MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KOTA KINABALU SABAH

DIVORCE PETITION

BETWEEN

M

AND

S

JOINT PETITIONERS

JUDGMENT (ENCLOSURES 10 & 26)

Introduction

[1] The applicant and the respondent in Enclosures 10 and 26 were the joint petitioners in a mutual divorce petition. In this judgment, I shall refer to the applicant as the wife petitioner and the respondent as the husband petitioner. The petition was heard and granted on 6th September 2016 by this court. The custody of the sole issue of the marriage, a 3-year old boy (now 4 years old) was granted to the husband petitioner as per the agreement of the parties in the joint petition. On 5th September 2017, the wife petitioner filed an application in Enclosure 10 to vary the custody order under section 96 of the Law Reform (Marriage and Divorce) Act 1976.

[2] The husband petitioner filed his second affidavit (Enclosure 23) to oppose the application on 20th January 2018. In the second affidavit in opposition, the husband petitioner alleged that the wife petitioner was an immoral and a promiscuous woman and that she is an unfit mother. He exhibited 24 photographs. Some of the photographs depict a young woman in various stages of undress. Two photographs depicts a naked woman in a compromising position with an unknown male. Other photographs show the same young woman partying with a male companion. The husband petitioner alleged that the young woman is the wife petitioner.

[3] The wife petitioner filed an application in Enclosure 26 to expunge several paragraphs and the related nude pictures in the said affidavit. I gave my decision in respect of the expunction application on 7th February 2018. I then proceeded to hear the variation application in Enclosure 10 and gave decision on 15th May 2018. I shall now give my reasons for both decisions.

Expunction application (Enclosure 26)

[4] The principal prayer sought in the expunction application is as follows:

> (a) leave to be granted to the petitioner wife for this application to expunge paragraphs 11, 14, 15 and 16, as well as the accompanying exhibits described as "particulars" listed in paragraph 11 (pictures 1 to 24), pictures 25 and/or in the alternative the whole affidavit dated 20.12.2017.

[5] In paragraph 11, the husband petitioner deposed that his former wife is a "loose woman" who partied with other men and had nude photographs of her taken by others. He also alleged that she distributed the naked pictures of herself

to "different men". In relation to this allegation, the husband petitioner exhibited 24 pictures. Pictures 1 and 2 show a young woman having sexual intercourse with a man. It is not possible to know if the man in Picture 1 and 2 is the same man because the face of the man in both pictures is not visible. The husband petitioner averred that the wife petitioner had sex with numerous men and is therefore promiscuous woman. Pictures 3, 4, 5, 6, 9, 16, and 20 show the same young woman in a state of partial or full nudity. The other pictures show the same young woman and a man having drinks. However, it appears to be the same man and not different men as alleged in the affidavit.

[6] In paragraph 14, the husband petitioner averred that the wife petitioner "prostituted herself" with other men on the matrimonial bed in their Kuala Lumpur home. It appears that the couple maintained a home in Kuala Lumpur although the principal matrimonial home was in Labuan. In paragraph 15, the husband petitioner averred that the wife petitioner "needs rehabilitation and psychiatric care". In paragraph 16, he averred that his former wife "needs to be rehabilitated to change her wild lifestyle".

Source of photographs

[7] In the second affidavit in opposition, the husband petitioner did not state the source of the photographs. However, in a subsequent affidavit, he stated that the he obtained the photographs from the hand phone and the laptop computer of the wife petitioner. For good measure, he said that as her husband at the material time, he had "every right" to access the said devices.

Issues

[8] The application in question is made under Order 41 rule 6 of the Rules of Court 2012 which reads as follows:

> 6. Scandalous matter in affidavits (O 41 r 6)
>
> The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

Thus, the issue that arises is whether the averments in the said paragraphs and the photographs fall within the ambit of Order 41 rule 6 of Rules of Court 2012.

Decision

[9] The wife petitioner did not admit that she is the young woman in the pictures in question. Nonetheless, her counsel submitted that the pictures and the averments based on the said pictures in paragraphs 11, 14, 15 and 16 should be expunged. She pointed out that some of the photographs featured frontal nudity without any censoring whatever to respect a woman's modesty. Pictures 1 and 2 shows the young woman in a coital position with an unknown male. Again, the husband petitioner or his counsel did not bother to censor parts of the two pictures. Thus, the said pictures are graphic, indecent and are even pornographic in nature.

[10] Counsel for husband petitioner submitted that the said pictures are relevant to show that the wife petitioner is an immoral and "loose woman" and is thus an unfit mother. He said that the pictures show that the wife petitioner had sex with many men and that she partied "wildly" and therefore requires "rehabilitation".

[11] Order 41 rule 6 gives the court discretion to strike out an affidavit on the ground that it is scandalous, irrelevant or otherwise oppressive. In my opinion,

the wife petitioner has succeeded in proving that the affidavit offends all three limbs of the said rule. The argument of counsel of husband petitioner is that the pictures are relevant to show that the wife petitioner is immoral and an unfit mother. Even assuming for a moment that the pictures are relevant, in my opinion the uncensored graphic pictures were not necessary to drive home the immorality point.

[12] In at least two reported cases (cited by counsel for wife petitioner), the courts had expressed very strong disapproval of indecent photographs of woman taken without their consent (See *Maslinda Ishak v Mohd Tahir Osman & Ors* [2009] 6 CLJ 653 and *Lim Eve Poh v. Dr Lim Teik Man & Anor* [2011] 4 CLJ 397) as it is a matter it involves their modesty and dignity. In *Lim Eve Poh v. Dr Lim Teik Man & Another* (supra) where a photograph of woman patient's anus was taken by the doctor without her knowledge or consent, the court in awarding her damages said as follows:

> The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights.

[13] It is granted that in this case, the wife petitioner may have caused the pictures to be taken and therefore it cannot be said that the said pictures were taken without her consent. Nonetheless, she did not release the pictures into the public domain. She had stored them privately in her hand phone and laptop computer. It is the husband petitioner who accessed them without her permission and gave access to others including law firm staff and court staff by exhibiting them in the affidavit in opposition without any sort of censoring whatever.

[14] Thus, the exhibition of the said pictures of the wife petitioner in the affidavit in opposition was a gratuitous and malicious act to embarrass and humiliate her. The exhibition of the uncensored pictures in the second affidavit in opposition were therefore scandalous and oppressive. In the premises, the discretionary power vested in the court under Order 41 rule 6 of the Rules of Court 2012 should come to the aid of the wife petitioner.

[15] I am also of the opinion that, even if the pictures were censored before being exhibited in the second affidavit in opposition, they are irrelevant to the variation application. In *Mohamed Moidu Bin Mohammed & Another v Hassan Bin Kadir & Ors* [1997] MLJU 31, the court said that the relevant question to ask is whether objectionable evidence has any relevance to the issue at hand. The full passage in the above-mentioned judgment is as follows:

> A general jurisdiction is accorded to the court to expunge scandalous matter in any record or proceeding (Re Miller 54 L.J. Ch. 205). Allegations of dishonesty and outrageous conduct itemised in the statement of claim are not scandalous so long as they are relevant to the issue at hand (Rubery v. Grant L.R. 13 Eq. 443). Brett L.J. in Millington v. Loving 6 Q.B.D. page 196remarked, quite correctly, that: "The mere fact that these paragraphs state a scandalous fact does not make them scandalous." What is pertinent to ask is this: Whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief claimed: Christie v. Christie L.R. 8 Ch. page 503; and Whitney v. Moignard 24 Q.B.D. 630.

[16] The theme in the impugned paragraphs is that the wife petitioner had sex with many men and is a wild and loose woman. It was even alleged that she distributed the naked pictures of herself to many men. However, the photographs in question only show the same man and not different men. This fact was conceded by counsel for the husband petitioner during argument. There is no

evidence that the wife petitioner had distributed the pictures to other men. The photographs were apparently private photographs taken from the hand phone and laptop computer of the wife petitioner. Thus, even if the graphic pictures are admitted into evidence, they do not support the averment in the impugned paragraphs. Surely, in this day and age, private intimate photographs of a person stored in the computer or hand phone should not suggest that person in question is immoral or an unfit parent. I am not unmindful that the husband petitioner suggested that the photographs indicate that the wife petitioner had committed adultery. However, as there is no time stamp on the photographs, it is not known when the pictures were taken i.e. before or after the dissolution of the marriage. Even if it were otherwise, as the marriage had apparently broken down, I do not see what it has to do with the fitness of the wife petitioner as a parent.

[17] In conclusion, I allowed the application and I expunged paragraphs 11, 14, 15 and 16 and the photographs on pages 8, 9,10, 11, 12, 13, 16, 23, 27. I also order the husband petitioner to pay costs of RM3,000.00 to the wife petitioner which is subject to payment of allocatur.

Variation application (Enclosure 10)

[18] The principal prayer sought in the variation application is the alteration of the custody order in respect of the child of the marriage. The wife petitioner is now claiming custody. The other prayers are in respect of details of visitation rights to be accorded to the husband petitioner. The wife petitioner is also praying child maintenance of RM1000.00 per month.

[19] The grounds of the wife petitioner are as follows:

(a) The husband petitioner denied the wife petitioner rights to visit the child between March 2017 until end of June 2017 on the ground he will not be in Labuan.

(b) The husband petitioner left the child with an known third party as his mother left Labuan in January of 2017.

(c) The wife petitioner looked after the child since he was born and is willing to look after him again.

(d) The husband petitioner fiercely threatened the wife petitioner when she requested overnight visits with the child in July of 2017.

(e) The husband petitioner frequently gave unreasonable excuses to prevent video calls between wife petitioner and the child.

(f) When the wife came to Labuan to visit the child in July of 2017, the husband petitioner allowed her to see the child only for two hours from 6 p.m. to 8 p.m.

(g) The child is only three years old and needs the mother's love and care. She averred that she has a stable job now.

[20] The husband petitioner has strongly objected to this application. In the first affidavit in opposition, he denied the allegation that he left the child with a third party. He said the wife petitioner had agreed to the terms in the joint petition and only raised the issue of varying custody a year later. He said he had always taken care of the child. He did not directly deny being difficult in granting access to the child. However, he accused his former wife of being a loose and immoral woman who spent most of her time socializing and flirting with men. He also said that his wife did not take care of the child on previous occasions when she took the child to her mother's place. He said that on one occasion she left the child with her mother and went on a holiday to Korea. He said she had a bad temper and on one occasion smashed the screen of the *ipod* device in front of the child. In the second affidavit he exhibited nude pictures of his former wife. I shall not say more of those pictures as I have expunged the same.

Issues

[21] The application for variation is made under section 96 and/or 97 of the Law Reform (Marriage and Divorce) Act 1976 which read as follows:

> *96. Power for court to vary orders for custody or maintenance*
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance f a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.
>
> *97. Power for court to vary agreement for custody or maintenance*
>
> The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

[22] Counsel for the husband petitioner submitted that prior to the presentation of the joint petition, the parties had agreed that the husband petitioner would have custody of the child of the marriage. Pursuant to the said agreement between the parties, a consent order was entered in the joint petition whereby the husband petitioner was given custody of the sole issue of the marriage.

[23] Counsel for husband petitioner cited several cases where the courts held that a consent order, even in divorce case should rarely be disturbed (see *Lau Hui Sing v Wong Chou Yong* [2008] 9 CLJ 232 and *Seetha a/p Vijaya Ratnam v Vicknesh a/1 Visvalingam* [2013] 7 CLJ 53. In *Lau Hui Sing v Wong Chou Yong* (supra), the High Court held as follows:

"As a general rule, consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant that intervention of Court for the benefit of the children."

[24] The issue in the above mentioned case was also a variation application in respect of maintenance. In *Seetha a/p Vijaya Ratnam v Vicknesh a/1 Visvalingam* (supra), the issue was also about variation of a maintenance order. The application was made under section 83 of the Law Reform (Marriage and Divorce) Act 1976 which reads as follows:

83. Power of court to vary orders for maintenance

The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in circumstances.

[25] The approach taken in the above mentioned cases and other cases is nothing new. Courts are generally slow to vary consent orders even in divorce cases. However, it must be noted that under section 96 and section 97 of the Law Reform (Marriage and Divorce) Act 1976, the court is vested with the power to vary any of the orders made when granting a dissolution of marriage application. The rationale was addressed in *Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408 by Faiza Thamby Chik J who said as follows:

There is, however, a provision to vary orders for custody and/or maintenance and that power ought to be exercised where ss. 83 and/or 96 apply, so as to preserve the *parens patriae* position of the court in relation to all children within the jurisdiction. I, therefore conclude that as custody and maintenance orders may be varied, under our legislation,

> it does not therefore matter whether the order sought to be varied was a consent order or not.

[26] Thus the court as the *parens patriae* (literally the parent of the nation) or in the context of custody applications, the legal protector of children, cannot be divested of the power to vary its own orders. In the recent case of *Celvambigai a/p S Thirucelvam v Pandian a/l Subramaniam* [2015] MLJU 2093, Lee Swee Seng J emphatically ruled that the courts always retain the power to vary a consent order if satisfied that it is for the welfare of the child. The variation application in that case was in respect of a maintenance order but court said that it is related to welfare of the children which is the paramount consideration. In that case the parties had entered a consent order in an originating summons application before the divorce petition was heard. Therefore, the court looked afresh at the maintenance order made in the originating summons and varied it. The facts of the instant case are different of course and I am mindful of that. Nonetheless, His Lordship's pronouncement on the importance of the welfare of children in variation applications, is in my view, of general application:

> The welfare of the child being of paramount importance, no fetters should be placed on the Court's powers to make an order that would best promote the welfare of the child. Whilst the Court would have always in mind the terms of any consent order entered into by the husband and wife, that consent order or for that matter, an order made after analysing the affidavits and hearing submissions of counsel, cannot be cast in concrete and changing circumstances may operate to constrain the Court to tweak and tailor its previous order always with the child's welfare at the heart of its concern.

[27] Thus, the main issue in the instant application is whether by reason of change of circumstances which affects the welfare of the child, the custody order should be varied. The fact that the parties had previously agreed that the husband petitioner should have custody is not a significant factor.

Decision

[28] In the instant case, the wife petitioner deposed that after the decree nisi was granted, the husband petitioner had made it difficult for her to access the child and did not comply with the agreed terms. She also said that the mother of the husband petitioner had left Labuan and that whenever the husband petitioner is out of town, the child is left with an unknown third party. Thus, it was difficult for her to contact the child through video call. Even when she came to Labuan, the husband petitioner only allowed her access for two hours between 6 p.m. and 8 p.m. although the child left the pre-school institution at 12 noon. She also deposed that she is willing to look after the child with the assistance of her mother who lives with her in Kuala Lumpur. During submission, her counsel stated that particulars of her present employment were not given in the affidavits as her client feared that the husband petitioner would forward her nude pictures to her workplace to humiliate her.

[29] It must be noted that in the first affidavit in opposition dated 29th September 2017, the husband petitioner did not specifically deny that his mother had left Labuan. Instead, he deposed that he has many relatives in Labuan. He also did not specifically denying giving the wife petitioner only two hours access to the child. In the second affidavit in opposition dated 20th December 2017, the husband petitioner again did not deny that his mother left Labuan and that he had been restricting access of the child to the wife petitioner for two hours only when she visited Labuan. He also did not deny that the child was sent to stay with an unknown third party. Instead, he exhibited nude photographs of wife petitioner taken from her computer and hand phone without her consent and stated she is a "wild woman" and an unfit mother. In the third affidavit in opposition dated 4th January 2018, the husband petitioner did not deny that his mother left Labuan and that he had restricted the wife petitioner' access to the child. He only made a

general averment that he did not prevent access. In the fourth affidavit in opposition dated 9th January 2018, the husband petitioner only referred to the photographs that he had exhibited. In the 5th affidavit in opposition dated 25th April 2018, the husband petitioner also did not deny that his mother had left Labuan. However, he said granted the wife petitioner access to the child.

[30] Thus, it appears that in the affidavits of the husband petitioner, there is no specific averment that since the grant of the decree nisi, his mother had not always been at hand in Labuan to assist him and that he had been limiting access of the wife petitioner to the child who was only three years old. The recurrent theme of all the affidavits of the husband petitioner is that his former wife is an immoral woman who committed adultery in the past and that she continues to live a wild life style by having "sex with many men". He also deposed that his former wife is infected with herpes and that the disease is contagious and that it renders her an unfit mother.

[31] In my view, the adultery allegation is irrelevant to the instant application. The parties filed a mutual divorce petition where such an allegation are irrelevant. The instant application is about variation of custody order. Thus, even if it is true that the wife had committed adultery in the past, it would be irrelevant for the purpose of the present application. As a decree nisi to dissolve the marriage had been granted, the wife is entitled to move afresh with her life.

[32] As I stated earlier, in the affidavits of the husband petitioner, it is alleged that the wife petitioner is an immoral woman who likes to have sex with numerous men and is therefore an unfit mother. This allegation is premised on the second affidavit in opposition wherein nude photographs of the wife petitioner was exhibited by the husband petitioner. I addressed this issue earlier. I struck out parts of the affidavit and expunged all the related nude and semi-nude

photographs. However, I did not expunge the photographs in which she appears fully clothed. These photographs also do not support the allegation of the husband petitioner that the wife petitioner had cavorted with "many men". The male featured in these appears to be the same man. In fact, during oral argument in the expunction application (Enclosure 26), counsel for husband petitioner conceded this fact. In the premises, the argument that the wife petitioner is an unhealthy influence on child because she has many lovers is without any basis in fact. Thus, there is no ground to conclude that the wife petitioner's morality renders her an unfit mother.

[33] The husband petitioner also submitted that his former wife is infected with type 2 herpes and that she can pass it to her son. He exhibited a blood test report that was issued in 2016. The wife petitioner did not deny that she is infected with herpes. However, she deposed that the husband petitioner knew about her infection even before they got married on 11th June 2013. Their child was born on 6th March 2014. She exhibited a report from her doctor that states she did not suffer any outbreak of herpes since 29th April 2014. This averment of the wife petitioner was not denied in the subsequent affidavit of the husband petitioner.

[34] There is no evidence whether the child is already infected with herpes. However, in my opinion, there is no reason to hold that the wife petitioner is an unfit mother by virtue of being infected with herpes. The unrebutted medical report by the specialist doctor states that the wife petitioner did not suffer a herpes attack since 2014. The report also states that her daily activities are not affected.

[35] Thus, the disease in question is certainly not a life threatening or debilitating disease. The wife petitioner nursed the child and looked after him for a year before leaving for Kuala Lumpur to look for a job. At that point in time, there was no issue that the wife petitioner should be barred contact with the child

on account of her dormant illness. Even, in the consent order, overnight visits were agreed upon. Again, the husband petitioner did not express any fear that wife petitioner would infect the child with the disease. I should think that the wife petitioner as a mother would certainly take precaution not to infect her young son with the disease. In any event, there is no medical evidence in the affidavits that says that the disease can be easily transmitted by the mother while taking care of him. For all the above reasons, I am of the view that the dormant illness of the wife petitioner does not render her as an unfit mother.

[36] Counsel for the husband petitioner argued that the child should not be taken away from his present environment as he is schooling and that any change would be disruptive and not in his long term interest. He also submitted that the child had always been with the husband petitioner. In my view, this is not a good reason to displace the rebuttable presumption in section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 that it is good for a child below the age of seven to be with the mother. In the first place, the now four-year old child is only in pre-school. Thus, any disruption due to custody change would be minimal. It is also not disputed that the wife petitioner was with the child since the birth of the child for more than a year until she went to Kuala Lumpur. I interviewed the child in chambers in the presence of women interpreters. The child was generally unresponsive. However, it is evident that the child is still very close to the mother. In my opinion, a child as young as four years old should not be denied the love and care of a mother who is willing to look after him.

[37] I am aware that the husband petitioner deposed that the home environment of the wife petitioner in Klang is not conducive as it is a small house. He even said that cockroaches and rats were spotted in the house. I am not convinced that these are good reasons to hold that the wife petitioner cannot provide a conducive home environment. Pest infestation is something that can be overcome.

[38] Counsel for the husband petitioner also submitted that the behaviour of the wife petitioner and the existence of the nude pictures "which may go viral" would embarrass the child in the future. I find it difficult to follow this argument as the pictures were not released to the public by the wife petitioner. It was the husband petitioner who accessed the pictures from her hand phone and computer and inappropriately exhibited them in the affidavit in opposition.

[39] For all the above reasons, I am of the opinion, that there is a material change in circumstances that justify varying the custody order. The husband petitioner failed to specifically rebut the averment of the wife petitioner that his mother had left Labuan and that the care of the child had been delegated to others. He also did not specifically rebut the allegation that he had unreasonably restricted the access of the wife to the child. I am also of the view that regardless of the agreement between the parties prior to the grant of decree nisi, the court retains the power to vary the custody order having regard to the welfare of the child. The paramount consideration is the welfare of the child and having regard to all the circumstances of this case, it is my opinion that it would be best served if the child is brought up by the mother.

[40] In the Notice of Application, the wife petitioner prayed that the husband be granted reasonable access and stipulated details of access arrangements. However, in my view, it is more practical that parties work out access arrangement after the child settles in the home of the wife petitioner in Klang. If possible, parties should agree on the access arrangement. For now, I shall order that the husband petitioner should be granted reasonable access to the child. In the event, agreement in respect of access arrangement cannot be reached, parties are at liberty to apply. In respect of child maintenance, the wife petitioner had applied for RM1000 a month from the husband petitioner. However, apart from

stating that he is from a wealthy family, no details of income were given. In the premises, I order the parties to attempt to agree on child maintenance failing which parties are at liberty to apply to court.

Conclusion

[41] In conclusion, I grant the application for variation of custody order and grant the wife petitioner custody of the child of the marriage. As I do not have sufficient material to make an order in respect of the child maintenance, the wife petitioner is at liberty to make another application for child maintenance. In respect of access to respondent, I grant reasonable access to the respondent. If parties cannot work out details of access arrangement, either party is at liberty to make another application.

(RAVINTHRAN PARAMAGURU)
Judge
High Court
Kota Kinabalu, Sabah

Date of Grounds of Judgment	:	23.5.2018
Date of Delivery of Decision	:	7.2.2018 (Enclosure 26) 15.5.2018 (Enclosure 10)
Date of Hearing	:	6.9.2016 10.10.2017 9.1.2018

7.2.2018
3.4.2018
27.4.2018

For The Appellant	:	Shane Cheng, Elaine Ng and G Vasuki Of Messrs Elaine Ng & Partners Advocates and Solicitors Selangor
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revision.