IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF KUALA LUMPUR

[DIVORCE PETITION NO: WA-33-43-01/2016]

BETWEEN

TONG SEK EE (P) ... PETITIONER

AND

1. HO SHU JOON

2. AOM SUNITSA ... RESPONDENTS

GROUNDS OF JUDGMENT

Introduction

[1] The First Respondent husband ('R1') had, vide a Notice of Application filed on 31.10.2017 (Enclosure 20), applied for an order to vary the *Decree Nisi* dated 16.11.2016 ('said *Decree Nisi*') in relation to the terms for access to his two children, HEV and TJH under section 96 of the Law Reform (Marriage & Divorce) Act 1976 [*Act 164*] ('LRA 1976'). Subsequently, R1 filed another Notice of Application on 9.1.2018 (Enclosure 25) on 9.1.2018 for an order to have the name of the child "TJH" changed to "HJH" pursuant to section 13A of the Births and Deaths Registration Act 1957 [*Act 299*] ('BDRA 1957').

[2] On 24.9.2018, I allowed both Enclosures 20 and 25 with costs to be borne by each party.

[3] The Petitioner, being dissatisfied, now appeals against my decision for both Enclosures.

The Cause Papers

[4] The relevant affidavits for purposes of Enclosure 20 are as follows:

(a) R1's Affidavit In Support ('AIS') affirmed on 23.10.2017 (Enclosure 19);

(b) the Petitioner's Affidavit In Reply ('AIR') affirmed on 28.11.2017 (Enclosure 22);

(c) R1's AIR affirmed on 21.12.2017 (Enclosure 23);

(d) the Petitioner's AIR (2) affirmed on 11.1.2018 (Enclosure 26);

(e) R1's Additional Affidavit affirmed on 24.7.2018 (Enclosure 38); and

(f) the Petitioner's AIR affirmed on 10.8.2018 (Enclosure 41).

[5] The following are the Affidavits which were filed by the parties in respect of Enclosure 25:

(a) R1's AIS affirmed on 5.1.2018 (Enclosure 24);

(b) the Petitioner's AIR affirmed on 24.1.2018 (Enclosure 27); and

(c) R1's AIR affirmed on 2.2.2018 (Enclosure 28).

[6] Learned counsels for the Petitioner, Mr. Balbir Singh and Ms. Sharon Selva and learned counsels for the Respondents, Mr.

Ravi Neeko and Ms. Parvinder Kaur appeared before the Court on 25.4.2018 for the hearing of Enclosure 25. Basically, they relied on the Affidavits and written submissions which had been filed. I then fixed 22.5.2018 as the date for decision on Enclosure 25.

[7] Having had a closer read of the Affidavits and written submissions filed in respect of Enclosure 25 and also Enclosure 20, which was still pending at the material time, on 22.5.2018 I asked learned counsels whether both Enclosures could be looked into together with a view of attempting a settlement between the parties. Learned counsels for the Petitioner who appeared in Court that day, Mr. Balbir Singh and Mr. Daniel Ong had no objections while Ms. Parvinder for the Respondents had left it to the Court to decide. All counsels had no objections for the Court to speak to the parties in an attempt to mediate the matter. However, subsequently, learned counsels had, on their own efforts, proposed R1's terms of access to the two children on a trial basis. Unfortunately, the access did not take place as planned and thereafter, learned counsels prayed that the Court delivers its decision for Enclosures 20 and 25.

[8] Before I proceed to give my full grounds in arriving at the decision as I did, I would like to clear any issues that may be raised by the parties in the appeal as regards R1's 2nd. AIR affirmed on 13.8.2018 ('said Affidavit') which was submitted in hard copy to the Court on 13.8.2018 for purposes of Enclosure 20. Upon receiving the said Affidavit, I noticed that there was no proof of filing and payment of the requisite fees. Thus, on the date fixed for decision of Enclosures 20 and 25, I had asked learned counsel for R1 regarding this matter whereupon Ms. Parvinder Kaur confirmed that e-filing of the said Affidavit was not done. A few minutes after I had delivered my decision in

Chambers, learned counsel for the Petitioner came back and enquired whether I had taken the said Affidavit into account in my deliberation. I informed Mr. Balbir Singh that I had read the said Affidavit and seen the CD containing the video of HEV swimming in the pool. However, it must be made clear here that the contents of the said Affidavit and the CD were not taken into consideration in my final decision on Enclosure 20.

Brief Background Facts

[9] The Petitioner and R1 were legally married on 30.3.2013. The couple have a daughter, HEV who was born on 30.10.2013. The Divorce Petition was filed on 21.1.2016, four days after the Petitioner gave birth to TJH on 17.1.2016.

[10] The Petitioner alleged that R1 had committed adultery with R2, a Thai night club employee. The Petitioner and R1 had lived separately since September 2015. The Marriage Tribunal in Kuantan made two attempts on 25.11.2015 and 30.12.2015 to reconcile the marriage but these came to naught.

[11] Thereafter, the Petitioner and R1 obtained an order, by consent, from the High Court in Kuantan on 4.1.2016 for R1's access to the children.

[12] The marriage was dissolved pursuant to the said *Decree Nisi* before Siti Mariah Binti Haji Ahmad J where the terms on custody, care and control of the children; R1's access to the children; maintenance for the children; division of property; and educational expenses for HEV were recorded by consent. The said *Decree Nisi* was made absolute by a certificate dated 6.1.2017.

(A) Enclosure 25: R1's application for an order to have the name of the second child changed from "TJH" to "HJH"

[13] This application is made pursuant to section 13A BDRA 1957 which provides as follows:

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

[14] The main reason for this application is that the Petitioner had, without R1's knowledge, registered the surname of their son as "Tong" being the Petitioner's surname instead of R1's surname which is "Ho".

- The Parties' Contentions

[15] R1 submitted that TJH is a legitimate child of the Petitioner and R1 and as such, the surname should be that of the father as provided for under section 13A BDRA 1957.

[16] Before I progress further, it is useful at this juncture for me to set out the salient terms in the said *Decree Nisi* which are relevant to the determination of Enclosures 20 and 25 as follows (quoted as they appear with the errors in the numbering of the paragraphs):

> "... ***DAN ADALAH DIPERINTAHKAN SECARA PERSETUJUAN*** *bahawa:-*
>
> *1. Pempetisyen, TONG SEK EE diberikan hak jagaan (custody), pemeliharaan (care), kawalan (control)*

*terhadap anak-anak Pempetisyen dan Responden Pertama iaitu (**Ho** ... dan **TONG** ...;*

2. *Responden Pertama akan diberikan akses mulai 1 haribulan Januari 2017 di Kuantan seperti berikut:-*

   a. *Anak perempuan*

      i. *Setiap hari Sabtu bersilih ganti (alternate) dari pukul 10.30 pagi hingga 7.00 petang*

      ii. *Setiap Ahad bersilih ganti (alternate) dari pukul 10.30 pagi hingga 9.00 petang*

   b. *Anak lelaki*

      i. *Setiap Sabtu bersilih ganti (alternate) dari pukul 4.30 petang hingga 7.00 petang di rumah Pempetisyen*

      ii. *Setiap Ahad bersilih ganti (alternate) dari pukul 7.30 petang hingga 9.00 petang di rumah Pempetisyen*

      iii. *Responden Pertama akan memastikan bahawa anak-anak tersebut menghadiri aktiviti ko-korikular semasa aksesnya*

      iv. *Hak lawatan dan akses di atas mesti berlaku dalam kehadiran Responden Pertama*

      iv. *Akses di perenggan a(i) & (ii) dan b(i) & (ii) akan berlaku pada minggu yang sama*

   c. *Cuti Sekolah dan cuti am*

i. Cuti sekolah dan cuti am bagi anak perempuan dan anak lelaki selepas setiap mereka mencapai umur 7 tahun masing-masing akan dibahagi samarata di antara Pempetisyen dan Responden Pertama.

ii. Sekiranya cuti sekolah dan cuti am jatuh pada hari akses anak-anak, maka cuti sekolah dan cuti am akan berjalan serentak dan tidak boleh digantikan.

iii. Aktiviti persekolahan anak-anak semasa cuti sekolah akan diberi keutamaan dan baki cuti persekolahan ini akan dibahagi samarata.

d. Tahun Baru Cina

Pempetisyen akan memberi akses munasabah pada musim Tahun Baru Cina kepada Responden Pertama.

4. Nafkah untuk anak-anak

Responden Pertama akan membayar RM500.00 untuk setiap anak pada atau sebelum hari ke-7 setiap bulan dari tarikh perintah ini.

...

6. Perbelanjaan Pendidikan

Responden Pertama bersetuju membiayai perbelanjaan pendidikan Sarjana Muda universiti anak perempuan

8. Perintah Mahkamah Tinggi Kuantan

Terma-terma persetujuan mengenai akses ini akan menggantikan perintah Mahkamah Tinggi Kuantan bertarikh 4 Januari 2016.

…".

[17] For the Petitioner, three main grounds were put forth in resisting Enclosure 25, namely that –

(a) R1 is estopped from raising the issue of TJH's surname as it was previously raised during the hearing of the Divorce Petition;

(b) R1 had, prior to recording the said *Decree Nisi*, agreed to relinquish his rights to raise the issue of surname in the future in exchange for not having to pay maintenance for the Petitioner and not having to bear the tertiary education costs for TJH; and

(c) the Petitioner and R1 had agreed for the name in the said *Decree Nisi* to be stated as "TJH".

The judgments in *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 4 CLJ 466; *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232 and *Ganapathy Chettiar v. Lum Kum Chum & Ors., Meenachi v. Lum Kum Chum & Ors.* [1981] 2 M.L.J. 145 were referred to in support of the Petitioner's arguments.

[18] In response to the above submission, learned counsel for R1 relied on the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 to support his submission that the doctrine of estoppel is not applicable

because the issue of the son's surname was never adjudicated in court in the earlier proceedings nor was there any term recorded in respect of the said issue.

[19] R1 also submitted that there was no arrangement as alleged by the Petitioner that R1 had relinquished his right in respect of the son's name. If there was such an arrangement or agreement, a term in the said *Decree Nisi* to that effect would have been recorded.

[20] In furtherance of the Petitioner's submission, counsel had sought to rely on the draft consent terms dated 4.10.2016 prepared by R1 (exhibit "**T-1**" in Enclosure 27) which was discussed in the negotiations leading up to the said *Decree Nisi*. Learned counsel for R1 submitted that exhibit "**T-1**" is inadmissible as it is a document which was used during the negotiations with a view to an amicable settlement and the case of *Hadi bin Hassan v. Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522 was referred to in support of this submission.

[21] On the other hand, the Petitioner's counsel relied on the case of *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749 for the proposition that since the terms of the said *Decree Nisi* have been completely and successfully negotiated, exhibit "**T-1**" will no longer be protected from disclosure because its purpose is now complete and at an end.

- Analysis and Findings of the Court

[22] The Petitioner, in persuading this Court that the doctrine of estoppel is applicable in this case, relied upon the judgment of Peh Swee Chin FCJ in the landmark case of *Asia Commercial*

Finance where His Lordship held (at page 197 of the report) as follows:

> "*What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; ...*".

The other authorities cited by the Petitioner are *Syarikat Duasama Sdn Bhd v. Abdul Aziz bin Ibrahim (t/a Radiant Star Enterprise) (Tiong Sing Trading Co Sdn Bhd & Anor, third parties)* [2018] MLJU 5; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; and *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] 1 M.L.J. 7.

[23] In reply to R1's contention that the issue regarding the son's surname was not adjudicated and decided upon in the earlier proceedings and thus, estoppel does not arise, the Petitioner submitted that this case came within the broader principles as laid down in *Asia Commercial Finance* i.e. that such issues which might have been and which were not brought forward as described, though not actually decided by the Court, are still covered by the doctrine of *res judicata*. Peh Swee Chin FCJ explained these broader principles at pages 199 -200 of the report in the following words:

> *"... the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell,*

from a consideration of case law, means in law a lot more i.e. that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. ...

...

There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the Court, are still covered by the doctrine of res judicata ...

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel.".

[emphasis added]

[24] In my view, since the said *Decree Nisi* and the terms of the order were made pursuant to an agreement reached between the Petitioner and R1, the authorities on whether such an order by consent may be pleaded as an estoppel have to be considered.

[25] In this respect, apart from the said *Decree Nisi* itself, R1 sought to rely on exhibit "**T-1**" in Enclosure 27 which is the draft consent terms dated 4.10.2016 prepared by R1 and discussed during the negotiations. In this regard, the head notes of the

judgment of Abdul Malik Ishak J in the case of *Hadi bin Hassan v. Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522 which are of significance to the case before this Court read as follows:

> *"...*
>
> *(2) All the meetings were designed for the parties to meet and settle their disputes amicably. The fact that these attempts at settlement failed was not disputed. Communications made with a view to settle disputes between the parties must be held to be privileged communications and outside the purview of the courts (see para 37). Genuine negotiations with a view to settlement are certainly protected from disclosure whether or not the 'without prejudice' label has been expressly applied to the negotiations or otherwise (see para 38).*
>
> *(3) The phrase 'out of court settlement' can refer to a civil resolution between the parties without any pending litigation. It can even refer to a situation where there has been a pending litigation and the parties thereto meant to resolve the dispute without proceeding further with the litigation. The plaintiff's claim that litigation must be pending in court before the 'without prejudice' communications can take place cannot be accepted (see para 39).*
>
> *...*
>
> *(5) The 'without prejudice' tag need not be written on the document in order to prevent that document from being given in evidence. Of crucial importance is to look at the surrounding circumstances in order to*

> *ascertain whether the parties were indeed seeking to compromise the dispute. And if that can be seen from the surrounding circumstances then the 'without prejudice' rule would be put in motion. The underlying purpose of the 'without prejudice' rule is basically to protect a potential litigant from being embarrassed by any admission made purely in an attempt to achieve an amicable settlement (see para 53)…."*.

[26] In the earlier case of *Dusun Desaru*, His Lordship Abdul Malik Ishak J had also discussed the issue of documents or letters with the label "without prejudice" and the question as to when a document would lose its privilege status. His Lordship answered this poser at page 757 of the report in these words:

> " *... once the settlement is negotiated successfully and the matters finalised completely, then the document will lose its sting as a privilege document because its purpose is now complete and at an end (Knappa v. Metropolitan Permanent Building Society Association [1888] 9 LR (NSW) 468; 5 WN (NSW) 27; and South Shropshire District Council v. Amos [1987] 1 All ER 340). ...*".

[27] In view of the fact that negotiations between the Petitioner and R1 were successfully concluded with the said Decri *Nisi* and the terms therein being pronounced on 16.11.2016, I am inclined to agree with the submissions of the learned counsel for the Petitioner that exhibit "**T-1**" has lost its status as being a privileged document. Therefore, I had given consideration to exhibit "**T-1**" where it is noted that –

(a) a cross ('x') has been placed against paragraph 3(b)(iv) which states that "*Pempetisyen akan mengambil langkah-*

langkah dalam masa satu (1) bulan dari tarikh perintah untuk menukar nama keluarga anak lelaki dari Tong kepada Ho.";

(b) the term as regards payment of maintenance for P is absent;

(c) paragraph 6 states that "*Responden Pertama bersetuju membiayai perbelanjaan pendidikan Sarjana Muda universiti anak perempuan*." i.e. there is no reference to the second child; and

(d) there is no signature of the parties and their respective counsels.

[28] I am of the opinion that in the absence of the signatures of the Petitioner and R1 as well as their respective counsels, exhibit "**T-1**" is of limited support to the Petitioner's submission that R1 now seeks to approbate and reprobate.

[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 statutory provision in the form of section 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 sought to be altered and thus arguments on estoppel can, and have indeed been, raised by the Petitioner.

[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. Pushpa Mahabir Prasad* [1981] 2 MLJ 326 and *W v. H* [1987] 2 M.L.J. 235). Section 24 of the Courts of Judicature Act 1964

[*Act 91*] provides the civil jurisdiction of the High Court in the following terms:

> "***Civil jurisdiction—specific***
>
> ***24.*** *Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —*
>
> *(a) jurisdiction under any written law relating to divorce and matrimonial causes;*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;*
>
> ...".
>
> [emphasis added]

[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.

[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 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 has taken in resisting the application in Enclosure 25. As much as the parents may despise each other in the days and months leading to their divorce and as they go 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.

[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 section 13A BDRA 1957 and I have also not been able to find any judgment which has elucidated on this point.

[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.

[35] I would just add that at the point of time when I delivered my decision, and in light of R1's application being allowed, I had strongly urged R1 to bear the educational expenses of TJH at first degree level in the same manner that he had agreed for HEV. The need to ensure that a child's future education is not affected by a divorce between the parents is recognised by way of an amendment to section 95 of LRA 1976 by virtue of section

7 of the Law Reform (Marriage & Divorce) (Amendment) Act 2017. The said amendment which provides for the cessation of child maintenance upon completion of a child's higher education or training came into operation on 15.12.2018 by the notification in *PU(B) 697/2018*. Thus, at the time of writing of this grounds of judgment, the legal position is that an order for custody or maintenance of a child shall expire on the attainment by the child of the age of 18 years or where the child is under physical or mental ability or is pursuing further or higher education or training, on the ceasing of such disability or completion of such further or higher education or training, whichever is the later.

(B) Enclosure 20: R1's application to vary the terms on access to the children in the said *Decree Nisi*

[36] Through this application, R1 prayed for the current access order to be more specific and enlarged to enable him to have a better and stronger bond with the two children. In order to have a full appreciation of the orders sought by R1, the prayers in Enclosure 20 (again quoted as they appear with the errors in the numbering of the paragraphs) are set out in full below:

> "*1. Terma 2 (a) dalam Dekri Nisi bertarikh 16.11.2016 diubah dan Responden Pertama diberikan akses kepada Ho .., anak perempuan [selepas ini dirujuk sebagai "anak perempuan tersebut" seperti berikut:*
>
> *1.1 Responden Pertama diberi akses bermalaman pada setiap minggu bersilih ganti (alternate) dari hari Jumaat jam 6:00 petang hingga hari Ahad jam 8:00 malam.*

1.2 Responden Pertama diberi akses hari bekerja pada setiap hari Rabu dari jam 1:00 tengah hari hingga jam 7:00 malam pada minggu Responden Pertama tidak mempunyai akses bermalaman.

1.3 Responden Pertama diberi akses pada Hari Bapa (Father's Day) setiap tahun dari jam 1:00 petang hingga 7:00 malam dan sekiranya minggu tersebut bukanlah minggu akses Responden Pertama, maka Responden Pertama akan diberikan keutamaan minggu tersebut dan satu penggantian akses minggu akan dipersetujui antara Pempetisyen dan Responden Pertama dan begitu juga untuk Hari Ibu.

1.4 Responden Pertama diberi akses pada hari jadi Responden Pertama setiap tahun dari jam 1:00 tengah hari hingga 7:00 malam sehingga anak perempuan tersebut mencapai umur 7 tahun dan seterusnya seperti berikut:-

a. Jika anak perempuan tersebut berada dalam sesi petang di sekolah, maka Responden Pertama akan diberikan akses dari pukul 6:30 petang hingga 9:00 malam; dan

b. Jika anak perempuan tersebut berada dalam sesi pagi di sekolah, maka Responden Pertama akan diberikan akses dari pukul 2:00 petang hingga 7:00 malam.

1.5 Responden Pertama diberi akses pada hari jadi anak perempuan tersebut pada setiap tahun bersilih ganti (alternate) dari jam 1:00 tengah hari hingga jam 7:00 malam sehingga anak perempuan tersebut

mencapai umur 7 tahun dan seterusnya seperti berikut:-

a. jika anak perempuan tersebut berada dalam sesi petang di sekolah, maka Responden Pertama akan diberikan akses dari pukul 6:30 petang hingga 8:00 malam; dan

b. jika anak perempuan tersebut berada dalam sesi pagi di sekolah, maka Responden Pertama akan diberikan akses dari pukul 2:00 petang hingga 7:00 malam.

1.6 Responden Pertama dibenarkan kebebasan akses telefon yang munasabah pada masa yang munasabah.

1.7 Dalam setiap peraturan akses di atas, Responden Pertama akan menjemput anak perempuan tersebut dari rumah kediaman Pempetisyen dan memulangkan anak perempuan tersebut ke rumah kediaman Pempetisyen kecuali sekiranya terdapat aturan yang lain antara Pempetisyen dan Responden Pertama.

1.8 Sekiranya waktu akses Responden Pertama bertindih dengan aktiviti ko-kurikulum / kelas tambahan anak perempuan tersebut, maka Responden Pertama akan menghantar dan menjemput anak perempuan tersebut dari sebarang aktiviti dan / atau kelas tambahan pada waktu akses.

2. Terma 2 (b) dalam Dekri Nisi bertarikh 16.11.2016 diubah dan Responden Pertama diberikan akses kepada Tong ..., anak lelaki [selepas ini dirujuk sebagai "anak lelaki tersebut" seperti berikut:

2.1 Responden Pertama diberi akses pada setiap hari Sabtu bersilih ganti (alternate) dari jam 5:00 petang hingga Ahad jam 8:00 malam sehingga anak lelaki tersebut mencapai umur 3 tahun.

2.2 Selepas umur 3 tahun, Responden Pertama diberi akses kepada anak lelaki tersebut sama seperti anak perempuan tersebut di perenggan 1.1 dan 1.2 di atas.

2.3 Responden Pertama diberi akses pada Hari Bapa (Father's Day) setiap tahun dari jam 10:00 pagi hingga 7:00 malam dan sekiranya minggu tersebut bukanlah minggu akses Responden Pertama, maka Responden Pertama akan diberikan keutamaan minggu tersebut dan satu penggantian akses minggu akan dipersetujui antara Pempetisyen dan Responden Pertama dan begitu juga untuk Hari Ibu.

2.4 Responden Pertama diberi akses pada hari jadi Responden Pertama setiap tahun dari jam 1:00 tengah hari hingga 7:00 malam sehingga anak lelaki tersebut mencapai umur 7 tahun dan seterusnya seperti berikut:-

a. jika anak lelaki tersebut berada dalam sesi petang di sekolah, maka Responden Pertama akan diberikan akses dari pukul 6:30 petang hingga 9:00 malam; dan

b. jika anak lelaki tersebut berada dalam sesi pagi di sekolah, maka Responden Pertama akan diberikan akses dari pukul 2:00 petang hingga 7:00 malam

1.9 Responden Pertama diberi akses pada hari jadi anak lelaki tersebut pada setiap tahun bersilih ganti (alternate) 10:00 pagi hingga jam 7:00 malam sehingga anak lelaki tersebut mencapai umur 7 tahun dan seterusnya seperti berikut:-

a. jika anak lelaki tersebut berada dalam sesi petang di sekolah, maka Responden Pertama akan diberikan akses dari pukul 6.30 petang hingga 9.00 malam; dan

b. jika anak lelaki tersebut berada dalam sesi pagi di sekolah, maka Responden Pertama akan diberikan akses dari pukul 2.00 petang hingga 7.00 malam.

2.5 Responden Pertama dibenarkan kebabasan akses telefon yang munasabah pada masa yang munasabah apabila anak lelaki tersebut mencapai umur 3 tahun.

2.6 Dalam setiap peraturan akses di atas, Responden Pertama akan menjemput anak lelaki tersebut dari rumah kediaman Pempetisyen dan memulangkan anak lelaki tersebut ke rumah kediaman Pempetisyen kecuali sekiranya terdapat aturan yang lain antara Pempetisyen dan Responden Pertama.

2.7 Responden Pertama dibenarkan menghantar dan menjemput anak lelaki tersebut untuk sebarang aktiviti dan / atau kelas tambahan pada waktu akses.

3. Akses kedua-dua anak perkahwinan akan berlangsung pada minggu yang sama.

4. Terma 2 (c)(i) dalam Dekri Nisi bertarikh 16.11.2016 diubah dan Responden Pertama diberikan akses kepada kedua-dua anak tersebut pada separuh pertama cuti sekolah.

5. Terma 2 (d) dalam Dekri Nisi bertarikh 16.11.2016 diubah dan Responden Pertama diberikan akses kepada kedua-dua anak tersebut pada malam sebelum Tahun Baru Cina (Chinese New Year) dari jam 5:00 petang hingga 9:00 malam dan pada hari pertama Tahun Baru Cina dari jam 10:00 pagi hingga 8:00 malam pada setiap tahun bermula pada tahun 2018.

6. Pempetisyen memberikan laporan prestasi kemajuan setiap semester tadika / sekolah kedua-dua anak perkahwinan kepada Responden Pertama dalam masa 7 hari dari tarikh Pempetisyen menerima laporan tersebut.

7. Responden Pertama dibenarkan membawa kedua-dua anak perkahwinan untuk bercuti selama 8 hari mulai hari Jumaat minggu pertama bulan Disember pada jam 6.00 petang hingga hari Jumaat minggu ke-2 bulan Disember jam 8.00 malam setiap tahun mulai bulan Disember 2017 sehingga setiap anak mencapai umur 7 tahun.

8. Kos permohonan ini ditanggung oleh Pempetisyen.

9. Lain-lain perintah yang dianggap wajar, sesuai dan berpatutan oleh Mahkamah yang Mulia ini.".

- The Parties' Contentions

[37] Based on all the Affidavits filed by the Petitioner, she opposed R1's application for variation on the grounds that -

(a) there is no conflict in the timing of R1's access visits with TJH;

(b) R1 is given sufficient space to have access with TJH without any interference;

(c) TJH is currently suffering from bronchitis and anal fistula and requires sufficient rest and care;

(d) HEV has extracurricular activities and will be emotional and aggressive after having overnight access with R1;

(e) R1s intention to have access with the children on Father's Day and the children's birthdays is an afterthought; and

(f) the children should be kept in a stable environment.

[38] In his AIR (Enclosure 23), R1 averred that there is an overlap in the access hours accorded in respect of HEV and TJH, respectively under the terms of the said *Decree Nisi* which means that he has to leave HEV in his house while he has access to TJH at the Petitioner's house. R1 also averred that he is not comfortable in having access to TJH at the Petitioner's house due to the lack of freedom and privacy for R1 to play or spend time with TJH. As regards TJH's health condition, photographs showing TJH on outings with the Petitioner were shown as exhibit "**HSJ-5**". Additionally, it was averred that R1's mother who stays with R1 would be able to assist in the care of TJH.

- Analysis and Findings of the Court

[39] Paragraph 89(2)(*d*) LRA 1976 empowers the court to give a parent deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonable. The power of the court to vary orders for custody is provided in section 96 LRA 1976 which reads as follows:

> "***96. Power of 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 circumstances.".*

[40] In arriving at my decision, I am mindful of the legal principles as laid down by the cases cited by learned counsels for the Petitioner and R1, namely -

(a) that a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. In *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232 at 239, Hamid Sultan Abu Backer JC (as His Lordship then was) said that -

> *"As a general rule, consent order cannot be set-aside, varied or discharged. Though, there are statutory exceptions to this rule in matrimonial matters, it is incumbent on the court as a matter of public policy to ensure that the issues are not re-*

litigated again; and again and in this case within less than two years after the consented divorce petition was allowed. This is in line with the concept of 'clean break' principles advocated in a number of cases (see Minton v. Minton [1979] 1 All ER 79)….";

(b) on the meaning of "*material change in the circumstances*" (see *Sivajothi a/p K Suppiah v. Kunathasan a/l Chelliah* [2006] 3 MLJ 184 and *Liew Sing Yong v. Pok May Cheng* [2016] 1 LNS 1215) where, ultimately, this must depend on the facts and circumstances of each particular case (see *Saraswathi Devi a/p K Govind v. Keith Ian Monteiro* [2006] 3 MLJ 88); and

(c) that the burden is on R1 to prove, on a balance of probabilities, that there are material changes in circumstances since the said *Decree Nisi* was recorded.

[41] The Petitioner urged this Court to maintain the terms of access in the said *Decree Nisi* since these were achieved by consent of the Petitioner and R1 himself. However, no order relating to access to children is cast in stone; it is always subject to review as statutorily provided under section 96 LRA 1976. Of course, an applicant has to prove that there is a material change justifying a variation of the previous court order. The question as to whether an applicant can successfully prove that there is such material change would depend on the facts and circumstances in each case.

[42] Gill J. in delivering His Lordship's judgment in *T. v. T.* [1966] 2 M.L.J. 302 had this to say:

"*The object of allowing access to the father is to see that the child grows up knowing and loving him and not to*

allow him to share in the custody, care and control which must necessarily remain with the mother. ... In all the circumstances of the case and with a view to avoiding any emotional conflict of loyalties and affection in the mind of the child, I would make an order that the father do have access to the child once a month on the second Sunday of each month between the hours of 9 a.m. and 1 p.m., and that the original order be varied accordingly. ...

Before concluding the matter I would like to point out that, as was stated by Wilmer L.J. in S. v. S. and P., no order relating to custody, care and control, or access to children is ever permanent; it is always subject to review, and the order I am making is no exception. It may well be that the result of this order giving access will turn out to be successful; if so, it may be that at some time hereafter the father will be disposed to ask for more liberal terms of access. On the other hand, the access granted may turn out to be unsuccessful, in which case possibly the petitioner will come back again and once more request that access be denied to the father.".

[emphasis added]

[43] The last two sentences in the passages quoted above aptly reflects the reality that any order of the court regarding access to a child is not an exact science with a proven formula for success. It is unfortunate that in most cases, the hostility and communication issues between the parents makes it difficult for any order on access to be strictly complied with. Nonetheless, the court will not allow the resentment of the parents towards each other to detract the court from striving to determine the terms of access that would best foster the continued bond between the parents and the child/ children and in a way that can

avoid any emotional conflict of loyalties and affection in the mind of the child/ children as stated by Gill J. in *T. v. T.*

[44] I have given careful consideration to Enclosures 19, 22, 23, 26, 38 and 41 and it is my finding that R1 has, through his averments in his Affidavits, discharged the burden of proof on a balance of probabilities to show that there are material changes in circumstances since the said *Decree Nisi* was recorded. Although R1's application was filed just 11 months after the said *Decree Nisi*, there are real issues in terms of his meaningful access to the children, including the notable change in HEV's reaction of late when R1 comes to fetch her for the access visits. It is apparent from the affidavit evidence that the terms of access as recorded in the said Decri *Nisi* are not working out in a manner that meets the best interests of the children.

[45] In view of the above, this Court made the following orders in relation to Enclosure 20:

(a) prayer 1.1 is allowed except that the access shall end at 6 p.m. on Sunday;

(b) prayer 1.2 is not allowed as the Court is of the view that overall, the terms of access which shall be granted through this order are reasonable and meet the needs of R1 and the children, and there is no necessity for a mid-week access to be granted under the circumstances;

(c) prayers 1.3 until 1.8 are allowed;

(d) prayer 2.1 is allowed except that access shall be on every alternate Sunday from 10 a.m. until 6 p.m.;

(e) prayer 2.2 is allowed only to the extent that access shall be the same as that given for the daughter in prayer 1.1;

(f) prayers 2.3 – 2.7 are allowed (to note the typographical error in the numbering of the prayers "1.9, "2.5", "2.6" and "2.7" in Enclosure 20);

(g) prayer 2.8 is allowed whereby the term shall be drafted in words similar to prayer 1.8;

(h) prayer 3 is allowed;

(i) prayer 4 is not allowed as it is not possible to apply to amend only subparagraph 2(c)(i) in the said *Decree Nisi* without due consideration being given to subparagraph 2(c) in its entirety;

(j) prayer 5 is allowed except that R1 shall have access to the children for the Chinese New Year ('CNY') celebration on an alternate year basis beginning with R1 in 2019 and access shall end at 6 p.m. on the first day of CNY;

(k) prayer 6 is allowed;

(l) prayer 7 is not allowed at this point of time as the Court is of the view that, taking into account the children's young age and how they adjust to the terms of this variation order, R1 may make an application at a future date for an order for longer access for purposes of vacationing with the children;

(m) prayer 8 – costs to be borne by each party; and

(n) prayer 9 – in complying with the terms of this order, the Petitioner and R1 are reminded that the children's interests and welfare shall be given paramount consideration and TJH's medical condition shall be given priority. If, during the period that R1 is to have access to TJH, and TJH is in

need of medical care and treatment or is undergoing such care and treatment either at the Petitioner's house or at any medical facility, TJH's treatment towards his full recovery shall take precedence over any access.

Conclusion

[46] In the premises and based on the aforesaid reasons, I therefore allowed R1's application in Enclosures 20 and 25 with costs of both applications to be borne by the Petitioner and R1.

(ALIZA SULAIMAN)
Judicial Commissioner
High Court Ncvc 1
Kuala Lumpur

Dated: 29 JANUARY 2019

COUNSEL:

For the petitioner - Balbir Singh & Sharon Selva; M/s Najiana Wan Balbir

For the respondent - Ravi Neeko & Parvinder Kaur; M/s Hakem Arabi & Associates

Case(s) referred to:

Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd [2004] 4 CLJ 466

Lau Hui Sing v. Wong Chuo Yong [2008] 9 CLJ 232

Ganapathy Chettiar v. Lum Kum Chum & Ors., Meenachi v. Lum Kum Chum & Ors. [1981] 2 M.L.J. 145

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 MLJ 189

Hadi bin Hassan v. Suria Records Sdn Bhd & Ors [2005] 3 MLJ 522

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749

Syarikat Duasama Sdn Bhd v. Abdul Aziz bin Ibrahim (t/a Radiant Star Enterprise) (Tiong Sing Trading Co Sdn Bhd & Anor, third parties) [2018] MLJU 5

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd. [1985] 1 M.L.J. 7

Mahabir Prasad v. Pushpa Mahabir Prasad [1981] 2 MLJ 326

W v. H [1987] 2 M.L.J. 235

T. v. T. [1966] 2 M.L.J. 302

Legislation referred to:

Births and Deaths Registration Act 1957, s. 13A

Courts of Judicature Act 1964, s. 24

Law Reform (Marriage & Divorce) Act 1976, ss. 95, 96

Law Reform (Marriage & Divorce) (Amendment) Act 2017, s. 7