

16. FAMILY LAW

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Custody

Child's wishes and continuity

16.1 In *AOF v ACP* [2014] SGHC 99 (“*AOF*”), the couple divorced after being married for 14 years; the husband had committed adultery. They had one son aged 13. In 2011, interim care and control of the son was granted to the husband, with detailed conditions governing the wife’s right to access. Joint custody was also awarded.

16.2 The wife alleged that in 2010, the husband took the son away from her. Since that time, the wife had very little contact with him, and the son was very reluctant to see the mother even though the latter was keen. In 2011, the son even made a police report to state that he did not wish to see his mother. Nonetheless, the wife applied for care and control of the son and, in the alternative, continuation of the interim access order.

16.3 George Wei JC refused (at [23]) the application for care and control. Although it was the wife who had looked after the son for many years since his birth, the son had grown to resent his mother to the point that he stopped seeing her for more than three years. Citing the Court of Appeal’s decision in *Wong Phila Mae v Shaw Harold* [1991] 1 SLR(R) 680, Wei JC held that continuity is a factor that may be taken into account by the court in determining what is in the best interests of the child. The son had settled down in his living environment, was doing well academically, and there was no evidence that his well-being was compromised in any way. Given the relationship between mother and child, altering the existing care and control arrangement would likely result in emotional stress for the son.

16.4 As regards access, Wei JC referred to s 125(2) of the Women’s Charter (Cap 353, 2009 Rev Ed) (“Women’s Charter”), which states that the wishes of the child are subject to the overriding consideration of what would be in the best interests of the child. He then referred to *ABW v ABV* [2014] 2 SLR 769, which highlighted the importance of allowing the non-custodial parent to have access to the child so that he is assured, to the greatest extent possible, of a normal family life with two parents: in this regard see also (2013) 14 SAL Ann Rev 358 at 362–

365, paras 16.11–16.21. Accordingly, Wei JC held (at [25]) that denying the wife access to the son cannot be said to be in his best interests as that would be akin to a complete alienation of the child from his mother.

16.5 Is there a seeming contradiction in permitting the wife access on the one hand, and refusing the wife care and control on the other hand? If permitting care and control would result in emotional stress for the son, would not permitting access have the same effect (though not necessarily of the same scale), thereby defeating the paramount purpose of protecting the child?

16.6 Perhaps the answer lies in the nature of care and control, which involves the upbringing of the child on a mundane and daily basis (whereas “custody” broadly refers to the making of major decisions for the child): see Leong Wai Kum, *Elements of Family in Singapore* (LexisNexis, 2nd Ed, 2013) at p 336. In other words, had the wife been given care and control, the son would be seeing her on a daily basis, and neither the court nor the other parent would be able to do much to regulate this.

16.7 Access, on the other hand, can either be regulated by a court order or sorted as between the parents (even with consultation with the child (see para 16.18 below)). It is also something that can be modified over time where necessary with less disruption to the child as compared to changing an order for care and control, which by definition involves upheaval. Of course, preserving access also preserves the hope, however faint, that the parent may once again be an important part of the child’s life. That is usually the ideal scenario for most families.

16.8 With respect to the issue of care and control, *AOF* may also be briefly compared with *APC v APD* [2014] SGHC 260. In that case, Woo Bih Li J had previously granted care and control over the three children (aged ten, 12, and 18) to the wife. The eldest child was closer to the wife while the other two children were closer to the husband. Woo J denied the application to transfer care and control of the two younger children to the husband even though the wife had to move out of the matrimonial home and did not have as high-paying a job as the husband.

16.9 In reaching his decision Woo J appeared to place the most weight on the finding that the husband was a domineering and possibly manipulative person who was responsible for much of the acrimony in the family. He also interviewed the children and sought a social welfare report to confirm his views. Thus, even though the two younger children had expressed a clear preference to live with the husband rather than the wife, Woo J did not think that acceding to their request would be in their best interests. Woo J also denied (at [50]) the husband’s

alternative prayer for split care and control, on the ground that this would confuse the children as to who they should listen to. Ultimately, it would appear that the fact that the husband was of poor character proved to be decisive.

The importance of the maternal bond

16.10 In *BMJ v BMK* [2014] SGHC 14 (“*BMJ*”), the couple had two sons from the marriage aged six and 11. They were married between 2000 and 2011 and were granted interim judgment for divorce when the husband committed adultery. When the husband left the matrimonial home in 2010, the interaction between the children and him became less. He also became engaged and had another son with his fiancée.

16.11 While the couple was prepared to settle on joint custody of the children, they differed on the question of care and control and access. The wife sought sole care and control with the husband being allowed reasonable access, while the husband sought the converse.

16.12 Tan Siong Thye JC (as he then was) held that it would be in the best interests of the children that the wife be given sole care and control, with the husband given reasonable access. He made the following points (at [9]–[17]):

- (a) The wife was more involved in the children’s education, having done volunteer work and attended all school meetings. She also enrolled them in enrichment classes and brought them to these classes.
- (b) Although the husband’s fiancée was close to the children and could even tutor them, she would not be able to replace the wife as the mother to them. She also had to look after her own young son, who would require much more care and attention.
- (c) The husband did not rebut the allegations that he had failed to instil discipline in his children and had instead indulged them with expensive consumer gadgets and computer games.
- (d) The bond between the natural mother and her child is an unexplainable wonder of human nature, and the court would be doing a disservice to justice and humanity if it turned a blind eye to the most fundamental bond of mankind by taking the child away from the mother.
- (e) The children had been living with the wife since birth, and a change in the environment would not be good for them.

(f) Though the husband would be granted reasonable access, he would have to strike a correct balance between measured discipline and liberated upbringing.

16.13 As evident in *AOF* (para 16.1 above), the importance of the maternal bond can be displaced by other factors if, for instance, the child does not wish to see the mother or the child has not been living with the mother. Indeed, the prior decision of *AWN v AWO* [2012] SGHC 228 had stated that the maternal bond is only a factor and there is no operative presumption in favour of the mother in care and control matters: see also (2012) 13 SAL Ann Rev 299 at 301–302, paras 16.7–16.11. Nonetheless, the importance of the maternal bond appears to be greater when the children are fairly young, based on past and present case law: see *Chan Kah Cheong Kenneth v Teoh Kheng Yau* [1994] 2 SLR(R) 595; *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430; *ACU v ACR* [2011] 1 SLR 1235 (“*ACU*”). Whether or not this sentiment could or should be fortified in courtrooms by social studies remains to be seen, however.

Regulating access

16.14 In *ADL v ADM* [2014] SGHC 95, the couple got married in 2009 but the husband filed for divorce in 2013. They had a daughter aged 21 months. Care and control had been granted to the wife but the father was granted access (9.00am to 2.00pm every Monday, Wednesday, and Friday). However, he appealed for greater access (9.00am to 5.45pm every weekday and 11.00am to 9.00pm every Sunday).

16.15 The husband, being a university lecturer, argued that he had a more flexible work schedule and was free to look after the child every weekday from 9.00am to 5.45pm, and that this was a better arrangement than leaving the child in the care of the wife’s father and domestic helper. There was no clear evidence that the parents were jointly considering a day-care centre as an option. The wife, an in-house counsel, objected to greater access principally on the ground that increasing access would be tantamount to sharing care and control and this was impractical.

16.16 Choo Han Teck J allowed the appeal in part, citing (at [8]) two important factors: first, the young age of the child; and secondly, the flexible working hours of the husband. He further noted that disputes over greater access usually involve older children who had become more accustomed to one parent than the other, but it was not the case here: in this regard see also *APA v APB* [2014] SGHC 275 at [14]–[17] and *AOB v AOC* [2015] SGHC 13 at [6]–[7]. The daughter here was too young to be influenced by one parent to the detriment of the other, and

neither parent appeared to lack the capacity or character to look after her. Choo J thus opined that the daughter would be better off with quality time from both parents, and modified (at [14]) the access to 9.00am to 2.00pm every day except Saturdays.

16.17 The importance of having both parents involved in the upbringing of the child was also emphasised in *ADD v ADE* [2014] SGHC 80. There, the wife sought to revoke the order allowing the husband access to one of their children (aged 14) every Monday from 7.00pm to 9.00pm on the basis that access was disruptive to the child's tuition lessons during that time. The husband argued that the existing access order was already subject to any clashes with the child's tuition schedule. Choo J (at [4]) dismissed the wife's application, opining that it was in the best interests of the child to interact with both parents rather than have both parents fight over a trivial matter which they could easily sort out themselves without turning to the court.

16.18 In comparison to the two cases mentioned above, in *ANH v ANI* [2014] SGHC 184 ("*ANH*"), no order of access was granted. There, the couple divorced after being married for 17 years. They had a 14-year-old daughter. Though the couple agreed on joint custody, they disagreed on access. The husband claimed that the wife had denied him access to his daughter since 2012, but the wife claimed that it was the daughter who did not want to see the husband. The wife argued that any access should be arranged by the husband and the daughter as the daughter was already a teenager. Choo Han Teck J agreed with the wife, stating that the daughter was mature enough to be able to decide if she wanted to see her father, and refrained from granting access.

16.19 Accordingly, it appears, from these three cases at least, that access will normally be granted if the parent seeking it intends to spend quality time with the child and there are no compelling reasons to deny access. In this light, it may be said that *ANH* is unique because it is probably not enough that the child says that he or she does not want to see a particular parent; the court must also be persuaded that the child is mature enough to have thought about such a decision thoroughly and carefully. Notably, however, the child in *ANH* was only a year older than the child in *AOF* (above, para 16.1), and the child in *AOF* had even gone as far as to lodge a police report, but the court in *AOF* nonetheless held that access should still be granted. If there were any other differentiating facts between these two cases to warrant different outcomes, they were not apparent from the judgments.

16.20 A separate – and, indeed, rare – question of whether supervised access is appropriate arose in *APE v APF* [2015] SGHC 17 ("*APE*"). The couple had an 11-year-old daughter from a 12-year marriage. Two significant facts of the case were that the husband was overseas from

2004 to 2007 as he was undergoing pilot training, and that he was asked to leave the matrimonial home in 2010.

16.21 The wife argued that supervised access would be warranted in this case because the husband was a poor caregiver, had a deteriorating relationship with the child, and had failed to visit the child for a couple of years. The husband argued that he did not want to put the child in a position of conflict and that he wanted to repair the father-daughter relationship; instead of supervised access, he should be granted unsupervised access at least 12 times a year and the child should be allowed access whenever she wished.

16.22 Tan Siong Thye J (as he then was) ordered conditional supervised access, citing (at [25]–[38]) the following reasons:

(a) The weight of local case law shows that when a parent does not live with his child, it is common to expect that he will get an order of reasonable access.

(b) The English courts have made extensive reference to social science research in answering the question of whether parental involvement on both sides (in the context of contact orders, which are essentially the same as access orders) is indeed in the best interests of the child. The conclusion that they have drawn is yes, and in effecting the objective of promoting the bond between the child and the custodial parent, the English courts often attach conditions to contact orders.

(c) Although supervised access can be warranted if a parent has been estranged or alienated from the child or the child is uncomfortable being left alone with the parent because of the lack of a strong bond, the factors that tend to justify supervised access are more severe such as violence, mental illness, inappropriate parenting, and fearfulness on the part of the child.

16.23 Here, the husband was estranged from the child and they did not have a good relationship. However, the wife had some part to play in that. An initial order for access to be supervised by professionally trained staff of the Centre for Family Harmony – which the family had some experience with – combined with an order for both parents to undergo a parenting course and counselling (together with the child) was thus made. The order for supervised access was subject to review upon recommendations made by the centre to the court.

16.24 A notable feature of this case was the court's citation of social science research to complement the principles established by case law. It was already mentioned earlier (at para 16.13 above) that social science

research may potentially be useful for the courts to consider, particularly when answering questions relating to what is in the best interests of the child. While it is probably often the case that such questions can be resolved by an experienced judge without the aid of such research – and much depends on the facts of each dispute after all – the utility of such research has not received much discourse in our courts. One may, of course, take the view that policy- and law-makers are better placed to compare and consider such research, or that any such research should be based on the local context and not from another jurisdiction that may have different attitudes and cultures. However, where children are involved in the dispute, it does seem prudent to at least consider – without necessarily accepting or giving great weight – what insights other disciplines may have to offer.

Sole custody versus joint custody

16.25 In *AMB v AMC* [2014] SGHC 169, the couple had two sons from the marriage aged 15 and 17. The husband was a former Chief Financial Officer while the wife was the primary caregiver who did freelance accounting work. The marriage began in 1994 but effectively ended in 2012 after the wife filed for divorce on the basis of the husband's unreasonable behaviour. The wife left the matrimonial home with the children to stay in a rental flat. The husband sought joint custody of the children while the wife sought sole custody.

16.26 The wife argued that it was not practicable to have joint custody because the husband was abusive and physically violent towards her; violent towards the younger son and had assaulted him in her absence; vindictive and would annoy the family by smoking heavily, watching pornography and masturbating without cleaning up after himself; and inconsiderate to the children's educational needs as he would watch television with the volume turned up even when they were in the midst of their examinations. The husband claimed that there was no evidence to support the allegations and pointed to the fact that he was never charged and that the wife failed to apply for a Domestic Exclusion Order even though she had a chance to.

16.27 Tan Siong Thye J (as he then was), in ordering conditional joint custody (with the wife having the final say if no consensus on custody issues could be reached), took into account (at [17]–[31]) the following factors:

- (a) The court has always been in favour of joint custody so that parental bonds are maintained and both parents can execute their common responsibilities for the upbringing and development of their children. This also gives effect to Singapore's international obligations under Art 18 of the

Convention on the Rights of the Child (20 November 1989, 1577 UNTS 3).

(b) There are, however, two exceptions to this based on the Court of Appeal's decision in *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 ("*CX v CY*"): the first is where a parent has ill-treated or exhibited violence against the children; and the second is where there has been a complete lack of co-operation between two antagonistic parents.

(c) There is a difference between granting a sole custody order on the basis of acrimony and one in which the parties are unable to co-operate with each other, in that in the latter the parties have already shown that they had tried to work together in the child's best interests but failed.

(d) The husband was a poor parent not just based on the wife's allegations, but also due to the fact that he only made minimal contributions towards the household expenses while indulging in a lavish lifestyle for himself, and that he had deprived his younger son of financial aid for school.

(e) Nonetheless, the wife had to show that the husband was so unfit for parenting that the benefits of having his involvement in the sons' lives did not outweigh the harm that he would bring to them, or show that co-operation is impossible even after mediation and counselling and the lack of co-operation was harming the children.

16.28 Notably, Tan J had interviewed the sons separately in the presence of both parties' counsel. The sons were unequivocal in their disdain for their father and united in their love for their mother as she was always the one who cared about them and took care of all their needs. This was a position the sons maintained in their affidavits. The sons were also not young children, so the question that arises is whether it was really necessary to have one last shot at joint custody, especially when the children concerned were nearing critical junctures in their lives (in the form of major academic exams, national service, and tertiary education plans).

16.29 Perhaps the key in justifying Tan J's decision may lie in the fact that the order for joint custody was a conditional one, the breach of which would presumably lead to a discharge of the order and the eventual result of sole custody to the wife. The concept of conditional or qualified custody has been recognised by the Singapore courts before (see, for instance, *ACU* (above, para 16.13)). An order for no custody was also not feasible, since in accordance with *Anthony Patrick Nathan v Chan Siew Chin* [2011] 4 SLR 1121, that presupposes that there is no actual dispute between the parents over any serious matters relating to

the children's upbringing. Nor was an order for sole custody, as the Court of Appeal had confirmed in recent cases such as *ZO v ZP* [2011] 3 SLR 647 that the threshold established in *CX v CY* is indeed a high one. In the circumstances, conditional joint custody was perhaps the most logical option.

16.30 The question of whether an order for sole custody was appropriate was also posed to Tan J in *APE* (above, para 16.20), and that decision may be briefly compared. There, the wife sought sole custody on the grounds that the husband had taken no interest in the child's life (including being away for three years for pilot training) and was an abusive person with a very bad temper. However, Tan J found that the evidence did not substantiate the wife's claims and, in any event, the threshold for sole custody was a high one.

Relocation of children

16.31 *BNT v BNS* [2014] 4 SLR 859 ("*BNT*") was an appeal from a District Judge's decision permitting a mother to relocate to another country with the children. The husband, wife and their two children were Canadian citizens. The husband was a lawyer who had been working in Asia for 13 years, while the wife was principally a homemaker who had part-time working experience as a conference planner.

16.32 The couple married in 2002 in Canada and lived in Singapore between 2002 and 2004 before living in Thailand (where the children were born) between 2004 and 2008. The family returned to Singapore in 2008. However, the wife filed for divorce in 2011 on the basis of the husband's unreasonable behaviour, for which interim judgment was given in 2012. In 2011, the court ordered interim joint custody of the children and granted interim care and control to the wife. The husband was also given fairly liberal access.

16.33 In late 2012, the wife applied for permission to permanently relocate to Toronto. In late 2013, the District Judge allowed the application, citing the following reasons:

- (a) The wife was the primary caregiver.
- (b) The wife had never intended to make Singapore her permanent home and she had few friends and no family in Singapore.
- (c) The children would benefit from the wife regaining her self-esteem and self-confidence in a new environment.

- (d) The wife had better prospects of rebuilding her career in Canada.
- (e) The wife had laid out a sufficiently clear relocation plan as regards accommodation and the children's schooling needs.
- (f) The relocation was not incompatible with the children's interests as they were more emotionally attached to their mother and they would enjoy free education and medical benefits in Canada.

16.34 Judith Prakash J disagreed with the decision and allowed the appeal. She first noted (at [15]–[20]) that the only applicable principle of law in relocation cases is that the welfare of the child is the paramount and overriding consideration, and that neither the Court of Appeal in *Re C (an infant)* [2003] 1 SLR(R) 502 (“*Re C*”) nor the High Court in *AZB v AYZ* [2012] 3 SLR 627 (“*AZB*”) stood for the proposition that there is a legal presumption in favour of allowing relocation if the primary caregiver's desire to relocate is not unreasonable or done in bad faith. She said this was the position in the UK as well (citing *Payne v Payne* [2001] Fam 473 and *MK v CK* [2011] EWCA Civ 793).

16.35 Prakash J next observed that it is generally in the child's interests for him to continue to have a meaningful relationship with both his parents notwithstanding that the relationship between the parents has broken down: *BNT* at [21]. Though the local cases she cited (*CX v CY* (above, para 16.27) and *BG v BF* [2007] 3 SLR(R) 233 (“*BG v BF*”)) were in the context of joint custody and access respectively, she considered them to be relevant to relocation applications as well. Moreover, there was authority from Hong Kong (*HKMB v LKL* [2007] HKCU 291) that supported this position.

16.36 Prakash J held that the following factors played a part in her determination that the welfare of the children would not be best served by permitting the relocation (*BNT* at [24]–[56]):

- (a) The husband participated meaningfully in the children's daily lives and maintained a keen sense of responsibility for their upbringing.
- (b) There was a real likelihood that the good relationship between the husband and the children would be severely undermined if relocation was permitted.
- (c) The wife's hostility towards the husband was disconcerting at times (such as assaulting him in public), and that hostility drove her to behave at times in a manner that was not in the children's interests (such as affecting their schooling needs).

(d) The wife's relocation plan, especially in relation to the children's schooling needs, was not well thought through and was motivated by a desire to avoid the unpleasantness of having to maintain contact with the husband.

(e) The children have been leading stable and comfortable lives in Singapore which is the only home they have known since 2008 when they moved here as infants.

(f) The husband was unlikely to find meaningful employment in Canada, and this in turn would affect the income stream for the family since he would likely remain the breadwinner.

16.37 It was suggested in Debbie Ong, "Parental Relocation across Borders: Is Relocation in the Child's Welfare?" (2009) *Law Gazette* that the factors relied on in Singapore case law in determining the appropriateness of relocation are whether: the relocation is temporary or permanent; the relocating parent is remarrying; there is familial support abroad; the child will receive a good education; there will be a loss of relationship with the other parent; and there are enlistment obligations if the child is a male. It was subsequently suggested by the same author in (2012) 13 SAL Ann Rev 299 at 304 that:

... while all factors are relevant and should be given appropriate weight, the dominant factor is the reasonable wishes and intentions of the primary caregiver desiring to relocate with the child.

16.38 These suggestions are consistent with the observations of Prakash J in *BNT*. There will always be many factors to consider, and even though some factors may seem more important than others, it is a different thing to say that a legal presumption arises. Indeed, the aversion in *BNT* to a presumption simply confirms yet again that the Singapore courts still strongly believe that both parents should feature in the children's lives to the most feasible extent possible. Relocation is probably the most extreme manifestation of sole custody and deprivation of access, so unless it is clear that cutting the other parent off is in the best interests of the child, it is unlikely that such applications will succeed (see also the discussion above at paras 16.14–16.29).

16.39 Then there is the question of whether a short-term or long-term view should be taken in terms of what is in the best interests of the child: in this regard see also Jonathan Muk, "The Case for Relocation – Relocation *versus* Continuity" *Singapore Law Watch Commentary* (November 2014). There is certainly academic support for the notion that the court should not be too ambitious when considering this question: see Leong Wai Kum, *Elements of Family in Singapore*

(LexisNexis, 2nd Ed, 2013) at pp 330–333. However, in *AZB* (above, para 16.34), the court had noted (at [20]) that:

... since the long-term interests of the child are closely aligned with the emotional and psychological well-being of the primary caregiver, the court will place considerable weight on an application by the primary caregiver for relocation with the child.

Of course, where short-term and long-term interests coincide (which may have been the case in *AZB*), that is ideal. However, where they collide instead, which should give way? Relocation has long-term ramifications, much more than any other order relating to the child. The most sensible approach may be to ask if there are any obvious long-term negative ramifications for not relocating that override the positive status quo (assuming it is positive). The burden of proof will naturally fall on the relocating parent to demonstrate this.

Division of matrimonial assets

Whether misconduct should be a factor

16.40 In *Chan Tin Sun v Fong Quay Sim* [2014] 3 SLR 945 (“*Chan Tin Sun (HC)*”), the couple divorced after being married for 34 years. The wife was 72 while the husband was 74 years old. The wife was convicted of causing hurt and sentenced to one year’s imprisonment in 2010 after she had poisoned her husband with arsenic in 2004, causing him to suffer from anaemia and liver cirrhosis. She claimed that she did so because he had neglected her and verbally abused her over the years. Subsequently, the wife sought maintenance and a fair and equitable division of the matrimonial assets, but the husband argued that she should get neither due to her act of poisoning (which he considered an act of attempted murder). One of the issues, therefore, was whether this particular misconduct should have any bearing on the ancillary relief sought.

16.41 As regards the division of matrimonial assets, Tan Siong Thye JC (as he then was) first noted (at [9]–[11]) that in reaching a just and equitable outcome, the court should adopt a broad brush that relies on the application of sound discretion rather than any rigid formula; in addition, indirect contributions should be quantified with the full benefit of hindsight and in a broad manner. In this case, the husband was the sole breadwinner and had made most of the major financial contributions, while the wife was a full-time homemaker who looked after their son.

16.42 Tan JC next noted (at [19]–[21]) that s 112(2) of the Women’s Charter does not list the misconduct of a party as a consideration for the

court when dividing matrimonial assets, but while the list in s 11(2) is not exhaustive, for misconduct to be a factor there must be some nexus between the misconduct and the contributions of either spouse. On the facts, Tan JC found (at [22]–[25]) that there was no relation between the wife's act of poisoning and her prior indirect contributions to the family and from that perspective, her contributions were not negated and must still be recognised. However, from the point when the wife poisoned her husband (that is, 2004 onwards for a period of seven years), there was a drastic reduction in her indirect contributions towards the family since their son had begun working and her taking care of her husband had been compromised by the poisoning.

16.43 Tan JC considered some precedents and concluded (at [36]–[38]) that the wife ought to receive a 35% share of the pool of matrimonial assets (which totalled \$2.1m); this was at the lower end of the scale for marriages of similar lengths with children. He took into account the fact that the husband was in poor health largely because of the poisoning and would continue to require medical care. However, given that the husband had not made full and frank disclosure of his money and could not account for some \$700,000, Tan JC adjusted the wife's share to 42%.

16.44 As regards maintenance, Tan JC referred to s 114(2) of the Women's Charter, which permits the conduct of the parties to be taken into consideration when ordering maintenance for wives and former wives. While he found that both parties had contributed substantially to the breakdown of the marriage, the wife's grossly disproportionate act of revenge had to lead to a lower sum of maintenance, especially since the husband's health has been deteriorating as a result of the poisoning with medical expenses amounting to \$127,000. The husband also no longer had any income. Thus, Tan JC awarded a lump sum maintenance of \$18,000, calculated at $3 \times 12 \times \$500$.

16.45 On the issue of division of matrimonial assets, perhaps the decision could have been fortified by referring to what the Court of Appeal had said in *AQS v AQR* [2012] SGCA 3 at [39] (“AQS”):

[W]hile we note that divorce is no longer based on fault, conduct of the parties in relation to the family is nevertheless a relevant consideration in the division of matrimonial assets ... Where parties were clearly in a highly acrimonious relationship and they have alleged various counts of misconduct against each other, the court should not too readily sift through the facts and evidence in order to assign relative blame for the purposes of dividing matrimonial assets.

16.46 Of course, the misconduct in question in *Chan Tin Sun (HC)* was not just mere misconduct but an actual (and serious) crime committed by a spouse against another: in this regard see also Chen

Siyuan, “Misconduct and the Division of Matrimonial Assets” *Singapore Law Blog* (21 October 2014). Indeed, the phrase “just and equitable” in s 112 of the Women’s Charter is theoretically wide enough to factor in criminal acts; the words of s 112 also do not expressly impose a requirement of a nexus between the misconduct and the contributions of the spouse.

16.47 This question was addressed further in *Chan Tin Sun v Fong Quay Sim* [2015] 2 SLR 195 (CA) (“*Chan Tin Sun (CA)*”) when an appeal was lodged (*vis-à-vis* the division of matrimonial assets) by the husband – and it was allowed. The Court of Appeal first noted (at [22]) that while s 112 does not expressly refer to misconduct as a factor, the factors in s 112 are not exhaustive either. Pointing then to cases such as *AQS*, in which it was suggested that extreme misconduct may in certain circumstances be considered, the court proceeded on an analysis as to whether extreme misconduct can be ascribed a negative value as part of valuing the spouse’s contribution to the marriage.

16.48 It surveyed the English position on the basis that it was not inconsistent with the overriding purpose of s 112 (which is to achieve equitability) to consider s 25(2)(g) of the English Matrimonial Causes Act 1973 (c 18) which provides that the court, in exercising its power to adjust property holding between spouses, shall have particular regard to the conduct of the parties if it would be inequitable to disregard it. The court further noted that while historically, English family law did not adopt the community of property approach, this appears to have changed in more recent times.

16.49 In any event, the court found it useful to refer to various analogous English cases such as *Bateman v Bateman* [1979] Fam 25 (the wife seriously wounded the husband twice), *Evans v Evans* [1989] 1 FLR 351 (the wife solicited others to murder the husband), and *H v H (financial relief: attempted murder as conduct)* [2006] 1 FLR 990 (the husband attempted to murder the wife), and stated that “where one spouse’s future foreseeable financial needs have largely been the result of the conduct of the other, it ought to be given more weight”: *Chan Tin Sun (CA)* at [49].

16.50 Accordingly, while the court agreed with the High Court that the wife’s indirect contributions to the welfare of the family “had been drastically reduced from 2004 as a result of her starting to poison”, it differed from the High Court as to whether the conduct fundamentally undermined the co-operative partnership that marriage entails: *Chan Tin Sun (CA)* at [55]. At the same time, it said that an award of no share of the matrimonial assets to either spouse could only be justified where that spouse had made no contributions to the marriage whatsoever: *Chan Tin Sun (CA)* at [57]. Considering that marriages of 17 to 35 years

with children tended to yield divisions between 35% and 50%, and ascribing a negative value of 7% for the misconduct, the court held that the wife was entitled to 28% of the pool of matrimonial assets: *Chan Tin Sun (CA)* at [58].

16.51 As a preliminary observation, local cases involving spousal misconduct as extreme as this are rare and this probably explains why the Court of Appeal sought recourse to English family law. As much as it was not really necessary to do so (given the broad language in s 112(2) of the Women's Charter and the judicial mandate to achieve equitability), we now have a clear local precedent that extreme misconduct can result in a reduction of the share of matrimonial assets, and that is helpful. However, although the Court of Appeal took the view that it differed from the High Court as to the effect extreme misconduct should have on the share of matrimonial assets, a closer reading of the judgment in *Chan Tin Sun (HC)* perhaps shows otherwise.

16.52 First, *Chan Tin Sun (HC)* at [21] suggests that Tan JC was aware that misconduct could, in certain circumstances (but without stating what they were save to imply the threshold was not met on the facts), lead to a reduction in the share of matrimonial assets. Secondly, *Chan Tin Sun (HC)* at [22] suggests that it is possible for contributions to be reduced to some extent as a result of misconduct (though the actual word used was "negate"). It is also noteworthy that Tan JC had, in effect, ascribed some negative value by reducing the sum of maintenance that the wife would otherwise have received. Indeed, it is not uncommon for maintenance sums to be adjusted due to uncertainties in the division of matrimonial assets and *vice versa*, but this aspect of *Chan Tin Sun (HC)* was not discussed correspondingly in the judgment by the Court of Appeal.

16.53 Nonetheless, given that Tan JC had justified the reduction of maintenance principally on the basis that s 114(2) of the Women's Charter expressly permitted him to (while s 112(2) did not for the division of matrimonial assets), the Court of Appeal was right in clarifying that extreme misconduct of similar or greater scale should result in a deduction of the share of matrimonial assets in future cases, even if s 112(2) was on the face silent on the matter.

More equitable to widen the pool of assets

16.54 In *Tan Yen Chuan v Lim Theam Siew* [2014] SGHC 110 ("*Tan Yen Chuan*"), the couple divorced after being married for 28 years. They had two daughters aged 24 and 28. Initially, the husband and wife proposed that all of the matrimonial assets be retained in their own

names, with the exception of the matrimonial property which was worth between \$1m and \$2m.

16.55 However, Lee Kim Shin JC (as he then was) refused to adopt this proposal mainly because the difference between the parties' proposal for the division of the net proceeds from the property was 40% (each party wanted a 70% share of the proceeds). He held (at [21]) that the more equitable approach was to calculate each party's interest as a percentage of the entire pool of matrimonial assets, but there was a complication in that the wife alleged that the husband had dissipated some \$1.5m from his bank accounts. The main contention over the value of the total pool of matrimonial assets was over the amount dissipated.

16.56 Lee JC accepted the Court of Appeal's observation in *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 that when a court decides to give a value to what it considers to be undisclosed assets it is not undertaking an exercise based on arithmetic but judgment. However, he found that the wife's estimate of the dissipated sum to be mathematically problematic to begin with: the \$250,000 cash gift to the husband's mistress overlapped with the husband's cash withdrawals of \$644,000 from his bank accounts; the wife could not substantiate her claim that the husband had deliberately "parked" \$221,000 in their daughters' bank accounts; and the \$280,000 that the husband supposedly diverted from the \$441,000 arising from the sale of his shares could actually be accounted for.

16.57 Accordingly, after deducting plausible expenditures of the alleged dissipated sum, there was only \$246,000 unaccounted for. Applying an adverse inference, however, a further 30% was added, making the unaccounted sum \$320,000. As for the remaining assets, they were assessed to be \$575,000 for the husband and \$121,000 for the wife. The total value of the pool of matrimonial assets, assuming the matrimonial property would be worth \$1.8m, was therefore around \$2.8m.

16.58 After factoring in the wife's direct financial contributions (around 30%) and her role as an involved, albeit paranoid and abusive, mother, as well as the length of the marriage and a couple of analogous precedents, Lee JC held (at [58]–[62]) that awarding the wife a 40% share of the matrimonial assets was just and equitable in the circumstances. He also said (at [65]) that he would have awarded a higher proportion if not for the daughters' and husband's portrayal of her as someone who caused tension in the house.

16.59 This decision is noteworthy at least to the extent that Lee JC had rejected the couple's initial proposal to limit the pool of matrimonial

assets to the matrimonial property because he thought that this would not be equitable. Indeed, under the proposal, the wife could have gotten as little as \$540,000 instead of the \$1.1m eventually awarded to her, which is a significant difference in both absolute and relative terms. Of course, Lee JC might have taken a different approach had the parties been in agreement on not just the property to be divided, but the share that each party should receive as well. After all, even though he was able to deduce the value of much of the undisclosed assets, an adverse inference still had to be applied in the end. Nevertheless, judicial initiative such as the one demonstrated here would assume even greater importance in the new family justice landscape in Singapore.

When equality in division can be justified

16.60 In *Lee Siew Choo v Ling Chin Thor* [2014] SGHC 185 (“*Lee Siew Choo*”), the couple divorced after being married for 29 years. They had two daughters. The largest matrimonial asset and the only property in question was a house worth around \$1.3m, of which the husband held a 75% share and the wife held a 25% share as tenants-in-common. The wife did not adduce evidence of the financial contributions for the previous matrimonial home (which was sold at \$844,000), nor did she substantiate her claim for expenses for living in alternative accommodation after she was excluded from the matrimonial home in 2010.

16.61 In relation to the remaining assets, the wife was prepared to include in the pool assets worth \$687,000 comprising cash, Central Provident Fund (“CPF”) moneys, insurance policies and shares. The husband contended that the figure should be \$997,000 instead, and should include cash belonging to the wife’s mother, the savings of the two daughters and the remaining value of a car due to be scrapped in a year. On the husband’s part, he was prepared to include \$811,000 comprising cash and CPF moneys, or about half of the \$1.66m which the wife claimed he had. He maintained that he had made full and frank disclosure.

16.62 The husband submitted that the wife should get a maximum share of 30% of the property, and a maximum share of 35% of the other assets. The wife submitted that equal division would be the just and equitable outcome. The wife, having had a lower paying job than the husband, had less financial contributions.

16.63 Choo Han Teck J first held (at [5]–[6]) that the car fell within the definition of “matrimonial asset” under s 112(10) of the Women’s Charter. He then drew an adverse inference against the husband as he did not think he had properly disclosed all the entries and statements of

his bank accounts, and found the value of his assets to be worth \$1.66m as the wife had suggested. Noting that equality of division is the norm for long marriages, and that there was Court of Appeal precedent for homemaker wives in long marriages receiving an equal share, Choo J held (at [9]) that an equal division would be just and equitable in this case.

16.64 Choo J essentially took the same approach in *ANH* (above, para 16.18), which was released shortly after *Lee Siew Choo*. For the matrimonial home, worth \$3.2m, the wife contributed 32.1% of the financing while the husband contributed 67.9%. There was another property, worth \$2.47m, which the wife contributed around 25% while the husband contributed around 75%. There were also two properties in China, which were valued at \$180,000 collectively. The remaining assets comprised \$232,000 of savings by the husband and \$74,000 of savings by the wife.

16.65 Choo J held that although equality of division is neither ideal nor the norm in accordance with the Court of Appeal's decision in *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 520, the courts tend to lean towards equality of division for long marriages. This is because (*ANH* at [10]):

... there is no formula or means to determine the differential between the financial and non-financial contribution of the parties with precision. An equal division is also probably the closest the courts can give effect to the parties' declaration in their matrimonial vow of treating both of them as one. Thus in the absence of a better formula, the courts will regard equality as justice.

16.66 A near-equal and equal division was awarded in even shorter marriages in *BMJ* (above, para 16.10) and *ABT v ABU* [2014] SGHC 25 ("*ABT*") respectively. In *BMJ*, the marriage lasted around 13 years and the pool of matrimonial assets was worth around \$2.4m. The husband was responsible for most of the direct financial contributions, but the wife had made greater indirect contributions. However, after factoring in an adverse inference against the husband for certain non-disclosures, the share awarded by Tan JC to the wife was increased to 47.6%.

16.67 In *ABT*, the couple divorced after being married for 15 years. They had a 16-year-old daughter, who lived with the husband. The pool of matrimonial assets was worth around \$1.45m. The details of the parties' direct and indirect contributions were not stated explicitly in the judgment, except that the wife appeared to have made minimal direct contributions. Nonetheless, Choo J held (at [10]) that an equal division would be just and equitable, mainly because the husband appeared amenable to an equal division based on his submissions in court as well as the general thrust of what was agreed upon in a mediation agreement.

16.68 It is interesting to compare the decisions highlighted in this section with the findings made in Lim Hui Min, “Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result” in *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010, Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011). In that article (which was cited in *BMJ*), the author noted that empirically, Singapore courts have typically awarded between 35%–45% of the assets where the marriages were ten years or longer, the couple had children, both parties were working, and the husband had greater direct financial contributions than the wife: in this regard, see also *Lynn Foo Yoke Lin v Tan Fung Chuan* [2014] SGHC 201 at [27]–[29] and *ANZ v AOA* [2014] SGHC 243 at [57]–[61].

16.69 *Lee Siew Choo* (above, para 16.60) can be completely accounted for given the length of the marriage, the raising of two children, and the adverse inference that was drawn against the husband. In slight contrast, *ANH* (above, para 16.18) might fall on the side of being a little generous given that the marriage was relatively average in length and there was only one child. Also, though the marriage in *BMJ* shared more features with *ANH* than *Lee Siew Choo*, the distinguishing factor was the adverse inference drawn against the husband. As for *ABT* (above, para 16.66), it would appear that the distinguishing factor was the husband’s supposed willingness to agree to an equal share.

16.70 Finally, it should be noted that Choo J at the end of his judgment in *ANH* provided a fairly comprehensive list of information that he thought would be essential for lawyers to have in ancillary hearings. With respect to matrimonial assets, for instance, lawyers for both parties are expected to prepare a combined table of matrimonial assets, highlighting disputes on financial contributions and value. For assets such as bank accounts and shares, lawyers must readily have answers to questions relating to current value and date, ownership, contribution, outstanding loans and encumbrances. Giving the court this information can only help in establishing a just and equitable share for both husband and wife.

Short and childless marriage

16.71 While there appears to be some incremental liberalism being introduced in the apportionment of assets for long marriages, the law on short marriages is unlikely to change. In *ACY v ACZ* [2014] 2 SLR 1320 (“*ACY*”), the parties were barely married for three years. The wife was 51 and the husband 56 and they had no children. Before the hearing for ancillary matters, they reached a settlement in respect of most of the matrimonial assets, except for a property located in the UK, which was worth around \$750,000.

16.72 The husband had paid for the entire purchase price of the property, but the wife asked for a 25% share on the basis of her indirect financial contributions towards the property (she had expended time and effort to find the property) as well as her indirect contributions to the marriage generally (she had co-ordinated their very active social lives). The husband, on the other hand, argued that the wife should not be given any share in the property.

16.73 George Wei JC, in awarding the wife a 5% share in the property, made the following points (at [21]–[40]):

(a) Under s 112(2) of the Women's Charter, settlement agreements are but a factor that the court considers when making a just and equitable division. Moreover, the agreement here was not comprehensive as it did not deal with matrimonial assets such as the property in the UK.

(b) The Court of Appeal in *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729 ("*Ong Boon Huat Samuel*") had held that in a short and childless marriage, the division of matrimonial assets will usually be in accordance with the parties' direct financial contributions as non-financial contributions will be minimal.

(c) Although the wife claimed that she had paid all the household bills, she could not adduce any relevant evidence to prove it. As for the maintenance of the household, the parties had engaged a domestic helper.

(d) The cases cited by the wife were all adverse authorities. They showed that courts tend to award 5% to 10% in recognition of the wife's indirect contributions to the household, in addition to their direct financial contributions that tended to range from 20% to 30%.

(e) The law on whether pre-marital contributions can be taken into account in the division of matrimonial assets is unclear, but in any event the wife's premarital indirect contributions here only constituted a part of her alleged indirect contributions.

16.74 Though not referred to in the judgment in *ACY*, *Ong Boon Huat Samuel* has also been relied on in recent cases such as *AXW v AXX* [2012] 3 SLR 900 and *BJS v BJT* [2013] 4 SLR 41. This but confirms that the position in *Ong Boon Huat Samuel* regarding the emphasis on direct financial contributions in short and childless marriages is unlikely to change in the foreseeable future: see also (2007) 8 SAL Ann Rev 229 at 239–240, paras 14.33–14.34. However, had the scope of the settlement agreement in this case extended to the UK property, the outcome may

well have been different, as will be seen in the discussion in the next section.

The relevance of mediation agreements

16.75 In *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284, the couple was awarded an interim judgment of divorce in 2007 after being married for 35 years. They spent the next two years settling the ancillary matters; as the parties had been successful in business, there were many documents and allegations to be explored as regards the issues of maintenance and division of matrimonial property. They eventually decided to go for mediation, and in May 2011, with both parties represented by counsel, a full-day mediation session took place, resulting in a settlement agreement that was signed by both parties.

16.76 However, in late 2011, the wife's lawyers told the husband's lawyers that the wife did not wish to be bound by the agreement; hence, it was not translated into an order of court. When the ancillary matters came on before the High Court, the judge decided not to give effect to the settlement agreement and carried out a division exercise that resulted in a different division from the one provided in the agreement: in this regard see *Siti Jaswant Kaur v Surindar Singh s/o Jaswant Singh* [2013] 4 SLR 838 and (2013) 14 SAL Ann Rev 358 at 381–382, paras 16.66–16.71. He reasoned that as this was a long marriage and the wife had made significant financial contributions to the most valuable assets to be divided, a more just and equitable division was to award the wife a 50% share rather than a 32% share as stated in the agreement.

16.77 On appeal, the main issue was the appropriate weight to be accorded to the settlement agreement. Judith Prakash J, in delivering the judgment of the Court of Appeal that allowed the appeal, made the following points (at [20]–[68]):

(a) In determining whether a binding agreement in this case exists, the court must be guided by the legal requirements of the common law of contract. As the settlement agreement here had a legal purpose, was entered into by two mentally capable adults who were legally advised, and the negotiations were long, the agreement was binding.

(b) Even though the agreement was reached after divorce proceedings had commenced and were not made in contemplation of divorce, s 112(2)(e) of the Women's Charter does not restrict the time the agreement is made to a time before divorce proceedings have commenced, but merely clarifies that it does not include agreements made while the

parties are still married. In any case, the ultimate power resides in the court to order a division that is just and equitable by considering all the circumstances of the case.

(c) As recognised by the Court of Appeal in *TQ v TR* [2009] 2 SLR(R) 961, postnuptial agreements relating to the division of matrimonial assets may be given more weight than prenuptial agreements as they are meant to cater to the immediate needs and desires of the parties. More weight may also be placed on agreements where the circumstances show that the process by which the parties reached the agreement was fair and the agreement was not manifestly disadvantageous to one party. In appropriate cases, the court may even give conclusive weight to such agreements.

(d) Where parties have properly and fairly come to a formal separation agreement with the benefit of legal advice, the court will generally attach significant weight to that agreement. The parties are in the best position to determine what is a just and equitable division based on their own assessment of each party's direct and indirect contributions and knowledge of the extent and value of the assets. Due to the inherent limitations of fact-finding, courts should not lightly depart from such agreements.

(e) The parties had the opportunity to and did in fact make amendments to the settlement agreement following the mediation session, and the wife's lawyers had sent the husband a draft consent order, which reproduced the terms in the settlement agreement, for the husband's endorsement.

16.78 Generally, it has been a longstanding practice of Singapore courts to refrain from interfering with settlement agreements if they are comprehensive and have been fairly concluded: see, for instance, *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR(R) 347; *Wong Kam Fong Anne v Ang Ann Liang* [1992] 3 SLR(R) 902; and *ANX v ANY* [2015] 1 SLR 728. From this perspective, it is clear that the agreement here was of a different nature and consequence from some of the agreements and proposals discussed in this review.

16.79 Indeed, with the changes to the family justice landscape in Singapore, mediation (and concomitantly mediated postnuptial agreements) is likely to feature more and more in resolving family ancillary matters and understanding mediation will be part of many a family lawyer's necessary skillset (more broadly, mediation is also gaining greater traction in Singapore with the launch of the Singapore International Mediation Centre and Singapore International Mediation Institute). This judicial endorsement of properly mediated agreements is thus timely. This will provide greater certainty for parties involved in

such disputes and, hopefully, reduce the acrimony that is typically accompanied as well.

Varying consent orders

16.80 In *Seet Poh v Lim Lee Cheng* [2014] 3 SLR 208 (“*Seet Poh*”), the parties divorced in 2005 but in 2004, they had entered a consent order for an equal division of their matrimonial assets, which included a provision that if either spouse wishes to retain a particular asset, that spouse should serve notice in writing, following which either spouse may fix the amount the transferee spouse has to pay the transferring spouse to retain the asset by commissioning a valuation. However, the consent order left it to the parties to determine the time frame to effect the transfer.

16.81 In 2009, the wife expressed her wish to retain the matrimonial home (which value had risen from \$1.3m in 2004 to somewhere between \$1.4m and \$1.89m), which the husband did not object to. As it were, due to a series of confusing correspondences a dispute arose as to whether the husband had agreed in 2010 to sell his half-share of the home to the wife at a price fixed by reference to its value then (\$1.75m), and if he did, whether he was bound to transfer the home to the respondent at that price in 2014. The parties therefore sought to vary the consent order.

16.82 Section 112(4) of the Women’s Charter states that the court “may, at any time it thinks fit, extend, vary, revoke or discharge any order made” in relation to the division of matrimonial assets. Vinodh Coomaraswamy J thus made the preliminary observation (at [30]) that the parties’ request:

... raises at the outset particularly difficult issues. A consent order is the result of and the expression of an underlying contract between the parties. Where the subject matter of the consent order is the division of matrimonial assets ... further difficult issues are raised about the scope of s 112(4) ... and its effect on the court’s general powers to vary a consent order.

He cited *AYM v AYL* [2013] 1 SLR 924, which held that a court will only exercise its power under s 112(4) if circumstances have emerged since the order was made which so radically change the situation such that to implement the original order would be to implement something that is radically different (in this regard see also para 16.95 below).

16.83 Nonetheless, Coomaraswamy J held that whether a court was dividing matrimonial assets, supplementing a consent order so that it could be implemented pursuant to an expressly agreed liberty to apply

provision, or exercising its powers to fill a gap or lacuna in a consent order, the imperative was the same: to achieve a just and equitable division in all the circumstances of the case: *Seet Poh* at [35]. Given the facts of the case, Coomaraswamy J held that it was not just and equitable for the husband to take the full benefit of the increase in the value of the matrimonial home (which had risen to \$4m in 2013) or for the wife to bear the full burden of that increase: *Seet Poh* at [46].

16.84 Specifically, the husband had in 2010 accepted a valuation of \$1.75m proposed by the wife. However, neither party took any steps to complete the transfer. The latest valuation of the property that was in evidence before the District Judge was done in 2012 and showed a valuation of \$2.9m. The average of the 2010 and 2012 figures was \$2.33m. A half-share of this figure would represent a 33% increase over the \$875,000 which the husband was prepared to accept in 2010, albeit a discount of 19% from the \$1.45m he would receive based on the 2012 valuation. Coomaraswamy J was of the view that this would be the most just and equitable result in the circumstances, especially since both parties were sophisticated and had opportunities to expedite the completion of the transaction but it suited both their interests to leave the disposition of the matrimonial home unresolved as it were.

16.85 An appeal has been lodged, but the Court of Appeal has yet to render its decision at the time of writing. Suffice to say for now there is no easy resolution to the matter when both parties leave an important provision in the order ambiguous, and when both parties do not want to communicate clearly with each other. The court should not be unnecessarily dragged into the dispute and asked to pronounce a fair and equitable outcome when the parties should have known better.

Adducing further evidence on appeal

16.86 Before departing from this section, a brief note may be made about the adducing of further evidence on appeal. In *Shailja Sharma @ Bhatara Shailja v Rajat Sharma* [2014] SGHC 256 (“*Shailja Sharma*”), both the husband and wife sought to adduce further evidence on their appeal and cross-appeal with respect to the order on division of matrimonial assets made by the District Judge.

16.87 Valerie Thean JC first noted (at [24]) that as held in *ACU* (above, para 16.13), where a High Court judge hears an appeal from a District Judge, he is to treat the appeal as a first instance hearing, with freedom to admit fresh evidence. At the same time, however, recourse may be had to the rule in *Ladd v Marshall* [1954] 1 WLR 1489, but with some modification.

16.88 Specifically, whereas *Ladd v Marshall* requires three conditions to be strictly fulfilled before fresh evidence can be received – that is, the evidence (a) could not have been obtained with reasonable diligence for use at the trial; (b) would probably have an important influence on the result of the case; and (c) must be apparently credible – these conditions need not operate as conjunctive requirements, but only as flexible criteria as the appellate judge is permitted a more liberal exercise of discretion. This was the position adopted by Thean JC as well: *Shailja Sharma* at [28]; in this regard see also *Tan Boon Heng v Lau Pang Cheng David* [2013] 4 SLR 718 at [42].

16.89 However, it is important to bear in mind that this modification does not apply to all manner of appeals relating to ancillary matters: see also *Tan Hwee Lee v Tan Cheng Guan* [2012] 4 SLR 785 at [21]–[27]. In this case, and as was the case in *Kwong Ling Yi v Liu Kah Foong* [2014] SGHC 47, the appeal was from the District Court to a High Court judge in chambers; such appeals are by way of rehearings and the Rules of Court (Cap 332, R 5, 2014 Rev Ed) is silent as to whether any special conditions need to be met for the admission of further evidence in such a situation. Further, this modification will presumably apply beyond the context of division of matrimonial assets as well.

Divorce

Exceptional hardship

16.90 *Tan Yan Ling Kyna v Chan Wei Zhong Terence* [2014] SGHC 195 was an appeal from a District Judge's decision granting the wife's application to dissolve the marriage notwithstanding the fact that three years had not lapsed since the date of the marriage. Under s 94 of the Women's Charter, no writ for divorce can be filed within the first three years of marriage unless there has been exceptional hardship suffered or exceptional depravity inflicted.

16.91 The husband and wife were 26 and 25 years old respectively and had been in a relationship for seven years before their marriage. The wife argued exceptional hardship on the basis of a psychiatric report, which concluded that she was clearly suffering from major depressive disorder as a result of the husband's physical and verbal aggression. She also adduced a police report that contained allegations of the husband punching her on two occasions.

16.92 Choo Han Teck J allowed the appeal, citing the following reasons (at [4]–[6]):

- (a) The wife's other allegations of violence did not occur during the marriage.
- (b) Given its timing, the police report was clearly made to serve the purpose of the wife's application and there was also no medical evidence to support the allegations in the report.
- (c) The statutory moratorium of three years is to impress upon married couples that marriage is not an event that one can sign in and out as they fancy, and there are alternative remedies in cases of abuse, such as personal protection orders.
- (d) The moratorium is also intended to hold out the hope of reconciliation, as the abuser may see the error of his ways and reconcile with the other.

16.93 This decision is perhaps only notable in so far as there has only been one other known High Court decision on this issue: *Ng Kee Shee v Fu Gaofei* [2005] 4 SLR(R) 762 ("*Ng Kee Shee*"). What it does do, however, is accept that s 94 of the Women's Charter actually serves a laudable purpose despite arguments to the contrary: in this regard see (2005) 6 SAL Ann Rev 259 at 262–263, paras 13.9–13.10, recommending that the three-year bar be reduced to a one-year bar and that the requirement of "exceptional" hardship or depravity be removed.

16.94 Of course, the facts in this decision were certainly not as extreme as those in *Ng Kee Shee*. There, the wife had returned to China after just a few months of marriage, lying to her husband that she would return. No purpose would have been served in preserving a marriage that was clearly devoid of hope. In this case, both the husband and wife were very young and had known each other for quite some time, suggesting that restoration of stability in the relationship would not be a fanciful possibility. Perhaps most crucially, the wife simply could not properly substantiate her claims that there was any violence committed by the husband against her. In other words, she seemed to have acted out of impulsion, which the court would not entertain, and correctly so. To do otherwise would have been but a decision of mere political correctness without a balanced consideration of the matter. It cannot be the case that any unproven allegation must tie the court's hands and lead to a divorce.

Maintenance

Material change in circumstances

16.95 In *AYM v AYL* [2014] 4 SLR 559 ("*AYM*"), the couple divorced in 2010 after being married for more than 20 years. They had

three children. In July 2010, they reached an agreement on ancillary matters regarding custody, care and control, maintenance, and the division of matrimonial assets; the terms of the agreement were recorded in a consent order as part of the interim judgment.

16.96 The issue on appeal concerned only varying the terms of the maintenance. In this regard, the consent order had provided that the husband would pay \$2,670 *per* month as maintenance for each of the children, the children's school fees (around \$7,000 *per* month in total), and \$3,990 *per* month as maintenance for the wife. This worked out to around \$19,000 in total *per* month.

16.97 In June 2011, the husband cited two material changes in circumstances as his justification for varying the terms. Specifically, he had been made redundant at work in 2007. He then entered into a business venture, investing \$1m in the company, but this business eventually failed. Secondly, the couple had obtained an unexpected windfall from the sale of their matrimonial property; the price of \$5.1m was almost \$1.4m higher than what the parties had envisaged, and the wife was going to receive 70% of this windfall in accordance with the consent order.

16.98 On the part of the wife, she wanted to convert the periodic maintenance payments into a lump sum: \$250,000 for herself and \$750,000 for the children, or \$1m in total. The High Court found in favour of the wife and the husband appealed, arguing that a lump sum payment would financially cripple him.

16.99 The Court of Appeal, in allowing the appeal in part, made the following observations (at [13]–[46]):

(a) The court's power to vary the terms of a consent order is reflected in ss 72, 73, 118 and 119 of the Women's Charter.

(b) The parties have since moved on with their lives, with the wife and the children relocating to Australia and the husband remarrying, with stepchildren to take care of. A lump sum would help the parties achieve a clean break and avoid further rancorous interactions, and should be awarded provided it does not financially cripple the husband.

(c) When the terms of the consent order were proposed, the husband was already aware that his business venture might not succeed.

(d) Although the husband claimed that he had already made substantial payments since the date of the consent order, it would be unfair to factor this in as the sum of the amounts that would have remained payable if the periodic payments due

under the consent order had been converted would have been around \$1.8m.

(e) As the wife received a greater windfall from the sale than the husband by \$540,000, an appropriate downward variation of the lump sum maintenance would be \$270,000. Reducing the amount of maintenance this way was not contrary to the welfare of the children as it was made having regard to the resources available to the wife to provide for herself and the children. After further deducting \$40,000 paid by the husband as interim maintenance, the husband would be liable to pay \$690,000 to the wife and children. The appropriate apportionment would be \$100,000 for the wife and \$590,000 for the children.

(f) Without factoring in his assets, the husband had at the very least \$800,000 left, and so he would not be financially crippled by the maintenance award. His fresh obligations to his new family should not compromise the pre-existing obligations he continues to owe the wife and the children.

16.100 In analysing this decision, it will be helpful to begin by closely examining the words of the ss 72, 73, 118 and 119 of the Women's Charter, of which the first two apply (principally) to the maintenance of children and the latter two apply to the maintenance of ex-wives.

16.101 Unfortunately, there is a (surprisingly) great scarcity in local case law interpreting ss 72/73 and 118/119, let alone the relationship between the provisions. Here, the bulk of the maintenance sought, and indeed the bulk of the maintenance awarded was for the children rather than the wife. The court framed (at [23]) the issue of whether the maintenance should be varied as a question of whether there was a "material change in the circumstances". However, the phrase "material change in the circumstances" only appears in ss 118 and 119; s 72(1) uses the phrase "change in the circumstances ... or for other good cause", while s 73 states that any change in the terms of a maintenance agreement has to be "reasonable and for the welfare of the child".

16.102 This difference in language, and the potentially greater breadth of s 72 in particular, was noted by the Court of Appeal itself in *AXM v AXO* [2014] 2 SLR 705, but it also made the tentative conclusion that the difference would probably not be a practical one in most cases. Read together with the decision rendered in *AYM*, it seems then that "material change in the circumstances" applies generally as a possible test when the court is considering whether to vary a consent order for the maintenance of children and/or former wives. Whether there has been a "material change in the circumstances" is surely a more stringent standard than mere "change in the circumstances" in s 72, but the

comparison with s 73 yields uncertain results, though presumably the idea of reasonableness and welfare of the child in s 73 requires a more objective appraisal than changes in circumstances. For the sake of internal statutory consistency, it may be better for Parliament to condense the provisions into a single one or to tighten the language used if they are kept as they are.

Token maintenance and no maintenance with liberty to apply

16.103 In *Guo Ningqun Anthony v Chan Wing Sun* [2014] SGHC 56 (“*Anthony Guo*”), the couple divorced after being married for nine years. They did not have any children. The husband, 52, was a university lecturer while the wife, 49, was a businesswoman. On the question of division of matrimonial assets, Belinda Ang Saw Ean J held (at [115]–[117]) that the total net value of the (disclosed) matrimonial assets was \$9.3m, and that the wife would receive a share of 41%.

16.104 With respect to the wife’s application for monthly maintenance of \$6,500, Ang J decided (at [125]) to make no order on maintenance. She pointed to the following points: first, the wife is expected to exert reasonable efforts to secure gainful employment and contribute to preserve her pre-breakdown lifestyle; secondly, the wife appeared to submit inflated expenses to justify the sum sought; thirdly, the husband’s monthly salary was only \$6,300; fourthly, the wife was likely able to enjoy economic independence to support her lifestyle; and finally, the length of the marriage and the wife’s sizeable amount of the matrimonial assets.

16.105 In *ADB v ADC* [2014] SGHC 76, the couple divorced after being married for ten years. The wife had a child, 17, from a previous marriage, which the husband had adopted. The wife sought \$120,000 in lump sum maintenance for herself and \$2,500 a month for the child.

16.106 The wife, 48, was a regional sales manager of a multinational corporation with a net monthly income of between \$6,600 and \$8,800, but with bonuses and commission the amount could be as high as \$13,600. The husband was a senior officer in the Singapore Prison Service, with a net monthly income of \$8,200.

16.107 Noting that the wife had care and control of the child, Choo Han Teck J allowed (at [6]) the application for maintenance for the child, but adjusted the figure to \$1,000 a month as the wife was clearly financially independent (the wife also had more than twice the amount of assets than the husband). However, in that connection, Choo J also dismissed (at [13]) the application for maintenance for the wife by referring to *AAE v AAF* [2009] 3 SLR(R) 827 and *Anthony Guo* for the

proposition that it is possible not to order any maintenance at all. He then made the following observations (at [8]–[11]) as regards token maintenance:

(a) Courts sometimes award a token \$1 monthly maintenance, presumably with a view to preserve the wife's rights to maintenance. However, this is unnecessary because s 118 of the Women's Charter permits parties to apply for a variation or rescission of the maintenance order at any time. Thus, an order that there be no maintenance for the time being with liberty to apply suffices.

(b) An order of "no maintenance but with liberty to apply" is particularly appropriate where the husband is truly and clearly incapable of providing maintenance for the time being, but where the wife clearly does not require maintenance, the order should just be "no order for maintenance". This distinction is important if women were to be treated as equal to men in marriage and in divorce.

(c) The idea that maintenance is an unalloyed right of a divorced woman is an idea borne from the time when women were housewives living on the maintenance of men. However, the idea that women need protection is yoked to an old attitude that should be changed. If it were to continue even where protection is no longer needed, it might lead to suppression of women in the name of chivalry. If women are truly equal and independent, they do not require patronising gestures that belie deep chauvinistic thinking. To award a token sum would be wrong even if it was merely symbolic.

16.108 This appears to be the first case in Singapore that has criticised the concept of token maintenance in such strong terms. However, as was written in Chen Siyuan, "Maintenance under the Women's Charter" *Singapore Law Blog* (21 October 2014):

... s 114 of the Women's Charter actually already provides unequivocal guidance to the court on the determination of maintenance in the sort of factual matrix that confronted the court here.

16.109 Indeed, though there might be merit in the argument that token maintenance should not be awarded purely on the basis of a symbolic gesture, it was unnecessary to go a few steps further and imply that women who are given maintenance are any less equal or independent than women who do not need or want it. Maintenance under the Women's Charter was conceptualised as a means to protect financially vulnerable women and not to put them down. The reality is that there is no shortage of single mothers trying to work and look after their

children at the same time. Costs of living are always rising as well. The purpose of maintenance should be seen in this light instead.

Length of maintenance and discounting factors

16.110 In *Tan Yen Chuan* (above, para 16.54), the husband, 61, was a retiree who last drew a monthly salary of \$15,670 in 2012. The wife, 59, was a manager who drew a monthly salary of \$3,000. The wife sought \$5,000 a month in maintenance, and calculated over 16 years the total sought was \$960,000. Lee JC awarded a lump sum of \$370,440 instead, and in doing so noted the following (at [68]–[88]):

(a) The husband wanted to portray himself as someone financially incapable of maintaining the wife when he had liquid assets amounting to more than \$400,000 and was fully capable of returning to work.

(b) The husband could not in the same breath allege that the wife had always depended on his earnings while they remained married, but she could not post-divorce depend on him to support her lifestyle.

(c) Although the standard of living enjoyed by the family before the breakdown of the marriage was a relevant consideration, the court must also be mindful of the age of the parties. Five thousand dollars a month to cover the wife's expenses was an extravagant request, and applying a 30% discount to the more reasonable sum of \$3,150 a month and factoring in the wife's employment as well, the monthly maintenance was fixed at \$2,205.

(d) The Court of Appeal in *Wan Lai Cheng v Quek Seow Kee* [2012] 4 SLR 405 had adopted the formula of calculating the number of years that maintenance ought to be paid, which is to divide in two the sum of the average life expectancy of a Singapore woman (85 years) and the usual retirement age of a Singapore male worker (65 years), and then to deduct the wife's age. In this case, the length would be 16 years.

(e) However, a two years' discount to the length was reasonable, as the sum payable, if invested judiciously, could generate decent returns, and the benefit of time value of money was also too significant to ignore.

(f) The husband could not complain that he could not afford the maintenance as the sale of the matrimonial property would have been more than adequate to cover the lump sum maintenance and the wife's share of the matrimonial assets.

16.111 The wife's share of the matrimonial assets (around \$1.1m) was certainly a big factor in the court's decision to award a significantly lower amount of maintenance than the amount sought. What is perhaps more interesting about this decision was the court's assumption that the wife would and should be able to invest the maintenance money judiciously, to the extent that it warranted a two-year discount to the length of which maintenance was to be calculated. It is not clear from the judgment that the wife was an experienced or savvy investor. This would suggest that the idea of such a discount (which would presumably be moderated accordingly based on the length and quantum of the maintenance, as well as the consideration of the share of the division of matrimonial assets, if any) is meant to be a general proposition and is not unique to the facts of this case. If that is the case, one would further assume that if the wife was an experienced or savvy investor, a greater discount would be applied. Expecting a wife to be able to invest money, even if only on a judicious and not savvy level, is different from expecting a spouse to resume working or to reduce her expectations of a prior standard of living, which are fair and neutral considerations in issues of maintenance. Whether or not a wife should be expected to assume some risk deserves further judicial elucidation.

16.112 Separately, it should be mentioned that the mere fact of unemployment may not absolve a husband of his duty of maintenance was also alluded to in *ABX v ABY* [2014] 2 SLR 969, albeit in the context of the maintenance of children. There, the couple had twin children, aged 12, with one staying with the husband and the other staying with the wife. This was against a previous court order of joint custody and shared care and control of the children.

16.113 The wife sought monthly maintenance of \$3,000 for the child not staying with her. The husband argued that each parent should bear his or her own expense. However, the husband, who was 44 years old and had been unemployed for nine years, though suffering from Anxiety and Panic Disorder and Generalised Anxiety Disorder, did not adduce any proof that he was unfit to work. Moreover, Andrew Ang J noted (at [71]–[74]) that first, the husband had a substantially higher earning capacity than the wife (\$13,000 a month, compared to the wife's \$6,000); and secondly, the husband was going to receive much more of the net sale proceeds of a disputed property than the wife (85.6% *versus* 14.4%). Accordingly, Ang J ordered the husband to pay the wife \$2,500 a month for the child's maintenance.

Short and childless marriage

16.114 In *ACY* (above, para 16.71), the settlement agreement was silent on the issue of maintenance. The wife sought a lump sum of \$317,000

and said that this would help achieve a clean break. The husband argued that no maintenance order should be granted.

16.115 Wei JC distinguished all of the authorities that the husband cited to support his claim that no maintenance should be awarded, pointing out certain features of those cases that did not arise in this case such as: youth and employability; alleged theft of the husband's assets committed by the wife; the husband earning a low wage; and maintenance of children. Wei JC also cited the Court of Appeal's decision in *Foo Ah Yan v Chiam Heng Chow* [2012] 2 SLR 506 to refute the husband's claim that no maintenance should be awarded just because the wife had become accustomed to fending for herself and maintaining herself.

16.116 However, the wife was unable to justify the sum she sought either. She asserted that there was surplus wealth created and acquired during the marriage but could not prove it. She cited *BG v BF* (above, para 16.35) for the proposition that an order for maintenance is made to even out any financial equalities and economic prejudice suffered by the wife during the marriage, but her contributions to the very brief marriage were not substantial. She asserted that her personal expenses amounted to \$9,000 *per* month, but the claims appeared excessive. Finally, her monthly income was already \$13,200, further suggesting her claim was excessive. Accordingly, Wei JC held that a multiplicand of \$4,000 *per* month and a multiplier of 18 months would be a fair and equitable sum, giving rise to a total lump sum maintenance of \$72,000: *ACY* at [58].

16.117 As mentioned earlier, the wife was awarded a 5% share in the UK property that was worth around \$750,000, which translates to \$37,500, though of course there was a settlement agreement for the other matrimonial assets. Overall, however, for marriages that are childless and as short as this, there is practically no chance that the court would award a big share of the pool of matrimonial assets if there are no direct financial contributions. Though different considerations and reasoning apply in matters of maintenance, the outcome in terms of the substantiality of the award is likely to be similar.

No default equal responsibility for maintaining children

16.118 In *AKC v AKD* [2014] 3 SLR 1374 (“*AKC*”), the couple divorced after being married for ten years and had a nine-year-old son and six-year-old daughter. The District Court had ordered the husband to pay \$2,400 *per* month as interim maintenance for the children but the wife wanted lump sum maintenance of \$300,000 or in the alternative, for the sum increased to \$4,500 *per* month.

16.119 The son had a learning disorder (Pervasive Developmental Disorder – Not Otherwise Specified) and the wife wanted to employ a shadow teacher who would sit in the son's classes to watch his behaviour and assess how best to teach him to follow class work. The wife claimed that the teacher alone would cost \$5,000 *per* month, but the husband said that there was no need for such a teacher as the son was doing well in school and if there was a real need for the teacher, the wife would have employed one in 2011 and not waited for a few years to do so.

16.120 Choo Han Teck J rejected (at [6]) the husband's contention as the idea of getting a shadow teacher came from the son's school, and that even if the son was doing well in school, it was necessary in the circumstances to incur expenses to deal with the son's learning disorder. However, Choo J was only willing to increase the monthly maintenance to \$3,500, with the primary means of fulfilling this being a lump sum payment of \$300,000. Regard was had to s 69(4) of the Women's Charter, which requires the court to take into account the husband's ability to pay the maintenance in question.

16.121 Specifically, although the wife cited *BNH v BNI* [2013] SGHC 283 for the proposition that "even if one parent earns less than the other parent, both parents may still have to bear the children's expenses equally", in this case, the husband had a monthly income of \$9,200 while the wife had a monthly income of \$34,700: *AKC* at [10]. In comparison, in that case, the husband had a monthly income of \$36,200 while the wife had a monthly income of \$19,000, and the ordered maintenance for two children was \$9,500 *per* month. Not only was the husband not earning less than the wife in that case; the husband was barely earning a quarter of what the wife did as was in this case.

16.122 Be that as it may, the husband actually admitted that he could afford even the \$4,500 monthly maintenance sought, though this was almost half of his monthly income. However, Choo J was of the view that it was not reasonable for the husband to assume his maintenance responsibility to this extent. Though not stated expressly in the judgment, consideration was probably given as well to the fact that the wife was awarded a share of 60% of the matrimonial assets, which were worth at least a few million dollars. All things considered, this decision was correct and clarifies that there is no default equal (financial) responsibility on both parents to maintain the children. As always, much depends on the facts and circumstances of each case.

Backdated maintenance for children

16.123 In *Lee Siew Choo* (above, para 16.60), the couple had two daughters aged 23 and 25, the younger of which was studying for a

degree on a scholarship (August 2013–May 2015) that paid for her tuition fees and gave her an annual stipend of \$5,000. Previously, she was also on a scholarship for a diploma in 2011 and 2012, receiving an allowance of \$1,600 every academic month. The wife sought lump sum maintenance of \$26,400 for the younger daughter, a sum that was based principally on maintenance that the husband had previously promised to pay but did not pay in the end.

16.124 Choo J ordered (at [14]) a lump sum maintenance of \$15,000 as he thought this would give the parties a clean break and that this sum was reasonable in view of the financial support the younger daughter had and would be receiving through her scholarships. He also noted that the husband did not contest his ability to pay maintenance and there was no prejudice to him since the maintenance was to be deducted from his share of the sales proceeds of the matrimonial home.

16.125 Choo J also took the opportunity to clarify (at [15]) that even though the wife did not ask for interim maintenance for her younger daughter, and even though the Women's Charter is silent on the issue, this did not preclude the wife from asking for backdated maintenance at the ancillary hearing. This was because such an order:

... ensures that the parent in default pays for the child's needs right from the outset instead of from only from the time maintenance is sought. It is a practical and pragmatic tool.

16.126 Choo J then listed (at [16]) some considerations that the court should have regard to when deciding whether to grant orders for backdated maintenance:

- (a) the applicant has to show he needs maintenance from the date before the application for maintenance or ancillary hearing;
- (b) the applicant should give good reason(s) for the delay in seeking maintenance for the child/children;
- (c) the income and expenses of the parties in the past and whether circumstances have changed since;
- (d) the applicant should not be obligated to apply for interim maintenance pending the hearing of ancillaries if he is willing or able to wait until those have been heard;
- (e) potential savings in costs, time, and resources in having maintenance for children dealt with in the ancillary hearing, instead of having a separate hearing for interim maintenance;
- (f) the detriment caused to the parent in default if backdated maintenance is ordered;

- (g) the default of payment of maintenance may lead to committal proceedings;
- (h) the difficulties the applicant faced in trying to meet expenses before the claim for maintenance; and
- (i) the length of the period for which maintenance is claimed, and whether the applicant sought maintenance from the parent in default to begin with.

16.127 Choo J further noted (at [17]) that the court has a wide power to backdate maintenance to a date which the court considers fair, and may even award the applicant a higher share of the matrimonial assets or higher maintenance for the child in the future. The order for maintenance may also be backdated to before the filing of the writ of divorce and to the time when the failure to provide reasonable maintenance was proven to have begun.

16.128 Recent jurisprudence had prompted some discussion on the court's exact powers over backdating maintenance, particularly in situations where interim orders have already been made: see (2013) 14 SAL Ann Rev 358 at 383–387, paras 16.72–16.86. In this case, however, no interim order had been made. In *AMW v AMZ* [2011] 3 SLR 955, the court had established a list of non-exhaustive considerations when to order maintenance to start. This case built on that list, while reiterating that the list of considerations will always be non-exhaustive.