



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(FAMILY DIVISION)
[DIVORCE PETITION NO. WA-33-403-07/2019]**

**In the matter of sections 53,
54(1)(b), Parts VII and VIII of the
Law Reform (Marriage and
Divorce) Act 1976**

And

**In the matter of section 24(d) of
the Courts of Judicature Act 1964**

And

**In the matter of sections 2, 3, 5, 10
and 19A of the Guardianship of
Infants Act 1961**

And

**In the matter of sections 2 and 10
of the Domestic Violence Act 1994**

BETWEEN

M

... PETITIONER

AND

M

... RESPONDENT



GROUNDS OF JUDGMENT

(Enc. 10 and Enc. 25)

[1] The application in Enc. 10 is the petitioner wife’s (“**PW**”) application for an interim injunction against the respondent husband (“**RH**”). And the application in Enc. 25 is RH’s application to set-aside the *ex-parte* interim injunction order that was granted by this Court on 30.1.2020.

[2] PW and RH were married in May 2011. Since February 2018, they have been engaged in a high conflict custody proceedings for the only child of the marriage (“**the Child**”) at the High Court at Shah Alam. At the time of the custody proceedings, the Child who was born in December 2012, was 5 years of age.

[3] In June 2018, the Shah Alam High Court awarded sole custody of the Child to RH (“**High Court’s Custody Order**”). PW appealed the High Court’s decision. In September 2018, the Court of Appeal reversed the High Court’s decision and granted sole custody and care of the Child, to PW, with access to RH (“**COA’s Custody Order**”). The Federal Court refused RH leave to appeal the COA’s Custody Order.

[4] In July 2019, PW filed the petition for divorce in this Court. RH filed his answer to the petition and cross petition in September 2019.

[5] Because this case involves a minor and allegations of sexual abuse, I have used my discretion under section 15 of the Courts of Judicature Act 1964 to refer in this Judgment to the petitioner wife as “**PW**”, the respondent husband as “**RH**”, and the child of the marriage as “**the Child**” so as not to lead to their identification. I have also not included in this Judgment, the address of PW’s house and the name of the Child’s school stated in the *ex-parte* interim injunction order.



Enclosure 10

[6] Pursuant to the COA’s Custody Order, RH was accorded access to the Child on alternate weekends, the 1st half of the school holidays, Hari Raya and Chinese New Year (“CNY”) holidays alternately, and Father’s Day.

[7] It was during RH’s access to the child for the CNY holidays in January 2020 that the Child informed a child psychiatrist that he had been sexually abused by PW’s brother for the past 2 years. On 28.1.2020, RH presented the Child to Hospital Kuala Lumpur’s (“HKL”) Suspected Child Abuse and Neglect (“SCAN”) team. PW was informed on 29.1.2020 by the HKL’s SCAN team of the sexual abuse allegation against her brother.

[8] In her application for the interim injunction, PW alleged that RH has been engaged in a pattern of repeated false allegations of physical and emotional abuse directed against her and her family members since the commencement of Court proceedings between them – not just in this divorce petition but the earlier custody proceedings for the Child. It is a matter of Court records that the custody proceedings were peppered with allegations of child abuse and child abduction and a total of 17 police reports were filed by both PW and RH.

[9] PW avers that since the commencement of the custody proceedings, the Child had been repeatedly reviewed by Pusat Perubatan Universiti Malaya (“PPUM”) and HKL for examination by their SCAN teams. The Child was also regularly taken to his usual paediatrician at Pantai Hospital Kuala Lumpur. During the course of the custody proceedings, the Child was also personally interviewed and/or examined by various psychologists and psychiatrists separately appointed by PW and RH. However, in all those reviews by the SCAN



teams, by his paediatrician, and by the psychologists and psychiatrists, no allegations of sexual abuse were ever raised.

[10] In her affidavit in support of the interim injunctions in Enc. 10, PW averred that RH's "*pattern, fanciful and inconsistent allegations and complaints*" will continue until the conclusion of these divorce proceedings to the detriment of the Child. She also averred that she had been informed that RH planned to hold a press conference with "*PS The Children*", a non- governmental organisation that works with victims of sexual abuse, to publicise the allegations of sexual abuse against the Child. PW contends that such a press conference would not be in the best interest of the Child. She says that the press conference was intended purely out of spite and malice in a bid to demonise her brother and her family, and to put pressure on her for RH to gain advantage in these divorce proceedings.

[11] RH had taken the Child for his CNY holidays access on 24.1.2020. One of PW's prayers in Enc. 10 is a mandatory injunction for RH to return the Child to PW's house by 2.2.2020. PW avers that the mandatory injunction is necessary because RH has a history of abducting the Child on 3 occasions: the 1st time was where from 11.2.2018 to 23.2.2018, RH stopped PW's access to the Child, and only returned the Child to PW on 23.2.2018; the 2nd time, where RH in breach of an interim access agreement between him and PW, from 15.3.2018 to 12.4.2018 stopped PW's access to the Child, stopped the Child from attending school and concealed the Child's whereabouts from PW, until the Child was produced in Court on 12.4.2018 for an interview with the High Court Judge; and the 3rd time was when RH in breach of the High Court's Custody Order refused to deliver the Child at the start of the July 2018 school holidays as he claimed that PW and her family was physically and emotionally abusing the Child. The Court of Appeal on 23.8.2018 ordered RH to immediately return the Child to PW. On 18.3.2019, the Shah Alam High Court had found RH



guilty of contempt of court for breach of the High Court's Custody Order.

[12] PW avers that the allegation of sexual abuse of the Child by PW's brother is the latest of false allegations of abuse against PW and her family. After the COA's Custody Order, RH had obtained an *ex-parte* Interim Protection Order ("IPO") against PW on 21.6.2019 based on allegations of abuse of the Child by PW. As a result of the allegation of abuse, the Child was admitted and investigated by HKL and the Social Welfare Office, Petaling District. The IPO was set-aside by the Petaling Jaya Magistrate's Court on 5.8.2019.

Ex-Parte Interim Injunction Order

[13] PW in her affidavit in support of the injunction application and her counsel's certificate of urgency requesting for the application to be heard *ex parte*, averred that if the application was not heard *ex parte* and there was no *ex-parte* injunction order made against RH, there was a real risk that RH would abduct the Child as he had done on three previous occasions during the custody proceedings at the Shah Alam High Court; that he will breach the COA's Custody Order and not return the Child at the end of his CNY holidays access; that he would make further false allegations of abuse against PW and her family; that he will subject the Child to more examinations by the SCAN Teams at PPUM and HKL and to more interviews and/or examinations by psychologists and psychiatrists; that he will file more reports alleging abuse of the Child by PW and her family until the conclusion of the divorce proceedings; and that he will hold a press conference with "*PS The Children*" on the alleged sexual abuse of the Child by PW's brother in order to gain advantage in the divorce proceedings. PW went on to aver that RH had previously defamed her and her family in his Facebook posting, which posting was referred to



by the Court of Appeal in their judgment. The Court of Appeal in their judgment had remarked that “*from the records, we note that the father had been denying the mother access to the child*” and had listed the three occasions that RH refused PW access to the Child.

[14] A Court is empowered under **Order 29 rule 1(2) of the Rules of Court 2012 (“ROC”)**, to make an *ex-parte* interim injunction order in urgent cases. The application for an *ex-parte* injunction must be supported by an affidavit. Order 29 rule 1(1) and (2) of the ROC reads as follows:

“Application for injunction (O. 29, r. 1)

1. (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s originating process, counterclaim or third-party notice, as the case may be.

(2) Such application may be made by a notice of application supported by an affidavit and **where the case is one of urgency, may be made ex parte.**” [Emphasis added]

[15] I was satisfied that based on PW’s affidavit and her counsel’s certificate of urgency that PW’s application for the interim injunction was one of urgency and that this Court may make the interlocutory injunction order *ex-parte* subject to the law governing interlocutory injunctions and Order 29 rule 1 of the ROC.

[16] I was also satisfied that PW’s affidavit in support of her application for an interlocutory injunction contained clear and concise statements required under Order 29 rule 1(2A)(a) - (g) of the ROC.

[17] The law on the granting of interlocutory injunctions is long settled. Based on the principles established in *American Cyanamid*

Co. v. Ethicon Ltd [1975] AC 396 HL and *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193; [1995] 2 AMR 1859 CA, the issues that a Court must address in deciding whether or not to grant an interlocutory injunction are as follows:

- (i) whether there is a *bona fide* serious issue to be tried?
- (ii) where does the balance of convenience lie?
- (iii) are damages adequate?
- (iv) should the status quo be preserved?

[18] The House of Lords in **American Cyanamid** and the Malaysian Court of Appeal in **Keet Gerald Francis Noel John** held that in any application for an interlocutory injunction, a judge must first decide whether the facts in an applicant's affidavit in support of an application for an interlocutory injunction, discloses a *bona fide* serious issue to be tried. In doing so, the Judge must take into account that the existence of the rights of the plaintiff or the defendant, as the case may be, and the alleged violation of such rights are uncertain and shall remain uncertain until final judgment in the suit or action. As held by Lord Diplock in **American Cyanamid**:

“[W]hen an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.”

[19] If the judge finds that there is no *bona fide* serious issue to be tried, he or she must dismiss the application for interlocutory

injunction. If the judge finds there is a *bona fide* issue to be tried, the judge must then go on to the second step and decide where does the balance of convenience lie.

[20] The proceedings before this Court is a petition and cross petition for divorce by PW and RH respectively. Petitions for divorce of non-Muslims in Malaysia are governed by the **Law Reform (Marriage and Divorce) Act 1976** (“LRA”). The Courts are empowered under section 48 of the LRA to make a decree of divorce and under section 64 to make a decree of judicial separation. During the course of any matrimonial proceedings and when granting or subsequent to the granting of the decree of divorce or judicial separation, a Court may make orders for maintenance of a spouse or ex-spouse and the child of the marriage. With regards to the custody of a child of the marriage, sections 88 and 89 of the LRA empowers a Court to make an order of custody of the child of the marriage at any time, and that order for custody of the child “*may be made subject to such conditions as the court may think fit to impose.*”

[21] Both PW and RH are joint guardians of the Child pursuant to the High Court’s Custody Order and the COA’s Custody Order. It is clear from the facts of this case that the high conflict between PW and RH before, during and after the custody proceedings at the Shah Alam High Court and the appeal at the Court of Appeal had affected and continues to affect the welfare the Child. **Section 19A of the Guardianship of Infants Act 1961** provides where there is a dispute between the joint guardians of an infant, on the application of one of the guardians, “*the Court may make such order regarding the matters in difference as it may think proper*”.

[22] In addition to these statutory powers under the LRA and the Guardianship of Infants Act 1961 to make orders as regards children and infants, the Courts are invested with an inherent jurisdiction that

is derived from the Crown's prerogative powers as *parens patriae*: see Raja Azlan Shah AG LP (as HRH then was) in *Mahabir Prasad v. Mahabir Prasad* [1981] 2 MLJ 326.

[23] The facts show that the entire dispute between PW and RH throughout the custody proceedings has been almost entirely on the custody and access of the Child – and whether the Child had been physically and emotional abused by PW and her family.

[24] In PW's application for interlocutory injunction in Enc.10, the matter in dispute between PW and RH also relates to the Child, namely, whether the Child had been sexually abused by PW's brother for the past 2 years prior to RH's filing of the police report in January 2020.

[25] In any divorce or custody proceedings, the first and paramount consideration of any Court is the interest and welfare of the children of the marriage: per Raja Azlan Shah AG LP (as HRH then was) in *Mahabir Prasad v. Mahabir Prasad* (*supra*); and per Siti Norma Yaacob JCA (as she then was) in *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721; [2002] 2 MLJ 97; [2002] 2 AMR 1527.

[26] As Cozens-Hardy M.R. held in English Court of Appeal case of *Stark Stark* [1910] P 190 at 193 “*And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse.*”

[27] Taking into account the Court's inherent jurisdiction as *parens patriae* and that its paramount consideration is the interest and welfare of the Child, this Court finds that based on the averments of PW's affidavit in support of her application for an interlocutory injunction there are *bona fide* serious issues to be tried in this case.



[28] Having found that there is a *bona fide* serious issue to be tried, the next step a Court has to consider is where does the balance of convenience lie in the case. Usually, in deciding where the balance of convenience lies, a judge must weigh the harm that the interim injunction would produce to the defendant against the harm that would result to the plaintiff from refusing to grant the injunction.

[29] However, where an application for interim injunction involves a child, a Court must consider the harm that the interim injunction would cause the child against the harm that would result to the child if the interim injunction was not granted. This is because a Court's paramount consideration is the interest and welfare of the child and not that of his parents who are either the petitioner and respondent in a divorce proceedings or plaintiff and defendant in a custody proceedings before the Court.

[30] Similarly, in deciding whether damages are adequate and whether the status quo should be preserved, where a child is involved, a Court must make its decision based on what is in the best interest and welfare of the child.

[31] In this case, since the applications in para. 3 and 4 of the prayers in PW's application are for mandatory interim injunctions, namely for RH to return the Child to PW by 2.2.2020 and for RH to deliver to PW's solicitors copies of all reports to the police, social welfare department and psychological or psychiatric reports regarding the Child that were procured by RH, this Court has to decide whether there are special circumstances and an "unusually strong and clear case" shown to warrant the granting of the *ex parte* mandatory interim injunction: see the Supreme Court's judgment in *Tinta Press Sdn Bhd v. Bank Islam Malaysia* [1987] 2 LJ 192.

[32] On 30.1.2020, upon reading PW's application in Enc. 10, her affidavit in support and hearing the submissions of her counsel at the



ex- parte hearing of PW’s application in Enclosure 10, I was satisfied that PW’s application was one of urgency; that there were *bona fide* serious issues to be tried, that the balance of convenience laid in granting the ex- parte interim injunction; that there were special circumstances and an “unusually strong and clear case” to warrant the granting of the ex parte mandatory interim injunction as prayed in para. 3 and 4 of PW’s application in Enc. 10. I also found that damages were not an adequate remedy in the circumstances and that *prima facie* PW’s affidavit contained all the statements required under Order 29 rule 1(2A)(a) to (g) of the ROC.

[33] For these reasons, at the conclusion of the *ex-parte* hearing of Enc. 10 on 30.1.2020, this Court granted the following *ex-parte* injunction orders:

- “1. RH by himself or his servants, officers or agents or otherwise howsoever be restrained from doing or causing any of the following to be done without first obtaining leave of this Honourable Court:
 - 1.1 making any further reports to the police, the social welfare authorities, or the School or to any other third party or authority with regard to [the Child] including but not limited to complaining of any form of abuse whatsoever;
 - 1.2 subjecting [the Child] to any psychologist or psychiatric evaluation or treatment;
2. RH shall be restraining from making or causing any party to make an *ex-parte* applications whether in court or otherwise regarding [the Child] particularly but not limited to matters of his custody, care, control and access;



3. RH be ordered to return [the Child] to PW on Sunday 2nd February 2020 at 4pm at [PW's house address] in accordance with the Order of the Court of Appeal;
4. RH be ordered to deliver to PW's solicitors forthwith copies of all reports to the police, social welfare department and all procured by RH from a psychological or psychiatric report regarding [the Child];
5. RH by himself or through his servants, officers or agents or otherwise howsoever shall be restrained from making any press statement or giving any press conference or making or issuing or causing any publication to be made on social media or otherwise howsoever in relation to the accusations that [the Child] has suffered abuse (including but not limited to sexual abuse)."

Enclosure 25

[34] On 7.2.2020, RH filed his application in Enc. 25 to set aside the ex- parte injunction order granted by this Court on 30.1.2010.

[35] In the application in Enc. 25, RH states that his reason for filing the application is to prevent PW from interfering with the investigation work of the authorities; that PW had launched a series of acts designed to impede and/or prejudice the ongoing criminal investigations relating to the sexual abuse of the Child; that PW had through the *ex-parte* injunction order demanded documents and evidence that will be part of the criminal investigation, which demands RH says will prejudice the Child, RH and the criminal investigation.

[36] RH avers that he had lodged a complaint to the police that the Child had been sexually abused by PW's brother based on a report by

Dr Diana- Lea Baranovich, a consultant psychotherapist, dated 21.1.2020, which details the alleged sexual abuse by PW's brother on the Child. On the application by the Jabatan Kebajikan Masyarakat (“JKM”), the Petaling Jaya Magistrates Court appointed a “Protector” (as defined in section 8 of the Child Act 2001) and ordered that the Child temporarily be placed in the care of “a fit and proper person” under section 25(2)(b) of the Child Act 2001.

[37] Learned counsel for RH argues that the orders in the *ex-parte* injunction order should be set aside for the following reasons:

- (i) RH should not have to apply for leave of Court before filing reports or subjecting the Child to any psychologist or psychiatric evaluation or treatment. This is because although PW alleges that RH makes false police reports, to date he has not been prosecuted for making false reports. Also, the fact that the police have not charged the suspects or have classified a case as “NFA” (No Further Action) does not make the report filed by RH a false report;
- (ii) RH should not be restrained from filing an *ex-parte* application. This is because there are sufficient safeguards in Order 29 rule 1(2A) (a) to (g) of the ROC and he is required to give an undertaking as to damages;
- (iii) Item 3 in the *ex-parte* injunction order should not be granted at all because RH is required to return the Child pursuant to the Court of Appeal Custody Order. If there is any breach of the Court of Appeal Custody Order, then PW can commence committal proceedings against RH. Learned counsel argues that the right process is for PW to commence committal proceedings against RH if the Child was not returned on 2.2.2020 – she should not have applied



for a High Court order to reinforce the COA's Custody Order;

- (iv) PW is not entitled to an *ex-parte* interim mandatory injunction order that the police reports and other reports should be given to her. Learned counsel for RH argues that if the reports are given to PW there is nothing to stop PW from impeding the police investigations. RH contends that PW's application for the police reports is for a collateral purpose, namely to interfere with the ongoing police investigations into the allegation of sexual abuse;
- (v) Item 5 in an *ex-parte* injunction order restraining RH from making a press statement or giving a press conference on that the Child has suffered abuse impedes RH's freedom of speech. Learned counsel for RH argues that if RH had abused his freedom of speech, PW's remedy is to commence defamation action against RH.

[38] Learned counsel for RH argues that PW did not use the Court process "*to remedy a genuine grievance, but as an instrument of oppression.*"

[39] RH contends that he is not a vexatious litigant since the number of applications filed by PW outnumbered that filed by RH. Below is a table, produced by learned counsel for RH, of the number of applications filed by PW and RH in the custody proceedings and in these proceedings to date. It shows that the applications filed by PW outnumbered those filed by RH:

Shah Alam High Court: Applications		
	PW	RH
1.	Cross-application for custody, care & control of the Child	Originating Summons for custody, care & control of the Child
2.	Injunction to restrain RH from selling his house.	<i>Ex-parte</i> interim application for custody of the child that was heard inter-parte.
3.	Application for an order to enter the matrimonial house.	Application for stay pending completion of assessment of Paul Jambunathan.
4.	Appeal to COA against Interim Order giving interim custody of the Child to RH.	
5.	Application to vary the Interim Order for custody.	
Kuala Lumpur High Court: Applications		
6.	Petition for divorce	Cross-petition for divorce
7.	Application for <i>ex-parte</i> interim injunction	Stay application of para.1 and 4 of the <i>Ex-Parte</i> Injunction Order
8.		Setting-aside application of <i>Ex-Parte</i> Injunction Order

[40] Learned counsel for RH submits that as shown in the table, RH was not protracting legal proceedings by filing numerous applications/suits on the same subject matter. RH cited as authority the decision of the Court of Appeal in *Sim Kooi Soon v. Malaysia Airlines System (No. 2)*[2010] 9 CLJ 936; [2011] 4 MLJ 728, where Abdul Malik Ishak JCA held that the hallmark of a vexatious litigant is a “*claimant who sues the same party repeatedly in reliance on*



essentially the same cause of action, perhaps in variations, is termed as a vexatious litigation”, and a vexatious proceedings “*in one where the vexatious litigant had little or no basis in law and in effect was to subject the opposing party to inconvenience.*” Learned counsel submits that RH did not sue PW repeatedly on the same cause of action and therefore, is not a vexatious litigant.

Analysis

[41] In deciding whether or not the ex parte interim injunction order should be set aside, this Court taking into account both the affidavit evidence of the party who had applied for the interlocutory injunction on an *ex-parte* basis and the affidavit evidence of the party seeking to set aside the ex parte interim injunction order, must consider, (i) whether there was an urgency to warrant the granting of the interlocutory injunction *ex-parte*; (ii) whether there was a *bona fide* serious issue to be tried; (iii) where does the balance of convenience lie; (iv) whether damages adequate; and (v) whether the *status quo* should have been preserved? Additionally, in this case, as two of the orders are mandatory interlocutory injunctions, this Court must also determine, taking into account the evidence in PW’s affidavits as well as in RH’s affidavits whether there is an “unusually strong and clear case” to maintain the ex parte mandatory interim injunction or should the orders be set aside.

[42] There are numerous conflicts in PW’s and RH’s affidavits. It is trite that when dealing with conflicting affidavit evidence, the Court can only consider evidence that is undisputed or uncontroverted. In the Privy Council case of *Tay Book Choon v. Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] 1 CLJ 441, Lord Templeman held:

“At the end of the day the judge must decide the petition on the evidence before him. **If allegations are made in affidavits by**



the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.” [Emphasis added]

[43] The principles in **Tay Bok Choon** were applied by the Court of Appeal in *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721; [2002] 2 MLJ 97; [2002] 2 AMR 1527, where Siti Norma Yaacob JCA (as she then was) held:

“Allegations and counter allegations of other forms of improper behavior made by one party against the other abound in the 13 affidavits filed in support or in opposition to the applications for custody. They are all aimed at showing either party to be the guilty party and therefore not the fit and proper parent to have the custody of the four children. Needless to say the affidavit evidence alone, conflicting as they are, cannot form the basis of deciding the truth of the matters complained of in the absence of any cross examination of the makers of the affidavits. However, above and beyond that, there is the paramount interest and welfare of the children to be considered and it is the omission on the part of the trial judge to consider this aspect of the law that compelled us to disturb and reverse his finding of indefinitely putting off the determination of the disputed custody matter until the hearing of the divorce petition between the parties.

Faced with such conflicting affidavit evidence, what the trial judge should have done was to sieve through such evidence, consider only those that are undisputed or uncontroverted and balance these with the consideration of what would work towards the betterment and interests of the four children. In



this regard, he is reminded of the provisions of s. 88(2) of the Act and to act accordingly.” [Emphasis added]

[44] In deciding RH’s application to set aside the ex parte interlocutory injunction order, I am similarly faced, as the trial judge in *Diana Clarice* (*supra*) with conflicting affidavit evidence in PW’s and RH’s affidavits. As Siti Norma Yaacob JCA (as she then was) held in **Diana Clarice**, in such situations where a child is involved, I must sieve through the evidence in PW’s and RH’s affidavits and consider only those evidence that are undisputed or uncontroverted and balance them with the welfare and interest of the Child.

[45] Having shifted through the evidence in PW’s and RH’s affidavits, I find that the evidence that are undisputed and uncontroverted are that (i) the Child had informed Dr Diana during one of his consultation session with her that he had been sexually abused by PW’s brother; that Dr Diana included what the Child told her about the alleged sexual abuse in her report dated 21.1.2020; (ii) RH made a police report of the alleged sexual abuse by PW’s brother; (iii) the Child was examined by the SCAN team at HKL following RH’s police report; (iv) the alleged sexual abuse of the Child is being investigated by the authorities, including the police and JKM; (v) the Petaling Jaya Magistrate Court appointed a Protector for the Child and placed the Child in the care of “a fit and proper person” pursuant to the Child Act 2001; (vi) RH had in past withheld PW’s access to the Child or failed to return the Child to PW after his access with the Child.

[46] There is no evidence that PW’s brother sexually abused the Child. At the time of hearing of RH’s setting aside application, the allegation of sexual abuse was being investigated by the police and JKM. RH’s police report against PW’s brother is based on what Dr Diana wrote in her report of 21.1.2020 of what she said the Child had



told her during one of his consultations with her in January 2020. PW contends that the allegation of sexual abuse was fabricated against her brother and that RH had taught the Child to tell Dr Diana and Dr Beh of HKL SCAN team that he was sexually abused by PW's brother. In para. 5.4.10 of PW's third affidavit affirmed on 7.2.2020, PW averred that when the Child was alone with her, the Child apologised for not telling the truth and told her that her brother never did the things that RH told the Child to say. In para. 14.1 of her affidavit, PW averred:

“On Sunday 2 February 2020 [the Child] among other things, told me that he had lied about the allegations of sexual abuse. This was independently witnessed and verified. I reserve the right [to] fully set out the matters that transpired in a further affidavit.”

[47] In para. 16.3 of the PW's fourth affidavit affirmed on 11.2.2020, PW again averred that the Child informed her that he had lied to the doctors and the police. PW also said that the Child had told Dr Noor Aishah, a consultant clinical psychologist, that he had lied and that he drew and wrote on Dr Noor Aishah's note pad admitting that he had lied. The Child had told both PW and Dr Noor Aishah not to tell RH and his paternal grandmother that he had lied. PW averred that the Child's statement to her and Dr Noor Aishah was witnessed by a lawyer and that the Child had written a card to PW's brother and his wife saying sorry for having lied.

[48] RH denies that he had taught the Child to tell Dr Diana that he was sexually abused by PW's brother. In his second affidavit in reply affirmed on 11.2.2020, RH denies that he had brainwashed the Child and avers that the Child is intelligent and knows how to differentiate between a lie and the truth. RH denies PW's averment in her third affidavit that the Child had told her that he had lied about being



sexually abused by her brother. In para. 4.5.8 and 4.5.9.1 of his affidavit, RH averred:

“4.5.8 Paragraph 5.4.10 of the Petitioner’s 3rd Affidavit is denied. In fact [the Child] had informed me that the Petitioner and her sister who was present in the Hospital had attempted to yet again threaten [the Child] to not reveal what her brother had done. In fact [the Child] had run to me complaining on this and I had informed the Petitioner to not repeat her action. She cannot deny this true fact.

4.5.9.1 The fact that [the Child] was behaving in such a terrified manner was witnessed by all parties above.”

[49] By reason of these contradictory averments, I find that it remains in dispute whether the Child had lied to Dr Diana about being sexually abused by PW’s brother or whether he had lied to PW and Dr Noor Aishah that he lied about being sexually abused and that he was taught by RH to tell the lie.

[50] Nonetheless, what is uncontroverted and not in dispute is that the Child had informed Dr Diana that he had been sexually abused by his uncle, PW’s brother. Pursuant to **section 28(1) of the Child Act 2001**, RH as a family member of the Child based on “belief on reasonable grounds” that the Child has been sexually abused is under an obligation to inform a Protector (as defined in the Child Act 2001). Failure to do so is an offence under section 28(2) of the Act. **Section 28 of the Child Act 2001** reads as follows:

“28. Duty of member of the family

(1) If any member of the family of a child believes on reasonable grounds that the child is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or



exposed, or is sexually abused, he shall immediately inform a Social Welfare Officer.

(2) Any member of the family who fails to comply with subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.”

[51] From my reading of Dr Diana’s report, I agree with RH that the description of the sexual acts that the Child told Dr Diana his uncle asked him to do and his uncle did to him is sufficient grounds for any parent of a child to make a police report.

[52] Learned counsel for RH argues that there is no serious issue to be tried since the proceedings before this Court is a petition for divorce; hence, this Court cannot give an interim injunction based on an allegation of sexual abuse by the Child.

[53] With respect to learned counsel for RH, I am unable to agree with him that there is no serious issue to be tried just because the application for interim injunction in these divorce proceedings was premised on the allegation of sexual abuse of the Child. The welfare and interest of a child of a marriage is paramount in any divorce proceedings. This Court would be very remiss in its duty as *parens patriae* if it were to conclude that an allegation of sexual abuse of a child of a marriage is not a serious issue to be tried just because the allegation was not pleaded in the petition for divorce.

[54] In determining where the balance of convenience lay and what is best for the Child’s interest and welfare, I agree that the injunction in para. 1.1 of the *Ex-Parte* Interim Injunction Order, which requires RH to seek leave of Court before filing any reports to authorities, including the police and social welfare authorities, with regards to the Child including but not limited to complaining of any form of abuse,

is not compatible with RH's duty under **section 28(1) of the Child Act 2001** as the Child's family member to report based on his belief on reasonable grounds any ill- treatment, neglect or abuse, among others, of the Child. Accordingly, para. 1.1 of the *Ex-Parte* Interim Injunction Order should be set aside.

[55] Further, I agree that para. 2 of *Ex-Parte* Interim Injunction Order has the effect of restraining the government authorities such as the police and the social welfare department among others from making any ex parte applications in respect of the Child. Such injunction is contrary to **Section 29 of the Government Proceedings Act 1956**, which prohibits the granting of injunctions against the government, and **section 54 of the Specific Relief Act 1950**, which prohibits the grant of an injunction against any Malaysian government department: see *Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751 CA. For this reason, para. 2 of the *Ex-Parte* Interim Injunction Order should be set aside.

[56] Para 3 of the *Ex-Parte* Interim Injunction Order is a specific mandatory injunction which requires RH to return the Child to PW's house by 2.2.2020. Since RH had returned the Child to PW's house on 2.2.2020 prior to the date of the hearing of Enc. 10 and Enc. 25, I agree that this clause has become academic and should be set aside.

[57] This Court is of the view that it will not be in the best interest and welfare of the Child to be subjected to numerous psychological or psychiatric evaluation, treatment and/or therapy by either PW or RH as they have done in the past. Therefore, this Court using its inherent jurisdiction as *parens patriae* and its statutory powers under **section 19A of the Guardianship of Infants Act 1961** hereby orders that PW and RH are to seek leave of this Court before either of them subjects and/or causes the Child to be subjected to any psychological or



psychiatric evaluation, treatment and/or therapy. Section 19A of the Guardianship of Infants Act 1961 states that where there is a dispute between the joint guardians of an infant, “*the Court may make such order regarding the matters in difference as it may think proper*”. In my view, this requirement for leave of Court is necessary and proper as this Court needs to be satisfied that any proposed psychological or psychiatric evaluation, treatment and/or therapy of the Child is absolutely necessary and is in the best interest and welfare of the Child before he is subjected to the same again.

[58] Pursuant to the COA Custody Order, RH and PW are joint guardians of the Child and PW is the sole custodian of the Child. As joint guardian and sole custodian of the Child, PW is responsible for the upbringing, education, welfare and wellbeing of the Child. An allegation of sexual abuse against the Child is a very serious allegation. Furthermore, as a family member, PW has an obligation to report to allege abuse to the authorities under the Child Act 2001.

[59] In order to discharge her duties and obligations as joint guardian and custodian of the Child, PW should be allowed to see the copies of the reports in relation to the alleged sexual abuse filed by RH and/or his solicitors with the police and the social welfare department and any other government authorities. She should also be entitled to see all the psychological and/or psychiatric reports procured by RH, relating to the allegation of sexual abuse of the Child. For these reasons, I am of the view that there are special circumstances and an “unusually strong and clear case” for RH to be ordered to deliver copies of all those reports relating to the allegation of sexual abuse of the Child.

[60] As discussed above, it is uncertain at this stage and until the investigation by the authorities are complete, whether PW’s brother had indeed sexually abused the Child or whether the Child had lied to



Dr Diana, RH and the authorities about the alleged sexual abuse. Therefore, in order to address RH's contention and his fear that PW, her solicitors or her representatives will use the said police reports and the psychological and/or psychiatric reports to interfere and/or tamper with the investigations by the police and other authorities into the allegation of sexual abuse, and since the alleged abuser is PW's brother plus PW position, as averred in her affidavits, is that the allegation is untrue and that the Child was brainwashed or coached by RH to lie to Dr Diana that he was sexually abused by PW's brother, I find that the balance of convenience lay in restraining PW, her solicitors or her representatives from the using the said reports and any information derived from the said reports to interfere and/or tamper with the investigations by and /or actions of the police, social welfare department and any other authorities.

[61] It is clear to me from the conduct of the parties during and after custody proceedings and in these proceedings, there is a lot of bitterness and mistrust between PW and RH. Taking into account each party's allegation that the other will take actions to malign, oppress, defame and/or oppress him or her until the conclusion of the divorce proceedings, it is this Court's view that in the interest, welfare and wellbeing of the Child, both PW and RH are to be restrained from making or causing to be made any statements to the press and/or to publish or causing to be published in the press and/or on any form of social media any information in respect of and/or in connection with the allegation of sexual abuse of the Child.

Decision

[62] **Enclosure 25:** For the above reasons, para. 1.1, 2 and 3 of the Ex- Parte Interim Injunction Order is hereby set-aside.



[63] Enclosure 10: For the above reasons, an Interim Injunction Order pending the disposal of the petition for divorce (Enc. 1) is hereby ordered on the following terms:

- (a) Both PW and RH by themselves or their respective solicitors, representatives and/or agents are restrained, without prior leave of this Court, from subjecting and/or causing the Child to any psychological or psychiatric evaluation, treatment and/or therapy;
- (b) RH shall within 7 days from the date of this Order deliver to the PW's solicitors copies of all reports made and/or filed by RH and/or his solicitors and/or agents with the Polis DiRaja Malaysia, the Jabatan Kebajikan Masyarakat and any other governmental authorities and all psychological and/or psychiatric reports procured by RH, relating to the allegation of sexual abuse of the Child referred to in Enc. 10 ("the said Reports");
- (c) PW is by herself or through her solicitors, representatives, agents and/or members of her family is restrained from using the said Reports or any information in the said Reports and/or any information derived from the said Reports to interfere and/or tamper with the investigations by and/or actions of the Polis DiRaja Malaysia, the Jabatan Kebajikan Masyarakat and any other governmental authorities relating to the allegation of sexual abuse of Child referred to in Enc. 10; and
- (d) Both PW and RH by themselves or their respective solicitors, representatives and/or agents are restrained from making and/or causing to be made any statements to the press and/or to publish and/or causing to be published in the press and/or on any form of social media any



information in respect of and/or in connection with the allegation of sexual abuse of the Child referred to Enc. 10.

[64] There is no order as to costs in respect of the applications in Enc.10 and Enc. 25. Each party is to bear its own costs.

Dated: 23 OCTOBER 2020

(FAIZAH JAMALUDIN)

Judge

High Court of Malaya at Kuala Lumpur

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Legislation referred to:

Courts of Judicature Act 1964, s. 15



[2020] 1 LNS 1723

Legal Network Series

Law Reform (Marriage and Divorce) Act 1976, ss. 48, 64

Guardianship of Infants Act 1961, s. 19A

Child Act 2001, ss. 8, 25(2)(b), 28(1)(2)

Government Proceedings Act 1956, s. 29

Specific Relief Act 1950, s. 54

Rules of Court 2012, O. 29 r. 1(1), (2), (2A)(a), (g)