

A **MELISSA MARIE ALBERT v. MALCOLM FERNANDEZ &
 ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
 YEOH WEE SIAM JCA

B HANIPAH FARIKULLAH JCA
 [CIVIL APPEALS NO: B-02(A)-1277-06-2018
 & B-02(A)-1278-06-2018]
 3 DECEMBER 2018

C ***FAMILY LAW: Divorce – Children – Custody – Interim custody of five year old
child given to father – Whether father rebutted statutory presumption in s. 88(3) of
Law Reform (Marriage and Divorce) Act 1976 – Whether allegations by parent
against each other corroborated – Whether allegation of abuse of child led to
prosecution – Whether interview with child for purpose of determining interim
custody could be relied on – Whether statutory presumption could be rebutted solely
by interview – Whether mother shown to be unfit to have custody of child –
Whether denying mother access to child constituted blatant disregard to welfare of
child – Whether mother entitled to custody of child***

E The two appeals filed by the appellant ('mother') were: (i) Civil Appeal No.
B-02(A)-1277-06-2018 ('Appeal No. 1277') in respect of encl. 1 of the
originating summons ('OS') which was filed by the respondent ('father'); and
(ii) Civil Appeal No. B-02(A)-1278-06-2018 ('Appeal No. 1278') in respect
of encl. 48 of the OS. Enclosure 1 was the father's application for, *inter alia*,
custody, care and control of the child, to be given to the father with access
F to the mother, together with other ancillary orders and encl. 48 was the
mother's notice of application to amend the interim custody order granting
interim custody of the child to the father pending the hearing of the OS, *ie*,
the application in encl. 1. The mother had applied to vary the interim
custody order to reverse it so that sole custody of the child would be given
G to her. The father and the mother were legally married in 2011 and were
blessed with a son, the child. Both parties were professionals; the father was
a practising lawyer whilst the mother, who was a qualified accountant, had
been working on flexible hours as a real estate negotiator. The father's
account of the facts was that the marriage was plagued with disputes and
quarrels due to the quick temper of the mother who, more often than not,
H threatened the father by hurting herself, loved to scream and would turn
violent every time her wishes were not complied with. The father alleged
that, in fact, the mother had, on a few occasions, caused damage to their
household properties and a few of their maids have left their employment
because of the mother's temper and attitude. The father also alleged that the
I mother was always prioritising her side of the family, rather than spending
time with their son and him. Sometime in 2018, after yet another quarrel
between them, the mother together with the child left their family home and
went back to her parents' house. Although the mother admitted that they

were always quarrelling, she stated that it was not because of her, but because of the father's quick temper, dishonesty, abuse and manipulation. The mother denied the allegation of her being destructive of the household items. The mother further averred that she was the one who spent most of the time with the child and managed the child's school timetable and other activities because of her flexible working hours, in contrast to the father who was a fulltime partner in a law firm and was always busy, and most of the time he would let his mother or their maid to take care of the child. The mother made a counterclaim in the OS, by way of her affidavit for custody of the child, claiming that she was the better person to care for the child. The issue herein was whether the father had rebutted the statutory presumption in s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') for him to be awarded custody of the five-year-old child.

Held (allowing appeal in Appeal No 1277 and substituting with order granting custody to mother; striking out Appeal No 1278)

Per Yeoh Wee Siam JCA delivering the judgment of the court:

- (1) The law on granting custody of a child is provided under s. 88 of the LRA and s. 88(3) provides for a rebuttable presumption that, if the child is below the age of seven, it is for the good of the child that he should be with his mother. (paras 13 & 14)
- (2) Despite all the negative evidence that each party had adduced against each other, including allegations of abuse of the child by the other party, medical reports on the child, and police reports lodged by both parties, the Judicial Commissioner ('JC') concluded that without corroboration, the allegations remained as bare allegations. The JC further found that none of the various allegations of abuse inflicted on the child by both parties had led to any prosecution of the parties by the appropriate authorities. There were no specific findings of fact against the father or mother in order to determine whether the statutory presumption in s. 88(3) of the LRA had been rebutted. In light of the findings, the statutory presumption in s. 88(3) of the LRA remained intact and had not been rebutted by the father to entitle him to be granted custody of the child. (paras 18-20)
- (3) The JC erred in relying solely on the previous interview of the child conducted for the purpose of determining interim custody of the child, pursuant to which the interim custody of the child was granted to the father. The statutory presumption in s. 88(3) of the LRA could not be easily rebutted by the so-called brief interview of the child by the JC, more so when it was conducted for the purpose of deciding interim custody. Even if the interview had been detailed and thorough, and the results of the interview had been disclosed to both parties, the statutory presumption could still not be rebutted solely by an interview. (paras 22 & 24-26)

- A (4) The evidence adduced by the father against the mother only revealed
that both the father and mother had serious disputes in their marriage
between themselves as spouses, and that she was a poor employer to her
B maids. There was no convincing evidence to prove that the mother was
unfit to have custody of the child, and was detrimental to the child's
welfare. In fact, all the allegations of physical abuse of the child by the
father and mother were found by the JC to be mere allegations,
uncorroborated, and no police action was taken against either parent.
C The mother was the one who spent most of her time with the child. She
gave up her successful career in internal audit and worked flexible hours
as a real estate negotiator in order to spend more time with, and to care
for the child. The father was a busy litigation lawyer, and did not adduce
D cogent evidence of a good support system at home to take care of the
child. (paras 27, 28 & 31)
- (5) The father had denied and deprived the mother of access, to the
E detriment of the child. The child also did not go to school for numerous
days, and this was surely not for the welfare of the child, which ought
to be the paramount consideration under s. 88(2) of the LRA, and which
the father totally disregarded. It was also not for the welfare of the child
F for the father to prevent the child from going for an overseas vacation
with his mother during the school holidays when it was the mother's
turn to have access, in blatant disregard of access arrangements granted
by the court. While every parent has a right to custody of a child, it is
also the right of the child, and for the welfare of the child, to be well
G cared for and loved by both parents. It was wrong of the father to
deprive the child from the care and love of his mother by denying access
to the mother. Based on the father's past poor track record of keeping
the child away from the mother, should custody of the child be given
to the father, it was highly probable that he would continue to deny
access to the mother. Therefore, the order was substituted with an order
granting custody to the mother. (paras 32, 35 & 39)

Bahasa Malaysia Headnotes

- Dua rayuan yang difailkan oleh perayu ('si ibu') adalah: (i) Rayuan Sivil No.
B-02(A)-1277-06-2018 ('Rayuan No. 1277') berkaitan dengan lampiran 1
saman pemula ('SP') yang difailkan oleh responden ('si bapa'); dan Rayuan
H Sivil No. B-02(A)-1278-06-2018 ('Rayuan Sivil No 1278') berkaitan
lampiran 48 SP. Lampiran 1 adalah permohonan si bapa untuk, antara lain,
penjagaan dan kawalan anak, diberi kepada si bapa dengan akses diberi
kepada si ibu, bersama-sama dengan perintah-perintah sampingan dan
I lampiran 48 adalah notis permohonan si ibu untuk meminda perintah jagaan
interim memberi perintah jagaan anak kepada si bapa sementara menunggu
perbicaraan SP, iaitu, permohonan lampiran 1. Si ibu memohon untuk
mengubah perintah jagaan interim untuk diakas agar jagaan anak diberi
sepenuhnya kepada si ibu sahaja. Si bapa dan si ibu berkahwin secara sah

pada 2011 dan dikurniakan dengan seorang anak lelaki, anak tersebut. Kedua-dua pihak adalah profesional; si bapa beramal sebagai peguam manakala si ibu, seorang akauntan bertauliah, bekerja mengikut masa fleksibel sebagai seorang perunding hartanah. Fakta kes, menurut si bapa, adalah perkahwinan mereka dilanda pertikaian dan pergaduhan disebabkan kelakuan si ibu yang cepat meradang dan selalu mengugut si bapa untuk mencederakan dirinya sendiri, suka menjerit dan akan menjadi ganas setiap kali keinginannya tidak dipatuhi. Si bapa mendakwa bahawa, sebenarnya, si ibu, beberapa kali, mengakibatkan kerosakan pada barangan di rumah dan beberapa pembantu rumah telah meninggalkan pekerjaan disebabkan sifat marah dan perangai si ibu. Si bapa juga menyatakan bahawa si ibu selalu memberi lebih keutamaan pada keluarganya daripada meluangkan masa dengan anak dan si bapa. Pada 2018, selepas satu lagi pergaduhan antara mereka, si ibu bersama-sama dengan anak tersebut meninggalkan rumah keluarga dan kembali ke rumah ibu bapa si ibu. Si ibu, walaupun mengakui bahawa mereka sering bergaduh, menyatakan bahawa itu bukan disebabkan oleh dirinya, tetapi disebabkan oleh sifat marah, ketidakjujuran, penderaan dan manipulasi si bapa. Si ibu menafikan dakwaan yang dia membinasakan barangan rumah. Si ibu selanjutnya menyatakan bahawa dia yang paling banyak meluangkan masa dengan anak dan menguruskan jadual sekolah, aktiviti-aktiviti lain anak disebabkan oleh masa kerja fleksibelnya, berbanding dengan si bapa yang adalah rakan kongsi sepenuh masa di firma guaman dan sentiasa sibuk, dan pada kebanyakan masa si bapa akan membiarkan ibunya atau pembantu rumah menjaga anak. Si ibu menuntut balas dalam SP melalui afidavitnya untuk jagaan anak dengan menyatakan bahawa dia lebih sesuai menjaga anak. Isu di sini adalah sama ada si bapa berjaya mematahkan anggapan statutori dalam s. 88(3) Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta') untuk diberi jagaan anak berumur lima tahun.

Diputuskan (membenarkan rayuan dalam Rayuan No 1277 dan menggantikan dengan perintah memberi jagaan kepada si ibu; membatalkan Rayuan No 1278)

Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:

- (1) Undang-undang untuk memberi jagaan anak diperuntukkan bawah s. 88 Akta dan s. 88(3) memperuntukkan anggapan yang boleh dipatahkan bahawa, jika anak di bawah umur tujuh tahun, adalah untuk kebaikan anak bahawa dia tinggal dengan ibunya.
- (2) Walaupun dengan kesemua keterangan negatif yang dikemukakan oleh setiap pihak terhadap satu sama lain, termasuk dakwaan penderaan anak oleh pihak satu lagi, laporan perubatan anak, dan laporan-laporan polis oleh kedua-dua pihak, Pesuruhjaya Kehakiman ('PK') memutuskan bahawa tanpa keterangan sokongan, dakwaan-dakwaan itu kekal dakwaan semata-mata. Pesuruhjaya Kehakiman selanjutnya mendapati tiada satu pun daripada berbagai dakwaan penderaan atas anak oleh

- A kedua-dua pihak menjurus pada pendakwaan terhadap pihak-pihak oleh pihak berkuasa yang sewajarnya. Tiada dapatan fakta spesifik terhadap si bapa atau si ibu untuk menentukan sama ada anggapan statutori bawah s. 88(3) Akta dipatahkan. Berdasarkan dapatan itu, anggapan statutori bawah s. 88(3) masih kekal dan tidak dipatahkan oleh si bapa untuk
- B diberi hak jagaan anak.
- (3) Selanjutnya, dalam mencapai keputusan itu, PK terkhilaf apabila bersandar semata-mata atas temu bual terdahulunya dengan anak yang dibuat untuk tujuan menentukan hak jagaan interim anak, yang berikutan itu jagaan interim anak diberi kepada si bapa. Anggapan statutori dalam
- C s. 88(3) Akta tidak boleh dipatahkan dengan mudah oleh temu bual pendek anak itu oleh PK, lebih-lebih lagi apabila temu bual itu dibuat dengan tujuan menentukan jagaan interim. Walaupun temu bual dibuat dengan terperinci dan menyeluruh dan keputusan temu bual dinyatakan pada kedua-dua pihak, anggapan statutori masih tidak boleh dipatahkan
- D hanya dengan satu temu bual.
- (4) Keterangan yang dikemukakan si bapa terhadap si ibu hanya mendedahkan bahawa mereka mempunyai pertikaian serius dalam perkahwinan mereka sebagai pasangan suami isteri, dan si ibu adalah majikan yang tidak bagus untuk pembantu-pembantu rumahnya. Tiada
- E keterangan yang meyakinkan untuk membuktikan si ibu tidak sesuai mendapat jagaan anak, dan akan menjejaskan kebajikan anak. Hakikatnya, kesemua dakwaan penderaan fizikal terhadap anak oleh si bapa dan si ibu didapati PK sebagai dakwaan semata-mata, tidak disokong dan tiada tindakan polis diambil terhadap mana-mana pihak.
- F Sebenarnya, si ibu yang paling banyak meluangkan masanya dengan anak. Dia meninggalkan kerjayanya sebagai juruaudit dalaman dan bekerja dengan masa fleksibel sebagai perunding hartanah untuk meluangkan lebih masa, dan untuk menjaga anak. Si bapa adalah peguam litigasi yang sibuk dan tidak mengemukakan apa-apa keterangan munasabah sistem sokongan baik di rumah untuk menjaga anak.
- G
- (5) Si bapa menafikan dan mengetepikan akses kepada si ibu, sehingga memudaratkan pada anak. Anak juga tidak pergi ke sekolah untuk beberapa hari, dan ini bukan dalam kebajikan anak, yang sepatutnya menjadi pertimbangan utama bawah s. 88(2) Akta, yang tidak diendahkan langsung oleh si bapa. Kebajikan anak tidak terjaga apabila
- H si bapa menghalang anak bercuti ke luar negara bersama-sama dengan si ibu semasa cuti sekolah apabila si ibu sepatutnya mempunyai akses, jelas tidak mengendahkan aturan akses yang diberi mahkamah. Walaupun setiap ibu bapa mempunyai hak jagaan anak, menjadi hak anak dan demi kebajikan anak, untuk dijaga dan disayangi oleh kedua-
- I dua ibu dan bapa. Salah untuk si bapa menafikan anak daripada jagaan dan kasih sayang si ibu dengan menafikan akses kepada si ibu.

Berdasarkan rekod tidak memuaskan si bapa yang menjauhkan anak daripada si ibu, jika jagaan anak diberi kepada si bapa, kemungkinan besar dia akan terus menafikan si ibu akses. Oleh itu, perintah digantikan dengan perintah memberi jagaan kepada si ibu.

A

Case(s) referred to:

Sia Lee Fei v. Soh Kok Kong [2010] 8 CLJ 492 HC (*dist*)

B

Thanaletchimy Batamallai v. Vijaya Kumar Kassinathan [2018] 8 CLJ 61 CA (*refd*)

Viran Nagapan v. Deepa Subramaniam & Other Appeals [2016] 3 CLJ 505 FC (*refd*)

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, s. 88(2), (3)

For the appellant - Ambiga Sreenevasen, Honey Tan Lay Ean, K Shanmuga & Nasyrah Samir; M/s Kanesalingan & Co

C

For the respondent - M Menon, Puspa Ratnam, Ravi Nekoo & Parvinder Kaur; M/s Hakem Arabi & Assos

[*Editor's note: For the High Court judgment, please see Malcolm Fernandez v. Melissa Marie Albert* [2018] 1 LNS 1092 (*overruled*).]

D

Reported by S Barathi

JUDGMENT

Yeoh Wee Siam JCA:

E

Introduction

[1] The following two appeals were heard together before us on 23 August 2018 and 4 September 2018:

- (i) Civil Appeal No. B-02(A)-1277-06-2018 (“Appeal No. 1277”) in respect of encl. 1 of the originating summons (“OS”) which OS was filed by the respondent/plaintiff/father of the child (“father”); and
- (ii) Civil Appeal No. B-02(A)-1278-06-2018 (“Appeal No. 1278”) in respect of encl. 48 of the OS.

F

Both appeals were filed by the appellant/defendant/mother of the child (“mother”).

G

[2] Enclosure 1 was the father’s application for, *inter alia*, custody, care and control (hereinafter cumulatively referred to as “custody”) of the child, Marc Aiden Fernandez, to be given to the father with access to the mother, together with other ancillary orders.

H

[3] Enclosure 48 was the mother’s notice of application to amend the interim custody order dated 12 April 2018 where, in respect of encls. 4 and 10, the High Court had granted interim custody of the child to the father pending the hearing of the OS ie, the application in encl. 1. The mother had applied to vary the interim custody order to reverse it so that sole custody of the child would be given to her.

I

A Background Facts

[4] Briefly, the facts of in the case are as follows:

[5] The father and mother were legally married on 28 May 2011. On 16 December 2012, they were blessed with a son, ie, the child.

B [6] Both parties are professionals. The father is a practising lawyer whilst the mother, a qualified accountant, is now working flexy hours as a real estate negotiator with Reapfield Properties (HQ) Sdn Bhd.

C [7] According to the father, their marriage was plagued with disputes and quarrels due to the quick temper of the mother who more often than not always threatened the father by hurting herself, loved to scream and would turn violent every time her wishes were not complied with. The father alleged that in fact the mother had, on a few occasions, caused damage to their household properties such as breaking the kitchen cabinet door and the door to their bedroom cabinets (paras. 19-24 of the father's affidavit in encl. 2). The father further alleged that a few of their maids have left their employment because of the mother's temper and attitude. The father has come to a point where he is now reluctant to engage a new maid to assist in the housework since he is wary of the wife's behaviour and ill treatment of their maid (maid's letter, exh. MF4 of encl. 2). The father alleged that the mother is always prioritising her side of the family, rather than spending time with their son and him. On or about 10 January 2018, after yet another quarrel between them, the mother together with the child left their family home in Taman Gasing Indah, Petaling Jaya, and went back to her parents' house.

F [8] The mother, in her affidavit in reply, admitted that they were always quarrelling not because of her but because of the father's quick temper, dishonesty, abuse and manipulation. The mother denied the allegation of her being destructive of the household items. She averred that instead, those incidents were beyond her control, for example, the glass cabinet fell because it was loose, and when she was cleaning the glass fragments, the father came back and accused her of causing damage to the glass door of the said cabinet. The mother further averred that she was the one who spent most of the time with the child and managed the child's school timetable and other activities because of her flexible working hours, in contrast to the father who is a full time partner in a law firm and is always busy, and most of the time he would let his mother or their maid to take care of the child.

H [9] The wife made a counterclaim in the OS by way of her affidavit for custody of the child claiming that she is the better person to care for the child.

I Decision Of The High Court

[10] The High Court heard both encls. 1 and 48 together. On 11 June 2018, the High Court gave order in terms of encl. 1 and dismissed encl. 48. The effect of such decision and final order is that joint guardianship was given to both parents, but sole custody was given to the father, with access to the mother.

[11] The mother is now appealing to this court against the said decision. A

Decision Of This Court

[12] Having heard the submissions of both learned counsel, and having perused the records of appeal, on 4 September 2018 we made the following unanimous decision: B

- (i) Appeal No. 1277, on encl. 1, is allowed with no order as to costs; and
- (ii) Appeal No. 1278, i.e. the appeal on the interim custody order, has been rendered academic and is therefore struck out with no order as to costs;
- (iii) the deposits are to be refunded to the appellant/mother. C

Grounds For Our Decision

The Law On Custody Of A Child

[13] The law on granting custody of a child is provided in s. 88 of the Law Reform (Marriage and Divorce) Act 1976 (“LRA”): D

Power for court to make order for custody

88(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person. E

(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 F
- (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(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 fact of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. G

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently. (emphasis added) H

[14] The law is very clear. If the child is below the age of seven years, then the presumption under s. 88(3) of the LRA is that for the good of the child, he should be with his mother. I

A [15] Section 88(3) of the LRA was considered by this court in the recent case of *Thanaletchimy Batamallai v. Vijaya Kumar Kassinathan* [2018] 8 CLJ 61; [2018] 4 MLJ 557 where Umi Kalthum JCA, in delivering the judgment of the Court of Appeal, at pp. 67-69 (CLJ); pp. 563-565 (MLJ) stated the following position of the law on the said statutory presumption:

B [28] The position of the law on the power of the court to make an order for custody of children below the age of seven years old is clearly provided under s. 88(3) of the LRA. The law presumes (*albeit* rebuttable presumption) that it is in the best interest of the child aged seven years and below to be under the care and custody of the mother unless it can be proven to the court that the child would be better off with someone else.

C [29] The rationale behind this presumption has been elucidated in numerous cases. Reference is made to the case of *L v. S* [2002] 7 MLJ 584; [2002] 6 CLJ 106 where Justice Clement Skinner HCJ (as he then was), explained the rationale behind the presumption under s. 88(3) of the LRA, at p 593 (MLJ), as follows:

D The rationale behind this presumption has been explained in a number of cases. It is that this period ie, a child reaches seven years of age, is a period of nurture when a young child is dependent on the mother for its physical and emotional needs. Thus, in *K Shanta Kumari v. Vijavan* [1986] 2 MLJ 216 at p 218, Wan Yahya J (as he then was) said:

E Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else.

F And in *Re Orr* [1973] 2 DLR 77 Muloch CJ said:

G 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 ...

H And in *W v. H* [1987] 2 MLJ 235 Shankar J (as he then was) in deciding that custody of a newborn baby should be given to its mother said at p 242:

I I would state it as a categoric opinion of this court that in such a situation and overwhelming case would have to be shown before a newborn baby should be deprived of the society of its mother. It would be unwise to try and catalogue the circumstances before such an order would be made, but I would venture to suggest that the applicant in such cases would have to come close to proving that the health or welfare of the infant would be put at serious risk if it is left with the mother.

Thus, even though the presumption is a rebuttable one, Shankar J in *W v. H* was of the opinion that strong grounds would be needed to rebut the presumption ...

A

[30] We were of the view that the care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s. 88(3) of the LRA is rebutted. Strong grounds are needed to rebut this presumption. In short, *prima facie* the care and custody of a child of the tender age should remain with the mother and strong grounds are required to justify depriving the mother of such care and custody.

B

[31] In this present appeal, other than mere unsubstantiated allegations by the defendant against the plaintiff, there was no evidence to suggest that the plaintiff was an unfit mother to her child.

C

Issue

[16] The issue is whether the father had rebutted the statutory presumption in s. 88(3) of the LRA for him to be awarded custody of the five year old child.

D

Whether The Interview Of The Child Can Be The Basis For The Statutory Presumption In s. 88(3) Of The LRA To Be Rebutted

[17] Upon a thorough reading of the judgment (RRT 3 pp. 2826 to 2853) of the learned Judicial Commissioner (“JC”), we note that the learned JC did set out the submissions of the father (paras. 8 to 13 of the judgment) and the submissions of the mother (paras. 14 to 20 of the judgment).

E

[18] From the evidence adduced before her, the learned JC did not make any specific findings of fact against the father or mother in order to determine whether the statutory presumption in s. 88(3) of the LRA has been rebutted. We note that the learned JC merely made a general finding in the following manner:

F

[25] It is to be observed in the present case, that notwithstanding the various allegations of abuse inflicted on the said child by both parties, none had led to any prosecution of the parties by the appropriate authorities. Unless and until materials of enough evidentiary value can be adduced to corroborate such allegations, it remains merely that, bare allegations.

G

[26] I wish to add that the public display of animosity and hostility between the parents as are discoverable from the contents of their affidavits filed herein leaves the said child in a most unfortunate predicament that a minor his age should not need to go through. It falls upon this court to make the most appropriate order in all the circumstances of the case to minimise, mitigate and relieve the said child from such a distressing situation so that his overall interests, continuing stability and welfare are the primary and only consideration in the exercise of this court’s judicial consideration.

H

I

A [27] All other relevant facts and circumstances of the case have been judiciously considered to determine the course to be applied which is most beneficial and would, in the circumstances of the case duly serves the welfare and interests of the said child and parties cannot oust the protective jurisdiction of the court over the said child in matters of custody and maintenance (see *W v. H* [1987] 2 MLJ 235 at p.238, 241).

B [19] Thus, despite all the negative evidence that each party had adduced against each other, including allegations of abuse of the child by the other party, medical reports on the child, and police reports lodged by both parties, the learned JC concluded that without corroboration, the allegations merely remain as bare allegations. She further found that none of the various
C allegations of abuse inflicted on the child by both parties had led to any prosecution of the parties by the appropriate authorities.

D [20] Pursuant to the above findings of the learned JC, it only means that the statutory presumption in s. 88(3) of the LRA remains intact and has not been rebutted by the father to entitle him to be granted custody of the child.

[21] The learned JC then went on further to decide the issue based on her interview of the child, and she made the following finding thereof:

E [32] From the said interview, it is apparent that said child has better composure, attachment and dependability on PH. Consequently, it would not be just in the circumstances for the said boy to forcibly separate him from that comfort and the sense of security that he enjoys with PH during this period of nurture in his life. Continuity must be observed. I am satisfied that in all the circumstances of the case the burden of rebutting the presumption under section 88(3) of the Act has been successfully discharged by PH and I gave order in terms of Enclosure (1).

F (Note: "PH" in the above refers to the plaintiff husband or the father)

G [22] There is no record in this Judgment of the learned JC on encls. 1 and 48 dated 8 August 2018 (RRT3 pp. 2826 to 2853) of how the interview was conducted by the learned JC. However, from the submissions of learned counsel for the mother, we note that the learned JC had relied solely on the previous interview of the child that she had conducted for the purpose of determining interim custody of the child.

H [23] At our own instance, we therefore referred to the learned JC's judgment dated 6 August 2018 (RRT2 pp. 2776 to 2793) in respect of the two applications in encl. 4 (by the father), and encl. 10 (by the mother) for interim custody of the child. We note that in para. 15 of that judgment (RRT2 pp. 2790 and 2791), the learned JC had more to say on the said interview of the child:

I [15] In all the hostility between the parties as revealed in their respective affidavits, I had the opportunity to interview the said child in the presence of his parents and I find the said child to be timid even though he can speak and voice his opinion very well. He was always on PH's lap and despite the fact that DW has not seen the said child for three weeks (as

alleged by DW), the said child didn't go running to DW as normally a child that age would do if he misses his mother. But it is not so in this case, I can see that the said child is very close and attached to PH and he talks a lot about his daddy and his office and not once did he refer to the mother. I tried to have a personal interview with the said child where I have asked both parties to leave the said child and pretend that we are playing hide and seek, however when the said child realised that PH was not around, he ran outside looking for PH. The attachment and closeness to the father is plainly obvious where the child appears to be very much composed, relaxed and able to answer my question clearly. The finding of facts because of the court's interview with the child plays a vital role in applying section 88 of the Act.

(Note: "DW" in the above refers to the defendant wife or the mother)

[24] It was pursuant to that interview that the learned JC had granted interim custody of the child to the father in encl. 4, and dismissed the mother's application in encl. 10.

[25] We are of the view that the learned JC, in deciding encls. 1 and 48, had erred in relying on the previous interview that she had conducted for determining interim custody of the child. In the first place, it was not even an interview of the child personally considering that when the learned JC wanted to put the child at ease with her alone in her chambers by playing hide and seek, the child ran away to the outside to look for the father. Secondly, as submitted by learned counsel for the mother, the interview was conducted at a time when the mother had been prevented by the father from having access to the child for three weeks. Thus, in our view, it is highly probable that the child would be feeling estranged from the mother and would naturally be more attached to the father, not discounting the real likelihood of parental alienation caused to the child by the father against the mother. In this respect, we note the Facebook post of the father dated 12 June 2018 at 00:44 hours, on the night after he had been given custody of the child in encl. 1, where he talked about ensuring that the child will never be in a "toxic environment", referring obviously to the mother's environment, and how he told a bedtime story to the child that day, describing his lawyers as "Guardian Angel", and in particular where he told the child of his "battle" against the mother:

I told him of how his lead Guardian Angel Pushpa had led the battle. That was his bedtime story today. He was pleased.

[26] We are of the considered opinion that the statutory presumption in s. 88(3) of the LRA cannot be easily rebutted by the so-called brief interview of the child by the learned JC, more so when it was conducted for the purpose of deciding interim custody in encls. 4 and 10, and not for the purpose of deciding encls. 1 and 48 in the present matter, bearing in mind that the five year old child had not been with the mother for three weeks. In any case, even if the interview had been detailed and thorough, and the

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A results of the interview had been disclosed to both parties (which was not done by the learned JC in this case), we do not think that the statutory presumption can be rebutted solely by an interview.

Other Factors To Be Considered For The Welfare Of The Child

B [27] Going on the premise that the law presumes that it is for the good of the child below seven years of age to be in the custody of the mother, then there must be strong and cogent evidence to rebut such statutory presumption. In this case, although it was not specifically considered by the learned JC in her judgment, we note that the evidence adduced by the father against the mother, for example, she being of quick temper, often threatening the father by hurting herself, screaming and turning violent every time her wishes were not complied with, breaking the kitchen cabinet door and door to their bedroom cabinets, a few of their maids leaving their employment because of her temper and attitude, and ill treatment of their maid (exh. MF4, encl. 2, and paras. 36-39 of the father's submissions), prioritising her side of her side of family, being too engaged with social media etc, only reveal that both the father and mother had serious disputes in their marriage between themselves as spouses, and that she is a poor employer to her maids. However, there is no convincing evidence to prove that the mother is an unfit mother to have custody of the child, and is detrimental to the child's welfare.

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E In fact, all the allegations of physical abuse of the child by the father and mother were found by the learned JC to be mere allegations, uncorroborated, and no police action was taken against either parent.

F [28] Contrary to the evidence of child abuse alleged by the father against the mother, and as noted by the learned JC regarding what the mother averred in her affidavit in reply, the mother was the one who spent most of her time with the child. She gave up her successful career in internal audit and worked flexible hours as a real estate negotiator in order to spend more time with, and to care for the child. We note the following submissions of learned counsel for the mother:

G The evidence shows that until the dispute arose, the Mother had been the one attending to Marc's educational needs, medical, social, emotional and other daily needs. She was the one who nurtured and took care of him, and spent the most amount of time looking after him whilst the Father was occupied with work and other pursuits. For example, it will be shown (see paragraph 133 below) that the Mother primarily liaised with Marc's teachers and was the one who oversaw and signed off Marc's homework on a daily basis; regularly organised outdoor activities like picnics and playdates for Marc, and took him for birthday parties (be it of other children or organised Marc's own birthday parties); stayed with Marc whilst he was hospitalised and attended to him whilst he was sick at home; did drawings with Marc, liaised with Marc's piano teacher, and generally did almost everything necessary for Marc's welfare on a day to day basis.

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[29] In *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505, the Federal Court ruled that the paramount consideration in determining the custody of a child is the child's interest and welfare and the court cannot yield on the hurt feelings of either parents though the court may consider their wishes. The child's interest is the sole consideration for the court's determination. In this case the custody of a seven year old boy and five year old girl were given to the father as the children were able to express that they were physically abused by their mother. A B

[30] We have considered the case of *Sia Lee Fei v. Soh Kok Kong* [2010] 8 CLJ 492 cited to us by learned counsel for the father where Yeoh Wee Siam JC (as she then was) awarded custody of, *inter alia*, the five year old twin girls to the respondent/father. In that case, the High Court held that the statutory presumption in s. 88(3) of the LRA was rebutted by the finding of facts that the father was the more suitable parent for the good of the twins. There, the father could provide a secure and stable environment for the child and did not travel abroad for work, but was working locally. On the other hand, the petitioner wife/mother was not granted custody of her children since she was volatile and emotional, but more so because she was hardly at home due to her freelance work. C D

[31] We are of the view that the present case ought to be distinguished from *Sia Lee Fei (supra)*. In this case, the father is a busy litigation lawyer, and prior to the dispute, most of the time the mother was the one who had time to care for the child. The father did not adduce cogent evidence of a good support system at home to take care of the child. At one time his aged mother, 76 years old, took care of the child, but the aged mother had recently been hospitalised for her heart condition (CCB Vol 1 Tab 12 p. 127, para. 7.3). It appears to be that the child spent a lot of time at the father's law office, and was also taken care of by the father's staff at his office. Even if the paternal grandmother and a maid, if at all any maid is employed by the father, were to take care of the child, we do not think that such care can substitute for the mother's own consistent care of the child at home. E F G

Custody And Access Are For The Welfare Of The Child

[32] From the records, we note that the father had been denying the mother access to the child. The father disputed the mother's allegations that he had "abducted" the child on the following three occasions: H

(i) 1 February 2012 to 22 February 2018:

The father refused the mother access, and kept the child away from school for 11 days (CCB Vol 1, Tab 12, p. 156, para. 26 of mother's affidavit no.1);

(ii) 16 March 2018 to 12 April 2018: I

A The father did not return the child to the mother in accordance with the interim access arrangement which was reached after parties had gone through private mediation (CCB Vol 2 Tab 27 pp. 157-160-Solicitors' letters confirming Mediation Agreement). The child was held 28 days completely incommunicado from the mother. The child was not even sent to school by the father:

B (iii) From 27 July 2018 which continued until the hearing of the two appeals in the Court of Appeal before us on 23 August 2018.

C The mother went to pick up the child from the father at the start of the school holidays. The mother was due for access over the school holidays, and had planned to take the child on a trip overseas to Australia. No one was present at the father's house. Calls by the mother to the father went unanswered.

D The father refused to disclose where the child was, despite repeated letters and demands by the mother.

E [33] Even if the father refuses to acknowledge that he had "abducted" the child on three occasions, or objects to the mother's use of the words "abducted" or "abduction", the fact remains that he had denied and deprived the mother of access, to the detriment of the child. The child did not go to school for numerous days, and this is surely not for the welfare of the child, which ought to be the paramount consideration under s. 88(2) of the LRA, and which clearly the father totally disregarded. It is also not for the welfare of the child for the father to prevent the child from going for an overseas vacation with his mother during the school holidays when it was the mother's turn to have access. This is a blatant disregard of access arrangements granted by the court. It is also totally unreasonable considering that the mother had informed the father earlier of such travel plans.

F [34] We take note of the fact that whilst under the care of the father, the child has developed well and has shown an impressive flair for art and drawn some art pieces which have been sent to Sireh Pinang Art Colony, and both father and son have been offered to do a "Father and Son Solo Exhibition" in which they need to come up with 30 art pieces. We are of the view that the father can continue to guide the child and bring out the best in the child even if the mother is given custody of the child, and the father is given regular access. In our considered opinion, it is critical for the welfare of the child to have constant daily or regular care by the mother. A child, in particular one who is only five years old, is of tender age and needs the tender nurture and care of his mother in his most formative years.

G [35] While every parent has a right to custody of a child, it is also the right of the child, and for the welfare of the child, to be well cared for and loved by both parents. Thus, it is wrong of the father to deprive the child from the care and love of his mother, which only the mother can give. It is therefore wrong for the father to deny access to the mother. Based on the father's past

poor track record of keeping the child away from the mother, we are concerned that should custody of the child be given to the father, it is highly probable that he would continue to deny access to the mother.

[36] In fact, the records show that in respect of the alleged third abduction, the father has been found to be *prima facie* in contempt of the High Court Order dated 11 June 2018 (which custody order is the subject matter of the appeal on encl. 1). The High Court had on 9 August 2018 granted the mother's *ex parte* application dated 2 August 2018 for leave to commence committal proceedings against the father for, *inter alia*, denial of access for half of the school holidays.

[37] On record before us is also the fact that as on 23 August 2018, when the two appeals came before us, upon a preliminary issue raised by learned counsel for the mother, this court did not proceed to hear the appeals until the father produced the child in court for access to be given to the mother. The case was stood down for more than an hour until after the lunch break to ensure that the father would come to court to hand over the child to the mother. After the child had been handed over to the mother, we then adjourned the hearing pending a possible amicable settlement of the matter between both parties.

[38] Unfortunately, both parties could not reach an amicable settlement. Hence, we proceeded to hear the case on 4 September 2018, and decided accordingly. We underscore the fact that the father has a propensity to deny the mother access to the child, regardless of the welfare of the child.

Conclusion

[39] Finally, we are satisfied that the learned JC had erred in fact and in law to hold that the statutory presumption in s. 88(3) of the LRA has been rebutted by the father and thereby granting custody of the five year old child to the father. We find merits in Appeal No. 1277 and allowed the appeal, and set aside the order and decision of the High Court, and substituted it with an order granting custody to the mother with similar previous access arrangements (which had been given to the mother by the High Court in encl. 1) to the father.

[40] In view of our decision on Appeal No. 1277, Appeal No. 1278 has been rendered academic, and therefore struck out.

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