tik Wendy v. Lim Soon Boon Herbert*,⁶⁷ the court found that the children had become accustomed to their routine in their father's care and held "While the [mother] has harped on the fact that it is actually the ... paternal grandmother who is looking after the children and not the [father] himself, her position would also be similar if the children were to live with her. This is because the [mother] will continue to be a working mother herself and her own mother, a Hong Kong national, will look after the children when she is at work."⁶⁸

⁶⁷ [2000] SGDC 47.

⁶⁸ *Ibid.* at paras. 10, 12-13.

Similarly in *DN v. DO*,⁶⁹ the Family Court held that the child “is close and attached to the [father] and his paternal grandmother and aunt ... Even factoring in the adaptability of young children, I was of the view that it was not in the best interests of [the child] to uproot him from the familiarity of his home and care-givers of the last 7 years”.

[iv] Recognition of value of a working parent’s active role in care giving:

The cases have also placed some weight on the parent’s involvement in the child’s care after working hours. Where a working parent is an active caregiver outside working hours, that parent’s care is preferred over a grandparent’s care, provided there is also good care giving support during working hours.

In *Cheok Wah Jin v. Guo Xiao Ying (m.w.)*,⁷⁰ even though the children were looked after by the paternal grandparents since they were young, the mother, who was found to be an active caregiver of the children, was given care and control. She also had the assistance of the maternal grandparent in care giving during working hours. Similarly, in *HW v. HX*,⁷¹ the court stated that it would be better for a child to be cared for by her own mother than by relatives.

In *DV v. DW*,⁷² the child was cared for by the maternal grandmother in the day and the mother was found to be committed to caring for the child and concerned about the child’s education. The paternal grandparents were also close to the child and were available to look after the child. In such a case where two pairs of grandparents were available to provide care for the child, the continuity of living arrangements and the active parenting guidance⁷³ from the mother favoured care and control to be given to the mother.

[v] Recognition of the natural mother’s bond with a young child:

It is useful to state here that, in Singapore, mothers of young children may have a slight edge over fathers as carers, where all other things are equal. In the landmark decision of *Soon Peck Wah v. Woon Che Chye*,⁷⁴ the Court of Appeal held that where both parents are equally good parents, young children should be with their natural mother.

[vi] Recognition of the value of grandparents’ care where a parent lacks commitment to the child’s interests:

However, it is possible for a mother to be found lacking in commitment for the child’s interest in which case the *Soon Peck Wah* principle will not apply. In *EO v. EP*,⁷⁵ the paternal grandparents showed themselves to be better caregivers than the maternal grandmother. Coupled with the finding that the mother had no definite plans on

⁶⁹ [2004] SGDC 204 at paras. 9-11.

⁷⁰ [2003] SGDC 72 at paras. 38-39, 45.

⁷¹ [2005] SGDC 81 at paras. 11-12.

⁷² [2004] SGDC 214.

⁷³ The Family Court noted that under the mother’s “firm guiding hand” the child had been doing exceedingly well in school; *ibid.* at para. 16.

⁷⁴ [1998] 1 S.L.R. 234 (C.A.) [*Soon Peck Wah*]. The court said (at 251), “*All other things being equal*, a very important factor to bear in mind was that we were dealing with an extremely young infant. We felt that the maternal bond between the natural mother and the infant was a pivotal consideration here.” [Emphasis added].

⁷⁵ [2004] SGDC 18.

the child's care in the immediate future,⁷⁶ the court placed the young child of three years in the care of the father who had the assistance of the paternal grandparents. A similar instance is found in *FN v. FO*.⁷⁷

[vii] Recognition of possibility of a grandparent exerting a bad influence on a child under her care:

An interesting case involving a grandmother found to have a bad influence on the child to whom she provided daily care arose in *Jasvinder Kaur d/o Gurcharan Singh v. Jaswant Singh s/o Jaginder Singh*.⁷⁸ The child, who was 7 years old at the time of hearing, had been looked after by the paternal grandmother since his birth. The district judge found that "the child is left largely to the care and company of his grandmother ... the child lacks guidance and supervision, is confused between what is the right and wrong values and socially he has developed poorly ... The grandmother was observed being violent and abusive towards [the child's mother] ... If left under the care of his father, there was every likelihood that he might grow up to be a juvenile delinquent. ...".

This case reminds us that while much focus has been placed on the fitness and ability of the parent to care for the child, it is also very important for the court to consider the fitness of the grandparent to care for and raise the child.

The reported court cases demonstrate that even where a grandparent may have the right to seek custody, care and control of the child, few exercise this right to seek parenting orders. It is not surprising that grandparents do not contest parents over the child in ordinary circumstances, since the substantive legal position is that parents have the *prima facie* right to parent their child, premised on the recognition that it is in the child's welfare to be raised by his or her natural parents. However, the cases reveal that where parents contest each other for care and control of their child, the parent with grandparenting support has a much stronger case than the one without. Under these latter circumstances, the courts have rightly given consideration to the importance of grandparents to the welfare of the child.

(b) *Opinions of specialist family law practitioners:*

The next set of data on the role of grandparents is provided by interviews with four family law practitioners. The court cases in Singapore show that very few grandparents are awarded custody, care and control where at least one parent is available to care for the child. Thus the few precedents available provide little assistance to a court faced with the question of considering grandparents as the best option. As many cases in Singapore are resolved by agreement through the assistance of lawyers and mediators, further data was usefully drawn from responses

⁷⁶ *Ibid.* at paras. 25-26. The district judge held (at para. 25) that the "wife has not clearly set out what concrete plans were for the child's care in the immediate future. Full day childcare or care by a maid would not be on par with the dedicated care of the paternal grandparents, especially since the child was quite so young".

⁷⁷ [2004] SGDC 292. The Family Court found that the children had been looked after all their lives by the paternal grandmother with the assistance of maids. As the mother's proposed care arrangements were not well thought out, it was best that they remained in the care and control of the father whose mother would continue to provide childcare.

⁷⁸ [2001] SGDC 64.

from four highly experienced family law practitioners interviewed for the purpose of this article.⁷⁹

To the question: “Assuming you are a Family Court judge, what would you say are the three most important reasons that would compel you to grant grandparents custody of their grandchildren?” the responses from the four specialist family practitioners were as follows:

First, the parents must be unfit or unavailable to care for their children. The more specific reasons offered were (a) where the natural parents are not available to care for the child (such as where they are deceased or incarcerated); (b) where the natural parents are incapable of caring for the children (such as where they are suffering from a mental or physical handicap, or other illness); (c) where the natural parents are unfit to care for the child such that the child will suffer harm under their care (such as where they are sexual abusers or drug users); and (d) where both natural parents are not interested in the child or do not want custody of the children, whether due to remarriage or relocation overseas.

Second, the grandparents must be “fit” caregivers. Two factors were of relevance in the opinion of the four family law specialists: (a) where the grandparents have raised the grandchildren since birth and the natural parents had never actively played any role in organizing their children’s lives or future; and (b) where the grandparents have played a significant role in the children’s lives and exhibit a keen concern for their continued welfare.

These responses reflect a two-stage process to the determination of custody. First, the court must heed the principle from the cases in Singapore, England, the U.S. and Australia that generally, it is best for a child to be with his or her natural parent. The court should not move away from this presumption unless the case falls within the limited circumstances described above on the unavailability or unfitness of parents. Only if the natural parents are deceased, unavailable, incapacitated or unfit should the court move on to the next stage of considering the fitness of the grandparents. At this stage, the court may consider relevant factors such as whether the grandparents had been interested in the child’s welfare prior to the hearing, whether they had established a good bond with the child, whether they have been supportive of the children by giving positive care instead of contributing to the parent’s marital conflict or having a bad influence on the grandchildren, and whether they are of advanced years or in very poor health in which case they may not be fit to have custody, care and control of the child.

In a U.S. case, the Oregon Supreme Court stated that a grandparent may be unfit if she had “a penchant for withholding her grandchildren from their mothers”, “had enrolled [the grandchild in question] in school under [the grandmother’s last name] rather than under [the father’s name]”, or had, in the past, been extremely insensitive to her daughters’ being ‘molested’ by their brothers and stepfather.⁸⁰

In Singapore, the case of *Jasvinder Kaur d/o Gurcharan Singh v. Jaswant Singh s/o Jaginder Singh* demonstrates who may constitute an unfit grandparent. In that

⁷⁹ These four lawyers were interviewed by D.S.L. Ong in September 2005. One has practiced family law since 1993, one since 1991, another since 1982, and the fourth since 1981.

⁸⁰ Ytreberg, *supra* note 47, at § 11; *Denessen v. Taylor* (1953) 198 Or. 347, 255 P.2d 148 (Or. Sup. Ct. 1953).

case, the grandmother was observed being violent and abusive towards the child's mother and the child under her care exhibited extreme delinquent behaviour. If a grandparent is unfit, the child's welfare may be better served by placing the child with another relative or the sibling of the parent. Siblings come close to grandparents in terms of suitability to have custody, care and control of the child where the parents are unable or unfit to care for him or her.

When asked who would be their choice of permanent caregivers to their children should they and their spouse be unable to care for their children, the family practitioners were somewhat divided on their choices. Two lawyers were inclined to choose their siblings while the two were inclined to prefer their parents.

The views given by the family practitioners coincide with the experiences of the four divorced parents (below) and other social science findings in all but one aspect: two of the family law practitioners suggested that when their parents divorce, older siblings may provide better substitute care to the youngest child than grandparents. The experiences of the four divorced parents (part II.B, below) show that the presence of and support from grandparents is preferred. This is also the main finding from social science studies of children in divorced families. The love and affection provided by most grandparents to the child is typically recognized by parents as above and beyond that of uncles, aunts and other adult members of the family. This is demonstrated also in intact families where working parents usually see grandparents as the best child-minders of their children.⁸¹

B. *The Social Role of Grandparents in Divorced Families*

Our three-fold argument in this paper (that grandparents do not inevitably interfere with the role of parents; that grandparents play a significant supporting role for children in divorced families; and that divorce courts need to exercise their inquisitorial function to determine the availability of that role) are supported by social science research findings on family structure, relationships and dynamics. Social science studies have systematically documented over the past fifty years the persistent and positive role played by grandparents in many cultures.⁸² Grandparents tend to be meaningful conflict 'buffers' for children of a divorce by providing a trusted, secure and supportive relationship.⁸³ Following the preceding overview of the legal situation in the United States, Australia, the United Kingdom, and Singapore, it is pertinent to look at the social role of grandparents in these four countries.

In the United States and Canada, grandparents in ethnic minority communities such as the African Americans, Native Americans, Native Canadians, and lower-income groups, are significantly more involved than grandparents in other communities in the physical, emotional and even financial care of their divorced

⁸¹ S.R. Quah, *Family in Singapore*, *supra* note 23.

⁸² Examples of the wealth of relevant sociological studies are: E. Bott, *Family and Social Network: Roles, Norms, and External Relationships in Ordinary Urban Families* (New York: Free Press, 1957); S.J. Bahr, *Family Research A Sixty-Year Review, 1930-1990* (New York: Lexington Books, 1991); S.R. Quah, *Home and Kin*, *supra* note 2.

⁸³ Joan B. Kelly, "Children's adjustment in conflicted marriage and divorce: A decade review of research" (2000) 39 *Journal of the American Academy of Child and Adolescent Psychiatry* 963, at 965.

children's children.⁸⁴ Similar findings on the active support from grandparents are reported in Australia⁸⁵ where the 2003 population statistics show that 62% of divorces involved children below 10 years of age⁸⁶ and "grandparents are the largest providers of informal care" particularly in divorced (one-parent) families.⁸⁷ In the United Kingdom child benefits covered 97% of parents with dependent children in 2002-2003 and the provision of formal childcare has increased. But with life expectancy increasing, a larger proportion of adults in the UK today have at least one of their parents alive, thus "grandparents played a large role" in childcare.⁸⁸

The intensity of grandparents' involvement in the care of their grandchildren varies across cultures, but their involvement is widespread⁸⁹ although some analysts argue that grandparental help with childcare in intact families is less available in industrialized countries and that even in developing countries it may include inconvenient traveling between the parents' and grandparents' homes.⁹⁰ Nevertheless, social science research indicates that when the parents' marriage breaks up, healthy grandparents normally offer stability to their grandchildren by providing a sense of home, stepping in with love, discipline and the transmission of family values that children might have missed over the period of conflict that preceded and accompanied their parents' divorce.

The grandparents' supporting role for the child has two fundamental advantages over help offered by social services, appointed foster homes and other external sources. The first advantage is the history of the natural bond with the child; grandparents who fill in for the divorced parents usually have maintained close contact with the grandchildren over the years. Thus they are seen by the children as possibly the closest family members after their own parents. The second advantage is that grandparents offer a sense of stability and refuge for the child confronting the divorce crisis. Children of a divorce typically endure various unexpected and traumatic changes as their parents go through the deterioration of their marriage, separation, divorce, grief, new relationships and eventual remarriage. For the child these transitions are unsettling and represent unwanted changes of residence and school, and the departure from friends and familiar places. In contrast, the grandparents' home (and/or their presence) is stable and trustworthy. Unfortunately, while

⁸⁴ See e.g. U. Alder Falk & G. Falk, *Grandparents: A new look at the supporting generation* (Amberst, New York: Prometheus Books, 2002); Bachman, Heather J. & Chase-Lansdale, P. Lindsey, "Custodial grandmothers' physical, mental, and economic well-being: Comparisons of primary caregivers from low-income neighbourhoods" (2005) 54 *Family Relations* 475.

⁸⁵ See e.g. D. Edgar, "The social reconstruction of marriage and parenthood in Australia" in S.R. Quah, ed., *Family as an Asset: An International Perspective on Marriage, Parenthood and Social Policy* (Singapore: Times Academic Press, 1990) 96.

⁸⁶ Australian Bureau of Statistics, *Divorces, Australia, 2003* (Canberra: ABS Publication 3307.0.55.001, 2005).

⁸⁷ Australian Bureau of Statistics, *Australian Social Trends, 2005* (Canberra: ABS Publication 4102.0, 2005).

⁸⁸ United Kingdom Office for National Statistics, *Social Trends 35* (London: Census, Labour Force Survey, 2005) at 18-119.

⁸⁹ See e.g. S.K. Steinmetz, ed., *Family Support Systems Across the Life Span* (New York: Plenum Press, 1988); M.B. Sussman, S.K. Steinmetz, & G.W. Peterson, eds., *Handbook of Marriage and the Family*, 2nd ed. (New York: Plenum Press, 1999); A.J. Cherlin, *Public Families: An Introduction* (New York: McGraw-Hill, 2004).

⁹⁰ Hein, *supra* note 21 at 6-7.

they are visible to their grandchildren, grandparents are invisible to the courts unless specifically mentioned in the divorce petition of one or both of the parents.

Data from sociological studies of families in Singapore suggest the same trends reported above.⁹¹ The long history of the bond between grandparents and grandchildren in Singaporean families is evident. While not all family households have grandparents, about nine out of every ten grandparents live in the same household with their married children and grandchildren.⁹² The analysis of personal interviews with 50 persons who were divorced or in the midst of divorce proceedings⁹³ demonstrates the supporting role that grandparents play for their children and grandchildren. Two thirds of these divorced persons sought advice and help regularly from their own parents on matters concerning their marital problems, child care and disciplining, practical help with housekeeping and related issues.

Beyond the macro-level trends outlined by census data and studies of large populations, the supporting role of grandparents in the lives of their grandchildren can be appreciated from a 'microscopic' perspective through the life experiences of four divorced parents. The four divorce cases, Ela, Jessy, Ann and Nadah (these are pseudonyms given by us to comply with the assurance of confidentiality given to the interviewees), were selected from the users of services at a Family Service Centre in the western part of Singapore and were interviewed in-depth, specifically for this study.⁹⁴ All of them are lone working parents: Ela is a 41-year-old Chinese female with two sons aged 12 and 15; Jessy is a 32-year-old Chinese female and has an 11-year old son; Ann is 53, a Chinese female, and has an 8-year old daughter; and Nadah is 43, an Indian male, and has a 10-year old daughter. The first two cases (Ela and Jessy) demonstrate the vital role played by grandparents. The other two cases (Ann and Nadah) illustrate the hardship created by the absence of grandparents' help.

1. *When Grandparents Save the Day: the Cases of Ela and Jessy*

Ela completed her secondary school and was working as a bank clerk when her first son was born. She quit her job and became a full-time housewife. In her 10th year of marriage she was abandoned by her husband who simply took off one day and left her and their two boys. "My husband left us all. He is not interested in the boys," she said. "For me it has been a constant struggle but it was worst at the beginning" because "I was not working when he left us. All we had was his salary. When he went away he left us with nothing." Ela loved her husband and was totally unprepared

⁹¹ S.R. Quah, *Family in Singapore*, *supra* note 23; Stella R. Quah, "Ethnicity and parenting styles in Singapore" (2003) 35:3/4 *Marriage and Family Review* 63.

⁹² S.R. Quah, *Family in Singapore*, *ibid.*; B.G. Leow, *Census of Population 2000* (Singapore: Department of Statistics, 2001).

⁹³ These personal interviews were part of a national study of families conducted by one of us and based on a representative sample of the total Singapore population. For further details on findings and the study methodology see S.R. Quah, *Study on Singapore Families*, *supra* note 23.

⁹⁴ The four semi-structured in-depth interviews were conducted by S.R. Quah in September and October, 2005. The four interviewees (three Singaporean Chinese women and one Singaporean Indian man) were selected from the divorced parents currently receiving counseling at one of the Family Service Centres ('FSC') in Singapore. There are more than 30 FSCs throughout Singapore, offering a wide variety of services, from counseling to education and recreation, for children, youth, adults and senior citizens. The quality of the FSCs' services is monitored by the Ministry of Community Development, Youth and Sports.

for the crisis. She went into severe emotional turmoil when he abandoned her and the children. She sought and received advice and help from her siblings, friends, and several counselors. But what has provided stability for her and the children are her parents. "My mother cooks dinner for us every day," explains Ela, "we eat together. The boys go straight to my parents' apartment after school every day, just within walking distance. I go there after work. We meet there and have dinner. She helps a lot." Her parents, particularly her mother, bestow on their daughter and grandchildren more than instrumental assistance (housekeeping, meals preparation); their home is home as well for Ela and her boys. Although Ela and her children live in their own apartment nearby, having daily meals at her parents' home is a meaningful symbol of family togetherness. The boys play and study at their grandparents' home after school and Ela and her mother enjoy the chance to talk. Ela observed that her father "never talks much. He doesn't like to talk or give advice ... I think he doesn't like what's going on [the marriage breakup] but he doesn't say anything. My mother talks more." Ela added with a smile, "Sometimes my mother gives too much advice." But "my mother worries a lot about the children", particularly their education. As the grandmother did not have formal education she cannot offer guidance on her grandchildren's schooling but she does what she can. "She cooks for us everyday and loves the boys very much."

As expected, the relationship between grandparents and grandchildren is a loving one but the children's perspective of the 'fun' part of that relationship changes as they get older. Ela noted that her boys, now teenagers, have begun to "feel there is nothing to talk about [with adults] and that their grandparents are 'nagging'. They think I am 'nagging' too! They were happier with the grandparents when they were little," she added. With the support and advice of her parents, siblings and friends, she has found a full-time job and, as she put it, now "things are better. I have peace of mind." She is now paying punctually the monthly installments on her apartment and utilities and has no outstanding debts. Asked who she thinks are the best three persons she trusts to look after her children if she needs help, Ela replied, "The best person is my mother; in second place either my elder brother or my elder sister; and in third place my father. My mother prepares our food. She is the best. She knows how to help us and she loves the children. My brothers and my sister are all married and have children. They could help, especially my elder brother ... but we are not very close. My father is not a good choice [he does not like to interact much]. He would be only a last resort."

The second illustration of the positive support provided by grandparents is the case of Jessie who is in her early thirties and has an 11-year old son. Her husband abandoned her and their son after three years of marriage. Jessie and her son moved to her parents' apartment after her husband left her. Her parents' home offered the refuge she needed at that critical time but the logistics proved difficult; as she explained, her parents and four siblings live in a three-bedroom apartment and "it was very crowded ... and noisy"; she could not get the night rest she needed to keep up with her full-time day job. She and her son are now living in her own rented apartment, in the same neighbourhood as her parents. Jessie comes from a very traditional Chinese family where emotions are not discussed easily or openly; and she tends to be shy. "I don't talk too much with people. I prefer to be alone and quiet." She did not ask her parents for help directly. "They don't talk much either. We are Chinese. They care for us but we don't talk." Affection and concern

are shown through deeds. Although there were already six persons in her immediate family sharing a three-room apartment, her parents welcomed her and their grandson when her marriage broke down. Jessy's mother feels sad and worried for her. "She cooks dinner for us every evening. We eat there. She cares a lot for my son. But she spoils him. She lets him do whatever he wants." Jessy describes her father as "very quiet. He doesn't talk. But he loves us. He likes a lot that we eat all together on Sundays and he follows us to the park. He plays with my son. And they talk. Father doesn't like to talk but he talks with my son!" Occasionally when her work stretches beyond regular hours her parents look after their grandson. He is never left alone. Asked who she thinks are the best three persons she trusts to look after her children if she needs help, Jessy ranked her mother first, her father second and her elder single sister, third. She explained, "My mother is the best but I am afraid the problem is she spoils my son. She doesn't punish him when he is naughty. She lets him do whatever he wants. My father loves my son and they talk a lot. My son loves him too. But, like my mother, my father spoils him too. My sister is good because she loves my son but she would discipline him if he doesn't behave well."

2. *When Grandparents are Absent: the Cases of Ann and Nadah*

Ann is a Chinese woman in her early fifties. She has an 8-year old daughter, Cecil. Her marital breakdown was caused by her husband's aggressive temper and the physical violence she and her daughter had to endure. In contrast to Ela and Jessy, Ann does not have any support from her own parents or siblings and has had to deal with her situation alone. "I didn't know what to do," she said. "For five years it was terrible. I used to cry a lot. My daughter tried to console me. I had no one at first until my friend asked me to seek counseling." With the help of a social service counseling agency, Ann found a shelter for abused women but it was only available for three months. She left her matrimonial home with her daughter and stayed at the shelter. She moved from there to the empty office owned by a sympathetic landlady who allowed her to use the space with her daughter, free of charge, as a provisional 'home' until the next tenant moves in. The interview was conducted there. Ann said she cannot move back to her matrimonial apartment because it is part of the matrimonial assets currently under dispute at the divorce court. She is also afraid her ex-husband might resume his abuse. She is supporting herself and her daughter, working on a variety of short-term part-time jobs and a job at a real estate agency.

Both Ann's father and mother are in poor health. Her mother is showing early signs of dementia and her father has difficulties walking and has been hospitalized recently. But, more important than her parents' recent health problems, is their negative attitude towards Ann's marriage breakdown. Ann explained, "My parents don't help me with the divorce. They were against my marrying that man in the first place. They are rich. ... Mine was a late marriage [Ann was 42 when she got married] and he [her former husband] is uneducated, rude, and aggressive. He has threatened to burn their house. My parents are scared of him and want nothing to do with me and my daughter because of him. My father ... and my mother were against my marriage with that man. They have money and this man had nothing. My father simply advised me to get a lawyer! He was implying it was my problem, my fault. [My ex-husband] insults me with vulgarities and threatens to beat me up and he used to beat up my daughter. He has said he would burn up my parents' house. Because

of that I don't want to go to their house; he might follow me. I want to keep that man away from my parents."

What is most unexpected and which makes Ann's and Cecil's lives particularly distressing is the attitude of the grandparents towards their granddaughter. Said Ann, "My parents hate my daughter". Cecil cuts in, "They hate me. They say I am like my father." "Yes," said Ann, "My parents and my brothers and sisters say my daughter is naughty and aggressive like her father and they think she even looks like her father! They hate her. They don't want to have anything to do with us." Cecil's paternal grandparents are also absent. According to Ann, her mother-in-law "does not have contact with us at all and could not care less about my daughter"; she said her father-in-law felt the same way when he was alive. Asked who she thinks are the best three persons she trusts to look after her daughter if she needs help, Ann responded "Nobody" and looked at her daughter for confirmation. The little girl agreed, saying "Nobody". But, after giving it some thought, Ann said, "My younger sister (she is two years younger than me) would be number one because she is my daughter's godmother. She is doing very well. She has her own house and she is single." Ann found it difficult to identify the second best person to take care of her daughter. After some hesitation she decided, "My elder sister could take care of my daughter. She is married, her children are grown up and she already has three grandchildren! But once I asked her for some help to look after my baby because I was working and she refused. Yet she takes care of her grandchildren!" Prompted to think of a third best person, Ann replied, "There is no one else."

The second illustration of the added distress caused by the absence of grandparental support is the case of Mr Nadah and his 10-year old daughter Dashi. Mr Nadah is a temporary truck driver. He has only two years of formal education but is proud of his success in getting his driver's licence which is effectively his and Dashi's "meal ticket". The marital conflict that ended in divorce for Nadah became acute when his wife accused him in court of drunkenness and physical abuse, which he denies. After serving a 10-month prison term he returned home but his wife decided to leave him. She left Dashi with him. The divorce was granted in the 11th year of marriage. They are currently involved in a child custody dispute. Nadah's major dilemma concerns the care of his little girl. Putting his arm around Dashi he said, "This is a girl. Girls need the mother to take care of them. I am the father. I am good to bring the money only. I don't know how to take care of her. But I have to care for her. Her mother is not good. She left us." His father passed away 25 years ago and his mother died two years ago. "She passed away one month after I went to prison as a result of the PPO. She was very sorry for what happened because she was the one who found the woman as a bride for me. She felt very bad." Nadah said he receives no help at all from his siblings (one brother and two sisters). Although he feels his married elder brother is "OK", he does not see his brother as a source of advice on how to solve his marital problems. Nadah's mother-in-law and father-in-law passed away before he got married. Asked who he thinks are the best three persons he trusts to look after his daughter if he needs help, Nadah could only mention "Auntie", a neighbour who is the paid child-minder taking care of Dashi after school hours. Nadah explained, "Auntie is a lady who is married and has her own children and looks after children. I pay her \$300 per month. She fetches Dashi from the childcare centre every day. I [join them there and] eat at Auntie's house ... and go home with Dashi. Auntie cooks good food for Dashi and makes her do her

homework. She knows what to do. She is very good.” Nadah has to depend on paid help as he has no family to provide emotional and practical support to care for his only daughter. He feels very stressed by, on one hand, what he believes is his innate inability as a man to look after his daughter, and on the other hand, the imperative of fighting for custody because he is convinced his former wife is an unfit mother.

To sum up, the interviews with the four lone divorced parents illustrate the major contrast in stress and adjustment between the two divorced parents who enjoyed the presence of grandparents in their children’s lives and the two parents who had to face alone the adversity brought about by their marital breakdown. They and their children lack the stable, trusted source of reliable support and affection typically offered by grandparents. The quality of the relationship between the grandparents and the child over the child’s life span is fundamental in creating a sense of affection and trust between them. Jessy and Ela know this very well. These two divorced women trust their parents as caring and loving grandparents and both women, like most lone parents, need the support the grandparents offer. Ann and Nadah are experiencing the negative side of that relationship. There are no grandparents who can give Nadah the emotional and practical support he seriously needs as a lone parent. Ann’s relationship with her parents was bad from the beginning of her marriage and has become destructive for both her daughter and herself.

IV. CONCLUSION

Should a grandparent be given serious consideration as an alternative parent by the court in child custody decisions? There are two general answers in the literature. On one hand, there is general agreement in legal circles in the United Kingdom, the United States, Australia and Singapore that the natural right of parents supersedes the goodwill of grandparents and even any material advantages they may have over the child’s parents; and that grandparents should be considered on the same basis as any other potential child custodian. On the other hand, social science studies indicate that grandparents can play a vital role in the lives of children affected by parental divorce and that the role of grandparents is not given serious consideration in court decisions on custody orders and on care and control orders.

We set out in this study to explore possible answers using a combined legal and sociological perspective. Our argument in this article is threefold: (a) there is agreement on the “parental right” doctrine whereby parents are assumed to be “the natural guardians and custodians of the child”; that this principle is subject to the welfare of the child; and, consequently, contrary to standard opinion in legal circles, the grandparent’s role does not inevitably interfere with the rights of natural parents protected in the common law; (b) grandparents can contribute significantly to the well-being of the child when one or both parents face serious crises and/or are unable to perform their normal role obligations; (c) the court should take on a more inquisitorial role in cases involving children of divorced parents and have regard to the presence of grandparents in determining the welfare of the child. We have discussed this threefold argument in the light of findings from social science and legal studies in several countries with particular attention to the situation in Singapore. The data discussed include population figures, surveys, and qualitative interviews of specific cases of divorced parents and family law practitioners.

Summarizing our findings, we suggest the following considerations which can usefully guide the development of the law as well as the court tasked with determining whether to grant custody, care and control to a grandparent or to a divorcing parent:

(1) The data collected from Singapore legal sources show that even when a grandparent is legally entitled to seek custody in the course of the parents' divorce proceedings, the reality is that few grandparents in Singapore use the legal process to intervene. Instead, grandparents continue to assist the parents in parenting responsibilities without being formally given a legal right or responsibility to do so. The cultural norms that emphasize family support lead most grandparents to provide their support spontaneously and to see their involvement in the lives of their grandchildren as a normal aspect of family life. These social norms suggest that there is currently no pressing need to provide grandparents the legal right to intervene when the parents are in a subsisting marriage. As social norms and family structure change over time, the provision of legal rights and the present legal framework would need to be modified accordingly.

(2) Despite the dearth of cases involving grandparents seeking custody for themselves, the roles of grandparents have been given much recognition in the court when parents contest for custody orders. The cases demonstrate that it is common for parents to present to the court childcare arrangements which involve substantive childcare provided by grandparents. We suggest that the court should continue to give recognition to the important social role of grandparents by considering their contribution seriously in the caregiving of children, particularly of divorced working parents. It is appropriate for the court to take into account the support given by grandparents when it is determining which parent the child should live with. The court should not be overly mesmerised by the "parental right" doctrine such that it fails to give due regard to the role of grandparents. Further, even when parents do not or need not present facts on grandparenting support in order to strengthen their case, the court should assume a more inquisitorial role in investigating whether there are grandparents who can contribute to the welfare of the child. For example, the court could direct lawyers and parties to give more information on the involvement of the grandparents in the child's life. It could also direct social workers to submit a custody evaluation report which reflects on the roles of the grandparents. In appropriate cases, it may interview the child on his or her wishes under section 125 of the *Women's Charter*, raising questions that bring out the role of the grandparents in that child's life.

(3) Any provision of further legal rights to grandparents where the parents' marriage is terminated needs careful consideration. Even when the court has jurisdiction and powers to grant custody, care and control to a grandparent under Part X of the *Women's Charter*, it should bear in mind that first, parents are presumed to be the best caregivers and it is only when they are unavailable or unfit that other non-parents should be considered for custody, care and control. Thus, the court should be guided as follows:

(a) Where parents are available and are fit parents, the "parental right" doctrine applies, and grandparents cannot compete with them on the same footing as caregivers;

(b) When deciding the award of care and control between two available and fit parents, the court should consider the support that grandparents can contribute to the welfare of the children whether or not the parents present the facts on their own initiative;

(c) Where parents are unavailable or unfit, grandparents stand out as the group most suitable as alternative parents to the child;

(d) Where parents are unavailable or unfit, when deciding whether to award custody, care and control to the paternal grandparents, maternal grandparents or some other adult (usually a sibling of the parents), the court should consider grandparents as generally the most suitable provided the examination of these factors prove them suitable: the fitness and ability of grandparents to continue to provide good care; the quality of the relationship between grandparent and grandchild over the child's life span; and the quality of the relationship between the grandparent and each of the child's parents over the child's life span.

Points (1) and (2) set legal boundaries to the roles of parents and grandparents. Grandparents need not be given further legal rights⁹⁵ to intervene where parents are in a subsisting marriage as there is a risk of unnecessary interference with the parents' autonomy to parent their child. However, their role is so significant that their contribution to the child's welfare should be given legal recognition as an important factor when the court determines parenting orders sought by the parents.

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⁹⁵ A similar conclusion was reached in Douglas & Ferguson, *supra* note 30.