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INTRODUCTION

His Royal Highness Sultan Azlan Shah's forays into the field of family law have not been as extensive as his involvement in other areas of the law. His few reported decisions however have left their mark particularly as there were hardly any appeals against his judgments as a High Court judge. Although these judgments are not binding and are open to challenge in future cases they are a valuable guide to various aspects of considerable importance in the field of family law.

His Royal Highness's first reported case on family law and perhaps his most innovative decision was the case of *Roberts alias Kamarulzaman* v *Ummi Kalthom*[1] which was a claim by a divorced husband for a

[1][1966] MLJ 163.

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share in immovable property acquired jointly during the marriage and registered in the name of the wife. The claim was based on a Malay custom that *harta sepencarian* would be divided between spouses in the event of a divorce, the divison having to be made during the lifetime of the spouses. *Harta sepencarian* according to *adat* was property acquired during a marriage by the joint effort of spouses. His Lordship (as he then was) examined several precedents and outlined the practice in the different states of Malaysia. It was quite apparent from His Lordship's (as he then was) review of the law in force, that Malay *adat* was recognised as forming part of the law of the land, that claims based on the *adat* had been enforced previously, that most claims were made by wives who were usually awarded either a half-share or a one-third share depending on whether they had contributed towards the purchase of the property. The case before His Lordship (as he then was) was different in that it involved a claim by a husband who was not a Malay but a convert to Islam. Could he benefit from a custom that, strictly speaking, did not apply to him? His Lordship (as he then was) held that the *adat* applied to the parties in the case and awarded the husband a half-share in the property.

His Royal Highness' manifest desire was to do justice in every case. To achieve this he was even prepared to depart from established practice. One example is the case of *Nagapushani* v *Nesaratnam,*[2] in which a wife sought the return of property which she alleged had been her's and which she had been forced to transfer to the husband who subsequently transferred it to his mother. The ungallant husband denied ever marrying the plaintiff. As the existence of a valid marriage was vital to her claim, the plaintiff was put to the trouble of proving the marriage by calling as witnesses friends and relatives who had either arranged, helped at or attended the wedding ceremony. She was unable however to call the priest who solemnised the marriage or any other expert to testify as to the validity of the marriage. All previous cases involving Hindu customary marriages had required such expert testimony. His Lordship (as he then was) however held that the evidence adduced was sufficient to establish a valid marriage. This decision introduced a much needed change as it was becoming increasingly difficult to get expert opinion with regard to valid Hindu marriages.

His Royal Highness' judgments are a pleasure to read as they are well organised and his views well expressed. The exemplary manner in which he sets out the facts of the case, the issues to be decided by the court and the legal principles to be applied makes for easy understanding of the law. In *Yan Kian Sin* v *Lim Guat Seong*[3] His Royal Highness enunciated with clarity the principles which should guide a court when determining whether cruelty has been established in a divorce case. In

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[2][1970] MLJ 8.

[3]4 MC 68.

Rajalachmi v *Sinniah*[4], His Royal Highness had to interpret the phrase "living in adultery" found in section 5(2) of the Married Women and Children (Maintenance) Ordinance, 1950. After a lengthy but lucid discussion, His Lordship (as he then was) concluded that 'occasional lapses from virtue' did not fall within the meaning of 'living in adultery'; therefore a wife's isolated act of adultery would not cause her to lose her right to maintenance. If this view suggests that His Royal Highness (as he then was) is a liberal feminist, his decision in *Ang Siew Hock and Others* v *Ang Choon Koay*[5] immediately denies it. In *Ang Siew Hock's* case, His Royal Highness decided that the family house which had been placed in trust for the use of the children and decendants of the testator could only be enjoyed by the male issue and their decendants. This refusal to give equal rights to the female heirs could well be questioned. It should be remembered however that His Royal Highness was applying Chinese custom as there was ample evidence that that, in fact, was the intention of the testator. The decision therefore was correct even though its effect may not be desirable.

All His Royal Highness's judgments seem to be well researched with references to many precedents. His Royal Highness's high regard to English decisions however, sometimes led to the application of English authorities which are not binding on our courts. The result would be a decision that is proper insofar as the English position is concerned but not quite supportable from the point of view of our specific legislation and in the light of our peculiar circumstances. The paradigm is the case of *Re Balasingam and Parvathy, Infants,*[6] a custody application by a mother of two illegitimate children who were in the care of the putative father. His Lordship (as he then was) relied heavily on English cases which dealt with corresponding English legislation and failed to consider an important difference between the two statutes. His Lordship (as he then was) therefore mistakenly concluded that the Guardianship of Infants Act, 1961 could not be applied to illegitimate infants. The significant difference between the English statute and our local law is that the latter, in the very first section, makes indisputable reference to illegitimate children. This, together with the fact that the Act was extended to Muslim children in order to provide for uniformity of the law throughout the country, must necessarily mean that it was intended to include illegitimate children. Any other interpretation would lead to the exclusion of a small minority of children and a consequent multiplicity of laws relating to the guardianship and custody of children. The decision itself would not have been so detrimental if His Lordship (as he then was) had assumed jurisdiction under section 24 of the Courts of Judicature Act, 1964. Unfortunately, His Lordship (as he then

[4][1973] MLJ 133.

[5][1970] MLJ 149.

[6][1970] 2 MLJ 74.

was) restricted the jurisdiction under section 24 to jurisdiction under the Guardianship of Infants' Act, 1961 only. This limitation of the court's powers was quite unwarranted especially as section 27 of the Civil Law Act, 1956 enables the courts to administer the English law in cases where there are no local provisions. If the Guardianship of Infants' Act 1961 does not apply to illegitimate children, then the English law must. The jurisdiction to hear the case must lie in the Courts of Judicature Act, 1964. Perhaps this is an opportune moment to call for the reform of the Guardianship of Infants' Act, 1961 to provide *inter alia* a clarification of the scope of its application.

The other two custody cases that His Royal Highness was involved in were dealt with far more satisfactorily. The judgments in *Teh Eng Kim* v *Yew Peng Siong,*[7] and *Mahabir Prasad* v *Mahabir Prasad*[8] were delivered by His Royal Highness on behalf of the Federal Court, the latter in his capacity as Chief Justice of Malaya. The infinite care with which the facts of the cases were weighed reflects His Royal Highness's concern for the welfare of the children, an attitude that is most commendable.

DECISIONS AND COMMENTS

DIVORCE: CRUELTY

Yan Kian Sin
v
Lim Guat Seong

[1966] 4 MC 68 High Court, Kuala Lumpur

Cases referred to:-
(1) *Gollins* v *Gollins* [1963] 2 All ER 966.
(2) *Bater* v *Bater* [1951] P 35.
(3) *King* v *King* [1953] AC 124, 148-149.

RAJA AZLAN SHAH J (delivering oral judgment): This is a husband's petition for divorce on the ground of cruelty. The wife cross-petitioned for divorce on similar ground. In addition, she claimed custody of their daughter of the marriage, Nancy Yan Lian Shi, and maintenance for the child and herself.

The husband is a police constable. On July 30, 1960 he married the wife in the Registry of Civil Marriages, Kuala Lumpur, under the provisions of the Civil Marriage Ordinance, 1952. Thereafter they lived and cohabitated at various places, and finally at Police Quarters, Birch

[7][1977] 1 MLJ 234.

[8][1982] 1 MLJ 189.

Road, Kuala Lumpur. There are two children of the marriage, Yen Seng Boo, a son who died in June 1964 at the age of two years, and Nancy Yan Lian Shi, a daughter, born in February 1961.

The husband relied on eight alleged acts of cruelty while the wife alleged that the husband had committed at least six distinct acts of physical violence against her which resulted in her leaving the husband in November 1965.

It is axiomatic that a comprehensive definition of the matrimonial offence of cruetly is not feasible. Acts of cruelty, like acts of negligence in the law of tort, are infinitely variable. Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb, or health, bodily or mental: see *Gollins* v *Gollins*[1].It is therefore a question of fact and degree whether cruelty is established; the particular individuals concerned and the particular circumstances of the case must be taken into account rather than an objective standard.

Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt: see *Bater* v *Bater*[2]. It is therefore in the light of that onus and standard of proof that the credibility of the witnesses who gave evidence before me must be determined.

According to the husband, the unhappy event in their married life started in February 1964, that is, after four years of married bliss, when there was a quarrel between them and the wife bit him on the left upper arm and on the chest. In cases such as this, the difficulty arises as to the nature and origin of the quarrel, for the husband did not seem to clarify this point. It was almost in the same vein that the husband charged the wife with biting his right little finger in April 1964. All he did say was that there was a quarrel and she bit him. The wife, on the other hand, admitted that she did bite the husband's arm and finger, but claimed that she had done that in order to release herself from the husband's hold when he assaulted her. The husband further charged the wife with cutting all his clothes with scissors, leaving only the clothes he was wearing. To that, the wife denied and charged him with having cut her clothes with scissors. It therefore resolves itself on the factual question as to who to believe.

Next, the husband relied on what I will term the Malacca incident. It happened when the husband was keeping watch over his late father's coffin. That was in February 1965. He charged the wife with picking a quarrel with him in the early hours of the morning and spitting at his face in the presence of his relatives and guests, thus belittling him. The husband's elder brother, who was called by him to give evidence, testified that there was a quarrel between them in the rear portion of the house. That was all he said. The wife's version was this. She said that the husband was outside the house gambling at *mahjong*. She called him to the rear portion of the house and told him that it was unbecoming of him to gamble when his late father's body

was still in the house. According to her, he told her that she should not control him and that he could do what he liked. He then slapped her twice. She denied spitting at him. One point in her favour was that she called the husband to the rear portion of the house. That was admitted by the husband. If she was malicious she could have picked a quarrel at the *mahjong* table. Anyway, the husband denied gambling. This again is a factual question.

A further allegation against the wife was that she ill-treated their son. An instance of ill-treatment relied by the husband was that the wife objected to the child sleeping with them in the same double-bed but instead had placed the child on the floor next to their bed. Another serious charge against the wife was that she caused the death of the boy. The brother seemed to corroborate that there were black marks on the buttock of the child when he visited the wife one day. He also said that his mother shed tears when she saw her grandson sleeping naked on the floor. The wife's father was called by the husband to give evidence. He said that the parties quarrelled frequently when they lived with him. He also said that each of them complained to him that the other assaulted the boy. Each of the spouses denied assaulting the child. The wife's explanation as to how the child came by his death was that he fell down from a table.

The husband further charge the wife with having done something to cause her abortion. The wife denied that. She said that she was unwell when she was six weeks pregnant. She bled. She then went to hospital where she was examined by Dr Bhupalan. The doctor distinctly said that there was no external sign of interference. To my mind, the accusation was not well-founded, and to accuse a wife of causing an abortion is, to my mind, as cruel a charge as a husband can bring against his wife. There is not a shred of evidence worthy of consideration.

Lastly, there was what I may call the midnight incident on November 18, 1965. The husband alleged that the wife woke him up in the middle of the night and scolded him. She accused him of being a useless person and she was alleged to have said that if the husband so desired he could draw up a separation agreement, to which the husband replied that if she did not wish to live with him she could leave the house. Then there was the allegation that the wife threw things at him and a quarrel ensued which resulted in the neighbours being awakened by the noise. The wife, on the other hand, said that that episode started when the husband told her that he wanted to take a mistress and she objected; the result was a quarrel, and it ended with the wife leaving the house with her daughter.

In addition to the above incidents, the husband claimed that the wife constantly quarelled with him, used abusive language, and refused to cook food for him. All that was denied.

A summary of the husband's charge against the wife is therefore as follows. She had used physical violence on him on at least two occasions, damaging his clothes on one occasion, insulting him at his father's funeral in the presence of his relatives, ill-treating their son and causing his death, causing abortion to herself, constant quarrels

leading to the midnight incident of November 18, 1965, using abusive language to him, and finally refusing to cook his dinner.

With regard to the charge of physical violence, it is hard to believe that in view of the circumstances prevailing it was the wife who sparked off the quarrel resulting in her biting the husband. If she was so aggressive as the husband wished this court to believe, I have no doubt that she could well afford to inflict injuries on him by means other than biting him. It must be realised that they were living in Police quarters with some fifty odd families in one building, and their neighbours could not fail to notice such acts of violence if she was as evil as the husband would have me believe. I believe her when she said that the quarrel started when she accused her husband of associating with the other woman, whereupon he assaulted her and she in turn bit him in order to free herself from his hold. The accusation that the wife had damaged his clothes cannot be upheld since there is no evidence to substantiate it. It is true, and I accept it as a fact, that there was an argument between the spouses at Malacca, but in view of the nature of the evidence adduced by the husband, I cannot bring myself to the conclusion that the wife had deliberately insulted the husband in the presence of his relatives. The fact that the incident occurred in the rear portion of the house does indicate the probability that the wife was trying to save the husband's face by leading him away from the scene at the *mahjong* table to advise him against gambling. With regard to the allegation that the wife ill-treated the son, it is sufficient to ask this single question. Why is there no allegation of ill-treatment against the daughter? In the absence of such an allegation is it probable that the wife would have committed such alleged acts of violence against her own flesh and blood? I accept the evidence of the brother that he saw black marks on the child's buttock. But that piece of evidence is negatived by the father-in-law's evidence that each of them had complained to him that the other had assaulted the child. Then there is the evidence of the grandmother who had shed tears on seeing the child sleeping naked on the floor. It is common knowledge that grandparents pamper their grandchildren too much. That is no doubt due to human failings. Is the grandmother's standard to be accepted as evidence of cruelty? I think not. Assuming that the wife had neglected that child, is that evidence of cruelty against the husband? My understanding of the law is that in the case of conduct not directed at the husband, neglect of a child is not cruelty unless done for the express purpose of wounding the husband's feelings or done in circumstances which the wife must know are likely to cause injury to the husband. There is no such evidence towards that direction. The cause of the child's death cannot reasonably be imputed to the mother for the pathologist had said that death was most probably caused by a fall, a probability consistent with the mother's story. That has not been challenged. The accusation of abortion has not been substantiated. Nor was the allegation of using abusive language or refusing to cook for the husband. What remains is the admission of the wife that she bit the husband on two occasions in circumstances which would amount to provocation. Looked at from the wife's point of view, is the wife's

conduct wilful and unjustifiable, or does it merely show the development of her character in a particular way short of cruelty? Acts which appear on the surface to be unjustifiable may in the particular circumstances of the case be justified by the petitioner's own conduct and the amount of provocation which he (or she) has offered to the respondent. That aspect of provocation was discussed by the House of Lords in *King* v *King*[3] where Lord Asquith of Bishopstone pointed out that such questions are always questions of degree and that the court must bear in mind the intensity and degree of the respondent's conduct whilst making allowances for the intensity and degree of provocation offered by the petitioner and for all other relevant circumstances. Considering the impact of the husband's conduct upon the mind of the wife and after weighing all the incidents and quarrels between them from that point of view, I am of the opinion that she was provoked by the conduct of the husband. Her conduct in the circumstances cannot be said to be unforgiveable. To my mind, the case boils down to nothing more than the case of two people with incompatible temperaments, and this court has neither the power nor the inclination to deal with mere unhappiness of ill-assorted marriages. The husband's petition is therefore dismissed with costs.

The wife's cross-petition is based on physical violence committed on her on at least four occasions. In October 1962 she alleged that she was assaulted by the husband. There is corroboration of her story in the nature of the medical report No 3359/62 which states that she sustained a lacerated wound on her middle finger at the terminal phalanx — medical aspect (Exhibit D6). She said she sustained that injury when she warded off the husband's blow with an aerated water bottle. On April 29, 1964 she was assaulted by the husband and received the following injuries (Exhibit D4): left side of face (erythema of skin cheek and temporal region), bruise about $^1/_4$" diameter corner (outer) left eye, back of neck and back just below root of neck, right side of neck, eythema with petechial haemorrhages, right arm scratches, left ear, no discharge seen. On June 14, 1965 she sustained a bruise $^1/_2$" in diameter on the dorsum of her right hand (Exhibit D5). On February 27, 1963 she sustained three abrasions each $1^1/_2$" long on her chest, abrasions on dorsum of right hand, left front elbow joint, $^1/_2$" long. Dr Yu Kwo Wei corroborated that. She alleged that she was assaulted at Ulu Yam Bharu by the husband when he learned that she had spoken to the father of 'the other woman'. Finally, there was the midnight incident of November 18, 1965 to which reference has been made earlier in the judgment. Those allegations have not been changelled. In my view, these acts of violence are sufficiently grave as to cause and did cause physical injury to the wife as to amount to legal cruelty. That is sufficient ground to entertain her petition for divorce. I also award her custody of the daughter and costs of the suit. There will be an order for maintenance in respect of the daughter in the sum of $40 per month with effect from November 1, 1966.

Petition dismissed. Cross-petition allowed.

KK Lam for the petitioner.
G Tara Singh Sidhu for the Respondent.

Note

This was a petition and cross-petition for divorce, both on the ground of cruelty under the now-repealed Divorce Ordinance, 1952. As cruelty *per se* is no longer a ground for divorce, the observations made in this case with regard to the proof of cruelty are no longer applicable.

CUSTOMARY LAW
(a) *Harta Sepencarian* — division of matrimonial property on divorce of Muslims

Robert alias Kamarulzaman
v
Ummi Kalthom

[1966] 1 MLJ 163 High Court, Kuala Lumpur

Cases referred to:-
(1) *Hujah Lijah binte Jamal* v *Fatimah binte Mat Diah* [1950] MLJ 63.
(2) *Teh Rasim* v *Neman* (Perak Supreme Court Suit No 232 of 1919) (1937), 15/1 JMBRAS 18.
(3) Wan Mahatan v *Haji Abdul Samat* (Ipoh Civil Appeal No 27 of 1925) (1937), 15/1 JMBRAS 25.
(4) *Re Elang, Re Kulop Dego and Lebar* v *Degor Niat* (1937) 15/1 JMBRAS 48.
(5) *Wan Nab* v *Jasin* (Kedah Civil Appeal No 37 of 1922) (1937), 15/1 JMBRAS 20.
(6) *Habsah binte Mat* v *Abdullah bin Jasoh* [1950] MLJ 60.
(7) *Laton* v *Ramah* (1927), 6 FMSLR 116, 128; 15/1 JMBRAS 35.
(8) *Re Noorijah* (Selangor Civil Appeal No 44 of 1934) (1937), 15/1 JMBRAS 59.

RAJA AZLAN SHAH J: The question for determination which in the precise form in which it comes before me can be formulated as follows. It is whether a Muslim divorced husband can claim to a half share as *harta sapencarian* of immovable propertly jointly acquired by both spouses during the coverture of their marriage but registered in the name of the wife.

The latest exposition of law on *harta sapencarian* was judicially considered by Briggs J in 1950 in *Hujah Lijah bte Jamal* v *Fatimah bte Mat Diah.*[1] He defined it as 'acquired property during the subsistence of their marriage of a husband and wife out of their resources or by their joint efforts'. After stating that 'on full consideration of those cases and of the views of the learned author' in the valuable treatise of Taylor on 'Malay Family Law' *Part 1 of Volume XV of The Journal of the Malayan Branch, Royal Asiatic Society* (May 1937), the trial judge said at page 64:

> ....I think there can be no doubt that the rules governing *harta sapencarian* are not a part of Islamic law proper, but a matter of Malay *'adat'*.

And in a later passage:

> In view of the clear recognition of *harta sapencarian* both in various States and by the courts, I am prepared to hold that the rules governing it now form part of the general law of the State....

It is desirable to discuss the facts of that case at a later stage, but for the moment I shall endeavour to state the position of *harta sapencarian* in the various States of Malaya in general and in the State of Selangor in particular.

In Perak the question of *harta sapencarian* was set at rest by a Perak State Council Minute dated the 18th January 1907, which declared and ordered to be recorded:

> that the custom of the Malays of Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties or one of them during marriage, is to adopt the proportion of two shares to the man and one share to the woman and that gifts between married persons are irrevocable either during marriage or after divorce.

Kathis are called in as advisers on principle where claims to such property are dealt with by the court or Collectors of Land Revenue in the case of land registered in the Mukim registers. In *Teh Rasim* v *Neman,*[2] it was held that a Malay divorced wife who had assisted to cultivate land acquired by the husband during the coverture was entitled to one-third share of the value of the land in spite of the proved fact that she was divorced for adultery. In *Wan Mahatan* v *Haji Abdul Samat*[3] it was held that the divorced wife's share of one-third would not be defeated in divorce by *tebus talak* unless the consideration thereof was the waiver of her claim to *harta sapencarian.* The divorced woman's one-third share may be increased to one-half if she assisted in the actual cultivation of the land. Thus, Taylor at page 55 of his work said:

> .... in the Perak River kampongs there is a custom almost invariably followed, by which on divorce the property acquired during the marriage is divided between the parties — the division depends on circumstances and is arranged by the two families and the *Ketua Kampong;* if the woman assisted in the actual cultivation she can claim half. If she did not work on the land she receives a smaller share — perhaps one-third. If a man of this class earns a salary (e.g., as a Government servant) and property is bought out of his earnings the wife's share is one-third.

See in *Re Elang, Re Kulop Dego* and *Lebar* v *Degor Niat.*[4] However, in *Wan Mahatan* v *Haji Abdul Samat, supra, the Kathi* of Larut stated that where a woman marries a person who earns wages so that the woman does not work, property obtained during coverture is not in partnership with the woman but is appropriated to the husband alone.

In Kedah it was held that on the dissolution of a Malay marriage the property acquired by both husband and wife is divided between them but there is no established rule or principle to guide the court in deciding their respective share: *Wan Nab* v *Jasin.*[5] In that case the appellant sued her husband, the respondent, for her share of their joint earnings during marriage up to the time of their quarrel and separation,

roughly a period of seven years. But in *Habsah bte Mat* v *Abdullah bin Jusoh,*[6] Callow J held that by Malay customary law in Kedah a woman is entitled on divorce to half of any property acquired during the coverture by joint efforts and that her subsequent marriage was no bar to her claim. That was a claim by the plaintiff-wife for the transfer of a half-share in land which was registered in the name of the defendant-husband. The parties possessed no real property on marriage but subsequent thereto acquired certain land. At page 60 Callow J remarked:

> There is evidence that the plaintiff was seen working over a period on the land SPK 4057 with her then husband, the defendant. In my judgment once it is established that the property was acquired subsequent to marriage, and the wife was seen working thereon, a presumption arises that on divorce it is subject to *sharikat.*This can be rebutted by evidence showing that the land was acquired by the sole efforts and resources of the husband.

In Kelantan in *Hujah Lijah bte Jamal* v *Fatimah bte Mat Diah, supra,* a widow claimed as *harta sapencarian* one-half share of certain land registered in the Mukim register in the name of her deceased husband. It was proved that prior to her marriage she owned certain land. Her husband owned no land. Both spouses worked her land and from the income of the land they bought more land and again it was worked by both of them. Briggs J awarded the widow a half-share of the land as *harta sapencharian.*

In Pahang, *harta sapencarian* is fixed by Pahang custom. A divorced wife can claim *harta sapencharian* but there is no fixed rule as to her share. But it would appear that she can get either an equal or unequal share pursuant to an agreement between the parties or confirming a gift or by judgment of the *Kathi.*

In Selangor there is an absence of reported cases as to the share of a divorced wife in the *harta sapencarian.* In *Laton* v *Ramah,*[7] on the evidence of *Kathis,* the trial judge allowed a claim by a widow to a share in her deceased husband's estate at the time of his death, but the Court of Appeal held that the evidence of the *Kathis* was not admissible. Thorne J in delivering the judgment of the Court said at page 129:

> The question in debate was not, in the view which I take, a question of foreign law at all, but the question was, in the events that had happened, what was the rights of the plaintiff according to the law of this land in the estate of her deceased husband. The local law is on a matter of which the court must take judicial notice. The court must propound the law, and it is not competent to the court to allow evidence to be led as to what is the local law.

A re-trial was ordered, but eventually the parties arrived at a settlement and a consent order was made. Taylor explained that the decision of the Court of Appeal led to the passing of the Muhammadan Law and Malay Custom (Determination) Enactment of 1930. At page 12 of his work he

stated:

> The case is noteworthy because although in accordance with the established practice of the Supreme Court oral evidence of the law or custom applicable had been given by *Kathis* at the trial without objection it was held on appeal that this evidence was legally inadmissible. This decision left disputed issues of Muhammadan law at a deadlock for no judge or collector could undertake to decide abstruse questions unaided and since he was debarred from taking evidence he was left without any possible means of informing himself. This led directly to the passing of the Muhammadan Law and Malay Custom (Determination) Enactment of 1930 which enables any judge or collector before whom a question of Muhammadan law or Malay custom arises to draw up a statement of the facts and submit the question to the Ruler of the State in Council for decision.

In 1935 the case of *Re Noorijah, deceased*[8] was decided. In that case the deceased was the wife of a public servant. She left eleven lots of, mukim register land registered in her own name. The husband filed an application for distribution. It was proved that the lands were acquired with the husband's own earnings but registered in the wife's name because the Government regulations prohibited the husband from holding land. Upon the matter being referred to the Ruler of the State of Selangor in Council under the Muhammadan Law and Malay Custom (Determination) Enactment 1930, it was declared that if there was sufficient evidence to show that the lands were not a gift to the deceased wife, it should be held that the lands belonged to the husband and they should not be regarded as the estate of the deceased. The Court held accordingly and the husband was awarded the whole of the property.

The Enactment of 1930 was repealed and superseded by the Administration of Muslim Law Eanctment, 1952. It would appear that a divorced spouse can claim to a share of the *harta sapencharian* by virtue of section 45 subsection (3) whereby the court of a *Kathi Besar* can hear and determine any division of, or claim to, *sapencarian* property. However, under sub-section (6) of that section the court, notwithstanding the provision of this Enactment, has jurisdiction to hear and determine such claim.

A principle gleaned from these cases established that *harta sapencharian* is a matter of Malay *'adat* and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local law which the court must take judicial notice and it is the duty of the court to propound it; see *Ramah* v *Laton, supra.*In the face of the compelling authorities above, I am of the view that once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is *harta sapencarian.*The presumption is rebuttable such as by evidence that the property was acquired by the sole efforts or resources of the husband or by the evidence that it was a gift made to the wife. With regard to the division of the *harta sapencarian* I can safely say that generally throughout the States of Malaya a divorced spouse is entitled to a share. The share of a Perak

woman is fixed at one-third following the State Council Minute of 1970. In other States the general trend is a half share depending on the particular circumstances.

I now come to the facts which, insofar as they are uncontraverted, are these. The plaintiff was a Government servant presently carrying on a private business as a chartered accountant in Kuala Lumpur. He has held various Government posts as an accountant, rising to the appointment of Accountant-General, Malaya.In 1951 he embraced the Muslim faith and married the defendant in Kuala Lumpur according to Muslim rites. It has become a truism that when a man takes a wife to himself, he takes her parents to be his parents and they become his parents-in-law; he therefore becomes part of her family. The plaintiff is no exception. He became part of her family. He assisted them in setting right her deceased father's estate under which the defendant as a beneficiary received a piece of land in Gombak and a one-seventh share of a shophouse at Batu Road. He financed his sister-in-law in her studies abroad. He was also the wife's financial adviser. Like every other Government expatriate officer in the country, he was affected by the Malayanisation scheme. Being thoughtful of the future, he decided in late 1965 to remain in the country and consequently the question of buying a house arose. They managed to negotiate for the purchase of a house (hereinafter referred to as the said property) at Setapak, Kuala Lumpur, for a price of $50,000. To cut the story short, the plaintiff raised $40,000 while the defendant raised $10,000 towards the purchase price. The sale was completed in March 1957 and the said property was registered in the defendant's name. They lived in the house until February 1962, after which they let it out at a rental of $600 per month for a period of three years with effect from 1st March, 1962. It was arranged that out of this rent the defendant was to pay the household bills. It was not the intention that the defendant should have all the rent to herself. In 1960 both plaintiff and the defendant were going on leave to Europe, and as the plaintiff was leaving earlier he opened a bank account in the name of the defendant and deposited a sum of $1,000 in order to facilitate the payment of bills while the plaintiff was abroad. It was also arranged that the rent from the house was to be credited into that account. Without going into anything like detail, in September 1963 they were divorced by the Kuala Lumpur *Kathi* according to Muslim rites the financial details were gone into and it was agreed that the plaintiff should pay $500 per month in respect of *Eddah* for 100 days. It was also agreed that he should pay a sum of $150 per month for the maintenance of their adopted daughter. It was further agreed that he should pay a sum of $5,700 as compensation. With regard to the property in question it was suggested by the plaintiff that both he and the defendant should have an equal share. As this was not agreed upon, the parties came to this court to determine the issue.

It was urged upon me by the plaintiff that at the time of purchasing the said property it was never intended to make it as a gift to the defendant. To use his own words:

> At that time I was a Government officer and not a Federal citizen and the General Orders affecting Government officers were very strict on the subject of the ownership of land. There was no time to apply for permission. As the defendant was a Malayan citizen it was quicker to put it in her name. Never intended as a gift to the defendant.

In short, it was alleged that the said property was registered in the name of the defendant for the sake of convenience.

The defendant contended that the conveyance was a gift. Under Muslim law a man may lawfully make a gift of his property during his lifetime provided the following three conditions are fulfilled: (i) manifestation of the wish to give on the part of the donor: (ii) the acceptance of the donee, whether impliedly or expressly: (iii) the taking possession of the subject matter of the gift by the donee whether actually or constructively: see *Outlines of Muhammadan Law* by Fyzee at page 187; *Principles of Mahomedan Law* by Mulla, 15th Edition, at page 130. Once a gift is established it is irrecoverable either during the marriage or after divorce. It was argued that the surrounding circumstances clearly showed that a gift was intended. Firstly, it was contended that the said property was registered in her name. As this averment is closely linked with the second limb of her defence I shall deal with it in a later passage. Secondly, it was said that when the question arose as to the purchase of a joint family house by the members of the defendant's family, the plaintiff advised her not to participate in that joint venture because according to her the plaintiff wanted to buy her a house for herself. That may be so, but in my view the real purpose of discouraging her from joining that venture was that the plaintiff had advised her to invest her money in Gilchrist War Stocks in London. Thirdly, it was argued that the belated claim in respect of the said property was not made until 1963. And lastly, it was contended that if it was true that the said property was not purchased as a gift to the defendant, the plaintiff would have encountered no difficulty in obtaining Government's permission either before or after the said purchase so that the said property could be re-registered in his name. To my mind both these grounds taken by themselves may be tenable, but after considering the whole facts, so far as they appear, there cannot be any doubt in my mind as to the result which I am about to give.

In my judgment, the said property was acquired by the joint resources of the parties and I therefore hold that it is *harta sapencharian.*I am also satisfied that the evidence adduced by the defendant as it stands failed to establish fully the unequivocal manifestation of the plaintiff of an intention to make a gift of the said property to the defendant. Having arrived at this conclusion I hesitate to consider the other two conditions of a gift.

The matter does not rest here. It was strongly urged upon me, as a second limb to the defence argument that since the said property was registered in the name of the defendant, her title was indefeasible by virtue of section 42 of the Land Code (Cap 138). Now in *Re Noorijah deceased supra,*the deceased's estate could have resisted the claim of the husband on the ground of indefeasibility of title under section 42 of the

Land Code (Cap 138). It must be assumed that the court was aware of that provision of law. If that was so, it would follow that the beneficiaries of the deceased could have obtained a share of the estate. Again, in *Habsah bte Mat* v *Abdullah, supra,* it can be seen that the husband could in like manner have resisted the claim of the wife by invoking indefeasibility of title under section 43 of the Kedah Land Enactment (No 56). Had he taken that course it may be that the plaintiff wife would have lost her claim to a half share in the land as *harta sapencharian.* I must again assume that the court had taken cognisance of section 43 of the Land Enactment. In *Hujah Lijah bte Jamal* v *Fatimah bte Diah, supra,* if the deceased's estate had resisted the claim of the plaintiff widow by taking advantage of the indefeasibility of title provision under section 37 of the Kelantan Land Enactment, 1938, the plaintiff would have lost her claim to a half share in her husband's estate as *harta sapencharian.* It may now be asked why in those three cases the provisions of the Land Enactments with regard to indefeasibility of title were never invoked. To my mind the answer is obvious. It is implicit from the three judgments that the provisions of the Land Enactments with regard to indefeasibility of title are not amenable to matters pertaining to *harta sapencharian.* That being so, counsel's argument cannot be sustained.

Coming back to the plaintiff's claim, it is necessary to determine what is the division of the share between the plaintiff and the defendant. Although the court has power to refer such matters to the *Majlis* under section 41 sub-section (4) of the Administration of Muslim Law Enactment, 1952, I am prepared, in view of the circumstances of this case, to award an equal share to each of the parties if they agree.

In the circumstances, it is in the best interests of both parties that the said property be sold under the supervision of the court and the net proceeds be shared equally between them. I shall also order that the defendant pay to the plaintiff 50 *per cent* of the total rent received by the defendant in respect of the said property from the date of the divorce up till the date of sale.

With regard to the counter-claim, the defendant is asking:

(i) a balance of $900 in respect of *Eddah.* It is admitted that a sum of $600 was paid. The plaintiff contended that the defendant had received $1,800 in respect of three months' rental at $600 per month. Since it is to be divided equally, the defendant is deemed to have received $900 as her share. I cannot accept this contention. In my view, the effective date is from the date of divorce. The money obtained from the rent was used in respect of household expenses and it cannot be said that there is certainty as to how much each party is allowed to receive under that item. I would allow this claim;

(ii) a sum of $5,700 as compensation. This is admitted by the plaintiff, and I would allow the claim.

With regard to costs, each party will bear his or her own costs.

I have been asked by counsel for the defendant to stay the issue with regard to the division of the share so that he may get instructions from his client. I therefore adjourn this case to 29th November 1965.

Raja Azlan Shah (on November 29): Having now been told by both counsel that each party agrees to a half share in the subject matter of this suit, I will order accordingly.

Order accordingly.

MS Naidu for the Plaintiff.
Kamarul Ariffin for the Dependant.

Note

This was an application by a divorced husband for the division of property jointly-acquired by the spouses during the marriage. The claim was based on *adat* or Malay customary law relating to *harta sapencarian.* Raja Azlan Shah J (as he then was) held that the husband was entitled to a share in the property even though it was registered in the wife's name. The parties agreed to his Lordship's award of an equal share to both of them. One note-worthy feature of this case is that although the wife was a Malay, the husband was not. He was however a convert to Islam and that perhaps qualified him for the benefit of the *adat* which is administered alongside the Muslim law.

(b) Chinese custom — meaning of descendents

Ang Siew Hock & Ors
v
Ang Choon Koay

[1970] 2 MLJ 149 High Court, Kuala Lumpur

Case referred to:-
(1) *Re Tan Soh Sim deceased; Chan Lam Keong & Ors* v *Tan Saw Keow & Ors* [1951] MLJ 21.

RAJA AZLAN SHAH J: I have been asked to interpret the words and phrases embodied in a trust deed. The relevant passages are as follows:

1. In consideration of the premises, the trustees hereby declare that they hold the said lands as trustees upon the following terms;
(a) Upon trust until the expiration of twenty-one years from the death of the last surviving child of Ang Seng, deceased:
(i) As to such premises situated on the said lands as were used by the said Ang Seng now deceased, in his lifetime as his family house, upon trust as a family house in accordance with Chinese custom for the enjoyment, use and occupation of the said Ann Chee and the children and descendants of the said Ang Seng deceased.

The plaintiffs are the grandsons of the said Ang Seng (hereinafter called

the deceased). The defendant is the surviving son and trustee of the deceased. The other son of the deceased who was also the trustee of his estate, together with the defendant, was Ang Chew Mue (now deceased, the father of the first four plaintiffs).

In 1911, the deceased left a will appointing his wife, Ann Chee, as sole executrix of his estate. By virtue of the said will she was to receive during her lifetime all rents and profits from the said trust properties and after her death all the rents and profits were to be used in equal shares among the sons and daughters of the said deceased. The deceased, in his will, had also declared that the house (No 13, Brickfields Road) be used as a family house in order that his name may be preserved and perpetuated and wherein prayers would be offered for his and his wife's names as is customary amongst Chinese. On Ann Chee's application the court, *vide* Civil Suit No 71 of 1920, on the 18th of October 1927, ordered her to transfer the said trust properties to Ang Chew Mue (now deceased) and Ang Choon Koay, the defendant on trust, the terms of which were embodied in a trust deed which was approved by the court. We are only concerned with clause 1(a)(i) of the said trust deed which is reproduced above.

Mr Devaser for the plaintiffs argued that the words and phrases used by the deceased can according to Chinese custom only mean those on the male side and their descendants; while those on the female side are excluded. Mr Selvarasan on behalf of the defendant submitted that they include both the male and female issues and their descendants.

There are two issues in this case. The first is whether the deceased intended that the use and enjoyment of the said family house by his children and descendants be in accordance with Chinese custom, and secondly, if he did, under Chinese custom who are the issues and descendants entitled to its use and enjoyment.

To determine the intention of the deceased, it is necessary to refer to his will of 1911 to see whether there is evidence or words used to indicate that the deceased in fact intended that Chinese custom, in respect of the use and enjoyment of the family house, be followed. I find there is sufficient evidence of such intention in the words:

> I declare that my house No 13, Brickfields Road shall be kept up and used as a family dwelling house in order that my name may be preserved and perpetuated and wherein prayers shall be offered for the names of my wife and myself as is customary amongst the Chinese ...
>
> [page 1 of the will]

I think the deceased had used these words in some special sense, that is, according to Chinese custom.

Having thus determined that the deceased intended that Chinese custom should be followed in respect of the use and enjoyment of the family house, it is necessary to determine who are the 'descendants' entitled under such custom. Expert opinion regarding Chinese custom in respect of the property was given by Khor Pooi Kee (PW 1), a retired Chinese interpreter of the Supreme Court, Kuala Lumpur. His evidence was that 'descendants of the desceased' mean male issues and unmarried female issues. The female issues are out if they are married, because

from the date of marriage they take their husbands' names, and remain so until death. Their tombstones inscribe their names and the surnames of their husbands. Once they are married they do not have the right to live in the family house because they now belong to their husbands' families. He also testified that each Chinese clan has a birth register at the ancestral temple, and only the names of the male issues are registered. This is because they carry the family name. The daughters do not carry the family name once they are married.

This expert opinion is clearly in line with the judgment of Taylor J in *Re Tan Soh Sim* deceased; *Chan Lam Keong & Ors* v *Tan Saw Keow & Ors*.[1] The relevant passages of the learned judge's judgment are found at pages 26-27. He said:

> ... Their whole system is based on the notion that the family, not the individual, is the unit for consideration. A person is either a member of the family or outside it. When a girl is married she leaves her father's house and goes to reside in the house of her husband's father or grandfather. Her first ceremonial duty is to worship at the family shrine and her second is to *kowtow* to her husband's parents and elders; then his juniors in the family *kowtow* to her. All this is symbolic of the fact that she has been married into the family and is expected never to leave it. If her husband should die, however young, his brothers will still maintain her for the rest of her life; provided always that she remains in the family house; if she was permitted to remarry she would not be allowed to take her children with her; they belong to the father's family and must be brought up to worship his ancestors. If she leaves the family, she leaves it completely and they have no further responsibilities towards her.
>
> The custom affecting property conforms naturally to the family principle. All the sons inherit equally. The daughters do not inherit at all. A man is expected to provide presents and festal expenses on his daughter's marriage but nothing further. His duty is to provide for his daughters-in-law; they may bear grandsons to worship him; his own daughters cannot do so. To a Chinese man, a sister-in-law means a brother's wife, to whom he has responsibilities; his wife's sister is a person outside his family. To a Chinese woman, her husband's brother is a brother-in-law who has responsibilities towards her; her sister's husband is not. In China, said Hare. There is no inheritance through a female *(Chinese Family Law,* 1904). This is because relationship is not traced through females, except for the limited purpose of considering eligibility for marriage ...

On the strength of this authority, I think the words 'the children and descendants of the said Ang Seng, deceased' in clause 1(a)(i) of the trust deed stipulate that only the male issues and their descendants are entitled to the use and enjoyment of the family house. And there being no words to the contrary they hold equal shares. I therefore hold that the plaintiffs' claim succeeds. And being the trustee, the defendant is liable to submit a proper statement of account of all monies that had come into his hands ever since he took over the administration of the said trust properties.

Costs to be borne by estate.

Judgment for the plaintiffs.

KL Devaser for the Plaintiffs.
T Selvarasan for the Defendants.

Note

This case required the interpretation of the terms of a trust deed with regard to the use of a family house by the children and descendants of the deceased in accordance with Chinese custom. The learned judge held that according to Chinese custom 'the children and descendants of the deceased' must mean only the male children and their descendants. The female children therefore were not entitled to the enjoyment of the family house.

(c) Claim to matrimonial property by wife — proof of Hindu customary marriage

Nagapushani
v
Nesaratnam & Anor

[1970] 2 MLJ 8 High Court, Kuala Lumpur

Cases referred to:-
(1) *Spivack* v *Spivack* (1930) 142 LT 492.
(2) *Paramesuari* v *Ayadurai* [1959] MLJ 195.
(3) *Silver* v *Silver* [1958] 1 All ER 523.
(4) *Mews* v *Mews* (1852) 15 Beav 529.
(5) *Blackwell* v *Blackwell* [1943] 2 All ER 579.
(6) *Re Rogers' Question* [1948] 1 All ER 328.
(7) *Rimmer* v *Rimmer* [1952] 2 All ER 863.
(8) *Cobb* v *Cobb* [1955] 2 All ER 696.
(9) *Mercier* v *Mercier* [1903] 2 Ch 98.
(10) *Spellman* v *Spellman* [1961] 1 WLR 921.
(11) *Balfour* v *Balfour* [1919] 2 KB 571.

RAJA AZLAN SHAH J: This action is brought by Nagapushani d/o Chelliah against Nesaratnam s/o Rasiah (first defendant) and Thangammah d/o Velupillai (second defendant). The plaintiff claimed to be the wife of the first defendant and the daughter-in-law of the second defendant who was the mother of the first defendant. She claimed that on 30th April 1942 at Sungei Buloh, she went through a ceremony of marriage with the first defendant according to Hindu rites. The defendants denied this. In June or July 1957 the first defendant negotiated with one Ng Choo Kiat Company, Petaling Jaya for the purchase of two pieces of land on which houses were to be built. The pieces of land are along Road 3A (formerly Road 18A) Petaling Jaya and the negotiated price for each house was $17,500. The said land was held under approved applications. The house and land in Lot 3 Road 3A, Petaling Jaya is now the subject-matter of this action. On 15th September 1958 the said land was assigned to and registered in the name of the first defendant. On

4th March 1959 the first defendant assigned his rights in favour of the plaintiff. On 27th December 1961, the plaintiff assigned her rights in favour of the first defendant. Finally, on 19th February, 1962, the first defendant assigned his rights in favour of the second defendant. When the house was completed by 1959 it was rented out. The plaintiff used to collect the monthly rents until February 1962 when the first defendant began to collect the rents himself.

The plaintiff prayed for: (i) A declaration that the assignment of rights in respect of Lot 3 Road 3A, Petaling Jaya, executed by her in favour of the first defendant and the subsequent assignment by the first defendant in favour of the second defendant were void. (ii) A declaration that she was the beneficial owner of the said land. (iii) An order directing the proper registering authority to register the plaintiff's name as the approved applicant for the said land. (iv) An order that the first and second defendants should pay to her the amount of rents collected by them from the tenants of the said house from February 1962 to the date of judgment less the amount expended by them for payment of quit rent and assessment. (v) Such other order or reliefs as the court may deem fit and proper.

Counsel for the defendants contended that it was immaterial whether the plaintiff was married to the first defendant. With respect, I am unable to agree with that. The existence of a marriage, if any, between the plaintiff and the first defendant must surely go to the root of the dispute since rights and liabilities would have been created by the coverture.

The plaintiff said that she married the first defendant on 30th April 1942 at Sungei Buloh according to Hindu rites. She came to Malaya in 1941 from Ceylon with her sister, Nagaratnam d/o Chelliah, at the invitation of the father of the first defendant who wanted to arrange a marriage between her and the first defendant. She was then 17 years old. A copy of the invitation card was produced. The names of the sponsors of the wedding were stated in the invitation card to be V Kulathungam, T Thambirasa, and K Arunachalam — all three since deceased. Friends and relatives are invited. The plaintiff said that she was given away by Kulathungam and his wife. Yalliani d/o Kunagaratnam (PW4), the wife of the late Kulathungam, testified that she and her husband had given the plaintiff away at the wedding. The priest who performed the ceremony could not be located but the plaintiff described the ceremony with some detail. She produced a *'tali'* (a golden chain) which she claimed the first defendant tied around her neck during the wedding ceremony as a symbol of marriage. Maniam s/o Kuthiappan (PW2), a goldsmith, recognised the *tali* produced in court as the one which he had made for the father of the first defendant during the Japanese Occupation in 1942, that is the year of the alleged wedding. She called witnesses who attended the wedding. Veeriah s/o Venkatachalam (PW3) testified that he was consulted by the father of the first defendant to choose an auspicious date for the wedding and that he attended the wedding. K Arul Ayah (PW5) the brother of PW4, testified that he and his wife were at the wedding ceremony. Logambal d/o

Ponnusamy (PW6) also testified that she attended the wedding ceremony. The plaintiff said that she and the first defendant cohabited at various places in Selangor from 1942 until 1960 when the first defendant left for Johor Bharu. The first defendant agreed that he and the plaintiff had lived under the same roof. When they were living together, they went to film shows, attended dinners and visited relatives together. The plaintiff produced a photograph showing her and the first defendant taken about a year after the wedding. PW5 testified that on some occasions the plaintiff and the first defendant had paid him social calls. The plaintiff and the first defendant has also visited PW6. PW5 and PW 6 also testified that from about three or four years after the marriage, the first defendant began an affair with the plaintiff's sister.

The first defendant denied that he had undergone a ceremony of marriage with plaintiff. He said that his father wanted him to marry the plaintiff but he refused. Undaunted, his father had carried on with the preparations for the marriage, fixed a date and issued invitation cards. To avoid the marriage he said that he left for Alor Star after which his father called off the marriage. The first defendant further said that on 20th January 1944 he married the plaintiff's sister according to Hindu rites which marriage was registered on 28th March 1962 at the Civil Registry, Kuala Lumpur. The second defendant and the plaintiffs's sister gave evidence to similar effect.

In view of the evidence before me, I am satisfied that the plaintiff and the first defendant went through a ceremony of marriage in 1942 according to Hindu rites, cohabited for a number of years and enjoyed the reputation of husband and wife. In any event, in the circumstances obtaining in this case, the court can properly apply the presumption of marriage in the plaintiff's favour which has not been rebutted by clear evidence: see *Spivack* v *Spivack*[1].

Marriage by Hindu rites is common in this country and is commonly regarded as binding on the parties. It will be startling to hold otherwise in view of the prevalent practice. Such a marriage was recognised in *Paramasuari* v *Ayadurai*[2] where the parties went through a ceremony of marriage according to Hindu custom.

On 19th March 1951 the first defendant opened an account in the Post Office Savings Bank in the name of the plaintiff with an initial deposit of $250. Thereafter, he deposited various sums from time to time in her name. The plaintiff also deposited the savings from the household allowances given her by the first defendant. By 1957, the total deposits had amounted to $5,652.94 (plus the interest for that year). On 11th July 1957, the plaintiff withdrew the sum of $5,600 and handed it to the first defendant who used it for part payment towards the purchase price of the land in Lot 3 Road 3A, Petaling Jaya. The first defendant stated in evidence: 'House No 3 cost $17,500. Out of this, $5,600 came from plaintiff's account.' From time to time the first defendant paid various sums as instalments. All the payments were made in the name of the first defendant. The final payment was made on 15th September 1958.

Plaintiff first claimed that the assignment of rights in favour of the first defendant made on 27th December 1961 was void on ground of

coercion. There was no evidence in support of that. In my view, the assignment of rights was properly executed on 27th December 1961 in favour of the first defendant. The allegation of fraud in respect of the assignment to the second defendant on 19th February 1962 was also not proved.

Counsel for the plaintiff argued that a gift of the house ought to be presumed in the plaintiff's favour. He relied on a passage from 19 *Halsbury's Laws of England,* 3rd edition, p832:

> Where a husband purchases property or makes an interest in the name of his wife, a gift to her is presumed in the absence of an intention to the contrary...

But the presumption is more easily rebutted now than it used to be. I need only refer to *Silver* v *Silver.*[3] In that case, the husband and wife bought a house for £895 of which £90 was provided by the wife's parents and the rest was borrowed from a building society. Later this house was sold, another was bought for £2,000 of which £1,500 was borrowed from the building society. Subsequently, this house was sold and yet another house was bought for £4,950 of which £2,500 was borrowed from the building society. All the houses were conveyed into the name of the wife. In each mortgage, the husband joined as guarantor and the mortgage payments of principal and interest were paid out of a weekly allowance made by the husband to the wife. The Court of Appeal held that the wife was entitled to the house on the presumption of a gift by the husband. Lord Evershed said at p 525:

> There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more easily capable of rebuttal — a rule that if a husband makes a payment for or puts property into the name of a wife, he intends to make an advancement to her. As was said by Sir George Jessel some time ago, such a disposition by the husband, unless otherwise explained, will be treated in equity as intended to effect a gift.

The presumption of a gift can be rebutted by the words and acts of either spouse either prior to, contemporaneous with or subsequent to the transfer of the property.

Applying that test, there is a presumption of gift of the house to the plaintiff by the first defendant who, on 4th March 1959, executed an assignment of rights in her favour. But this presumption of gift is rebutted by the act of the plaintiff in assigning the house back to the first defendant on 27th December 1961.

Counsel for the plaintiff next contended that the initial deposit and the subsequent sums which the first defendant had put into the account of the plaintiff in the Post Office Savings Bank were to be presumed as gifts to her. It is stated in 19 *Halsbury's Laws of England,* 3rd edition p 833:

> A gift is also presumed where money is deposited at a bank in the name of the wife...

This statement is based on an *obiter dictum* in an old English case of

Mews v *Mews*.[4] In that case a farmer's wife had deposited in her own name the money derived from the produce of the family firm and the husband had given directions to his executor to remove the money from the firm and to do the best he could with that for her. The Court held that the evidence was insufficient to establish a gift to the wife. Sir John Romilly MR said (*obiter*):

> The evidence which is required to constitute a valid gift, as I have before stated, is that there must be some clear and distinct act by which the husband has divested himself of the property, engaged to hold it as a trustee for the separate use of his wife ... if he had himself deposited the money with bankers, or with those gentlemen as quasi-bankers, stating that they were to hold it for his wife, that would probably have been sufficient for that purpose.

Applying that, there is a presumption of a gift to the plaintiff in respect of the money which the first defendant had deposited in the Post Office Savings Bank in the name of the plaintiff.

The plaintiff agreed that part of the savings in thePost Office Savings Bank was derived from money saved from the household allowances provided by the first defendant. It is not known what part of the savings was so derived. In *Blackwell* v *Blackwell*[5] it is established that savings from household expenses belong to the husband. In that case, the husband and wife separated and there was a sum of money standing to the credit of the wife in a co-operative society which represented money saved from the housekeeping allowances given to the wife; the Court of Appeal held that the sum belonged to the husband. In the present case, that part of the money deposited in the plaintiff's savings account which was derived from the savings from housekeeping allowances belonged to the first defendant. Therefore, a part of the total deposit of $5,652.94 in the plaintiff's account in 1957 belonged to the first defendant, but it is not possible to ascertain the exact portion that was first defendant's.

To sum up, the first defendant used the sum of $5,600 as part payment for the purchase of this house. This sum was drawn from the plaintiff's savings account, the deposits of which belonged in part to her and in part to the first defendant. The rest of the purchase money was paid by the first defendant in various instalments.

When both spouses contributed to the purchase of a house, they must be presumed to have intended to take some interest. The question arises as to the size of interest each is to take. If the spouses had contributed in fixed and definite amounts, their respective interests should be in the same proportion as their contributions. In *Re Roger's Question*[6] where the spouses bought a house for £1,000 out of which the wife contributed £100, the husband borrowed the rest on a mortgage and the wife made it clear £100 was all she was prepared to contribute, the Court of Appeal held that the husband should hold the house on trust for sale and the proceeds should be divided in the ratio of nine for the husband and one for the wife. But where it is not possible to make such a clear division, it will be equitable to hold that the spouses are entitled equally. In *Rimmer* v *Rimmer*[7] the spouses bought a house for £460 in

the name of the husband. The wife provided the deposit of £29 and the rest of the money was borrowed on the security of a mortgage from a building society in the name of the husband. £151 of the principal of the mortgage money was repaid out to housekeeping money provided by the husband, and the remaining £280 was repaid by the wife out of her own money. The Court of Appeal held that it was not possible to assess the separate beneficial interest of the husband and the wife by reference to the contributions which they had made towards the purchase of the house and that the beneficial interest should be divided equally between them. Romer LJ said at p 870:

> Cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes the purchase price of property, and ... the old-established doctrine that equity leaned towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application.

(See also *Cobb* v *Cobb*[8]). This is sometimes referred to as 'palm tree' justice.

The present case is an apt occasion to apply the 'palm tree' justice. Both the plaintiff and the first defendant contributed towards the purchase of the house though the exact contribution of the plaintiff cannot be ascertained. It will be equitable that they have equal shares in the house (and land on which the house stands). *Re Rogers' Question, supra,* is distinguished on two grounds. First, the contribution of each spouse in that case could be ascertained with certainty which is not possible in the present case. Secondly, the wife in *Re Rogers' Question* had stipulated that her contribution of £100 was all that she would be prepared to pay while in the present case the wife seemed prepared to make further contributions. Indeed, on 10th January 1962 she withdrew $2,000 from her savings account and gave this sum to the first defendant, *inter alia,*for payment of assessment rates for the house.

When the plaintiff assigned the house to the first defendant on 27th December 1961, the latter is deemed to hold her interest on trust for her and he is liable to account for whatever rents to which she is entitled, that is, one half of the rents collected from February 1962 to the date of judgment less the payments for quit rent and assessment rates. It is concisely stated in 19 *Halsbury's Laws of England,* 3rd ed p 834:

> No presumption of a gift from a wife to husband arises from the transfer into his name, or into their joint names, of shares or stock belonging to her; or from a purchase of property with her money, on an investment of her money, in his name or in their joint names. In all such cases, the husband is presumed to be a trustee for the wife in the absence of a contrary intention: see *Mercier* v *Mercier*[9].

Finally, counsel for the defendants contended that as between the plaintiff and the first defendant there was no intention to enter into a legal relationship in respect of the purchase of the house. Counsel referred to *Spellman* v *Spellman.*[10] In that case, it was agreed between

the spouses that a car should be bought for the wife. When the wife saw a car which was delivered to the house she asked the husband whether that was the car which he had 'bought' for her. He replied that it was. When the spouses separated both spouses claimed the car. The car was in fact bought under a hire-purchase agreement. The Court of Appeal held that the husband had no power to give the car to the wife while the hire-purchase agreement was subsisting. The Court also held that the agreement was purely a domestic arrangement not intended to create legal relationship and was, therefore, not enforceable by the court. Danckwerts LJ said at p 926:

> It seems to me that the proper conclusion on all the evidence in the present case is that there was not any intention to create legal relations, but merely an informal dealing with the matter between the husband and wife, which is common in daily life, and which does not result in some legal transaction but is merely a matter of convenience.

Therefore, the husband was entitled to the car. In *Balfour* v *Balfour*[11] the wife sued the husband for money which was due under a verbal agreement whereby he was to give her a monthly sum in consideration of her agreeing to support herself without calling upon him for any further maintenance. The Court of Appeal held that the agreement was only a domestic arrangement which could not be enforced as the parties did not intend that the arrangement be attended by legal consequences. It must be observed that in both the cases, what the plaintiff spouse sought to do was to enforce the promise of the other spouse. In *Spellman* v *Spellman* it was the promise of a car which was sought to be enforced, and in *Balfour* v *Balfour* the promise of a monthly sum of money. But in the present case, the court is not called upon to enforce any promise made by the husband. If that were so, the court would decline to act on the authority of *Spellman* v *Spellman* and *Balfour* v *Balfour*. This court is invited to adjudicate the interests of the parties in regard to a house which was bought by the monetary contributions of both the spouses. The plaintiff's claim does not depend on the existence of an enforceable contract between herself and the first defendant in respect of the purchase of the house. Her claim is founded on the rights and privileges which flow from the special relationship between husband and wife. Her claim is, to a great extent, buttressed by the presumptions of law in her favour. Where both spouses have contributed to the purchase of a home, each must have intended to take some benefit, and, it will be for the court to decide the respective interest of each.

Costs to be borne by each party. Order accordingly.

Order accordingly.

A Mahendra for the Plaintiff.
RR Chelliah for the Defendants.

Note

A wife sought the return of property which she claimed she had been forced to transfer to her husband, the first defendant who subsequently

transferred it to his mother, the second defendant in this case. Raja Azlan Shah J (as he then was) found on the facts that there had been no coercion or fraud leading to the transfer and that the property had in fact been jointly-acquired by the spouses during the marriage. His Lordship held that the plaintiff's right to the property was not based on any contract between the parties but was a right that flowed from the relationship of husband and wife. With regard to the defendant's denial that he had ever married the plaintiff, His Lordship (as he then was) held that notwithstanding the absence of expert testimony, the plaintiff had successfully established the existence of a valid Hindu customary marriage. Raja Azlan Shah J (as he then was) applied the doctrine that equity leans towards equality and awarded the plaintiff and half-share in the property.

CUSTODY OF INFANTS

(i) Re Balasingam & Paravathy, Infants Kannamah v Palani

[1970] 2 MLJ 74 High Court, Kuala Lumpur

Cases referred to:-
(1) *Re Miskin Rowter* [1963] MLJ 341.
(2) *In re CT (an infant)* [1957] Ch 48.
(3) *In Re A* (1940) 164 LT 230.
(4) *Galloway* v *Galloway* [1955] 3 All ER 429.
(5) *Ponniah Pillai* v *Senthamarai* [1954] MLJ 175.

RAJA AZLAN SHAH J: In this case, the applicant applies for custody of her two infant children. There is dispute as to whether she is legally married to the respondent but for the purposes of this case, it will be assumed that there was no valid marriage. The question, to be settled before the court can go into the merits of the case is, whether this court has jurisdiction to entertain an application by the *de facto* mother for a custody order under the Guardianship of Infants Act, 1961.

Counsel for the applicant contends that the court has been granted original jurisdiction under section 24(d) and (e) of the Courts of Judicature Act, 1964 in addition to the Guardianship of Infants Act, 1961. Section 24 of the Courts of Judicature Act, 1964 states:

> Without prejudice to the generality of the provisions of the last preceding section, the civil jurisdiction of every High Court shall include:
> (d) jurisdiction to appoint and control guardians of infants; and generally over the person and property of infants;
> (e) jurisdiction to appoint and control guardians and keepers of the

> persons and estates of idiots, mentally disordered persons and persons of unsound mind.

He argued that under English law, there is no corresponding section to our section 24 of the Courts of Judicature Act, 1964. The case of *Re Miskin Rowter*[1] was cited in which the guardianship of an illegitimate child was given to the natural mother.

Counsel for the respondent contended that it cannot be said that the Parliament did not have illegitimate children in contemplation when drafting the Guardianship of Infants Act, 1961 because section 1(2)(a) specifically mentions illegitimate children and which states as follows:

> Nothing in this Act shall apply in any State to persons professing the Muslim religion until this Act has been adopted by a law made by the Legislature of that State: and any such law may provide that —
> (a) nothing in this Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion;

He further argued that if 'mother' in section 6 of the same Act is given a wider interpretation to mean *de facto* mother, then 'father' in section 5 would also include a putative father. Question may arise as to who the putative father is so that the sections cannot refer to the putative father and mother and accordingly, mother must mean legal mother and father must mean legal father.

In determining the issue before this court, the first question that arises is whether English law on this subject is applicable which must then be followed by a consideration of how far this English law, if applicable, has been eroded by the Guardianship of Infants Act, 1961, other legislation and local case law.

Section 27 of the Civil Law Ordinance, 1956 reads:

> In all cases relating to the custody and control of infants, the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned; unless other provision is or shall be made by any written law.

What then was the law of England on this date? By the Guardianship of Infants Acts, 1886 and 1925, the court may, upon the application of the mother as, of the father, make such orders as it thinks fit with regard to the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents and to the wishes of the mother as well as those of the father, the welfare of the infant as the first and paramount consideration.

The case of *In re CT (an infant)*[2] is of help in determining whether the Court in England in 1956 had jurisdiction to entertain custody proceedings by *de facto* parents of illegitimate children. It was there held that the court had no jurisdiction to make an order granting custody of two

illegitimate children to the putative father. The court considered in great length the meanings to be given to the words 'father' and 'mother' used in the Guardianship Acts of 1886 and 1925 and came to the conclusion that *prima facie,* the titles of 'mother' and 'father' belonged only to those who had become so in the manner known to and approved by the law, and that the meaning of such terms in a statute was not to be departed from unless a compelling reason could be found in the statute for so doing. Since no compelling reason can be found anywhere in the Act of 1886 (as amended) for extending the term 'father' from a *de jure* to a putative one, this word must be construed as meaning legitimate father and did not extend to a putative one. There is a compelling reason in the case of the mother in one particular regard as has been held in the case of *In Re A,*[3] that the title of 'mother' in section 5(2) of the Guardianship Act, 1925, does include an unmarried mother. The reason is that by the Act of 1925, the mother of an infant may be deed or will appoint any person to be guardian of the infant after her death. By Part II, where an infant is illegitimate and the mother is dead, the person whose consent to marriage is required is the guardian appointed by the mother, and this fact implies that she has power to appoint a guardian to an illegitimate infant. Other than this particular instance, there is no compelling reason to extend the meaning of 'mother' to that of a *de facto* one.

It is therefore quite settled that the law of England in 1956 was that neither the putative father nor the *de facto* mother of an illegitimate infant can make an application to the court for an order of custody.

The issue now arises as to whether this law is still applicable here or whether it has been modified by local legislation or case law.

The Guardianship of Infants Act, 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the abovementioned section 1(2)(a), would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words 'father' and 'mother' in sections 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway* v *Galloway*[4] it is safer to say that 'infant' means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words 'father', 'mother' or 'infant' can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

Section 24(d) and (e) of the Courts of Judicature Act 1964 and Order 55A of the Rules of Supreme Court are only meant to confer jurisdiction on the High Court to entertain proceedings under the Guardianship of Infants Act. If illegitimate children are not within the ambit of the Act, how can it be said that jurisdiction has been conferred by the Courts of Judicature Act and the Supreme Court Rules on the High Court to entertain applications for the custody of illegitimate children brought

under the Guardianship of Infants Act? The provisions of the Courts of Judicature Act, 1964 are based on existing legislation except in so far as they are consequential to the Malaysian Act. Therefore, whatever jurisdiction the High Court has in respect of custody proceedings can only be such as to entertain proceedings which are in accordance with the Guardianship of Infants Act, 1961. The High Court has no jurisdiction to entertain custody proceedings which cannot be brought under the Guardianship of Infants Act of 1961.

There are only two local cases on this point. The latest one is the case of *Re Miskin Rowter*[1] which is no authority for either side since the question of jurisdiction was not raised at all; the court proceeded on the assumption that it had jurisdiction. In the case of *Ponniah Pillai* v *Senthamarai*[5] the putative father unsuccessfully applied for custody of his infant children. It was held that under section 6(1) of the Civil Law Enactment (now section 27 of the Civil Law Ordinance, 1956), English law is applied to cases relating to custody and control of children but regard is to be had to the religion and customs of the parties.

It would thus seem that neither local legislation or case law has altered the common law position on this point. The net result is that this court has no jurisdiction to entertain this application for custody by the *de facto* mother. However, it is not correct to say that as a result, the applicant has no remedy. She can still institute wardship proceedings. The application is dismissed with costs.

Application dismissed.

M Mahalingam for the Applicant.
G Vadiveloo for the Respondent.

Notes

In this case Raja Azlan Shah J held that the Guardianship of Infants' Act 1961 did not apply to illegitimate children. This conclusion seems unsupportable since section 1 of the Act refers to illegitimate children, albeit Muslim children. There seems to be no justification in applying it to Muslim illegitimate children but not to non-Muslim illegitimate children.

His Lordship (as he then was) declined to make any decision as to the custody of the children on the ground that the courts' jurisdiction in custody cases as stated in the Courts of Judicature Act, 1964 is restricted to applications under the Guardianship of Infants' Act, 1961. This restriction too is unsupportable particularly as section 27 of the Civil Law Act, 1956 provides that the court may apply English law where there are no local provisions applicable. In order to apply the English law, the High Court must have jurisdiction in guardianship and custody cases generally. It is submitted that this jurisdiction is provided in the Courts of Judicature Act, 1964.

(ii) Teh Eng Kim
v
Yew Peng Siong

[1977] 1 MLJ 234 Federal Court, Penang

Coram: Lee Hun Hoe Ag LP, Ali Ag CJ (Malaya) and Raja Azlan Shah FJ

Cases referred to:
(1) *Jussa* v *Jussa* [1972] 2 All ER 600.
(2) *H* v *H and C* [1969] 1 All ER 262.
(3) *Austin* v *Austin* (1865) 35 Beav 259,263.
(4) *Kades* v *Kades* (1965) 35 ALJR 251.
(5) *Re Orr* [1973] 2 DLR 77.
(6) *J* v *C* [1970] AC 668,715.
(7) *P (LM)* v *P (GE)* [1970] 3 All ER 659,662.
(8) *Gissing* v *Gissing* [1970] 2 All ER 780,788.
(9) *Fribance* v *Fribance* [1957] 1 All ER 357,360.

RAJA AZLAN SHAH FJ: This is an appeal from a judgment of Arulanandom J in which he awarded custody of the three children of the marriage to the respondent wife with access to the father, the present appellant. The appeal is also directed against the following orders made by the learned judge:

(a) that the children be permitted to leave Malaysia and reside in Australia on the undertaking by the mother that they be given permission to visit Malaysia at least once a year during the school holidays;
(b) that the appellant pay maintenance of $1,000 a month in Malaysian currency for the said children until they reach the age of 18 years;
(c) that a piece of land, in Lot 927, Mukim 18, NED Penang with premises No 77, Tanjong Bungah Park, Penang, be sold within 6 months of the Order and the proceeds to be divided equally between the parties;
(d) that all the furniture, fittings, and effects to be the property of the respondent;
(e) that the appellant be at liberty to apply.

I do not think it necessary to survey in detail the relations between the parties. Suffice it to say that they had both departed in a considerable way from ordinary standards of morality. 'So it appeared' said the learned judge 'that there has apparently been an exchange of spouses between these 2 parties'. He found that one Selma Brazier with whom the appellant is now living and cohabiting and who was cited in the petition for divorce by the respondent wife as co-respondent was originally the wife of Laurance Edwin Howell, the present husband of the respondent. He was only divorced on December 5, 1975 in Australia on the ground of his adultery with the present respondent.

The facts of the case are short and simple. The parties were married in August 1959. There were three children of the marriage, Alban Teh, aged 15 years, Kathleen Josephine Teh, aged 10 years, and Bernard Antione Teh, aged 5 years. The appellant husband is the personnel

manager of Malayawata Steelworks at Prai. The respondent wife is a qualified teacher. The matrimonial home was No 77, Tanjong Bungah Park, Penang. When the marriage began to break up and a deed of separation was entered into between the parties on February 10, 1975, the three children were left in the matrimonial home in the custody, care and control of the respondent. The appellant went to live at No 1, Jalan Pelangi, Hillside, Penang. But he kept in constant touch with the children practically everyday. The eldest son Alban and daughter Kathleen, were attending the Penang Free School, and Convent Light Street, respectively. The respondent petitioned for divorce on September 9, 1975, on the ground of the appellant's adultery with the said Selma Brazier.

The suit was not defended. The decree *nisi* was made on November 28, 1975. The respondent requested a shortening of the term for making the decree *nisi* absolute on the ground that she intended to marry the said Laurance Edwin Howell. The learned judge ordered the decree *nisi* to be made absolute in 6 weeks, i.e., on January 9, 1976. Since then the respondent had married Laurance Howell. He is an Australian, and was at that time a Colombo Plan technical expert attached to the Regional Centre for Education in Science and Mathematics in Penang. His contract was expiring on March 6, 1976 and he was returning to Australia to set up a home with the respondent. There were 3 children of the Laurance Howell/Selma Brazier marriage. Belinda, aged 13 years, who is now living with her mother and the appellant at No 1, Jalan Pelangi, Hillside, Penang, Jeremy, aged 18 years, had already completed his schooling in Australia, and Danny, aged 17 years, was in his final year as a boarder at Scotch College, Melbourne.

On January 27, 1976, the respondent applied for custody of the children and other consequential reliefs. In the affidavit in support, she stated *inter alia* that she sought those reliefs because both she and the appellant had entered into a deed of separation whereby the children had been left in her custody and control and that she was intending to marry Laurance Howell (by the time the application was before the court she had already married him) who was returning to Australia to take up the position of Assistant Director of the Curriculum Development Centre, Canberra, at an expected salary of Australian $17,000 per annum. She herself was a qualified teacher and could secure a job in Australia if necessary, although she had no intention of doing so as she wanted to look after the children. As her children were fluent in English she considered Australia could offer good educational facilities for her children. Apart from formal academic education, her two elder children were taking piano lessons which she hoped to advance in Australia together with the youngest child. She herself was a qualified pianist and coached the children in the art. She further stated that all along the appellant had agreed to her having custody and control of the children and taking them to Australia with her and that he would assume full financial responsibilities for the children. Relying on those assurances she had made all arrangements to take them to Australia and had bought among other things clothes and furniture for their home. With

the appellant's consent the youngest child was taken out of school at the end of 1975 to avoid paying a full term's fee for 1976 when the child might only go to school for five weeks. She also stated the appellant's wishes on the future and education of the children would always be respected and she would always be willing to allow the children to return to Malaysia if required by the court. The appellant was earning $3,500 a month with a yearly bonus of approximately 2 to 3 months and she asked for maintenance of Malaysian $1,200 a month for the children. She also asked for the land in Lot 927, Mukim 18, NED Penang having premises No 77, Tanjong Bungah Park, Penang, to be sold and the proceeds divided between her and the appellant on grounds shown in paragraph 11 of her affidavit (paragraph 11 will be dealt with in due course).

Her application was also supported by her present husband who confirmed what the respondent had said and that his salary put him among the top 10 per cent of wage earners in Australia and that he held shares in the Tukinya Home Loans which entitled him to a A $30,000 loan at $2^1/_4$% reducible interest to purchase a house and that he also had an A$72,000 superannuation policy with the Australian Mutual Provident Fund. He gave details of the joint property owned by him and the respondent. As far as his commitments were concerned, his eldest son had already completed schooling and was of 18 years of age and the second boy who was 17 was already in the final year as a boarder at Scotch College, Melbourne, where a major portion of his fees was met by the Australian Government. His youngest daughter, 13 years old,was in the care and custody of his former wife and it would cost him A$1,860 to maintain her. He was also paying A$155 per month to his ex-wife but this was only to carry on until she remarried and from what he understood she was intending to remarry. He further stated that he was in a good position to maintain the respondent and her three children even without any maintenance which may be paid by the respondent.

The appellant resisted the application on the grounds that he had not abandoned the children but allowed them to stay with his wife because he was afraid that otherwise the respondent would be mentally affected. He was also averse to the children studying in Australia because he was afraid that the education in Australia was of a higher quality and he was uncertain whether his children could adjust themselves. He further stated that he would be getting married to Selma Brazier whom his children knew well and that she would continue to provide the children with the necessary care, comfort and attention.

On February 16, 1976, the court gave her custody, care and control of the children with access to the appellant. She was granted other reliefs as stated earlier in this judgment.

With regard to the custody of the children, the learned judge was more concerned with their welfare than the preferred rights of either parent. He had interviewed the children in his chambers and found that the youngest child, Bernard, was naturally not expected to have any views on the matter. The elder two children impressed him as intelligent

and confident. Kathleen, especially was talkative and had very decided views on what she wanted. In talking to them,the learned judge found that they made it very clear to him that they wanted to be with their mother, that they were looking forward to going to Australia with their mother and studying there, and what was more, they did not want to stay with their father. They told the learned judge that although the father used to visit them once a week on a Sunday and took them out to lunch they were really never happy with him. Another reason why they did not want to stay with their father was that they did not like the woman he was living with and they hated her daughter who was living with them.

Under the circumstances the learned judge gave serious consideration to the question of the children remaining within jurisdiction with their father. He was of the view that the welfare of the children would be best served if the mother had custody, care and control of the children and was able to take them with her to Australia. He took into consideration these factors; First, he said that if the children remained in Malaya they would have to live with their step-mother for whom they decidedly had no affection. Secondly, there was the child of the father's would-be wife, whom the children disliked which naturally would lead to a lot of altercations and clash of loyalties in the house as one would expect a step-mother naturally to take the side of her own child. On the other hand, there was no other young child of the mother's present husband who would be staying with them. Both the mother's present husband's two elder boys were almost 18 and thus would not affect the home of the respondent and their children in Australia. Thirdly, from an emotional and psychological point of view, he was of the opinion that they would be far happier and better off with their mother, be it they were living in Australia or in Malaysia. The youngest child was too young to be separated from the mother and the needed the mother's love and affection. The other children were very enthusiastic about going to Australia with their mother as all preparations had been made. From his conversation with the children he had no doubt that they could easily adjust to the Australian system of education and benefit from whatever opportunities the Australian system offered them. He said that many parents in our country of their own volition are sending their children to Australia for education and he did not feel the children could be in any way adversely affected by the Australian education system. The mother had given an undertaking that she would, whenever arrangements could be made, send the children to visit their father in Malaysia if he so desired and also that his wishes could be considered in the upbringing of the children.

It is noted that at the trial both parents sought custody of the three children; neither sought for a split orders, *i.e.,* either a joint order for custody with care and control to one spouse, or, what must be the more normal form of split order, an order for custody to one spouse solely, with care and control to the other. On appeal the appellant's attitude changed. He conceded, in my view very rightly, that he did not wish to interfere with the present arrangement that care and control be given to

the respondent, but urged that custody be given to him as he feared that his wishes to have a supervisory role of deciding the children's future and education would not be respected by the respondent. Alternatively, he asked for an order of joint custody with care and control to the mother. Indeed the only reason, in my mind, for this change in attitude is to gratify the natural and honest paternal concerns of the appellant. The case of *Jussa* v *Jussa*[1] was referred to us as an example of a split order. That was a case of a mixed marriage between an Indian Muslim man and an English woman. The marriage broke down. On appeal both parents were awarded joint custody of the children of the marriage with care and control to the wife.The order for joint custody was made on the basis that both the parents were wholly unimpeachable in character, and there was a reasonable prospect that they could co-operate with each other in the interests of the children whom they loved. In any event, one comes back to the point that it is the welfare of the children that is the paramount consideration. For myself, I can only say this much: that the decision of the Court of Appeal was wholly appropriate to the facts of that particular case.

In these circumstances the only matter in issue right now is whether the learned judge was right in making the order which he did, committing custody, care and control of the children to the respondent alone. This case demonstrates once againt the difficulties in resolving a contested custody application, and the equal difficulties which beset an appellant, unsuccessful below, who seeks to contend that the discretion of the learned trial judge was wrongly exercised.

In such a case as the present, the position of an appellate court is quite clear. It is not entitled to interfere unless satisfied that the learned judge had clearly acted on wrong principles, e.g., if he had acted under any misapprehension of fact in the exercise of his descretion by either giving weight to irrelevant or unproved matters or omitting to take into consideration matter which were relevant. The possibility, or even the probability that it would have come to a different conclusion on the same evidence is insufficient *per se* to warrant interference. Giving to some factors lesser weight than the appellant's arguments demanded is also not a sufficient consideration for interference.

In my opinion, this case is one in which the learned judge quite clearly applied himself with great care to the relevant factors. He had the parties before him, he saw the children, and was able to form a better judgment on those matters than in this case this court can. In fact, during the address of counsel for the appellant in this court, no attack was made on the judgment on any footing that the learned judge had overlooked any factor to which he should properly have had regard, save to this extent, that it was suggested in a moderate and proper way, that there was a possibility, when one reads the judgment, that the learned judge might not have had sufficiently prominently in mind the wife's admission that the appellant husband should have the right to make major decisions with regard to the children's future and education and that his wishes should always be respected.

The position as I see it is to disregard entirely any concept of parental

claim. As the welfare of the childen is the paramount consideration, the welfare of these three children prevail over parental claim. The father's claim to make major decisions with regard to his children's future and education enters into consideration as one of the factors in considering their welfare, but not as a dominating factor if it is in conflict with their welfare. The learned judge recognised this aspect of the case and he gave effect to it in the following words: "In considering questions of custody of children the paramount consideration is the welfare of the children. No parent has a prior right". I think he has said enough. He could not have put it any better. Parental rights are overridden if they are in conflict with the welfare of the children.

Just as parental rights are overridden, criticisms of the conduct of parents because they transgressed conventional moral code also have no place in custody proceedings except in as far as they reflect upon the parent's fitness to take charge of the children. As Salmon LJ said in a custody case:

> I do not myself think that, whether this marriage broke up because of the fault of the father or mother or both of them, is of any consequence whatsoever. But I am bound to say that what impressed me is the fact, not that this mother committed adultery with another man in May 1966 but that she went off to live with him leaving the child behind: see *H* v *H and C.*[(2)]

The question is, what is best in the interests and welfare of these children? I think the overall interests must prevail over everything else. Many different views can be said about the overall interests, but with children of the ages of Alban, Kathleen and Bernard, the maintenance of a stable and secure home in which they can enjoy love and affection seems to me the most important thing right now. The first two are of school age and their future in life and society depends greatly upon their capacity for study and concentration. The question then arises which of the two new households can give them a stable and secure home. This is not a case in which the answer should depend upon comparing two individuals, but upon two households. In considering which of the two competing groups can give stability and security to these children, the respondent wife started with the immense advantage that after separation she has had the custody, care and control of the children and they had thriven under her care and control. They seemed happy with her and they did not want to stay with their father. They seemed never really happy with him. They did not like the woman with whom the father is living with and they hated her daughter who was living with them. All these things show that they appeared to have a strong attachment to their mother and are emotionally far more relaxed and stable with her than with their father and the other woman. A remarkable feature of the respondent's case is the support she had had from her present husband who swore an affidavit in strong support of her application. His affidavit speaks for itself. To my mind this demonstrates a willingness on his part to discharge the duties of a surrogate father. The woman with whom the appellant is living did not appear to

fulfil the role of a surrogate mother, beyond a bold statement by the appellant that she knew the children well and that she would continue to provide the children with the necessary care, comfort and attention. She swore no affidavit. I think that is one other factor which had influenced the learned judge in committing custody to the respondent. Since the welfare of the two children is of paramount consideration, I agree with the learned judge that their future lies with her in Australia. A new family unit has been created in which the children have enjoyed proper care and attention and it is in their best interests that they remain where they are.

The youngest child, Bernard, is of tender years. In my opinion, his place right now is with the mother. 'No thing, and no person', said Sir John Romilly MR, in the case of *Austin* v *Austin*[3], 'and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place.' This view has found judicial favour in many jurisdictions: in Australia, for example, in *Kades* v *Kades,*[4] the High Court, in a joint judgment stated: 'What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together'. In Canada, Muloch CJ in *Re Orr*[5] commented that, 'In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father....'

Bernard has lived with his mother all these years and irreparable damage can be done to his emotional development if he is suddenly removed from a known,secure, supporting set of relationships, and thrust among strangers, even if there be some blood relationship with one or more of the strangers. I think the speech of Lord MacDermott in *J* v *C*[6] is apt:

> Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case.

Any solution to the problem presented here in which custody is given

jointly to both parents as suggested by the appellant exhibits an error in the application of principle. In *Jussa* v *Jussa, supra,* the parents who were both living in England were willing to co-operate in the interests of their children who loved their father and enjoyed his visits. In that case a joint custody order was appropriate. In the present case I do not think such an order would be appropriate. The children and the father are living in different jurisdictions. Since the parent who has custody has control, he or she is put in a position to become the dominant influence, fixing the daily life style of the children. An absent and inactive parent, whatever his legal relationship to the children may be, cannot have such influence. He or she cannot do it by remote control.

In a situation such as the present, when one parent has been given custody, and it is working well, it is a very wrong thing for this court to make an order which will interfere with the life style of the new family unit. Of course, one sympathises with the father, but it is one of those things which he must face when the marriage breaks up. Perhaps a short quotation from the judgment of Sachs LJ in *P (LM)* v *P (GE)*[7] is apposite:

> When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn LJ, has pointed out produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.

It seems to me that it would be quite wrong for this court to make an order of joint custody because the appellant feared that the respondent would not consider his wishes that he be given a supervisory role of deciding the children's future and education. In my opinion, that fear is somewhat unjustified as the respondent had given an undertaking to the court that she would consider his wishes.

In the course of the argument counsel for the appellant contended that an order of custody varies the position of the father as guardian. He referred us to the provisions of sections 3 and 5 of the Guardianship of Infants Act 13 of 1961. Section 3 reads:

> The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

Section 5 is as follows:

> Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:

> Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

The sections apply only to guardianship and it is clear that it comtemplates that a father as the legal guardian has the custody of the infant and shall be responsible for his support, health and education unless the court removes him as guardian. Be that as it may, the application before the learned judge was one of custody only, and not guardianship and he restricted his judgment to an order that the children's custody be given to the mother, the applicant. I shall say no more on the subject.

There are other grounds of appeal but, in my opinion, they do not merit consideration. I think, I need only say something about the matrimonial home. The respondent's affidavit on the subject appears on paragraph 11 and it reads as follows:

> The respondent (appellant) and I possess a piece of land contained in Lot 927, Mukim 18 NED Penang containing premises No77 Tanjong Bungah Park, Penang (hereinafter referred to as the 'said land'). The said land was purchased for approximately $43,000 for which a down-payment of approximately $5,000 was paid. I paid $1,000 towards the down-payment and the respondent (appellant) borrowed a sum of $1,000 from my mother and paid the remainder himself. The balance sum was loaned from the Penang Port Commission who were then his employers. The said land was to be registered in joint-ownership but the loan arrangements necessitated the registration of the said land in the name of the respondent (appellant). It was the understanding between us that the respondent(appellant) pay the monthly instalments on the loan and I paid to maintain and upkeep the house, provide and pay for the children, pay for their music lessons,costs of schooling, wages for the servants to which end the respondent (appellant) contributed $35 weekly and $100 towards the monthly accounts. I also paid for the purchase of furniture and fittings for the house, initial renovation, cost of building a garage repainting the house two years later. The expenses for all this amounted to approximately $6,000.

That was not traversed nor fully argued before the learned judge. His remark on the matter was that, as far as the joint property was concerned, the appellant had agreed in the deed of separation itself that the net proceeds from the sale of the joint property should be equally divided between them.

Before us it was contended that the deed of separation was a temporary arrangement and as such that particular provision relating to the joint property terminated by the marriage of the respondent. That may be so, but one cannot run away from the fact that she contributed to the purchase and running of the matrimonial home. 'Contributions' says Lord Pearson in *Gissing* v *Gissing*[8] 'are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments'.

In my opinion, where both parents are working and have agreed to share in the purchase and running of the matrimonial home, then *prima facie,* the proceeds of sale thereof are to be divided between them in equal shares. Lord Denning LJ (as he then was) took a similar view in *Fribance* v *Fribance*[9] where he said:

> In the present case it so happened that the wife went out to work and used her earnings to help run the household and buy the children's clothes, whilst the husband saved. It might very well have been the other way round. The husband might have allotted to the wife enough money to cover all the housekeeping and the children's clothes, and the wife might have saved her earnings. The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit — either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets — and the product should belong to them jointly. It belongs to them in equal shares.

I would dismiss the appeal with cost.

Lee Hun Hoe Ag LP and **Ali Ag CJ (Malaya)** concurred.

Appeal dismissed.

Gan Teik Chee for the Appellant.
SJD Mathuram for the Respondent.

Note

In this case the Federal Court upheld the High Court's award of custody of three children to their mother. The significance of this decision lies in the fact that the mother was planning to take them away to Australia, out of the jurisdiction of the court. Nevertheless the court was of the view that the children's welfare would be best served if they were placed in the care of their mother. The father's appeal for joint custody was rejected as it was considered inappropriate in view of the distance that would lie between him and the children.

(iii) Mahabir Prasad
v
Mahabir Prasad No 1

[1981] 2 MLJ 326 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah Ag LP, Wan Suleiman and Salleh Abas FJJ

Cases referred to:-
(1) *Teh Eng Kim* v *Yew Peng Siong* [1977] 1 MLJ 234, 239.
(2) *Mc Kee* v *Mc Kee* [1951] AC 352.

(3) *Robinson* v *Williams* [1965] 1 QB 89,100.
(4) *B* v *W* [1979] 1 WLR 1041, 1055.

RAJA AZLAN SHAH Ag LP: (delivering the judgment of the Court): This is an application for custody by the father of two infant daughters aged 7 years and 8 years respectively. The father is a Malaysian citizen and the mother an Indian citizen. They were both married in Bombay, India in 1972; the infants were born there. The father left India in 1974 but the mother and the infants remained and lived in India. They came over to Malaysia in 1978. In January, 1980 the marriage broke down. The parties entered into a deed of separation by which custody of the infants was given to the father. The mother returned to India.

In March, 1980 the mother filed a divorce petition for dissolution of the marriage in the City Civil Court of Bombay and on the same day filed notice of motion for the custody of the infants. The father was represented at the hearing. The Bombay Court made an interim order granting custody to the mother pending the trial of the divorce petition. The father gave an undertaking to produce the infants on the date fixed for hearing. On that date, December 8, 1980, the father failed to appear and produce the infants. On December 16, 1980 the Bombay Court granted an order of dissolution of the marriage and awarded custody of the infants to the mother.

On December 15, 1980 the father unsuccessfully instituted custody proceedings in the Kuala Lumpur High Court. The learned judge was of the view that the father was estopped from making the present application stating that the decision of the Bombay Court was conclusive as against the father and it was not open to him to ask for another order in this court on the same matter in which he had agreed to accept the decision of the Bombay Court. Another reason for disallowing the application was that on the merits the father had not shown any change of circumstances to re-open the custody order granted by the Bombay Court.

As we see it the appeal is one against the exercise of a discretion by the learned judge and accordingly the father must show that the learned judge erred in exercise of the discretion in accordance with the principles enunciated by this court in *Teh Eng Kim* v *Yew Peng Siong*.[1]

In a case of this nature the courts in this country have jurisdiction to hear a custody case. The High Court in hearing a custody case regarding infants within jurisdiction is vested with an inherent jurisdiction which is derived from the Crown's prerogative powers as *parens patriae*. The problem which this court has to face in circumstances of this kind is not new and the question to be asked is from what angle ought we to approach the case, and how far is there any restriction imposed upon the course which we should take by reason of the order of foreign court of competent jurisdiction granting custody to the mother? There are many well known cases on the subject and we think we need only refer to the Privy Council decision of *McKee* v *McKee*[2] which was cited to the learned trial judge where the Judicial Committee re-

affirmed that the infant's welfare is of paramount consideration and that the court in whose jurisdiction the child happens to be should give effect to the foreign judgment without further enquiry; only when it is in the best interest of that infant that the court should not look beyond the circumstances in which the foreign jurisdiction was invoked. It is the law of this country as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication. Consequently, although our courts must take into consideration the order of a foreign court of competent jurisdiction, we are not bound to give effect to it if this would not be for the infant's benefit. We cannot regard that order as rendering it in any way improper of contrary to the comity of nations if the courts in this country consider what is in his best interest. Such an order cannot from its nature be final or irreversible. It is only of persuasive authority.

We are satisfied the learned judge erred in the exercise of his discretion as his determination arose from an error of law. In view of the manner in which he approached his decision, we are unable to determine whether the conclusion reached by him served the best interest of the infants and we would add that this is not a case where this court should substitute its own findings for that of the learned trial judge.

We are of the opinion that the learned judge was also wrong in law in coming to the conclusion that on the merits the father could not succeed. He said that if at all there was any allegation of change in the circumstances, it was only an allegation that the infants had expressed their strong decision to remain in Malaysia under the father's custody, an allegation to which he attached little importance. Change of circumstances, in our view, may be brought into the picture to reverse a previous decision of the same court, even though differently constituted. In such a case the matter is never *res judicata.* A custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but, will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare and happiness of the infants are the paramount considerations.

We echo the statement of the law by Widgery J, (as he then was) in *Robinson* v *Williams*[3]:

> The cases all now show that the fact that justices have refused to make an order in favour of the mother on an earlier occasion does not create any estoppel in the event of her seeking to obtain an order against the same man on a subsequent occasion. It is quite clear that the facts are not res judicata and there is no provision in any statute which requires either that fresh evidence or additional evidence should be produced on a second or subsequent application. In my judgment the only reason why fresh or additional evidence is required in practice is the reason given by Oliver J at the end of his judgment in *Rex* v *Sunderland Justices, Ex parte Hodgkinson,* [1945] KB 502, 509; 'It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently

> constituted, should be invited to reverse a previous decision of its own'. If the justices are invited in effect to reverse a previous decision of their own upon the same grounds and the same evidence, they would obviously take the direction of Oliver J. But if the evidence is different in the sense that it raised different considerations and justifies a reassessment, it seems to me proper for the justices to embark upon a second consideration of the matter.

Despite the mass of affidavit evidence, there is little information of the infants who are the central figure in the case. It has always been accepted that judges are entitled to see the infants and each of the parents in private. That was not done in this case. We feel that there should be comprehensive information; information not only dealing with the merit or otherwise of the parents involved it the dispute, but also information related to the infants. Only after a hearing in which all the aspects of the case had been gone into would he been able to arrive at a firm finding as to what are for their benefit. Anything short of this would leave the father with the smarting feeling of injustice.

We propose to deal with this appeal on the basis suggested by Lord Scarman in *B* v *W*[4] that where the Court of Appeal is satisfied that the order was wrong but unsure on the evidence what order ought to be made, the court can remit the case to another judge with such directions for the care and control of the child in the meantime as it thinks best in the children's interest.

The appeal must be allowed and the proceedings remitted for a rehearing before another judge. Our decision to allow the appeal is on a point of law only and it does not relate to the substantive merit of the case. Pending further order the custody of the infants will remain with the father. The mother is to have access to the infants on terms to be agreed upon between the parties.

Appeal allowed.

L Fernando for the Appellant.
K Anantham for the Respondent.

(iv) Mahabir Prasad
v
Mahabir Prasad No 2

[1982] 1 MLJ 189 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Abdoolcader J

Cases referred to:-
(1) *Mahabir Prasad* v *Mahabir Prasad* [1981] 2 MLJ 326.
(2) *J & Anor* v *C & Ors* 11970] AC 668, 710-711.
(3) *Teh Eng Kim* v *Yew Peng Siong* [1977] 1 MLJ 234, 239.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): This is an appeal against the decision of Ajaib Singh J who awarded custody of two female children of a broken marriage, aged $7^1/_2$ and $8^1/_2$

years respectively, to the mother. The facts and circumstances leading up to the decision are contained in a lucid and lengthy judgment of the learned judge which we do not feel obliged to repeat. We would like to state at the start that we sympathize with the parent who does not succeed in this appeal. This is one of those things which a parent must face when a marriage breaks up.

We are here dealing with the future of these 2 children. We must therefore consider the reality of the situation which is designed to promote their interests and welfare, and not to demote the claims of either parent.

The learned judge approached the matter by considering the welfare of the children as the first and paramount consideration. The phrase 'first and paramount consideration' does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration. We think that:

> "it connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." *[per* Lord MacDermott in *J & Anor* v *C & Ors*[(2)]*]*.

In arriving at his decision the learned judge has considered what will be in the best interests of the two children and what will be best to promote their welfare and protect their rights. In considering their welfare he has considered, amongst other things, the conduct of the parents in so far as it might indicate their future behaviour, the question whether the children of tender age should be with their father or mother, the situation in Bombay and Malaysia, the wife's apparent ability to spend some long and continuous period with the two children in the immediate future, the present situation where the children are brought up by the father's own family, the confidential reports of the social welfare officer and the firm wishes of the children who want to be with their mother.

Also the learned judge has considered the *status quo* of the children. It is true that this *status quo* was established by the father when the mother left for India in January 1980. The learned judge saw no virtue in preserving the *status quo*.

In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate. The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare. Consequently, it cannot be right to speak of the pre-eminent position of the parents alone, or their exclusive right to the custody of the children, when their

future is being considered by the court. Neither is it right to choose between two unimpeachable parents; we are here considering two households. Nor is it the case that we are confronted with the prospect of bringing to an end the continuity of a situation said to be good for the children. Of the two parents, the mother lives in a family situation, she has a thirteen year old son by a previous marriage and who is the step-brother of the two children and he has established close relationships with the children. She is also their mother and is prepared and able to devote a very long and continuous period to the care of the children. This demonstrates a willingness to face up to the responsibilities of parenthood. The father, on the other hand, will be at work when the children will be left at home with elderly people and there is no children of their own age group in that household. This is one other factor which has influenced us considerably. The father cannot constantly be present to care for the children and to provide for them. The father can therefore offer, at best, life with himself and his parents, brother and sisters. We are therefore uncertan what will be the relationship which will develop between the children and their elderly relations.

As to continuity, the present situation does not, in any way, encourage us to believe that its continuation can do anything to operate against the welfare of the children.

We are also aware of the damage done to emotional development of children if they are suddenly removed from a known, secure, supporting set of relationships, and thrust among strangers, even if they be some blood relationship with one or more of the strangers, In some cases this may be explored by calling expert evidence; in others, the ordinary experience of the courts is relied upon. But this does not mean that the *status quo* must always be preserved. It merely means that we must anxiously consider the evidence placed before the court and determine how best to promote the interests and welfare of the children. After having done that we are of the opinion that it cannot be but for the children's interests and welfare that they be returned to their mother.

For a judgment of this kind to be reversed by this court, matters must be shown of the kind to which reference has been made in many cases, such as *Teh Eng Kim* v *Yew Peng Siong*[3]. We are by no means satisfied that the learned judge, in the circumstances of this particular case, was wrong in the sense to which those principles refer, or that he was in default in relation to the kind of considerations referred to in such cases.

The appeal is dismissed with costs.

Appeal dismissed.

L Fernando for the Plaintiff.
K Anantham for the Defendant.

Note

In this case, the Federal Court upheld the decision of the High Court. The dispute as to the custody of the two female infants aged $7^1/_2$ years

and $8^1/_2$ years, was between their father, a Malaysian citizen resident in Ipoh and their mother, an Indian citizen resident in Bombay. Both girls were not Malaysian citizens. The court stressed that the primary consideration was the welfare of the children and held that placing them in their mother's custody would be in their best interest. In arriving at this conclusion the court considered the kind of household each parent had, their financial standing and ability to support the children, the ages as well as the immigration status of the children.

MAINTENANCE

(a) 'Living in adultery' within the meaning of section 5(2) of the Married Women and Children (Maintenance) Act, 1950

Rajalachmi
v
Sinniah

[1973] 2 MLJ 133 High Court, Kuala Lumpur

Cases referred to :-
(1) *Pandari* v *Parkash Rao* AIR (1952)Hyd 44.
(2) *Nand Lal Misra* v *Kankaiya Lal Misra* AIR (1960) SC 882.
(3) *Haji Ahmad* v *Sadah* [1954] MLJ 101.
(4) *Marimuthu* v *Thirucitambalam* [1966] 1 MLJ 203.
(5) *Jatindra Nath Mohan Banerjee* v *Gouri Bala Devi* AIR (1925) Cal 794.
(6) *Kista Pillai* v *Amirthammal* AIR (1938) Mad 833.
(7) *Ma Thein* v *Maung Mya Khin* AIR (1937) Rang 67.

RAJA AZLAN SHAH J: This appeal raises once again the familiar question of the right and duty of the husband to maintain his wife under the provisions of the Married Women and Children (Maintenance) Ordinance 1950. It is enacted in subsection (2) of section 5 of the Ordinance that a wife 'living in adultery' forfeits her right to be maintained by her husband. The subsection consists of two limbs, to wit:

> No wife shall be entitled to receive an allowance from her husband under the provisions of this Ordinance, if she is living in adultery, or if, without sufficient reason, she refuses to live with her husband.

The appellant is the wife of the respondent. She married him according to Hindu rites in 1954. There are 7 children of the marriage, 4 are now living with the respondent while 3 are with the appellant. In her application for maintenance she has made several allegations of cruelty against the respondent, who in turn has raised counter allegations of adultery and leaving the matrimonial home without sufficient reason. At the conclusion of the case the learned magistrate dismissed her claim for maintenance but allowed a sum of $55 per month for the maintenance of the said 3 children in her custody in the following manner:

(i) Bhavani (age 4 years) — $25 pm maintenance
(ii) Genarakaran (age 15 years) — $15 pm maintenance
(iii) Rajeswari (age 16 years) — $15 pm maintenance.

I am of the opinion that the learned magistrate has properly exercised his discretion in awarding maintenance in favour of the 3 children because it is settled law that a wife's adultery does not affect the court's discretion to make an order for maintenance with repsect to children. The appellant has now appealed against the whole of the decision of the learned magistrate.

There is evidence on record to show that the stress and strain of the marriage relationship appeared 3 years after marriage, resulting in the appellant constantly leaving the children and the matrimonial home when she found the moment propitious. The learned magistrate also found that some time in 1965 the appellant had indulged in extra marital relations with one E Muniandy. He strongly relied on the uncorroborated testimony of the parties' daughter, aged 9 years (RW1), who stated that:

> In 1965 one E Muniandy used to visit their home when the respondent was at work and that during those visits she and the other children were asked to leave the flat while he and the applicant stayed there for about an hour or so.

He concluded in these words:

> RW 1 was about 9 years old then and I do not see any reason to doubt her testimony.

The appellant's constant absence from the matrimonial home had inflicted a traumatic wound upon the respondent's mind until it reached a stage beyond endurance. In 1966 she again left the matrimonial home for some 10 months. During this period he had taken another wife 'to look after the children'. In April 1968 the appellant finally left the matrimonial home. In January 1969 Dr Lim Yew Inn of the Tanglin Hospital performed a D and C on her. According to the doctor she was 4 months pregnant and that she had an incomplete abortion. This vital aspect of the case was never challenged. It is common ground that from the time she left the matrimonial home until the abortion, marital intercourse did not take place between both spouses.

The learned magistrate directed his mind on the standard of proof with regard to adultery by saying and I quote in full:

> On considering the evidence adduced by the parties and counsel's submissions I was satisfied and on balance of probabilities that the applicant had committed adultery since leaving the respondent in April 1968. She denied having sexual intercourse with the respondent since leaving him but was found to be in the family way on 19.1.1969 — after about 8 months of being separated from the respondent. The only conclusion to be drawn from this fact was that she must have had sexual relations with somebody other than the respondent during the period April 1968 until 19.1.1969.

With regard to the second limb of the subsection the learned magistrate after reviewing the evidence said in a passage:

> On the foregoing reasons I find it difficult to believe that the applicant was forced to leave the matrimonial home by the respondent in April 1969. From the facts it was clear that the applicant, by her unwarranted behaviour, had been the cause of most of the family quarrels, and was used to leaving the matrimonial home on her own volition prior to 1968. From her past conduct, the irresistible inference to be drawn was that she was not forced to leave the house by the respondent in April 1968. Pursuant to the second limb of section 5(2) of the Ordinance, *supra,* I therefore hold that the applicant is not entitled to receive any maintenance from the respondent.

The appeal is directed on four main grounds: (i) The learned magistrate misdirected himself as to the standard of proof of adultery in that he found on the balance of probabilities that the appellant had committed adultery when he ought to have considered that the appellant had committed adultery beyond reasonable doubt. (ii) The learned magistrate erred in law and/or in fact in believing the uncorroborated testimony of RW 1, a child of tender age, alternatively in failing to warn himself of the danger of believing such testimony in the absence of corroboration. (iii) The learned magistrate erred in law and or in fact in holding that the appellant was not forced to leave the house by the respondent in April 1968 without sufficiently considering the appellant's grounds for refusing to return to the matrimonial home. (iv) The learned magistrate erred in law and or in fact in awarding the monthly allowance of $55 in respect of the three children, which sum is grossly inadequate.

With regard to the standard of proof required to prove adultery, it is quite clear that here the learned magistrate was wrong in approaching the case on the balance of probabilities as is required in a civil case. It is not necessary to examine the authorities at any length; suffice it to say that the matrimonial offence of adultery must be proved beyond reasonable doubt.

It has been suggested that the uncorroborated testimony of a child of tender age should not be acted upon in a divorce suit. No doubt that is a prudent and proper general practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn. Even if there are no infirmities in such evidence it is desirable to seek corroboration of her evidence in view of her tender age. The respondent has given evidence that from investigations he discovered that the appellant had relations with one E. Muniandy in 1965 but such evidence, without something more, could not have sufficiently proved his case. The uncorroborated testimony of his daughter of tender age for reasons which later become clear, is of no assistance. In any event, nothing turns on this issue.

The words 'living in adultery' in their ordinary and natural meaning are susceptible of only one meaning i.e., to a course of guilty conduct rather than to an isolated act of adultery or occasional lapses from virtue. That in my view seems to be exemplified and established in a number of judicial decisions under section 488(5) of the Indian

Criminal Procedure Code, which is *in pari materia* to our section 5(2) of the Married Women and Children (Maintenance) Ordinance, 1950. The relief given under both the sections are essentially of a civil nature. See *Pandari* v *Parkash Rao,*[1] *Nand Lal Misra* v *Kanhaiya Lal Misra,*[2] *Haji Ahmad* v *Sadah (f),*[3] Marimuthu v *Thiruchitambalam.*[4]

Thus in *Jatindra Nath Mohan Banerjee* v *Gouri Bala Devi*[5] it was held that unless continuity of conduct is established it cannot be held from a single act of adultery that a woman is 'living in adultery'. In *Kista Pillai* v *Amirthammal*[6] the court indicated that continued adulterous conduct is what is meant by 'living in adultery'. In *Ma Thein* v *Maung Mya Khin,*[7] after stating that the phrase 'living in adultery' refers to a course of guilty conduct and not to a single lapse from virtue, the court held that the fact that the child was begotten when the husband could not get access to her shows that the wife has been guilty of adultery on more than one occasion.

The question as it seems to me is whether a reasonable tribunal after properly directing its mind to the standard of proof required to prove adultery and applying it to the facts of the present case, is entitled in all the circumstances to draw the inference that the appellant was 'living in adultery'. When all these matters are considered together, I am far from saying that there was no material on which a court could properly infer, as it did infer that the appellant was living in adultery. In my judgment such an inference flows naturally from the facts. The fact that she was 4 months' pregnant after leaving the matrimonial home in April 1968 is clearly indication that she must have been living in adultery with someone other than the respondent. Accordingly I would dismiss her appeal.

In view of my finding that it has been proved beyond reasonable doubt that the appellant was 'living in adultery', it would be otiose to consider ground (iii). If it is necessary to do so I would associate myself with the finding of the learned magistrate that she refused to live with the husband without sufficient reason. In the absence of solid evidence, it strains credulity to suggest that the appellant who had no qualms in abandoning the children and the matrimonial home on a number of occasions, left the husband with sufficient reason.

I now come to ground (iv), which is an appeal on quantum. The respondent is a draftsman attached to the City Hall, drawing a total salary of $802 and after various deductions his take home salary is between $320 and $350. With that amount he has to support his second wife, the 4 children and a younger brother. Speaking for myself, I very gravely doubt whether the sum of $55 is sufficient to maintain three growing-up children in this jet age. Times have changed; the cost of living has gone up. Bearing that in mind I would award a monthly sum of $30 in respect of each child, to take effect from 1 June 1971 and further order that this sum of $90 pm be attached from the respondent's salary.

Order accordingly

Sri Ram for the Appellant.
E Devadason for the Respondent.