16. FAMILY LAW

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Custody

16.1 This chapter will be broken down into four main parts: custody (including access and care and control issues); division of matrimonial assets; divorce; and maintenance. With respect to custody, the first two cases discussed reflect the breadth of measures available to a court in deciding what is in the best interests of the child, such as engaging social and medical professionals in rebuilding the lost trust between a parent and her children, and having the children interviewed by the court. The two cases that follow after that pertain to relocation applications, with one concerning the substantive merits of such applications and the other the procedural question of pending foreign proceedings.

Guardianship dispute between widow and testamentary guardians

16.2 In *JBE v JBF* [2015] 3 SLR 1271, the husband had passed away and there was a dispute between the widow on the one hand and the two children's grandmother and testamentary guardians on the other over the children's custody. The husband, wife, children, grandmother and testamentary guardians had lived together since the marriage in 2004. The husband and wife had a difficult marriage and in 2012, the wife suffered from acute stress reaction. There was also a quarrel that led to the police being called and the grandmother applying for a personal protection order for herself and the children. The wife was sent to the Institute of Mental Health for treatment and discharged a few days after, shortly before the husband passed away from cancer. In his will, the husband appointed his brother and sister-in-law as testamentary guardians of the children. The children were six and eight years old at the time of the hearing.

16.3 When the wife commenced an originating summons for the children to be delivered to her custody, care and control, the testamentary guardians cross-applied to be appointed joint guardians of the children. When the matter was brought before the District Judge, a series of measures were initiated by the court: (a) a number of assisted access sessions at the Centre for Family Harmony were ordered; (b) a social welfare report was requested; (c) a referral was made to the Child Guidance Clinic; and (d) counselling sessions were arranged. The

outcomes of these measures showed quite clearly and consistently that the children were uncomfortable with the wife but enjoyed a good relationship with the grandmother and testamentary guardians.

16.4 The wife and testamentary guardians were thus granted joint custody of the children, while the testamentary guardians were granted care and control, with supervised access to the wife. When the matter was appealed to the High Court – the wife wanted to assume care and control – Valerie Thean JC interviewed the parties and the psychiatrist who was treating both children. She was satisfied that the District Judge had made the right decision but made a couple of enhancements to the wife's access.

16.5 In arriving at her decision, Thean JC first noted that under the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), the mother shall be the joint guardian of the infant if the father had appointed a guardian before his death, and that if complications arise, the court is to resolve the matter. The first and paramount consideration is the welfare of the infant.

16.6 The wife said that she was fit to care for her children as she had recovered from her mental illness; she was employed with a good salary as a teacher at an international school for young children; and her accommodation was provided for. The testamentary guardians, however, said that the wife had left a permanent psychological scar on the children and pointed out that the grandmother had always been the primary caregiver for the children. The children would be better off in a loving environment, which they could provide.

16.7 Thean JC distinguished the main authorities raised by the wife. For instance, while the Court of Appeal in *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 had emphasised the importance of the maternal bond between mother and children, that importance presupposes that all other factors are equal. Here, the wife did not have a good relationship with the children to begin with. Similarly, while the Court of Appeal in *Re C (an infant)* [2003] 1 SLR(R) 502 ("*Re C*") had observed that a surviving parent has a *prima facie* right to the custody of the child, this is still subject to the paramount consideration of welfare of the child. On the facts, the children were simply not ready yet for their mother to be given care and control.

16.8 Both the District Judge and High Court demonstrated commendable commitment to the new judicial philosophy for the hearing of family law cases that was introduced in 2014 together with the restructuring of the family justice system: see Chen Siyuan, "An Overview of the Impending Changes in the Family Justice Landscape" *Singapore Law Blog* (10 August 2014). For instance, in the

orders that were made by the High Court, the door was kept open for the wife to reintegrate herself into her children's lives. This door was kept open with sensible interim conditions, such as that of assisted access with the wife facilitated by the children's psychiatrist and counselling with a court counsellor to enable the wife and the testamentary guardians to rebuild their relationships. The onus was put on the wife to reacquire the love and respect of her children, but she was not left to her own devices to figure how to do this.

16.9 Critically, the court also understood that the role of parents – particularly when one has already passed away – is intricately connected to the welfare of the children, even if the parent may not be well accepted by the children in the present. Further, by involving a wider field of social and medical professionals, this can sometimes defuse the adversarial conflict between opposing parties that is inherent in traditional litigation (and in fact more so in family law litigation); the courts would no doubt have to play an even more proactive role in managing strained relationships than before for family cases, especially when safeguarding the welfare of the children (in this regard see also *THL v THM* [2015] SGHCF 11 at [14]–[31]). After all, this was the principal purpose behind the sea change to the family justice system in 2014.

Judicial interviews with children

16.10 In *AZB v AZC* [2016] SGHCF 1, the wife was addicted to Internet activities of a sexual nature and the husband sought to prove that she was neglectful of her parenting duties. The husband was granted care and control of the couple's three daughters, while the wife was granted access. The wife challenged this order twice. She first applied for shared care and control. She claimed that there was a material change in circumstances that justified the variation of the order, in that the children had grown older and needed her care and they had also indicated they wished to spend more time with her. The High Court dismissed the application as the judge thought that the children should be given the stability and peace of mind to grow up without constant changes to their lives. He declined to interview the children.

16.11 The wife then applied a couple of months later for care and control, requesting that the children be interviewed by the court or that a child representative be appointed. The husband argued that this application was an abuse of process and the High Court had already decided only a couple of months ago against interviewing the children. Debbie Ong JC heard this application. Citing a wide variety of social science research as well as developments and practices from other

jurisdictions throughout the judgment, she first stated (at [20]–[23]) that judicial interviews with children can be useful if the judges are equipped with the necessary skills as such interviews enable the welfare of the children to be realised:

> I am of the view that judicial conversations with children are very useful, and the way forward must be to equip judges with the necessary skills, provide an environment most conducive to an effective process and eliminate or reduce as many of the risks as possible. Judges ought to be aware of the limitations and give the appropriate weight to the views expressed in judicial conversations with children.
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> The court's discretion whether to interview the children should be exercised for the children's welfare, in light of all the circumstances. Pursuant to this discretion, a judge may even choose to interview the children on his or her own motion without an application being made by either parent. …
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> I do not think that having the children speak to a judge necessarily draws them into the fray of the parties' contentious proceedings. Many children in family proceedings have already witnessed and continue to witness parental conflict … Giving them the opportunity to express their views to a judge who will be making orders directly affecting their lives might in fact provide them a window out of the seemingly endless on-going parental conflict.
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> … our current family justice system has taken on a more robust approach to protecting the welfare of the children. Although it is at its core an adversarial legal system, our family justice system has taken on a more inquisitorial character. … A judge is obliged to place the welfare of the child as its paramount consideration and is empowered to use a proactive approach to reach orders that serve the interests of the child.

16.12 As for the way such judicial interviews should be conducted, Ong JC also noted (at [25]) that a judge should avoid asking leading questions and consider the age and maturity of the children, the wishes of the children, whether the children were pressurised by a parent to speak, and whether a child was expressing certain views only because of induced alienation.

16.13 Applying these principles in the present case, Ong JC chose to interview the children in the end. She stated (at [26]) three reasons: first, there were indications they wanted to speak with her; secondly, they were mature enough to express their own views on the relevant matters; and finally, she did not think interviewing them would be dragging them into the fray.

16.14 As for whether it was an abuse of process for the wife to apply for judicial interview when an identical application had been rejected

just a short time ago, Ong JC also did not think that there was an abuse of process as the courts should not readily find applications made under s 128 of the Women's Charter (Cap 353, 2009 Rev Ed) to be an abuse of process: at [29] and [31]. In such applications, "it is conceivable that significant changes to the parties' lives can take place within a short period of time". Here, the wife had obtained a new home, found stable employment and made good progress with respect to her Internet addiction. The children also told Ong JC that they enjoyed access at the new condominium, and she considered this to be a material change in circumstances that warranted a variation of the previous order. However, while she was prepared to increase access for the mother, she did not think the time was ripe to vary the order on care and control.

16.15 This case is yet another development in the new family justice landscape mentioned above and a natural extension of cases such as *ZO v ZP* [2011] 3 SLR 647 (which held (at [15]) that in applications to vary custody orders, the views of the children should be taken into account by way of judicial interviews, and which was cited in this decision). However, while judicial interviews with children would no doubt increase as a result of the mandated emphasis on the judge-led approach, as Ong JC noted (at [14]–[15]), the issue of the desirability of judges speaking directly to children in parenting disputes has been a keenly debated one in various parts of the world, with various concerns surrounding the issue. At bottom, if judicial interviews with children are to become something of a mainstay in custody hearings, this requires family law judges to be trained to become expert and child-friendly mediators to the point that they are a welcome and familiar sight for the children caught in the middle of their parents' dispute. This is all the more so if a family law judge is expected to take up a case from its inception and follow it through to the end. An alternative (or supplement) of course is to have reports prepared by social workers and professionals from the relevant disciplines. One suspects, however, that judges may prefer direct interactions with the children rather than just receiving information from third party sources.

16.16 Separately, one potential technical complication not explicitly contemplated by the judgment is whether an appellate tribunal – usually comprising at least three judges – should also be encouraged to interview the children (and if so, whether in its full complement) if a decision on the variation of a custody order is appealed. Otherwise, is the appellate tribunal to accept the lower court's assessment, despite any possible (material) change in circumstances? In ancillary proceedings like this, there is no finding of fact in the traditional sense as ancillary orders can be varied at any time, depending on the change in circumstances. If a High Court judge is not bound by a previous High Court judge's order as was the case here, it seems in principle neither should an appellate court.

Relocating children: Balancing reasonable wishes of the primary caregiver and loss of relationship with parent left behind

16.17 In *BNS v BNT* [2015] 3 SLR 973, the husband and wife were Canadians who married in Canada in 2002. In 2004, they moved to Bangkok and their two children were born there. The family moved to Singapore in 2008 and the husband and wife divorced in 2012. That same year, the wife applied to relocate with the children to Toronto. As previously discussed in (2014) 15 SAL Ann Rev 354 at 362–365, the High Court dismissed the application on the basis that it would not be in the best interests of the children to relocate as they still shared a close bond with the husband. Here, the Court of Appeal dismissed the wife's appeal for the following reasons (at [19]–[26] and [30]–[34]):

(a) The welfare of the child is paramount and this overrides any other consideration in all proceedings affecting the interests of children, including relocation applications.

(b) The reasonable wishes of the primary caregiver are relevant only to the extent that there will be a transference of his insecurity and negative feelings onto the child. As the High Court in *TAA v TAB* [2015] 2 SLR 879 had stated, the law expects parents to put the interests of the children before their own: *TAA v TAB* at [17]. Further, the court in *Re C* (above, para 16.7) did not intend to state that the reasonable wishes of the primary caregiver was a determinative factor in the sense of it being a trump, but that it was an important factor: *Re C* at [22].

(c) Different factors may assume different importance in different cases. Courts elsewhere, for instance in Australia, Canada, England and New Zealand, have distanced themselves from the use of presumptions in assessing the welfare of the child in relocation applications.

(d) The factor of the child's loss of relationship with the left-behind parent has not received much judicial attention even though it is an important one. A child benefits from the nurturing presence and joint contribution of both parents in his life and this does not cease to be true upon their divorce. Relocation is a serious threat to the ideal state of joint parenting, though much depends on the strength of the existing bond between the left-behind parent and the child.

(e) On the facts, it was more important that the children were able to sustain the strong relationship that they enjoyed with the husband than it was for the wife to relocate with them. The husband had played an active and involved role in the children's lives and it was also impractical to expect the husband

> to similarly relocate to Canada, given the regional expertise he had acquired in his profession. It was preferable for the children to continue to have personal contact with him instead of letting them stay in touch mainly through remote means.

16.18 This decision represents a needed positive development in this area of family law and appears to reverse a recent trend of relocation applications being approved almost all the time: see *TAA v TAB* at [9]. In an increasingly globalised and interconnected world, there would be more and more families that are broken by divorce and seeking to relocate. Though the court was quick to emphasise that even the factor of loss of relationship with the left-behind parent may not necessarily be so important as to be determinative, there is a critical difference between this factor and the competing factor of reasonable wishes of the primary caregiver. In the latter factor, it is about the primary caregiver believing subjectively what is in the best interests of the child, possibly despite and against what is objectively in the best interests of the child. This may occur even if the primary caregiver had been a good parent (which is more likely than not given that care and control was probably awarded in the first place).

16.19 In the former factor, however, if the left-behind parent had been a good parent, it should be a certainty that it would objectively be in the best interests of the child for the relationship to be sustained as the focus of the inquiry is on the quality of the parent rather than what the parent wants. A possible exception to the former factor being reduced in significant importance may be if the child is already quite old and is mature enough to relocate with a low likelihood of emotional turmoil. What may be trickier is if the child is young and somehow does not have a good relationship with the left-behind parent despite that parent having been active and involved. Will it truly be in the best interests of the child to effectively sever the relationship just because the child does not appreciate or even like that parent for the moment? What if the child is also desperate to relocate under the thinking that it would be desirable to start life afresh in a new place?

16.20 Preserving the status quo or adopting a short-term view to things, as courts tend to do sometimes in the context of guardianship, may not be wise all the time. In the context of relocation – which is by nature a long-term decision with long-term and maybe even irreversible implications – the courts must be bold in thinking about what is truly in the best interests of the child. Moreover, as observed in *TAA v TAB*, a "refusal to allow relocation at the time of application does not necessarily mean that a future relocation can never be possible"; the law should not "permit hastily made unilateral plans that fail to consider the welfare of the children": *TAA v TAB* at [20]. Indeed, in that case, although the parent who was going to be potentially left behind did not

have as good a relationship with the children as in *BNS v BNT*, she was once close to them at an earlier point in their lives until the marriage broke down, and the court placed considerable importance on that in refusing the relocation application by the other parent: *BNS v BNT* at [22]–[23]. However, the court also placed considerable importance on the fact that the children were well settled in Singapore.

16.21 At the end of the day, courts are being asked to make very difficult choices in relocation applications. Before such applications are made, the words of the High Court in *TAA v TAB* are worth bearing in mind (*TAA v TAB* at [20]):

> [W]ell made plans that promote both the common interests of the parent and the children can be supported. Well made plans may require robust and extensive discussions between both parents exploring various options and setting in place clear access plans while the families are in two different countries. Some left behind parents may even be willing to move to or nearer to the new country. The law expects at least such efforts to have been made as cooperative parents of the children whose welfare is being threatened.

Absent such efforts, relocation applications will probably be rejected, and this will be to the detriment of not just the parents but the children as well, as litigation is needlessly protracted.

Relocating children: Pending foreign proceedings

16.22 In *TDX v TDY* [2015] 4 SLR 982, an unmarried couple comprising an Australian father and a Singaporean mother were based in Hong Kong as they had been working there for at least six years. They had a relationship and their child was born in 2013 in Hong Kong. In 2014, the mother took the child to Singapore.

16.23 The father commenced proceedings in Hong Kong, seeking custody, care and control of the child. He also wanted the child to be returned to Hong Kong and to be made a ward of the Hong Kong court. The mother commenced proceedings in Singapore, seeking custody, care and control of the child, and an order to prevent the father from bringing the child overseas without her consent. The father sought a stay of the Singapore proceedings (as opposed to a return of the child based on the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) (1343 UNTS 89)).

16.24 Debbie Ong JC first noted (at [12]–[13]) that while *BNS v BNT* had made it clear that the welfare of the child is the paramount consideration in the context of cross-border relocation of children, for a Singapore court to make a fresh determination of the issues in every case "could prevent a more appropriate forum from determining what is

in the best interest of the child". In her view, the welfare principle does not invariably require the Singapore courts to decide on the merits of each case afresh. She cited the following reasons (*TDX v TDY* at [14]–[18]):

> (a) It is well accepted in local jurisprudence that the doctrine of *forum non conveniens* remains relevant in proceedings involving the custody of children.
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> (b) The application of the welfare principle involves the proper application of the doctrine of *forum non conveniens*, which requires the court to examine which jurisdiction is better placed to decide on the issues concerning the welfare of the child. The welfare of the child encompasses a broad range of needs and this can only be appropriately evaluated by the forum which is better equipped to determine this.
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> (c) The court's consideration of all the relevant factors when applying the doctrine of *forum non conveniens* and the weight to be given to these factors depends on the nature of the dispute; in cases involving custody, care and control, and access, the relevance and weight of the factors must be decided in the light of the welfare principle.
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> (d) Multiplicity of proceedings which results in increased and unnecessary costs, delays, tensions, energy and possible contradictory orders will substantially affect the child's welfare.

16.25 Accordingly, a substantive determination of the case should only be made after it has been decided that Singapore is the more appropriate forum to decide matters concerning the welfare of the child. On the facts, Ong JC held (at [25]–[26] and [63]) that since the most relevant factors were the child's connections to Hong Kong and Singapore, the parents' connections to Hong Kong and Singapore, and the existence of parallel proceedings in Hong Kong, Hong Kong was clearly the more appropriate forum to hear the issues concerning the child. Specifically, Hong Kong was the seat of the relationship, all parties were clearly habitually resident in Hong Kong, and the child's habitual residence had not changed after she was taken to Singapore. Further, the Hong Kong proceedings had advanced further than the Singapore proceedings and the Hong Kong court was actively and efficiently fulfilling its obligations to the child, who had been made a ward of the court. All things considered, it was in the welfare of the child for the proceedings to take place in the Hong Kong courts rather than the Singapore courts.

16.26 This decision is a correct one, though it may not always be the case that the parent left behind is able to take out a stay application in a timely manner. As noted by Ong JC (at [64]), if the mother had wanted

to relocate with the child, her first port of call – so that the welfare of the child was properly considered – should have been to work out an arrangement with the father or, in the alternative, an application should have been taken in the Hong Kong courts. Denying the stay application and hearing the dispute afresh in the circumstances would have been tantamount to condoning irresponsible and unilateral conduct on the part of the relocating parent, no matter how compelling her reasons for leaving might have been. Indeed, what is also of importance is that Ong JC expressed confidence (at [65]) that the welfare of the child would have been well protected by the Hong Kong legal system. This was not a situation of a foreign court being inherently unreliable; thus, there was also no real need to consider whether the wife would have been denied substantial justice there.

16.27 On a broader level, in light of an increasing number of transnational marriages and family relocations, it is worth noting that an international advisory council will be established some time in 2016 to discuss and study the latest international best practices and solutions in family law and practice. The Family Justice Courts will also be developing an international family mediation framework to address cross-border family issues. It is hoped that these two developments will go some way in resolving the complexities in cross-border family litigation.

Division of matrimonial assets

16.28 Although many written judgments on family law involve the question of the division of matrimonial assets, there were still several judgments of note in 2015. The first case discussed here clarified the division framework generally but also reiterated the rejection of the concept of uplifts. The remaining cases mostly address a variety of issues that arose in rather specific circumstances (such as whether a foreign polygamous marriage can affect the just and equitable division of assets) but are useful in examining the limits on the court's discretion when exercising its power to divide matrimonial assets.

Clarifications on rejection of uplift methodology

16.29 In *ANJ v ANK* [2015] 4 SLR 1043, one of the main issues was the division of matrimonial assets. The High Court judge had ascertained the parties' direct financial contributions to be 60:40 in favour of the husband. The judge then gave the wife what was in effect a 20% "uplift" to account for the greater indirect contributions she had made towards the family, converting the final ratio to 60:40 in her favour. Reiterating what it had said before in previous cases, the Court

of Appeal rejected the concept of using an "uplift" in the division exercise, stating (at [18]–[20]):

> [I]t is not uncommon for lower courts … to start from the proportions of the spouses' financial contributions to the acquisition of matrimonial assets before adjusting those proportions by giving the spouse who had made more significant contributions an 'uplift' (also known as a 'mark-up' or 'premium') to those proportions. This court has on past occasions disapproved of the use of the 'uplift' methodology as it is *inconsistent* with the rationale of the broad-brush approach as well as the underlying spirit of s 112 of the [Women's Charter] …
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> [T]he 'uplift' methodology is not a good tool to assess and recognise the parties' indirect contributions to the marriage. The primary difficulty with this approach is the inherent risk of it undervaluing a spouse's non-financial contribution …
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> … Not only does that approach carry with it the risk of undervaluing the homemaker's indirect contributions, it could also cause an *overvaluation* of the homemaker's indirect contributions … A decision to grant a wife, say for instance, a 5% uplift to what would have been a 50:50 ratio of direct contribution between spouses translates into an actual uplift of 10%, as not only does the wife receive a 5% uplift, the court also *deducts* a 5% share from the husband.
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> [emphasis in original]

16.30 The Court of Appeal recognised, however, that an overly broad-brush approach could lead to an unstructured division and arbitrary results. It thus set out (at [22]) what it thought would be the appropriate approach when balancing direct and indirect contributions: first, the court would ascribe a ratio that represents each party's direct financial contributions towards the acquisition or improvement of the matrimonial assets; secondly, the court would do the same for each party's indirect contributions to the well-being of the family throughout the marriage; thirdly, the court would then use each party's direct and indirect percentage contributions to derive the average percentage contribution; and finally, adjustments would be made to the average percentage contributions if necessary. As to the fourth step in this approach, the court recognised (at [27]) the length of the marriage, size of the pool of matrimonial assets, and extent and nature of indirect contributions as likely key factors for consideration.

16.31 The methodology in *ANJ v ANK* may be compared with *Teh Kah Wen David v Chow Lai Meng Nina* [2015] 3 SLR 469 ("*Teh Kah Wen David*"), which was decided before *ANJ v ANK* but arguably adopted a similar methodology. In *Teh Kah Wen David*, the couple were married between 1991 and 2012 and bore two children who at the time of the case were 21 and 22 years old. The pool of matrimonial assets was

worth around $16m, most of which comprised stock options belonging to the wife. Indeed, the wife was the principal breadwinner who made 92.2% of the financial contributions during their marriage, while the husband was intermittently employed. When the husband eventually decided to pursue his hobby by becoming a toy retailer, the wife helped him procure the inventory and set up the shop. In terms of non-financial contributions, the wife was found to be an extremely involved mother and homemaker in spite of her full-time job. She also had to take care of her parents and sister. The husband, on the other hand, did not contribute anything of note to the family and was even occasionally violent towards the wife. Though Chan Seng Onn J thought that the husband could only claim a 5% share of the non-financial contributions, he was willing to accept the wife's claim that he had contributed 10%: *Teh Kah Wen David* at [43]–[44].

16.32 Chan J described the division exercise as one of finding a "single overall ratio" that was just and equitable: *Teh Kah Wen David* at [45]. Having decided that the wife had provided 92.2% of the financial contributions and 90% of the non-financial contributions, he wrote (*Teh Kah Wen David* at [49]) that it:

> … must follow that the 'overall single ratio' for the [wife's] share to be used … must fall somewhere between 92.2% and 90% and where it would fall would depend on the relative weightage or relative importance placed on the financial and the non-financial contributions.

Chan J decided that the appropriate weightage in this case was 65% for financial contributions and 35% for non-financial contributions, which translated to a "single overall ratio" of 91.43% to the wife and 8.57% to the husband: *Teh Kah Wen David* at [50]–[51].

16.33 As a preliminary point, although it is settled law that the court is supposed to take a broad-brush approach when dividing matrimonial assets (see *ANJ v ANK* at [17]), this has not stopped the courts from devising various means to try to achieve greater precision and certainty in the exercise. Indeed, the Court of Appeal has generally resisted adopting an overly rigid or formulaic approach (as it did, for instance, in *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 520 at [55]–[58]; *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [81] ("*Yeo Chong Lin*"); and *AYQ v AYR* [2013] 1 SLR 476 at [17]–[24]), a point it made again in *ANJ v ANK*. Although *Teh Kah Wen David* was decided before *ANJ v ANK* and therefore did not have the benefit of considering it, is it nonetheless compatible with its four-step approach? It would appear so for at least three reasons.

16.34 First, the Court of Appeal had an opportunity to invoke *ANJ v ANK* again in *Twiss, Christopher James Han v Twiss, Yvonne Prendergast*

[2015] SGCA 52 at [2], and this came sometime after *Teh Kah Wen David*. If *Teh Kah Wen David* was indeed a departure from or contradiction to *ANJ v ANK*, the Court of Appeal would (given the fact that it was at pains to reiterate what it thought was the right methodology) probably have pointed it out and corrected the methodological error there and then, unless for some reason it was not aware of it: *cf TAU v TAV* [2015] SGHCF 2 at [10].

16.35 Secondly, although Chan J deployed the hitherto unused term of "single overall ratio" (the only other known case that has used this very term was another case decided by Chan J, *ASI v ASJ* [2016] 1 SLR 1 at [27], but it was decided also before *ANJ v ANK*), the steps in arriving at the final ratio are essentially the same as that in *ANJ v ANK*. Perhaps the third step of identifying the appropriate weightage for the direct financial contributions and indirect contributions is expressed differently from *ANJ v ANK*'s third and fourth steps (of averaging the two ratios and then making adjustments), but the result is the same, or at the very least they are in principle attempting to achieve the same thing using indistinguishable means (in this regard see also *ANJ v ANK* at [26] where the Court of Appeal made some observations about putting financial and non-financial footing on an equal footing in most cases).

16.36 Finally, the Court of Appeal in *ANJ v ANK* actually made it quite clear that it was not changing the law in any way but merely reiterating and clarifying what it had previously stated in a rather long string of cases including *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 at [23] and *Tan Hwee Lee v Tan Cheng Guan* [2012] 4 SLR 785 at [84]. In other words, the court in *Teh Kah Wen David* would have been bound to apply those precedents before *ANJ v ANK* anyway (even if they were not categorically cited), and it should not be lightly assumed that they were ignored, not in its knowledge, misunderstood, or misapplied.

16.37 Perhaps in the final analysis, the real problem – and as recognised by the Court of Appeal in *ANJ v ANK* at [24] – is the difficulty of quantifying indirect contributions to the well-being of the family (in this regard, see also *Zhou Lijie v Wang Chengxiang* [2015] SGHC 316 at [62]–[66] ("*Zhou Lijie*")). Not only may there be limited concrete evidence to support the claims of the parties, but indirect contributions are also by nature difficult to reduce into quantifiable or monetary terms. Yet within the framework of *ANJ v ANK*, a number must be conjured up in the second step (which then of course affects the outcome in at least the third, if not also the fourth, step). However, difficult as it may be, it is vital that courts adopt a structured approach to explaining the division (in this regard see also *TEG v TEH* [2015] SGHCF 8 at [16] ("*TEG*")). In particular, they have to be as consistent as

possible in applying all the steps of the *ANJ v ANK* framework, including coming up with a percentage for the second step (ratio for indirect contributions). A quick survey of the High Court and Court of Appeal decisions involving the division of matrimonial assets in the last five years or so is revealing: the *ANJ v ANK* framework can only be readily applied to around 20 of the 100-odd decisions because concrete information pertaining to one or more of the steps in the framework could not be easily identified or discerned. For the framework to achieve its intended purpose, consistency would be required.

The effect of a foreign polygamous marriage

16.38 *ANJ v ANK* would feature again in another case, albeit in a context not contemplated. In *TIG v TIH* [2016] 1 SLR 1218, the husband, a Malaysian-turned-Singaporean, had two marriages in Malaysia in 1973 and 1978. Polygamy was legal in Malaysia back then. One of the main issues was whether his subsisting marriage with his first wife should be taken into account in dividing the matrimonial assets between him and his second wife following their divorce in 2014.

16.39 The second wife argued that on the facts, the first wife was at all times based in Malaysia and had done nothing to contribute to the setting up of the husband's highly profitable businesses in Singapore. As to the law, she argued that s 112(2) of the Women's Charter only contemplates the division of matrimonial assets as between a husband and a wife in a monogamous marriage; accordingly, even if she had made contributions, the first wife cannot be given any share of the matrimonial assets, be it as a direct award or as an indirect award via the husband's share.

16.40 The husband argued that the first wife had indirectly but considerably contributed to the acquisition of the matrimonial assets as it was her taking care of the household (they had two children) that allowed the husband to set up his businesses in Singapore; moreover, she had helped run the business for a few years and also sold a property to finance his business. While the husband accepted that the first wife could not be awarded a share of the matrimonial assets, s 112(2) of the Women's Charter is wide enough to allow the court to take into account the polygamous family arrangement when exercising its power of division between the parties.

16.41 Valerie Thean JC first held (at [47]) that considering the length of the marriage and the fact that there were two children, the first wife did indeed make indirect contributions to the husband's businesses. She then held (at [48]–[49]) that while the court had no power to directly award a non-party any share of the pool of matrimonial assets, the court

could take into account the first wife's contributions as part of the husband's share of the matrimonial assets. What remained to be resolved was quantifying the first wife's contributions relative to the contributions of the husband and wife.

16.42 In this regard, Thean JC opined (at [53]) that the most appropriate way to divide the assets in this context was to use the accumulated pool of matrimonial assets as the starting point. The court would then ascertain, in a broad-brush manner, how each of the parties (including the first wife) had contributed to this pool, both directly and indirectly, following the first two stages of *ANJ v ANK*. The different circumstances in each household would be duly accounted for when weighing the contributions of each party. Once all of the ratios have been ascertained, further adjustments may still be made on an overall analysis in accordance with the final stage of the *ANJ v ANK* approach.

16.43 This method of dividing the assets may be compared with the preferred method put forth by the husband, which was to apply the first two stages of *ANJ v ANK* only to the husband and wife, and then work in the first wife's contributions at the final stage of the *ANJ v ANK* approach. However, as Thean JC noted (at [52]), this would require the court to first:

> … derive two separate ratios – the first ratio … to express the contributions of the Husband against that of the Wife while the second ratio … to express his contributions against that of [the first wife].

Both ratios would then somehow be "merged" into a third and final ratio by incorporating the percentage of the first wife's contribution. However, as stated by Thean JC, this method of division suffers from a fundamental problem in that it assumes that it is "permissible to compare the contributions made in one household against the other".

16.44 But there may perhaps be another fundamental problem, and this is regardless of whether the husband's or the court's approach is taken. The division of matrimonial assets under the Women's Charter is primarily premised on the "concept of marriage as an equal partnership of efforts" (this phrase by the Court of Appeal in *NK v NL* [2007] 3 SLR(R) 743 at [28] has been echoed in dozens other cases), but as between a man and a single wife, not as between a man and several or many wives. On a more specific level, the recognition and weighing of direct and indirect contributions in a marriage as envisioned in cases such as *ANJ v ANK* is also premised on a marriage between a man and a single wife and not anything else.

16.45 The point is that when two parties marry, sacrifices usually need to be made. The classic example is where one party works while

the other party looks after the home and children. Both contribute in their own way – and make sacrifices in their own way so that the other party can do what is needed to be done. Their contributions and sacrifices are with respect to each other only and not anyone else for they clearly had intended to be the only parties in the marriage. Should the marriage unfortunately fail, s 112 of the Women's Charter then provides a framework to recognise what these two people, and these two people only, had put into the marriage when dividing the matrimonial assets. But if the marriage is a polygamous one, this framework – together with the *ANJ v ANK* methodology – might not be appropriate anymore, as there may well be different considerations to division if the marriage goes beyond two parties working together to the exclusion of others (for instance, a polygamous marriage presents the possibility of multiple divorces (in the sense of the husband divorcing different wives within the polygamous marriage)). Though the court is empowered by the Women's Charter to take into consideration all the circumstances of the case, the indirect contributions from another wife, whether subsisting marriage or not, might not quite have been within the legislative contemplation.

The effect of bankruptcy on the division of matrimonial assets

16.46 In *AVM v AWH* [2015] 4 SLR 1274, the parties were married in 1996 and had triplets in 2003. In 2009, it was discovered that the husband had been constantly engaging in homosexual liaisons, becoming HIV positive in the process. However, his behavior took a turn for the worse after he confessed to his adultery. He practically lived apart from the family for at least six years, was physically violent towards the wife and the children on multiple occasions, and in 2011 was convicted of the possession and consumption of drugs and imprisoned for half a year. In 2012, he was adjudicated a bankrupt.

16.47 With respect to the division of matrimonial assets, Vinodh Coomaraswamy J said (at [37]) that though he had decided this case before *ANJ v ANK* was released, the approach he took effectively corresponded with the one set out in *ANJ v ANK*. He first found (at [60]) that the husband's direct contribution to the pool was 46.59% and the wife's direct contribution was 53.41%. For indirect contributions, he found (at [62] and [78]) that the ratio should at the very least be 2:1 in favour of the wife, mainly because she was the primary caregiver and the husband had provided quite substantially for the family needs until the wife left the matrimonial home in 2010. Averaging the direct and indirect percentages, the wife was to be awarded approximately 60% of the matrimonial assets and the husband 40%. Coomaraswamy J was of the view (at [80]) that this result was "broadly fair", considering that the marriage lasted about 15 years

and the husband had to pay a lump sum for the maintenance of the triplets.

16.48 The main complication in this case was the fact that the husband became a bankrupt after ancillary proceedings had commenced. By becoming a bankrupt, the husband's creditors were prevented by the statutory moratorium under s 76(1)(*c*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) from pursuing proceedings against him in respect of any debt provable in his bankruptcy. Further, by virtue of s 76(1)(*a*) of the Bankruptcy Act, the husband's property became vested in the Official Assignee immediately and became divisible amongst his creditors, unless such property was caught by the exceptions set out in s 78(2) of the Bankruptcy Act.

16.49 Coomaraswamy J clarified (at [110]), however, that the wife, in pursuing divorce and ancillary proceedings, was not to be considered a creditor for the purposes of s 76(1)(*c*). This was an important clarification as until this decision was released, it would appear that the only known case that dealt with this point was a District Court case, *JA v JB* [2005] SGDC 104. However, what that case did not do was to consider the effect of s 76(1)(*a*) on the court's power to divide matrimonial assets. Coomaraswamy J opined (at [111]) that this was an important question to answer as:

> … a bankruptcy can be used tactically to obstruct or delay the court exercising its jurisdiction under s 112 [of the Women's Charter to divide matrimonial assets]. Likewise, divorce proceedings can be brought collusively to put the assets of an insolvent or near insolvent spouse beyond the reach of his creditors through a transfer of property.

16.50 Coomaraswamy J's answer to this question was that the court's powers under s 112 of the Women's Charter could be exercised only in respect of assets excluded from the vesting by s 78(2) of the Bankruptcy Act: *AVM v AWH* at [115]–[119]. Accordingly, a non-bankrupt spouse seeking any transfer of assets which had vested in the Official Assignee by virtue of s 76(1)(*a*) had to first effect a re-vesting of those assets in the bankrupt spouse by securing an annulment of the bankruptcy order under the Bankruptcy Act (via ss 123(1)(*a*), 123(1)(*b*) or 123A(1)). If this is not done, the non-bankrupt spouse has no choice but to defer the resolution of the ancillary matters until the bankruptcy order is otherwise annulled.

16.51 If Coomaraswamy J's reading of the interaction between the said aspects of the Bankruptcy Act and Women's Charter is correct, this presents a rather significant inconvenience for the non-bankrupt spouse. At the very least it presents additional costs which may not even be recoverable. It is unclear if this is how the law was envisaged to be

implemented. On the other hand, if the court was to simply divide matrimonial assets as it normally would subject to representations made by the Official Assignee in attendance during the relevant hearings, this might not be the most optimum deployment of taxpayer resources.

The operative date when calculating direct financial contributions

16.52 In *ARL v ARM* [2015] SGHC 61, the parties were granted interim judgment for divorce in November 2012. The hearing for ancillary matters concerning matrimonial assets took place in January 2015. In assessing the direct financial contributions to the matrimonial home and another property, George Wei JC (as he then was) was confronted with the preliminary issue of whether payments of the monthly loans and quarterly maintenance sums of the matrimonial home made by the wife since October 2012 were to be taken into account. The husband had stopped paying the monthly loan and maintenance in October 2012. The sum in contention was around $56,000.

16.53 The husband argued that this sum should be ignored as they were made after the grant of interim judgment, and cited *Yeo Chong Lin* (above, para 16.33) in support. Wei JC rejected this argument as the issue in that case was the date which the court should adopt to determine whether an asset owned by a spouse was a matrimonial asset, and not the date which the court should adopt when calculating contributions: *ARL v ARM* at [39]. Moreover, the Court of Appeal had said in that case that the adoption of an operative date may not be as critical as arriving at a just and equitable division. Wei JC also pointed to *Anthony Patrick Nathan v Chan Siew Chin* [2011] 4 SLR 1121, in which the court had to determine the operative date for the purposes of calculating the value of the pool of matrimonial assets: *ARL v ARM* at [40]. The High Court observed that this was a matter of judicial discretion as the overriding consideration was the just and equitable division of matrimonial assets. Wei JC thus held that it was appropriate to take into account the contested sum as part of the wife's direct financial contribution: *ARL v ARM* at [41]. He noted that there was nothing in s 112 of the Women's Charter that precluded this.

16.54 This decision seems like a sound one for the reasons given by the court. However, perhaps the relevant portions of the Women's Charter should be amended to provide clarity. From this decision and the decisions cited, it can be seen that there are at least three unnecessary uncertainties regarding the appropriate operative dates in the context of division of matrimonial assets that can and should be resolved by amendments to the effect of confirming that these dates are to be determined by the court, either on a case-by-case basis or

by following a set of factors (or where appropriate, the possible cut-off junctures can also be stated): see also *ARX v ARY* [2015] 2 SLR 1103 at [18]; *Zhou Lijie* (above, para 16.37) at [31]–[34]; *TDS v TDT* [2015] SGHCF 7 at [27]–[29]; and *TEG* (above, para 16.37) at [17]. This is arguably better than just resolving practically every ambiguity in the division of matrimonial assets through the broad mantra of just and equitable division. There is no need to persist in making practically everything in family law that open-ended, despite the previously espoused parliamentary intention of not committing to any particular cut-off dates for one aspect of the division of matrimonial assets: see *Yeo Chong Lin* at [32].

Varying consent orders for the division of matrimonial assets

16.55 In *Seah Kim Seng v Yick Sui Ping* [2015] 4 SLR 731 ("*Seah Kim Seng*"), the parties had in 2002 agreed to the recording of a consent order. There were two main conditions: first, the wife could continue living in the matrimonial property (which was a flat) rent-free; and secondly, the flat was to be sold only on agreement of both parties. In 2013, the husband sought a variation of this order for the flat to be sold in the open market and the proceeds to be divided according to their contributions. He claimed that he had agreed to the consent order in 2002 as it was not economically feasible to sell the flat at that time. The wife also sought a variation, but for the flat to be transferred to her free of payment. She claimed that this would best capture an undertaking given by the husband in 1995 via a deed of undertaking, and that the reason the original order did not provide for an absolute transfer was that in 2002, the Central Provident Fund ("CPF") rules required, upon such transfer, a refund to the husband's CPF account of any CPF moneys used by the husband to buy the flat. The High Court ruled in favour of the wife.

16.56 Aedit Abdullah JC first noted (at [24]–[27]) that while s 112(4) of the Women's Charter was worded broadly, the Court of Appeal in *AYM v AYL* [2013] 1 SLR 924 had said that s 112(4) did not confer a totally free hand upon the court to vary any order made; there had to be exceptional reasons before variation can be effected, or the finality of consent orders would be undermined. To justify varying the order, any new circumstances that emerge must radically change the situation such that to implement the original order would be to implement something that is radically different from what was originally intended. Only then would the court make the necessary variations to the original order as the original order would have become unworkable. He then held that on this premise, if there is a change in the foundation or underlying basis of the original order – for instance, if the order was made on the basis of a particular statutory requirement, and such a requirement was later

removed – then this would constitute unworkability: *Seah Kim Seng* at [28]. On the evidence presented, the wife's account was found to be more believable. Accordingly, it was found that the original order had indeed been drafted to give effect to the deed of undertaking, and a transfer could not be effected because of the then applicable rules regarding the refund of CPF moneys.

16.57 It is noteworthy that unlike a couple of other sections in the Women's Charter, s 112(4) says nothing about the grounds for variation. Specifically, s 118, which pertains to the power of the court to vary court orders for maintenance, states that the court must be satisfied that "the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances". Likewise, s 128, which pertains to the power of the court to vary court orders for custody, states that the court must be satisfied that "the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances". The conclusion to be drawn is that whereas court orders for maintenance and custody can only be varied on any of the three grounds of misrepresentation, mistake of fact, or material change in circumstances, court orders for the division of matrimonial assets can take into account a wider array of grounds.

16.58 What could account for this difference? After all, maintenance and custody are in themselves already different matters requiring different considerations: maintenance is about balancing the reasonable needs of the parties being maintained and the ability of the party paying the maintenance, while custody is primarily about the welfare of the child. Putting that aside, however, one could conceivably see how in many situations varying an order for division of matrimonial assets could be more disruptive than varying other types of orders. The problem is that s 112(4), while attempting to be consistent with the court's general mandate under s 112 to achieve just and equitable results, does not readily reflect the sort of circumscriptions demanded by *AYM v AYL* and *Seah Kim Seng*. If indeed, in the final analysis, s 112(4) can only be successfully invoked under the very limited ground of radical change of circumstances leading to unworkability, then it should be legislatively amended as such.

Whether a foreign property bought before the marriage can affect the just and equitable division of matrimonial assets

16.59 In *JAF v JAE* [2015] SGHC 114, there was a piece of property in Poland that was purchased in early 2001, about 20 months before the husband and wife married in late 2002. It was purchased in the wife's sole name for around $73,000, with the husband contributing a portion

of the price. The issue was whether this property would be considered a matrimonial asset for the purposes of division; the only other property in question was a property in Scotland. The District Judge found that the Poland property was liable to be divided on two grounds, but Valerie Thean JC disagreed with both grounds.

16.60 First, the District Judge had characterised the property as a joint investment that was intended to be used as a family home and therefore fell within the scope of s 112(10)(*a*)(i) of the Women's Charter. However, Thean JC held (at [15]) that for this section to apply, the property:

> … must, *in fact*, be ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together … If parties had *intended* to do so, but eventually failed … it is an insufficient basis for the asset to be considered a matrimonial asset. [emphasis in original]

It was found that the Poland property was only used twice and this was not sufficient for the purposes of s 112(10)(*a*)(i).

16.61 Secondly, the District Judge had applied the law of resulting and constructive trusts in finding that the husband had a 30% beneficial interest in the property. However, Thean JC held (at [17]) that the longstanding approach of s 112 of the Women's Charter has not been to apply the law on property or the law on trusts (which is concerned with the intentions of the parties) but to simply reach a just and equitable outcome (which is based on a broader range of factors and dependent on the circumstances of the case).

16.62 Nonetheless, Thean JC was of the view that this did not bring an end to the matter. She reasoned as follows (at [20]–[25]):

> (a) Section 112(2) of the Women's Charter provides a non-exhaustive list of factors that the court is to take into account when dividing matrimonial assets. Factor (*g*), which relates to the "giving of assistance or support by one party to the other party", does not place any restrictions as to time period. It is wide enough to encompass pre-marital contributions that enhance a consequent marriage. There is also some implicit support for this proposition in *Smith Brian Walker v Foo Moo Chye Julie* [2009] SGHC 247 at [13] and *ACY v ACZ* [2014] 2 SLR 1320 at [38]–[39].
>
> (b) The wife had moved to Scotland to stay with the husband in 2001. At that time, the husband had an apartment with his previous fiancée which he sold to facilitate the purchase of the Poland property. This act should be taken into account even though the Poland property is not a matrimonial asset as it "enabled parties to start off their marriage on a secure

foundation and functioned as a platform from which they built up their joint lives together".

(c) The actual matrimonial home was the property in Scotland and the division of that property decided by the District Judge was not a point on appeal. The wife had not made any financial contribution to the Scotland property. Nonetheless, given that the wife had the full benefit of the Poland property by virtue of it not being liable for division, a just and equitable division of the Scotland property would be a higher percentage of 75% in favour of the husband (the District Judge had awarded 65%).

16.63 Although s 112(2)(*g*) does not contain any explicit temporal restrictions, it is noteworthy that the other factors in s 112(2) are clearly with reference to matters that took place during the marriage and not before the marriage. Even s 112(2)(*h*), which refers to s 114(1) – the factors that the court shall have regard to when ordering the maintenance of a wife or former wife – seems to contemplate only matters that took place during the marriage. Of course, Thean JC made it clear that the pre-marriage property was only relevant here because of what she considered was the unusual context of the case; under the normal run of things, the circumstances surrounding property acquired before the marriage would not affect the justness of the division of matrimonial assets. Nevertheless, the scope of s 112(2)(*g*) has no doubt been broadened by this decision.

Divorce

16.64 In this section, two broad issues will be examined. The first relates to the relatively under-discussed question of entitlement of costs in divorce proceedings, while the second involves foreign divorces and the jurisdiction of the Singapore courts.

Entitlement to costs in divorce proceedings, ancillary hearings, and appeals

16.65 In *JBB v JBA* [2015] 5 SLR 153, the wife had commenced proceedings on the basis that the parties had lived apart for a continuous period of at least four years immediately preceding the filing of the writ, but upon the husband's challenge, the wife amended her writ to rely on the fact that the husband had behaved in such a way that she could not reasonably be expected to live with him. The husband nonetheless contested the case. The District Judge granted an interim judgment of divorce and ordered the parties to bear their own costs.

16.66 The husband's appeal against the grant of an interim judgment of divorce was dismissed, but the High Court reserved judgment on the issue of costs as the submissions on it were rather substantial. Essentially, the husband argued that there should generally be no order as to costs in matrimonial proceedings, while the wife argued that costs should follow the event (or adopt the approach in typical civil litigation). Debbie Ong JC eventually awarded costs of the appeal to the wife, but also took the opportunity to disambiguate the law on costs in matrimonial proceedings. After surveying the law, she made the following conclusions (at [27]–[31] and [33]–[34]):

> (a) The award of costs lies in the discretion of the court, and the overriding concern is to achieve the fairest allocation of costs. While costs should generally follow the event, the court is free to depart from this, and such departure may be more easily justified in matrimonial proceedings. This is because unlike other types of civil proceedings, matrimonial proceedings do not yield obvious winners and losers in litigation.
>
> (b) With respect to divorce in particular, whether a divorce is obtained in reliance of a neutral fact (such as s 95(3)(*d*) of the Women's Charter) or a more fault-based fact (such as s 95(3)(*a*) of the Women's Charter), given that there is no divorce by consent in Singapore, court proceedings for divorce are less likely to be considered unmeritorious litigation as compared to other types of civil proceedings.
>
> (c) Distinguishing between winners and losers in matrimonial proceedings might also unnecessarily increase acrimony between the parties and adversely impact the children. Further, costs orders might have undesirable implications on the division of matrimonial assets if costs are paid out of the pool of matrimonial assets.
>
> (d) For the hearing of ancillary matters, it is the conduct of the parties in the proceedings which will have greater relevance in the court's exercise of discretion in determining costs. For appeals, the party who has succeeded in the appeal would generally be awarded costs of the appeal.

16.67 This decision provides some timely guidelines on the issue of costs in matrimonial proceedings, as the most recent cases that discussed the issue at length were decided almost 20 years ago: see, for instance, *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906. Apart from the scenarios outlined by Ong JC as to when no order as to costs might be justified, it is also possible for the court to depart from an order of costs to follow the event even in the situation of a contested divorce that is based on a fault-based fact and that resulted in a judgment of divorce: noted in Geraldine Kuah & Li Kun Hang, "Principles in the

Determination of Costs in Matrimonial Proceedings under Singapore's 'No-Fault' Divorce Regime" *SLW Commentary* (August 2015) at p 4 ("Kuah and Li").

16.68 For instance, in *AVJ v AVK* [2011] SGDC 366, although the divorce was obtained on the basis of the husband's unreasonable behaviour, the court thought it would be unfair to saddle him with a costs order when he had tried his best to preserve the marriage after he realised his wrongdoing; the wife, on the other hand, persisted in prolonging the trial by constantly dredging up past incidents. Thus, while the wife might have been considered to have won the case since she was the one who sought the divorce and it did not seem to be her fault that the marriage broke down, she did not prevail on the issue of costs. In Kuah and Li's view, this decision exemplifies how a no-fault divorce regime operates, in that it recognises that a breakdown of a marriage is a complicated matter and seeks to avert further resentment during the litigation.

16.69 Kuah and Li, however, also note (at p 5) that there are some cases that might not comport with the no-fault regime and its attendant costs implications. They point out that there are a number of cases involving adultery whereby the court is in effect engaged in some degree of fault-finding by ordering defendants (and sometimes co-adulterers as well) to bear the costs of the plaintiffs who had hired private investigators to uncover evidence of adultery. Perhaps, as the authors opine, if such defendants choose not to contest the divorce, there is a higher chance that the costs of hiring the private investigators would be split between the plaintiff and the defendant, as had occurred in cases such as *Melissa Su-San Chin (m w) v Andrew Chan* [2010] SGDC 155. This seems sensible as a no-fault divorce regime does not mean that there is a virtually unassailable presumption of no order as to costs.

16.70 Finally, Kuah and Li are of the view that the Court of Appeal in *Tham Khai Meng v Nam Wen Jet Bernadette* [1997] 1 SLR(R) 336 had taken a different position as regards costs in ancillary hearings. Specifically, the court there stated (at [50]):

> [Q]uite often the High Court considers the hearing of ancillary matters in isolation from the hearing of the petition in dealing with … costs … this is not correct … the hearing of the ancillaries is part of or a continuation of the hearing of the petition … where a party … is awarded costs at the hearing of the petition, the same order as to costs should follow at the hearing of the ancillaries.

This is clearly quite different from having the conduct of the parties assume greater relevance. Further judicial clarification on this question is desirable, especially since it was not made clear why the conduct of

the parties is only of greater relevance for ancillary matters but not other hearings in the divorce process.

Foreign divorces and financial relief in Singapore

16.71 In *Harjit Kaur d/o Kulwant Singh v Saroop Singh a/l Amar Singh* [2015] 4 SLR 1216 ("*Harjit Kaur*"), the High Court was tasked to interpret a series of provisions found under Pt X, ch 4A of the Women's Charter, which was only introduced in 2011 to fill a lacuna in the law that had previously prevented Singapore courts from dealing with post-divorce issues if the marriage was not terminated in Singapore.

16.72 The husband and wife had married and divorced in Malaysia. One of the orders made by the Malaysian court was that a property in Singapore was to be sold and the husband was to pay the wife a sum of RM250,000 upon the sale. The property was sold in 2014 and the dispute was over the release of the sale proceeds. The wife applied under s 121B of the Women's Charter to have the sale proceeds divided by the Singapore court.

16.73 Debbie Ong JC declined to grant leave. She first noted (at [11]) the proper steps to be taken when applying for financial relief after a foreign divorce, nullity, or separation under s 121B:

> First, parties must satisfy the jurisdictional basis in s 121C. Next, leave of the court is required and in regard to this, there must be 'substantial ground' for the application in order for leave to be granted (see s 121D). Finally, Singapore must be the appropriate forum to grant the reliefs (see s 121F). After fulfilling these conditions, the court may make any orders which it could have made under ss 112, 113 or 127(1) 'in the like manner as if a decree of divorce, nullity or judicial separation in respect of the marriage had been granted in Singapore' (s 121G).

16.74 With respect to s 121D in particular, Ong JC stated (at [17]–[19]) that its purpose was to filter out unmeritorious claims as the objective of the ch 4A regime was to alleviate injustice where a party connected to Singapore had no real opportunity to pursue financial reliefs in foreign matrimonial proceedings, or where no or inadequate financial provision has been provided by the foreign court. The applicant would need to show that he has a "substantial" or "solid" case, which is a higher standard than "serious issue to be tried" or "good arguable case", but not necessarily one requiring a 50% chance of success. Factors the court would consider include the powers of the foreign court to grant financial relief and the orders made thereunder and the relevant circumstances (such as the reason why such orders or no orders were made).

16.75 As for s 121F, Ong JC stated (at [20]) that the nine circumstances enumerated therein (such as connection which the parties have with Singapore and that of the foreign country in question, and the likelihood of enforcing orders made under s 112G) ought also to be considered at the stage where the court is deciding the leave application. While s 121F is not a wholesale application of the *forum non conveniens* principles, it contains factors common with those used in the determination of stay of proceedings. Accordingly, leave should not be granted if it is clear that Singapore is not the appropriate forum to grant the relief sought.

16.76 In this case, since financial relief had already been made by a Malaysian court, Ong JC held (at [22] and [25]) that the Singapore courts, as a starting point, ought to be "cautious not to make any order that will allow a party to have a second bite of the cherry or offend the fundamental rule of comity as between courts of competent jurisdiction" and ought not to "merely top up an award already given by a competent foreign court". Given that there was nothing inadequate or unfair about the Malaysian order and the Singapore property had been included in the order which was made by consent of the parties, leave was not granted.

16.77 *Harjit Kaur* may be briefly compared with *TGX v TGY* [2015] SGFC 134. The parties had married in Singapore in 1998, and according to the wife she was persuaded by the husband to move to Malaysia, only for him to divorce her there in 2012. The wife then returned to Singapore and applied for financial relief under ch 4A of the Women's Charter, specifically asking for the division of matrimonial assets. The Malaysian court did not appear to have made any orders relating to the division of matrimonial assets.

16.78 The District Judge was prepared to grant leave in this case as unlike *Harjit Kaur*, the wife was neither attempting to take a second bite at the cherry nor attempting to re-litigate the matter. However, the wife faced a fundamental obstacle in that her marriage was a Syariah marriage registered in Singapore and the divorce granted by the Malaysian courts was also a Syariah one. Given that s 3(2) of the Women's Charter – which clearly states that Pt X of the statute does not apply to persons married under Singapore or Malaysia Muslim law – was not amended when ch 4A was added in 2011, it could only be assumed that ch 4A did not confer on the Singapore courts jurisdiction to provide ancillary relief for Malaysian Syariah marriages. Moreover, the wife had at least two other recourses: she could have set aside the Malaysian divorce in Malaysia before filing for a divorce in the Singapore Syariah court, or she could have sought ancillary relief in the Malaysia courts. The latter option, in particular, should have been

pursued as the bulk of the matrimonial assets to be divided comprised Malaysian properties.

16.79 In both cases, it was quite clear that the parties pursuing proceedings in Singapore were forum shopping (or came very close to it) and attempting to test the boundaries of the ch 4A provisions. It was unsurprising that both of them met with a complete lack of success. Future parties would probably only seriously attempt to invoke the provisions if the foreign court had offered no financial relief to begin with. In this regard, Ong JC in *Harjit Kaur* provided some useful guidelines as to how a Singapore court might address the matter: *Harjit Kaur* at [21].

16.80 For a start, although a refusal by the foreign court to grant financial relief may suggest that there is an inadequacy of provision, there is no automatic granting of leave as all the circumstances need to be considered. For instance, there is a difference between the foreign law not providing for the remedy sought and an applicant choosing not to apply for relief in the foreign court in the hope of obtaining a more favourable award elsewhere; the latter would probably constitute forum shopping. A party may also be attempting to obtain some further advantage by invoking ch 4A, and in such a situation, leave is also likely to be refused.

Recognition of foreign divorces that lacked capacity

16.81 In *Yap Chai Ling v Hou Wa Yi* [2016] 1 SLR 660, the husband, a Singapore citizen, and the wife, a Chinese national, registered their marriage in Shanghai in 1991. When they tried to register their marriage in Singapore after moving here, the husband was charged with bigamy and the wife was deported because at the time of the Shanghai marriage, the husband had yet to obtain a decree absolute in respect of a previous marriage in Singapore. However, the Singapore High Court subsequently granted the decree absolute for the previous marriage, paving the way for the husband and wife to register their marriage in Singapore in 1992.

16.82 In 2002, following the breakdown of the marriage, the wife returned to Shanghai. In 2004, the husband commenced divorce proceedings in Shanghai. The wife contested the proceedings on the ground that their marriage was void from the outset since the husband was still legally married to his previous wife at the time it was registered, and further argued that the divorce proceedings should be heard in Singapore. The Shanghai court granted the divorce and this decision was upheld on appeal. In 2006, the Chinese courts ordered a division of the couple's matrimonial assets that were in China.

16.83 In 2005, the wife filed for divorce in Singapore. The husband wanted to strike out the application but withdrew it. The divorce then proceeded on an uncontested basis and a decree *nisi* was granted in 2006, with the court not having knowledge of the Shanghai divorce. When the Singapore court heard the parties regarding ancillary matters in 2007, the husband filed, twice, for a declaration that the Shanghai courts had dissolved the marriage and therefore the decree *nisi* by the Singapore court should be rescinded. However, he withdrew both applications. The Singapore court proceeded to hear the ancillary matters, and made orders regarding the division of the parties' matrimonial assets in Singapore and maintenance. The wife did not receive much of a share and appealed against these orders, but the husband passed away while the appeal was pending.

16.84 In the husband's will made in 2002, he had left the bulk of his estate to the first and second appellants, who were his niece and nephew respectively, and also the executors of his estate. In 2011, the appellants sought to make the decree *nisi* absolute, but the court declined to do so as the marriage had been dissolved by the death of the husband. In 2012, they sought to enforce the ancillary orders. In 2013, they sought to have both the decree *nisi* and ancillary orders rescinded or set aside. It was against this protracted factual backdrop that Hoo Sheau Peng JC had to answer the question of whether the Shanghai divorce judgment should be recognised in Singapore. If it was, then the decree *nisi* by the Singapore court faced the possibility of being set aside or rescinded. To these questions, Hoo JC made two main points: at [64]–[68].

16.85 First, s 7(*b*) of the Women's Charter states that a marriage can be dissolved by an order of a court of competent jurisdiction, including foreign courts. However, a foreign divorce judgment will only have effect if it is recognised in Singapore in accordance with the rules of private international law. Since the wife had returned to China in 2002 with the intention of making her home there, the Shanghai courts had jurisdiction based on domicile.

16.86 Secondly, once a foreign court is found to be competent, the defences to recognition are limited and international comity usually compels our courts to recognise the foreign divorce judgment, unless enforcement would be manifestly contrary to public policy or offend the judicial sense of substantial justice. Although Chinese law requires marriages to be monogamous, it recognises the possibility that a marriage that is void for want of capacity may be regularised (in this case, by the grant of the decree absolute). In contrast, ss 4, 5, 11, and 105 of the Women's Charter would have rendered the Shanghai marriage a complete nullity because of the absence of capacity. Accordingly, to recognise the Shanghai divorce judgment would be tantamount to acknowledging that a bigamous marriage may be regularised.

16.87 The result, then, was that since the Shanghai divorce judgment was not recognised in Singapore, the appellants could not apply to have the decree *nisi* in Singapore and the ancillary orders that followed set aside or rescinded on the basis that the Shanghai courts had already granted a divorce. However, the question is: If the Shanghai divorce should not be recognised today because there was a subsisting marriage when the Shanghai marriage was contracted in 1991, why did the Singapore courts grant the decree absolute for the previous marriage in 1992 to pave the way for the wife's return? If the Singapore courts were wrong in 1992, should that not have been a factor when addressing the issue of public policy?

16.88 As Hoo JC noted (at [61]–[62]), the answer probably lies on the authority of *Noor Azizan bte Colony (alias Noor Azizan bte Mohamed Noor) v Tan Lip Chin (alias Izak Tan)* [2006] 3 SLR(R) 707 at [5], where it was held that there cannot in Singapore be multiple subsisting marriage relationships which can exist in parallel and be dissolved separately; the marriage effects a permanent change in the legal status of those entering into marital union and there can only be one marriage relationship, while marriage ceremonies are merely the formalities that accompany the acquisition of the legal status and there may be multiple ceremonies. For this reason, a divorce can only operate with respect to one marriage and one marital legal status, and courts are to be bound by that if the matter is brought before a Singapore court. Coupled with the fact that foreign marriages void *ab initio* cannot be regularised by a Singapore court, the obligation to apply private international law rules – at least with regard to the specific situation here – actually just comes down to what the Women's Charter permits and prohibits, and not any other factor.

Maintenance

16.89 In this final section, four discrete issues are explored: the interaction between remarriage and a clean break when ordering lump sum maintenance; the maintenance of children who are no longer located in Singapore; the conceptual necessity of nominal maintenance orders and when they should be ordered; and whether there are different evidential requirements as between interim maintenance and maintenance.

Likelihood of remarriage as a factor in lump sum payments

16.90 In *AQB v AQC* [2015] SGHC 29, the couple were married for seven years. They had an 11-year-old son. The husband was a surgeon who earned $30,000 a month while the wife earned around $3,000 a month as a realtor and businessperson. The wife sought $8,000 a month

in maintenance for the child and a lump sum of $1.98m for herself (based on $8,700 a month and a multiplier of 19 years). The husband proposed to pay $2,000 a month for the child but argued that the wife should not get any maintenance as she was capable of supporting herself and in any event had been dishonest about disclosing her income.

16.91 Tan Siong Thye J held (at [17]) that a more reasonable sum to accord for the son's monthly expenses was $3,000 a month, of which the husband was to pay $2,000. As for the wife's maintenance, Tan J held that the proposed figure was extravagant and awarded $2,500 a month instead. One factor he took into consideration in deciding whether a lump sum or monthly sum was more appropriate was the likelihood of the wife remarrying. Specifically, he said (at [25]):

> First, the wife is only 48 years old and there is a chance that she might remarry in the future. It would not make sense to order lump sum maintenance in the circumstances and, in the event the wife remarries, penalise the husband, who would then be paying maintenance for the period during which the wife is remarried … Second, the husband has been paying maintenance regularly to the wife and the child and there is no evidence that he had ever defaulted.

16.92 Although Tan J also took into account (at [23]) other factors such as achieving a clean break for the parties and the avoidance of financially crippling the husband, it would appear that the likelihood of the wife remarrying was the biggest factor or at least a very significant factor. Notably, this is not one of the factors previously set out by the Court of Appeal in *Lee Puey Hwa v Tay Cheow Seng* [1991] 2 SLR(R) 196 at [9] and *AYM v AYL* [2014] 4 SLR 559 at [18]. However, those two cases have also emphasised that ordering lump sum maintenance is largely a matter of judicial discretion based on the particular facts of each case, so it must mean that it is open to the court to take into account the likelihood of the wife remarrying.

16.93 The issue that remains is how is this likelihood of remarriage determined? If it is based on the particular facts of each case, wives might be incentivised not to disclose information that suggests that they might be remarrying. If it is based on some kind of general statistical probability for the age group in question, what is the appropriate "cut-off" age? Further, it seems that the likelihood of remarriage is going to be theoretically present in many cases (assuming, for simplicity, cases involving wives below 50 years of age, which is probably the bulk of divorces), but it is almost never explicitly considered as a factor in the relevant jurisprudence. Or perhaps, in the final analysis, it was the rather high lump sum that was sought in this case that gave the court greatest pause.

16.94 In *ASP v ASQ* [2015] SGHC 123, the couple was married for six years. They had a six-year-old daughter. Both husband and wife worked in the aviation industry, each earning around $15,000 a month. The wife sought lump sums of $768,000 and $144,000 in maintenance for herself and her daughter respectively. Although Chua Lee Meng JC ordered (at [46] and [48]) monthly maintenance of $3,500 for the daughter and made no order for maintenance for the wife, the facts of this case made it difficult to justify any maintenance for the wife: the husband in this case had considerable financial obligations towards his previous family, parents and daughter, and the wife, apart from earning a higher income, had also obtained a 60% share in the division of matrimonial assets. In other words, a request for a relatively small sum of maintenance can still be denied if the wife clearly is financially independent: see (2014) 14 SAL Ann Rev 354 at 382.

Maintenance for children who have relocated or who are located overseas

16.95 In *AUD v AUE* [2015] SGHC 139, the court had previously in 2011 ordered that the husband pay around $7,800 a month to the wife for the maintenance of the two children. In 2015, the wife sought an upward variation of this order, but the husband asked for the order to be rescinded as the children had moved to the UK to study in 2011 and were no longer under the jurisdictional purview of the Singapore courts. The husband also pointed out that the children were British citizens: they were born in the UK, held UK passports and had been habitually resident in the UK since 2011. The children were 15 and 18 years old when this summons was heard.

16.96 Woo Bih Li J held (at [18]–[20]) that the Singapore courts have jurisdictional purview over the maintenance of the children as the divorce proceedings were commenced validly in Singapore – the maintenance order did not cease to have effect merely because the children had relocated. Moreover, s 118 of Women's Charter gave the Singapore courts the power to vary any subsisting order for maintenance at any time if there was a material change in the circumstances. The fact that the courts in the UK would also have jurisdiction over the matter by virtue of the Child Support Act 1991 (c 48) did not change this. Woo J hinted, however, that there might have been an argument on the ground of *forum non conveniens* that could have been pursued, but as the husband did not plead this or submit on it, the judge declined to elaborate upon this (in this regard see *Sanjeev Sharma s/o Shri Sarvjeet Sharma v Surbhi Ahuja d/o Sh Virendra Kumar Ahuja* [2015] 3 SLR 1056 at [12]–[14] and [25]–[35]).

16.97 For slight comparison, in *TGT v TGU* [2015] SGHCF 10, the mother and the son were citizens of Hong Kong and resided there. The son was 21 years old, diagnosed with autism and obsessive compulsive disorder. The father, who worked and resided in Singapore, was a British citizen with permanent residencies in Hong Kong and Singapore. The mother sought maintenance for the son in Singapore. She said she had to make the application in Singapore rather than Hong Kong because she was legally advised that by default, any application for child maintenance in Hong Kong has to be made before a child becomes 18 years old, and applications made after that require the child to be legitimate and not born out of wedlock. These restrictions, however, do not apply in Singapore. The father contended that Hong Kong was the more appropriate forum.

16.98 The District Judge applied the two-stage test in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") and concluded Hong Kong to be the more appropriate forum at the first stage. For the second stage, she was satisfied that a stay of proceedings would deprive the son of a right of action in maintenance against the father. Given that the welfare of the child was the paramount consideration and that the issue of comity was not engaged as there was no competing suit in Hong Kong, she declined to order a stay of proceedings. On appeal, Foo Tuat Yien JC disagreed that there would be a denial of substantive injustice if the Singapore proceedings were stayed for the following reasons (*TGT v TGU* at [24]–[28], [30]–[35] and [54]–[60]):

> (a) The fact that the mother could no longer apply for the son's maintenance in Hong Kong did not change the fact that Hong Kong was an available forum. The unavailability of relief in Hong Kong was only relevant in the second stage of the *Spiliada* analysis.
>
> (b) In a family case with international elements, *per TDX v TDY* (above, para 16.22), it is not for the forum court to assess what the welfare of the child requires, but to determine which court is more appropriate to determine the welfare of the child. Here, almost all the connecting factors point to Hong Kong, and Hong Kong was thus the more appropriate forum to hear the dispute.
>
> (c) As regards the second stage of the *Spiliada* analysis, courts have been slow to find a denial of substantial justice just because a foreign court applies a law unfavourable to a plaintiff. There were three factors here in granting the stay. First, the mother could not offer any good reason as to why she did not apply for the son's maintenance before he was above the age limit. Secondly, to allow the laws of Singapore to intrude into

> the father's obligations based solely on the arbitrary fact of his residence and employment here would not achieve substantial justice between the parties. Finally, the mother's argument, reduced to its core, requires the court to weigh the quality of justice available under the Singapore and Hong Kong family justice regimes, but this undermines international comity.

16.99 This decision, albeit dealing with the more specific point of maintenance, echoes the overarching point in *TDX v TDY*, that the welfare of the child principle, in the context of family dispute across borders, must still be assessed through the lens of *forum non conveniens*. As stated by Foo JC, the question is not which forum will provide the child the greatest measure of welfare, nor is it whether the mother will be able to bear the burden of bringing up the son without the financial help of the father, but rather which system of law should govern their rights and obligations in relation to the son: *TGT v TGU* at [61]–[62]. Having said that, one can probably say that this case turned on the lack of initiative of the mother to apply for maintenance in Hong Kong in a timely manner. Her choice to turn to Singapore made it a clear case of forum shopping.

The reasons for making an order for nominal maintenance

16.100 In *APE v APF* [2015] 5 SLR 783, the Court of Appeal affirmed (at [5]) its previous decision in *Tan Bee Giok v Loh Kum Yong* [1996] 3 SLR(R) 605 ("*Tan Bee Giok*") that for a wife's right to future maintenance to be preserved, the court is absolutely obligated to make an order for nominal maintenance (which is usually $1 a month) rather than to make no order for maintenance or to make an order to say that there would be no maintenance in the interim but there would be liberty for the wife to apply for it in the future. If an order for nominal maintenance was not made, the wife would be permanently precluded from applying to the court for maintenance (in this regard see also *ATD v ATE* [2015] SGHC 131 at [34]).

16.101 This affirmation was expressly meant to be a direct refutation of three recent High Court cases that had cast some doubt on the correctness of *Tan Bee Giok*: first, in *ADB v ADC* [2014] SGHC 76 at [9], where Choo Han Teck J had stated that the appropriate order to preserve a wife's right to maintenance in the future was to make an order of no maintenance but with "liberty to apply"; secondly, in *ANJ v ANK* [2014] SGHC 189 at [30], where Woo Bih Li J had questioned if it was logical to maintain a distinction between nil maintenance and nominal maintenance; and finally, in *APE v APF* [2015] SGHC 17 at [41] (the decision that *APE v APF* was appealed from), where Tan Siong Thye J had stated that there was no practical difference between making no

order and making an order for nominal maintenance. But does *APE v APF*'s conception and justification of nominal maintenance square with the words and principles of the Women's Charter?

16.102 First of all, s 113 of the Women's Charter states that:

> The court may order a man to pay maintenance to his wife or former wife —
>
> (*a*) during the course of any matrimonial proceedings; or
>
> (*b*) when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage.

Section 118 of the same statute then states that:

> The court may at any time vary or rescind any subsisting order for maintenance … on the application of the person in whose favour or of the person against whom the order was made … where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

These two provisions state quite clearly that the court has considerable discretion when it comes to ordering and varying maintenance. This is consistent with the court's broad range of powers in ancillary matters, and it seems incongruous that its powers in the context of varying maintenance stand and fall by the existence of an order for $1 maintenance. Perhaps the strongest point put forth by the Court of Appeal in *APE v APF* in justifying the need for a nominal order is a conceptual one (*APE v APF* at [7]–[8] and [12]):

> An order for *nominal* maintenance, *by its very terms*, *clearly preserves* a wife's right to apply for a variation of that maintenance order in the *future* should the need arise because there has been a material change in the circumstances.
>
> In *contrast*, an order that there be *no order* on a wife's application for maintenance is, in *substance*, a *rejection* of that application itself. Put simply, an order that there be no order on an application for maintenance must necessarily constitute *a decision* on that application and cannot, instead, be an order that puts everything in limbo or which 'suspends' final judgment on the application, so to speak …
>
> …
>
> … [Making no order on maintenance] is, in substance as well as effect, a *rejection or disallowance* of the wife's application, thus *precluding her from ever claiming maintenance again*. In *those* circumstances [a liberty to apply] would *have nothing to apply to*. This is because it is settled law that the 'liberty to apply' order is only intended to *supplement* the main orders of the court in form and convenience so

> that the main orders may be carried out and may not be used to *vary* the order of the court …
>
> [emphasis in original]

16.103 In other words, making either no order on maintenance or an order for nil maintenance is supposed to reflect a conscious decision on the part of the court to put an irreversible end to maintenance variation applications. Without saying as much, in the court's view, the term "subsisting order for maintenance" in s 118 categorically excludes no orders and nil orders, and no newly discovered misrepresentation, mistake of fact or material change in circumstances thereafter can allow the court to award or vary maintenance. This may be an undue fetter on its own powers. If the concern is that leaving things open-ended (in that even a no order or nil order can be sought to be varied by the wife in the future) may lead to an abuse of process or produce a crippling lack of finality, an order for nominal maintenance does not alleviate it in any way either and, more crucially, there are no known barriers to just imposing an order of nominal maintenance with no temporal limits when the court is undecided anyway. So the real question, as noted in Beatrice Yeo & Fiona Chew, "Nominal Maintenance: Worth Every Dollar" *SLW Commentary* (September 2015) at p 3 ("Yeo and Chew"), is "whether an order for $1 maintenance should be the default position or only made sparingly".

16.104 Presumably, nominal maintenance should not be awarded when the court is simply undecided (for instance, if there are not enough facts) as to whether periodic or lump sum maintenance is appropriate. However, there has not been much judicial guidance thus far, either suggesting that this is not something the courts have applied their minds to or the issue is patently resolvable by commonsensical justice that no substantial reasoning is necessitated. Of course, one can always look to s 114 of the Women's Charter, which is technically applicable since it sets out a number of mandatory factors for consideration when the court has to determine "the amount of any maintenance to be paid by a man to his wife or former wife" – and $1 maintenance is an "amount". Of the factors in s 114, which of them might be relevant? If the wife is employed or employable, that must surely be a strong factor against a nominal order (s 114(*a*)). The same can be said if the wife is relatively young (s 114(*d*)). If there are children to be taken care of for a substantial period of time, that can be taken care of through separate orders for the maintenance of the children. Notably, these factors are somewhat similar to the considerations for the court when deciding if a clean break should be achieved for the parties. The problem is that the cases have not been consistent when justifying whether nominal maintenance should be awarded or not.

16.105 Uncontroversially, there are cases that state that if the wife is of means and has the ability to keep working for a while more, or if the wife has been awarded substantial assets following the division of matrimonial assets, no maintenance will be awarded to her at all – the necessary implication of this is that any hope for an order of nominal maintenance to preserve her right of future variation is also foreclosed: see, *eg*, *AAE v AAF* [2009] 3 SLR(R) 827 at [16]–[24]; *Guo Ningqun Anthony v Chan Wing Sun* [2014] SGHC 56 at [120]–[125]; *AOF v ACP* [2014] SGHC 99 at [78]; *AOB v AOC* [2015] 2 SLR 307 at [29]; *ASI v ASJ* (above, para 16.35) at [56]; and *ASP v ASQ* (above, para 16.94) at [46]–[48].

16.106 However, the question is: When does a court decide that despite the wife not requiring maintenance at the present, that right should be preserved and nominal maintenance should be awarded for the time being to preserve that right? A sampling of recent cases shows that reasons are usually not given directly when such a decision is made, other than to say that it is to insure against the possibility of circumstances changing in the future: see, *eg*, *BMJ v BMK* [2014] SGHC 14 at [31]; *TCY v TCZ* [2014] SGDC 179 at [7]; *Goh Ah Hwa v Lim Boon Kang* [2014] SGDC 191 at [7]; *ARL v ARM* (above, para 16.52) at [52]; and *Loh Swee Peng v Chan Kui Kok* [2015] 3 SLR 1 at [53]. The point that is being made here is that whether a wife is financially independent or not or whether she still has many working years left, circumstances can always change somewhere down the line in a material way to justify a request for maintenance or a variation of the order. However, it surely cannot be the case that every decision not to grant maintenance for the moment should result in an order for nominal maintenance "just in case". Indeed, this was precisely what the Court of Appeal in *ATE v ATD* [2016] SGCA 2 cautioned against. First, the court said (at [27]) that "it would be invidious (and even futile) … to attempt to lay down the legal principles in a comprehensive or exhaustive fashion" as to when nominal maintenance can be justified – everything depends on a close examination of all the facts and circumstances of each case. However, this is subject to three principles: first, the courts cannot order nominal maintenance automatically or as a matter of course; secondly, it will not suffice for the wife to argue, without more, that she is entitled to an order because her situation might change in the future; and finally, the power to order maintenance is supplementary to the power to order a division of matrimonial assets.

16.107 All things considered, however, the better approach may be to just scrap the idea of nominal maintenance and to think of a mechanism to ensure that frivolous revisitations of the issue of maintenance are either pre-emptively short-circuited or penalised (through costs for instance). After all, as submitted above, there is nothing compelling in the Women's Charter that demands a holding on to the idea of a

nominal order to preserve the wife's rights – and the court's powers for the matter. There are of course also other objections to the idea of nominal maintenance that are based on different considerations, but they need not be rehashed here: see (2014) 14 SAL Ann Rev 354 at 383–384 and Yeo and Chew at 5.

Whether proof of neglect or refusal to provide reasonable maintenance is required for interim maintenance

16.108 In *TCT v TCU* [2015] 4 SLR 227, interim judgment for divorce was granted in July 2014 and a month later the wife applied for interim maintenance via s 113 of the Women's Charter, seeking $1,000 and $4,000 in monthly maintenance for herself and her nine-year-old son respectively. The wife was earning around $16,300 a month while the husband was earning around $17,300 a month. The District Judge granted maintenance, but ordered that the monthly amounts be adjusted to $500 and $1,500 respectively instead (she found that the wife's and household expenses were closer to $1,000, while the son's monthly expenses were closer to $2,000). She made the order notwithstanding the fact that there was no proof that the husband had neglected or refused to maintain either his wife or son. She justified this by pointing to what she thought were different legal thresholds found in ss 69 and 113 of the Women's Charter.

16.109 Under s 69(1), which is found under Pt VIII (entitled "maintenance of wife and children"), a married woman:

> … whose husband neglects or refuses to provide her reasonable maintenance may apply to the court, and the court may, on due proof thereof, order the husband to pay a monthly allowance or a lump sum for her maintenance.

Section 69(2) essentially provides the same for the maintenance of children.

16.110 Under s 113(*a*), which is found under Pt X, ch 4 (entitled "financial provisions consequent on matrimonial proceedings"), the court:

> … may order a man to pay maintenance to his wife or former wife … during the course of any matrimonial proceedings; or … when granting or subsequent to the grant of a judgment of divorce.

Section 127(1) essentially provides the same for the maintenance of children.

16.111 Valerie Thean JC held that despite the difference in words used, ss 69, 113 and 127 all required proof of neglect or refusal to provide

reasonable maintenance. In arriving at this decision, she made the following observations (at [14]–[15], [19]–[20] and [25]–[26]):

> (a) For the maintenance of children, s 127(2) states that regardless of whether there is a divorce, the factors that determine the maintenance of children are the same. However, for the maintenance of wives, there is no equivalent of s 127(2) found in s 113.
>
> (b) Where a woman is still married but is involved in divorce proceedings, she can elect to file an application for maintenance either under s 69(1) or s 113(*a*) of the Women's Charter. In practice, many women do file s 69 applications even after the commencement of divorce proceedings.
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> (c) The legal threshold is specified in s 69 because parties are not yet before the court, and criteria are provided to found the court's jurisdiction. In a s 113(*a*) application, there is no need to specify any criteria to allow an application to be filed, as the court is already seised of the suit. However, the obviation of this need does not mean that the court should apply a lower legal threshold when ordering maintenance under s 113(*a*).
>
> (d) The parliamentary debates and case law indicate that maintenance is ultimately premised on need. A court should not be more ready to intervene simply because a divorce suit already exists. Further, where children are involved, a court order for maintenance sends a signal to the child as to whether the father is a responsible parent or a callous husband. Even if no children are involved, each application has financial and non-financial costs consequences.

16.112 For not the first time in this year's Ann Rev, it would appear that if this decision is indeed correct, the simpler and better way forward is for the relevant portions of the Women's Charter to be amended so as to clarify and harmonise the law once and for all. After all, the District Judge only interpreted ss 69 and 113 the way she did because the words of the provisions are indeed different – as a matter of statutory interpretation, it should not be lightly assumed that different provisions in the same statute using different words create the same test. The fact that a party is able to use either s 69 or s 113 is something that has been going on for a while already, and if nothing has been done about it either legislatively or judicially, it can legitimately be assumed that this has not been a hidden lacuna in the law or that there was not even a lacuna to begin with.