IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
[ORIGINATING SUMMONS NO: WA-24F-46-02/2022]

Dalam Perkara mengenai Kanak-Kanak yang bernama ILA

Dan

Dalam Perkara mengenai seksyen-seksyen 3, 5, 10, dan 11 Akta Penjagaan Kanak-Kanak 1961

Dan

Dalam Perkara mengenai seksyen 24(d) Akta Mahkamah Kehakiman 1964

Dan

Dalam Perkara mengenai seksyen 27 Akta Undang-Undang Sivil 1956

BETWEEN

OLI **...APPLICANT**

AND

RAN **...RESPONDENT**

GROUNDS OF JUDGMENT

Introduction

[1] This was an application ("this Application") by the Applicant mother for, *inter alia*, sole guardianship, custody, care and control of the child of the Applicant and Respondent, and for the Respondent father to be prohibited from having access to their child, and from removing their child from the jurisdiction of this Court**.**

[2] In the interest of privacy of the parties concerned, and sensitivity of the issues in these proceedings, the Applicant, Respondent and their child have been anonymised in this judgment as OLI, RAN, and ILA respectively.

The factual background

[3] The Applicant and Respondent had begun to cohabit at the Respondent's residence since December 2019, and in February 2020, they went through a Hindu customary ceremony of marriage. Their marriage was never registered, and in December 2020, the couple was blessed with a daughter ("the Child").

[4] The Applicant, alluding to numerous police reports lodged, alleged that from the very beginning, their relationship was volatile and marred by violence. As a result thereof, she finally left the Respondent's residence in January 2022, and returned to her parents' house.

[5] On 26 January 2022, under the pretext of coaxing the Applicant to return to his house, the Respondent had unilaterally taken the Child from the Applicant's custody. The Applicant then lodged a police report on the same day.

[6] On 4 February 2022, the Applicant filed an *ex parte* application seeking a court order for the Respondent to return the Child. The

order was granted on 9 February 2022, but the Respondent refused to comply with it. In March 2022, the Applicant applied for leave to initiate committal proceedings, which was granted on 17 March 2022.

[7] The committal hearing was initially scheduled in April 2022. However, due to the Respondent's refusal to attend Court, a warrant of arrest was issued, and on 14 July 2022, the Respondent finally appeared in Court, where he was compelled to return the Child to the Applicant after being severely reprimanded.

[8] The Court proceeded to hear this Application, which was allowed in principle for the following reasons.

Contentions, evaluation, and findings

The overriding factor - welfare of the Child

[9] The starting point to any application concerning guardianship and custody of a child is his or her welfare, as prescribed by section 88 of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage & Divorce) Act") and section 11 of the Guardianship of Infants Act 1961 ("Guardianship of Infants Act"), both of which read:

> **Law Reform (Marriage and Divorce) Act 1976**
>
> Section 88 - *Power for court to make order for custody*
>
> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

...

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Guardianship of Infants Act 1961

Section 11 - *Matters to be considered*

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.

[Emphasis added.]

[10] The meaning of 'welfare of the child' was referenced in a plethora of cases including *Teh Eng Kim v. Yew Peng Siong*, *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189, *Tan Sherry v. Soo Sheng Fatt* [2016] 1 LNS 1586, and *Tan Erh Ling v. Ong Khong Wooi* [2021] 1 LNS 1325.

[11] I was also guided by the Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722**,** in its reference to the Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1987] 1 LNS 77, wherein the expression 'welfare of the child' was explained in the following manner by Chan Sek Keong JC (as he then was), in the following passage:

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.

[Emphasis added.]

[12] The Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors*, through the opinion of James Foong FCJ, proceeded to explain 'welfare of the child' in the following passage:

> [53] According to *Halsbury's Laws of England*, 4th edn, reissue (Mackay edition), para 443 the term, "welfare principle" is a set of factors used when "a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration". In the English Children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. <u>These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved.</u> Thus, this term "welfare principle" relates to certain factors to be considered and their priority during deliberation in such cases.
>
> [Emphasis added.]

[13] The meaning of 'welfare of the child', therefore, must be considered in the widest sense, and all factors necessary must be weighed against one another for this Court to arrive at a decision. It would be impossible to enumerate specifics, since circumstances in each case are varied.

Whether presumption in section 88(3) of Law Reform (Marriage & Divorce) Act had been rebutted

[14] Since the Child was only just a little over two years at the time of the hearing, the application of the 'tender years' doctrine, set out in section 88(3) of the Law Reform (Marriage & Divorce) Act, was crucial. The provision reads:

> Section 88 - *Power of court to make order for custody*
>
> **…**
>
> (3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.
>
> [Emphasis added.]

[15] I am mindful that the parties are not legally married, and hence, the absence of the legitimate status of the Child. However, the issue of guardianship, custody, care and control of the Child is still within the purview of the Law Reform (Marriage & Divorce) Act by virtue of the definition of 'child' in section 2 of the Law Reform (Marriage & Divorce) Act, and hence the applicability of section 88(3) of the Law Reform (Marriage & Divorce) Act. Section 2 reads:

> Section 2 – *Interpretation*
>
> "child of the marriage" means a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption;
>
> [Emphasis added.]

[16] The presumption in section 88(3) of the Law Reform (Marriage & Divorce) Act, therefore, favours the Applicant as the mother, based on the age of the Child, and as such, strong grounds are

required to rebut this presumption on a balance of probabilities, by adducing evidence to convince this Court that the Applicant should be denied guardianship, custody, care and control of the Child, on the ground that she was an unfit mother: see *Thanaletchimy Batamallai v. Vijaya Kumar Kassinathan* [2018] 8 CLJ 61.

[17] However, after perusing the evidence adduced by both parties, I was of the view that the disputes between the Applicant and Respondent were caused by their volatile and explosive relationship, and had nothing whatsoever to do with the Applicant's fitness (or otherwise) as the mother of the Child.

[18] There is a plethora of cases, which include *Myriam v. Mohamed Ariff* [1971] 1 LNS 88; [1971] 1 MLJ 265, *K Shanta Kumari v. Vijayan* [1985] 1 LNS 135, *Gan Koo Kea v. Gan Shiow Lih* [2003] 1 LNS 440 and *Teh Eng Kim v. Yew Peng Siong* [1977] 1 MLJ 234, where it had been explained that, when dealing with young children, it would be in the interest of their welfare to be with their mother. In *Teh Eng Kim v. Yew Peng Siong*, the relationship between a young child and mother was detailed by Raja Azlan Shah FCJ (as he then was), in the following passage:

> The youngest child, Bernard, is of tender years. In my opinion, his place right now is with the mother. "No thing, and no person," said Sir John Romilly MR, in the case of *Austin v. Austin* [1865] 35 Beav 259 263 "and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place..." This view has found judicial favour in many jurisdictions: in Australia, for example, in *Kades v. Kades*, (4) the High Court, in a joint judgment stated: "What is left is the strong

> presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together." In Canada, Muloch CJ in *Re Orr* [1973] 2 DLR 77 commented that, "In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father...
>
> [Emphasis added.]

[19] I also drew guidance from the case of *Myriam v. Mohamed Ariff*; [1971] 1 MLJ 265, where in considering the custody of a three-year old infant, it was stated by Abdul Hamid J (as he then was):

> In my mind, it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection. It is proper that he should be in the custody of the Appellant until at least he reaches the age of 7 or 8 years at which time either party may be at liberty to apply
>
> [Emphasis added.]

[20] In an effort to persuade this Court that the Applicant was unfit, the Respondent had made several averments that not only questioned the Applicant's moral character, but also made numerous disturbing accusations against her family members, such as her father and siblings, portraying them as disreputable

and unsavoury individuals.

[21] The Respondent also alleged that the Applicant led an immoral and permissive lifestyle, having gone through two prior marriages and divorces, and contended that her behaviour would serve as a negative influence on the Child.

[22] I found this argument to be unfounded for several reasons. Firstly, the Applicant had refuted all allegations made by the Respondent, aimed at tarnishing her moral character. As a result, the Respondent was required to provide concrete evidence for the disputed claims, which he had failed to do.

[23] Secondly, this Court, particularly in the context of a family court, cannot attach any social stigma to divorce, as that was a personal and legal decision of the Applicant.

[24] Thirdly, the Applicant's previous marriage and divorce is a matter of her past. Whilst a person's past can provide an insight into their character and behavior, it is also important to recognise that people can and do change and grow over time. As such, the Applicant's past and her previous relationships are not relevant at all to this Application.

[25] I am mindful that the welfare of the Child encompasses her moral upbringing, but it is important to remember that there are numerous legal precedents, such as Federal Court cases of *Chai Sau Yin v. Kok Seng Fatt* [1966] 1 LNS 25 and *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209, that emphasise that a court of law should not assume the role of moral police. As such, unless the Applicant's purported immoral conduct, if at all, had violated the law, or had a detrimental impact on the welfare of the Child, it would be baseless and unjust to label her an unfit parent.

[26] Reference was made also to the Court of Appeal case of *Patricia*

Sue Lin Knudsen v. Joey Jams Ghazlan [2021] 7 CLJ 588, in the words of Azizah Nawawi JCA**:**

> In this, we agree with the appellant that the court had erroneously applied its own moral compass onto the appellant despite expressly stating that it should not do so and that what the court considers is morally appropriate behaviour is likely to be different from that of the appellant's. Further, there is no evidence whatsoever that was produced by the respondent to indicate that the child's welfare and interest has been negatively affected due to the appellant's relationship with her partner. In any event, the various photos posted on Instagram relied by the respondent shows that the child was comfortable with the appellant's partner.
>
> [Emphasis added.]

[27] To compound the matter, the irony was that the Respondent also had been married and divorced before, and had a son from his previous marriage. Hence, the case of 'pot calling the kettle black'.

[28] In the present case, other than mere unsubstantiated allegations by the Respondent, there was no evidence whatsoever to suggest that the Applicant was an unfit mother to the Child. As such, it was my view that the Respondent had failed to rebut the presumption in section 88(3) of the Law Reform (Marriage & Divorce) Act.

[29] My decision to grant the Applicant sole guardianship and custody was based on the extremely acrimonious and antagonistic relationship between the parties which would render co-parenting almost impossible. The relationship of the parties was marked by a pattern on intense highs and lows, with both experiencing

extreme emotions, vacillating from rage to passion. In such relationship, it was my view that there will be lack of respect, trust and communication, which will result in conflicts, argument and fights, evidence of which already have been adduced. This would definitely have a negative impact on the welfare of the Child. As such, it would be in the interest of the welfare of the Child for the Applicant to have sole guardianship, custody, care and control of the Child.

Whether Respondent should have access to the Child

[30] Although I took the view that the Applicant should be granted sole guardianship, custody, care and control of the Child, I was not agreeable to her prayer to deny access altogether by the Respondent to the Child.

[31] It cannot be gainsaid that a child needs both parents, in the gender- binary sense, as it stands in our society today. Both parents have invaluable contributions to make to a child's life. It was also crucial to impress upon parties that it is the Child's right to have an ongoing and meaningful relationship with both parents, regardless of how unfit they are. To have access denied by any parent to the Child, amounts to a violation of the Child's right.

[32] However, it was my view that although the Respondent should have access to the Child, such access would have to be limited and supervised. This was due to the Respondent's conduct in unilaterally removing the Child from the Applicant's custody.

[33] The Respondent's behaviour was compounded by his stubbornness in refusing to comply with the order of the Court, until a warrant of arrest was issued. I, therefore, had to agree with Counsel for the Applicant that this raised a significant concern that the Respondent may repeat such conduct in future.

Conclusion

[34] In the upshot, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this Court, including written and oral submissions of both parties, it was ordered that:

(a) Sole guardianship, custody, care and control to be given to the Applicant;

(b) Important documentation relating to the Child must be returned by the Respondent to the Applicant within seven days from the date of granting this Order;

(c) Daily online access to the Child by the Respondent only, for a maximum of 30 minutes, anytime between 7pm and 8pm, which the Applicant must facilitate and not attempt to interfere, or interrupt, or frustrate;

(d) Physical Access to the Child by the Respondent only, on alternate weekends, on Saturdays and Sundays, from 11am to 2pm, in a public place (to be agreed upon by both parties) and to be supervised by the Applicant only.

Dated: 28 APRIL 2023

(EVROL MARIETTE PETERS)
Judge
High Court, Kuala Lumpur

Counsel:

For the applicant - Gunamalar Joorindanjn; M/s Gunamalar Law Chambers

For the respondent - Mehnagha Luckhmana; M/s Dinesh Muthal & Co

Cases referred to:

Chai Sau Yin v. Kok Seng Fatt [1966] 1 LNS 25

Gan Koo Kea v. Gan Shiow Lih [2003] 1 MLRH 769

K Shanta Kumari v. Vijayan [1985] 1 LNS 135

Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189

Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209

Myriam v. Mohamed Ariff [1971] 1 LNS 88; [1971] 1 MLJ 265

Patricia Sue Lin Knudsen v. Joey Jams Ghazlan [2021] 7 CLJ 588

Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2011] 3 CLJ 722

Tan Erh Ling v. Ong Khong Wooi [2021] 1 LNS 1325

Tan Sherry v. Soo Sheng Fatt [2016] 1 LNS 1586

Tan Siew Kee v. Chua Ah Boey [1987] 1 LNS 77.

Teh Eng Kim v. Yew Peng Siong [1977] 1 MLJ 234

Thanaletchimy Batamallai v. Vijaya Kumar Kassinathan [2018] 8 CLJ 61

Legislation referred to:

Guardianship of Infants Act 1961 - section 11

Law Reform (Marriage & Divorce) Act 1976 - sections 2, 88