



[2013] 1 LNS 1388

Legal Network Series

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

(BAHAGIAN KELUARGA)

[SAMAN PEMULA NO: 24-81-04-2013]

DI ANTARA

SEOW LEE ANN

... PLAINTIF

(KP: 740905-10-5290)

DAN

TAN KEVIN

... DEFENDAN

(KP: 720615-14-5667)

JUDGMENT

This is an application by the Plaintiff Wife (PW) (Encl. 1) for the following reliefs:-



- 1) Bahawa Plaintiff, SEOW LEE ANN (No. KP: 740905-10-5290), diberikan hak penjagaan, jagaan, pemeliharaan dan kawalan terhadap anak-anak perkahwinan tersebut, KEITH TAN JIN RONG (No. KP: 000523-14-1209), KENRICK TAN JIN YAU (No. KP: 000523-14-1217), KELLY TAN KAI YEE (No. KP: 030702-14-1180) dan KARLY TAN KAI YEN (No. KP: 110114-10-1158) (selepas ini dirujuk secara terkumpul sebagai “Anak-anak tersebut”);
- 2) Bahawa Defendan akan mempunyai akses munasabah kepada Anak-anak tersebut atas terma-terma yang akan ditentukan oleh Mahkamah Mulia ini dan akan dijalankan dalam bidangkuasa ini;
- 3) Bahawa Defendan, TAN KEVIN (No. KP: 720615-14-5667) membayar kepada Plaintiff tersebut suatu jumlah bulanan sebanyak RM34,000 sebagai nafkah untuk Anak-anak tersebut, nafkah yang mana akan dibayar pada atau



sebelum 3hb setiap bulan secara terus ke dalam suatu akaun bank yang dipilih oleh Plaintiff tersebut. Nafkah di sini akan tertakluk kepada suatu kenaikan tahunan sebanyak 5% atas jumlah nafkah yang dibayar pada tahun sebaik sahaja selepas kenaikan tersebut, kenaikan yang mana akan berkuatkuasa dari 1hb. Januari setiap tahun.

- 4) Bahawa Defendan membayar untuk semua perbelanjaan-perbelanjaan pendidikan untuk Anak-anak tersebut termasuk tetapi tidak terhad kepada yuran sekolah (termasuk di sebuah sekolah persendirian atau antarabangsa), semua aktiviti-aktiviti kurikular tambahan, tuisyen, buku-buku sekolah, alat-alat tulis, barang-barang pendidikan, seragam dan pengangkutan, perbelanjaan pendidikan yang mana akan dibayar sehingga dan termasuk pendidikan universiti atau tertinggi. Dalam berkenaan ini:-



- 4.1) Defendan tersebut akan membayar yuran atau sebarang perbelanjaan pendidikan yang lain secara terus kepada sekolah/kolej/universiti/pertubuhan pendidikan tersebut;
- 4.2) Defendan tersebut akan membayar untuk sebarang perbelanjaan pendidikan yang lain yang tidak diliputi oleh jumlah yang diberikan dalam 3.1 di atas samada secara langsung selepas diberikan dengan suatu inbois untuknya bayaran yang mana adalah di dalam masa yang dihadkan untuk bayaran tersebut dalam inbois tersebut atau dengan serta merta membayar balik Plaintiff tersebut untuk sebarang bayaran yang beliau telah buat selepas diberikan dengan resit untuk perbelanjaan tersebut bayaran yang mana adalah dalam masa tujuh (7) hari selepas resit bayaran diberikan kepada Defendan tersebut, bayaran dibuat secara terus ke dalam suatu akaun bank yang dipilih oleh Plaintiff tersebut.



- 5) Bahawa Defendan akan membayar untuk semua perbelanjaan perubatan, dental dan optikal Anak-anak tersebut termasuk tetapi tidak terhadap kepada perbelanjaan perundingan, rawatan dan penghospitalan.

- 6) Bahawa Defendan akan membayar kepada Plaintiff tersebut jumlah sebanyak RM8,000 sebulan sebagai nafkah untuk Plaintiff tersebut, nafkah yang mana akan dibayar secara terdahulu sebelum 3hb setiap bulan takwim secara terus ke dalam suatu akaun bank yang dipilih oleh Plaintiff tersebut. Nafkah di sini adalah tertakluk kepada suatu kenaikan tahunan sebanyak 5% atas jumlah nafkah yang dibayar dalam tahun sebaik sahaja selepas kenaikan tersebut, kenaikan yang mana akan berkuatkuasa dari 1hb. Januari setiap tahun.

- 7) Bahawa Defendan akan membayar faedah yang akan terakru pada kadar sebanyak 5% setahun atas yang berikut:-



- a) Sebarang tunggakan nafkah sehingga penyedaran penuh;
 - b) Atas semua bayaran nafkah masa hadapan yang diperintahkan di sini dari tarikh terakhir bulan takwim di mana ianya menjadi terhutang, sehingga penyedaran.
 - c) Sebarang jumlah lain yang menjadi terhutang dan yang perlu dibayar berikutan kepada Perintah ini dari tarikh bayaran tersebut sepatutnya diterima tau dibayar, sehingga penyedaran.
- 8) Bahawa Defendan diperintahkan untuk membayar kos tindakan di sini;
 - 9) Relif lanjut atau lainan yang Mahkamah Mulia ini anggap wajar dan perlu.



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At the outset of his submission, counsel for the Defendant Husband (DH) informed the Court that he had been instructed by the DH to say that:-

- a) The DH has no intention to abandon his family;
- b) The DH is very remorseful of his past affair with the Serbian lady;
- c) The DH wishes very much that his wife can forgive him;
and
- d) The DH has no wish to be in his present predicament,
that is living alone.

It seems to me, there is some truth in the saying you never know what you have until you lose it.

At the outset, I would like to mention that this Court had on 12/4/2013 granted to the PW an interim order whereby the PW was



given *interim* custody, care and control of the 4 children and also access. Reproduced is the order given by the Court on 12/4/2013.

- 1) Plaintiff, SEOW LEE ANN (No. KP: 740905-10-5290), diberikan jagaan, pemeliharaan dan kawalan I terhadap anak-anak perkahwinan tersebut, KEITH TAN JIN RONG (No. KP: 000523-14-1209), KENRICK TAN JIN YAU (No. KP: 000523-14-1217), KELLY TAN KAI YEE (No. KP: 030702-14-1180) dan KARLY TAN KAI YEN (No. KP: 110114-10-1159) (selepas ini dirujuk secara terkumpul sebagai “anak-anak tersebut”);

- 2) Defendan akan mempunyai akses *interim* kepada Anak-anak tersebut dalam kehadiran Plaintiff pada hari Ahad dari pukul 11.00 am hingga 2.00 pm dan hari Rabu pada pukul 7.00 pm to 9.00 pm.



DAN AKHIRNYA DIPERINTAHKAN bahawa kos adalah dalam kausa.

Bertarikh pada 12 April 2013.

In his written submission, counsel for the DH had instructions to agree to the following:-

- a) that the PW be granted care, custody and control of the 4 children of the marriage, subject to reasonable access to the DH.
- b) that DH is agreeable to provide the current educational needs of each and every child of the marriage up to the age of 18 as long as there is no material change in his current financial capability.
- c) that the DH pay a sum of RM7000/= per month to the PW as her maintenance (This is acceptable by the PW).



- d) that the DH will provide the current educational needs of each and every child of the marriage up to the age of 18.

Hence these remain only 3 issues to be decided by this Court as follows:-

- a) Guardianship
- b) Access
- c) Maintenance

Guardianship

DH would like to have joint guardianship of the 4 children. He had in fact agreed that care, custody and control be given to the PW but would like to have joint guardianship. The PW wants sole guardianship. It was submitted that the relationship between the parties as well as the behaviour towards the children shows that an order for joint guardianship is not workable. Counsel for PW supported her submission by saying that the DH admitted that the parties have different views and ways regarding the upbringing of the



children and this divergence of opinions is one of the main reasons of the parties frequent arguments.

Counsel for DH on the other hand cited section 5 of the Guardianship of Infants Act 1961 as follows:-

“ 5. *Equality of parental rights*

- (1) *In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.*

- (2) *The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.”.*



Counsel for the DH also cited the case of *Jennifer Patricia a/p Thomas v. Calvin Martin a/l Victor David* [2005] 6 MLJ 728 where His Lordship Low Hop Bing J said:-

“In my judgment s. 5 of the 1961 Act, where relevant, as amended vide Act A1066 with effect from 1 October 1966, merits reproduction as follows:-

5. *Equality of parental rights.*

(1) *In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.*

(2) *The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as that possessed by the father.*



The provision of s. 5 are clear and unambiguous in that parents may be given joint guardianship. In this regard, it is pertinent to point out that s. 11 thereof requires the Court to have regard primarily to the welfare of the infant and the wishes of the infant's parents.

As the father of the children and on the basis of the above factual background, I am of the view that the husband's request for joint guardianship cannot be said to be without any basis."

In any event, I had interviewed the 3 elder children ie, the twins Keith and Kenrick and the girl Kelly. I find that although the twins had said things about the alleged violence by the father towards them, they did say that the father had taken interest in their education which in one case resulted in the father scolding Kenrick for not joining the school badminton team. But generally he is interested in the good performance in school which basically means he is interested in their education. I can find no fault in that. Is it not better for a very strict father to be interested in his children's education to cater for their



future development. There may be differences between the 2 parents but if they truly love their children they will have to come to a common consensus. Therefore I am giving both the PW and DH joint guardianship of the 4 children.

Access

As was said earlier, this Court had granted interim access to the DH every Sunday from 11am to 2pm and every Wednesday from 7am to 9pm. The DH had come up with a very detailed access proposal. As I had stated, I had interviewed the 3 children and I am taking into account their views. As Zainun Ali J said in the case of *Leong Sam Moy v. Low Chee Tuam* [1997] 2 CLJ Supp 212.

*“ The law as it stands on the authority cited before me says that
“access is the basic right of the child rather than the parent ...
The Court must consider whether the welfare of the children is
prompted by access or the reverse and decide accordingly..”*



With that in mind, I order access to the 4 children of the marriage be on every Wednesday 7pm to 9pm and every Sunday from 10am to 6pm. The DH is to fetch and send the children from and to their residence.

Maintenance

I now deal with the maintenance of the children. Counsel for the wife cited section 92 and 93 of the LRA which is reproduced below:-

“ 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 any time order a man to pay maintenance for the benefit of his child.”.

It is her submission that a reading of the aforesaid Sections 92 and 93 of LRA 1976 clearly sets out the **legal principles applicable when ordering maintenance for a child**, and the principles are as follows:-

Section 92 LRA 1976 states that it is the duty of a parent to maintain a child, whether the child is in his/her custody, by providing the child with:-

- a) **accommodation, clothing, food and education,**
- b) as may be reasonable having regard to his or her **means and station in life.**

and that Section 93 LRA 1976 provides that:-

- a) The **primary obligation is on the Husband** to pay maintenance for the benefit of his child/children;



- b) The Wife has only a secondary obligation to pay or contribute where *“having regard to her means it is reasonable so to order.”*

The wife’s counsel further submitted that the quantum of maintenance awarded must also be sufficient to maintain the Mother and the Children in the same standard of living they enjoyed previously.

She cited the case of *Parkunan Achulingam v. Kalaiyarasy Periasamy* [2004] 7 CLJ 175 where it held when considering what constituted “maintenance”:-

“The term “maintenance” used in ss. 77 and 92 of the LRA aforesaid, should be construed widely as it signifies any form of material provision that will enable the wife and children to be placed in a position to enjoy the same standard of living as they did during the existence of the marriage. In



the case of Re Borthwick (deceased), Borthwick v. Beauvais [1949] Ch. 395 at p. 401, Harman J held:

*It is said that maintenance is the only thing you can look at. What does that mean? It does not mean that you can only give the dependent just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she live, and the money which she has in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. **Maintenance cannot mean only a mere subsistence.**”*



She also referred to the case of *Sivajothi a/p K. Suppiah v. Kunathasan a/l Chelliah* [2000] 3 CLJ 175, where it was held that:

“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.”.

And further that:-

“Maintenance does not only mean the food a wife puts into her mouth. It 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. Maintenance cannot mean only mere subsistence.”.

It was also held in the same case that:-

“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.”.



On the facts, we have an affluent family who has lived in prime locations, attended international school, having overseas holidays regularly eating out at expensive restaurants and hotels.

They are a family of 4 children and naturally expenses will be reflective of raising 4 upper middle class children. The mother had in her affidavits set out the lifestyle and standard of living of the family before separation.

This family has always lived in the premier neighbourhoods in Kuala Lumpur, in Bangsar, Desa Park City, Damansara Heights and in the high-end neighbourhood in Melbourne.

The mother will buy groceries for the family from various supermarkets in Bangsar such as Village Grocer, Cold Storage, BSC and Hock Lee's, TMC and also food from various outlets including organic and health food suppliers such as BMS Organics, Ban Joo Chinese herbs shop and Yolek vegetarian food.



The youngest daughter, Karly is still drinking milk ie, Isomil and Pediasure and wears Diapers which costs RM1,000 a month. The family usually shop at various malls and branded outlet such as Zara, Marks and Spencer, Metrojaya, Charles and Keith, Geox, Nike, Sketchers, Adidas and various boutiques at One Utama dan Mid Valley.

The children have always used good sportswear and shoes which require regular replacements due to wear and tear and also because they are growing up.

The family's entertainment and outings include eating out at various restaurants which include Delicious, Sushi Zanmai, TGIF, American Chillies, Organic Kitchen, Rakuzen, buffets at hotels, Opika, Italianies, Din Tai Fong, Purple Cane, Whick, Starbucks, Coffee Bean, Secret Recipe as well as going for movies, roller blading at BSC, Kids Zone, Scrap Booking, going to the climbing wall One Utama.



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The family had always enjoy services of a maid and also a nanny.

The mother therefore claimed the following for the 4 children:-

- Monthly Maintenance of RM34,000 a month;
- All educational expenses;

I have given careful consideration on the matter of maintenance taking into account sections 92 and 93 of the LRA and the various case laws cited.

For maintenance I am therefore giving the following orders:-

- a) the DH is to pay maintenance of RM2000/= per month for each of the 4 children until they reach the age of 18.
- b) that the DH pay RM4,200/= per month as rental for the accommodation.



- c) the the DH pay RM3,400/= for the salaries of the maid and the nanny.

- d) that the DH pay RM1,500/=for petrol, toll but the maintenance of the car is to be borne by the DH on production of receipts by the PW and DH is to pay PW within 2 weeks from the date of the receipt.

To summarise, I am giving the following orders:-

- 1) Bahawa Plaintiff, SEOW LEE ANN (no. KP: 740905-10-5290) diberikan hak jagaan, pemeliharaan dan kawalan terhadap anak-anak perkahwinan tersebut, KEITH TAN JIN RONG (No. KP: 000523-14-1209), KENRICK TAN JIN YAU (No. KP: 000523-14-1217), KELLY TAN KAI YEE (No. KP: 030702-14-1180) dan KARLY TAN KAI YEN (No. KP: 110114-10-1158) (selepas ini dirujuk secara terkumpul sebagai “Anak-anak tersebut”);



- 2) Bahawa Plaintiff dan Defendan diberi hak penjagaan (joint guardianship) bersama kepada Anak-anak perkahwinan.

- 3) Bahawa Defendan diberi akses kepada Anak-anak tersebut tanpa kehadiran Plaintiff pada setiap hari Rabu dari jam 7 petang hingga 9 malam dan pada setiap hari Ahad dari jam 10 pagi hingga 6 petang dan Defendan hendaklah mengambil dan menghantar balik kanak-kanak tersebut.

- 4) Bahawa Defendan membayar RM2,000/= sebulan sebagai nafkah bagi setiap orang anak perkahwinan sehingga mereka mencapai umur 18 tahun.

- 5) Bahawa Defendan membayar RM7,000/= sebulan sebagai nafkah Plaintiff sehingga Plaintiff berkahwin semula atau meninggal dunia yang mana yang lebih awal.



- 6) Bahawa Defendan membayar RM4,200/= sebulan sebagai sewa rumah kepada Plaintiff.
- 7) Bahawa Defendan membayar RM3,400/= sebagai gaji pembantu rumah dan pengasuh.
- 8) Bahawa Defendan membayar RM1,500/= sebulan sebagai wang minyak dan tol dan apa-apa penyenggaraan kereta yang digunakan oleh Plaintiff dan bagi tujuan ini, Plaintiff hendaklah mengemukakan resit penyenggaraan kepada Defendan dan Defendan hendaklah membayar dalam tempoh 2 minggu selepas itu.
- 9) Kesemua pembayaran-pembayaran di perenggan-perenggan 4, 5, 6, 7 dan 8 di atas dibayar oleh Defendan pada atau sebelum 7 haribulan setiap bulan bermula pada 7 haribulan Disember 2013 dan pembayaran



hendaklah dibayar secara terus ke dalam suatu akaun bank yang dipilih oleh Plaintiff tersebut.

- 10) Bahawa Defendan membayar untuk semua perbelanjaan-perbelanjaan pendidikan untuk anak-anak tersebut termasuk tetapi tidak terhad kepada yuran sekolah (termasuk di sebuah sekolah persendirian atau antarabangsa), semua aktiviti-aktiviti kurikular tambahan, tuisyen, buku-buku sekolah, alat-alat tulis, barang-barang pendidikan, sehingga Anak-anak perkahwinan mencapai umur 18 tahun.

- 10.1) Defendan akan membayar yuran atau sebarang perbelanjaan pendidikan yang secara terus kepada sekolah/kolej/universiti/pertubuhan pendidikan dengan serta merta selepas diisukan dengan suatu inbois dari sekolah/kolej/universiti/pertubuhan pendidikan tersebut.



11) Bahawa Defendan akan membayar untuk semua perbelanjaan perubatan, dental dan optikal Anak-anak tersebut termasuk tetapi tidak terhad kepada perbelanjaan perundingan, rawatan dan penghospitalan sehingga mereka mencapai umur 18 tahun dan sekiranya Plaintiff membuat pembayaran dahulu, maka Defendan hendaklah membayar semula kepada Plaintiff dalam tempoh 2 minggu selepas resit-resit dikemukakan.

12) Bahawa Defendan diberi akses dari jam 5 petang sehari sebelum perayaan Tahun Baru Cina sehingga jam 2 petang hari pertama Tahun Baru Cina dan peraturan ini akan berselang seli diantara Plaintiff dan Defendan dan bermula pada perayaan Tahun Baru Cina tahun 2014, dengan akses di atas diberi kepada Defendan dan kemudiannya berselang seli pada tahun-tahun berikutnya.

Bagi tahun-tahun dimana Defendan tidak mendapat akses pada perayaan Tahun Baru Cina, Defendan akan



diberi akses pada hari kedua Tahun Baru Cina bermula dari jam 10 pagi sehingga 6 petang.

- 13) Bahawa kos ditanggung oleh pihak masing-masing.

(NORAINI ABDUL RAHMAN)
Hakim
Mahkamah Tinggi Keluarga
Kuala Lumpur.

Tarikh: 22 NOVEMBER 2013

Counsel:

For the plaintiff - Seow Le Ann; T/n YN Foo & Partners

For the defendant - Tan Kevin; T/n Arifin & Partners