Lau Lai Kam (P) v Long Shih Wei (L)
[2018] MLJU 1191

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HIGH COURT (SHAH ALAM)

HAYATUL AKMAL JC

ORIGINATING SUMMON NO BA-24F-30-01 OF 2018

20 August 2018

Ng Kam Thai (Tan Chong Lii & Co) for the plaintiff wife.
*Christopher Yeo Wee Choon (Tan Shir Lay with him) (**David Gurupatham** and Khoy) for the defendant husband.*

Hayatul Akmal JC:

JUDGMENTINTRODUCTION

[1]This is an application (enclosure 1) filed by the Plaintiff Wife ("PW") against the Defendant Husband ("DH") seeking an order for custody, care and control of the child of their marriage, i.e., Long Ji Hang (now almost 2 years old) be given to PW and DH be given access (no overnight stay) once every fortnight with details as per para 3 of this Originating Summons ("OS") and other prayers which includes maintenance for the said child and for PW. DH in his affidavit in reply, denies the averment of PW and pray that this OS be dismissed with cost.

[2]The relevant cause papers and written submissions, are as follows:

(a) Enclosure 1: Originating Summons filed on 23rd January 2018; (b) Enclosure 2: PW's affidavit in support affirmed by Lau Lai Kam on 23rd January 2018;

(b) Enclosure 4: DH's affidavit in reply affirmed by Long Shih Wei on 15th March 2018;

(c) Enclosure 5: Affidavit in reply affirmed by Choir Poh Swan (mid-wife) on 15th March 2018;

(d) Enclosure 6: PW's affidavit in reply affirmed by Lau Lai Kam on 29th March 2018;

(e) Enclosure 7: Affidavit in reply (2) affirmed by Choir Poh Swan (mid-wife) on 22nd March 2018; (d)

(f) Enclosure 25: DH's affidavit in further reply affirmed by Long Shih Wei on 28th June 2018; Submissions/reply filed by PW and DH, respectively.

[3]This application was heard before me on the 2nd July 2018 and after perusing the cause papers filed, respective written submissions of the parties, I allowed the said OS (except for prayer 5) with no order as to cost. Dissatisfied, the DH had filed this appeal and my reasons are as follows:

BRIEF FACTS

The brief facts disclosed from the cause papers are as follows:

[4]PW and DH were legally married on 2nd July 2016 and are blessed with a son, born on 20th December 2016 [(now almost 2 years old)-("the said child")] and resided at a condominium unit owned by DH at C-9-2, Sri Putramas Condo 1, Jalan Putramas 1, Kuala Lumpur. Subsequently (during her confinement after the delivery of the said child), they moved to stay with DH's younger brother since DH is selling the said condominium unit. When the said child was about a month old, PW claimed that she was chased out of DH's brother's house because of some disagreement with her father in law (DH's father) and she was not allowed to bring along the said child. After Chinese New Year, PW was informed by DH that the said child is now with a baby sitter/mid-wife in Klang.

According to PW, the mid-wife was under strict instruction from DH not to allow the said child out of the house, therefore PW had to go to the mid-wife's house to spent time with the said child. Later she was informed by the mid-wife that the said child was taken to Melaka to be cared for by DH's parents. She had difficulty in accessing the said child because of the various limitations set by DH and his parents. Because of this difficulty in accessing her own child, PW eventually lodged a police report on 17th December 2017 [(exhibit A-4) - (enclosure 2)] over the matter. PW contended that DH has all this while maintained her and the said child and therefore she prayed in this OS for the maintenance of the said child and herself too.

[5]DH in his reply to the said OS denies the averment of PW and claimed that PW was experiencing postpartum depression (allegedly admitted by PW) and she was the one who pick-up a fight with his father (on 7th January 2018) when they came to visit him and his family and it was then that PW informed him that she wishes to move out of the house but changed her mind when advised by him and his family. On 10th January 2018, DH did call PW's sister to inform her that since Chinese New Year celebration is coming, DH thought that it was best for PW and his father not to be together, so DH had asked PW's sister to fetch PW to take her back to her parent's house. DH further claimed that it was PW who had decided to move out of the house and was never chased out by him. DH and PW's sister referred PW to a specialist because PW admitted that she was suffering from postpartum depression and the doctor gave PW medication, i.e., Lexapro 10mg and Risperdal 1mg which DH alleged as strong medication (for mental illness) and requested that PW submit the report by the said specialist. DH prays that this OS be dismissed with cost and that DH to continue with the custody and care for the said child with reasonable access given to PW.

SUBMISSION BY THE PLAINITFF WIFE (PW)

[6]PW was deprived of her right as a biological mother to the said child when DH had unilaterally took the said child away and placed him with his parent's in Melaka. PW was only able to see the said child once every fortnight with limited time for access. The access can only be exercised under the supervision or either DH or his parents and more often than not, access was not granted based on the reason that DH's father was unavailable or too busy to supervise the said access. PW's request to take custody and care of the said child was denied by DH and his parents on the allegation that PW was suffering from post-partum depression. PW denied suffering from the alleged medical condition but admitted that she did suffer emotional stress (*tekanan emosi*) as a result of her fear that her mother is unable to accept her out of wedlock pregnancy, her strained relationship with DH and his father whose is always blaming her for allegedly being problematic and quarrelsome. PW felt that her right as the biological mother to the said child was adversely affected by DH and his parents when her access to the said child was hindered because of the various limitations and conditions set by them. Because of the said child's tender age (almost 2 years old), it was submitted that PW is applying for custody, care and control of the said child because it concerns the said child's general well-being and his welfare both moral and physical during his infancy in these nurturing years.

[7]I was alluded to the case of *Kok Yoong Heong V Choong Thean Sang* *[1976] 1 MLJ 292*, **it was held:**

> *"It is not merely a question of whether the child will be happier in one place than in another, but it concerns the general well-being. The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years."*

[8]PW argued that the said child is 2 years old and in the process of nurturing and he needs his mother's care, love and affection which is important in nurturing a child of tender years. DH denied PW easy access to the said child and submitted further that the said child should not be deprived from maintaining personal relations and direct contact with PW/both parents on a regular basis.

[9]PW also alluded me to a Federal Court case of *Teh Eng Kim v Yew Peng Siong* *[1977] 1 MLJ 234* where it was held that the: -

> *""Nothing, and no person and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place."*

In the case of *CY v CC* [2015] 1 LNS 652 it was held that:

> *"The law recognizes what nature has endowed the mother of little children to have and to hold their young ones and to envelope and embrace them with a mother's love. To them belong the privilege of carrying the yet unborn child in their womb and then later, to bear the pain of child birth and the joy that comes from holding the child of their womb in their embrace. To them belong the privilege of their baby suckling at their breast and of nursing and nurturing them. The rhetorical question is often asked "Can a mother forget the baby at her breast and have no compassion on the child she has borne?" The rephrase is often heard that heaven lies at the feet of one's mother".*

[10]In view of the above, PW further submitted that PW has a flexible working timetable and that will assist her in taking care of the said child and to arrange the logistic needed during an emergency. PW had also purchased a new double storey house [(exhibit A-9) - (enclosure 6)] in her preparation to taking care of the said child and since her sister and her child is living with her, the said child can have company with another child which is vital for him to have a conducive environment to live in. I was alluded to the case of *Chan Kam Tai v Kong Peng Keong* [2008] 1 LNS 106 where it was held that the respondent has not adduced sufficient evidence to rebut the presumption under *section 88(3)* *LRA*. In the absence of evidence to the contrary, it was wrong for the respondent to speculate that the children would be adversely affected by the change of custody. In the circumstances, PW submitted that there is no averment by DH that the livelihood of the said child will be affected if there is a change in custody.

[11]The court is empowered under *section 88(3)* of the *Law Reform (Marriage & Divorce) Act 1976* ("LRA") and it is trite that there is a rebuttable presumption that it is good of a child below the age of seven years to be with his mother. The said child in the present case is almost 2 years old and therefore it is good for him to be with the mother.

[12]The allegation of postpartum depression by DH was only a speculation which is not supported by any medical report or findings. PW submitted that she admitted that she had informed the said doctor that she was under emotional stress which the said doctor explained it to be normal for a woman who has just delivered a baby because of hormonal changes in her body. The medication given by the said doctor was to assist PW to relax, sleep and to assist in her recovery. It is important to note that the said doctor had never at any material time said that PW was suffering from postpartum depression. It was merely the allegation of DH conjured up with no medical findings or report to attest to the same. DH with no medical expertise or back ground concocts the conclusion by himself that PW was suffering from postpartum depression on the basis of the medication prescribed by doctor to PW. I was alluded to the case of *Lee Chang Yong v Teng Wai Yee* [2017] 1 LNS 1818, where it was said:

> *"Other than presenting the alleged implications of the facts and circumstances of the case, PH had not been able to adduce any other material of probative value to prove his allegations and consequently, such omission would impair the satisfaction of the required burden of proof imposed on the PH concerning his allegations against the RW."*

The averment by DH was rebutted by PW in her affidavit in reply and it was never replied by DH. It is a settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of the opponent to contradict it is usually treated as an admission by him of the facts so asserted (see *Ng Hee Thong v PBB* *[2000] 2 MLJ 29*).

[13]DH had also filed a supporting affidavit by the mid-wife Choir Poh Swan (enclosure 5) to support his averment that PW is not a fit mother and will not be able to care for the said child. But it is to be noted that the said mid-wife had also filed a second affidavit (enclosure 7) denying the contents of the said first affidavit (enclosure 5) and has requested that this court not to consider the said affidavit (enclosure 5). The attempt by DH to show that PW is not a fit mother fails and it is merely a bare assertion on the part of DH unsupported by any evidential material of probative value in which to anchor his arguments on.

[14]DH is a busy working father and the facts also disclosed that the said child was placed to stay with a mid-wife in Klang before he was placed with DH's parents in Melaka. It was the averment of PW that the said child was taken care of by another baby sitter in Melaka from 8 am until 6 pm every day. This averment was not denied by DH. In the present case, the said child is almost 2 years old and he shouldn't be deprived of the love and affection of a mother since PW is ready willing and able as his mother to care for the said child. There is no plausible and legitimate excuse given for the paternal grandparents or baby-sitter to look after him in such circumstances.

[15]PW is working as a clerk at a local bank with salary of RM3944.00 with telephone allowance of RM100.00

[(exhibit A-1) - (enclosure 2)]. DH meanwhile is a manager in a company known as Lodging Travel Sdn Bhd in Sunway with a monthly salary of RM6,000.00 which was affirmed by his own affidavit (enclosure 4). Under *section 92* and *93 LRA* where the court may at any time order a man to pay maintenance for the benefit of his child. PW is claiming for RM3,000.00 as maintenance for the said child and even though it was objected to by DH, he had failed to give any legitimate reason to negate the amount claimed as maintenance for the said child. Under *section 77* and *78 LRA*, the court may order a man to pay maintenance to his wife during the course of any matrimonial proceedings. It is trite that any reference to marriage tribunal can be considered as a matrimonial proceedings and to my mind the amount claimed by PW for her own maintenance, i.e. RM650-00 is a reasonable amount in the circumstances of the case. PW is also claiming for cost because of the unreasonable stand taken by DH and his parents in depriving PW of the custody care and control of her only infant child.

SUBMISSION BY THE DEFENDANT HUSBAND (DH)

[16]DH submitted that he had reasonable grounds to suspect that PW is suffering from and/or suffered postpartum psychosis/bipolar disorder since PW had visited/consulted the specialist at “Brain Mind Specialist Clinic” [(payment receipt exhibit L-4) - (enclosure 4)] and was prescribed the medicine stated above. DH admitted that the said child is currently staying with his parents in Melaka and DH will go back to Melaka during the weekend or during his free time. DH is aware of the provision under *section 88(3) LRA* but submitted that the said child is now with DH and taken care off by his parents who are healthy and fit to care for the said child and they have in fact closed their business (no evidence adduced) to take care of the said child. The family house is comfortable, spacious and safe for the said child [(exhibit L-9) - (enclosure 4)].

[17]DH argued that the present arrangement is the best for the said child which is better than any nanny or day care centre because the grandparents who are willing to sacrifice their time and business to focus on taking care of the said child. I was alluded to the case of *B Ravandran v Maliga* *[1996] 2 MLJ 150* where it was stated that it is undesirable to disturb the life of a child by change in custody. In addition the court must evaluate whether improvement to the welfare of a child is sufficient to justify the disturbance and in this respect the advantages must be real and not merely promissory or speculative. DH submitted the environment of the family house of DH also shows that it is the best for the said child to remain in the custody care and control of DH at least until the divorce petition is filed. I was also alluded to the case of *Amar Kaur v Najar Singh* [1991] 1 CLJ 294 where it was held that a custody of a child is not necessarily granted to the mother. DH further submitted that PW is not suitable to have custody care and control of the said child because of her alleged medical condition which is serious issue to be considered by this court.

[18]As for the maintenance asked for by PW, DH submitted that PW is working and holding a stable job and DH denied ever paying PW for maintenance since the marriage and DH was the one who has been paying all the expenses for the said child and pray for a reasonable sum for maintenance of the said child and no order as to the maintenance of PW.

THE LAW

[19]*Section 88* of the *Law Reform (Marriage and Divorce) Act 1976* (Act 164) (“LRA”), provides the power of the Court to make an order for custody. For ease of reference I reproduced as follows:

> ***“****Section 88****. Power of the Court to make order for custody***
>
> (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.*
>
> (2) *In deciding whose custody, a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court should shall have regard-*
>
> (a) *To the wishes of the parents of the child; and*
>
> (b) *To the wishes of the child, where he or she is of an age to express an independent opinion.*
>
> (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 facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.*

(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."*

[20]*Section 88 (1)* LRA provides that the court may at any time by order place a child in the custody of his/her father or 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. *Section 88(2)* LRA makes it mandatory for the court to consider the welfare of the child as being paramount. In *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, Raja Azlan Shah, CJ considered the phrase "paramount consideration" with respect of the welfare of children under the Act and

stated:

"the phrase "first and paramount consideration" does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration".

FINDINGS OF THIS COURT

[21]In the present case, DH had hurled allegations of mental illness against PW where DH had unilaterally and personally deemed PW as unfit to have custody, care and control of the said child. However, those allegations remain merely that, since DH could not and/or did not adduce any materials of evidential value to support such allegation. That notwithstanding, the unrebutted facts that DH had taken away the said child from PW and unilaterally placing him with the baby-sitter in Klang and later placing the said child with his parents in Melaka to the total disregard of the mother (PW) of the said child clearly reflects unreasonable and unacceptable behaviour by any standard on the part of DH save and except in the presence of legitimate justifications that can withstand legal scrutiny of the court of law. From the evidence adduced I hold that DH had failed to provide a conducive matrimonial home for PW and the said child since they had to move in with the brother of DH since DH had intended to sell the condominium unit that they were initially staying in. I refer to the case of *Yong May Inn v Sia Kuan Seng* [1971] 1 MLJ 280 where Abdul Malek Ahmad J said:

"… In Yap Chee Kong v Chan Bee Yee [1989] 2 CLJ 668*, custody of a child below 7 was given to the mother who had left the husband's parents' home as the Court found her to be unimpeachable parent since her husband had failed to provide a matrimonial home."*

From the various affidavits filed, it can be safely inferred that there is certain interference from DH's family in their marriage and the said child. This is made clearer by DH's own admission that it was him who had asked PW's sister to take PW away since his parents were visiting. That is the wife that is being sent away for the sake of his parents. Clearly, in that regard she was not given mental physical and emotional support by DH. Low social support and poor marital relationship has been recognised and understood to be contributing factors to the kind of stress that she suffers which requires medication as prescribed. However, that cannot amount to postpartum depression save and except where it is formally and clinically identified and diagnosed by a qualified practising psychiatrist of which treatment (if so) includes hospitalisation for her and the baby to assists in the bonding process with spousal support and not deprivation. There is practically no evidence on this at all by DH except for his bare assertion. Therefore, the alleged medical condition is strictly a matter of speculation and will have no bearing on this decision (see **Dorland Illustrated Medical Dictionary, 32nd International Edition, 2012, Elsevier**; **Family Doctor Home Advisor, 4th Edition, 2008, Dorling Kindersley Book**). I find support in the legal principles as enunciated in Federal Court case of **Teh Eng Kim (supra)** in that nothing and no person and no combination of them, can replace the mother for the welfare of a child of tender years. Failure to provide evidence to the contrary would impair the onus required on the husband to prove otherwise and/or rebut the legal presumption under *section 88 (3)* LRA.

[22]There is a long line of authorities that holds that the mother should be entitled to custody of a child during what is called the period of nurture, until the child attains seven years (*see Amar Kaur Ram Singh v Najar Singh Sagar Singh* [1992] 2 CLJ 807, *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175, *K.Shanta Kumari v Vijayan* [1985] 1 LNS 135, *Mahabir Prasad v. Pushpa Mahabir Prasad* [1982] 1 MLJ 189/; [1981] CLJ 174). I refer to the case of *Viran Nagapan v Deepa Subramaniam & Other Appeals* 2016] 3 CLJ where The Federal Court held that the paramount consideration in determining the custody of a child is the child's welfare. As for DH's averment that

his parents who are the grandparents to the said child can better care for the said child cannot in the present case withstand legal scrutiny and it can never substitute the love care and affection of a natural mother to her child particularly in the nurturing years as was said by the Federal Court in **Teh Eng Kim's** case (supra). I wish to state here that the paramount consideration for determining custody under *section 88(2) LRA* shall be the welfare of the child even though the court shall have regard to the wishes of the parents of the child. The said child is currently two years old (almost) and the legal rebuttable presumption under *section 88(3) LRA* that enhances the natural law that the custody of any child below the age of seven years shall be given to the mother applies in the present case. On the facts, I find the presumption in *section 88(3) LRA* has not been successfully rebutted by DH and therefore custody of the said child must be restored to PW immediately. It is to be noted too that DH by his own admission acknowledged that PW is working and holding a steady job. That somehow rather does not equate with a person of serious mental health issue as alleged.

[23]Regarding maintenance for the said child, I am of the considered view that an amount of RM1,200.00 in the circumstances of the case to be reasonable considering the said child's age (until further ordered by this court). Even though PW is working, the law is trite that it does not bar her from being maintained by DH as provided for under *section 77 LRA* and an amount of RM650.00 is also reasonable in the circumstances of the case.

CONCLUSION

[24]In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed PW's application (enclosure 1) with no order as to cost.

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