IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
[ORIGINATING SUMMONS NO: WA-24F-51-02/2021]

In the matter of sections 5, 10 and 11 of the Guardianship of Infants Act 1961

And

In the matter of sections 88 and 89 of the Law Reform (Marriage and Divorce) Act 1976

And

In the matter of The Convention of the Rights of the Child 1989

And

In the matter of sections 50, 51 and 52 of the Specific Relief Act 1950

And

In the matter of Orders 29 and 92 rule 4 Rules of Court 2012

And

In the matter of sections 52 and 53 of the Child Act 2001

BETWEEN

MAS **... PLAINTIFF**

AND

YAM ... DEFENDANT

GROUNDS OF JUDGMENT

Introduction

[1] This was an application in enclosure 1 ("this Application") by the Plaintiff husband, seeking *inter alia*, for the Defendant wife to produce the child of the marriage, to the Plaintiff husband, to be brought back to South Korea.

[2] The Defendant, filed a Counterclaim in enclosure 9 ("this Counterclaim") to the Plaintiff's application, seeking, *inter alia*, sole guardianship and sole custody, care and control of the child of the marriage, with supervised access given to the Plaintiff, and for the Plaintiff to pay maintenance for such child.

[3] Both Application and Counterclaim were heard together and in the interest of privacy, and considering the sensitivity of the issues in these proceedings, the Plaintiff and Defendant have been anonymised in this judgment respectively as MAS and YAM.

The factual background

[4] In gist, this was a case where the dispute between the parties was whether their daughter should be with her father in South Korea or with her mother in Malaysia.

[5] The Plaintiff, a US citizen, holding a South Korean visa, and the Defendant, a Malaysian citizen, were married in South Korea in 2016, and were blessed with a daughter ("the Child") in June 2018.

[6] They resided in South Korea until February 2020, when the Plaintiff, Defendant and Child returned to Malaysia. In August 2020, the Plaintiff alone returned to South Korea and subsequently claimed that the Defendant and Child were being held hostage by the Defendant's family, in particular, her brother.

[7] In February 2021, this Application was filed, whilst the Counterclaim was filed in March 2021.

[8] The decision of this Court was, *inter alia*, for the Defendant to have sole guardianship, custody, care, and control, whilst the Plaintiff's right to access and visitation was confined to Malaysia. The decision of this Court was based on the following reasons.

Contentions, evaluation, and findings

Whether the Child was abducted from South Korea

[9] At the outset, the Plaintiff argued that the Child had been abducted by the Defendant from South Korea, and as such, this Court had no jurisdiction to determine the Defendant's Counterclaim. The Plaintiff further contended that the Child should be returned to South Korea, as it was ultimately for the court in South Korea to decide on the issues pertaining to guardianship and custody of the Child. In support thereof, the Plaintiff relied heavily on the case of *Neduncheliyan Balasubramaniam v. Kohila A/P Shanmugam* [1997] 3 MLJ 768, and the Hague Convention on the Civil Aspects of International Child Abduction 1980.

[10] I had to disagree with the Plaintiff on the allegation of abduction for the following reasons.

[11] In the present case, both Plaintiff and Defendant together with the Child, had voluntarily returned to Malaysia together in February 2020 and remained in the country until August 2020, when the Plaintiff had chosen to leave for South Korea, leaving behind the Defendant and the Child.

[12] The Plaintiff further averred that the parties had, in fact, acquired a family home in South Korea, and that the Child had a certificate of residency in South Korea prior to her returning to Malaysia. The Plaintiff contended that the only reason for returning to Malaysia was because of the onset of the Covid-19 pandemic at that material time.

[13] In my view, regardless of the reasons for returning to Malaysia, the fact of the matter is that the Plaintiff had done it voluntarily. He was not forced or coerced to do so. The Plaintiff had also not objected to the Defendant and Child remaining in Malaysia, and he continued to communicate virtually with them, whilst he was in South Korea.

[14] Furthermore, the Plaintiff had decided to file this Application only in February 2021, after he had become infuriated with the Defendant's brother, who appeared to be controlling the Defendant's life. As such, this Application was filed by Plaintiff after he had changed his mind about the Defendant and Child remaining in Malaysia. In my view, this was an afterthought that could not be entertained by this Court.

[15] In view of the facts of the present case, the Plaintiff's reliance on the case of *Nedunchelivan* was misconceived, as in that case, the parties had resided in Canada, and there was no period of transition where they had acquired a habitual residence in Malaysia, unlike the situation in the present case. Furthermore, in *Nedunchelivan,* except for the wife who was a Malaysian citizen with Canadian permanent residence, the husband and

child were Canadian citizens with Canadian passports. This was unlike the present case where the Plaintiff and Child were not even South Korean citizens, but were instead US citizens with South Korean visas. In fact, based on the evidence adduced, the Child's South Korean visa had expired in September 2021. These were important distinctions between the facts of the present case and that of *Neduncheliyan*, which in my view, rendered the Plaintiff's reliance on the case misconceived.

[16] The Plaintiff had made several averments regarding the Defendant's character and temperament, alluding to the fact that the Child was not safe with her, and as such, that warranted the immediate return of the Child.

[17] I took the view that the Defendant's character and her attitude towards the Plaintiff had nothing to do with her fitness (or otherwise) as the mother of the Child. No matter how cantankerous or quarrelsome she was, that may have a bearing on her suitability or desirability as a spouse, but not her fitness as a mother.

[18] A more serious allegation made by the Plaintiff was that the Child was becoming too thin and malnourished, whilst in the care of the Defendant. The basis of the Plaintiff's allegations was a video recording and photographs of the Child that were previously sent by the Defendant to the Plaintiff, and which were now attached as exhibits to the additional affidavit that the Plaintiff had affirmed.

[19] In response to these allegations, the Defendant had sought the services of two child specialists, Dr Nazatul Haslina binti Ramly and Dr Chew Bee Bee, to do a physical and developmental assessment on the Child. Both specialists confirmed that the Child is healthy and well.

[20] In my view, therefore, the conduct of the Plaintiff in making these baseless and unsubstantiated allegations was laced with *mala fide*, as he had relied only on such photographs that suited his narrative.

[21] The Plaintiff had relied on numerous cases which dealt with issues of abduction. I do not think it necessary to provide a granular analysis of the cases, save to say that in all those cases, the welfare and safety of the child were also considered. In the present case, in light of the condition of the Child, who is non-verbal and diagnosed with autism spectrum symptoms, sending her to South Korea without the Defendant who is, and has always been her primary care-giver, would be detrimental to the Child's health and welfare in general.

[22] In the final analysis, it was my finding that the Child was neither abducted, nor was she unlawfully retained in Malaysia. As such, this Court had the jurisdiction to decide on the Counterclaim, that is, on the issues of guardianship, custody, care and control.

Whether the presumption in section 88(3) of the Law Reform (Marriage & Divorce) Act 1976 had been rebutted

[23] Since the Child was four years old at the time of the hearing of this Application and Counterclaim, the starting point is the application of the concept known as the 'tender years' doctrine, found in section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act") which reads:

> (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.]

[24] The presumption in section 88(3) of the Law Reform (Marriage and Divorce) Act favours the Defendant as the Child's mother, and it was, therefore, for the Plaintiff to rebut the presumption on a balance of probabilities, by adducing evidence to convince this Court that the Defendant should be denied guardianship, custody, care and control of the Child, on the ground that she was an unfit mother.

[25] The Plaintiff raised a host of issues and made several allegations pertaining to the behaviour of the Defendant and her controlling brother.

[26] However, after perusing the evidence adduced by both parties, I was of the view that the disputes and increasing acrimony between the Plaintiff and Defendant were caused by a myriad of unresolved issues between the parties. It was obvious that the Defendant had no intention of having the Plaintiff in her life and had relied on the incidences of violence perpetrated by the Plaintiff which the Plaintiff had admitted but had tried to justify by claiming that it an isolated incident. In my view, these issues had nothing whatsoever to do with the Defendant's fitness (or otherwise) as the mother of the Child.

[27] The Plaintiff had also averred that the Defendant was unfit as the Child's health had suffered whilst she was in the care of the Defendant. As alluded to earlier, these averments were baseless and based on the evaluation by the two child specialists, the Child was healthy and fit.

[28] It was also crucial to note that although both the Plaintiff and Defendant were now separated, the Child had continuously been with the Defendant, since the Child's birth.

[29] There is a plethora of cases including *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 was explained that, when dealing with a very young child, it would be in the interest of his or her welfare to be with his or her mother. In *Teh Eng Kim v. Yew Peng Siong*, the relationship between a young child and mother was explained 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.]

[30] The issue, therefore, was whether it would be in the interest of the welfare of the Child to remove her from the comfort of her current surroundings to a foreign environment in South Korea to be with the Plaintiff.

[31] At this juncture, it is important to have a comprehension of the meaning of the phrase 'welfare of the child'. Reference was made to 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.

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

> 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.]

[33] 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 manner:

> [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. 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. Thus, this term "welfare principle" relates to certain factors to be considered and their priority during deliberation in such cases.
>
> [Emphasis added.]

[34] The meaning of welfare, 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.

[35] It was undeniable that the Child in the present case continues to be dependent on the Defendant for her physical, emotional and mental development. Considering the Child's condition, it

would, therefore, not be in the interest of the welfare of the Child to remove her from her current environment. I drew guidance from the case of *CY v. CC* [2015] MLJU 930, that had also dealt with an autistic child, to conclude that guardianship, custody, care and control of the Child should remain with the Defendant, as it would not be beneficial, at this stage, to separate the Child from her mother. The Child had also enjoyed the love, care and pampering of her maternal grandmother, and it would be cruel to rob her now of that.

[36] My reason for granting the Defendant sole guardianship and custody was also based on the extremely acrimonious and antagonistic relationship between the parties, which in my view, would render co- parenting almost impossible. Furthermore, bearing in mind that the Plaintiff is a foreigner, there was also the risk of the Child being removed from this country, if the Plaintiff was given guardianship and custody.

Whether the Plaintiff is entitled to unsupervised and overnight access to the Child

[37] The Defendant urged the Court to limit the Plaintiff's access to the Child, to supervised day access, based on her averments of violence and aggression.

[38] In my view, although there was aggression perpetrated by the Plaintiff, there was undeniably no evidence that the Plaintiff had physically abused or assaulted the Child. The disputes between the parties, regardless of the intensity, could not be held against the Plaintiff to deny him any form of contact or relationship with the Child.

[39] It was also crucial to impress upon parties that the Child has a right to have an ongoing and meaningful relationship with both

parents. Although the Child should remain with the Defendant, pursuant to section 88(3) of the Law Reform (Marriage & Divorce) Act, no one parent is superior to the other. The dynamics of the relationship between a child and his/ her father, and between that and his/ her mother are different. It does not mean that a father's rights with regard to his child are inferior to that of the mother.

[40] It must be remembered that the provisions of the Law Reform (Marriage & Divorce) Act were discussed, deliberated and determined during a time when the demarcation of the role of a father and mother was clear, where most women were stay-home mothers, to manage the household and raise children, and fathers were mere breadwinners for the family. However, a whole generation has transitioned since the Law Reform (Marriage & Divorce) Act was enacted and along with it, the traditional roles of a father and a mother have evolved. The relationship between a father and child has evolved and is more complex than one assumes.

[41] It cannot be gainsaid, therefore, 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.

[42] In the present case, the Plaintiff should be given the opportunity to bond with the Child as and when possible. He will remain the Child's biological father for the rest of the Child' life and this the Defendant should not deny or deprive.

[43] A court should grant supervised access only when there are cogent reasons to do so, such as to protect the child from physical violence, harassment, sexual abuse or neglect. In this case, there was none. The problems, if at all, were between the parties.

[44] In any event, the overnight and unsupervised access would be limited to only when the Plaintiff is in Malaysia, as stipulated in the Order. Furthermore, in order to overcome the alleged Child's unfamiliarity with the Plaintiff and his family, as claimed by the Defendant, I had granted the Plaintiff daily online access to the Child of not more than 30 minutes.

[45] As such, the arguments advanced by the Defendant were indefensible, and laced with emotional overtones.

Whether the Plaintiff was obliged to pay child maintenance

[46] I took the view that the Plaintiff was not obliged to pay any maintenance in light of his exclusion from the Child's life by the Defendant and her family members, in particular her brother.

[47] On this note, I would agree with the Plaintiff that the Defendant was influenced by her brother and was subservient to him. In fact, during the hearing of this Application and Counterclaim, the Defendant's brother who was sitting in the gallery in the courtroom, had an outburst whilst the Plaintiff's Counsel was submitting, and hurled insults at her. His verbal abuse was echoed by the Defendant, who contributed to the ruckus in Court.

[48] I took a dim view of the conduct of both the Defendant and her brother. As such, I instructed both of them to leave the courtroom and to remain outside until the conclusion of the proceedings. Although Counsel for the Defendant had profusely apologised, which apology was accepted by this Court, the outburst had fortified, in my view, the contribution of the Defendant's brother to the breakdown of the parties' marriage, and the Plaintiff's exclusion from the Child's life.

[49] Since the Defendant had insisted on sole guardianship and custody, it also meant that she would unilaterally be making decisions regarding the Child's development, without informing or consulting the Plaintiff. In all fairness, therefore, she should not expect any child maintenance from the Plaintiff. I, therefore, invoked the power of the Court pursuant to section 93(2) of the Law Reform (& Divorce) Act, which reads:

> Section 93 – *Power for court to order maintenance for children*
>
> …
>
> (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.
>
> **…**
>
> [Emphasis added.]

[50] Despite the findings I had made regarding the conduct of the Defendant and her brother in contributing to the breakdown of the marriage, it was important to reiterate that this had no bearing on my decision regarding the Child and her welfare, and the fitness of the Defendant as a mother.

[51] In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this Court, as well as the submissions of both parties, the decision of this Court was for the Defendant to have sole guardianship, custody, care and control, whilst the Plaintiff would have daily virtual access, and overnight, unsupervised, and uninterrupted access whilst he is in Malaysia, details of which have been specified in the Order. Both parties (including their family members) are ordered not to

harass each other and their family respective members, whilst costs are to be borne by the Defendant.

Dated: 17 NOVEMBER 2022

(EVROL MARIETTE PETERS)
Judge
High Court, Kuala Lumpur

COUNSEL:

For the plaintiff - Toh Kee Kim, Tang Joey & Yip Tze Yan; M/s Low & Partners

For the defendant - Steven CF Wong, Nur Diana Ramlan & Kim Kok Thai; M/s Arifin & Partners

For the suhakam (watching brief) - Tay Kit Hoo; M/s Tan Law Practice

Case(s) referred to:

Neduncheliyan Balasubramaniam v. Kohila A/P Shanmugam [1997] 3 MLJ 768

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

Gan Koo Kea v. Gan Shiow Lih [2003] 1 LNS 440

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

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

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

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

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

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

CY v. CC [2015] MLJU 930

Legislation referred to:

Law Reform (Marriage & Divorce) Act 1976, ss. 88(3), 93(2)