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TONG SEK EE v. HO SHU JOON & ANOR

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
NOR BEE ARIFFIN JCA
B [CIVIL APPEAL NO: W-02(IM)-2210-10-2018]
18 DECEMBER 2020

FAMILY LAW: *Children – Surname – Legitimate child – Marriage dissolved days after birth of child – Child's name registered using mother's surname – Parties*
C *entered into decree nisi – Child's name in decree nisi used mother's surname – Father applied to change child's surname to follow his – Whether father estopped from raising issue of surname – Whether law allows legitimate child to carry mother's surname instead of father's – Births and Deaths Registration Act 1957, s. 13A(1)*

D ***WORDS & PHRASES:*** *'ordinarily' – Births and Deaths Registration Act 1957, s. 13A(1) – Surname of legitimate child – Natural and ordinary meaning of 'ordinarily' – Whether to mean surname of legitimate child is of father only – Whether provisions of s. 13A(1) preclude mother from registering child's name using her surname*

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The appellant and the first respondent were married in 2013 but the marriage did not last long. In 2016, four days after she had given birth to their second child ('TJH'), the appellant filed for a divorce petition on the ground that the first respondent committed adultery with the second respondent. When TJH
F was born, the appellant registered his name using her surname ('Tong') and not that of the first respondent's ('Ho'). The marriage was eventually dissolved pursuant to a *decree nisi* by consent where the parties agreed on matters pertaining to the custody, care and control of the children, maintenance, access and division of property. Their second child's name spelt out in the *decree nisi* was TJH. The first respondent later filed
G applications at the High Court to vary the terms of his access to his children ('encl. 20') and to have TJH's surname changed from Tong to Ho ('encl. 25'). To support encl. 25, the first respondent submitted that, *inter alia*, as a legitimate child, TJH's surname should be that of the father, as provided for under s. 13A(1) of the Births and Deaths Registration Act 1957 ('Act'), and
H what the appellant had done was contrary to the provisions of the law. Objecting to, *inter alia*, encl. 25, the appellant argued that the first respondent was estopped from raising the issue of surname as he had agreed to relinquish his right to raise the issue in the future and this was reflected in the draft consent order ('exh. T-1'). The High Court allowed encls. 20 and 25. Hence,
I the present appeals against the decisions in encl. 20 ('Appeal No. 2211') and encl. 25 ('Appeal No. 2210'). Supporting her appeal, the appellant argued that the Judicial Commissioner ('JC') (i) wrongly construed s. 13A(1) of the

Act; (ii) failed to appreciate that in exh. T-1, the first respondent had agreed not to raise the issue on the change of surname and was estopped from doing the same; and (iii) erred in holding that the court was entitled to exercise its function as *parens patriae* and in taking into account issues that were not raised in granting the first respondent's applications.

Held (dismissing Appeal No. 2211; allowing Appeal No. 2210)
Per Nor Bee Ariffin JCA delivering the judgment of the court:

(1) Both parties, of Chinese race, have their surnames and TJH is their legitimate son. The language in s. 13A(1) of the Act is plain, unambiguous and explicit and admits to one meaning only; if the child is a legitimate child, ordinarily the surname of the father may be entered. The word 'ordinarily' is an ordinary word which should be given its natural and ordinary meaning. The word does not carry any special meaning or attribute. Based on dictionary definitions of the word 'ordinarily', what s. 13A(1) of the Act simply means is that, usually or normally or in the normal course of event, the child's surname should derive from his father. Accordingly, TJH's surname (Tong) should have been HJH (Ho) when his name was first registered with the National Registration Department. However, at the same time, s. 13A(1) of the Act does not preclude the appellant from registering TJH's name using her surname. In other words, while the surname of a legitimate child is ordinarily derived from the father, the surname could also be derived from the mother. (paras 17, 19, 25 & 26)

(2) If the word 'ordinarily' is absent from s. 13A(1) of the Act, the child's surname must solely be that of the father. However, when that is not the case and when deliberately the term 'ordinarily' is incorporated in the statute, it is made clear that the intention of Parliament is to allow some flexibility in the use of the surname as the words of the statute speak the intention of the Legislature. The ambit of s. 13A(1) of the Act is wide enough to allow the parents to exchange or abrogate or relinquish their rights. The legislative intent would be rendered meaningless if the mother is not constrained in any manner to register her child's name using her surname. (paras 27 & 28)

(3) The JC gave exh. T-1 due consideration but only to subsequently reject it because Her Ladyship opined that exh. T-1 carried limited weight since there was no signature of the appellant as the first respondent, as well as their respective counsel, to support the appellant's submission that the first respondent now sought to approbate and reprobate. The JC was wrong not to give appropriate consideration to exh. T-1 on that reason alone because the first respondent had never disputed that exh. T-1 was a draft consent order that related to their divorce proceedings. He only objected to the admissibility of the draft, the objection of which was overruled by the JC. If the JC had given some

A weight to exh. T-1, there was a paragraph that read 'Pempetisyen akan mengambil langkah-langkah dalam masa satu bulan dari tarikh perintah untuk menukar nama keluarga anak lelaki dari T kepada H'. The appellant did not agree to that paragraph and had it cancelled. In the *decree nisi*, the content of this paragraph was not there. An irresistible B conclusion to be drawn was that the first respondent had agreed to drop his term. Section 15 of the Act permits the name of a child, by which it is registered, to be altered before the expiration of one year from the date of the birth of the child. The first respondent could not feign ignorant of the law. He was represented by solicitors and exh. T-1 was C prepared by his solicitors. (paras 30 & 37)

(4) Even though the appellant's action in registering TJH's name did not seem to be in conformity with the express provision of s. 13A(1) of the Act, the first respondent's subsequent conduct gave a clear, unqualified indication of his intention to relinquish his right on the use of his D surname. TJH was ten months old when the *decree nisi* was granted by the court in 2018. TJH's name and his identity card number and the provision on maintenance of TJH and the first respondent's access to the children were all clearly spelt out in the *decree nisi*. The first respondent knew then that his son did not carry his surname. (paras 35 & 36)

E **(5)** The JC was plainly in error when failing to give sufficient judicial appreciation on the issue of estoppel raised by the appellant. The first respondent was estopped from revisiting the issue on the surname. It was obvious that the terms in the *decree nisi* reflected a compromise between the appellant and the first respondent, namely, the first respondent who F was fully conversant and conscious of his rights under s. 13A(1) of the Act, had agreed to relinquish his right to raise the issue of surname in the future in exchange for not having to pay maintenance for the appellant and not having to pay for the tertiary education costs of their son. The first respondent filed encl. 25 when he decided to have a G change of mind. The first respondent could not approbate and reprobate. The *decree nisi* was a decree by consent properly entered into by the parties. The law on the effect of a consent order is trite. The first respondent was bound by his agreement on his son's surname. (paras 39-41)

H **(6)** The JC decided to assume the parental role as she was deeply concerned with the rights of TJH and the stigma the child may suffer from in the years to come if he continues to maintain the surname of his mother. It was wrong for the JC to decide on the rights of TJH, no matter how strongly she felt about it, without giving the parents the opportunity to I be heard. More so in this case where the JC commented that the appellant should be mindful of the repercussions on her son in resisting this application. This inevitably left an adverse impression that the appellant was not being thoughtful of her son's future well-being when

she chose to oppose the application. If the JC was convinced that in the best interest of TJH, it was crucial for the court to assume the parental role, that finding could only be made after having heard the parties, and certainly not before or without hearing them. As the right of TJH seemed to be the overriding factor in allowing the application, the JC was plainly erroneous in arriving at her finding. (paras 43 & 46)

Case(s) referred to:
A Child & Ors v. Jabatan Pendaftaran Negara & Ors [2017] 7 CLJ 533 CA ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors [1996] 4 CLJ 141 CA ***(refd)***
Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors [1981] 1 LNS 59 FC ***(refd)***
Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 4 CLJ 731 FC ***(refd)***
Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC ***(refd)***
Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***
PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***

Legislation referred to:
Births and Deaths Registration Act 1957, ss. 7, 8, 13A(1), (2), 15

Other source(s) referred to:
AS Hornby, *Oxford Advance Learner's Dictionary*, 8th edn, Oxford University Press, 2010, p 1036

For the appellant - Balbir Singh & Zakiah Zaki; M/s Najiana Wan Balbir
For the respondent - Ravi Nekoo & Parvinder Kaur; M/s Hakem Arabi & Assocs

[Editor's note: For the High Court judgment, please see Tong Sek Ee v. Ho Shu Joon & Anor [2019] 1 LNS 128 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nor Bee Ariffin JCA:

Introduction

[1] This appeal raises an important issue on the construction of s. 13A(1) of the Births and Deaths Registration Act 1957 (Act 299) regarding the right of the parents to the use of surname in the case of a legitimate child.

[2] The child in this case is the second child of the appellant and the respondent. His name carries his mother's surname. His elder sister HEV, uses the surname of the father.

[3] The appellant and the respondent were married on 30 March 2013. HEV was born on 30 October 2013, TJH on 17 January 2016. The parties initially filed a joint petition to dissolve the marriage on 10 September 2015 in Kuantan High Court but the joint petition was withdrawn. The appellant subsequently filed the divorce petition dated 12 January 2016 in Kuala Lumpur High Court on 21 January 2016, about four days after she gave birth to TJH. The divorce petition showed that she and the respondent had lived separately since September 2015. She alleged that that her husband has committed adultery with the second respondent.

[4] When TJH was born, the appellant registered her son's name using her surname.

[5] Their marriage was dissolved pursuant to the *decree nisi* dated 16 November 2016. TJH then was about ten months old. It was a decree by consent where the parties had agreed on matters pertaining to the custody, care and control of the children, maintenance, access and division of property. Their son's name spelt out in the *decree nisi* was TJH.

[6] Approximately a year later, on 31 October 2017, the respondent filed an application to vary the terms of his access to his children (encl. 20). This was followed by another application filed on 9 January 2018 (encl. 25) for an order to have his son's surname changed from "Tong" (TJH) to his surname "Ho" (HJH). The two applications were heard together by the learned Judicial Commissioner ("JC", as Her Ladyship then was). Her Ladyship granted both applications in favour of the respondent on 24 September 2018. The appellant appealed against both decisions in Appeals No. 2210 (encl. 25) and No. 2211 (encl. 20).

[7] We heard the two appeals together. We unanimously dismissed Appeal No. 2211 and allowed Appeal No. 2210. This judgment relates only to Appeal No. 2210.

Enclosure 25

[8] The learned JC had withheld the names of the children to the marriage in her grounds of judgment ("GOJ"). We shall do the same.

[9] In this application, the respondent sought the following order:

> 1. Bahawa Pempetisyen dan Respondent Pertama hadir di pejabat Jabatan Pendaftaran Negara dalam masa 7 hari dari tarikh Perintah ini untuk menukar nama anak bernama TJH kepada HJH.

[10] The respondent made this application pursuant to s. 13A of the Births and Deaths Registration Act 1957 ("Act 299").

[11] The affidavits filed in this application showed the following.

[12] The respondent claimed that his daughter's name was in accordance with the provisions of s. 13A(1) of Act 299 where the surname "Ho" was used, but not his son. In essence, the respondent's case is that the appellant had without his knowledge, registered the surname of their son as "Tong" being the appellant's surname instead of the respondent's surname which is "Ho". As a legitimate child, TJH's surname should be that of the father as provided for under s. 13A(1) of Act 299 and what the appellant had done was contrary to the provisions of the law.

[13] The appellant claimed that the respondent is estopped from raising the issue of surname as the respondent had agreed to relinquish his right to raise the same in the future, in exchange for not having to pay maintenance for the appellant and not having to bear the tertiary education cost of their son. This was reflected in the draft consent order dated 4 October 2016 marked as exh. "T-1". Both parties have agreed for the name in the *decree nisi* to be read as "TJH".

[14] The respondent in the affidavit-in-reply responded that exh. "T-1" is inadmissible as it was a document used in the negotiation discussion. If he had agreed to such term, it would have been reflected in the *decree nisi* but there was no such term. The names of the children were used based on their birth certificates. In any event, the respondent claimed that there cannot be any settlement reached between the parties which contravenes the law as the law must be complied with.

Grounds Of Appeal

[15] The decision of the learned JC was assailed essentially on these grounds:

(i) that the learned JC had wrongly construed the provisions of s. 13A(1) of Act 229;

(ii) that the learned JC had erred in failing to appreciate that in the draft consent order in exh. "T-1", the respondent had agreed not to raise the issue on the change of the surname and that the respondent is estopped from raising the same; and

(iii) that the learned JC erred in holding that the court is entitled to exercise its function as *parens patriae* and she has taken into account issues not raised in the case in granting the respondent's application.

Our Decision

[16] Section 13A of Act 299 is a provision on surname and it reads:

> **Surname of child**
>
> 13A. (1) The surname, if any, to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.

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> (2) The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with s. 13 requests so, the surname may be the surname of that person.

B **[17]** In the present appeal, we are only concerned with s. 13A(1). There is no doubt with regard to the express language used in s. 13A(1) of Act 299 (see the decision of the Court of Appeal in the case of *A Child & Ors v. Jabatan Pendaftaran Negara & Ors* [2017] 7 CLJ 533). The language in s. 13A(1) of Act 299 is plain, unambiguous and explicit and admits to one meaning only,
C that is, if the child is a legitimate child, ordinarily the surname of the father may be entered (see also the decision of the Federal Court in *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 4 CLJ 731; [2020] 2 MLJ 277 – on appeal from the decision in *A Child & Ors (supra*)). In other words, while the surname of a legitimate child is ordinarily derived from the father, the surname can
D also be derived from the mother.

[18] The definition of "surname" in s. 13A of Act 299 was canvassed by the Court of Appeal in the case of *A Child & Ors (supra)* (see also the decision of the Federal Court in *Jabatan Pendaftaran Negara & Ors (supra*).

E **[19]** The surname is not an issue here. Unlike the complexity of the legal issues in the case of *A Child & Ors (supra)* (and also in *Jabatan Pendaftaran Negara*, *supra*) which involved the construction of s. 13A(2), the issue in the appeal before us is straightforward. Both parties are of Chinese race, they have their surnames and TJH is their legitimate son. The dispute is simply
F over whose surname shall prevail in the circumstances and as the surname of their son was registered using the appellant's surname, whether the appellant has failed to comply with the law.

[20] The learned JC did not opine, and we think correctly, that the surname must be that of the father. This is shown from the passage in the GOJ:

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> [29] To my mind, if R1 had indeed agreed not to pursue the change of surname of the second child, this should have been clearly stated as one of the terms in the said *decree nisi*, especially in light of an express provision in the form of s. 13A BDRA 1957. The absence of such a term in the said *decree nisi* takes this case out of the category where a consent order is
H sought to be altered and thus arguments on estoppel can, and have indeed been, raised by the Petitioner.

[21] The respondent's affidavits seemed to suggest that he premised his discontentment with the appellant on two grounds. Firstly, the words used in the affidavit in support "tidak mengikuti peruntukan s. 13A Akta
I Pendaftaran Kelahiran dan Kematian 1957" (see para. 9) connote an act of non-compliance. Secondly, the words "tidak boleh adanya sebarang persetujuan yang bertentangan dengan undang-undang negara dan Akta ini

perlu dipatuhi" in his affidavit-in-reply (see para. 6) connote an act in contravention of the law. We do not however intend to delve further on the second contention because at the hearing before us, learned counsel for the respondent conceded that s. 13A(1) of Act 299 did not take away the mother's right to name the child using her surname. It is the first contention that is the key issue in this appeal.

[22] The learned JC granted the application in encl. 25 for two reasons. The first was because the court took into account the right of TJH (which we shall advert to later in this judgment) and the second reason was these:

> [33] Furthermore, although learned counsel for the Petitioner submitted that the usage of the words "shall ordinarily" gives way to specific agreement to the contrary between the parties, no case law was cited on the interpretation of the words "shall ordinarily be" in the context of s. 13A BDRA 1957 and I have also not been able to find any judgment which has elucidated on this point.
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> [34] Under the circumstances, I am not convinced that this is a case that is exceptional or out of the ordinary such that R1's application should be denied nor one where estoppel lies to defeat the same.

[23] It is apparent from the above passages that the learned JC was rather hesitant to agree with learned counsel for the appellant that the words "shall ordinarily" allow parties to make specific agreement to the contrary because there was no decided case that had construed the meaning of the words "shall ordinarily" in the context of s. 13A(1) and also because she was unable to find any judgment which has canvassed this point. Her Ladyship did not consider it necessary to make a finding on the effect of the word "ordinarily".

[24] By reason of the respondent's insistence to displace the surname of the appellant, we say that Her Ladyship is called upon to interpret the word "ordinarily". Had she done so as a starting point, she would agree with learned counsel for the appellant that the presence of the word "ordinarily" allows the parties to make specific agreement to the contrary. With the definition in mind, we are of the view that the learned JC would have proceeded to give sufficient judicial appreciation to the facts and circumstances of the case in deliberating over the application, and to take relevant things for consideration and leave aside what is not relevant.

[25] The word "ordinarily" is an ordinary word which should be given its natural and ordinary meaning. The word does not carry any special meaning or attribute. We have looked at several dictionaries on the definition of the word "ordinarily" as shown below:

(i) AS Hornby, *Oxford Advance Learner's Dictionary*, 8th edn, Oxford University Press, 2010 at p. 1036:

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> 'Ordinarily' means: 1. 'a normal way', synonymous to 'normally', 2. Used to say what normally happens in a particular situation especially when something different happening is happening this time, synonymous to 'usually'.

(ii) Cambridge Dictionary defines 'ordinarily' as 'usually' which
B synonymous to 'commonly' and 'normally' (see https://dictionary.cambridge.org/dictionary/english/ordinarily)

(iii) Merriam-Webster defines 'ordinarily" as 'in an ordinary manner or to an ordinary extent: such as 'in the ordinary course of events', 'to the usual extent', or 'in a commonplace or inferior way' (see https://
C www.merriam-webster.com/dictionary/ordinarily#h1).

(iv) Collins English Dictionary defines the word 'ordinarily' as 'in ordinary, normal, or usual practice; usually; normally', 'usually; as a rule,' or 'in an ordinary manner or to an ordinary degree' (see https://www.collinsdictionary.com/dictionary/english/ordinarily).

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[26] From the above dictionary definitions of the word "ordinarily", what s. 13A(1) of Act 299 simply means is that usually or normally or in the normal course of event, the child's surname should derive from his father. Accordingly, TJH's name should have been HJH when his name was first
E registered with the National Registration Department. But at the same time, s. 13A(1) of Act 299 does not preclude the appellant from registering TJH's name using her surname. Learned counsel for the respondent submitted that to claim the right to use her surname, the appellant must come within the ambit of the law and say why the surname should not be of the father.

F **[27]** It is obvious that if the word "ordinarily" is absent from s. 13A(1) of Act 299, the child's surname must solely be that of the father. But when that is not the case and when deliberately the term "ordinarily" is incorporated in the statute, it is made clear that the intention of the Parliament is to allow some flexibility in the use of the surname as the words of the statute speaks
G the intention of the Legislature (see *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209). The ambit of s. 13A(1) of Act 299, in our view, is wide enough to allow the parents to exchange or abrogate or relinquish their rights. One clear example is when, prior to the registration, the parents reach an agreement for the mother's surname to be used instead of the father. Another example is, even if the registration of the child's name
H bears the mother's surname, the father has abrogated or relinquished the use of his surname. We say that the law conceptualises such situations to arise. This is the reason why the law does not impose any sanction if the mother does not conform to its express provisions.

I **[28]** Section 13A(1) of Act 299 does not contain words to the effect that if the surname is not that of the father, the mother has to offer reason or say why the surname should not be the father (as submitted by learned counsel for the appellant). We however acknowledge that when the appellant has

departed, so to speak, from the express provision of s. 13A(1) of Act 299, there ought to be a basis or reason for such action. Otherwise, we are not giving effect to the word "shall ordinarily". The legislative intent would be rendered meaningless if the mother is not constrained in any manner to register her child's name using her surname. Thus, whether a mother has brought herself within the ambit of the law would be dependent on the relevant inferences to be drawn from all facts and circumstances of the particular case. The learned JC in our view did canvass the facts and circumstances when she remarked that she was "not convinced that this is a case that is exceptional or out of the ordinary such that R1's application should be denied nor one where estoppel lies to defeat the same". But we think she has misdirected herself as to the facts and the law and hence, our appellate intervention is necessary.

[29] In our view, the factual matrix and the circumstances of this case amply demonstrate why the appellant's action in registering TJH's name is in order and does not fly in the face of the law. From her affidavit-in-reply, we can safely conclude that the appellant did not dispute that the surname should be the surname of the respondent but she resisted the application because she claimed that the respondent had, in the course of their negotiations to amicably reach a settlement with regard to the divorce petition, relinquished his rights.

[30] At the High Court, contrary to the contention of the respondent that exh. "T-1" was inadmissible, the learned JC accepted it. She gave it her due consideration but only to subsequently reject it because Her Ladyship opined that exh. "T-1" carried limited weight since there was no signature of the appellant and respondent as well as their respective counsels to support to the appellant's submission that the respondent now seeks to approbate and reprobate. The learned JC was wrong, in our view, not to give appropriate consideration to exh. "T-1" on that reason alone because the respondent has never disputed that exh. "T-1" was a draft consent order that relates to their divorce proceedings. He only objected to the admissibility of the draft, the objection of which was overruled by the learned JC. The respondent had accepted that decision and he can no longer maintain the argument before us on the inadmissibility of exh. "T-1".

[31] Even if exh. "T-1" is not to be taken into consideration, the *decree nisi* itself is telling. There is no dispute as to the correctness of the content of the *decree nisi*. It is common ground that the *decree nisi* was the result of several negotiations that went on between the parties to finally dissolve their marriage and their matrimonial disputes. By necessary implication, that would include the parents' right to the surname for TJH, the respondent being fully conversant and conscious of his rights to his son's surname.

[32] In the joint petition signed by both parties, para. 7 (at p. 38 of the records of appeal ("RR")) reads:

> 7. Pempetisyen Isteri pada tarikh petisyen ini telah mengandung selama 5 bulan dan dijangkakan bersalin pada penghujung bulan Januari 2016.

Paragraphs (c), (e) and (f) of the joint petition showed that the custody, care and control of the HEV and the child the appellant was pregnant with would be given to her, that she will pay for the maintenance of the children and she did not ask maintenance for herself (see p. 39 RR).

[33] In the divorce petition at para. 4, the appellant pleaded that she was pregnant with their second child and due to deliver the baby in mid-January 2016 (the divorce petition was dated 12 January 2016 and filed on 21 January 2016). The respondent has admitted to the content of para. 4.

[34] Thus, the respondent was well appraised of the arrival of his second child. There was no dispute that the respondent was nowhere to be seen when the appellant gave birth to their son and when she needed to register the child's name before the expiration of a period of 60 days from the date of birth of TJH as required by s. 8 of Act 299. It was also not disputed that the respondent and the appellant were living apart when TJH was born. The learned JC had made a mention in her GOJ on the alleged abandonment of the appellant and TJH during the period of TJH's birth. The appellant being a qualified informant to give information concerning the birth of TJH by virtue of s. 7 of Act 299, proceeded to register her son's name. Instead of using the respondent's surname, she registered her surname. Despite no interest shown to his newly born son, the respondent claimed that the appellant had done wrong in registering her surname without his knowledge and he now insists on his right as the father.

[35] We have considered the facts in totality. In our view, even though the appellant's action in registering TJH's name does not seem to be in conformity with the express provision of s. 13A(1) of Act 299, the respondent's subsequent conduct gives a clear, unqualified indication of his intention to relinquish his right on the use of his surname. Our reasons are as follows.

[36] TJH was ten months old when the *decree nisi* was granted by the court on 16 November 2018. THJ's name and his identity card number 160117-06-0617 and the provision on maintenance of TJH and the respondent's access to the children were all clearly spelt out in the *decree nisi*. The respondent knew then that his son does not carry his surname.

[37] If the learned JC had given some weight to exh. "T-1", and if we are to look at exh. "T-1" which was the draft consent order that was prepared by the respondent's solicitors, there is para. 3.b.iv (see p. 140 RR) which reads – "Pempetisyen akan mengambil langkah-langkah dalam masa satu bulan dari tarikh perintah untuk menukar nama keluarga anak lelaki dari T kepada H". The excerpt showed that the respondent was exerting his right.

The appellant said she did not agree to that para. 3.b.iv and had it cancelled. It is significant to note that in the *decree nisi*, the content of this para. 3.b.iv is not there. An irresistible conclusion to be drawn is that the respondent had agreed to drop his term. Section 15 of Act 299 permits the name of a child by which it is registered to be altered before the expiration of one year from the date of the birth of the child. The respondent cannot feign ignorant of the law. He was represented by solicitors and as we had mentioned earlier, exh. "T-1" was a draft prepared by his solicitors. Thus, if indeed the respondent was persistent in changing his son's surname, he could have done so as TJH was ten months old then. Exhibit "T-1" showed that he had wanted to but the *decree nisi* showed that the subject matter was not pursued.

[38] Even if again, we are not to look at exh. "T-1", the respondent's argument that if he had indeed agreed to relinquish his right, it would have been reflected in the *decree nisi*, is untenable. If he is persistent in the position taken that TJH's name should have used his surname, he ought to have made his reservation, or registered his objection or have the words to the same effect incorporated in the *decree nisi* in order to assert, protect, reserve and preserve his right on his surname. Instead of doing what is expected of him to cement his rights, he not only failed to ensure there is a term in the *decree nisi* to safeguard his right but he allowed TJH's name to be incorporated in the *decree nisi*. In this context, when he without any reservation or qualification allowed his son's name which carry his mother's surname to be mentioned in the *decree nisi*, nothing turns on any of his argument in his affidavits. His argument that the reference to the children' names was simply based on their identity cards is totally unconvincing and merely an afterthought.

[39] The learned JC in our view was plainly in error when she failed to give sufficient judicial appreciation on the issue of estoppel raised by the appellant. We agree with learned counsel for the appellant that the respondent is estopped from revisiting the issue on the surname (see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 and *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 4 CLJ 141; [1996] 2 MLJ 206).

[40] Given the facts and the circumstances in this case, it is obvious that the terms in the *decree nisi* reflected a compromise between the appellant and the respondent, namely, the respondent who is fully conversant and conscious of his rights under s. 13A(1) of Act 299, had agreed to relinquish his right to raise the issue of surname in the future in exchange of not having to pay maintenance for the appellant and not having to pay for the tertiary education cost of their son. The respondent filed the application in encl. 25 when he decided to have a change of mind. It is settled law that the respondent cannot approbate and reprobate (*see PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811; [2000] 4 MLJ 417).

[41] The *decree nisi* is a decree by consent properly entered into by the parties. The law on the effect of a consent order is trite. The respondent is bound by his agreement on his son's surname. Learned counsel for the appellant submitted, citing the Federal Court case of *Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors* [1981] 1 LNS 59; [1981] 2 MLJ 145, that the only possible way in which a consent order can be altered is by the consent of all parties. In this present case, there is no consent by the appellant, therefore the appellant said the respondent's application cannot succeed. It was further submitted that another reason why the respondent should not succeed is because there is no provision in the law to cater for the order he has sought.

[42] That brings us to another point to highlight. Learned counsel for the appellant contended that the order dated 24 September 2018 granted pursuant to the application in encl. 25 is fraught with uncertainty as to its execution. We find there is basis for this argument. Although the application relates to the use of surname as envisaged by s. 13A of Act 299, and since s. 15 of Act 299 is of no assistance to him as TJH has almost attained the age of two years old when the respondent had decided to file encl. 25 on 9 January 2018, it is incumbent on the respondent to specify the relevant provision of Act 299 or any regulations made thereunder or any law for that matter, that he is relying on in proceeding with his application. It is pertinent to note that even his counsel admitted that he was uncertain as to the procedure applicable *vis-a-vis* the execution of the order.

[43] We shall now address the issue of *parens patria*e. In this regard, the learned JC decided to assume the parental role as she was deeply concerned with the rights of TJH and the stigmatisation the child may suffer from in the years to come, if he continues to maintain the surname of his mother. The learned JC said:

> [30] However, having said that, I am of the view that there is an even more critical factor that requires the attention of this Court in exercising its function as *parens patriae* (see *Mahabir Prasad v. Mahabir Prasad* [1981] 2 MLJ 326 and *W v. H* [1987] 2 MLJ 235). Section 24 of the Courts of Judicature Act 1964 [Act 91] provides the civil jurisdiction of the High Court in the following terms: ..
>
> [31] It is notable that the submissions by counsels centred on the rights of the parents, their conduct and the agreement that they have entered between them. Unfortunately, in the warring factions between father and mother, which is the norm in family disputes, the most important aspect was not given any weight and that is the rights of TJH.
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> [32] The fact that R1 is the biological father of TJH is undisputed. If the surname of TJH is maintained as it is, i.e. with the surname "Tong" aspersions may be cast upon the second child as being an illegitimate child since subsection 13A(2) BDRA 1957 provides that "The surname, if any, to be entered in respect of an illegitimate child may be where the mother

is the informant and volunteers the information, be the surname of the mother ...". TJH has an elder sister who carries the surname "Ho". In due time, both children will begin to wonder and question the differences between their surnames. The Petitioner should be mindful of the repercussions of the position that she had taken in resisting this application in Enclosure 25. As much as the parents despise each other in the days and months leading to their divorce and as they go by their separate ways, the venom should not be allowed to manifest in a manner that will have negative impact on the children, especially TJH. An innocent child like TJH should not be stigmatised just because the Petitioner begrudges R1 for the alleged abandonment of the Petitioner and TJH during the period of TJH's birth.

[44] Learned counsel for the appellant submitted that the learned JC had gone on her own frolic in highlighting TJH's purported stigmatisation as the right of the child was never an issue before the court and the parties were not invited to address the matter. Learned counsel for the respondent, while admitting that TJH's right was not an issue before the court, submitted that the learned JC was correct and should be commended for taking into consideration the problems TJH may face in the future if his surname is left as it is.

[45] In addressing this issue, we can do no better than taking guidance from the observations made by Zaki Tun Azmi CJ in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430 at pp. 437 to 438 as shown from the passages below:

[14] The nature of our system is adversarial. This means that the judge has to listen to submissions or cases put by each party to an action. He then decides the case based on evidence and submissions put by both parties. In a criminal case, the prosecution has to prove their case beyond reasonable doubt while the defence's burden is merely to raise a doubt. In civil cases however, the burden placed on both parties is equally balanced. The successful party is the one that is able to prove to the court on the balance of probability that his case is more probable. That is on facts. The claimant has to plead his case in the statement of claim while the defendant pleads in his statement of defence. In short, both parties are aware of the other party's case. In fact, both parties would know the facts but also the documents, if any, that are going to be relied upon by his opposite party.

[15] The facts pleaded will inadvertently be related to the legal principles that the party will be relying upon. It is not for the court to decide on what principle a party should plead. It should be left to the parties to identify it themselves. (See *Tan Kong Min v. Malaysia National Insurance Sdn. Bhd.*, *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* and *Janagi v. Ong Boon Kiat*).

[16] The court also decides a case after considering the evidence adduced by each party and documents produced by them. Neither party should be taken by surprise. Even in respect of law, whether it is the court at first instance or the appellate court, judges rely heavily on the submissions put

A forward by the respective counsel. A good counsel is one who produces authorities to support the statement of law he is relying upon. The authorities can be in the form of reported judgments, text books or even published law articles. In fact, according to etiquette, he is supposed to even bring to the attention of the court authorities which favour his opponent's case. Of course in such an instance, he would then distinguish
B the facts of the case before the court to the case in the authority. It is therefore dangerous and totally unadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties
C before him. He must then give an opportunity for both parties to further submit on that particular point. There have been instances where a judge may already form some opinion on certain issues, legal or otherwise, but after hearing submissions and views expressed by a party, he may conclude differently.

D [17] The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the latin maxim *audi alteram partem*, which literally means, to hear the other side, a basic principle of natural justice.

[46] We think it is wrong for the learned JC to decide on the right of TJH,
E no matter how strongly she felt about it, without giving the parents the opportunity to be heard. More so in this case where the learned JC commented that the appellant should be mindful of the repercussions on her son in resisting this application. This inevitably leaves an adverse impression that the appellant was not being thoughtful of her son's future well-being
F when she chose to oppose the application. In our view, if the learned JC is convinced that in the best interest of TJH, it is crucial for the court to assume the parental role, that finding can only be made after having heard the parties, and certainly not before or without hearing them. As the right of TJH seemed to be the overriding factor in allowing the application, it is our view that the
G learned JC is plainly erroneous in arriving at her finding.

[47] We set aside the order dated 24 September 2018. We made an order that the parties are to bear their own costs.

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