IN THE HIGH COURT OF MALAYA AT JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM, MALAYSIA
DIVORCE PETITION NO: 33JP-162-02/2014

Dalam Perkara Seksyen 52 Akta Membaharui Undang-undang (Perkahwinan Dan Perceraian) 1976 (Akta 164)

BETWEEN

YSL **...PETITIONER WIFE**

AND

CCS **...PETITIONER HUSBAND**

GROUNDS OF JUDGMENT

Introduction

[1] Two applications were addressed in this grounds of judgment.

[2] Enclosure 17 was the Petitioner Wife's ("PW") application to vary a consent order dated 7 February 2018, to obtain custody, care and control of her daughter, CXY; whilst enclosure 34 was the Petitioner Husband's ("PH") application to set aside an interim *ex parte* order dated 20 January 2021, which had granted custody, care and control of CXY to PW, and for an injunction to restrain PH from removing CXY from the custody, care and control of PW, pending the disposal of the *inter partes* hearing of PW's application in enclosure 17.

The background facts

[3] After having their marriage dissolved in 2014, the petitioners obtained joint custody of their two children, CXY and CJY who at that time were 5 and 8 years old respectively, although PW had retained physical custody, care and control of both children.

[4] In February 2018, through a variation order and subsequent mediation, a consent order was recorded ("the Consent Order"), giving PH custody, care and control of CXY, whilst CJY remained in the custody, care and control of PW.

[5] In November 2020, CXY, after visiting PW, had refused to return to PH. In December 2020, the application in enclosure 17 was filed ("PW's application"), in which PW had sought to vary the Consent Order to obtain custody, care and control of CXY who was, at the time of such

application, 12 years old. This was followed by an *ex parte* application filed by PW on 1 January 2021, which was allowed on 20 January 2021 ("the *ex parte* Order") by Fredrick Indran XA Nicholas JC. On 1 March 2021, PH filed the application in enclosure 34 ("PH's application") to set aside the *ex parte* Order.

[6] Both applications by PW and PH were heard on 20 April 2021. PW's application was allowed, whilst PH's application was dismissed, for the following reasons.

Enclosure 34

[7] PH's application to set aside the *ex parte* Order was dealt with first. In his submission, PH contended that the *ex parte* Order had expired by the date of the *inter partes* hearing of PW's application, and that it should, therefore, be set aside.

[8] I found this contention untenable, in view of the fact that the *ex parte* Order stated as follows:

> *(a) Bahawa Pempetisyen Isteri diberi hak penjagaan, pemeliharaan dan kawalan ("custody, care and control") sementara ke atas seorang anak bernama CXY (P) (******) sementara menunggu* ***pelupusan penuh*** *tindakan di dalam satu lagi Notis Permohonan (Permohonan Pempetisyen Isteri untuk mengubah/ meminda Perintah Persetujuan bertarikh 7.2.2018) (Lampiran 17) yang telah difailkan di bawah Petisyen Penceraian No 33 (JP)-162-02/2014;*
>
> *(b) Bahawa satu Perintah Injunksi Interim Ex-Parte dikeluarkan terhadap Pempetisyen Suami samada secara sendiri dan/ atau wakil-wakilnya dan atau dengan apa jua cara sekalipun bagi*

menghalang sama sekali untuk mengambil anak bernama CXY CXY (P) (******) tersebut yang kini di dalam penjagaan, pemeliharaan dan/atau kawalan Pempetisyen Isteri, ***sehinggalah tarikh pelupusan permohonan*** *di dalam Lampiran 17 ini secara inter parte oleh Mahkamah yang Mulia ini;*

[Emphasis added.]

[9] It was very clear that the *ex parte* Order, which was interim in nature, was operative until the disposal of the *inter partes* hearing of PW's application. In fact, a perusal of the minutes of the case management of both applications by PW and PH revealed that the hearing date was postponed due to the delay in service and the movement control order. Furthermore, a physical hearing was requested for the hearing of both applications by PW and PH. I had to take judicial notice that many cases had to be postponed due to the movement control order, and as such, it was inequitable for PH to raise technicalities in an attempt to set aside the *ex parte* Order.

[10] In any event, any such delay, if at all, was not detrimental to the welfare of CXY, as she was, until the *inter partes* hearing of PW's application, in the care and control of PW.

[11] There were also averments by PH that, in obtaining the *ex parte* Order, PW had misled the Court and was dishonest in the facts she had adduced. I was unable to agree with this contention, as a perusal of the documents that were adduced for the purpose of obtaining the *ex parte* Order, indicated that PW was genuine in her application. She had made it very clear that the *ex parte* application was made due to the

deterioration of the educational and health welfare of CXY, affidavit evidence of which was adduced.

[12] The urgency of the *ex parte* application was compounded by the commencement of school and CXY's refusal to return to PH's house, including threats and intimidation made by PH against CXY for such refusal. Such threats and intimidation raised serious issues to be tried to justify granting the injunction to restrain PH from removing CXY from the care, custody and control of PW, pending the disposal of the *inter partes* hearing of PW's application. The balance of convenience for the injunction to be granted, therefore, lay in favour of PW.

[13] Since I was also disinclined to allow procedural skirmishes to prevail over substantive justice, I proceeded to address the merits of PW's application.

Enclosure 17

The applicable law

[14] The starting point to an application to vary an order for custody is sections 96 and 97 of the Law Reform (Marriage & Divorce) Act 1976 ("Law Reform Act"), which read:

> Section 96 – *Power for court to vary orders for custody or maintenance*
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

****

Section 97 – *Power for court to vary agreement for custody or maintenance*

The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

[Emphasis added.]

[15] The term 'material change in the circumstances' had been clarified in numerous cases including *Sivajothi K Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318, where it was stated by Azahar Mohamed JC (as he then was), in the following passage:

[10] The meaning of the section is plain and very clear. It is apparent that under s. 96, in so far as it relates to the case at hand, there must be a material change in the circumstance in order for the court to vary or rescind any order for maintenance. The section says any "material change" and not simply "change". There is no ambiguity whatsoever. It means a change in an essential part. In considering whether there has been any "material change" within the meaning of this section regard must be had to all the relevant circumstances, including, in the context of the present case, the judgment of Faiza Tamby Chik J. On a proper construction, the requirement in this section does impose a legal obligation on the defendant to prove on the balance of probability that there had been a material change in the circumstances as at 24 August 2001. There is no requirement at all for the plaintiff to disprove anything.

[Emphasis added.]

[16] Since the application to vary the Consent Order was in relation to the custody of the child, reference was made to section 88(2) of the Law Reform Act which emphasises the welfare of the child. The provision reads:

> Section 88 – *Power for court to make order for custody*
>
> ...
>
> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard-
>
> *(a)* to the wishes of the parents of the child; and
>
> *(b)* to the wishes of the child, where he or she is of an age to express an independent opinion.
>
> [Emphasis added.]

[17] I was guided by the case of *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189, in which Raja Azlan Shah CJ (as he then was) held:

> In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate. The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare.
>
> [Emphasis added.]

[18] Reference was made also to *Helen Ho Quee Neo v. Lim Pui Heng,* [1974] 1 LNS 48, where it was held by the Singapore Court of Appeal

that all relevant factors have to be considered including the conduct of the parties and their character, bearing in mind that the welfare of the child is the first paramount consideration.

[19] The list of factors when considering the welfare of the child was distilled by Abdul Wahab Patail JC (as he then was) in *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 1 LNS 579, where it was stated in the following passage:

> A court gives the 'best interests of the welfare' of the child the highest priority. What the best interests of the child are in a given situation depends upon many factors, including:
>
> (1) the child's age, gender, mental and physical health;
>
> (2) mental and physical health of parents;
>
> (3) lifestyle and other social factors of the parents, including whether the child is exposed, for example, to second-hand smoke and whether there is any history of child abuse;
>
> (4) the love and emotional ties between the parent and the child, as well as the parent's ability to give the child guidance;
>
> (5) the parent's ability to provide the child with food, shelter, clothing and medical care;
>
> (6) the child's established living pattern (school, home, community, religious institution);
>
> (7) the quality of school — particularly important when one parent wishes to move; and
>
> (8) the ability and willingness of the parent to foster healthy communication and contact between the child and the other parent.

Contentions, evaluation, and findings

[20] At the outset it was contended by PH that since this was a consent order, reviewing or varying it should be on rare occasions only.

[21] In my view, it was crucial to note that first and foremost, the Court's power to vary is statutorily provided in section 97 of the Law Reform Act, and it may do so 'at any time and from time to time' on condition that there is 'a material change in the circumstances' even in cases where parties had consented to the order. This was made clear by Faiza Thamby Chik in *Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408, in the following passage:

> There is no question of either party being estopped from varying an order made by consent, if the application to vary is made under either s. 83 or 96 of the Act (ie, to vary orders for custody or maintenance), as the law gives the court power to vary such orders in the circumstances set out in those sections. The power is not limited to non-consensual orders. Indeed, if consent orders may not be varied even if these are for custody or maintenance, then the primary principle of the welfare of the children would have to be disregarded in favour of a perceived notion that parties are bound by consent orders, no matter what the consequences – even when there is a material change in circumstances. That cannot be the law.
>
> [Emphasis added.]

[22] As such, an order with regard to custody is not cast in stone, and when required, it would have to be tweaked, tempered and tailored to suit any material change, if at all.

The child's attainment of puberty

[23] The Consent Order that PW was seeking to vary was granted in 2018 when CXY was 9 years old. She was slightly above the age of 12 at the time of the hearing of PW's application. The most apparent material change was that she has matured and was reaching puberty. Pushing 13, she was on the cusp of womanhood, and would soon be experiencing physical and emotional changes that would trigger other intimate and delicate female-oriented issues.

[24] In light of that, I was of the view that CXY would need her mother and sister for support. It is important to state at this juncture that in no uncertain terms am I making a general statement that fathers are incapable of providing the support required for their daughters, but in this case, PH would not be in a position to provide the mental and emotional support required of a pubescent girl such as CXY, who would also feel awkward and embarrassed to discuss female-oriented issues with her father. On this point, I found instructive the case of *Yong May Inn v. Sia Kuan Seng* [1970] 1 LNS 176, where in granting custody of three children to their mother, Sharma J opined in the following passage:

> ... The children are all girls and although it is not absolutely essential that they should remain in the custody and care of their mother, they are bound to feel freer in her company than in the company of their father and more particularly so when one of them is reaching an age when she may need the advice of her mother most."
>
> [Emphasis added.]

[25] The fact of the matter is, we live in a world where the comfort level of discussing certain delicate issues is dictated by the gender of the confidante, and when that confidante is a parent, a female pubescent child would tend to gravitate towards her mother. As such, the emotional support that CXY would require, in light of hormonal and physical development that she would experience, leaned in favour of PW, who would be in a better position to understand and cater to CXY's needs.

[26] CXY had also been separated from her sister since 2018, and the lack of sibling support had compounded her loneliness and seclusion.

[27] It has been viewed undesirable, 'that children should be split when they are close together in age and obviously fond of one another... Children do... support one another and give themselves mutual comfort, perhaps more than they can derive from either of their parents': per Dunn LJ said in *Adams v. Adams* [1984] FLR 768, which was adopted in *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175 and *Ooi Mei Chein @ Wei Mei Chein v. Micheal Tan Cheng Hai & Anor* [2013] 1 LNS 1090. In *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175, it was stated by Faiza Thamby Chik J, in the following passage:

> In General The Courts Dislike Separating Children
>
> In *Bromley's Family Law* 7th edn, 1987 by Professor B.M. Bromley and N.V. Lowe at p. 328 it is stated as follows:

Keeping the children together.
In general the courts dislike separating children.

[Emphasis added.]

[28] In the circumstances where CXY is attaining puberty, the added advantage of providing PW with custody, care and control of CXY is that CXY would have a coping mechanism in the form of sibling support from her sister, CJY. In fact, the support from CJY would also benefit CXY in her studies as she would have a point of reference, if the need arises.

Deteriorating health and educational welfare of the child

[29] It was PW's contention that CXY's health and educational welfare had deteriorated. This was based on PW's discussions with CXY's teachers and evaluation reports (attached as exhibits to PW's affidavits), which indicated CXY had missed deadlines in submitting her assignments. PW claimed that this was due to the fact that CXY had faced difficulties in following online classes whilst living with PH, as PH did not have the necessary facilities for CXY to engage in online lessons.

[30] CXY's health was also alleged to have deteriorated due to lack of dietary requirements and nutritional intake, as PH did not have the time to ensure that CXY had proper and balanced meals. PH naturally denied everything.

[31] In addition to the affidavit evidence, PW was in favour of an interview to be conducted with CXY to assess her situation, which I had acceded to.

Wishes of the child

[32] I am mindful that the interview with the child cannot be the sole factor in the determination of an application to vary a custody order, as the welfare of the child is of paramount consideration. In considering the opinion or wishes of the child, the court must always be cautious of the possibility that the child could have been influenced or coached by the people around her. As such, each case must be scrutinised based on its individual facts.

[33] However, pursuant to section 88(2)(b) of the Law Reform Act, the court is permitted to consider the wishes of the child if such child 'is of an age to express an independent opinion.' In *Mahabir Prasad v. Mahabir Prasad*, the court gave the opportunity to the children aged seven and half and eight and half years old to express their opinion.

[34] I am guided also by the Federal Court in *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505, where it was stated by Md Raus Sharif PCA (as he then was) in the following passage:

> ...a determination as to whether a child is able to express an independent opinion depends greatly on the circumstances peculiar to the facts of the case and the assessment of the judge of those circumstances. From the cases that have been decided, it may be reasonable to suggest here that the children above the age of seven can be presumed, subject to being

rebutted and other extrinsic factors closely related to the case, to be capable of giving independent opinion.

[Emphasis added.]

[35] I, therefore, proceeded to interview CXY in chambers. I must state that for a girl who was just over 12 years old, she impressed me with her demeanour, composure, and maturity. She was candid, truthful, and struck me as someone with a mind of her own and not one who could easily be influenced or coached by PW, or any parent for that matter. Averments, therefore, that CXY was coached or influenced by PW not to return to PH were unfounded as CXY was forthright in her wish to remain with PW.

[36] I appreciated the fact that she refrained from saying too many disparaging things about PH, but proceeded to state as a matter of fact that she felt happier, healthier, and safer living with her sister and PW. She had also informed me that transferring to the same school as her sister would only be conducive to her education, as she could rely on her sister for any form of assistance pertaining to schoolwork.

[37] Questions were also put to CXY about her dietary habits and nutritional intake, and CXY corroborated the fact that whilst living with PH, she had to endure stomach ailments, since PH did not have the time to ensure that CXY had proper and balanced meals; and that since living with PW, she did not

have to worry about meals and her health in general. CXY had also informed the Court that she found it easier to do her school work and to follow the online classes whilst at PW's house.

[38] My assessment of the affidavit evidence by PW and my conversation with CXY led me to the conclusion that in the best interest of CXY, PW should have custody care and control of her. Furthermore, PW's occupation as an educator and her involvement in the education industry put her in an advantageous position that would enhance the educational welfare of CXY.

Whether PW's behaviour/ lifestyle was detrimental to the welfare of the child

[39] Much was said about the PW's behavior and lifestyle and the negative impact it would purportedly have on the welfare of CXY. PH alleged that PW was abusive and had violent tendencies which would have adverse ramifications on the welfare of CXY. This, he alleged was supported by a police report lodged in 2014 by PH, and another lodged by one Sew Soo Hua, a kindergarten teacher who supposedly was employed at the childcare centre established by PW.

[40] I was unable to accept this contention, in view of the fact that such report by PH was lodged seven years ago, and had nothing to do with the issue of material change between 2018 and 2021. Furthermore, the police report made by PH against

PW did not refer specifically to the behaviour of PW, but merely to a meeting where he had referred to her angry facial expression. In my view, that could hardly describe the character or behaviour of a person.

[41] With regard to Sew Soo Hua, although her affidavit was affirmed in March 2021, it was based on a police report lodged in 2014, which was not only sketchy and ambiguous, it had also made no reference to PW, and had no relevance whatsoever to the welfare of CXY. I have to state at this juncture, therefore, that these were feeble attempts by PH to paint a loathsome picture of PW, merely to resist her application.

[42] In any event, CXY's refusal to return to PH and her insistence on continuing to remain with PW rendered it highly improbable that PW was abusive or that her behavior had a negative impact on CXY.

[43] In fact, it was PW's averment that PH was the abusive parent, displaying violence and bullying tactics. This was reflected by a police report lodged by PW on 25 November 2020, alleging that PH had harassed CXY to return to his house, and that if she refused to do so, he would come over to PW's residence and cause a commotion. In my view, the affidavit evidence pointed to PH bullying and intimidating CXY, which could not, in any way, be in the best interest of the welfare of CXY, especially since she had indicated her wish to remain with PW.

[44] PH further highlighted the fact that PW was now in a relationship with one PCK, and that he was her live-in partner. PH contended that by doing so, PW had, therefore, embraced a life of questionable morality and that such lifestyle would have a negative influence on CXY. In supporting this contention, PH relied heavily on the cases of *Teoh Hock Soon v. Chan Peng Yee* [2012] 2 CLJ 960, and *Legasri Purana Chandran v. Sreepathy Ganapathy Krishan Iyer* [2010] 8 CLJ 208.

[45] In my view, reliance on those case is misconceived as those facts are very different from the narrative of the present case. To begin with, in *Teoh Hock Soon v. Chan Peng Yee*, the defendant wife had an affair with a married man, residing in Australia at the material time. The defendant, in that case, also had a complicated relationship with the plaintiff husband whom she had previously divorced, and then reconciled several years later through a ceremonial wedding only, without having the marriage registered. Yet, despite referring to her lover in Australia as her boyfriend, and engaging in cyber-sex with him, she continued to represent to her children that she was still married to their father, the plaintiff. Furthermore, in *Teoh Hock Soon v. Chan Peng Yee,* one of children had expressed her displeasure to the judge of the defendant's dalliance, and that she was disappointed that the defendant had expressed her wish to travel to Australia to marry her boyfriend, as the child was against following the defendant to another country.

[46] In *Legasri Purana Chandran v. Sreepathy Ganapathy Krishan Iyer*, the facts that were viewed to be detrimental to the welfare of the child were

that the wife was co-habiting with an unknown man, and that he worked in the Middle East.

[47] In my view, these cases are distinguishable. In the present case, the relationship between PW and PH could hardly be termed an 'affair' or even 'adulterous', as PW had been divorced for seven years and was moving on with her life.

[48] Furthermore, PCK was known to CXY, and in my interview with her, CXY fondly referred to him as "Uncle PCK". She informed the Court that he is not just PW's partner, but is also a father figure who was very much involved in family activities. It was undeniable, therefore, that PCK was not an unknown or unsavoury male stranger lurking in the shadows, but on the contrary, was very much part of the family. In fact, I was of the view that PCK's presence as a father figure could only enhance CXY's life, especially since she could relate to him. In such circumstances, PCK's presence was far from inimical to CXY's welfare.

[49] It must also be borne in mind that this is a Court of law, and unless PW's purported immoral activities contravene the law or have a negative effect on the welfare of CXY, it would be unfair to penalise PW for wanting to move on in life with another man. I, therefore, found it extremely harsh to judge PW based on her lifestyle and her decision to have a live-in partner. Surely PW, who was now single and available, should

not be expected to live a life of a hermit, or to wear the 'scarlet letter' for the rest of her life.

[50] I was, therefore, guided by the opinion of Abdul Wahab Patail JC (as he then was) in *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 1 LNS 579, where he had stated:

> ... Adultery, although frowned upon by our society, by itself is not a sufficient ground to disqualify a mother from having custody of her children. Merely that another person has emerged in the Petitioner's life was not necessarily by itself bad for the children...
>
> [Emphasis added.]

[51] In fact, I found it a tad hypocritical of PH to comment on PW's lifestyle, in light of CXY's narrative during my interview with her, that PH had also moved on with other women. Although none were live-in partners, CXY had taken a dislike to PH's current partner, and that had exacerbated her loneliness and isolation. In such circumstances, it was inequitable and injudicious for PH to comment on PW's decision to have a partner, since 'people who live in glass houses should not throw stones.'

[52] I had to also bear in mind that 'welfare' in the context of section 88(2) of the Law Reform Act includes the ability to provide an adequate home environment, as propounded by Low Hop Bing J in *Gan Koo Kea v. Gan Shiow Lih* [2003] 4 CLJ 539. Taking into account all aspects of the welfare of CXY, my view was that PW's application should be allowed, to provide CXY with a conducive home environment.

[53] In the final analysis, it was my view that PW had proved on a balance of probabilities the material change as stipulated by section 96 of the Law Reform Act.

Conclusion

[54] In the upshot, after careful scrutiny and judicious consideration of all the evidence before this Court, including the written and oral submissions of both parties, PH's application was dismissed, and PW's application was allowed with reasonable access to PH, terms of which PH himself had drawn up and parties had agreed to.

Dated: 11 August 2021

.....SIGNED.....

(EVROL MARIETTE PETERS)

Judicial Commissioner
High Court, Johor Bahru

Counsel:

For the Petitioner wife – Norsuryati Abd Karim and Ungku Ahmad Hafis Ungku Fathil; Messrs Chiong & Partners

For the Petitioner husband – Foo Hiap Siong and Khoo May Yee; Messrs Foo Hiap Siong & Co

Cases referred to:

- *Adams v. Adams* [1984] FLR 768
- *Gan Koo Kea v. Gan Shiow Lih* [2003] 4 CLJ 539
- *Helen Ho Quee Neo v. Lim Pui Heng,* [1974] 1 LNS 48
- *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 1 LNS 579
- *Legasri Purana Chandran v. Sreepathy Ganapathy Krishan Iyer* [2010] 8 CLJ 208
- *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189
- *Ooi Mei Chein @ Wei Mei Chein v. Micheal Tan Cheng Hai & Anor* [2013] 1 LNS 1090
- *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175
- *Sivajothi K Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318
- *Teoh Hock Soon v. Chan Peng Yee* [2012] 2 CLJ 960
- *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505
- *Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408
- *Yong May Inn v. Sia Kuan Seng* [1970] 1 LNS 176

Legislation referred to:

- Law Reform (Marriage & Divorce) Act 1976 – sections 88(2), 96, 97