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1. [Tey Kok Wei v Then Swee Fong \(P\)](#)
[\[2019\] MLJU 1230](#)

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TEY KOK WEI v THEN SWEE FONG (P)

CaseAnalysis

[2019] MLJU 1230

Tey Kok Wei v Then Swee Fong (P) [2019] MLJU 1230

Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

CHOO KAH SING, J

PETISYEN PERCERAIAN NO. JA-33JP-981-09/2016

10 August 2019

Florence Toh (Willian, **Florence** & Partners) for the petitioner wife.
CW Yee (Vooi & Yee) for the petitioner husband.

Choo Kah Sing J:

DECISION

(Encl. 57)

Introduction

[1] This is an application (enclosure 57) filed by the petitioner wife seeking to vary a Decree Nisi dated 31.10.2016. Certain terms of the Decree Nisi have been previously varied by a Consent Order dated 3.7.2017 (hereafter 'the Consent Order'). (Note: *The date of the Decree Nisi printed as dated '17.9.2018' in para (a) in the enclosure 57 for the purposes of variation is wrong. It should be read as '31.10.2016'.*)

[2] The gist of enclosure 57 is that the petitioner wife was seeking for a court order to grant her the sole custody, care and control of her only child TLX (hereafter 'the child'), and the petitioner husband and/or his family members shall not be granted any right of access to the child.

[3] On 18.8.2019, this Court dismissed the petitioner wife's application, and on its own motion, this Court varied the Consent Order as it thought fit after evaluating the factual matrix of the case in the welfare of the child. The reasons for the decisions of this Court are set down as below.

The Background Facts

[4] The petitioners were married on 14.2.2014. In November the same year, the child was born. Currently, the child is 5 years of age. In 2016, the petitioners filed a joint divorce petition pursuant to [s. 52](#) of the [Law Reform \(Marriage and Divorce\) Act 1976](#) (hereafter 'the Act'). A decree nisi was granted by the court on 31.10.2016. The gist of the agreed terms in relation to the interest of the child is as follows:

- (i) Joint custody;
- (ii) The care and control of the child be given to the petitioner husband;
- (iii) The petitioner wife be given access to the child every day from 5.00 p.m. to 7.00 p.m. (hereafter 'the visiting hours'); and
- (iv) The petitioner wife is allowed to bring the child out not more than six hours once in a month other than the visiting hours.

[5] Half a year later, the petitioner wife filed an application to vary the agreed terms in relation to the interest of the child. The petitioner wife alleged that the agreed terms were entered into on a 'mistake of fact' and 'misrepresentation' in the joint divorce petition. However, the petitioners resolved the matter amicably by entering into a consent order. The main terms of the Consent Order dated 3.7.2017 in relation to the child were as follows:

- (i) There is no change to the issues of custody, care and control of the child;
- (ii) The petitioner wife's rights to the visiting hours or access to the child were varied to every Monday to Thursday from 5.30 p.m. to 7.30 p.m. and on Friday from 5.00 p.m. to Sunday 5.00 p.m. (hereafter 'the overnight access').

[6] After the Consent Order dated 3.7.2017 was entered into, the petitioner wife filed a second application to vary the Decree Nisi and/or the Consent Order. She again sought for an order of the court to grant her the sole custody, care and control of the child. However, the second application was withdrawn.

[7] This enclosure 57 filed on 12.5.2019 was the third attempt of the petitioner wife to vary the Decree Nisi. She again sought for a court order to grant her the sole custody, care and control of the child. In this third attempt, the petitioner wife sought for further order to prevent the petitioner husband and/or the petitioner husband's family members any access to the child.

Decision of the Court

[8] The petitioner wife's application was premised on [s. 96](#) of the Act to move the court to exercise its power to vary an earlier order for custody, care and control of a child on the grounds of 'misrepresentation' or 'mistake of fact' or that 'there has been any material change in the circumstances'.

[9] The petitioner wife affirmed three affidavits (enclosures 58, 62 and 64) in support of her application. In the first affidavit (encl. 58), the petitioner wife deposed that the purpose she filed this third application was that she was requested to do so by her daughter, the child. The petitioner wife has described the child as suffering from severe emotional and psychological harm to the extent the child is at the edge of breaking down. The petitioner wife even went on to state as follows:

"Sekiranya kita enggan menyelamatkan anak tersebut, kita akan secara tidak langsung membunuh jiwa anak tersebut dan kita akan menjadi penolong pembunuhan anak tersebut."

[10] In the petitioner wife's affidavit (encl. 58), she exhibited a 'Psycho-Educational Assessment Report' dated 3.6.2018 (exhibit 'P10') of the child and a follow-up one page report dated 3.4.2019 (exhibit 'P12'). Both reports are issued by a doctorate holder in educational psychology, Eva Wong, PhD. In encl. 62, the petitioner wife exhibited a third report dated 4.3.2019 (exhibit 'TSF-2') from the same Eva Wong. The one-page report (P12) and third report (TSF-2) were based on the same date of testing which was on 16.3.2019. It is baffling how the third report was prepared on 4.3.2019 when the testing was carried out on a later date on 16.3.2019.

[11] The date on the third report could be a typo error. The correct date presumably would be 3.4.2019. If that is the case, then the one page report and third report are the same, and the only difference is that the third report is an expanded version of the one-page report.

[12] This Court has studied the reports produced by the petitioner wife in relation to the child's emotional and psychological wellbeing. This Court observes as below.

[13] Firstly, the assessment was carried out to determine 'all areas of suspected disability related to the child educational need'; it was not an assessment of the child's emotional and psychological wellbeing. At page 2 of the report, it stated that it was a 'self-referred due to the emotional and psychological wellbeing of the child'. It was the petitioner wife who suspected the child was facing emotion and psychology disturbance.

[14] Secondly, the result of the assessment revealed that the child has an average score in her physical, cognitive and communication abilities which translate that these areas of development are within the range expected for her age group. Two areas the child scored below average were 'adaptive behaviour' and 'social-emotional'. With regard to 'adaptive behaviour', it was explained that the child 'has some difficulties in area of independent functioning'.

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which includes the ability to use current technology. With regard to 'social-emotional', it was explained that the child 'has some difficulties in expressing her needs, interacting with others, and adhering to societal norms.'

[15]If the score in the scale is 'Delayed', then it is necessary to take some form of action, such as, 'the need for further, more comprehensive evaluation by an expert in the field where the delayed classification was found, or by a more general child development expert such as a Child Psychologist or Paediatrician'.

[16]In the first report (exhibit P10), there was nothing distressing that required expert or special attention. The report concluded with the recommendation that the child 'needs more opportunity to learn to be more independent' and 'to have more outdoor activity and she should be encouraged for more circle time peers'. Based on the overall result of the first report, there was nothing alarming in respect of the development of the child's emotional and psychological wellbeing in June 2018.

[17]Thirdly, the one-page report dated 3.4.2019 (presumably this date is the correct date) which was prepared ten months after the first report revealed the same result as in the first report, i.e. the child scored below average in social emotional and adaptive behaviour. However, it was commented by the author that the child 'exhibited severe separation anxiety, the anxiety is more severe compared to the 1st assessment.' The one-page report concluded with the remark that the child 'needs for more assessment to address the psychological wellbeing'. This Court observes that in the earlier report, the same author who conducted the assessment did not mention of any obvious behaviour of 'separation anxiety'.

[18]This Court finds that the observation of apparent 'separation anxiety' by Eva Wong could be very much predisposed by the information provided by the petitioner wife for both the first report and the later one-page report. It was the petitioner wife who informed Eva Wong that the child grew up in 'a very aggressive environment' and the child 'witnessed the deterioration of the parent relationship'. In the one-page report, it was the petitioner wife who told Eva Wong that the child 'experienced severe emotional outburst after she witnessed the violence act of her father on her mother.'

[19]This Court observes that the remarks made by the author was not based on any independent assessment as to what was the cause of the child's anxiety (if any). It was rather a presupposed informed state of emotion of the child by the petitioner wife. Hence, this Court is doubtful as to the accuracy of the remarks made in relation to the increased 'separation anxiety' of the child by the author.

[20]This Court finds the contents of the third report more doubtful because the expanded portions, i.e. paragraphs 3 and 4, were added in later. This Court refers to a specific part of paragraph 3 which reads: *'From the description and input of LX's mother, LX has been living in confusion, she is forced to behaviour differently in two different household, as she cannot share about her joyful experience involving her mother while she is in his father's house; while she is in her mother's house, LX was noted with behaving very cautiously and gradually learn to compromise to everything even wrong acts.'* Firstly, the remarks was not made based on any assessment revealed in the first assessment held on 2.6.2018 nor was it done in the second assessment held on 16.3.2019. The information provided by the petitioner wife to the author is rather a self-serving statement. Secondly, the third report was exhibited in an affidavit affirmed on 2.7.2019 (encl. 62) which was filed after the first affidavit affirmed on 2.5.2019 (encl. 58) which exhibited the one-page report.

[21]There is a possibility the expanded version (third report) of the one-page report was written after the petitioner wife had gone back to ask her to modify the contents according to her needs for the purposes of this application in order to convince the court to grant her sole custody, care and control of the child.

[22]This Court after having carefully scrutinized the reports could not establish that the child is or was emotionally and psychologically tormented to the extent that the child needs to be removed from her father's care and control. Conversely, this Court finds that the care and control of the child should remain as per the status quo with the petitioner husband for the following reasons.

[23]Firstly, the petitioner husband has exhibited in his affidavit dated 17.6.2019 (encl. 59) an exhibit 'TEY-8' a Psychologist's Report dated 7.6.2019 from Gleneagles, Medini Hospital. The Psychologist's Report was prepared by a qualified psychologist Ms. R.R. Manjari. Two assessments were carried out by the psychologist on 30.5.2019 and 3.6.2019. The striking observation made by the psychologist is as follows:

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"6. According to LX her father and grandmother loved her, and they will not let the mother take her away from them. This is what LX calls 'love'.

7. She liked her paternal grandmother and her father, not her mother as the latter was very fierce. She is very fierce.

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10. LX did not like visiting her mother so often but would not mind visiting her once in 2 weeks.

11. LX did not want her mother to come back to her father. Her friends never asked her about her mother."

[24]The above observation by the psychologist in her report could be confirmed by this Court. On 18.8.2019, the child was brought to the Court by the petitioner husband. Initially, the child cried and did not want to come into the chambers together with the petitioner wife. A minute later, the child was brought into the chambers by her cousin sister (the petitioner husband's niece Tey Li Ting). The child clung tightly onto her cousin sister.

[25]The Court was rather surprised to witness the closeness displayed by the child with her cousin sister. After the child had calmed down, the petitioner wife was asked to come in. When the petitioner wife entered the chambers, the child suddenly felt apprehensive and did not respond to the petitioner wife's call; she turned her head away from the petitioner wife. The petitioner wife was then asked to be excused from the chambers. The petitioner husband was asked to come into the chambers. The child responded to her father's call and went to cling on to her father. The petitioner husband was then asked to be excused. The child was left alone with her cousin sister in the chambers together with a lady court interpreter, one Senior Assistant Registrar and myself. A minute later, the child began to feel more at ease. She came to me when asked to do so. The child could communicate and comprehend well in mandarin language. The child was petite for her age. She was a very timid and shy little girl. She spoke softly. She was asked why she did not go to her mother when the petitioner wife came in, and she answered, 'I am scared of my mother.' She whispered in my ear that her mother was very fierce and always beat her when she did something wrong.

[26]This Court did not take the beating allegation seriously because children are often unable to differentiate between beating and chastising at that young age. However, this Court noted the child's comment that the petitioner wife was a very fierce person which was exactly what was recorded in the Psychologist's Report. When asked whether she would like to stay with the petitioner wife, the child replied, 'No', firmly. Then I asked her why, she replied, 'Mommy always scold me.' When I casually suggested to her to stay with the petitioner wife, the child began to react with fearful emotion and tears welled up in her eyes. I changed the topic immediately to distract her emotion. It took a while for the child to behave normally again. What transpired in the chambers verifies the findings in the Psychologist's Report. The Psychologist's Report has revealed an accurate account of the child's emotion towards the petitioner wife.

[27]Secondly, this Court could not find any alarming situation in relation to the child's emotional and psychological wellbeing other than that she felt fearful towards the petitioner wife. Likewise, there is nothing in the Psychologist's Report that indicates there is such serious concern for the child's emotional and psychological wellbeing other than what this Court has witnessed, which is the child's emotion is trapped in between the relentless bickering of the two parents even after the divorce. The bickering is evident in the numerous police reports lodged by the petitioner wife (see exhibits 'P-4A', 'P-5', 'P-6', 'P-7' 'P-8', 'P-9' of encl. 58) and petitioner husband (see exhibits 'TEY-5' and 'TEY-6').

[28]The constant hardship faced by the petitioner wife when accessing the child could not be a reason for this Court to vary the order for custody, care and control to be given to the petitioner wife. The petitioner wife could have cited the petitioner husband for contempt in a committal proceeding in the event the petitioner husband failed to adhere to the court order or hinder her right of access to the child. The petitioner wife is required to produce more than mere conjecture to prove the child has suffered emotional and psychological harm. She has to demonstrate that any harm suffered was solely caused by the petitioner husband in order to convince the court to vary the order for custody, care and control to be given solely to the petitioner wife.

[29]Thirdly, the reports adduced by the petitioner wife are prepared by an educationist Eva Wong who specialises

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in educational psychology and holds a doctorate degree in that specific field. As for Ms. R.R. Manjari, she is an Applied Psychologist. This Court is of the opinion that the report produced by the petitioner husband is more relevant and had captured the essence of the emotion and psychological wellbeing of the child who is facing 'separation anxiety'. Whereas, the reports produced by the petitioner wife assessed the child's physical, adaptive behaviour, social-emotional, cognitive and communication levels, and focused on the educational development of the child.

[30]Fourthly, the petitioner wife had at the onset alleged that the application was made upon the request of the child. This allegation is seriously questionable after the Court has witnessed the child's demeanour and behaviour towards the petitioner wife in chambers, coupled with the observations made in the Psychologist's Report as exhibited by the petitioner husband.

[31]Lastly, with regard to the averments of 'mistake of fact' and 'misrepresentation' in relation to the presumption of law in [s. 88\(3\)](#) of the Act and the lawyers' advice, this Court is not convinced that the petitioner wife was ill-advised by the previous lawyers who had represented her in the joint divorce petition. In the joint divorce petition, the petitioners were represented by a common firm of solicitors Messrs. S.K. Song. In the first application to vary the Decree Nisi, the petitioner wife was represented by Tetuan Teo Poh San assisted by counsel Cik Bharathi a/p Krisnnan. In the aborted second application to vary the Decree Nisi, she was represented by Tetuan WK Wong. Finally, in the third application (enclosure 57), she was represented by Tetuan Willian, ***Florence*** & Partners. The petitioner wife has persistently attempted to vary the Decree Nisi through different sets of solicitors. She could not have been ill-advised by all the previous solicitors who have acted for her.

[32]The submission of 'mistake of fact' or 'mistake of law, or 'misrepresentation' is an afterthought argument. As far as this Court is concerned, the facts deposed in the affidavits of the petitioner wife could not sustain any finding of 'mistake of fact' or 'misrepresentation' within the meaning as envisaged in [s. 96](#) of the Act or that there 'has been a material change in the circumstances'.

[33]The hardship the petitioner wife faced in exercising her right of access to the child could not be considered as 'a material change in the circumstances'. Likewise, the petitioner wife could not establish a material change in the circumstances in respect of the child's emotional and psychological wellbeing. The child could have suffered 'separation anxiety' due to the separation of the parents which is a common problem in a divorce scenario as noted by the Psychologist. This problem could be overcome through the passage of time and the child will outgrow such anxiety. The recommendation suggested by Eva Wong, like enrolling the child to Art Therapy Programme, or the whole list of recommendations suggested by the Psychologist in her report could help the child deal better with such anxiety in the process of growing up, provided that both parents are willing to work together. Unfortunately, the parties could not see the problem the child is facing. The petitioner wife insisted the petitioner husband and his family members were to blame for the child's emotional and psychological wellbeing.

[34]In summing up, this Court finds the application did not establish that the child's emotional and psychological wellbeing has seriously deteriorated to an alarming level as claimed by the petitioner wife. The reports the petitioner wife exhibited do not support her claims. There is no reason for this Court to vary the existing order allowing the care and control of the child be given to the petitioner husband, and the parties shall continue to have joint custody of the child.

[35]With regard to the petitioner wife's right of overnight access, this Court is minded to review the overnight access right. Two important factors compelled this Court to review the right of overnight access to the child.

[36]Firstly, the petitioner wife has been having overnight access to the child in the past two years since the Consent Order was entered into on 3.7.2017. On all accounts, the child should have reacted normally when in the presence of the petitioner wife. However, what was stated in the report by the Psychologist and witnessed by this Court on 18.8.2019 speak otherwise.

[37]The child wanted to distance herself from the petitioner wife in fear that she could be scolded. The child's behaviour and reaction towards the petitioner wife suggests that the child does not want to spend so much time with the petitioner wife. This logical deduction is supported by the Psychologist's Report which reads the child 'did not like visiting her mother so often.' Placing the child in constant fear is very unhealthy for her emotional and psychological development. She has expressed her feelings and wishes before this Court. Her teary-eyed expression when the Court suggested that she stays with the petitioner wife demonstrates to the Court that the child is not willing to spend the night with the petitioner wife every weekend.

[38]Secondly, this Court was and still is worry of the petitioner wife's state of emotion. This Court observed that she was emotionally high with distress and depress state of mind. Her perspective of every events was very negative.

[39]The two factors as elucidated above have prompted this Court to exercise its power to vary her overnight access to the child to daily access from Monday to Friday from 5.30 p.m. to 7.30 p.m., and from 9.00 a.m. to 6.00 p.m. every Saturday. The reason this Court thought fit to vary the terms is to allow the petitioner wife to have some breathing space to deal with her own emotional wellbeing. Likewise, it is to reduce the time the child spends with the petitioner wife in order to lessen the emotional stress of the child. This is just a temporary measure to soften the distress and emotional state of both the petitioner wife and the child. The Court is of the view that the temporary measure is for the best interest of the petitioner wife and for the best welfare of the child.

Conclusion

[40]For the reasons stated above, this Court dismissed the petitioner wife's application and varied the Decree Nisi accordingly in relation to the petitioner wife's right of access to the child. This Court further ordered no order as to costs.