

Hoo Tat Fong (p) v Lim Cheun Eng

HIGH COURT, KUALA LUMPUR – DIVORCE PETITION NO S8-33-1089-2000
RAUS SHARIF, J
JUNE 20, 2003

Civil procedure – Res judicata – Application for care and custody of children – Previous order of High Court denying access to petitioner – Whether res judicata – Whether s 96 of the Law Reform (Marriage and Divorce) Act 1976 allowed any custody or maintenance order to be varied – Law Reform (Marriage and Divorce) Act 1976, ss 88, 88(2), (3), 96

Family law – Custody – Children aged below seven years – Whether should remain with petitioner mother – Paramount considerations – Indication of children’s wishes – Whether dispelled allegations of sexual abuse indicate petitioner best person to care for said children – Whether respondent father should be granted access – Law Reform (Marriage and Divorce) Act 1976, s 88(2), (3)

The petitioner applied for the custody, care and control of the three children of her marriage to the respondent. The petitioner further prayed that the respondent be ordered to pay monthly maintenance for the children in the sum of RM1000. The High Court had previously granted full custody, care and control of the three children to the petitioner, with fortnightly access to the respondent (the February 4, 1999 order) as well monthly maintenance of RM1000. The respondent subsequently filed an application seeking rescission of the custody order or alternatively, a variation of the order pertaining to access. The respondent then filed a further affidavit alleging sexual abuse of the two daughters of the marriage by the petitioner and various members of the petitioner’s family. Based on the said allegations, the High Court varied the February 4, 1999 order and ordered custody of the two girls to the respondent while the son remained with the petitioner (the January 16, 2001 order). The petitioner then obtained an interim ex parte stay of the said order pending an inter partes hearing of the same. The application for stay was dismissed and the petitioner appealed to the Court of Appeal for an interim stay pending an appeal, which denied the same, but allowed the petitioner access to her daughters every weekend pending the hearing of the appeal.

In the meantime, the petitioner filed this petition for divorce and ancillary relief. The marriage was dissolved by consent and the petitioner was settled with a sum of money after a division of the matrimonial assets. The petitioner subsequently withdrew her appeal to the Court of Appeal based on fresh evidence of the specialists findings as to the allegations of sexual abuse and proceeded with her application for ancillary relief for custody and maintenance.

The respondent submitted that as the petitioner had withdrawn her appeal, the January 16, 2001 order stood unvaried whereby no access was granted to the

petitioner. The respondent further submitted that if the petitioner desired to adduce fresh evidence, the petitioner ought to have filed the same by way of further evidence before the Court of Appeal. The respondent also raised the preliminary objection that the matter had been decided by the High Court by the January 16, 2001 order and was therefore *res judicata*.

Issues

1. Whether the application for custody, care and control of the petitioner's daughters were *res judicata* in light of the January 16, 2001 order of the High Court.
2. Whether the petitioner's daughters had been sexually abused.
3. Whether care, custody and control of the two girls should be granted to the petitioner.

Held

1. Section 96 of the Law Reform (Marriage and Divorce) Act 1976 (the Act) is clear in that any order for custody or maintenance may be varied from time to time. In fact, the January 16, 2001 order was a variation of the February 4, 1999 order. The court had the jurisdiction to vary the January 16, 2001 order in light of the evidence the petitioner wished to place before the court, i.e. that the children had not been sexually abused. In the circumstances, the principle of *res judicata* did not apply in this instant. [*see p 638 lines 12-20*]
2. There was no reason to doubt the final reports and oral testimony of the specialists who examined the two girls. The respondent's own specialist witness admitted that he was in no position to advise the court as to whether the children were sexually abused. The stories narrated to the various doctors by the children were inconsistent with the evidence adduced. The petitioner appeared to be a normal typical mother who showed love and affection to her children and did not seem able to capable of harming her own children, allowing them to be abused in the manner described, and further to participate in such acts. There was no evidence to support the allegations of sexual abuse. [*see p 641 line 24 - p 642 line 3*]
3. Section 88(2) of the Act provides that in decisions concerning custody and care of children, it is the children's welfare the paramount consideration. The wishes of the parents and those of the children, where they are able to express independent opinion, must also be regarded. The court must also have regard to the rebuttable presumption those children below the age of seven should remain with their mother pursuant to s 88(3) of the Act. The children had indicated their desire to remain with their mother. In light of the finding that there had no sexual abuse of the children, it was in the children's best interests for them to be given into their mother's care. [*see p 642 lines 5-29*]

Custody and care be given to petitioner; Weekly access granted to respondent; Respondent to pay monthly maintenance in sum of RM1000

1 **Cases referred to by the court**

Asia Commercial Finance (M) Bhd v Kawal Telili Sdn Bhd [1995] 3 MLJ 189, SC (*ref*)

Ng Seng Hwa & CI Holdings Bhd [1994] 1 MLJ 343, HC (*ref*)

5 *Samuel Pakianathan a/l Jabamanickam, ex Perwira Habib Bank (M) Bhd, Re* [1997]
5 MLJ 737, HC (*ref*)

Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234 (*ref*)

Legislation referred to by the court

Law Reform (Marriage and Divorce) Act 1976, s 88(2), (3)

10 *Judgment received: October 30, 2003*

Raus Sharif, J

The petitioner's (wife) application is for the following ancillary reliefs:

- 15 (i) For custody, care and control of two daughters Lim Mun Yee, (born
December 8, 1994) and Lim Jia Yee (born October 18, 1996) and her son
Lim Zi Shein (born October 8, 1997) and for the respondent to have access
to the three children every Saturday from 3.00 p.m. to Sunday 8.00 p.m.;
- 20 (ii) the respondent be ordered to pay the monthly maintenance for the
children of RM1000 by the fourth of every month (as per the court order
of May 27, 1999, which has never been varied) direct into the petitioner's
account; and
- (iii) the cost of this application is to be borne by the respondent.

25 *Agreed background facts*

The petitioner and respondent were married on March 4, 1993 by way of a civil
registry marriage. They bought a double storey house in Cheras in the joint names
of the petitioner, the respondent and the respondent's mother. They lived
together in that house with the respondent's family. They were blessed with three
30 children, namely a daughter, Lim Mun Yee born on December 8, 1994, another
daughter Lim Jia Yee born on October 18, 1996 and a son Lim Zi Shein born on
October 8, 1997.

Shortly after the birth of the son, the petitioner and the respondent began to
35 have serious matrimonial problems, due in part to having to live together with
the respondent's family. As a result, on September 26, 1998, the petitioner left
the matrimonial home and went back to her parents' home. On facing difficulties
obtaining custody of the children, the petitioner sought the court's assistance and
filed an application for custody of the three children. Two weeks later on October
40 14, 1998, the court granted immediate interim access to the petitioner, and on
February 4, 1999, after hearing the parties, Hashim Haji Yusof J (now JCA)
granted full custody, care and control of all three children to the petitioner, with

fortnightly access to the respondent (herein after referred to as “the February 4, 1999 order”). On May 27, 1999, the same learned judge granted the petitioner’s prayer for maintenance and ordered the respondent to pay RM1,000 a month as maintenance for all three children. 1

On January 19, 2000, the respondent filed an application seeking a rescission of the custody order or alternatively a variation of the order pertaining to access. The respondent’s supporting affidavit to this application stated that he had difficulty obtaining access and that he believed he could provide a better environment for the children. Subsequently, the respondent filed a further affidavit alleging sexual abuse of the girls by the petitioner and various members of the petitioner’s family. On the basis of the said allegations of sexual abuse, Rahmah Hussain J (now JCA) on January 16, 2001, varied the February 4, 1999 order and granted custody of the two girls Mun Yee and Jia Yee to the respondent (hereinafter referred to as “the January 16, 2001 order”). The custody of the son remained with the petitioner. The petitioner then obtained an interim ex parte stay of the said order pending inter partes hearing of the application for stay. The said application for stay was dismissed on June 20, 2001. The petitioner immediately appealed to the Court of Appeal for an interim stay pending appeal. On July 18, 2001, the Court of Appeal dismissed the application for stay but made an interim order allowing the petitioner access to the daughters every weekend pending the hearing of the appeal. 5 10 15 20

In the meantime, on October 2, 2000, the petitioner had filed this petition for divorce and ancillary reliefs to this court. On September 23, 2002, at the hearing of the petition, the said marriage was dissolved and by consent, it was agreed that the respondent to pay the petitioner the sum of RM35,000 in settlement of the division of matrimonial assets comprising the said house in Cheras provided the petitioner transfers her share of the said property to the respondent and the petitioner is released from all liabilities in relation to the said property. The court also ordered that the custody issues would only be tried after the outcome of the appeal. 25 30

On October 24, 2002, the petitioner withdrew her appeal before the Court of Appeal on the basis of fresh evidence and on the same day filed her notice of intention to proceed with her ancillary reliefs (encl 29) for custody and maintenance. On December 10, 2002, counsels for the petitioner and the respondent appeared before me for the hearing of said notice. I was appraised by counsel for the petitioner, that the respondent has denied the petitioner access to the two daughters since the withdrawal of the appeal. Counsel for the respondent submitted that the petitioner had withdrawn her appeal without the respondent’s consent. She then submitted, that since the appeal had been withdrawn, the High Court January 16, 2001 order stands unvaried whereby no access was granted to 35 40

1 the petitioner. Counsel for the petitioner then submitted that if the respondent
maintains that the appeal could not be withdrawn then the interim access order
as granted by the Court of Appeal must be complied with. She further submitted
that this court certainly had jurisdiction to hear the application for ancillary relief
5 in relation to the prayers for custody and maintenance in light of the fresh
evidence and that in the interim, it would be in the children's best interest to
preserve the status quo. Counsel for the respondent replied that if fresh evidence
were to be adduced by the petitioner she ought to have filed this by way of further
evidence for the appeal before the Court of Appeal and not proceed before the
10 present High Court. She further submitted that this case had been decided by the
High Court on January 16, 2001 and raised the principle of res judicata. This was
the respondent's preliminary objection to the case before me.

After hearing the said submissions, I ordered that the interim order of the
Court of Appeal to be maintained pending the hearing of the petitioner's notice
15 of intention to proceed with the ancillary reliefs. But in view of the allegations of
sexual abuse by the respondent, the petitioner's family is not allowed to have any
access to the children. Thus, the current arrangements regarding the children as
of the interim access order of the Court of Appeal, that is, for the past 1½ years,
are:

- 20 (i) the petitioner, that is the mother, has custody care and control of Zi Shien;
- (ii) the respondent, that is, the father has custody care and control of Mun Yee
and Jia Yee; and
- (iii) every Friday at 3.00 p.m. the respondent fetches Zi Shien from petitioner's
25 house to his house. On Saturday at 1.00 p.m. the petitioner, that is, the
mother will fetch all three children from the respondent's house and on
Sunday at 8.00 p.m. she will return the two girls Mun Yee and Jia Yee to
the respondent's house.

The son, Zi Shien, has always been with the petitioner. The two daughters, Mun
30 Yee and Jia Yee, have also never been parted from the mother except as from June
20, 2001 when the girls were separated from their mother and brother. The fresh
evidence which the petitioner wished to bring to this court's attention was that
the experts whom had been monitoring the children have had finally verified and
concluded that the children have not been sexually abused, and that the
35 allegations have been concocted, the children apparently have been coached to
tell these stories and the current arrangements are detrimental and a form of
emotional abuse on the children.

Res judicata

40 The principle of res judicata was raised by counsel for the respondent by way of
preliminary objection. According to her, since the petitioner had withdrawn her
appeal before the Court of Appeal, the petitioner is completely barred from

litigating the matter again. The cases of *Asia Commercial Finance (M) Bhd v Kawal Telili Sdn Bhd* [1995] 3 MCJ 189; *Re Samuel Pakianathan a/l Jabamanickam ex Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 and *Ng Seng Hwa & CI Holdings Bhd* [1994] 1 MLJ 343, were cited to support her proposition. With respect, I am unable to agree. The short answer to the preliminary objection is found in s 96 of the Act which provide as follows:

96. The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of an 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.

From the above provision, it is clear that any order for custody or maintenance may be varied from time to time. In fact, the January 16, 2001 order was a variation of the February 4, 1999 order. Surely, this court has the jurisdiction to vary again the January 16, 2001 order in light of the evidence the petitioner wishes to bring to this court's attention, that is, the children have not been sexually abused. To me, on the facts of this case, the principle of *res judicata* is not applicable.

Were the two girls sexually abused?

The respondent's case is that the two girls were sexually abused by members of the plaintiff's family whilst staying with the petitioner. To substantiate his case, the respondent relied on the medical reports, notably by Dr Irene Cheah, Dr Hamidah Salleh and other various doctors who attended to the two children. However it is apparent in this case, that the medical reports tendered and relied upon by the court in the January 16, 2001 order, were initial reports. Subsequently, further and final reports were prepared by the doctors. The doctors who continued examining and monitoring the two girls finally verified and concluded that no sexual abuse has ever occurred and the stories narrated to the doctors have all been concocted and the children have been coached by the respondent's family to tell the stories. In fact, two of the doctors, who prepared the initial reports, which were used by the respondent in obtaining the January 16, 2001 court order came before this court to testify on their findings.

One of the doctors who testified was Dr Irene Cheah Guat Sim (PW1), a consultant paediatrician attached to Kuala Lumpur General Hospital. PW1, is the chair person of the SCAN team, a team set up by the hospital to evaluate children who are admitted to the hospital for an alleged case of abused or neglect. The SCAN team comprise of doctors, police officers and welfare officers.

According to PW1, the two girls were first brought before her by the respondent on May 26, 2000 with a complaint that Jia Yee was experiencing pain

1 on her genital area. On examination of Jia Yee, PW1 found mild redness and a
tiny hole in Jia Yee's hymen. Arising from PW1's interview with the two girls, it
was revealed by Jia Yee that Robin, Roger and Ruben had touched her genital area,
(Robin, Roger and Ruben are the Jia Yee's maternal cousins age 10, 8 and 4 years
5 old respectively). PW1, however, could not conclude there was sexual abuse. But
she continued to monitor the two girls. In one of the follow-ups, the two girls
complained of pain on the genitals and vaginal discharge, and came up with the
same story that the maternal cousins had touched Jia Yee's genital area, with an
addition, that the maternal grandfather was also involved. It was at that time PW1
10 wrote a stronger report by recommending that the two girls be kept away from
the maternal grandfather and that they be placed with the respondent. Thereafter,
the two girls as well as the boy were placed in the hospital for three weeks for
observation. It was after the three weeks observation that PW1 concluded that
there was no sexual abuse on the two girls as alleged or feared by the respondent's
15 family especially the paternal grandmother.

Another doctor who testified was Dr Nur Hamidah Salleh (PW2), a consultant
psychiatrist attached to Gleaneagles Intan. According to PW2, the three children
were brought before her by the respondent on February 26, 2000 to assess the
20 children on the effect their parents' separation. For that purpose PW2 had seen
the children for more than ten times. According to PW2, when she first saw the
children, Mun Yee and Jia Yee had alleged that they were fingered by the cousin
brothers. On examination of Mun Yee, PW2 found that there was no evidence
of physical or sexual abuse. However with regard to Jia Yee as she found some
25 redness on her genital area, she formed an opinion that she had been sexually
abused and the alleged perpetrators were her cousin brothers. But according to
her, when she formed that opinion, she had yet to meet the mother. Subsequently
when she met the mother as well as the father and the maternal grandfather, she
revised her initial report. In her final report she concluded that the two girls had
30 not been sexually abused. She explained herself as follows:

Their presentation was not typical of sexually abused children. For sexually
abused children, they will be very scared to be examined. But the two children
did not show any sign that they were scared. They were stressed children but not
due to sexual abuses. For sexually abused children, they will have disturbed sleep
35 and dream of the events (nightmares). For the two children, they don't show
that they have disturbed sleep or nightmares. They don't show sexualised
behaviour, a behaviour which either they do the sexual act by herself or invite
people to do it. The children did not exhibit the symptoms of sexually abused
children.

40 When I first saw them with the mother they have no sign of fear with the
mother. They were talking normally to the mother. They play with her mother.
They show signs of affection.

There were allegations during the follow-up that they were sexually abused by others. They were mentioning the mother, grandfather, grandmother, uncles, cousins. For me, I cannot imagine that it could happen. I don't believe the way the story was described. For example, one of the stories they told me is that somebody will be holding her leg, somebody holding her hand, somebody was touching her private part with a finger. I asked them to draw and the drawing did not reflect the actual story told. For example, the figure was only touching the bed. The stories were not consistent and keep changing.

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PW2 concluded her evidence by saying that two girls had not been sexually abused.

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The petitioner also called professor Dr Kasmini Kassim (PW3) to testify. PW3 is a consultant psychiatrist and professor of psychology at University Putra, Malaysia. According to PW3, the three children were brought before her at Damansara Specialist Hospital on July 26, 2002 by the respondent who told her that the children had a lot to tell. PW3 described her meeting with one of the children Mun Yee as follows:-

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When I saw Lim Mun Yee, she was able to describe very fast what happen to her, whenever she goes to her mother's house every weekend. I didn't have to ask her many questions. She told me in English that her mother and seventeen others have been doing bad things to her and her other siblings. She said the mother will put her hand and a stick into her "apong" each time she goes to her mother's house in the weekend. When I asked her what is "apong" she pointed to her vaginal area. She said seventeen others will also put a stick and their bird into her "apong". She said all of them take turns to her in the same room and they all watch what is happening, including two other siblings. I asked her if she sees the birds of 17 people. She said yes. When I asked her whether they do other things to her, she just kept silence, and then she said yes. They also do the same thing to her backside. When asked further, whether there are other events, she said that is all. When I suggested whether they put anything into her mouth, she kept silence. She said yes, they also put the birds into her mouth. Then I asked her how often the event takes place and how frequent, she says it occurred every Saturday for 2 to 3 hours but she could not remember the number of times it happened. I asked her if she told the father about this. She said yes, that the father knows about this but the father still send her every weekend. She told me the court said so.

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PW3 also interviewed the other two children and in fact had another three sessions with the three children. PW3 also had a session with the mother. PW3, in her final report P4, concluded that there is no evidence to suggest that the three children were sexually abused. In her oral evidence she explained why she concluded that the children were not sexually abused. According to her, in her session with Mun Yee, especially the doll session, Mun Yee was not able to show

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1 how the doll was positioned as she told the story. According to PW3, Mun Yee's
story is not consistent to her action as demonstrated. PW3 also found that Mun
Yee was not able to demonstrate the sexual abuse using the dolls. According to
PW3, the behaviour of Mun Yee is normal, with no sign of fear or distress. In
5 conclusion, PW3 maintained that the three children had not been sexually
abused.

The respondent called Dr Edward Cheah (RW1) from the Malaysia Psychologist
Center. RW1 testified that Jia Yee and Mun Yee were brought by the respondent
before him for the purpose of doing an emotional assessment on the children. He
10 had three sessions with Jia Yee and one session with Mun Yee. According to RW1,
Jia Yee had informed him that she been sexually abused by twenty-one persons.
He was informed by Jia Yee that the twenty-one persons included her mother and
a lot of relatives on her mother's side, such as grandfather and uncles. According
to RW1, he was told by Jia Yee that the twenty-one persons put their fingers and
15 penis in her vagina. She also mentioned the people putting a stick into her vagina.
According to RW1, Mun Yee said similar things. Mun Yee also mentioned that
she was abused by twenty-one people and she refers to the same people as was
referred by Jia Yee. RW1 prepared a number of reports. However RW1 in his
evidence, made it clear that the reports that he had prepared was for the purpose
20 of assessing the emotional state of the two children and he is in no position to
advise the court as the truth of the allegations by Jia Yee and Mun Yee that they
had been sexually abused by the twenty-one people.

In light of the evidence presented before me, I have no hesitation in making
25 a finding that the children had not been sexually abused. In fact there is no
evidence at all to support the allegations. I have no reason to doubt the final
reports as well as the oral testimony of PW1, PW2 and PW3. No doubt the
respondent called RW1. But RW1's evidence did not support the respondent's
allegation that the children were sexually abused. As admitted by RW1, he is in
30 no position to advise the court as to whether the children were sexually abused.

To me the stories of sexual abuse as narrated to the various doctors by Jia Yee
and Mun Yee, are unreliable. Not only their stories differ from one doctor to
another, but the stories are also not consistent with the evidence adduced in this
case. For example, taking the story by Mun Yee that her mother with seventeen
35 others, taking turns to put their fingers into her private part as well as her sister's
private part, with a stick and their penis, will surely result in physical injuries. But
there is no such evidence of physical injuries. To me, seeing the mother in the
witness box, I do not believe that she will allow her children to be abused in such
a manner in her presence and what more to participate in such heinous acts. For
40 that matter no mother will do such a thing unless such person is mentally sick.
There is no evidence to show that the petitioner is a mentally sick person. She

appears normal, a typical mother who shows a lot of love and affection to the children. To me she does not appear to be a person who can harm her children.

Care and custody

What is left to be decided is, who should have custody, care and control of the three children. The law on this point is well settled. Section 88(2) of the Act provides that in deciding in whose custody a child should be placed, the paramount consideration should be the welfare of the child and the court shall have regard to the wishes of the parents and to the wishes of the children, where he or she is of an age to express an independent opinion. There is a rebuttable presumption that it is for the good of a child below the age of seven to be with his/her mother as specifically provided by s 88(3) of the same Act.

In this case the wishes of the parents as to the custody are in opposition to one another. However, the two girls had indicated their wish to be with the mother. When both of them were interviewed by this court, Mun Yee and Jia Yee indicated they wanted to be with their mother. I have no doubt of their desire to be with the mother.

To me, this is a typical case of marital break-up. The children are always the main victims. All along they had been staying together. But the two girls were separated from their mother and brother on the basis of allegations of sexual abuse by the respondent's family. The allegations of sexual abuse, have now been found to be totally untrue, it is only right that they should be reunited with the mother and the brother. To me it is in the children's best interest to be together and to be with their mother rather than their father who is presently staying with his mother (RW3) and sister (RW2). No doubt RW2 and RW3, love the two girls, but as rightly stated by Raja Azlan Shah CJ (as His Majesty then was) in the case of *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234 that, "there is no substitute to a natural mother's love, care and devotion for her children".

Conclusion

In conclusion, on the facts of this case it is in the paramount interest of the children, that they stay together, and their place should be with their mother. Accordingly I made an order that custody and care should be given to the petitioner. As the children have clearly demonstrated that they also love their father, I think it is only right that the respondent should be given reasonable access. With regard to access, it was agreed between the parties that the respondent be given access to the children on Fridays from 3.00 p.m. to Saturday 8.00 p.m. This court has also made an order that the respondent do pay monthly maintenance for the three children of RM1000 per month as requested by the petitioner, which was never disputed by the respondent. I have also ordered that the costs of this action be paid by the respondent. Counsel for the respondent,

1 argued that, in light some of the issues had been settled between the parties, it is
only fair that each party bear their own costs. I am unable to agree. This is because,
the respondent after being made known of the final report of the experts
indicating there is no sexual abuse on the children, chose to pursue the matter to
5 the very end. He remained adamant and should not be complaining now, when
costs is awarded against him.

Yvonne Raj (Jerald Gomez & Associates) for petitioner
Leong Yeen San (Lye Poh Kham & Associates) for respondent

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