

ORIGINATING SUMMONS NO.: S8-24-53-2008

AND

GROUND OF JUDGMENT

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Enclosure 48

The Plaintiff vide the Summons in Chambers in enclosure 48 sought to vary the Orders of 3.12.2009 and also applied for further orders as follows:

- a) That the Plaintiff be permitted access of the child on an alternate Friday 6 p.m. to Sunday 8 p.m.
- b) That the Plaintiff be granted access of the child for half the duration of final school term holidays beginning from the first day of the holidays.
- c) That the Plaintiff be permitted to take the child for holidays abroad and for the Defendant to furnish all necessary travel documents of the child to facilitate travel.
- d) That the child be permitted to interact with the Plaintiff's 2 daughters.
- e) That the Orders other than 1.2 and 5 in the Order dated 3.12.2009 be maintained.

Decision of the Court on enclosure 48

On 23.3.2011, after hearing both parties, I made the following decision:

Prayers (a) and (b) : allowed.
Prayer (c) : not allowed.
Prayer (d) : allowed.
Prayer (e) : allowed.

Costs to be borne by the Plaintiff.

Appeal

The Defendant's appeal is only regarding prayers (a), (b) and (d).

Grounds for my decision

The matter of guardianship and custody of an illegitimate child is governed by s.24(d) of the Courts of Judicature Act 1964 and the English common law (see s.27 of the Civil Law Act 1956), and not by the Guardianship of Infants Act 1961 (see **Re Balasingam & Paravathy, Infants Kannamah V. Palani** [1970] 2 MLJ 74), or the Law Reform (Marriage and Divorce) Act 1976 (see my previous Judgment in **Yap Lee See V. William Tay & 2 Ors** [2011] 1 CLJ 793).

Under English common law, the natural mother has the right of guardianship and custody of the illegitimate child. However, in determining whether to grant access to the child by the putative father, the paramount consideration should be the welfare and best interests of the child.

In this case, when the Court gave the Orders on access on 3.12.2009, the Court also gave liberty to both parties to apply for variation of the same Order.

Under the Order dated 3.12.2009, the Court allowed very elaborate terms of access to the child by the Plaintiff, inter alia, as follows:

- 1.1 : every Monday and Thursday from 6 p.m. to 9 p.m.
- 1.2 : alternate weekends from Friday 6 p.m. to Saturday 8 p.m.
- 1.3 : Christmas on alternate years from Christmas Eve 6 p.m. to Christmas day 8 p.m.
- 1.4 : Chinese New Year on alternate years from the eve at 6 p.m. to the first day of Chinese New Year at 8 p.m.
- 1.5 : the child's birthday on alternate years from the day before the birthday at 6 p.m. to the birthday at 8 p.m.
- 1.6 : reasonable access to the child through the telephone on any day at a reasonable time from 8.30 a.m. to 8.30 p.m.

The Plaintiff is also prohibited from permitting any interaction of the child with his wife or 2 daughters.

From the above access Order, it is clear that right from the beginning the Court allowed very liberal and reasonable access to the child by the Plaintiff, even though the child is an illegitimate child. I note from the Plaintiff's Affidavit that he is very keen to spend as much time as possible with the child. Both father and son appear to have a close relationship. The Plaintiff is also making efforts to foster a bond between the child with his 2 legitimate daughters i.e. the half siblings of the child.

It is my firm belief that the child is very much loved by the Plaintiff and the Plaintiff desires to spend more time with the child. I think it is for the welfare and best interest of the child to be allowed to see his father more often even if both his parents were never married. The child would develop better with not only a mother figure, but also a father figure, more so when the child is a boy. The child is not responsible for the fact that he was born out of wedlock and should not be punished further by being deprived of spending more time with his biological father who loves him and wishes to spend even more time with him.

Hence, I decided to allow the extra access sought by the Plaintiff in prayers (a) and (b). In fact, what I allowed is nothing new. It is consistent with most of the other access cases that I have decided on the basis that , wherever possible, the child should not only spend a lot of time with the parent having custody of the child, but also with the parent who is deprived of custody of the child. In my view, the child will develop better since he has the benefit of the love and nurture of both parents. It is fortunate for the illegitimate child in this case that the Plaintiff wants more access to the child, rather than being indifferent to or neglecting the child. The Court therefore encourages such initiative for more access by the father for the

sake of the welfare of this child. Thus, in prayer (a) I increased the alternate weekend access by an extra day i.e. from Friday 6 p.m. to Sunday 8 p.m., instead of ending access on Saturday 8 p.m. In prayer (b) I granted additional access so that the child can spend half of his final school term holidays with his biological father, the Plaintiff.

In the Order of 3.12.2009, the Court did not allow the Plaintiff to cause any interaction between the child and his 2 daughters. The Plaintiff found it difficult to comply with the condition. This is because his wife and 2 daughters reside in Canada and if they come back to Malaysia it poses logistical problems to the Plaintiff to have to separate the child from his 2 daughters. It would not be practical or realistic to expect the Plaintiff to accommodate his 2 daughters in a hotel if the child is around in his house at that time. With utmost respect to the previous learned Judge who did not allow any interaction between the child and the Plaintiff's 2 daughters, I am of the opinion that after 15 months from the Order dated 3.12.2009, a lot of tension between the 2 parties would have diffused by now, and both parties have got on with their lives and have already established a routine for access to the child. It is now the appropriate time to vary the Order and grant more access for the welfare and best interests of the child. It is good for the child to foster a healthy relationship and bond with his half siblings. It would be totally unreasonable to shut the child out from any interaction whatsoever with his 2 half sisters.

"Access is the basic right of the child, rather than the parent" [as per Zainun Ali J. (as she then was) in **Leong Sam Moy V. Low Chee Thiam** [1997] 2 CLJ Supp 212 at page 214].

The Court cannot allow the personal hang-ups of the Defendant to shut out the child from further access by the Plaintiff since such access will be beneficial for the full and harmonious development of the child's personality, if he is allowed to grow up in a family environment, in an atmosphere of happiness, love and understanding (see the Preamble to the Convention on the Rights of the Child).

The Defendant is aggrieved that the Plaintiff, at one time, did not comply with the Court's Order regarding maintenance and access. It is open to the Defendant to initiate committal or other enforcement proceedings against the Plaintiff for non-compliance. However, the non-compliance by the Plaintiff, in the past, should not be held against the child who would certainly grow better with more access by his father.

For the above reasons, I therefore ordered accordingly.

Dated 9 May 2011.

-sgd-

(DATIN YEOH WEE SIAM)
Judicial Commissioner
Family Court, Civil Division,
High Court Malaya, Kuala Lumpur

1. Mr. Francis Pereira of Messrs Francis Pereira & Shan, Counsel for the Plaintiff.
2. Encik Mohd. Khairul Khailani Rakmad of Messrs Zahir Razak & Co., Counsel for the Defendant.

Cases referred to :

1. **Low Swee Siong V. Tan Siew Siew** [2010] LNS 704, [2010] MLJU 1152.
2. **Legasri Purana Chandran V. Sreepathy Ganapathy Krishnan Iyer** [2010] 8 CLJ 208.
3. **Sivajothi K. Suppiah V. Kunathasan Chelliah** [2006] 5 CLJ 318.
4. **Wong Phila Mae V. Shaw Harold** [1991] 2 MLJ 147).
5. **Ananda Dharmalingam V. Chantella Honeybee Sargon (P) and other appeals** [2009] 2 MLJ 1.