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YAY v WHO & Anor

B HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO WA-33–178–04 OF 2019
EVROL MARIETTE PETERS J
17 JANUARY 2023

C *Family Law — Divorce — Ancillary matters — Divorce petition — Allegation of adultery — Welfare of child — Whether adultery had been proved — Whether breakdown of marriage was due to adultery — Whether petitioner wife entitled to monetary claim and spousal maintenance — Whether child entitled to have his father's surname — Whether petitioner wife entitled to sole guardianship and custody of child — Whether respondent husband entitled to access to child — Whether respondent husband obliged to pay child maintenance — Whether petitioner wife entitled to division of matrimonial assets — Guardianship of Infants Act 1961 ss 3, 5 & 11 — Law Reform (Marriage and Divorce) Act 1976 ss 53, 54(1), 59, 77(1), 78 & 88*

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The petitioner wife and the respondent husband had registered their marriage on 11 November 2016, but the respondent had subsequently left the matrimonial home allegedly due to his relationship with the co-respondent. It ought to be noted that at the time when the respondent left the matrimonial home, the petitioner was pregnant. The petitioner's allegation of adultery against the respondent and co-respondent was based on the evidence of a private investigator who was hired by the petitioner to investigate the relationship between the respondents. The petitioner then filed the present divorce petition seeking, inter alia, sole guardianship and custody of the child of the marriage, division of matrimonial assets, spousal and child maintenance from the respondent husband, and damages against the co-respondent for adultery allegedly committed between the co-respondent and the respondent. The issues arose in the present case were: (a) whether adultery had been proved — in relation to this issue, the court had to determine the question of whether the cause of the breakdown of the marriage was due to adultery between the respondent and co-respondent, pursuant to ss 53 and 54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'); (b) whether the petitioner entitled to monetary claim and spousal maintenance; (c) whether the child entitled to have his father's (the respondent) surname; (d) whether the petitioner entitled to sole guardianship and custody of the child; (e) whether the respondent entitled to access to the child; (f) whether the respondent obliged to pay child maintenance; and (g) whether the petitioner entitled to division of matrimonial assets.

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Held, allowing the petition only with regard to child maintenance, damages for adultery, and one third of the petitioner's monetary claim:

(1) Pursuant to s 103 of the Evidence Act 1950, the petitioner had the legal burden to prove adultery. The standard of proving adultery was on the balance of probabilities considering that adultery was not a crime in Malaysia. However, in the present case, although the standard of proof was on a balance of probabilities, a higher degree of such standard had to be considered in light of the seriousness of the allegation. In order to establish adultery, there was no requirement for the respondent and co-respondent to be 'living in adultery' and in the context of s 54(1)(b) of the LRA, just one act of voluntary sexual intercourse would suffice to establish adultery. In the present case, the court found that the respondent and co-respondent had cohabitated at the respondent's residence at least in 2017, which, although circumstantial evidence, was sufficient to prove that adultery had been committed; and that it was undeniable that it was such adultery that had led to the irretrievable breakdown of the marriage (see paras 9, 11, 15, 25–26 & 35).

(2) It was trite law that damages awarded pursuant to s 59 of the LRA were compensatory in nature. Bearing in mind that the petitioner was abandoned during her pregnancy due to the adulterous relationship between the respondent and co-respondent, the court had ordered the co-respondent to pay the petitioner damages in the amount of RM70,000, which in the court's view was fair and reasonable (see paras 37–38).

(3) The petitioner had claimed for the costs amounting to RM42,089.81 which incurred in relation to the delivery of the child, but the petitioner had no proof whatsoever of the details of the expenditure. However, it was undisputed that the petitioner had incurred some expenses due to pregnancy and childbirth and, as such, the respondent was ordered to pay one-third of the costs claimed by the petitioner. With respect to the claim for spousal maintenance, in s 77(1) of the LRA, reference was made to the word 'may' which was indicative that the court had the discretion in determining if, at all, the petitioner was entitled to maintenance. In the present case, the court found that the petitioner was not entitled to any maintenance because it would be most inequitable for the respondent to be burdened with maintaining a person he was married to for just six months. Further, the petitioner had failed the 'means and needs' test pursuant to s 78 of the LRA considering that the petitioner had the capacity to earn more than the salary she was currently drawing, as she had the necessary knowledge and experience (see paras 39–41, 43–44, 46–47, 51 & 54).

(4) There was no doubt that the child was result of the union between the petitioner and respondent, but the petitioner had unilaterally given the

child her surname. In the present case, since the petitioner had left it to the court's discretion in relation to this issue, the court held that the child should be given the respondent's surname, as there was completely no reason to do otherwise. The argument that confusion would arise since the child had all along maintained the petitioner's surname, was untenable as he was only five years old, and inserting the respondent's surname now would not be detrimental to the child. On the contrary, it would be in the interest of the child's welfare for the child to have the respondent's surname, to remove any doubt of his status as the legitimate son of the respondent. In fact, having the respondent's surname would enable the child to enjoy the family benefits derived from the respondent's employment as a banker (see paras 55–56 & 63).

(5) Since the child was only five years old at the time of the trial, it was undeniable that child should remain in the primary care of the petitioner pursuant to s 88(3) of the LRA. In relation to the guardianship of the child, it was evident that it was the petitioner herself who, due to her bitterness and anger, had deliberately prevented the respondent from seeing the child. The most important consideration for the court was the welfare of the child, as prescribed by s 88 of the LRA and s 11 of the Guardianship of Infants Act 1961. Although the petitioner should have custody, care and control of the child, no one parent was superior to the other. A child needs both parents. Therefore, the court held that the petitioner and the respondent should co-parent the child. It would be in the interest of the welfare of the child for the respondent to be in his life. To deny the child completely of the bond with his father, the respondent, would be most prejudicial to the child. Based on these findings, the court ordered joint guardianship of the child by the petitioner and the respondent and that the respondent to have access to the child (see paras 65, 69, 71, 73, 76, 78 & 80–81).

(6) There was no reason for the respondent not to pay the child maintenance. The respondent had acknowledged that he was in arrears in payment of child maintenance pursuant to an order of the court dated 4 October 2019, which instructed the respondent to pay child maintenance in the monthly sum of RM3,000. The respondent was ordered to settle the arrears as well. Therefore, the court in the present case ordered the respondent to pay, with immediate effect, a monthly payment of RM2,000 in child maintenance considering the fact that the court had also ordered the respondent to pay half of all the costs that were to be incurred for the child's health and education pursuant to the order of joint guardianship of the child (see paras 82–83).

(7) In relation to the division of matrimonial assets, the petitioner was adamant in claiming half of everything that belonged to the respondent, regardless of whether they were part of matrimonial assets, or whether she

made any form of contribution towards such assets. At this juncture, it must be impressed upon the parties that divorce proceedings should not be used to enrich oneself or obtain a windfall. It was obvious that in the present case, the petitioner was doing just that. For a marriage that lasted only six months, and in the absence of proof, the petitioner's claims to half the monies, investments, and shares were unjustified and laced with avarice. With regards to the respondent's property known as Regency 2 which was acquired by the respondent solely before marriage, the court held that this was not a matrimonial asset because there was no documentary evidence adduced by the petitioner to prove her contribution towards the property. In respect of the matrimonial home, the relief sought by the petitioner for the respondent to continue servicing the monthly loan repayment, and for her to continue residing there was most inequitable because the marriage lasted a very short time and there was no evidence that the petitioner contributed to the properties. As such, the court ordered for the matrimonial home to be sold and the proceeds thereof to be divided equally between the petitioner and the respondent (see paras 88–93 & 97–98).

[Bahasa Malaysia summary

Pempetisyen isteri dan responden suami telah mendaftarkan perkahwinan mereka pada 11 November 2016, tetapi responden kemudiannya telah meninggalkan kediaman mereka yang didakwa disebabkan oleh hubungannya dengan responden bersama. Perlu diingat bahawa pada masa responden meninggalkan kediaman mereka, pempetisyen sedang hamil. Dakwaan perzinaan terhadap responden dan responden bersama oleh pempetisyen adalah berdasarkan keterangan seorang penyiasat persendirian yang diupah oleh pempetisyen untuk menyiasat hubungan antara responden-responden. Pempetisyen kemudiannya memfailkan petisyen cerai semasa bagi memohon, antara lain, penjagaan dan hak penjagaan tunggal anak hasil daripada perkahwinan tersebut, pembahagian harta sepencarian, nafkah isteri dan anak daripada responden, dan ganti rugi terhadap responden bersama atas perzinaan yang didakwa dilakukan antara responden bersama dan responden. Isu-isu yang timbul dalam kes ini ialah: (a) sama ada zina telah dibuktikan — berhubung dengan isu ini, mahkamah perlu menentukan persoalan sama ada punca kepecahbelahan perkahwinan tersebut adalah disebabkan zina antara responden dan responden bersama, menurut ss 53 dan 54(1)(a) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'); (b) sama ada pempetisyen berhak menerima tuntutan kewangan dan nafkah pasangan; (c) sama ada anak tersebut berhak mendapat nama keluarga bapanya (responden); (d) sama ada pempetisyen berhak mendapat penjagaan dan hak penjagaan tunggal anak tersebut; (e) sama ada responden berhak mendapat akses kepada anak tersebut; (f) sama ada responden berkewajipan membayar nafkah anak tersebut; dan (g) sama ada pempetisyen berhak kepada pembahagian harta sepencarian.

Diputuskan, membenarkan petisyen tetapi terhad kepada nafkah anak, ganti rugi bagi perzinaan, dan satu pertiga daripada tuntutan kewangan pempetisyen:

(1) Menurut s 103 Akta Keterangan 1950, pempetisyen mempunyai beban undang-undang untuk membuktikan zina. Standard pembuktian zina adalah di atas imbangan kebarangkalian memandangkan zina bukanlah satu jenayah di Malaysia. Walau bagaimanapun, dalam kes ini, walaupun standard pembuktian adalah di atas imbangan kebarangkalian, tahap yang lebih tinggi bagi standard tersebut perlu dipertimbangkan berdasarkan keseriusan dakwaan tersebut. Untuk membuktikan perzinaan, tidak ada keperluan untuk responden dan responden bersama untuk 'hidup dalam perzinaan' dan dalam konteks s 54(1)(b) Akta, hanya satu perbuatan persetubuhan sukarela sudah memadai untuk membuktikan zina. Dalam kes ini, mahkamah mendapati bahawa responden dan responden bersama telah bersekedudukan di kediaman responden sekurang-kurangnya pada tahun 2017, yang mana, walaupun merupakan keterangan mengikut keadaan, adalah mencukupi untuk membuktikan bahawa zina telah dilakukan; dan tidak dapat dinafikan bahawa perzinaan tersebut yang telah membawa kepada kepecahbelahan perkahwinan yang tidak dapat dipulihkan (lihat perenggan 9, 11, 15, 25–26 & 35).

(2) Sudah menjadi undang-undang yang mantap bahawa ganti rugi yang diberikan menurut s 59 Akta adalah bersifat pampasan. Mengingat bahawa pempetisyen telah ditinggalkan semasa mengandung kerana hubungan zina antara responden dan responden bersama, mahkamah telah memerintahkan responden bersama membayar ganti rugi kepada pempetisyen dalam jumlah RM70,000, yang pada pandangan mahkamah adalah adil dan munasabah (lihat perenggan 37–38).

(3) Pempetisyen telah menuntut kos berjumlah RM42,089.81 yang ditanggung berhubung dengan kos melahirkan anak tersebut, tetapi pempetisyen tidak mempunyai apa-apa keterangan mengenai butiran perbelanjaan tersebut. Walau bagaimanapun, tidak dapat dipertikaikan bahawa pempetisyen telah mengeluarkan beberapa perbelanjaan kerana mengandung dan melahirkan anak tersebut dan, oleh itu, responden diperintahkan untuk membayar satu pertiga daripada kos yang dituntut oleh pempetisyen. Berkenaan dengan tuntutan untuk nafkah isteri, dalam s 77(1) Akta, rujukan telah dibuat kepada perkataan 'boleh' yang menunjukkan bahawa mahkamah mempunyai budi bicara dalam menentukan sama ada pempetisyen berhak mendapat nafkah, jika ada. Dalam kes ini, mahkamah mendapati bahawa pempetisyen tidak berhak mendapat apa-apa nafkah kerana adalah sangat tidak adil bagi responden untuk dibebani dengan tanggungan nafkah seseorang yang telah berkahwin dengannya selama enam bulan sahaja. Selanjutnya,

pempetisyen telah gagal dalam ujian 'means and needs' menurut s 78 Akta memandangkan pempetisyen mempunyai kapasiti untuk memperoleh lebih daripada gaji yang diterimanya sekarang, kerana dia mempunyai pengetahuan dan pengalaman yang diperlukan (lihat perenggan 39–41, 43–44, 46–47, 51 & 54).

(4) Tiada pertikaian bahawa anak tersebut adalah hasil daripada penyatuan antara pempetisyen dan responden, tetapi pempetisyen telah memberikan nama keluarganya kepada anak tersebut secara unilateral. Dalam kes ini, memandangkan pempetisyen telah menyerahkannya kepada budi bicara mahkamah berhubung dengan isu ini, mahkamah memutuskan bahawa anak tersebut harus diberi nama keluarga responden, kerana tidak ada sebab untuk berbuat sebaliknya. Hujah bahawa kekeliruan akan timbul kerana selama ini anak tersebut menggunakan nama keluarga pempetisyen tidak dapat dipertahankan kerana dia baru berusia lima tahun, dan memasukkan nama keluarga responden sekarang tidak akan memudaratkan anak tersebut. Sebaliknya, adalah demi kepentingan kebajikan anak tersebut untuk dia mempunyai nama keluarga responden, untuk menghapuskan apa-apa keraguan tentang statusnya sebagai anak sah responden. Malah, dengan mempunyai nama keluarga responden akan membolehkan anak tersebut menikmati faedah keluarga yang diperoleh daripada pekerjaan responden sebagai jurubank (lihat perenggan 55–56 & 63).

(5) Memandangkan kanak-kanak tersebut hanya berumur lima tahun pada masa perbicaraan, tidak dapat dinafikan bahawa anak tersebut harus kekal dalam jagaan utama pempetisyen menurut s 88(3) Akta. Berhubung dengan penjagaan anak tersebut, adalah jelas bahawa disebabkan kebencian dan kemarahannya, pempetisyen sendiri yang telah sengaja menghalang responden daripada berjumpa dengan anak tersebut. Pertimbangan paling penting bagi mahkamah ialah kebajikan anak tersebut, seperti yang ditetapkan oleh s 88 Akta dan s 11 Akta Penjagaan Kanak-Kanak 1961. Walaupun pempetisyen sepatutnya mempunyai hak penjagaan, penjagaan dan kawalan anak tersebut, tiada seorang pun ibu bapa mempunyai kelebihan ke atas yang lain. Seorang anak memerlukan kedua ibu bapa. Oleh itu, mahkamah memutuskan bahawa pempetisyen dan responden hendaklah mendidik anak tersebut bersama-sama. Ia adalah demi kepentingan kebajikan anak tersebut untuk responden berada dalam hidupnya. Untuk menafikan anak tersebut sepenuhnya daripada ikatan dengan bapanya, responden, akan sangat memprejudiskan anak tersebut. Berdasarkan dapatan-dapatan ini, mahkamah memerintahkan penjagaan bersama anak tersebut oleh pempetisyen dan responden dan responden mempunyai akses kepada anak tersebut (lihat perenggan 65, 69, 71, 73, 76, 78 & 80–81).

(6) Tiada sebab untuk responden tidak membayar nafkah anak tersebut.

Responden telah mengakui bahawa dia tertunggak dalam pembayaran nafkah anak tersebut menurut Perintah mahkamah bertarikh 4 Oktober 2019, yang mengarahkan responden membayar nafkah anak dalam jumlah bulanan RM3,000. Responden diperintahkan untuk menjelaskan tunggakan tersebut juga. Oleh itu, mahkamah dalam kes ini memerintahkan responden membayar, berkuat kuasa serta-merta, bayaran bulanan sebanyak RM2,000 sebagai nafkah anak tersebut mengambil kira fakta bahawa mahkamah juga telah memerintahkan responden membayar separuh daripada semua kos yang perlu ditanggung untuk kesihatan dan pendidikan anak tersebut di dalam perintah penjagaan bersama anak tersebut (lihat perenggan 82–83).

(7) Berhubung dengan pembahagian harta sepencarian, pempetisyen berkeras untuk menuntut separuh daripada semua harta milik responden, tidak kira sama ada ia adalah sebahagian daripada aset sepencarian, atau sama ada dia membuat apa-apa bentuk sumbangan terhadap aset tersebut. Pada peringkat ini, harus diingatkan kepada pihak-pihak bahawa prosiding perceraian tidak boleh digunakan untuk memperkayakan diri sendiri atau mendapatkan durian runtuh. Jelas sekali bahawa dalam kes ini, pempetisyen telah melakukan perkara tersebut. Untuk perkahwinan yang berlangsung hanya enam bulan, dan tanpa keterangan, tuntutan pempetisyen terhadap separuh daripada wang, pelaburan dan saham adalah tidak wajar dan dipenuhi dengan ketamakan. Berkenaan dengan harta responden yang dikenali sebagai Regency 2 yang dibeli oleh responden sahaja sebelum perkahwinan, mahkamah memutuskan bahawa ini bukan aset perkahwinan kerana tiada keterangan dokumen yang dikemukakan oleh pempetisyen untuk membuktikan sumbangannya terhadap harta tersebut. Berkenaan dengan kediaman suami isteri, relif yang dipohon oleh pempetisyen untuk responden meneruskan pembayaran balik pinjaman bulanan, dan untuk dia terus menetap di sana adalah sangat tidak adil kerana perkahwinan tersebut hanya bertahan dalam masa yang singkat dan tiada keterangan bahawa pempetisyen menyumbang kepada harta tersebut. Oleh itu, mahkamah memerintahkan supaya kediaman suami isteri tersebut dijual dan hasil daripadanya dibahagikan sama rata antara pempetisyen dan responden (lihat perenggan 88–93 & 97–98).]

Cases referred to

APE v APF [2015] SGHC 17, HC (refd)
Bater v Bater [1950] 2 All ER 458, CA (folld)
Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Briginshaw v Briginshaw [1938] 60 CLR 336, FC (refd)
CX v CY [2005] 3 SLR 690, CA (refd)
Choong Yee Fong v Ooi Seng Keat & Anor [2006] 1 MLJ 791; [2006] 5 CLJ 144, HC (folld)

Clarkson v Clarkson [1930] 143 LT 775; 46 TLR 623 (refd)
GGC v CCC & Anor [2016] MLJU 377; [2016] 1 LNS 885, HC (refd)
Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor [2022] 1 MLJ 398; [2022] 1 CLJ 23, FC (refd)
Leow Kooi Wah v Philip Ng Kok Seng & Anor [1997] 3 MLJ 133; [1997] 1 LNS 419, HC (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (refd)
Sean O'Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Sum Kum v Devaki Nair & Anor [1964] 1 MLJ 74; [1963] 1 LNS 131, FC (refd)
Tan Erh Ling v Ong Khong Wooi [2021] MLJU 1583; [2021] 1 LNS 1325, HC (refd)
Tan Sherry (P) v Soo Sheng Fatt (L) [2016] MLJU 1264; [2016] 1 LNS 1586, HC (refd)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20; [1987] 1 LNS 77, HC (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234, FC (refd)
Teoh Meng Kee v PP [2014] 5 MLJ 741; [2014] 7 CLJ 1034, CA (refd)
Thevathasan v Thevathasan [1960] 1 MLJ 255; [1960] 1 LNS 153 (refd)
Tong Sek Ee (P) v Ho Shu Joon & Anor [2021] 4 MLJ 210; [2021] 3 CLJ 125, CA (distd)
Unsung bin Rasad v PP [2019] 4 MLJ 448; [2019] 1 LNS 662, CA (refd)
Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17, CA (folld)
Yong Yin Siew v Chong Sheak Thow [1988] 3 MLJ 115; [1988] 2 CLJ Rep 569, HC (folld)

Legislation referred to

Evidence Act 1950 s 103
Guardianship of Infants Act 1961 ss 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976 ss 53, 54(1)(a), (1)(b), 59, 76, 77(1), 78, 88, 88(3)

Bernard Scott (Sault, Scott & Co) for the petitioner.
April Tay (Chow Kok Leong & Co) for the respondents

Evrol Mariette Peters J:

INTRODUCTION

[1] This was a divorce petition filed by the petitioner wife, seeking, inter alia, sole guardianship and custody of the child of the marriage, division of matrimonial assets, spousal and child maintenance from the respondent

husband, and damages against the co-respondent for adultery allegedly committed between the co-respondent and the respondent.

[2] In the interest of privacy and considering the sensitivity of the issues in these proceedings, the petitioner, respondent, and co-respondent have been anonymised in this judgment respectively as YAY, WHO and NAN.

THE FACTUAL BACKGROUND

[3] On 11 November 2016, the petitioner and respondent ('the parties'), registered their marriage and resided in Kuala Lumpur at a property known as Concerto North Kiara ('the matrimonial home').

[4] The marriage, which was fraught with difficulties from the start, had broken down by June 2017. The respondent had then left the matrimonial home and filed a judicial separation in August 2017 ('the judicial separation').

[5] In October 2017, the petitioner delivered their only child, a son ('the child'), the birth of whom the respondent was unaware of.

[6] At the end of 2018, the respondent had withdrawn the judicial separation, and in April 2019, the petitioner filed a divorce petition ('this petition') on the basis of adultery and claiming, inter alia, damages against the co-respondent as the person who had committed adultery with the respondent.

[7] The petition was allowed partially (only with regard to child maintenance, damages for adultery, and one third of the petitioner's monetary claim), for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether adultery had been proved

[8] Although the parties had agreed to the divorce, the issue in the forefront was whether the cause of the breakdown of the marriage was due to adultery between the respondent and co-respondent, pursuant to ss 53 and 54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform (Marriage and Divorce) Act'), which read:

> Section 53 — *Breakdown of marriage to be sole ground of divorce*
>
> (1) Either party to a marriage may petition for a divorce on the ground that the *marriage has irretrievably broken down*.

(2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

...

Section 54 — *Proof of breakdown*

(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say —

(a) (a) that the *respondent has committed adultery* and the petitioner finds it intolerable to live with the respondent;

... (Emphasis added.)

[9] There is no doubt that the petitioner had the legal burden to prove adultery by virtue of s 103 of the Evidence Act 1950 ('the Evidence Act'), as it was she who wanted the court to believe in the existence of a particular fact. However, the issue that first required consideration was the standard of proving adultery.

[10] The respondents contended that the standard of proof on the petitioner was beyond a reasonable doubt, and going by that standard, the contention was that the petitioner had failed to prove adultery between the respondent and co-respondent, and even if she did, it was not such adultery that had caused the breakdown of the marriage, as the respondent claimed that the marriage had broken down long before the respondent had any relationship with the co-respondent.

[11] As far as the standard of proof is concerned, I was of the view that it was on a balance of probabilities, for the following reasons. The standard of proof beyond a reasonable doubt should be imposed on criminal offences only. To begin with, as far as non-Muslims are concerned, marital infidelity or an adulterous conduct of one spouse is not a crime in Malaysia. At most, adultery was known as a matrimonial offence.

[12] However, it is crucial to note that laws pertaining to marriage and divorce had undergone significant changes after the Law Reform (Marriage and Divorce) Act came into force on 1 March 1982. Since adultery was, at that time, viewed as a matrimonial offence, for a divorce to be pronounced, the standard of proving adultery imposed frequently by the courts was beyond reasonable doubt. However, with the coming into force of the Law Reform (Marriage and Divorce) Act, the underlying rational for a divorce is now irretrievable breakdown of marriage, rather than the outmoded commission of a matrimonial offence.

[13] It must also be borne in mind that regardless of the allegation made, this is a civil court and just like any other serious allegation, such as fraud or forgery, the standard of proof should be standardised, that is, on a balance of probabilities. Reference on this point was made to *GGC v CCC & Anor* [2016] MLJU 377; [2016] 1 LNS 885, where in alluding to the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, it was stated by Lee Swee Seng J (as he then was), in the following passages:

> [99] Based on the cogent arguments of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, which has held that fraud in civil cases should be proved on the standard of proof of the balance of probabilities, the time has come for standardisation of proof even in cases of adultery in a divorce petition which is essentially fraud on a spouse in a civil proceeding: it should be henceforth on a balance of probabilities as well. The anomaly has to be realigned. To perpetuate the dichotomy would be to create an artificial distinction devoid of merits. The Federal Court could not have made it clearer when in declaring the standard of proof on a balance of probabilities in civil fraud as follows:
>
> > [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (Children). It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases*. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. (Emphasis added.)

[14] Be that as it may, it is pertinent to note that the balance of probabilities standard ranges from merely tipping the scales at more probable than not (or at 51 percent as prescribed by *Unsung bin Rasad v Public Prosecutor* [2019] 4 MLJ 448; [2019] 1 LNS 662) to a higher degree of probability, but one which has not reached beyond a reasonable a doubt.

[15] In this case, it was undeniable that the allegation of adultery is serious in nature. Therefore, although the standard of proof is on a balance of probabilities, a higher degree of such standard had to be considered in light of the seriousness of the allegation.

[16] I am guided by the case of *Bater v Bater* [1950] 2 All ER 458, wherein Lord Denning explained the relationship between the seriousness of the allegations made in a civil case and the varying degree of the balance of probabilities standard of proof:

> ... So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, *will*

naturally require a high degree of probability than that which it would require if considering whether negligence was established. (Emphasis added.)

[17] Also on point is the Court of Appeal case of *Teoh Meng Kee v Public Prosecutor* [2014] 5 MLJ 741; [2014] 7 CLJ 1034, where in applying the civil standard of proof, reference was made to the *Briginshaw* sliding scale in *Briginshaw v Briginshaw* [1938] 60 CLR 336, where it was held that although the scale is rooted in the civil standard of balance of probabilities, the degree of persuasion needed to convince the court varies in accordance with the seriousness or gravity of the allegation. Hence, although the balance of probabilities standard is maintained, the sliding scale slants towards the weight and assessment of the evidence required.

[18] In the present case, even with the application of the higher degree of the balance of probabilities standard, the conclusion was that adultery had, in fact, been proved based on the following facts.

[19] The co-respondent and respondent were colleagues at RHB Bank Bhd, where the co-respondent was employed from February 2017 to August 2017, and according to the evidence, they had started dating in June 2017, which was around the time when the respondent had left the matrimonial home.

[20] The petitioner had engaged two private investigators, who had undertaken surveillance and produced reports on the activities of the respondent and co-respondent. One of the private investigators, Ian Parthiban Paranthaman ('SP2'), testified on behalf of the petitioner.

[21] Through SP2, the court's attention was drawn to several photographs and video recordings which showed the respondent and co-respondent entering and exiting the respondent's one-bedroom unit condominium in Kuala Lumpur ('the respondent's residence'). In my view, the time of day that the respondent and co-respondent had entered and exited the respondent's residence were indicative that they had, at least in 2017, co-habited at the respondent's residence.

[22] Furthermore, the co-respondent also had her correspondence redirected to the respondent's residence, which in my view fortified the petitioner's contention that the co-respondent was cohabiting with the respondent.

[23] The respondent and co-respondent submitted that there was no actual proof that they were living in adultery and that all the evidence adduced was entirely circumstantial.

A **[24]** I found the respondents' contention untenable based on trite law that circumstantial evidence, just like in any case for that matter, may be relied upon to establish adultery. There is no hard and fast rule that adultery must be established by direct evidence only.

B **[25]** Furthermore, in order to establish adultery, there is no requirement for the respondent and co-respondent to be 'living in adultery'. Adultery, according to s 54(1)(b) of the Law Reform (Marriage and Divorce) Act, refers to 'voluntary sexual intercourse between a man and woman, who are not married to each other, but one of them is at least a married person': *Clarkson v* C *Clarkson* [1930] 143 LT 775; 46 TLR 623.

[26] As such, just one act of voluntary sexual intercourse would suffice to establish adultery in the context of s 54(1)(b) of the Law Reform (Marriage and Divorce) Act. In any event, as alluded to earlier, it was my finding that the D respondent and co-respondent had cohabited at the respondent's residence at least in 2017, which, although circumstantial evidence, was sufficient to prove that adultery had been committed.

E **[27]** There were also video recordings taken sometime in 2018, which showed the respondent and co-respondent with another couple in a restaurant, where they were sitting intimately, with the co-respondent sliding over and leaning her head on the respondent's shoulder. Her dressing and mannerism were indicative that her relationship with the respondent was more than F platonic, contrary to what the co-respondent had claimed.

[28] Although SP2 was remunerated by the petitioner for his services in conducting the surveillance on the respondent and co-respondent, I found him to be direct, candid, and unbiased. He painstakingly went through the frames G and explained his findings in detail. He had withstood the test of cross-examination and in the final analysis, I had no reason to doubt his credibility.

[29] The respondent and co-respondent, on the other hand, contradicted H each other, as they unconvincingly attempted to explain to the court that they were merely friends. They did not dispute the video recordings but their narrative as to why they were seen together at the respondent's residence was incredulous. The co-respondent even went to the extent of extolling her virtues as someone who would never date a married man, which in my view was I absolutely irrelevant, given the evidence which contradicted her testimony.

[30] The respondent had further contended that even if adultery was established, it was not the cause of the breakdown of the marriage, and that the marriage had crumbled long before that.

[31] I agreed with the respondent that the marriage was fraught with difficulties from the beginning. There were several fights and arguments between the petitioner and respondent in which the petitioner had frequently suggested divorce. This was evident from the deluge of *WhatsApp* messages between the parties. I would also agree with the respondent that the petitioner had made life unbearable for the respondent, and that had probably prompted him to seek happiness and comfort in the arms of another woman.

[32] In cross-examination, she had no choice but to admit that it was she who frequently started the quarrels with the respondent, but conveniently blamed her combative behavior on her pregnancy and hormonal imbalance, which she claimed caused her to behave erratically.

[33] In my view, the petitioner conveniently attributed her cantankerous behavior on her pregnancy which I found to be preposterous as pregnancy is not a disease but a condition. She had refused to acknowledge that marriage is not all sunshine and roses, and that concerted effort is required to make a marriage work, as marriage itself is a work in progress.

[34] Be that as it may, adultery is inexcusable, regardless of how rocky a marriage is. In the present case, despite the fights and arguments between the parties, the petitioner had conceived in January 2017, and soon after discovering the respondent's relationship with the co-respondent, she had pleaded with the respondent to return but he had refused. Instead of trying to disentangle the issues in the marriage, the respondent opted to walk out of the union, and did not hesitate to seek solace in another woman.

[35] In my view, his refusal to return to the matrimonial home was due to his relationship with the co-respondent, as the evidence had indicated that in June 2017, the respondent and co-respondent were an 'item', and by November 2017, it was discovered that they had been cohabiting at the respondent's residence. As such, although the petitioner and respondent had faced a rough patch in their marriage, the adultery committed by the respondent was the 'nail in the coffin', and it was undeniable that it was such adultery that had led to the irretrievable breakdown of the marriage.

[36] The petitioner claimed damages pursuant to s 59 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 59 — *Powers of court on claim to damages for adultery*
>
> (1) The court *may award damages against a Co-Respondent* notwithstanding that the petition against the respondent is dismissed or adjourned.
>
> ... (Emphasis added.)

[37] It is trite law that damages awarded pursuant to s 59 of the Law Reform (Marriage and Divorce) Act are compensatory in nature. Reference was made to *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133; [1997] 1 LNS 419, where the concept of damages against a co-respondent was explained by Mahadev Shankar J (as he then was), in the following passage:

> Excluding the exemplary and punitive elements seems to mean that the court must exclude all concerns for moral or social outrage. *What is left is compensatory damages. This is rooted in the duty of the court to restore the petitioner and the children, so far as money can, to the life they would have enjoyed if the break-up had not occurred*. But who is to say how this family would have developed if Fifi had not come into their lives? This must be why the quantum has been left to the discretion of the court. (Emphasis added.)

[38] Bearing in mind that the petitioner was abandoned during her pregnancy due to the adulterous relationship between the respondent and co-respondent, I had ordered the co-respondent to pay the petitioner damages in the amount of MYR70,000, which in my view was fair and reasonable.

Whether petitioner entitled to monetary claim and spousal maintenance

[39] With regard to the petitioner's claim for the costs incurred in relation to the delivery of the child, she had listed items totalling MYR42,089.81, in the following table:

No	Particulars	Amount (MYR)
1	Essentials for the petitioner wife and child of marriage	6,048.01
2	Cord blood	5,800
3	Ante-natal check-up fees	4,554.80
4	Delivery fees	12,500
5	Counseling fees	1,767
6	Confinement maid and confinement expenses including herbs and supplements	8,000
7	Post-delivery massage	1,800
8	Chinese herbs	1,620
	TOTAL	42,089.81

[40] What was crucial to note was that the petitioner had no proof whatsoever of the details of the expenditure. Furthermore, there was no basis for some of these items, and despite never having consulted the respondent, the petitioner claimed for the full costs of the items listed. This brings to the forefront the comment by Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 cited in *Sum Kum v Devaki Nair & Anor* [1964] 1 MLJ 74; [1963] 1 LNS 131, that 'it is not enough to write down the

particulars and throw them at the head of court, saying, 'This is what I have lost; I ask you to give me this damages". A

[41] Having said that however, it was undisputed that the petitioner had incurred some expenses due to pregnancy and childbirth and, as such, the respondent was ordered to pay one-third of the costs claimed by the petitioner. B

[42] With regard to spousal maintenance, I am mindful of s 77(1) of the Law Reform (Marriage and Divorce) Act which empowers the court to order spousal maintenance. The provision reads: C

> Section 77 — *Power of court to order maintenance of spouse*
>
> (1) *The court may* order a man to pay maintenance to his wife or former wife —
>
> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree of divorce or judicial separation; D
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive.
>
> ... (Emphasis added.)

E

[43] I took the view that the petitioner was not entitled to any maintenance, for the following reasons.

[44] First and foremost, in s 77(1) of the Law Reform (Marriage and Divorce) Act, reference is made to the word 'may' which is indicative that the court has the discretion in determining if, at all, the petitioner is entitled to maintenance. I am compelled to state, at this juncture, that there is no hard and fast rule that a man must maintain his wife or former wife. It must be remembered that the provisions of the Law Reform (Marriage and Divorce) Act were discussed, deliberated and determined during a time when the demarcation of the roles of husband and wife were clear, where most women were stay-home mothers and were financially dependent on their husbands who were the breadwinners for the family. F G

[45] However, a whole generation has transitioned since the Law Reform (Marriage and Divorce) Act was enacted and along with it, the traditional roles of husband and wife have evolved. Women are no longer relegated to merely handling household-matters. Gone are the days where a woman's only place was in the kitchen. As such, there is no automatic right for a woman to claim maintenance from her husband. All factors must be considered for this court to determine if maintenance from the respondent is justified. H I

[46] In the present case, the marriage had lasted only slightly more than six months. Although it was undisputed that the petitioner and respondent had

cohabited prior to the marriage, for the purpose of spousal maintenance, that fact cannot be considered. As such, it would be most inequitable for the respondent to be burdened with maintaining a person he was married to for just six months.

[47] Furthermore, in exercising its discretion, the court is governed by the 'means and needs' test pursuant to s 78 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 78 — *Assessment of maintenance*
>
> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on *the means and needs of the parties*, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. (Emphasis added.)

[48] At the time of the trial, the petitioner was 38 years old, able-bodied, and well-educated. She was, in 2019 after this petition was filed, earning a monthly salary of between MYR7,000 and MYR20,000 as a banker. It was also undisputed that at all material times, before and during the marriage, the petitioner was able to support and maintain herself and her alleged lavish and luxurious lifestyle due to her own financial capability.

[49] On this point, I found instructive the case of *Choong Yee Fong v Ooi Seng Keat & Anor* [2006] 1 MLJ 791; [2006] 5 CLJ 144:

> It may be summed up that s 78 of the Act requires *this court to assess the means and the needs of both the petitioner and the respondent* and also their respective conduct which contributed to the irretrievable breakdown of the marriage, in coming to a decision if the petitioner is entitle to a maintenance at all and if so, the amount to be awarded. In first assessing the means of the petitioner, attention is drawn to the petitioner's affidavit at para 9 (encl 76). The petitioner has averred therein that she was at one time until 2001, drawing a salary of RM1,800. The respondent in disclosing his financial ability at para 17 to 24 of encl 77 has averred that the average monthly income received by the respondent is RM2,800. The petitioner has been at all material time gainfully employed. *The petitioner is not in a situation where she is incapable of supporting herself but rather a case where there is an able-bodied petitioner who refuses to seek employment in order to claim for maintenance from the respondent*. This refusal to be self-supportive is further proven by the petitioner herself whereby despite of her alleged tight financial situation, the petitioner has shown total lack of initiative in mitigating her financial woes but has instead went on a spending spree as evidenced by her indiscriminate use of credit cards facilities which according to the petitioner's averment at para 12(a) and (b) of encl 76 amounts to a total sum of RM114,668.64. The potential earning power of the claimant must also be considered. (Emphasis added.)

[50] The petitioner had given evidence that she was no longer working at the bank and that, currently as a property agent, she was earning a monthly salary of about MYR4,000. It was undisputed that the petitioner was dismissed from her previous employment at the bank, but that such dismissal had nothing to do with the breakdown of the marriage. It would, therefore, be inequitable for the petitioner to expect the respondent to now maintain her when the dismissal from her previous employment had nothing to do with either the respondent or breakdown of the marriage.

[51] In my view, the petitioner had the capacity to earn more than the salary she was currently drawing, as she had the necessary knowledge and experience. The significance of the potential earning capacity of the spouse who claims maintenance was highlighted in the case of *Choong Yee Fong v Ooi Seng Keat; Chua Chong Hong* , where in referring to the earlier case of *Thevathasan v Thevathasan* [1960] 1 MLJ 255; [1960] 1 LNS 153, it was stated by Faiza Thamby Chik J in the following passage:

> *Therefore, applying the principle enunciated by the cases cited above, to the facts before me, it can be established that the petitioner who is 41 years of age, able bodied and until 2001 was earning a salary of RM1,800 per month certainly has earning potential with relevant past working experience which help enhances her earning power in the market work force.* The petitioner has in her own affidavit at paras 13 and 14 of encl 76 admits to renting out on the asset, namely the apartment at RM620 per month (with a market potential rental rate of RM700 per month see exh CYF at encl 79) whilst the installment payment to the bank is RM470. This indicates that the petitioner earns an income of RM150 per month from the apartment. *In gist, the petitioner has the means within the contemplation of s 78 of the Act, to be self-sufficient and self-reliant.* It must be emphasized that the marriage though registered in 1984, has lasted for less than ten years and with no children. Although the parties have since lived separately in 1994, the marriage, for all intents and purposes, has broken down irretrievably even before the physical separation in 1994. The petitioner who was 31 years of age in 1994 was working and self-supportive until her alleged unemployment in 2001. (Emphasis added.)

[52] In view of the fact that the child was raised by the petitioner's parents in Sungai Besar, I was also unable to accept any contention to the effect that the petitioner could not find employment which attracted a higher income due to her obligations as a mother. In fact, leaving the child with the petitioner's family provided her with all the time to seek higher-paying employment.

[53] To compound the matter, there was evidence to show that the respondent was now struggling with his financial commitments, as he alone continued to make monthly payments of approximately MYR6,000 towards the matrimonial home, where the petitioner was still residing.

[54] In my view, the petitioner had, therefore, failed the 'means and needs' test, and as such, spousal maintenance was not warranted.

Whether child entitled to have his father's (respondent) surname

[55] There was no doubt that the child is result of the union between the petitioner and respondent. However, despite that fact, the petitioner, when registering the child's name, had given her surname, instead of the respondent's surname.

[56] The net effect of the testimony of the petitioner was that, without any cogent reason or explanation, she had unilaterally given the child her surname. The petitioner provided flimsy excuses for not giving the child the respondent's surname, and even went to the extent of blaming the Jabatan Pendaftaran Negara ('JPN').

[57] In my view, there was no reason for the JPN to refuse to register the respondent's surname for the child, and more so now with the decision of the Federal Court in *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 MLJ 398; [2022] 1 CLJ 23.

[58] The petitioner had failed to convince this court that she had a valid basis to deny the child his father's surname, as her reasons were baseless and unsubstantiated. In my view, I had to agree with the respondent that the petitioner had refused to give the child the respondent's surname out of spite and bitterness towards the respondent for his adulterous relationship with the co-respondent.

[59] I am mindful of the Court of Appeal case of *Tong Sek Ee (P) v Ho Shu Joon & Anor* [2021] 4 MLJ 210; [2021] 3 CLJ 125, where it was stated that 'while the surname of a legitimate child is ordinarily derived from the father, the surname can be derived from the mother'. However, it was crucial to note that in *Tong Sek Ee v Ho Shu Joon & Anor*, the court was dealing with a different factual matrix, as in that case, the husband had agreed to relinquish his right to raise the child, in exchange for not having to bear the cost of the child's tertiary education. Furthermore, it had been documented in the consent order, in that case, that both parties had agreed for the surname in the decree nisi to be that of the wife's, instead of the husband's.

[60] In the present case, the respondent had never intended for the child to be denied his surname. In fact, it was the petitioner who had deliberately kept the respondent out of the child's life, but yet had the temerity to seek child maintenance. In fact, the petitioner had obtained an order in October 2019,

for the respondent to pay a monthly sum of MYR3,000 for child maintenance, pursuant to her application for ancillary relief. I was, therefore, of the view that it would be most inequitable if the child did not bear the respondent's surname.

[61] In this regard, I found instructive the case of *Yong Yin Siew v Chong Sheak Thow* [1988] 3 MLJ 115; [1988] 2 CLJ Rep 569, where the significance of the surname of the male lineage to a person of Chinese ethnicity was explained by Mustapha Hussain J in the following passage:

> PW1 after giving a summary of his special knowledge of the Chinese customs and traditions, stated that to the Chinese people, the surname or 'seh' was the hall mark of every Chinese family. It is unchangeable though there is nothing for a Chinese from going against the custom and changing his surname. *The surname is the perpetuation of a Chinese family,* the sons and daughters taking on the surname and the children of the sons will continue to have the surname, especially along the male line. *If a Chinese changes his surname, he will be treated as an outcast, he passes out of the family line and he loses all the rights of inheritance and succession.* (Emphasis added.)

[62] At this juncture, it was crucial to state that during cross-examination of the petitioner, she was asked if she would agree to changing the child's surname to the respondent's, and the petitioner responded in the following manner:

> Respondent's Counsel: Yes, what is your wish? Do you wish or do you, are you agreeable for the name of the Respondent Husband to be named as a father in this birth certificate? What is your wish Ms. *****?
>
> Petitioner: I have no idea *so* I *leave it to the court to decide it.* (Emphasis added.)

[63] Having agreed to leave it to the court's discretion, my decision was that the child should be given the respondent's surname, as there was completely no reason to do otherwise. The argument that confusion would arise since the child has all along maintained the petitioner's surname, was untenable as he is only five years old, and inserting the respondent's surname now would not be detrimental to the child. On the contrary, it would be in the interest of the child's welfare for the child to have the respondent's surname, to remove any doubt of his status as the legitimate son of the respondent. In fact, having the respondent's surname would enable the child to enjoy the family benefits derived from the respondent's employment as a banker.

[64] As such, since the petitioner had left it to the court's discretion, it was my decision that the child should be given the respondent's surname, even if it was to be hyphenated with the petitioner's surname, lest the petitioner rue on her impetuous decision in denying the child his own father's surname.

Whether petitioner entitled to sole guardianship and custody of child

[65] Since the child was only five years old at the time of the trial, it was undeniable that child should remain in the primary care of the petitioner pursuant to s 88(3) of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 88 — Power of court to make order for custody
>
> ...
>
> (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. (Emphasis added.)

[66] The issue, therefore, concerned the guardianship of the child, which required several points to be highlighted.

[67] I am mindful that the respondent had, in his pleadings, not contested the guardianship and custody of the child, and did not seek access. However, during cross-examination of the respondent and even during oral submissions/clarification, the respondent had indicated that he had yearned to see his son, but that he did not pray for such relief in his pleadings because of the acrimony between himself and the petitioner, resulting in the child being kept away from the respondent for more than five years.

[68] It was evident that the petitioner had deliberately ceased all the communications with the respondent. She had also, all this while, refused to inform the respondent the child's whereabouts. The respondent had found out that the child was living with the petitioner's family in Sungai Besar only when the petitioner had informed the court through her testimony. Despite her refusal in allowing the respondent to have anything to do with the child, the petitioner had no qualms seeking child maintenance.

[69] The petitioner dwelt on the fact that the respondent had not bothered to see the child but it was evident that it was the petitioner herself who, due to her bitterness and anger, had deliberately prevented the respondent from seeing the child. The petitioner had also submitted that the respondent was a stranger to the child and that it was too late for any such bonding between them.

[70] In my view, the petitioner's contention was bereft of merit, as the child was only five years old at the time of trial. In any event, it was my view that it is never too late for any child to bond with his parent, regardless of how old he may be.

[71] It was crucial to note that the most important consideration for this

court was the welfare of the child, as prescribed by s 88 of the Law Reform (Marriage and Divorce) Act and s 11 of the Guardianship of Infants Act 1961 ('Guardianship of Infants Act'), both of which read:

> *Law Reform (Marriage and Divorce) Act 1976*
>
> Section 88 — Power for 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.
>
> ...
>
> *****
>
> *Guardianship of Infants Act 1961*
>
> Section 11 — Matters to be considered
>
> The Court or a Judge, in exercising the powers conferred by this Act, *shall have regard primarily to the welfare of the infant* and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. (Emphasis added.)

[72] The meaning of 'welfare of the child' was referenced in a plethora of cases including *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, *Tan Sherry (P) v Soo Sheng Fatt (L)* [2016] MLJU 1264; [2016] 1 LNS 1586, *Tan Erh Ling v Ong Khong Wooi* [2021] MLJU 1583; [2021] 1 LNS 1325, *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20; [1987] 1 LNS 77, and *Sean O'Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, and has been considered in the widest sense and, as such, must include the right of the child to bond equally with both his parents.

[73] Although the petitioner should have custody, care and control of the child, no one parent is superior to the other. The dynamics of the relationship between a child with his/ her father and that with his/ her mother are different. It does not mean that a father's rights with regard to his child are inferior to that of the mother.

[74] Parties must be reminded of the role that a father has in ensuring that a child is raised in a nourishing environment. This was highlighted in the Singapore case of *APE v APF* [2015] SGHC 17, where reference was made by Tan Siong Thye J to the article *Contact and Domestic Violence — The Experts' Court Report* [2000] Fam Law 615 by Claire, Sturge and Danya Glaser, which provided an analysis of a father's role to his child:

A The findings are that the position in law that parental involvement on both sides is indeed in the best interests of the child. In a paper commissioned by the Official Solicitor, Claire, Sturge and Danya Glaser, 'Contact and Domestic Violence — The Experts' Court Report' [2000] Fam Law 615 ('The Experts' Court Report') at pp 616–617, the authors comment that:

B

> Contact with fathers, as opposed to other family members or people with whom the child has a significant relationship, brings the following, in particular, to bear, although the general principles remain the same:
>
> (a) the father's unique role in the creation of the child;
>
> C (b) the sharing of 50% of his or her genetic material;
>
> (c) the history of his or her conception and the parental relationship;
>
> (d) the consequent importance of the father in the child's sense of identity and value;
>
> D (e) the role modelling a father can provide of the father's and male contribution to parenting and the rearing of children which will have relevance to the child's concepts of parental role models and his or her own choices about choosing partners and the sort of family life he or she aims to create.
>
> E ...
>
> In summary, the benefits include the meeting of his or her needs for:
>
> (a) warmth, approval, feeling unique and special to a parent;
>
> F (b) extending experiences and developing (or maintaining) meaningful relationships;
>
> (c) information and knowledge;
>
> (d) reparation of distorted relationships or perceptions.

G

[75] The traditional roles of a father and a mother have evolved since the enactment of the Law Reform (Marriage and Divorce) Act. There has since been a shift in cultural norms, and as such, the role of a father is no longer relegated to secondary status. The relationship between a father and child has
H evolved and is more complex than one assumes.

[76] It cannot be gainsaid, therefore, that a child needs both parents, in the gender-binary sense, as it stands in our society today. Both parents have invaluable contributions to make to a child's life. Hence, not all fathers should
I be painted with the same brush, as there are some who take a more active role in raising children, whilst others undeniably sit back and leave their children to be raised by their wives and domestic help.

[77] At this juncture, reference was made to the Singapore case of *CX v CY*

[2005] 3 SLR 690, where the Court of Appeal recognised the importance of joint parenting and established the preferable position to preserve the concept of joint parental responsibility.

[78] Following from this, I took the view that both Petitioner and Respondent should co-parent the child, the significance of which has been highlighted in s 5 of the Guardianship of Infants Act, which reads:

> Section 5 — Equality of parental rights
>
> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, *a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.*
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father. (Emphasis added.)

[79] Pursuant to s 3 (*Duties of guardian of person*) of the Guardianship of Infants Act, both parents, therefore, have equal responsibility towards the child's support, health, and education. The correlation to the parties' responsibilities is the right of the child, in this case, to bond with both parents.

[80] It would be in the interest of the welfare of the child for the respondent to be in his life. To deny the child completely of the bond with his father, the respondent, would be most prejudicial to the child.

Whether respondent entitled to access to child

[81] As such, whilst custody, care, and control will remain with petitioner, in that she will have the decision-making of the day-to-day issues that will arise regarding the child, both petitioner and respondent will have joint guardianship of the child, with the respondent to have access as follows:

(a) the respondent should begin daily online access of a maximum of 30 minutes anytime between 7pm and 8pm, which the petitioner or her family members must facilitate, and not attempt to frustrate, interrupt or interfere with;

(b) until Chinese New Year of 2023, the respondent will have the right to have access to the child on alternate Saturdays and Sundays from 12pm to 5pm;

(c) during the Chinese New Year 2023, the respondent will have unsupervised and overnight access to the child from day 5 to day 9; and

A (d) after Chinese New Year 2023, the respondent will have unsupervised and overnight access to the child every alternate weekend from Friday 7pm to Sunday 7pm.

Whether respondent obliged to pay child maintenance

B

[82] Although I had not ordered the respondent to pay spousal maintenance, I did not see any reason why he should not pay child maintenance. The respondent had also acknowledged that he was in arrears in payment of child maintenance pursuant to an order of this court dated 4 October 2019, which C instructed the respondent to pay child maintenance in the monthly sum of MYR3,000. The respondent was ordered to settle the arrears as well.

[83] My decision was for the respondent to pay, with immediate effect, a monthly payment of MYR2,000 in child maintenance in view of the fact that D I had also ordered the respondent to pay half of all the costs that were to be incurred for the child's health and education, in light of the joint guardianship that I had ordered.

E **[84]** However, in order to ensure that both the petitioner and respondent work together towards co-parenting, I had ordered for both parties to jointly make major decisions regarding the child's education, health, religion and general support. This would mean that the party making the decision would have to not only inform the other party, but should obtain his or her consent as well. Only then would the cost be borne equally.

F

[85] However, if one party merely informs the other party but does not obtain his or her consent, then the party who made the decision would have to bear 80% of the cost. If, however, the party who made the decision neither G informed nor obtained the consent of the other party, then the party who made the decision would have to bear the full cost. This formula is crucial to remind both the petitioner and respondent that they have to put aside their differences for the sake of the child. It is also to ensure that one party does not unilaterally make a decision to the detriment of the other, especially where the implication H of decisions made regarding the child may result in high cost.

Whether petitioner entitled to division of matrimonial assets

[86] With regard to matrimonial assets, the petitioner had made claims I against the respondent for the following:

(a) the matrimonial home;

(b) Hartanah Hartamas Regency 2 ('Regency 2');

(c) half of monies in the respondent's bank accounts;

(d) half of all the respondent's investments;

(e) half of monies in the respondent's EPF; and

(f) half of the value of respondent's shares in several companies.

[87] The task of dividing the matrimonial assets is prescribed by s 76 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 76 — Power of court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any *assets acquired by them during the marriage* or the *sale of any such assets* and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to —
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> (aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage;
>
> (d) the duration of the marriage,
>
> and subject to those considerations, the court shall incline towards equality of division.
>
> ...
>
> (5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts. (Emphasis added.)

[88] With regard to the matrimonial home which was registered in both the parties' names, the petitioner's relief was for the respondent to continue servicing the monthly loan repayment, and for her to continue residing there.

[89] In my view, this arrangement was most inequitable for the following reasons. First and foremost, as alluded to earlier, the marriage lasted a very short time. Secondly, although the petitioner claimed to have contributed monetarily or otherwise to the matrimonial home, there was absolutely no evidence to support such averment. Thirdly, the petitioner's claim that she would need the matrimonial home for the child to also reside was baseless as the

child had remained, since his birth, with the petitioner's family at Sungai Besar, whilst the petitioner lived alone at the matrimonial home and only visited the child at Sungai Besar.

[90] As such, I took the view that the matrimonial home should be sold and the proceeds of sale, if any, should be divided equally. The respondent had agreed that if there was a shortfall, he would bear it fully. In fact, this was a very reasonable outcome for the petitioner.

[91] The Regency 2, on the other hand, was acquired by the respondent solely on 14 April 2016 under his sole name for investment purpose. It was acquired before the marriage and the respondent and petitioner had never resided in Regency 2. The onus was, therefore, on the petitioner to prove her contribution towards the acquisition or the improvement on Regency 2, to justify including it in the pool of matrimonial assets.

[92] However, the only evidence that the petitioner adduced in her testimony was that she had contributed by way of identifying Regency 2, helping to nominate a solicitor to handle the sale and purchase of Regency 2, finding a banker to handle the bank loan approval, purchasing the necessaries for Regency 2, and handling its rental. However, except for a couple of text messages, there was no documentary evidence whatsoever to support any of her averments.

[93] As such, I took the view that there no basis to even classify Regency 2 as a matrimonial asset.

[94] The petitioner had also made claims to half of the following that belonged to the respondent, namely, the monies in his bank accounts, his investments, EPF, and the value of his shares in several companies.

[95] With regard to the bank accounts, investments, and shares of the companies, the petitioner's pleadings were ambiguous as there were no details as to whether such assets were acquired during the subsistence of the marriage.

[96] On this note, I was guided by the Court of Appeal case of *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17, where it was stated that the party who makes the claim has the burden to prove that such assets were acquired during the subsistence of the marriage and for the purpose of continuing resources of the spouses or their children or the family as a whole. Hamid Sultan Abu Backer JCA explained in the following passage:

> [23] Whether the matrimonial assets fall under s 76(1) or (3) a spouse who asserts his/her claim, during the divorce petition, over division of the matrimonial property

alleged to have been acquired by the other spouse must adduce evidence to prove that the same were acquired during the subsistence of marriage and for the purposes of continuing resources of the spouses or their children or the family as a whole.

[97] Based on her testimony and the evidence that the petitioner had adduced, it appeared that the petitioner was adamant in claiming half of everything that belonged to the respondent, regardless of whether they were part of matrimonial assets, or whether she made any form of contribution towards such assets.

[98] At this juncture, it must be impressed upon the parties that divorce proceedings should not be used to enrich oneself or obtain a windfall. It was obvious that in the present case, the petitioner was doing just that. For a marriage that lasted only six months, and in the absence of proof, the petitioner's claims to half the monies, investments, and shares were unjustified and laced with avarice.

[99] I had also disallowed any claim by the petitioner to the respondent's EPF, bearing in mind that the EPF is a retirement savings fund which is for one's post-retirement well-being. There was no basis for the petitioner to make any claim to the respondent's EPF, as she had savings in her own EPF. Furthermore, the respondent already had the obligation to maintain the child, and together with his own commitments, he would need his savings in the EPF.

CONCLUSION

[100] In the upshot, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, and submissions of both parties, the petition was allowed only with regard to child maintenance, damages for adultery, and one third of the petitioner's monetary claim.

Petition allowed only with regard to child maintenance, damages for adultery, and one third of petitioner's monetary claim.

Reported by Dzulqarnain Ab Fatar