

HALLEY FRANCIS DAYAH v REGISTRAR-GENERAL OF BIRTHS AND DEATHS, NATIONAL REGISTRATION DEPARTMENT & ANOR

CaseAnalysis
| [2023] MLJU 1042

Halley Francis Dayah v Registrar-General of Births and Deaths, National Registration Department & Anor [2023] MLJU 1042

Malayan Law Journal Unreported

HIGH COURT (KOTA KINABALU)
CHRISTOPHER CHIN SOO YIN J
CASE NO BKI-24NCvC-120/8 OF 2022
6 April 2023

(Chang & Daut) for the plaintiff.
(Jabatan Peguam Negara Sabah) for the first and second dependent.

Christopher Chin Soo Yin J:

JUDGEMENT

(Originating Summons Enc 1)

Preliminary

[1]The Plaintiff is the biological father of a child “DHY”, who was born illegitimate in Kuala Lumpur, is seeking to have his name inserted into the child’s particulars in the Register of Births and Deaths. The parents of DHY remain unmarried as at the date of this decision. The Defendant is taking the stand that the application should not be allowed as there is no error in the existing entries in the Register and the mother had not earlier consented to the insertion of the Applicant’s name into the Register at the time DHY’s birth was being reported.

[2]At an earlier hearing I had ordered that the cause papers were adequately served on the 2nd Defendant the natural mother of DHY through “Whatsapp”. Despite evidence of such service, the 2nd Defendant elected not to appear in person or through counsel.

[3]The Plaintiff’s application was apparently triggered by an incident where the mother of DHY, the 2nd Defendant, suddenly appearing in Kota Kinabalu, unannounced with her husband, attempting to seize the child from school, but prevented from doing so by the school authorities.

[4]I allowed the application and the following are my reasons expressed with brevity.

Facts Found

[5]The following facts are clear.

- (a) The child “DHY” was born in Kuala Lumpur so the relevant legislation determining the registration of his birth is the Births and Deaths Registration Act 1957;
- (b) The biological father and mother of DHY” were unmarried upon his birth and remains so;
- (c) Once it became apparent that the mother was pregnant the Plaintiff took full financial responsibility to support the mother up to and meeting the costs of the delivery of the child on the 22.02.2017;

- (d) The Plaintiff at all times wanted to be named as the father of the child in the birth certificate but was informed by the mother that this was not allowed by the Respondent as DHY's parents were not married at the time of birth;
- (e) The Plaintiff was not informed of the provision in the 1957 Act that allowed his name to be included in the Birth Certificate upon the joint application of the biological parents;
- (f) The mother could not cope with caring for the child with her occupation as a full-time flight attendant so she flew to Kota Kinabalu and brought DHY together with his birth certificate and placed him in the custody care and control of the Plaintiff and the Plaintiff's parents on 05.04.2017;
- (g) This handing over of DHY took place when DHY was an infant of less than 2 months old;
- (h) DHY has been in the continuous and uninterrupted care of the Plaintiff and his parents for the last 6 years, that is, since 05.04.2017;
- (i) I interviewed DHY in person on the 06.04.2023 in my chambers. I note that he is in all respects a normal and happy child and there is clearly a strong bond between DHY, the Plaintiff and the Plaintiff's parents;
- (j) DHY is in full time education, currently in Kindergarten at Seri Rehmah in the final year. His needs are attended to by the Plaintiff's parents, both retirees, while the Plaintiff is at work as a medical officer in the Government Hospital; and
- (k) Upon the order of this Court a second independent DNA test has been conducted by Jabatan Kimia, Kota Kinabalu and the results confirmed that the Plaintiff is indeed the biological father of DHY.

Reasoning Behind Decision

[6]The decision I make today is founded not entirely on the interests of the Plaintiff or Defendants but upon the paramount interest and welfare of DHY. **Article 3(1) of the United Nations Convention on Rights of the Child ("UNCRC")** reads:

3(1). 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, ***the best interests of the child shall be a primary consideration.***

(2). States Parties undertake to ensure the child such protection and care as is necessary for *his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

The UNCRC came into force in 1989 and is one of the nine main human right treaties. Malaysia ratified the UNCRC on February 17,1995 and enacted the Child Act 2001 [Act 611] as part of her commitment to the UNCRC. See the paper by **Dr. Salahudin bin Dato' Hidayat Shariff** at page 145 et seq of the **Journal of the Malaysian Judiciary; January [2021] – "The Best Interests of the Child Principle in England and Malaysia"**, extracted with gratitude.

[7]This Court is further bound by the decision of the Federal Court in the case of *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 MLJ 398 where it was stated in paragraph 29 of the judgment that: -

"...a parent armed with a court order declaring him to be the biological father is entitled as of right to call upon the Registrar-General of Births and Deaths of the National Registration Department, Malaysia to carry out his statutory duty prescribed by section 27 of the Births and Deaths Registration Act 1957 (Act 299) (Revised 1983) to have the birth certificate of the Child corrected to reflect accurate information as regards the biological father, as required by the scheme of the said Act..."

In the same case Her Ladyship Mary Lim FCJ clearly decided: -

What we have here is a scenario where the appellant has requested the Registrar-General to update the register following the undisputed DNA results and the order of the High Court declaring the appellant as the biological father of the child; that with this latest information, the record of the identity of the father of the child as "maklumat tidak diperolehi" can no longer be maintained but must be updated by way of a correction or amendment."

"In our view, that request is fair and proper as the declaratory order of the court is valid and remains effective. We are of the

Halley Francis Dayah v Registrar-General of Births and Deaths, National Registration Department & Anor
[2023] MLJU 1042

firm opinion that this new information ought to be reflected in the public record, that is the register, that the true status of the child be corrected to reflect accurate information as regards the biological father, as required by the scheme of Act 299. We cannot see how it may be argued that correcting the register to reflect the declaratory order of the court is not in the interest of the child. On the contrary, it is certainly in the best interest and welfare of the child; consonant with the principles under the Convention on the Rights of the Child, to which Malaysia has acceded and ratified to on 11 February 1995.”

[8]Section 13 of the Registration of Births and Deaths 1957 (Revised 1984) enforceable in Kuala Lumpur, the place of DHY’s birth, provides:

13. Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

From section 13 (above) the Registrar is empowered to include the name of the biological father in the Register. From this the law is clear that with every power conferred by the legislature comes a duty on the party named to exercise or enforce such power. Otherwise the passing of the law would be an exercise in futility. Laws are passed to secure an ultimate good or to establish a system of governance or order ultimately linked to the Federal Constitution. It bears mentioning the dicta of HRH Azlan Shah in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135 (**FC**) on the exercise of powers by the person in authority:

“Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.”

[9]It is thus axiomatic that with every power created by statute comes a corresponding duty on the part of the person empowered to enforce or exercise such discretion or power, but within the limits of what was intended by the legislature.

[10]The law and practice not to include the name of the biological father in the birth register for a child born illegitimate is understandable. More often than not the biological father disappears from the scene as soon as he realises the magnitude of the responsibility of being a father of an unplanned child. Equally frequently, the mother is uncertain as to who was fathered the child. Single mothers faced a lifelong battle with schools, immigration and a host of authorities to get things done for an illegitimate child whose named father cannot be found or traced to execute applications, schooling requirements, forms, give consent etc. It is thus in the interest and convenience of the mother in most cases that the father’s name does not appear on the Birth Register and hence in the birth certificate.

[11]Hence it is no surprise that in Sabah, the pertinent legislation deems the natural mother of an illegitimate child the sole guardian of the child. The legislation in Sarawak gives either unmarried parent an equal right to be the guardian of the infant they brought to the world. In Sabah it is therefore common for a natural mother of an illegitimate child to apply to adopt her own natural child to rid herself of the inconvenience of the child having a birth certificate with the absconded biological father’s name included.

[12]On the other hand the mother cannot disappear from the responsibility of caring for the child as she is carries and delivers the child and invariably a natural bond will exist between mother and child. Nevertheless, the biological father has rights borne out of the responsibility to care for the child whose conception he was responsible for. There may be cases of fathers seeking to have their names inserted into the Register for pecuniary reasons. Those cases must be viewed and considered in their respective circumstances guided ultimately on what would be in the interest of the child.

Conclusion

Halley Francis Dayah v Registrar-General of Births and Deaths, National Registration Department & Anor
[2023] MLJU 1042

[13]In the premises having interviewed DHY, the Plaintiff, and the child's paternal grandparents and taking into consideration that his interest is best served by maintaining the status quo I order as follows: -

- (a) By virtue of and in acceptance of the report by Jabatan Kimia dated 16.02.2023 (ref 23-FR-S-00334) the Plaintiff Halley Francis Dayah (860403-49-5993) is the biological father of the Child, DHY (DM22812/MyKid 170222-14-0677);
- (b) that the 1st Defendant be directed within 14 days of today to enter the particulars of the Plaintiff as the father of DHY in the register of births pursuant to section 13 of the 1957 Act;
- (c) consequent upon the insertion of the Plaintiff's name into the register, that the race of the child now be listed as "Kadazan";
- (d) The Plaintiff shall be entitled, within 14 days of today to apply for and receive a certified extract from the register of births, a birth certificate of DHY with the above details duly recorded and inserted;
- (e) In recognition of the need to have DHY's education and welfare uninterrupted and to preserve the status quo I further order that:
- (f) The Plaintiff Halley Francis Dayah (860403-49-5993) is the appointed and declared sole guardian of the DHY (DM22812/MyKid 170222-14-0677) by virtue of **section 3 of the Guardianship of Infants Ordinance (Cap 54)**; The guardian of the person of an infant shall have the custody care and control of the infant, and shall be responsible for his support, health and education, until otherwise ordered by Court.
- (g) Nothing in today's orders shall in anyway restrict the rights of the parties to apply for or come to an amicable arrangement on access or to the joint custody, care and control in future of the child.
- (h) No order as to costs.

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