IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

(FAMILY DIVISION)

DIVORCE PETITION NO: 33-1415-08/2013

In the matter of Section 53, 54, 58, 59, 76, 77, 86, 88, 93, 94 and 102 of Law Reform (Marriage and Divorce) Act 1976

BETWEEN

GGC ... **PETITIONER**

AND

1. CCC

2. HMY ... **RESPONDENTS**

THE JUDGMENT OF

YA TUAN LEE SWEE SENG

[1] This is a sad story of a marriage that failed. It is sad because no divorce would leave the children of the marriage unaffected. The parties have 2 children, a girl and a boy. Parties cited irreconcilable differences that had led them to conclude that the marriage had irretrievably broken down. They went for a Judicial Separation which order was given in 2008 when the children were 8 and 4. They wanted their children to be least affected by what the adults have failed where their marriage was concerned. How true it is the saying that the best thing parents can do for their children is to love each other.

[2] They still stayed in the matrimonial home together until the Respondent Husband (RH) moved out in early 2010, after coming to the conclusion that nothing was going to work where their marriage was concerned. To add to the stress of the marriage the RH was diagnosed as been HIV+; he said in 2005 whereas the Petitioner Wife (PW) said she only knew about it in 2012.

[3] The PW has now filed a Divorce Petition and added a lady that the RH intended to marry as the Co-Respondent (CoR). The PW claimed for the usual order of a divorce and care, control and custody of the children as well as maintenance for the children and herself and also for division of matrimonial assets and finally damages against the CoR.

Maintenance for the 2 children

[4] It is the duty of the father to provide for the children and to maintain the standard living of the children. In **Sivajothi a/p K. Suppiah v. Kunathasan a/l Chelliah** [2000] 3 CLJ 175 it was observed as follows:

> "Maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie. the food she puts in her mouth but also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, **it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie. during the existence of the marriage.**" (emphasis added)

[5] The relevant provisions with respect to maintenance for a child is governed by s. 92 and 93 of the Law Reform (Marriage and Divorce) Act 1976 (“LRA”) which provide as follows:

"92. Duty to maintain children

Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such **accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life** or by paying the cost thereof.

93. Power for court to order maintenance for children:

(1) The court may at anytime **order a man to pay maintenance for the benefit of his child:**

(a) if he has refused or neglected reasonably to provide for the child:

(b) if he has deserted his wife and the child is in her charge:

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child." (emphasis added)

[6] As provided for above, the primary duty and responsibility of providing for one's children would rest on the shoulder of the husband. The wife would only have a secondary duty and responsibility here. The children, a girl and a boy, were of ages 13 and 9 at the filing of the Divorce Petition in August 2013. By the time the divorce was granted with the ancillary reliefs the children were 16 and 11 respectively. The PW said that she would need RM4,430.00 for the girl and RM4,292.00 for the boy. She had set out the details as particularised at paragraphs 15 and 16 respectively of the Divorce Petition. The details cover payment of insurance

premium, special tuition classes and extra-curricular activities like badminton and taekwondo classes for the boy and medical expenses for the girl because of her medical condition affecting her back since birth. The PW has inflated the maintenance sums to RM5,360.00 for the daughter and RM4,762.00 for the son in her evidence at the trial at Answers to Questions 20 and 21 of her Supplemental Witness Statement marked as PW1-WS2.

[7] One must look realistically at the income of the husband here. He testified that he would take home about RM7,000.00 as his monthly salary. He works for his father's lorry and transport business; he himself started off as a driver for his father's company by driving a 10-tonne lorry. Being a family company a couple of expenses were charged to the company of which he was a director and having ceased to be one recently.

[8] The RH's sister who managed the accounts of the family company testified of some medical expenses, transport expenses and tuition fees of the children that were paid out from the company direct. That is nothing unusual for a family-run company where the dividing line between company's expenses and personal expenses of the family may be blurred. There was also evidence of some RM416,507.00 owing by the RH to the

company in the 2013 financial statement of the company. It was a company where if the RH needed some cash, he could always draw upon its coffers to be repaid later. What is owing of course has to be repaid and correspondingly the board may also forgive the debt of its directors if they are minded to do so. The other directors are the RH's father and mother!

[9] Besides the monthly salary the RH would also be entitled to director's fees as declared in the company's account though a breakdown was not given by the RH or his sister or for that matter, the majority shareholder the RH's father, RW 2, as to how much was the RH's portion of his director's remuneration. The directors' remuneration in 2012, 2013 and 2014 was RM269,000.00, RM287,000.00 and RM236,042.00 respectively. There would be dividends declared from time to time as can be seen in the financial statements for 2013 and 2014 reflecting a dividend declared of RM800,000.00 and RM495,000.00 respectively. The RH could borrow apparently quite freely from the company, having a loan of RM416,507.00 in 2013 and the said debt was already extinguished in 2014.

[10] The Petitioner drew the Court's attention to refer to the extract of the CAS Transport Sdn Bhd's financial statement (Year 2012, 2013 & 2014):

NO	DETAILS	2012	2013	2014
1.	Sales/Revenue	6,976,077.00	7,428,909.00	6,942,403.00
2.	Profit	49,316.00	147,624.00	153,663.00
3.	Director Remuneration	269,000.00	287,000.00	236,042.00
4.	Staff Cost	177,260.00	190,859.00	265,277.00
5.	Dividend Paid Out	-	800,000.00	495,000.00
6.	Owing by Director	1,651,308.00	224,342.00	-
7.	Owing by Former Director (Respondent Husband)	-	416,507.00 (page 7 of the 2013 financial statement)	- (page 8 of the 2014 financial statement)

[11] I accept the fact that his capacity for work might have been reduced considerably after the discovery by both the PW and the RH that the RH is HIV+ which discovery the RH said was made in 2005 before the filing of the Judicial Separation Petition in 2008. RH's monthly commitment and expenses are set out in the Reply to Petition for Divorce at page 39 of Bundle A, at paragraph 10 and in the Witness Statement of the RH marked as RHWS-1 (Answer to Question 28) as follows:

(a) Medical expenses and supplements RM1,000.00

(b) Monthly allowance to parents RM 800.00

(c)	Costs of living including meals, transportation	RM1,000.00
(d)	Monthly Installment for Matrimonial House	RM2,873.00
(e)	Monthly maintenance and expenses for children	RM2,000.00
Total Monthly Commitment		**RM7,673.00**

[12] In addition to the above, he has a monthly commitment of RM1,500.00 per month as insurance for himself and the children. I do not believe that the RH is in deficit every month such that it would be difficult for him to keep body and soul together. I am not impressed by the fact that the RH has to support his parents financially as they are already earning substantially from the directors' fees and dividends, not to mention the rental income from the factories that are being let out on the Kampong Baru Subang land. There is, as pointed out, some flexibility where salary, remuneration, charging of expenses, entertainment, allowances and transport are concerned in a family-run company.

[13] Taking into consideration the amenities and standard of living that the children are accustomed to and the costs of living in a middle-income household and a township like Subang-USJ, I would grant a monthly maintenance of RM3,000.00 per month per child.

[14] The PW had prayed for the maintenance of the children to continue until they finish their tertiary education. However, the Court's hands are tied by the clear words of s 95 of the LRA. Much as the Court would appreciate to harsh reality of difficulty to secure a reasonably stable job with prospects without a university degree and thus be financially independent, the current position of the law does not permit the Court to order maintenance of children past their 18th birthday. S 95 LRA provides as follows:

> "Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, **it shall expire on the attainment by the child of the age of eighteen years** or where the child is under **physical or mental disability,** on the **ceasing of such disability**, whichever is the later." (emphasis added)

[15] In **Karunairajah a/l Rasiah v Punithambigai a/p Poniah** [2004] 2 MLJ 401, the Federal Court pronounced as follows:

> "41 **Clearly the word 'disability' as used in s 95 covers only 'physical' and 'mental' disability. It cannot cover financial dependence**. The word 'child' used in s 95 is also defined in s 87, the first section in 'PART VIII' on 'PROTECTING ON CHILDREN' to

mean a child under the age of 18 years. Section 95 is a part of PART VIII. We have also seen in *Gisela Gertrud Abe*, the Supreme Court also states that 'an order for maintenance of a normal child of the marriage shall expire on the child attaining the age of 18 years (see s 95 of the Act — pp 299–300 of the report). When the Supreme Court in that judgment used the words 'a normal child', it clearly means a child who is not 'under physical or mental disability'.

.....

45 With respect, I find no legal basis for interpreting the exceptions in s 95 to include financial dependence for the purpose of pursuing and/or vocational education after the 'child' has completed the age of 18 years. The only basis for such an interpretation, which goes against the clear words of the law, is moral basis. And Siti Norma Yaacob J puts it very aptly in *Gisela Gertrud Abe v Tan Wee Kiat* that 'moral grounds is of no relevance whatsoever'. Moral grounds can never override clear provisions of the law in deciding a case. The function of a judge is to apply the law, whatever his personal view about the law may be."

[16] Until the law here is amended, the Court must apply the law as it is, with the hope that the legislator will act soon to address this anachronistic anomaly in correcting that which is out of sync with reality.

[17] The maintenance for the children is to be paid from the date of filing of the Divorce Petition 28 August 2013 and that all arrears are to be paid by the RH to the PW on or before 31 May 2016 failing which interest at the rate of 5% per annum shall apply until date of payment.

[18] Though the PW had also claimed for maintenance for the children from January 2010 till August 2013, I find that on a balance of probabilities the RH would have paid what the children needed either through himself or payments being made out by his sister RW 3 Miss Chin Siew Mooi, from the company for tuition and transport fees and other expenses of the children like medical for instance. At any rate there was no provision made in the Judicial Separation Order as to the monthly maintenance for the children and parties must have been presumed that they were able to sort out the matter in the usual course of events, as both love the children though they both have decided to go separate ways. I am more than satisfied that at the end of 2012 when she moved with the children to the

RH's parents' place in the Kampung Baru Subang property, the needs of the children were amply provided for.

[19] The RH is mindful of the fact that the daughter was born with a medical condition known as "Grade 2 Spondylolistisis of L5/S1" which requires continuing periodic medical treatment and attention. The RH was agreeable to, on top of the maintenance for the daughter, pay for her medical expenses and so the Court recorded the following order with the consent of the RH: that the RH do pay all the medical bills of the daughter against production of receipts provided that the RH be informed earlier of the medical treatment and that he be allowed to seek a second opinion provided always that the child's health is not adversely affected and the RH shall continue to so bear all her medical bills until the daughter is financially independent.

Maintenance for the Wife

[20] The power of the Court to grant maintenance to the wife is found in s 77 (1) LRA which reads as follows:

> "77 Power for court to order maintenance for 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."

[21] In assessing the maintenance for the wife or the husband as the case may be, the Court is to have regard to s 78 LRA which states as follows:

"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)

[22] The PW is praying for a lump sum maintenance of RM500,000.00 or alternatively a sum of RM10,000.00 per month until she remarries. However the PW has been working and continues to work in the accounting line in a private firm. It is not disputed that her current salary is

RM4,800.00. She has been working for most of her working life except for a few years after the daughter was born because of her medical condition. Even then it was not disputed that the RH had engaged a nanny then to help in the household work. The PW has RM44,000.00 in her EPF Account based on the statement from EPF in 2012 whereas the RH has RM18,000.00 in his latest EPF statement as disclosed. She has not disclosed what she does with her salary every month other than stating that the RH was irregular in his support of the children and that she had used her own salary and savings and had to borrow from her family members to support the children and herself. She had not asked for any maintenance for herself during the judicial separation hearing. She did not claim for any maintenance even after the Judicial Separation order in 2008 until the filing of the Divorce Petition in August 2013.

[23] I can believe RW 3 Miss Chin Siew Mooi, younger sister to the RH, who is in charged of accounts in the company, that she would still pay from the company the daycare and tuition fees for the children, the house loan instalments and indeed the households needs of the family were provided for when she shifted in with the children into the RH's parents' house in the Subang New Village property in late 2012. The grandparents were only too happy to dote over the grandchildren.

[24] Looking at the RH's medical condition of HIV+ and the need to go for medical treatment and to purchase the monthly medication to take in slow the rate of deterioration of his health for as yet there is no known cure for HIV+, and his financial commitment to maintain the children of RM3,000.00 per month per child which would already add up to RM6,000.00 per month, I do not think it is justified for the PW to ask for any lump-sum maintenance for herself of RM500,000.00 or for that matter a sum of RM10,000.00 per month.

[25] Indeed if one day the RH is so incapacitated and disabled from earning his livelihood because of his ill-health stemming from his physical deterioration because of his HIV+ condition, such that he is not able to work, the RH may even have cause to apply for the wife to maintain him if having regard to her means it is reasonable so to order as provided for in s 77(2) LRA.

[26] However this Court shall not enter into such speculation at this stage but suffice to say that, the fact of the RH being diagnosed with HIV+, is a material change in circumstance that would require some adjustment in the lifestyle of the PW. The RH's capacity for hard work and long working hours have been severely affected and his take home pay is not as before.

[27] In **Dato' Low Nam Hui v Siew Chin** [1994] 1 MLJ 129 the respondent wife's application for maintenance for herself was dismissed on inter alia the ground that she had more than adequate financial resources to attend to her reasonable needs and that she had no justification or need for the husband's maintenance. It was also found as a fact that she had lived well by her own financial means for the preceding 5 years.

[28] This is not to say that the Court is unsympathetic to her need for some financial security. Whilst it is in all probability his promiscuous lifestyle that has led him to contract this ailment, the fact of the matter is that through the years his health will degenerate further and whatever that he could still salvage should go towards the maintenance of the 2 children and towards providing a roof above their heads for the wife and children. Appreciating this uncertainty and the PW's need for some financial security, I have ordered that the matrimonial house in USJ be fully paid by the PH by the end of 2016 and that the RH's half undivided share in the said house be transferred to the PW for her to hold in trust for the children's needs including their education. That would involve the RH forking out a sum of about RM335,972.00 being the current redemption sum for the said matrimonial house. With that, the PW would not need to worry where she

and the children would be staying and at the same time if additional financing is needed in future for the children's tertiary education she may proceed to use the house as a security for an education loan for the children.

[29] That would achieve some certainty for the wife and children for while our days are numbered for all, that of the RH are literally and more acutely numbered as immunity to infection for HIV+ patients are generally lower and with that a greater susceptibility to various ailments.

[30] At trial, PW made extensive reference and allegation on the wealth of RH's father and the family Company. However, the status of the husband's parents should not be an issue in an application for maintenance. In the case of **Ananda Dharmalingam v Chantella Honeybee Sargon** [2006] 6 MLJ 179, the Court held that the wife in that case had made extensive reference to the alleged wealth of the husband's family but that none of this wealth belonged to the husband, and that the husband's parents' station in life could not be ascribed to the husband.

[31] I am not unaware of the various cases cited by learned counsel for the PW which extol the obligation of the husband, upon a divorce being

granted, to place the wife in a position to enjoy the same standard of living as she did during the marriage. Only two Court of Appeal cases need be cited; that of **Tay Chong Yew & Anor v. Onn Kim Muah** [2016] 2 CLJ 579 and **Koay Cheng Eng v. Linda Herawati Santoso** [2008] 4 CLJ 105 p. 118; [2008] 4 MLJ 863 at p. 876 as enunciating the principle propounded in the English case of **Lumsden v. Lumsden** [1963] 5 FLR 388.

[32] However this is a case where the above principle has no application having regard to the limited means of the RH with his health condition that can only deteriorate with the passage of time and the fact that the PW is earning enough at least for her own needs at the moment and that the RH is made to pay the RW RM6,000.00 per month for the maintenance of the 2 children.

The matrimonial asset in the double-storey link house in USJ Subang Jaya

[33] S. 76 LRA provides for the division of matrimonial assets upon a decree of divorce being granted the factors the Court should have regard to making the division as follows:

> "76 (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 by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred in subsection (1) the court shall have regard to –

(a) **the extent of the contribution made by each party in money, property or work towards the acquiring of the assets;**

(b) any debts owing by either party which were contracted for their joint benefits;

(c) **the needs of the minor children**, if any, of the marriage, and subject to those considerations, the court shall incline towards equality of division.

(3) 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 during the marriage by the sole effort of one party to the marriage** or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to -

(a) 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 the family;

(b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, reference 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)

[34] It has been held that the degree of responsibility for the breakdown of the marriage has no application in a division of matrimonial assets under s 76 LRA unlike a wife's maintenance application under s 78 LRA. See the case of **SS v HJK** [1992] AMR 145 at p. 152 where Mahadev Shankar J

(as he then was) was astute to point out the discernible difference in the absence of the legislative provision for consideration of adultery in s 76 of LRA as follows:

> "Indeed it should be noted that the regard a Malaysian Court is required to have to the degree of responsibility for the breakdown of the marriage" under section 78 of the Act does not occur in section 76 of the Act. In other words this is a factor only in maintenance applications, not in a division of matrimonial assets."

[35] Likewise in **Lim Bee Cheng v Christopher Lee Joo Peng** [1996] 2 CLJ 697 at p. 698 it was held as follows:

> "The power of the Court to order division of matrimonial asset under section 76 is subject and subject only to those considerations prescribed therein and that conduct of the parties is and has always been irrelevant."

[36] In **Wong Kom Foong v Teau Ah Kau** [1998] 1 CLJ 358, Abdul Malik J (as he then was) observed as follows:

> "... on a true construction of s. 76 of the Act, a spouse's contribution to the welfare of the family is a relevant consideration. The petitioner

contributed a great amount to the welfare of the family. As such, both the houses were to be divided equally between the parties."

[37] Here is a case where to begin with the said house was purchased in both names and both PW and RH were registered as owners; each with 1/2 undivided share. The intention of the parties was clearly that this house was to be their matrimonial home where they would stay and raise their 2 children. It is true that the loan was taken in the name of the RH and it was the RH that was servicing the monthly loan instalments. However the PW's contribution in raising the children and taking care of the home should not be overlooked. This Court is not inclined to disturb the current equal undivided share in the said house.

[38] However having regard to the needs of the children, this Court cannot agree with the RH's proposal that the house, said to have a market value of RM1.2 million is to be sold and the proceeds after deducting the redemption should be shared equally between the PW and the 2 children. The calculation goes like this:

Market Value - Redemption Sum = Proceeds of Sale

(RM1,200,000.00 - RM335,972.00=RM864,082.00)

[39] Upon sale of the matrimonial home, the RH was prepared to surrender his portion of the proceeds of sale as a lump sum payment for the education funds for the children and for the wife's maintenance as follows:

(i) 1/2 share to the 2 children in equal shares = RM216,007.00 for each child for his/her maintenance and education; and

(ii) 1/2 share to the PW = RM432,014.00 for the PW as maintenance which may go towards payment of a new house.

[40] Furthermore, there is a snag in the sums above as the sorry state arising from the sale would be that the PW and the children are left without a home; a home where the children have grown up in. They would be forced to stay in a rented house where they would be at the mercy of the landlord who may ask for the house back or increase the rental. There would be no certainty and stability that comes with staying in one's own home. With the escalating price of houses in a mature township like Subang Jaya - USJ, one would not be able to buy any decent home for RM432,000+; not to mention the loan that the PW would have to take and with that the commitment to pay the monthly installments.

[41] Taking into consideration the needs of the children, now aged 16 and 11 and seeing that their schools are nearby, it would be best not to disrupt their current place of residence. Whilst the RH may not have the means to continue paying the instalments RM2,873.00, this is a case where he does not lack the means to borrow from the company. He had given the best of his years to the family business and was a director until early 2013. It was clear that his father has groomed him to take over the lorry transport business. It would be reasonable in the circumstances of the case where he should fully redeem the said house from the bank by end of 2016 and I do not see it a problem for him to raise the sum of about RM335,000.00 from the family company. Indeed he once had a loan of RM416,507.00 from the company as reflected in the financial statement of the company for 2013 and which debt was no longer reflected in the 2014 financial statement. It could have been paid off or the company has written it off.

[42] Having fully discharged the liability to the bank by year end, he is to transfer his 1/2 undivided share to the PW as trustee for the 2 children and the discharge and transfer shall be effected by 31 December 2016. The other 1/2 undivided share shall be hers to keep absolutely and until the said transfer is done, the RH shall continue to service the monthly instalment. The said 1/2 undivided share of the RH shall be held by the PW in trust for

the children until they are 23 years old and if the PW is selling the said house, the proceeds from the portion held in trust for the children shall be set aside for the children's education and other needs.

The 12% Shares of the RH in CAS Transport Sdn Bhd

[43] Both the PW and RH were married on 11 September 1999. RH testified that he worked as ten-wheeled lorry driver for his family's company CAS Transport Sdn Bhd ("the Company") while the PW was a clerk in private firm. However, the PW after giving birth of their 1st daughter on 18 May 2000 had given full attention to the baby for the first few years, as from the time she was born, the baby had a medical condition for her back which required her to wear supporting braces for her feet, legs and back. A nanny was also required to look after the baby. The baby needed special medical treatment due to her condition. The PW had later returned to work and has been working since.

[44] The Company was incorporated on 20 July 2001 as a private limited company. After almost 7 years in the Company and during the subsistence of the marriage, RH was appointed as a director since 10 March 2006 with 12% shareholding equivalent to 30,000 number of shares being registered in his name. The RH did not pay for the shares. It is more likely than not

that these are either a gift from his father to him or held in trust by him for his father, the Company being a family company started by his father and the shareholders are his parents and him at that time.

[45] There is no evidence that the PW had contributed to the enhancement of the shares in the company. She has her own job and at the same time, has to attend to the needs of the children. These shares are not shares in a public listed company where the husband has invested from his salary or perhaps even shares from some employees share option scheme. These are shares which in all likelihood his father would have registered in his name respective of whether he is married or single or divorced or married to the petitioner or someone else. In short the shares in the family company started by his father is outside the equation of division of matrimonial assets because these shares are not part of matrimonial assets to begin with.

[46] It is true that the shares were transferred out to the sister RW 3 in 2013 with no consideration but that does not change the character of the shares as a non-matrimonial asset. It is more consistent with his shares being held in trust for his father who ultimately controls the Company that he started. It is true that this transfer out from the RH to his sister was

effected during the time when the PW's wife solicitors had written to the RH on the terms of the divorce and after his previous solicitors had proposed for a joint divorce petition on or about 12 March 2013. Be that as it may, if it is his personal asset and not matrimonial asset, then he should not be faulted just because he transferred the shares out to his sister, acting on an abundance of caution.

[47] Based on the evidence of the father (RW 2) and his daughter (RW 3), the shares in the company were ultimately controlled by the RH's father and he alone decides who the shares parked in the name of the children should be transferred to.

[48] It is true that directors' remuneration were declared by the company as having been paid out to the directors of which the RH was one until 2013. RH admitted that he resigned as a director on 5 April 2013 and his brother Chin Weng Choon was subsequently appointed in his place. However directors' remuneration has nothing to do with shareholding and at most, it can only go to show that the RH's salary should also include his remuneration as a director. This Court has factored that into consideration with respect to the maintenance of the children of RM6,000.00 per month and also the order of this Court requiring to discharge the charge taken on

the matrimonial home by end of the year. He has no hold on the directorship and even much less, she. Finally it is up to his parents who are controlling shareholders in the Company to decide on which of their children they want to appoint as directors.

[49] Whilst it is true that the Company also declared dividends for the year 2013 in the sum of RM800,000.00 after RH ceased to be a shareholder and resigned as a director and that in the following year 2014, the Company declared another RM490,500.00, that again has no bearing on the shares of the RH that had been transferred out. At any rate even if the shares had continued to be in his name, his 12% shareholding would yield the sum of RM96,000.00 and RM58,860.00 and he should have no problem transferring the matrimonial house free from encumbrances to the PW and for her to hold his 1/2 undivided share for their children.

[50] The dicta of Lord Nicholls in the House of Lords' case of **White v White** [2000] 2 FLR 981 (HL) at p. 994 serves as a useful guide as to whether an asset acquired by one spouse as a gift or inheritance is matrimonial asset:

"Inherited money and property

I must also mention briefly another problem which has arisen in the present case. It concerns **property acquired during the marriage by one spouse by gift** or succession or **as a beneficiary under a trust**. For convenience I will refer to such property as **inherited property**. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand. A distinction along these line exists, for example, in the Family Law (Scotland) Act 1985 and the (New Zealand) Matrimonial Property Act 1976.

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. **Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it.** Conversely, the other

spouse has a weaker claim to such property than he or she may have regarding matrimonial property.. (emphasis added)

[51] The above dicta was applied by our Court of Appeal in **Tay Chong Yew & Anor v Onn Kim Muah** [2016] 2 CLJ 579 in allowing the first appellant's (the husband's) appeal on the shares in 2 family companies as these shares were a gift to the first appellant by his father, Tay How Seng. Hence, it could not be said to be matrimonial asset as it was acquired by the first appellant, no doubt during the subsistence of the marriage, by way of a gift with no contribution whatsoever from the respondent. The Court of Appeal opined as follows:

> "[91] ... We agreed with Lord Nicholls when he stated that property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage and that in fairness the spouse to whom it was given should be allowed to keep it. This is especially so when s. 76(4)(a) is taken into account.
>
> **Shares**
>
> [92] As for shares, the first appellant restricted his submission on four companies. They are Tong Ah Co Sdn Bhd, Tay Miang Guan

Sdn Bhd, Express Management Services Sdn Bhd and How Tian Enterprise Sdn Bhd. We will deal with them in that order.

Tong Ah Co Sdn Bhd

[93] This is a private limited company and was incorporated on 8 December 1947. In 1963, Tay How Seng had transferred 139 shares to the first appellant. At that material time, the first appellant was only six years old. At diverse dates, Tay How Seng transferred further shares totalling 380 shares to his son, the first appellant.

[94] The learned trial judge found that the 139 shares were a gift to the first appellant by Tay How Seng. However, the learned trial judge held that the balance 380 shares were a matrimonial asset and that the respondent was entitled to 50% of the remaining 380 shares. The respondent on the other hand cross-appealed and pleaded that she was entitled to 50% of 519 shares of the said company, without leaving out the 139 shares gifted to the first appellant by his father/Tay How Seng.

[95] For the reasons we have stated before this, we agreed with the first appellant's submission and found that the learned trial judge had erred in coming to a finding that the balance 380 shares were a

matrimonial asset and that the respondent was entitled to 50% of the 380 shares. **The 139 shares were a gift to the first appellant when he was a child and could not form part of the matrimonial asset. The 380 shares were also gifts to the first appellant where there was no money transaction for the transfer of all these 380 shares from Tay How Seng to the first appellant**. With the same token we dismissed the cross-appeal of the respondent on this aspect.

Tay Miang Guan Sdn Bhd

[96] This is a private limited company and was incorporated on 8 December 1947. In 1965, the Tay How Seng transferred 86 shares to his son, the first appellant. At that time, the first appellant was only eight years old. In 1993, another 86 shares were transferred by Tay How Seng to the first appellant. In 1997, another 34 shares were transferred by Tay How Seng to the first appellant. **The first appellant therefore was gifted a total of 120 shares in this company after his marriage to the respondent. The first appellant submitted that these 120 shares are not matrimonial assets as they are gifts from his father.**

[97] The respondent in her reply and cross-appeal submitted that the number of units of shares owned by the first appellant in Tay Miang Guan Sdn Bhd in which the respondent is given 50% should be 206, including shares given to the first appellant by his father when he was an eight years old boy. This was because the allegation of gift stated above was not proved by the first appellant or Tay How Seng.

[98] **It was our finding that all 120 shares given to the first appellant were gifts as there was no money transaction between the Tay How Seng and the first appellant.** As per our earlier reasons for allowing the first appellant's appeal on the issue of gifts, we also allowed the first appellant's appeal and dismissed the respondent's cross-appeal on this aspect." (emphasis added)

[52] Whether the 12% shares of the RH are a gift from his father or held in trust for his father, this Court is more than satisfied on a balance of probabilities that it is not matrimonial assets and thus not divisible or distributable in the way the PW had prayed for, which is to have the said shares transferred to her as trustee for the 2 children and to be transferred to them when they reach 18.

The 54A Kampung Baru Subang Land

[53] The RH is the registered owner having half (1/2) undivided share of the Land. The other half (1/2) portion belongs to and is registered under his cousin's name. Their grandmother had effected the transfer in 2009 to her 2 grandchildren from her 2 sons. I can appreciate why the PW was eyeing this Land for the 2 children and she prayed that the RH's share be transferred to her as trustee for the 2 children and to be transferred to them when they reach 18. It would give her the financial security that she craves for the children. According to her the monthly rental income is about RM14,000.00.

[54] It must be quite a sizable piece of land. On it stand the following:

(i) 3 units of shops of about 1,500 sq ft for each unit;

(ii) 1 unit of shop of about 3,000 sq ft;

(iii) 4 units of houses of about 1,200 sq ft each unit;

(iv) 10 units of workers quarters of about 350 sq ft each unit;

(v) 1 unit of lorry workshop of about 4,000 sq ft;

(vi) 1 unit of lorry workshop cum a cabin office of about 2,000 sq ft.

[55] The antecedents to the Land is relevant in considering whether it is matrimonial asset. It was transferred by the RH's to him after he had been judicially separated from the PW. I can accept the evidence of the RH's father RW 2, when he testified as follows:

> "My mother and I are the real owners of the Land. Eventhough the Land was registered under my son's name and that of my nephew, they are merely trustees for my family and my nephew's family. We collect all the rental from the said Land and pay the costs, expenses, upkeep and maintenance of the buildings on the Land. I also keep the title to the Land and I have never given the title to my son. In all the tenancy agreements signed with the tenants, I am named as the owner and I signed the tenancy agreements with the tenants of the shop units. The agreements are at pages 610-623."

[56] When asked why the said Land was registered in the RH's name and that of his nephew he explained as follows:

> "My mother was the owner of this Land before. Initially my mother wanted me and my late brother to be the registered owners but before the documentation could be executed, my brother died. I felt that it was more convenient to 'skip' one generation and straightaway

transfer to my son and my nephew and so I persuaded my mother to transfer the Land to straight to her grandchildren and to be held in trust for the 2 families of her sons. My son and my nephew did not do anything to effect the said transfer; all legal fees were also paid by my mother and me."

[57] I can also accept as a reasonable explanation the testimony of the RH's sister RW 3 when she testified of the trust arrangement within the family as follows:

> "My cousin and my brother are the registered owners of 54A. However 54A is only registered under their name because my uncle (my cousin's father and my father's brother) passed away and my grandmother couldn't figure out a way to split 54A fairly among her only two son's family without dividing the share up too much so she transferred the property to my cousin and family to be held on trust for their respective branch of the family. As far as I know, all income or rental proceeds are collected by my father and my grandmother for their own use. My brother and my cousin do not derive any monetary benefit from it. My grandmother and my father have been bearing all the quit rents and assessment for No. 54A."

[58] It is not disputed that the said Land is currently occupied by at least 3 sets of family, namely the RH's grandmother, RH's parents and sisters and RH's cousin branch of family. Besides, the father's company namely CAS Transport Sdn Bhd is also having their office on the said Land.

[59] The RH's testimony may summarized as follows:

> "My grandmother transferred the Land to me and my cousin in 2009 as she was growing older and was worried that her time might come anytime. Ever since she bought the Land ; I don't really know when but I have stayed at No. 54A ever since I was born. My grandmother had two sons, my father and my late uncle. Her intention was always to pass the Land to my father and my late uncle; however my late uncle passed away before any transfer could be made. My grandmother wanted to be fair and since my uncle had passed away, she decided to transfer the Land to her two grandsons from her respective sons instead to hold on trust for the respective branch of the family.
>
> This explained why all rental income or rental proceeds on my 1/2 portion of the Land are collected by my father since the 1/2 share was

transferred to me. I also referred to pages 601-605 of the CBOD which were between the tenants and my father as the landlord.

On the other hand, my grandmother receives rental on the other 1/2 portion and this is shown on pages 606 -609 of the CBOD.

The trust arrangement explained why the rental was never banked into my cousin's account or my account despite being registered owners. Clearly, we are merely bare trustees for the No. 54A Land and do not derive any monetary benefits. All quit rents and assessments and other outgoings were also paid by my father, not by me.

No 54A is trust property where I am merely a trustee and my father is the actual owner and ultimate beneficiary. If one day my father would want to give this 1/2 share to my brother or sister, I would have to do so. There is no certainty that my father would want my children to inherit the trust property. Moreover, 54A was only transferred to me after we were judicially separated. It was not obtained by way of joint efforts of the Petitioners during the marriage."

[60] I am more than satisfied that the said Land is inherited by RH's family from the grandmother. It is a gift by the grandmother to the RH's father's

branch of family; the RH being the eldest son of the family is merely the trustee for the family. In other word, RH is not even the ultimate beneficiary yet until his father should decide who he should give the Land to.

[61] Even in a situation that RH's father is giving his portion of the Land to RH, it is trite law that gifts, inheritance or anything given in consideration of love and affection are not divisible as matrimonial assets and should be **excluded** from division.

[62] His Lordship James Foong J (later FCJ) in **N(f) v C** [1997] 4 CLJ Supp 258 said:

> "A gift even acquired during the marriage to only one spouse should be excluded"

[63] In **N(f) v C**, his Lordship held that a half share in a dwelling house transmitted by the husband's deceased mother to him upon her death was a gift and therefore could not be subject to division as a matrimonial asset. A gift to only one spouse is not a matrimonial asset.

[64] The Court has also ruled that inherited property is neither property acquired by the joint efforts of the parties (which would fall under Section 76(1) and (2) of the LRA) nor property acquired by the sole efforts of one

party (which would fall under Section 76(3) and (4) of the LRA). Hence, inherited properties do not fall within the purview of Section 76 of LRA at all.

[65] Similarly, in the case of **Tan Puay Cheng (f) v Ting Ing Seek** [2009] 1 LNS 751, Albert Linton J. followed James Foong J's decision in **N(f) v C**, and disallowed a wife's claim to Properties the husband inherited from his mother:

> As to the wife's claim to a division of the husband's undivided share in four parcel of land bequeathed by the Husband's father to the Husband and his siblings, I need only refer to *N(f) v C* [1997] 3 MLJ 855 where in considering the division of an undivided shares in a parcel of land as a gift from the respondent's mother to the respondent, James Foong J (as he then was) said: "The undivided shares in a parcel of land as a gift from the respondent's mother which was transmitted to the respondent in 1986 is not subject to division. It fall outside the confines of S.76(1) of the Act. It is not an asset acquired by the petitioner and the respondent by their joint effort in the form of money, property or work towards its acquisition. It was a gift by the Respondent's deceased mother to her son. On this,

I am in agreement with the textbook author that a gift even acquired during the marriage to only one spouse should be excluded: see *Matrimorial Law In Singapore and Malaysia* by Tan Cheng Han; *Law and the Family* by Joh Dewar and *Conflicts Issue in Family and Succession Law* by Tan Yock Lin. This aspect of the wife claim must necessarily fail."

[66] This Court is more than satisfied on the balance of probabilities that the RH's 1/2 undivided share of the said Land is not matrimonial asset; it being a gift from the RH's grandmother and held in trust for the RH's father.

Whether the RH had committed adultery with the Co-Respondent

[67] We now come to that which is trickier to decide; involving as it does matters of the heart. How would one know what happened behind close door? This is a case where she (PW) had stopped loving him (RH) before he started loving her (CoR). One thing is clear; the CoR was not the cause of the breakdown of the PW's marriage to the RH.

[68] In **Clarkson v Clarkson** (1930) 143 LT 775, 46 TLR 623 it was held that adultery is the 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.

[69] One party must still be married and the other party may be married to someone else or single or divorced. From the definition, other forms of sexual contacts short of sexual intercourse is not adultery though parties may be said to have an affair or that they have been unfaithful to their spouse. In other words, it is not adultery of the mind that is being made punishable with a damages award against the adulterer or adulteress, but the physical act that had resulted in the breakdown of the marriage of the innocent party. That is the statutory test though the spiritual test is of a higher standard in that anyone who lusts after another while still married to one's spouse would have committed adultery already in his or her heart. It has often been said that the burden of proof is throughout on the person who alleges adultery, there being a presumption of innocence. See Raydon on Divorce (12th edition) p 193.

[70] In the PW's Petition for Judicial Separation she had already stated that the marriage had irretrievably broken down because of the RH's unreasonable behavior. It is also the RH’s position that the marriage had irretrievably broken down prior to the Judicial Separation Petition and this is evident in the Judicial Separation Petition filed by PW which could be found

at paragraph 10 of the said Petition (page 90 of Bundle B) where PW has confirmed that:

> *"Perkahwinan tersebut telah berpecah belah dan tidak dapat dipulihkan atau diselamatkan ..."* followed by her reasoning set out in sub-paragraph (a) to (j) of the said Petition.

That being translated into English would mean this: "The marriage has broken down irretrievably and could not be restored or saved....."

[71] She had also in her various police reports lodged against the RH after the Judicial Separation order in 2008 referred to him as her ex-husband or in the original language of the police report in Bahasa Malaysia, "bekas suami saya." The PW said she was fearful and confused at those various times when she had lodged her various police reports against the RH and that it was the police who had suggested the word. However, after listening to her evidence in Court, and quite a lengthy one at that in her Witness Statement and Supplementary Witness Statement and her evidence under cross-examination by counsel for RH and CoR, I was more than satisfied that she has a good command of the Bahasa Malaysia language that she chose to give evidence in and that she was comfortable and fluent in it.

[72] After the Judicial Separation Order the parties continued to stay in the matrimonial home to buffer the possible ramifications of their separation on the children. Credit given to them, they were of the view that the children were too young to understand what had happened to both the adults. If only they could continue to be more civil and kind to each other. Perhaps they did try to for the sake of the children, maintaining the semblance of a family still intact by going for holidays together with the children.

[73] However the relationship deteriorated further after the judicial separation. The parties continued to be caustic to each other with continuous conflicts flaring up to conflagration in verbal and physical threats and abuses and precipitating the various police reports from 2008 to 2013. The PW moved out and stayed with her sister in 2009 only to move back in 2010. The RH moved back to his parents' place in the Kampung Baru Subang property in February 2010 which is after the discovery of the PW's Dubai trip in January 2010. During that time his health deteriorated markedly because of his HIV+ condition. He said that the PW was cold, harsh and ignored him. He was depressed and his boiling point was reached when he found a photo of the PW at page 514 of the CBOD in an intimate position with another man named B, where she was on a so-called company trip to Dubai. In the photo she was sitting

intimately with a man hugging her from behind. While she claimed that he was just a colleague and she was there on a business trip, his conclusion was that a colleague of normal relationship would not sit in such an intimate position. It was also undisputed that RH had never moved back to the USJ house since then. At that time, the RH had not met the CoR yet.

[74] Though the PW would like this Court to believe that the relationship with the RH was improving after the Judicial Separation order, it was more a case of maintaining minimal interaction with each other and only when necessary for the sake of the children. If things were improving between the two of them, then there would not have been a necessity for the PW to move out from the matrimonial house in 2009 to her sister's house and only to come back in 2010 at which time in February 2010 the RH had already moved to his parents' place. He was never to move back again to the matrimonial home though she did move into the RH's parents' house in Kampong Baru Subang in late 2012 and moved back again to the matrimonial house after the purpose was achieved, which was to gather evidence of the RH's relationship with the CoR and information on the Company's financial matters. This period of their relationship far from being calmer, was in reality choppier with respect to police reports lodged by the PW in 2008, 2012 and 2013. Whilst appreciating that the course of true

love never doth run smooth, this was more a case where the relative calm and quietness was more descriptive of the time when they stayed separated from each other and each time they have more interaction with each other there would be more caustic conflicts, quarrels and fightings.

[75] On the present facts, PW and RH had been living separately from each other since 2010. The fact that the relationship was never repaired and indeed had gone into a downward spin is evident from the following:

(a) PW made several hostile police reports against RH dated 9 March 2008, 23 June 2012, 10 September 2012, 16 July 2012, 21 July 2012 and 15 May 2013. In at least two police reports made by her in year 2012, she referred RH as "Ex-Husband";

(b) The family trip is merely to comfort the children and to conceal the judicial separation from their respective families;

(c) PW travelled alone to Dubai with a male colleague namely B or that she had met him there;

(d) RH moved out from matrimonial house since year 2010 and never moved back since then;

(e) RH is unable to access children after he moved out as PW changed mobile number without notifying RH; and

(f) PW threatened and did subsequently circulate RH's HIV report to his friends out of vengeance.

[76] He said he was extremely depressed and emotionally disturbed by the conduct of the PW. He came to the conclusion that his relationship with the PW was irreconcilable. In his own words, "we quarreled horribly and I could not forget that she cruelly asked me 'to die as soon as possible, so she could claim my insurance payout.' "

[77] The RH was labouring under a misconception that after 2 years of judicial separation he was automatically divorced. He knew and befriended the CoR via a matchmaking service in 2012; having come to the conclusion that the PW must have been seeing someone. He admitted several months later he started dating her and told her that he had already been divorced. From the various sms messages produced in Court between the RH and the CoR, it may be safely said that they were flirting with each other and that some exchanges were of the intimate kind.

[78] The PW's counsel drew the Court's attention to the following circumstantial evidence which counsel said can only led to one and only one conclusion that both the RH and the CoR must have committed adultery with each other:

i) Both RH and CoR admitted that they had gone for a trip to Bali and proceeded for pre-wedding package including pre-honeymoon photo shot in Bali and that the CoR was dressed in a wedding dress;

ii) A deluxe premium room in Hard Rock Hotel for 3 nights stay from 18 August 2012 till 21 August 2012 in Bali for 2 adults was confirmed;

iii) The CoR admitted that she had posted status in her facebook with caption "Going Bali sooooonn..hurray" and she responded and affirmed to one of the comments that she considered that it is pre-honeymoon;

iv) The Co-Respondent admitted that she had posted status in her facebook with caption "Enjoying myself at Maxim Genting" wherein she received comments that "Honeymoon again ooo"; "only two of you? So happening!. The CoR in her affirmative answer that "Haha yes.. enjoying the luxury stay and treats..";

v) The trails of intimate messages between the RH and the CoR;

vi) The RH bought a diamond ring on 17 August 2012, a day before his trip to Bali with the CoR;

vii) Overnight stay at the CoR's house wherein the RH's car was seen and parked there;

viii) Discovery of the phone calls and voice calls from the phone bills of the RH. The CoR confirmed that telephone number xxxxxx belongs to her as announced in her facebook;

iv) Both the RH and CoR were having a breakfast on 24 May 2013 which was on Wesak Day, wherein on that day the RH should appreciate the significance of Wesak Day as a family man and as cultured by Chinese families. He should have had and spent the day with his children and the PW.

[79] There was also an HSBC Amanah Account joint account in both the names of the RH and the CoR.

[80] During Examination in chief of CoR (in CORW-1-WS1 & CORWS-1WS2), it was in evidence that RH and the CoR were planning to venture into F&B business even after the wedding plan was cancelled but it did not

materialise. I agree that premised on these facts, there was nothing unusual for the frequent calls record made between the RH and CoR. The parties had already been separated for 4 years already when this business venture between the RH and CoR was explored.

[81] This shows that CoR at its most was merely seeking RH's assistance to borrow money from others. The CoR also tendered evidence showing that the business capital of RM65,000.00 came eventually from her mother. This remained unrebutted by the PW.

[82] There is no documentary evidence to show that the wedding package is worth RM30,000.00. It was solely estimation by PW based on her own parameter.

[83] It was not denied that there was wedding plan which has to be cancelled. Also, CoR testified that the photo was proceeded with for 'memory' in view of RH's fatal disease and critical health condition:

> "But then at least there's some precaution because that's before married you see plus his viral is 400,000 is a lot as compared to what you all seeing in the medical report is 40,000 only. 400,000 is very critical. So might not know like next year, because that's why I say

the photo wedding is a bit like of memory. Because What Malaysia drug having is the final medicine, so if it's like cannot cure I mean it's cannot already."

[84] The PW alluded to the CoR's Facebook comments, status and photos uploaded by Co-R Pangkor Laut Resort, Maxim Hotel stay. However, there is no name or image of RH that appeared in any of these photos referred by PW. It was only by inference from some of the comments made by CoR's friend that PW alleged RH was in those photos with the CoR. Nevertheless, none of these people who commented on the Facebook had been called by PW as witness. These comments or observation by public are therefore merely hearsay and cannot constitute evidence that this Court may rely on with respect to its truth.

[85] The Petitioner further submitted that adultery has to be inferred from the circumstances of the case. It would be unreasonable to expect direct evidence of adultery unless of course a child is born and DNA test revealed the child's parentage. Normally the matrimonial offence of adultery is expected to be established by circumstantial evidence, but in that event the circumstances must be such as to lead to the necessary conclusion that adultery was committed by the spouse concerned. On the other hand it

would not be possible to lay down what circumstances would be sufficient to establish adultery, because circumstances may be diversified by the situation and character of the parties, by the state of general manners and by many other incidental circumstances, apparently slight and delicate in themselves, but they may have important bearing on the particular case. See the case of **Yew Yin Lai v Teo Meng Hai & Anor** [2013] 8 MLJ 787 where it was observed as follows:

> "[67] In the present case there is no other explanation for the conduct of the respondent other than that there was indeed an affair. In this case the respondent and co-respondent had all the opportunity. The respondent had once before admitted to the petitioner, that he did have extra marital affair. He was forgiven by the petitioner. **The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it."** (emphasis added)

[86] In the case of **Thanavathi A/P K. Krishnan v Sundra Rajoo A/L Nadarajah** [2010] MLJU 899, it was observed that:

> "The Petitioner had given evidence of his discovery of the phone calls from the phone bill of the Respondent. If this discovery was taken in

isolation, perhaps I would agree that these calls are not proofs of adultery. I had, however, considered the evidence its entirety and I have to say it has left me in no doubt that the Respondent had not been truthful in her evidence as far as her relationship with Baskaran Nair was concerned. She had herself admitted making phone calls to Baskaran Nair and him to her. I do not think that it matters that she cannot remember how many calls were made. More important, in my opinion, was that the calls were made. She also had admitted that they had met up, just the two of them without the accompaniment of at least Baskaran Nair's wife. She also admitted confiding to Baskaran Nair of her marital woes. Her reason for doing that was, as she put it simply, she wanted advice from the perspective of a married man. That may be so but I also took cognizance of the fact that it was never disclosed in evidence what was the 'advice' given by Baskaran Nair" Whether he, like PW2, had tried to mediate and help solve the differences between the Petitioner and the Respondent?

[21] Looking at the evidence, especially taken together as a whole, I am of the opinion that there is basis for me to draw the reasonable inference that there is justification in the Petitioner's belief that the Respondent was having an affair with Baskaran Nair. The numerous

phone calls made to each other, the 'secret' meetings between them and the phone bill which was discovered by the Petitioner, all of which has created an impression that there is something more that a ordinary friendship between the Respondent and Baskaran Nair, not forgetting PW2's evidence on the conversation he had with the Respondent which I have accepted to be true."

[87] The case of **Yew Yin Lai v Teo Meng Hai & Anor** [2013] 8 MLJ 787 can easily be distinguished from the present case as there the CoR elected not to give evidence. The Court there made the following findings:

> "The co-respondent elected not to give evidence and submitted no case to answer and did not call any witness on her behalf.
>
> [88] Based on oral and documentary evidence adduced by the petitioner and her witnesses, the petitioner had established a case in law for the co-respondent to answer. That being the case, the co-respondent had failed to show that the evidence of the petitioner in support of her claim is so unsatisfactory or unreliable that the burden of proof on the petitioner of relevant issues has not been discharged.

In *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 it was stated that:

> It is trite that once a defendant in a civil proceedings makes a submission of no case to answer and elects not to call evidence, then all evidence led by the plaintiff must be assumed to be correct."

[88] Where the CoR in this case did give evidence and a reasonable explanation that though the RH and her were dating each other, there was no adultery that had been committed that had led to a breakdown of the PW's marriage to the RH, this Court cannot simply equate opportunity to commit adultery to adultery having been committed. This Court found as a matter of fact that the CoR believed the RH when the latter said that he had already been divorced. There is also no good reason for the RH to have lied or misrepresented this fact to the CoR as the truth would bound to surface once the RH seeks to register his marriage with the CoR.

[89] I can quite believe the RH when he said that in late 2012 his previous solicitors called him for a meeting and explained to him that though the separation had been for more than 4 years already since the Judicial Separation order was made, the parties had not been divorced yet and so

could not marry someone else. As soon as he knew about this he told the CoR and the CoR and her parents considered this so ridiculous as to call off the marriage plans altogether.

[90] The following evidence of the RH in his testimony is relevant and a reasonable explanation by the RH:

Q: How did you come to know that you marriage was still valid?

A: One day, the lawyer who did the Separation called and asked me to pay a visit to his firm to discuss something. **He informed me that the Petitioner instructed him to contact me directly. It was from that discussion that I discovered that I was still married. I supposed that the Petitioner saw photos of the Co-Respondent and I from some social networks and she wants to use this as bargaining chip to renegotiate the divorce term.**

Q: What did you do after?

A: I also wanted a joint petition divorce which the Petitioner initially agreed. I refer to the letter from my lawyer at page 161 to 162 CBOD. But it fall through eventually because the Petitioner wanted more that what I could give. I refer to the letter from the Petitioner's lawyer

dated 28.5.2013 at page 392 to 395 and the reply by my lawyer dated 4.6.2013 at page 153 to 155 of CBOD. So I have to be frank to the CoR about the fact that we were not divorced.

Q: What is the CoR's reaction?

A: She and her family find this ridiculous and unacceptable. We broke up and cancelled all the wedding plan and package we signed up. But because we have too many common friends in the circle, we are now still friends.

[91] While such an incident may appear odd and strange, I would say that here there is no advantage in the RH concealing the status of his marital position from the CoR, in that he was merely judicially separated from his wife and not divorced yet and so, would not be in a position to marry the CoR until the divorce was finalized. The RH was in all probability mistaken with exceedingly embarrassing consequences in the CoR cancelling their proposed wedding plans. It was of course risky enough for the CoR to want to date the RH to the point of being prepared to marry him, eventhough she knew that he is HIV+. Love may overcome many an obstacle but in this case at least, not when the RH was mistaken as to his marital status upon a judicial separation order being obtained without a decree of divorce.

[92] The fact that the RH and the CoR had travelled to Bali together for pre-wedding photos to be taken and that they had planned to get wed each other does not necessarily mean that they must have sex with each other already in that trip. There is no good reason to disbelieve them when they said that they stayed in separate rooms; she with her make-up artist and he with the photographer. Furthermore the CoR's evidence of the RH's HIV+ count, she herself being a pharmacist, that the RH's condition had deteriorated sharply and as at year end December 2012 his virus load was 400,000 in one ml of blood which was on the high and dangerous side had not been challenged by the PW.

[93] I do not think that the CoR, being a pharmacist herself, would want to be exposed to such a risk before marriage. The CoR's own blood test result showed she is not HIV+. That has not been challenged by the PW. That I would say is a single most special set of facts that set this case and the circumstances apart from other cases where both opportunity and orientation (or disposition) of the parties would operate to give the irresistible inference from the nature of things that adultery, as in sexual intercourse, had taken place before the wedding night.

[94] The PW's counsel also submitted that the PW's blood test result also showed that she was not HIV+ but that has to be viewed in the context that

she and the RH have been legally separated since the Judicial Separation order of 2008.

[95] I do not blame the PW for concluding that based on the above factual matrix, adultery has taken place. The RH alluded to the fact that he felt constrained to marry the PW when they were dating because she was already pregnant with their first daughter. A look at the marriage certificate showed that the marriage was in September 1999 and the daughter was born in February 2000. Both parties are aware that self-control might be easier said and harder to exercise in the throes of love, attraction, romance and passion when opportunities present themselves with a natural progression to consummate one's love for the other! The RH having learnt from that first experience would be more cautious seeing that he is HIV+ and the CoR is aware of the danger of any sexual contact with a HIV+ person; being a pharmacist herself.

[96] At trial, when learned counsel for the PW asked RH whether he had any sexual intercourse with the CoR his answer was: *"No, I do not want her to contract HIV."*

[97] I am conscious of the fact that traditionally and for as long as family law has been around, proof of adultery has always been on the standard of

proof of beyond reasonable doubt. In the case of **Dr Gurmail Kaur a/p Sadhu Singh v Dr Teh Seong Peng & Anor** [2014] 11 MLJ 843 it was observed as follows:

> "It is trite law that in relation to an allegation of adultery, the standard of proof for adultery is beyond reasonable doubt and the adultery had caused the breakdown of the marriage as enunciated in the following cases. See:
>
> (a) *Wee Hock Guan v Chia Chit Neo & Anor* 1964] 1 LNS 214; [1964] 1 MLJ 217, OCJ Singapore, Winslow J at p 217 (right) to paras A-C, p 218 (left):
>
> It is well established that an allegation of this nature must be proved to the satisfaction of the court beyond reasonable doubt and that the onus of so satisfying the court in this case rests upon the petitioner.' The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the Court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the Court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any

other explanation' (see *Tolstoy on the Law and Practice of Divorce, (4th Ed)* at p 29). As Lord Merrivale P said in *Farnham v Farnham* [1925] 133 LT 320 'The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it'.

(b) *Choong Yee Fong v Ooi Seng Keat & Anor* [2006] 1 MLJ 791; [2006] 5 CLJ 144 (HC), Faiza Tamby Chik J at para 4, p 797 (MLJ); p 149 (CLJ) states:

> [4] The petitioner must prove to the satisfaction of the court beyond reasonable doubt that the respondent had committed adultery and it is due to the alleged adulterous relationship which led to the breakdown of the marriage. This principle is upheld in the case of *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222; [1976] 1 LNS 141 where Hashim Yeop A Sani J (as he then was) stated:
>
> > It is well established in law that an allegation of this nature must be proved to the satisfaction of the court beyond reasonable doubt. In *Rayden on Divorce, (12th Ed),* p 193,

it is said: the burden of proof is throughout on the person alleging adultery, there being a presumption of innocence.

(c) See also *Yew Yin Lai v Teo Meng Hai & Anor* [2007] 1 LNS 127; [2007] 4 MLJ 703; *Choo Hui Ling lwn Yeow Joen Ann dan satu lagi* [2013] 9 MLJ 788; *Shanmugam v Pitchamany & Anor* [1976] 1 LNS 141; [1976] 2 MLJ 222; *Kang Ka Heng v Ng Mooi Tee & Anor* [2001] 3 MLJ 331; [2001] 2 CLJ 578; *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 2 CLJ 371; [2005] 5 MLJ 82; *Wee Hock Guan v Chia Chit Neo & Anor* [1964] 1 LNS 214; [1964] MLJ 217.

[53] Based on the cases cited above, for allegation of adultery to be established, the evidence must be beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. In dealing with circumstantial evidence the court have to consider the weight which is to be given to the united force of all the circumstances put together."

[98] In **Shanmugam v Pitchamany & Another** [1976] 2 MLJ 222, Hashim Yeop Sani J held that an allegation of adultery must be proved to the satisfaction of court beyond reasonable doubts.

[99] Based on the cogent arguments of the Federal Court in **Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd** [2015] 5 MLJ 1, 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 standardization 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:

> "[48] As such, in our judgment the time has come **to realign the position of the law in this country on the standard of proof for fraud in civil claims.** While learned counsel for the defendant seemed to favour the adoption of the Singapore position, learned counsel for the plaintiff urged us to adopt the principle in *In re B (Children).*

[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'.

[50] Hence, it is therefore up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim to find whether the standard of proof has been attained. 'The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies'. The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation.

[51] Accordingly as stated earlier we agree with the reasons given by learned counsel for both parties that the present standard of proof for

fraud in a civil claim in this country is not in line with the principle as applied in other common law jurisdictions and should therefore be reviewed (see: *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR 469 which discusses the thorny issues related to the application of the criminal standard in a civil claim involving the allegation of fraud). Indeed it is quite obvious in *Narayanan* that Lord Akin did not provide any cogent reason for applying the criminal standard of proof in a civil claim when fraud is alleged. Similarly in *Saminathan* the principle in *Narayanan* was applied without any discussion on its rationale.

[52] We therefore reiterate that we agree and accept the rationale in *In re B (Children)* that in a civil claim **even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply**. And perhaps it is not out of place here to restate the general rule at common law that, 'in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities' (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, at p 74)." (emphasis added)

[100] It is also in keeping with the times. In this day and age where with increased mobility, both physical and electronic and the easy access to new-fangled means of communication via the Internet, Wechat, WhatsApp, Skype, Blogs, Twitter and the like, there has been ushered in a whole new world of unlimited opportunities to communicate with anyone anywhere at anytime. With certain communication between the sexes, chemistry develops and opportunities to meet abound. While private investigators may be hired to track and collect evidence of a spouse's infidelity, logistical costs have become prohibitive for many who have every reason to suspect a spouse is cheating on him or her but always a challenge to prove adultery. The time is both right and ripe for a realignment of the standard of proof even in adultery in a divorce petition to that of on a balance of probabilities.

[101] Even applying this lower standard of proof, I find that the PW has not proved adultery against the PH and CoR on a balance of probabilities. Assuming even for a moment that adultery has been proved on a balance of probabilities, this is not a case where the adultery complained of has been the cause of the breakdown of the marriage. The marriage had long broken down when the Judicial Separation Petition was filed. The breakdown continued even after the Judicial Separation order and with no

hope of reconciliation irrespective of the RH's new relationship with the CoR.

[102] In a case like here where by a Judicial Separation order, the couple is not obliged to live together and indeed legally permitted to lead separate lives henceforth with both no longer owing conjugal rights to the other, it would be incongruent to order damages to be paid to a so-called offended spouse in the circumstances of this case.

[103] Be that as it may this Court in dismissing the PW's claim against the CoR for damages for adultery, would not make any order as to costs as the relationship technically was not appropriate though short of been an adulterous one.

Employees Provident Funds ("EPF")

[104] There is no doubt that EPF contribution is matrimonial asset. See **Lim Kuen Kuen v Hiew Kim Fook & Another** [1994] 3 CLJ 471.

[105] The parties have led separate lives since their Judicial Separation order in 2008. As confirmed before the Court, the PW has RM44,000.00 in her EPF Account based on the statement from EPF in 2012 whereas the RH has RM18,000.00 in his latest EPF statement. I have no doubt that the

PW would nominate the 2 children as beneficiaries to her EPF account. As the RW's EPF contribution so far is not substantial, I made an order that the RH should irrevocably nominate the 2 children as beneficiaries in equal shares of his EPF account.

The 2 cars Perodua MYVI and Toyota Vios

[106] The Perodua MyVi is an old car and since its road tax has expired for a few years already, the car has been left unused in the matrimonial home. It is confirmed that the car is under the Company's name. It was used by the PW to fetch the children around when the parties were together. Being an asset of the Company it is not matrimonial asset.

[107] However, the Toyota Vios was purchased by RH. He said that it was for the use of his mother and is literally a gift from a son to his beloved mother. It was not disputed that PW was never a user of the Toyota Vios. It was submitted on behalf of the RH that the interest of RH's mother should equally be protected and that this Court should not allow the life of RH's mother to be affected by this divorce.

[108] During cross-examination, RH maintained his position that Toyota Vios is bought by him for the exclusive use of the mother and that she used

it to go for her exercise every morning, to buy the vegetables in the market every morning.

[109] The reality of living in a township like USJ-Subang is such that many parents would have to be chauffeurs, fetching their children from one activity to another and battling the traffic jam in the process. It is reasonable for the RH to so provide a means of transport for the children in keeping with what the children were accustomed to before. I had therefore ordered that the said Toyato Vios be delivered to the PW by 30 April 2016 and that the RH do continue to pay the hire purchase instalments for the said car and to transfer it to the PW free from all encumbrances by 31 December 2016.

[110] Meanwhile the Peodua MyVi is to be collected by the RH from the matrimonial home by 30 April 2016.

Insurance policies

[111] The PW is not claiming for insurance policies in her prayer m.(i) and (ii) as it has already been claimed. Policy m.(i) has been claimed by the RH. As for m.(iv) and (v) both have lapsed. At the submission stage of this proceeding, both parties were able to agree that the Great Eastern policy in prayer m.(vi) be kept alive and that the RH do pay the premium for the said

policy and further that the RH shall irrevocably name the 2 children as the beneficiaries. This prayer is by consent of the RH and PW where the claim on the insurance policies are concerned.

Pronouncement

[112] By consent both PW and RH agreed on items 1 to 3 below and the Court made the remaining orders as follows:

1. That the marriage be dissolved and the decree nisi be made absolute immediately;

2. Care, control and custody of the 2 children be given to the PW with reasonable access to the RH;

3. The RH shall have access twice a month to the children at a public place to be agreed and one day during the 1st to 3rd day of Chinese New Year to be with the RH at his house;

4. With respect to maintenance for the 2 children the Court awards RM3,000.00 per month per child from the date of filing of the Petition;

5. As for the medical expenses of the daughter, because of her medical condition, the RH shall pay the medical bills of the daughter against production of receipts provided he be informed earlier of the medical

treatment and that he be allowed to seek a second opinion provided always that the child's health is not adversely affected and this shall continue until she is financially independent and the RH consents to this order as communicated through his solicitors;

6. The Court makes no order as to maintenance of the wife as she is working and earning a reasonable income to support herself;

7. The RH shall fully discharge the existing loan to the Bank and transfer the whole of his half share to the PW to be held in trust for the children with respect to the matrimonial home in USJ and the discharge and transfer shall be effected by 31 December 2016 and the other half share in her name shall be hers absolutely and until that is done the RH shall continue to service the monthly loan installments. The said half share from the RH shall be held in trust for the children until they reach 23 years old and if the PW is selling the said house, the portion held in trust shall be held in trust for the children's education and other needs;

8. The RH shall irrevocably nominate the 2 children to be beneficiaries of his EPF monies in equal shares;

9. As for the prayer in (g) with respect to RH's half share in the Kampung Baru Subang land, the Court is convinced that this is his family property and not matrimonial asset as the explanation given is quite reasonable in that the grandmother had transferred to the property to the RH here and his cousin as part of her inheritance to both her sons and that the said property is held in trust for the family. From the evidence of rental collected, this Court is persuaded that the RH here has no control over the said rental which goes to the father;

10. PW is not claiming for insurance policies in her prayer m.(i) and (ii) as it has already been claimed. Policy m.(i) has been claimed by the RH. As for m. (iv) and (v) both have lapsed; as for the Great Eastern policy in prayer m.(vi) the RH shall keep the policy alive and pay the premium instalments when they fall due and irrevocably name the 2 children as the beneficiaries. This prayer is by consent of the RH and PW where the claim on the insurance policies are concerned.

11. Prayer n. The RH had 12% share in CAS Transport Sdn Bhd. From the evidence it is a family business started by the RH's father and the shareholders are the H's father, mother and himself; From the evidence the PW does not appear to have contributed to this business and it is clear that it was the RH's father who allowed the

said shares to be registered in the son’s name. I would hold that the PW has no claim on this shares held by the RH in the said Company;

12. The Toyota Vios car is in the name of the RH and taking into consideration the need to fetch the children, the RH shall transfer the Vios to the PW by 31 December 2016 and in the meanwhile the RH shall pay the Hire Purchase instalments for the car and the transfer shall be free from all encumbrances. The RH shall collect the Perodua MyVi car (as it is) which is in the CAS Transport Sdn Bhd's name from the PW by 30 April 2016 and the Toyota Vios shall be delivered by the RH to the PW by the same date;

13. As for the PW's claim against the CoR for damages for adultery, the Court takes into consideration that the PW had referred to the RH as her ex in her police report and also that in her petition for Judicial Separation she had stated that the marriage has irretrievably broken down. The parties have been staying apart for more than 3 years before the filing of the Divorce Petition and seeing that he is HIV+ and the CoR is not that and that evidence has not been challenged, the Court would not find adultery as having been proved. However the relationship is inappropriate and the Court would dismiss the claim and make no order as to costs;

14. The Court orders the RH to pay costs of RM25,000.00 to the PW by 31 July 2016 and allocatur to be paid before extraction of order of costs;

15. All arrears of maintenance for the children shall be paid by 31 May 2016 and failing which interest at 5% p.a. shall apply.

16. A penal clause shall be included as applying to both.

Dated: 29 July 2016.

Sgd

Y.A. TUAN LEE SWEE SENG

Judge

High Court

Kuala Lumpur

For the Petitioner Wife	:	Jasbeer Singh together with Nur Hakimah and K Revathi (Messrs Jasbeer, Nur & Lee)
For the Respondent Husband	:	Carol Tiong and Kenny Seng (Messrs Tiong & Woon)
For the Co-Respondent.	:	Christopher Mar and Nurul Shafiah (Messrs Munhoe & Mar)

Date of Decision: 21 April 2016