16. FAMILY LAW

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16.1 This chapter is divided into four main parts: custody; division of matrimonial assets; divorce and validity of marriage; and maintenance.

Custody

16.2 There is only one case of note that pertained to custody in this year's survey, and it concerned the variation of a term in a postnuptial marital agreement governing care and control arrangements.

Upholding a deed of separation

16.3 In *AUA v ATZ*,[1] the marriage between the parties broke down after only 19 months and they entered into a deed of separation. The deed, which was negotiated over five months with the parties being represented by lawyers throughout, contained detailed provisions on various matters relating to the care of their daughter (who was eight years old when the appeal was heard). After an interim judgment of divorce was granted, the wife applied to set aside the deed on the ground of undue influence while the husband applied to vary the incidence of care and control of the daughter (which resided with the wife in accordance with the deed). The High Court held that the deed had been entered into freely and voluntarily and that there was no basis to set it aside, but also rejected the argument that the care and control arrangement should be varied.

16.4 On appeal, the husband maintained that he was justified in seeking greater care and control and argued that he deserved to play a more active role in the child's life as he was a devoted father and he wanted to maintain the integrity of the bond with the child. The wife argued that changing the care and control arrangement would be excessively disruptive for the child as she had very different parenting styles from the husband and in any event, the husband already had substantial access to the child. The Court of Appeal, in dismissing the husband's appeal, made the following points:

1 [2016] 4 SLR 674.

(a) For the division of matrimonial assets and, to a lesser extent, the maintenance of children, the substance of the question is one of finances and the court will be inclined towards playing a comparatively minor role. However, where the welfare of the child is concerned, it is not something to be or can be bartered or negotiated at the termination of a marriage.

(b) Whether the marital agreement is a prenuptial or postnuptial arrangement, there is a presumption that any terms therein relating to custody or care and control of children are unenforceable; further, in the heat of matrimonial disputes, the interests of the child may unwittingly have been relegated to second place when the agreement is being negotiated.

(c) Accordingly, a court is not bound by anything relating to the child's welfare that may be set out in a marital agreement. The court treats the terms of any such agreement with great circumspection and will not give effect to them unless it is satisfied that doing so will be in the best interests of the child.[2]

16.5 On the facts of this case, the court placed great weight on the fact that the husband already had generous access to the child, who was able to spend up to half her leisure time with the husband as the wife. Further, given that the husband lived close to where the wife resided, a shared care and control order would not have allowed him to spend very much more time with the child than he already could. Finally, as both parties were not challenging the joint custody arrangement, the most important decisions affecting the long-term upbringing and the welfare of the child could only be made with the consent of both parents. In these circumstances, there was no need to destabilise and disrupt the child's life at this stage, especially since she had been living with the wife for almost seven years and had just made the transition to primary school.

16.6 Marital agreements have assumed greater currency in the past decade or so, but this decision is a reminder that where there are terms in such agreements that relate to children, the court will not even consider those terms as a reference point as the welfare principle is paramount and supersedes not only the parties' interests but the parties' intentions. This is a position that has been adopted since the seminal decision of *TQ v TR*,[3] which was relied upon by the court in this case. This is also not a position that is unique to Singapore, as was observed by the Court of Appeal in *AOO v AON*,[4] which noted that England also

2 *AUA v ATZ* [2016] 4 SLR 674 at [57]–[58].
3 [2009] 2 SLR(R) 961.
4 [2011] 4 SLR 1169.

adopts the same view.[5] Hence, even in the face of divorces that have a multi-jurisdictional character, it is unlikely that agreements that are contrary to the welfare of the children will easily find places of enforcement. However, as will be seen in a subsequent part of this chapter, terms in such agreements that pertain to the financial affairs of the spouses are treated very differently.

Division of matrimonial assets

16.7 There are two cases of note that pertained to the division of matrimonial assets. In the first case, the husband had left the matrimonial home more than a year before the interim judgment, and three years before the start of ancillary proceedings. What is the appropriate cut-off date when assessing what falls under the pool of matrimonial assets? The Court of Appeal provided important clarifications on this issue. In the second case, the Court of Appeal had to grapple with the issue of whether terms in a postnuptial marital agreement governing the division of matrimonial assets should be varied if the agreement does not appear to, adequately, factor in a party's indirect contributions to the marriage.

Operative date for determining the pool of matrimonial assets

16.8 In *ARY v ARX*,[6] the husband and wife married in 1994. During the early years of the marriage, the wife was the main source of financial stability as her salary far outstripped the husband's. In 1999, their first son was born. Over time, the husband became successful in his career, earning around S$40,000 a month at one point. In 2003, the parties relocated to Hong Kong. The wife also stopped working after their second son was born. In 2006, the parties relocated to Singapore after the husband was posted there. In 2008, the wife discovered the husband was having an affair. They separated in June 2009 when the husband left their rented matrimonial home. The husband continued to pay for the rent and the children's expenses, and gave the wife S$1,200 a month. The husband filed for divorce in February 2010 and an interim judgment was granted in October 2010. The ancillary proceedings began in June 2012.

16.9 The High Court held that the operative date for determining the pool of matrimonial assets was the date the ancillary proceedings began (June 2012). Based on that date, the assets amounted to S$1.47m. The husband's contention that the operative date should be either June 2009

5 *AOO v AON* [2011] 4 SLR 1169 at [18].
6 [2016] 2 SLR 686.

or October 2010 instead was rejected. Based on those dates, the assets amounted to S$966,000 and S$1.29m respectively. With respect to maintenance, the wife was awarded S$7,700 a month, which comprised S$3,000 for her personal expenses and S$4,700 for the children and rent. The husband also agreed to pay for the children's education, which amounted to S$7,250 a month.

16.10 The Court of Appeal took the opportunity to clarify the law on the appropriate starting date for determining the pool of matrimonial assets. In setting out the law, it noted the following points:

(a) Section 112(10)(*b*) of the Women's Charter[7] defines a matrimonial asset as one acquired during the marriage. While a court has the discretion to select the appropriate operative date, the discretion is neither free nor unguided.

(b) In *Yeo Chong Lin v Tay Ang Choo Nancy*,[8] the Court of Appeal had identified four possible operative dates. In chronological order, they are: the date of separation; the date the writ of divorce was filed; the date of interim judgment; and the date of the ancillary matters hearing.

(c) Generally, the date of interim judgment has particular appeal as it would be wholly unreal to treat assets acquired beyond that date as matrimonial assets; once an interim judgment is granted, the marriage has for all practical purposes come to an end.

(d) Further, the interim judgment indicates that the parties no longer intend to jointly accumulate matrimonial assets[9] and the court recognises that there is no longer any matrimonial home, no *consortium vitae*, and no right on either side to conjugal rights.[10]

(e) There is no reason why the actual division should not be done when the interim judgment is granted if all the relevant material is before the court at that time; it does not accord with good sense to encourage parties to drag out ancillary proceedings.[11] The parties should also be enabled to arrange their financial affairs and move on to a different phase in their lives.

7 Cap 353, 2009 Rev Ed.
8 [2011] 2 SLR 1157.
9 *AJR v AJS* [2010] 4 SLR 617 at [4].
10 *Sivakolunthu Kumarasamy v Shanmugam Nagaiah* [1987] SLR(R) 702 at [25].
11 *Yap Hwee May Kathryn v Geh Thien Ee Martin* [2007] 3 SLR(R) 663 at [25].

> (f) Consequently, unless the circumstances or justice of the case warrant(s) it, the default date should be the date in which the interim judgment is granted. The court must exercise care when departing from the default position, and should give reasons when it does. This is because it also has the discretion to determine the date at which the matrimonial assets should be valued, and the discretion to determine how the matrimonial assets should be divided.[12]

16.11 What, however, may constitute exceptions to the default position of adopting the date of interim judgment as the operative date? One example cited by the court is when a party incurs a large amount of expenditure such that the matrimonial assets have been unfairly depleted by the unacceptable actions of that party. Specifically, as pointed out in cases such as *AJR v AJS*,[13] if a party has indulged in excessive vices and, in doing so, wastefully dissipated the matrimonial assets before they have been divided by the court, the court ought to take that into account when deciding the appropriate operative date.[14]

16.12 On the facts of this case, the court first found that the husband did not manifest a clear intention to achieve a clean break even after he had left the matrimonial home in 2009, mainly because he continued paying for the rent and the wife and children's expenses (the wife appeared to accept that they managed their assets separately after 2009).[15] The court saw a similarity with the facts in *Oh Choon v Lee Siew Lin*.[16] There, the parties married in 1993 and the husband left the matrimonial home in 1999. He then purchased a car and a property in joint names with his mistress. Divorce was only filed in 2010, with interim judgment being granted in 2011. Notwithstanding the considerable lapse in time between the husband's departure and the date of interim judgment, the Court of Appeal rejected the argument that the operative date should be the date of separation in 1999, and instead adopted the date of the interim judgment. It highlighted what it considered to be a crucial fact: even after the husband left the matrimonial home, he visited his wife every month and gave her money. Thus, there was still a continuous, albeit attenuated, relationship between 1999 and 2011. It was a similar situation here.

16.13 The court, however, found reasons to go even further than the date of interim judgment in this case. It noted that the wife continued to

12 *ARY v ARX* [2016] 2 SLR 686 at [26]–[28], [31]–[34], and [36].
13 [2010] 4 SLR 617.
14 *AJR v AJS* [2010] 4 SLR 617 at [6].
15 *ARY v ARX* [2016] 2 SLR 686 at [39].
16 [2014] 1 SLR 629.

look after the children after the granting of the interim judgment, but more importantly, between that point and the commencement of ancillary proceedings, the husband had received a tremendous financial windfall in the form of salary and bonuses; this windfall resulted in an increase of 50% in the value of the matrimonial assets.[17] Given that the wife's care of the children and the household before the grant of the interim judgment could have contributed to the husband's ability to earn the said salary and bonuses, there was sufficient justification, in view of all the circumstances of the case, to use the date of commencement of ancillary proceedings as the operative date. Concerns that the court could end up double-counting the wife's efforts during the period between the date of interim judgment and the date of commencement of ancillary proceedings when determining the wife's indirect contributions were addressed in the court's judgment, which described the exercises of determining the appropriate date and the division of matrimonial assets as distinct.[18]

16.14 As noted previously in (2015) 16 SAL Ann Rev 464,[19] "there are at least three unnecessary uncertainties regarding the appropriate operative dates in the context of matrimonial assets":

> (a) the date for determining whether something is a matrimonial asset (which was the issue in this case);
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> (b) the date for calculating the value of any given matrimonial asset; and
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> (c) the date for calculating the value of the pool of matrimonial assets as a whole.[20]

Proponents of flexibility would no doubt point to the nature of the exercise of division of matrimonial assets as being necessarily open-ended and fluid; what is just and equitable inexorably requires a broad-brush approach, with close attention being paid to the unique facts of each case. Opponents, on the other hand, would advocate for any uncertainty to be minimised, if not eliminated, especially when judicial discretion exists at multiple turns of the inquiry. Further, there is some force to the argument that so long as there is the potential that the operative date may go beyond the date of the interim judgment, a party may be incentivised to protract the proceedings as much as possible. This presupposes of course that in the period that follows the date of the

17 *ARY v ARX* [2016] 2 SLR 686 at [42].
18 *ARY v ARX* [2016] 2 SLR 686 at [43].
19 See (2015) 16 SAL Ann Rev 464 at 481, commenting on *ARL v ARM* [2015] SGHC 61.
20 See also *TNC v TND* [2016] 3 SLR 1172 at [6]–[9], *TQH v TQI* [2016] SGHCF 11 at [9]–[14], and *TUV v TUW* [2016] SGHCF 15 at [11].

interim judgment, the other party does not dissipate the matrimonial assets.

Upholding a deed of separation

16.15 As mentioned above, in *AUA v ATZ*, there was a detailed postnuptial marital agreement. Apart from custody matters, the deed also covered matters relating to the division of matrimonial assets. In the main, the parties were to retain the assets in their respective names while the husband would retain the matrimonial home and arrange for the wife and child to stay in a separate apartment. While the High Court cited the decision of *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur*[21] ("*Surindar Singh*"), which held that postnuptial agreements negotiated with the benefit of legal advice would normally be ascribed significant weight when dividing matrimonial assets, it said that the case had to be applied in a nuanced manner. Specifically, the court would be slow to vary a division agreed by the parties only if it was first satisfied that the parties had factored all the contributions of each party in arriving at the division found in the agreement.

16.16 For instance, if the parties' continuing indirect contributions to the marriage were expected to subsist until a final judgment of divorce but were not taken into account in the division, it might be inequitable not to recognise those contributions. On the facts, the High Court held that the division arrived at in the deed failed to account for the prospective and continuing indirect contributions of the wife as a caregiver to the child from the date of the deed until the point where the final judgment was granted. However, on appeal, the Court of Appeal gave three main reasons for disagreeing with the High Court before concluding that the deed would not be disturbed by the court.[22]

16.17 First, the cut-off point for the determination of the parties' contributions to the marriage for the purposes of the division exercise should not be the date of the final judgment of divorce. When the deed was concluded, it was clear that there was no longer a matrimonial home, there was no *consortium vitae*, and neither party had conjugal rights thereafter. Because of this, it was artificial to give credit to the wife for her indirect contributions as a caregiver to the child: post-deed, those contributions were made in her capacity as a mother, rather than as a spouse. Secondly, the parties would have known that after the separation, the wife would be the main caregiver of the child. Further, during the lengthy negotiations, the parties were legally represented and

21 [2014] 3 SLR 1284.
22 *AUA v ATZ* [2016] 4 SLR 674 at [24]–[33].

they were given opportunities to propose alterations. One had to assume that the finalised terms were thought to be fair and reasonable to the parties. Finally, the existence of an agreement for the division of matrimonial assets in contemplation of divorce should be accorded due weight.

16.18 The last reason, in particular, warrants elaboration. As the Court of Appeal noted, "there are two distinct and separate reasons" as to why the High Court should not have adopted the narrow reading of *Surindar Singh*.[23] When it comes to postnuptial marital agreements that address, with some detail, the matter of division of matrimonial assets, they provide a useful tool for the court to determine the proper proportions of the parties' contributions to the marriage. When the parties have negotiated for an agreement with the benefit of legal advice, it must be assumed that they were doing so rationally and with full knowledge of their own contributions to the marriage. Litigation over matters relating to the division of matrimonial assets is often fraught with fact-finding difficulties (especially when it comes to indirect contributions), and parties who can reach an agreement obviate that problem. Further, for agreements (that are entered into freely and advisedly) to have any meaning at all, there should be a firm expectation that they should be adhered to. Even if marital agreements are a product of a compromise rather than an absolutely precise reflection of the parties' respective wishes, what the parties gain as a result is dispute avoidance and closure. Unnecessary judicial interference undermines that.

Divorce and validity of marriage

16.19 There are two cases of note that pertained to divorce and validity of marriage. In the first case, the Court of Appeal was confronted with the issue of whether a divorce obtained in another country should be recognised in Singapore, with the complication being that the marriage in question had been contracted while a previous marriage was still subsisting. In the second case, the dispute was over the inheritance of a deceased's CPF money and the High Court had to consider whether the marriage was a "sham" and, consequently, void.

Recognising foreign divorce judgments

16.20 As noted in a previous review,[24] *Yap Chai Ling v Hou Wa Yi*[25] involved the question of whether a Shanghai divorce judgment should

23 *AUA v ATZ* [2016] 4 SLR 674 at [31].
24 (2015) 16 SAL Ann Rev 464 at 490.
25 [2016] 1 SLR 660.

be recognised in Singapore. The matter went on appeal in *Yap Chai Ling v Hou Wa Yi*.[26] To recapitulate the key facts of the case, the husband and wife had registered their marriage in Shanghai while the husband was still legally married to another Singaporean. The husband then obtained the decree absolute and the parties registered their marriage in Singapore. When the marriage broke down, the husband began divorce proceedings in Shanghai but the wife argued that their marriage was null and void. The Shanghai courts both at first instance and on appeal held that while the marriage in Shanghai was invalid at its inception, it became valid when the decree absolute was granted in Singapore. Thus, divorce was granted.

16.21 At the same time, however, the wife commenced divorce proceedings in Singapore. A decree *nisi* was granted as the proceedings were uncontested and ancillary orders were also subsequently made. The husband passed away and the executors of his estate sought to set aside the decree *nisi* and the ancillary orders. The High Court affirmed the District Court's judgment and held that the Shanghai divorce judgment ought not to be recognised as the regularisation of a bigamous union even after the legal impediment to such a marriage no longer existed and was contrary to Singapore's public policy on monogamous marriages.

16.22 The Court of Appeal, however, had a different view. It first noted that it was:[27]

> … of paramount importance to appreciate that the concept of public policy is not one that can … be applied liberally. This should be unsurprising as there is also the countervailing (and no less) vital consideration of the concept of comity of nations … the concept of public policy is itself inherently difficult.

Keeping in mind that there could only have been one marital relationship between the parties at any one point in time, the court then noted that s 7 of the Women's Charter gives the Singapore courts the power to recognise foreign decrees made by courts of competent jurisdiction.[28] Given too that the wife's domicile was Shanghai, all signs pointed towards recognition. The fact that Chinese law, unlike Singapore law, permitted an invalid marriage to be regularised did not mean that the public policy in relation to marriage in both jurisdictions were different, in so far as both jurisdictions only recognised a regime of monogamous marriages. Accordingly, the court held that the Shanghai divorce would be recognised in Singapore.

26 [2016] 4 SLR 581.
27 *Yap Chai Ling v Hou Wa Yi* [2016] 4 SLR 581 at [45].
28 *Yap Chai Ling v Hou Wa Yi* [2016] 4 SLR 581 at [49].

16.23 It is important, however, not to read the Court of Appeal's judgment too broadly beyond the specific facts of this case. First, by the time the Shanghai courts had heard the divorce application, there was no question as to whether the parties were legally married even though there might have been some doubt as to when the marriage commenced. Thus, the Court of Appeal stated that recognising the Shanghai divorce judgment would only require the Singapore courts to recognise that there was a subsisting marriage between the parties at the date of the judgment, and did not require the Singapore courts to recognise that the marriage had commenced at the date of the registration of the marriage in Shanghai by virtue of the curative regime under Chinese law.[29] Secondly, if the Shanghai court had, say, granted ancillary relief during a period such that the regularisation of bigamous marriages would have been engaged, the decision might well have been different; but, since that was not the case here, the Court of Appeal did not have to answer the question.

Sham marriages

16.24 In *Soon Ah See v Diao Yanmei*,[30] the deceased was a divorcee who had nominated the plaintiffs to receive his CPF money upon his death. However, after the nomination was made, he married the defendant, a "study mama" from China, without informing the plaintiffs. This marriage meant that the nomination was automatically revoked and the CPF money fell to be distributed in accordance with the Intestate Succession Act[31] upon his death. The plaintiffs believed that the marriage was a sham and challenged its validity to prevent the defendant from obtaining her share of the money. They argued that the marriage licence was procured by fraud and should be rendered void *ab initio*.

16.25 Although Edmund Leow JC found that there was indeed no genuine relationship between the deceased and the defendant and that the marriage could only be described as a sham marriage or marriage of convenience,[32] he held that the marriage was not void for the following reasons:

> (a) The grounds on which a marriage is void are set out in s 105 of the Women's Charter. Section 22(1) further states that every marriage solemnised in Singapore must be solemnised on the authority of a valid marriage licence, while s 17(2)(*d*) states

29 *Yap Chai Ling v Hou Wa Yi* [2016] 4 SLR 581 at [53]–[54].
30 [2016] 5 SLR 693.
31 Cap 146, 2013 Rev Ed.
32 *Soon Ah See v Diao Yanmei* [2016] 5 SLR 693 at [16]–[29].

that no marriage licence shall be issued until the registrar is satisfied by statutory declaration made by each of the parties to the proposed marriage that there is no lawful impediment to the marriage.

(b) In *Valberg Kevin Christopher v Heran binte Abdul Rahman*,[33] the judge had granted a declaration that the marriage was null and void as both parties were Muslims; this was a true lawful impediment to the union as the Women's Charter prevented Muslims from being married under the statute and the husband had also falsely declared himself to be a Catholic. Similarly, in *Lim Ying v Hiok Kian Ming Eric*,[34] the petitioner was entitled to a decree of nullity as both parties were female, presenting a lawful impediment as the Women's Charter only permitted marriages between people of different gender.

(c) The validity of a marriage should not be lightly impugned as a change in marital status brings about numerous implications at law and in life. It cannot be open to two individuals to enter into a marriage and then say that the marriage was void all along merely because they did not have the requisite intention to enter into a genuine marriage.

(d) Nonetheless, perhaps in recognition of marriage being an important social institution, parties who enter into marriages of convenience may be prosecuted under s 57C of the Immigration Act,[35] which criminalises the entering of a marriage for the purpose of illegally obtaining an immigration advantage.[36]

16.26 This decision follows two High Court cases which both held that so-called sham marriages do not constitute void marriages. The first is *Toh Seok Kheng v Huang Huiqun*,[37] where the deceased had also secretly married a foreign national without telling his family. During the probate dispute between his family and the wife that followed, the application by his family for the marriage to be declared a sham marriage was denied by the High Court; there, the court also held that it was irrelevant that a party to a sham marriage could be liable for corruption or immigration offences. The second case is *Tan Ah Thee v Lim Soo Foong*,[38] which similarly held that the grounds for holding a

33 Originating Summons No 1274 of 1990.
34 [1991] 2 SLR(R) 525.
35 Cap 133, 2008 Rev Ed.
36 *Soon Ah See v Diao Yanmei* [2016] 5 SLR 693 at [31]–[48].
37 [2011] 1 SLR 737.
38 [2009] 3 SLR(R) 957.

marriage void are set out exhaustively in s 105 and marriages entered into with ulterior motives do not fall under those grounds.

16.27 However, as the court noted, the scenario of sham marriages or marriages of convenience being considered illegal under other laws but valid under the Women's Charter transformed in October 2016 (but well after the marriage in this case was solemnised and so did not affect the proceedings): The Women's Charter was amended and s 11A was introduced, which renders a marriage void if a party to the marriage is convicted of the marriage of convenience offence under the Immigration Act.[39] But it was this very amendment that also suggested to the court in this case that prior to the change in the law, marriages of convenience did not lead to their invalidation under the Women's Charter.[40] Thus, while s 11A now makes it clear that a marriage of convenience may be rendered void under the said condition, this does not apply retroactively. In addition, while the amendment *per se* does not completely foreclose the possibility of marriages being rendered void for reasons not provided for in the Women's Charter, on the strength of this case and the precedents it cited, there appears to be no room left to argue that marriages can be rendered void for such reasons.

Maintenance

16.28 There are two cases of note that pertained to maintenance. In the first case, the husband had been paying substantial maintenance to his step-child and subsequently asked for a refund. This gave the Court of Appeal the opportunity to revisit the relatively novel issue of a non-parent's duty to maintain a child. Because the wife in this case also sought nominal maintenance, the Court of Appeal also took the opportunity to elaborate on its recent remarks on such maintenance. In the second case, the High Court considered the relationship between the provisions in the Women's Charter that concern the variation of maintenance orders.

Non-parent's duty to maintain a child

16.29 In *TDT v TDS*,[41] the parties were married in 2006. There were no children to the marriage, but the wife had a daughter ("Q") who was born in 1996 out of wedlock from a previous relationship. The three of them lived together in a home owned by the wife and her sister between 2006 and 2009 before the parties moved out in 2009. The wife left the

39 *Soon Ah See v Diao Yanmei* [2016] 5 SLR 693 at [46].
40 *Soon Ah See v Diao Yanmei* [2016] 5 SLR 693 at [48].
41 [2016] 4 SLR 145.

husband in 2011 and an interim judgment for divorce was granted in 2013.

16.30 In 2011, the court ordered the husband to pay interim maintenance of S$12,500 a month (S$2,500 for the child). In 2013, the order was varied to S$10,500 a month (S$2,500 for the child). By the time the ancillary proceedings were heard in 2015, the husband had paid S$533,500 in interim maintenance. The High Court hearing the ancillary matters awarded the wife 30% of the matrimonial assets and also held that there would be no further maintenance of the wife and Q. On appeal, the husband argued for, *inter alia*, a refund of the interim maintenance paid to Q. The Court of Appeal took the opportunity to clarify the law on a non-parent's duty to maintain a child. In setting out the law, it noted the following points:

> (a) Section 70 of the Women's Charter imposes a duty on persons such as step-parents and non-biological parents to maintain a child if two conditions are met: first, the child must be accepted as a member of the person's family; and secondly, the non-parent is to maintain the child so far as the father or mother of the child fails to do so. These conditions strike a balance between achieving justice and fairness for the child on the one hand and for the non-parent on the other.
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> (b) Whether the first condition is met depends on whether the person has, from an objective viewpoint, accepted or assumed parental responsibilities over the child's welfare in the light of all the relevant circumstances of the case. Strong indicators of acceptance include marrying the step-child's biological parent, changing the child's surname to that of the step-parent and encouraging the child to address the step-parent in parental terms. Other possible factors include an agreement between the spouses and the intention evinced by the child's biological parent.
>
> (c) Further, knowledge of the full facts and an unequivocal agreement between both spouses to accept the child are only factors and not necessary conditions. The central inquiry is the quality of the relationship between the non-parent and the child. Hence, if the non-parent has assumed parental responsibility on the basis of facts which later turn out to be false, this should be a bar to finding that he has accepted the child as a member of his family unless, for instance, there is an egregious situation involving fraud.

(d) As for the second condition, there were conflicting local authorities. In *EB v EC*,[42] the High Court adopted the position that it is sufficient to show that the child's biological parents, irrespective of their means, have not adequately provided for the child. In *AAE v AAF*,[43] the High Court adopted the position that it must be demonstrated that the child's biological parents lack the financial means to provide adequately for the child. The former approach is to be adopted as that is more consistent with safeguarding the welfare of the child. Further, s 70 allows the non-parent to recover the sums expended on the child from the biological parents, obviating the situation of an unfair liability placed on the non-parent.

(e) As to when the duty ceases, there were again conflicting local authorities. In *EB v EC*, the court adopted the position that the duty to maintain may cease upon the elapsing of a reasonable time after the non-parent has indicated, by way of divorcing (or being divorced by) the biological parent, that he or she no longer wishes to maintain the child. In *AJE v AJF*,[44] the High Court adopted the position that the duty ceases only when the child ceases to be a child. The approach to be adopted is that where a child is taken away from the non-parent in the context of a breakdown of a marriage between the non-parent and the child's parent, this will cause the duty to cease; this will ordinarily happen when interim judgment for divorce is granted.[45]

16.31 On the facts of this case, the court first found that the fact that the husband had married the wife knowing that she had a child from a prior relationship was *prima facie* evidence of his acceptance of Q as a member of his family.[46] The court also gave little weight to the husband's claims that Q never acknowledged him as her father, that they had a distant relationship, that all of the gifts to her was out of his generosity, and that he had never taken part in disciplining her.[47] Accordingly, there was a basis upon which the court could order the husband to pay interim maintenance to Q. However, the court held that when interim judgment for divorce was granted and Q was taken away by the mother, there was no longer any reason for the husband to pay maintenance.[48] A refund of S$40,000 was thus ordered.

42 [2006] 2 SLR(R) 475.
43 [2009] 3 SLR(R) 827.
44 [2011] 3 SLR 1177.
45 *TDT v TDS* [2016] 4 SLR 145 at [79]–[123].
46 *TDT v TDS* [2016] 4 SLR 145 at [132].
47 *TDT v TDS* [2016] 4 SLR 145 at [130]–[131].
48 *TDT v TDS* [2016] 4 SLR 145 at [134].

16.32 This decision by the Court of Appeal is useful and timely as it clarified two important points of law that were previously afflicted with some ambiguity. What needs to be borne in mind is that the duty to maintain only kicks in when the first condition of acceptance of the child is satisfied and the purpose of s 70 is to serve as a "stop-gap measure to provide for a child with immediate needs".[49] The Court of Appeal noted this, further stating that it would be "too onerous a burden if the applicant for maintenance is required to demonstrate that the child's parents, who may, in some cases, be missing or un-contactable, do not have the resources to provide for the child".[50] The position of the non-biological parent was also given due regard, in that his duty to maintain was contingent on the subsistence of the marriage with the biological parent rather than the maturity of the child.[51] As the Court of Appeal noted, "a non-parent does not stand in the same position" as a biological parent.[52] All things considered, the court's interpretation of s 70 adopts a balanced approach to the maintenance of non-biological children.

Nominal maintenance

16.33 One of the other issues in the decision of *TDT v TDS* mentioned above was whether the wife was entitled to seek nominal maintenance. The parties had been involved in several businesses and in 2011, one of the husband's companies sued the wife for the diversion of a business opportunity to another company (*viz*, the separate proceedings). Because of this, the wife argued that whether she should be entitled to maintenance should be dependent on the outcome of that suit and in any event, she should be awarded nominal maintenance so that her future right to apply for maintenance could be preserved.

16.34 Not too long before this case, there had been some uncertainty over the precise conceptual justification for the court ordering nominal maintenance (as opposed to making no order) to preserve a wife's right to future variations of maintenance orders.[53] However, while that matter was resolved by the Court of Appeal in *APE v APF*,[54] there remained no guidelines as to when nominal maintenance should be ordered. This changed in *ATE v ATD*,[55] which provided three broad guiding principles

49 (2011) 12 SAL Ann Rev 298 at 300.
50 *TDT v TDS* [2016] 4 SLR 145 at [114].
51 See also *AUA v ATZ* [2016] 4 SLR 674 at [40].
52 *TDT v TDS* [2016] 4 SLR 145 at [124].
53 (2015) 16 SAL Ann Rev 464 at 496–500; see also Beatrice Yeo & Fiona Chew, "Nominal Maintenance: Worth Every Dollar" *SLW Commentary* (September 2015) at pp 1–4.
54 [2015] 5 SLR 783.
55 [2016] SGCA 2.

as to when nominal maintenance may be ordered: first, nominal maintenance is not awarded as a matter of course; secondly, the wife cannot merely assert that her situation may change in the future; and thirdly, the underlying purpose of maintenance of former wives is financial preservation (or the reasonable maintenance of the prior standard of living).

16.35 *TDT v TDS* elaborated on the second principle. It considered the wife's attempt at seeking nominal maintenance on a contingency basis to be tantamount to making the husband a "*general insurer* of her legal costs and/or her damages in the [separate proceedings]" [emphasis in original].[56] It wholly rejected the wife's argument that seeking maintenance this way could serve as "a useful Sword of Damocles" to keep the husband "in check against filing frivolous actions" against her, as the appropriate action against frivolous suits was to apply for striking out or to ask for indemnity costs.[57] On the facts, the court found that the amount of interim maintenance the husband had paid the wife (S$416,000) to be fair and reasonable, considering that the marriage was childless and less than five years.[58] Further, the wife worked during the course of the marriage and proved to be a determined and capable businessperson; before her marriage, she had also operated eight healthcare businesses.

16.36 While one cannot seriously quibble with the court's reasoning and conclusion given the facts of the case, more concrete guidelines as to when nominal maintenance is appropriate still need to be developed. As highlighted in a previous review,[59] one possibility is to use s 114 of the Women's Charter, which sets out a number of factors that the court is obligated to consider when determining the amount of payable maintenance, as a starting point. We also know from case law, including *TDT v TDS* itself, that if the marriage is short and if the wife is capable of working for a while more or if the wife has been awarded substantial assets following the division of matrimonial assets (or interim maintenance for the matter), then the case for nominal maintenance, without more, is extremely weak.[60] Though, the problem is that one cannot foretell the future with certainty even if there have been some indicia relating to financial independence. Following the ruling in *APE v APF*, a refusal to grant maintenance (nominal or not) effectively renders the issue of maintenance *res judicata*, notwithstanding the existence of s 118 of the Women's Charter, which empowers a court to vary

56 *TDT v TDS* [2016] 4 SLR 145 at [72].
57 *TDT v TDS* [2016] 4 SLR 145 at [73].
58 *TDT v TDS* [2016] 4 SLR 145 at [74].
59 See 16 SAL Ann Rev 464 at 498.
60 See also *AZZ v BAA* [2016] SGHC 44 at [171].

subsisting orders on maintenance. If so, why should a court ever want to take the risk of not ordering nominal maintenance in most cases? Further judicial clarification on when nominal maintenance should be awarded would, thus, be helpful.

Variation of maintenance-of-child orders

16.37 In *ATS v ATT*,[61] the parties were divorced in 2009 and an order for the maintenance of the wife and children was made in 2011. The husband's appeal against the order failed, and an application to vary the order in 2013 was also dismissed. Subsequently, the husband brought an application and tried to vary the order again, arguing that there had been a material change in his circumstances.

16.38 In dismissing the application, Belinda Ang Saw Ean J first noted that under the Women's Charter, there are two relevant provisions that allow a court to vary or rescind a maintenance order.[62] First, under s 118, which pertains to former wives, a court may vary or rescind an order when there has been a misrepresentation, a mistake of fact, or a material change in circumstances. Secondly, under s 72, which pertains to both former wives and children, a court may vary or rescind an order when there is "proof of a change in the circumstances of that person, or that person's wife, incapacitated husband or child, or for other good cause being shown". Cases such as *AXM v AXO*[63] have stated that the grounds under s 72 are broader than those under s 118. However, the husband in this case chose to rely on s 118.

16.39 Ang J then noted the following points:

(a) The condition of "material change in circumstances" in s 118 refers to the change with respect to the circumstances prevailing at the time the previous order was made; any variation application that relies on circumstances before the order should be rejected as that would be tantamount to relitigating the original order.

(b) A variation application is not heard *de novo*; if the requisite condition relied upon for variation is established on the evidence, the variation court should make an appropriate variation in light of the requisite change's impact on the maintenance order and it should not approach the issue as if it were making a maintenance order.

61 [2016] SGHC 196.
62 *ATS v ATT* [2016] SGHC 196 at [7]–[8].
63 [2014] 2 SLR 705.

> (c) Accordingly, whether under s 72 or s 118, the variation court strictly considers the question of "change in circumstances" from the time of a post-ancillary order, and examines whether such change being alleged:
>
> (i) is a change from circumstances prevailing during the ancillary matters hearing;
>
> (ii) arises after the ancillary matters hearing; and
>
> (iii) is sufficient to satisfy the court that a variation is necessitated in light of the factors that determined the order made at the ancillary hearing.[64]

16.40 On the facts of this case, the court held that no changes in circumstances were demonstrated. Of greater interest here is that this decision provides a useful clarification as to whether there is any difference between making a variation application under s 72 and under s 118 of the Women's Charter. However, even the court itself noted that whether the requirement of materiality in s 118 (which is not found in s 72) sets a more stringent standard than mere change in circumstances (in s 72) remains an unresolved one. The Court of Appeal in *AXM v AXO* had suggested that, in practice, there may be no difference, but the court here said that "there could be a difference … whether the difference is really one of threshold and standard, or merely one of nuanced variance in considerations".[65] Nonetheless, as this was not a live issue in this case, the court declined to comment further.

64 *ATS v ATT* [2016] SGHC 196 at [10]–[13].
65 *ATS v ATT* [2016] SGHC 196 at [15].