15. FAMILY LAW

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Conflict of laws

Stay of divorce proceedings; forum non conveniens

15.1 In (2007) 8 SAL Ann Rev 229 at 229–231, paras 14.1–14.7, the High Court decision in *VH v VI* [2008] 1 SLR(R) 742 was noted. In that case, the petitioner wife was a French national and the respondent husband was a Swedish national. The wife began divorce proceedings in Singapore. The husband submitted to the jurisdiction of the Singapore courts and participated in the proceedings. A year later, he started proceedings in Sweden. Both parties applied to stay the proceedings begun by the other but both were unsuccessful in their respective applications. The wife then applied for an anti-suit injunction in Singapore. The court granted an interim injunction prohibiting the husband from proceeding with the Swedish proceedings pending the hearing and disposal of the anti-suit application. In disregard of the order, the husband applied to the Swedish court to issue the divorce decree. The High Court held that the ongoing proceedings may continue in Singapore, but if the divorce has already been granted by the Swedish court, the Singapore court must first determine whether the Swedish divorce is recognised in Singapore. If it is, then the Singapore court cannot grant a divorce as there is no longer a subsisting marriage to dissolve, in which case the wife can no longer obtain any matrimonial and ancillary financial relief in the Singapore court.

15.2 After this decision, the wife argued in *VH v VI* [2009] SGDC 68 that her divorce proceedings should be permitted to continue in order that she may seek maintenance for herself and the children under the divorce petition. The husband applied to strike out the divorce petition and the two related summonses. The District Court struck out the divorce petition for "there is no longer a cause of action … (t)he Swedish divorce has been recognized by the High Court" (at [10]). The

court also noted that maintenance for the children could still be obtained in Singapore despite the recognition of the Swedish divorce.

15.3 Subsequently, the High Court in *Weschler Mouantri Andree Marie Louise v Mountri Karl-Michael* [2009] SGHC 83 (involving the same parties but which title had not been redacted) confirmed that "(o)ur courts cannot grant a divorce to a petitioner whose marriage had already been dissolved by the Swedish Court whose jurisdiction we recognise".

15.4 The saga of *VH v VI* [2008] 1 SLR(R) 742, [2009] SGDC 68 demonstrates at least two points. First, it underscores the importance of diligently pursuing available remedies. The husband had initially participated in the Singapore divorce proceedings begun by the wife. Had those proceedings been pursued and concluded more expeditiously, the wife might have achieved a different result. This is on the assumption that it is indeed possible to proceed more swiftly than the wife in fact managed when one is undergoing rather emotionally-trying divorce processes. Second, the wife's complaint about not being able to pursue her maintenance proceedings in Singapore after the Swedish divorce brings to light again the *lacuna* in the law, long highlighted in Ong, "Financial Relief in Singapore after a Foreign Divorce" [1993] Sing JLS 431–451. Reform has been suggested in this area (see Singapore Academy of Law *Report of the Law Reform Committee on Ancillary Orders after Foreign Divorce or Annulment* (2009) SAL Law Reform Committee, July 2009).

15.5 For the purposes of contrast, the following case is noted as an example of when a stay of divorce proceedings in Singapore is appropriate. In *ABR v ABS* [2009] SGHC 196, the parties were married in India and subsequently resided in Singapore. They were Singapore permanent residents and had one child. Three years into the marriage, after the couple went to India to attend a wedding, the wife remained in India with the child. The husband began proceedings in India for the restoration of conjugal rights. The wife then started divorce proceedings in Singapore, which were not diligently pursued and subsequently struck out. She then commenced divorce proceedings in India. Five months later, the husband commenced divorce proceedings in Singapore. The wife applied for a stay of the Singapore divorce proceedings. The High Court applied the *Spiliada* principles (*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460) and held that India was the more appropriate forum. The parties and their child were Indian citizens and the wife and child lived in India. India was the appropriate forum to decide on the custody and access issues. The cost of living in India was also relevant in maintenance issues. That there was an HDB flat in Singapore did not tip the scales.

Marriage: Void and voidable marriages

15.6 The law on the formation of marriage received some welcomed clarification in the High Court decision of *Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957. In this case, the deceased was married to Madam Koh and had six children from this marriage. The deceased's first marriage ended with the death of Madam Koh in 1994. At Madam Koh's wake, it was revealed that during the subsistence of that marriage, the deceased had a relationship with the defendant and a son was born to this extramarital relationship. Subsequently, the defendant and the son moved into the deceased's home and "systematically took control of the person and property of the deceased to the exclusion of Mdm Koh's children" (at [5]). The plaintiffs alleged that (at [6]):

> [O]n 11 March 1996, the defendant, with the assistance of a lawyer, caused a marriage to be solemnised between herself and the deceased. At that point of time, he was 81 years old, wheelchair-bound and suffering from Parkinson's disease. On or about 5 January 2000, TGC caused the deceased to execute a will which made provision for the defendant and TGC only ('the 2000 Will'). Mdm Koh's children were entirely excluded from the 2000 Will. The deceased passed away on 25 July 2000 at the age of 85.

15.7 The plaintiffs had previously commenced proceedings for, *inter alia*, a declaration that the 2000 Will was invalid. The High Court granted the declaration sought and ordered that the estate be distributed according to the provisions of the Intestate Succession Act (Cap 146, 1985 Rev Ed). Under this Act, the defendant would have been entitled to one half of the estate. The plaintiffs sought the following reliefs in the present action (*Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 at [9]):

> (a) A declaration that there was no valid and subsisting marriage between the deceased and the defendant.
>
> (b) Further and/or in the alternative, a declaration that the marriage between the deceased and the defendant is null and void.

15.8 The whole purpose of the plaintiffs' action was to invalidate the marriage so that the defendant would not have a share in the estate. The plaintiffs provided three bases for the grant of the declarations sought (*Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 at [10]):

> First, it is asserted that the marriage was voidable under s 106(*a*) of the Women's Charter (Cap 353, 1997 Rev Ed) ('the Charter') as it had never been consummated. Second, the court is urged to find the marriage void because the marriage was procured by the actual or presumed undue influence of the defendant over the deceased. The third contention is that the marriage ought to be found void for being

> a sham marriage against public policy as the defendant's sole or predominant motive in registering the marriage was to revoke the deceased's will.

15.9 The assistant registrar struck out the plaintiffs' action in so far as it was based on non-consummation as she was of the view that only parties to the marriage may seek to avoid a voidable marriage on the ground of non-consummation. However, she refused to strike out the other bases argued by the plaintiffs to support their claim that the marriage was void. The plaintiffs appealed against the first part of the assistant registrar's decision while the defendant appealed to strike out the whole action.

15.10 The High Court dismissed the plaintiffs' appeal and allowed the defendant's. It held that it had the power to make the declarations sought by the plaintiffs but that the bases given by the plaintiffs were not justiciable and hence the statement of claim should be struck out.

15.11 The High Court first noted that the Women's Charter (Cap 353, 1997 Rev Ed) provides a complete code on the law applicable to marriages in Singapore apart only from Muslim marriages which have their own separate regime. Thus, the status of the marriage in question had to be judged solely in accordance with the provisions of the Women's Charter with no room for the court to apply any other standard (*Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 at [19]).

15.12 The court rejected the plaintiffs' argument that the marriage was voidable for non-consummation and/or lack of valid consent under ss 106(*a*) and 106(*c*) of the Women's Charter (Cap 353, 1997 Rev Ed) and should be declared void. It held (*Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 at [26]) that: "[W]hile the declaratory jurisdiction of the court may be used to declare whether a marriage is valid or not, it cannot be used to *alter* the status of the marriage. Such a decision may only be made by a court acting on the petition of either party to the marriage, via its matrimonial jurisdiction." [emphasis in original] Thus, only parties to a marriage can seek a nullity judgment on the basis that a marriage is voidable under one of the grounds in s 106 of the Women's Charter. This is in contrast with the court's declaratory jurisdiction to declare a marriage void *ab initio* on one of the grounds provided for under s 105 of the Women's Charter, which strangers to a marriage may seek to invoke.

15.13 In any case, it was noted as an aside that as a nullity judgment operates to invalidate the marriage from the time of the judgment, this relief will not help the plaintiffs' cause at all (*Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 at [30]). At the time of the deceased's death, there was no judgment of nullity and hence the defendant qualified as

the deceased's "spouse" within the meaning of the Intestate Succession Act (Cap 146, 1985 Rev Ed) and would have been entitled to a half share of the estate.

15.14 The plaintiffs further argued that the lack of consent rendered the marriage void *ab initio*, and that the grounds in s 105 of the Women's Charter (Cap 353, 1997 Rev Ed) are not exhaustive. Support was sought from a discussion in an academic book which cited *Lim Ying v Hiok Kian Ming Eric* [1991] 2 SLR(R) 525 and *Valberg Kevin Christopher v Heran bte Abdul Rahman* (Originating Summons No 1274 of 1990) for the suggestion that the section does not exhaustively provide for grounds on which a marriage is void.

15.15 The High Court rejected the argument, observing that Parliament had clearly classified the lack of consent to be a ground rendering a marriage voidable and not one which made a marriage void. As the Women's Charter (Cap 353, 1997 Rev Ed) is a complete code on the law of civil marriages, a marriage cannot be declared void on any other ground not provided for in s 105. The court noted that the cases of *Lim Ying v Hiok Kian Ming Eric* [1991] 2 SLR(R) 525 ("*Lim Ying*") and *Valberg Kevin Christopher v Heran bte Abdul Rahman* (Originating Summons No 1274 of 1990) ("*Valberg*") may be justified on the grounds in s 105: in *Lim Ying*, being of the same gender was a "lawful impediment" to the marriage since the parties were of the same birth sex, while in *Valberg*, there was a "lawful impediment" to the marriage between two Muslims since the Women's Charter has forbidden two Muslims to solemnise their marriage under the Women's Charter. The existence of such lawful impediments rendered the marriage licence invalid which amounts to a breach of s 22, which is listed in s 105. The court also opined that the High Court's holding in *Lim Ying* that the marriage licence was invalidated by the lack of consent was wrong: lack of consent was a ground which rendered the marriage voidable under s 105, not one which should affect the validity of a licence. The court observed that the holding in *Lim Ying* (*Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 at [51]):

> … will unnecessarily confuse the law that regulates the issue of the marriage licence with that of when a solemnized marriage is nevertheless voidable …
>
> Not keeping these two areas separate fails to maintain a rational process of the solemnization of marriages. Persons who have duly obtained a marriage licence from the Registrar or a special marriage licence from the Minister and who solemnize their marriage within the licence's period of validity can still be left in doubt as to whether the licence was valid. They are entitled to be left with no doubt about this. They did obtain proper authorization by their valid licence and they have thereby complied with the first critical prescription of solemnization. Whether their marriage is voidable for cause is a

> separate consideration and ought not to enter into the matter of obtaining valid authorization for the solemnization.

15.16 The final argument made by the plaintiffs is that the marriage was a "sham marriage" and hence against public policy. The court also rejected this argument, holding that a marriage for improper motives is not a ground in s 105 which renders the marriage void.

15.17 The decision in *Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 has done well in clarifying the law on void and voidable marriages. For a long time, one of the holdings in *Lim Ying v Hiok Kian Ming Eric* [1991] 2 SLR(R) 525 ("*Lim Ying*") resulted in the suggestion that a lack of consent could render a marriage licence invalid. The effect of this holding was that the lack of consent, clearly a ground for voidable marriages with defined limits to its application, has been "raised" in importance to a ground that renders a marriage void as it amounts to a breach of s 22. Further, the other holding in *Lim Ying* that the marriage was void as the parties were of the same sex gave rise to the suggestion that the grounds in s 105 were not exhaustive. *Tan Ah Thee v Lim Soo Foong* has clarified that these two holdings are incorrect. For a fuller analysis of the case, see the case comment in Leong, "Clarity in the Law of Valid, Void and Voidable non-Muslim Marriages" (2009) 21 SAcLJ 575.

15.18 Only one more point of discussion is made here: ironically, the explanation offered by the court to justify how the marriage licences could be invalid due to the lawful impediments present in *Lim Ying v Hiok Kian Ming Eric* [1991] 2 SLR(R) 525 ("*Lim Ying*") and *Valberg Kevin Christopher v Heran bte Abdul Rahman* (Originating Summons No 1274 of 1990) may in fact also suffer from a failure to keep separate the "formal validity" of a marriage from the "essential validity" of a marriage. The formal validity of a marriage focuses on whether the formal requirements of marriage have been complied with. Thus, a marriage contracted in Singapore requires parties to have complied with s 22 of the Women's Charter (Cap 353, 1997 Rev Ed). A marriage celebrated outside Singapore must comply with the legal formal requirements of the country in which it is celebrated. On the other hand, the essential validity of a marriage focuses on whether the parties have the capacity to marry each other. Thus, Singapore domiciliaries must comply with the capacity provisions of the Women's Charter whether they marry in Singapore or abroad. In *Lim Ying*, the parties married in Singapore under the regime of the Women's Charter: Lim Ying was a woman who would not have consented to marry Eric Hiok had she known that Eric Hiok was a female transsexual. The High Court in *Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 suggested that being of the same gender constituted a "lawful impediment" referred to in s 17 which rendered the marriage licence invalid. As a consequence of

that, there would have been a breach of s 22 and thus a nullity judgment could have been made under s 105. Such an explanation opens up the possibility that numerous other "impediments" not listed as grounds which make a marriage void under s 105 could also have the effect of rendering a marriage void. Suppose their marriage had been validly contracted outside Singapore in accordance with the formalities required in the country abroad, the fact that the parties were of the same sex would not have had the same effect because ss 17 and 22 would be irrelevant in such a marriage contracted outside Singapore. Since s 105 exhaustively provides for all the grounds on which a marriage is void, then at the time of the marriage, being of the same sex would not have been a ground on which to find a marriage void. By holding that there are "incapacities" which are not grounds listed in s 105 but are, nevertheless, "lawful impediments" which render a marriage licence void in fact transforms these "incapacities" to grounds which make a marriage void *ab initio*. Further, it only selectively applies to Singapore domiciliaries who marry in Singapore whose solemnisation is governed by s 22 of the Women's Charter.

15.19 It might have been better that *Lim Ying v Hiok Kian Ming Eric* [1991] 2 SLR(R) 525 and *Valberg Kevin Christopher v Heran bte Abdul Rahman* (Originating Summons No 1274 of 1990) are confined to their own facts at a time when there were gaps in the law which have since been rectified. Other "lawful impediments" not classified under s 105 Women's Charter (Cap 353, 1997 Rev Ed) that were not apparent at the time of issue of the marriage licence should not be held to invalidate a marriage licence.

Divorce: Unreasonable behaviour

15.20 *Teo Hoon Ping v Tan Lay Ying Angeline* [2010] 1 SLR 691 concerned an appeal from the decision of the District Court which granted the wife a divorce on the ground that the marriage had irretrievably broken down because the husband had acted in such a way that she could not reasonably be expected to live with him. The District Court had found that the husband had treated the wife with disrespect, based largely on a series of e-mails as well as the testimony of a witness. The High Court dismissed the husband's appeal. One of the husband's arguments was that the court should not have accepted the e-mail as evidence of him having acted intolerably because the wife had voluntarily returned to live with him even after those e-mails. The High Court thought that s 95(6) of the Women's Charter (Cap 353, 1997 Rev Ed) quite easily dealt with this point (at [18]):

> It is quite clear that the object behind this section (s 95(6)) is to encourage estranged parties to attempt reconciliation. Thus, Party A who is considering divorce because of Party B's intolerable behaviour

> can go back and try to live with Party B for another six months to see if things improve. If the attempt fails, Party A can still seek divorce on the ground of intolerable behaviour. Party B cannot rely on the fact that Party A had gone back to live with him even after the incidents of intolerable behaviour as evidence that his behaviour was not intolerable.

15.21 Of greater legal interest is the argument that the court had erred in failing to take into account the husband's depression which had affected his actions towards his wife. The husband also argued that he had been acting that way since the start of the marriage and there was no reason why the wife should not put up with him. The High Court applied the oft-used test in *Wong Siew Boey v Lee Boon Fatt* [1994] 1 SLR(R) 323 (*Teo Hoon Ping v Tan Lay Ying Angeline* [2010] 1 SLR 691 at [36]–[37]):

> This test requires the court to ask if the plaintiff, with his or her characteristics and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, can reasonably be expected to live with the defendant. The test as stated is an objective one that requires the court to take into account the subjective qualities of the plaintiff. There appears to be no local case that has directly addressed the issue of whether the reasons for the defendant having acted as he did should be a factor in determining the reasonableness of his behaviour.

15.22 The court cited the English case of *Thurlow v Thurlow* [1976] Fam 32 and thought that *Katz v Katz* [1972] 1 WLR 955 was similar to the present case. It held that (*Teo Hoon Ping v Tan Lay Ying Angeline* [2010] 1 SLR 691 at [46]):

> [T]he reason behind a defendant's behaviour is a relevant factor which a judge ought to consider in determining whether the defendant has acted in such a way that the plaintiff cannot reasonably be expected to live with the defendant. But the fact that the defendant cannot be blamed for his behaviour should not be a bar to a finding that is in favour of a plaintiff under s 95(3)(*b*) of the Women's Charter. Moreover, the weight which should be placed on this factor depends on many other circumstances, such as the nature and severity of the defendant's mental illness, the kind of treatment which the plaintiff has suffered, and the strength of the causative link between the defendant's illness and the behaviour which he or she has inflicted on the plaintiff.

15.23 The High Court thought that there was little causative link between the husband's depression and his poor behaviour towards the wife. The District Court was entitled to place little or no weight on the husband's depression when considering if he had acted in such a way that the wife could not reasonably be expected to continue living with him. Further, the fact that the wife had been able to tolerate his

behaviour since the start of the marriage (*Teo Hoon Ping v Tan Lay Ying Angeline* [2010] 1 SLR 691 at [52]):

> … spoke more of the Wife's patience rather than any redeeming feature on the Husband's part … it was obvious that the Wife's patience had been exhausted by the cumulative effect of his taunts and abuses over the years and the realisation that there was hardly any prospects of the Husband mending his ways.

15.24 The High Court rightly held that the fact that a spouse cannot be fully blamed for his behaviour should not of itself be a bar to finding that the marriage has irretrievably broken down based on s 95(3)(*b*) of the Women's Charter (Cap 353, 1997 Rev Ed). This position taken by the court is a sensible one. A court may find that a spouse should not be prejudiced only by the fact that the defendant cannot be fully blamed for all his behaviour. Whether a spouse is expected to live with the defendant's behaviour in such cases may be determined also by taking into account the defendant's responses and attempts to control his behaviour. For example, it is conceivable that, applying the test in *Wong Siew Boey v Lee Boon Fatt* [1994] 1 SLR(R) 323, a plaintiff may be expected to live with a spouse who is difficult but who recognises his own underlying illness as the main cause of his difficult behaviour and is genuinely seeking treatment for it.

Children: Custody, care and control and access

Parental responsibility of father of illegitimate children

15.25 In *AAV v AAW* [2009] 4 SLR(R) 488, the High Court had to decide the care and control of an eight-year-old daughter of parties who were not married to each other. First, it is noted that the fact that the parents were not married to each other did not affect the issues at hand. No significance was attributed to the father's parental authority and responsibility towards his illegitimate child. It was noted in last year's review (see (2008) 9 SAL Ann Rev 309 at 314–315, paras 14.20–14.21) that the common law position is that only the unmarried mother is the natural guardian of an illegitimate child. The common law position partially persists in England under the current English Children Act 1989, where an unmarried father must take certain steps before he is conferred parental responsibility over his child. This High Court decision affirms the position taken in the District Court cases noted last year, *VT v VU* [2008] SGDC 1 and *XG v XH* [2008] SGDC 88, which recognised the equal parenting responsibility and authority of both parents, whether or not they are married to each other.

15.26 The father in *AAV v AAW* [2009] 4 SLR(R) 488 at [23] was found to be "the more capable in the sense that he was running a

successful business and was a person who could take charge of matters". However, despite finding the father the "more capable", the court was concerned with his parenting approach and awarded care and control to the mother (at [30]):

> He had told the welfare officer that at one time he was concerned with B's careless mistakes in her spelling tests and when mistakes were made a second time, he had told B that he would cane her if mistakes were made a third time. However, when they occurred a third time, he had asked B to stretch out her hand while he caned his own hand. He then told B that he had caned himself as he had failed as a parent. He said B was moved to tears and has since been more careful in her spelling. I found AAV's idea of discipline questionable.

15.27 The commitment to supervising and coaching a child in his school work is positive but some methods of supervision and discipline may cause concern. Further, an excessive focus on academic performance may not be healthy. In a case noted some years ago, *Shoba d/o Gunasekaran v A Rajendran* [2001] SGHC 138 (see (2001) 2 SAL Ann Rev 226 at 230, para 13.14), the High Court found that the father showed his sincerity in wanting to care for the child by forgoing weekends with the child, choosing instead to spend the week nights coaching the child in his schoolwork. *AAV v AAW* [2009] 4 SLR(R) 488 cautions that some methods of coaching and discipline can cross the line to constitute inappropriate parenting methods. Another example of "excessive discipline" showed up in *ACV v ACW* [2009] SGDC 434, where there was evidence of injuries on the son. The District Court held (at [10]):

> [N]o doubt the injuries arose from his stance as a disciplinarian. I was of the view that it was clear excess of discipline. … It was clear to me that until and unless the Plaintiff had undergone some form of counselling and a parenting programme, he should not be granted care and control of their children.

Joint/Shared care and control

15.28 The landmark decision of *CX v CY* [2005] 3 SLR(R) 690 set the path in Singapore for joint parenting by holding that joint or no custody orders will be the norm and sole custody the exception. However, few cases have considered joint or shared "care and control". Joint parenting which promotes the welfare of the child includes encouraging both parents to spend as much time as practicable with the child. Usually, giving care and control to one parent and generous access to the other parent is seen to sufficiently enable the child to spend substantial amounts of time with both parents. Whether joint care and control is in the welfare of the child depends on the facts of the case. In last year's review (see (2008) 9 SAL Ann Rev 309 at 313, paras 14.15–14.18), it was noted that *XX v XY* [2008] SGDC 253 was a welcomed case which

ordered this less common arrangement of joint care and control. This year, in *ZO v ZP* [2009] SGDC 33 ("*ZO v ZP*"), the District Court considered whether it would be in the welfare of the three daughters to spend alternate weeks with each parent. The court noted two factors highly relevant in determining shared care and control: first, the age of the child, and second, whether a high level of co-operation is possible between the parents. Of the first, the court observed (*ZO v ZP*, at [20]–[22]):

> In the case of infants and very young pre-schoolers, … although consistency in their physical care is of greater importance, the need for consistent rules for discipline and academic development may be less critical
>
> … An alternated care arrangement allows different caregivers the chance to bond with the child. This widens the pool of caregivers available to help provide care for the [young] child and reduces the burden on one or two individuals. If respective caregivers are able cooperate [*sic*], this could sometimes operate to the best interests of the child.
>
> In the instant case, however, … [a]s school-going girls, the type of care they need, the kind of supervision that is required and the nature of contact that strengthens bonding are different. Given the ages of the girls, there is little to be gained, if anything at all, from the disruptiveness and inconvenience of the alternated care arrangement.

15.29 Of the second, the court noted (*ZO v ZP* [2009] SGDC 33 at [11]–[13]):

> There can be no question that every child needs to be guided by proper boundaries … it is necessary for there to be a sense of overall consistency and clarity, both in the making and the ongoing enforcement of the house rules …
>
> The upholding of such consistency and clarity is usually challenging enough in any ordinary household with two parents … if the children are also to grow up alternating between two separate households on a weekly basis, one can imagine the compounded difficulty.
>
> Achieving a reasonable level of consistency across two separate households may not be impossible. But it certainly means a very high degree of co-parenting. It entails an extremely high level of co-operation and constant and effective communication both [*sic*] heads of households.

15.30 The court in *ZO v ZP* [2009] SGDC 33 at [25] rejected shared alternated care and control:

> Taking into account the degree and nature of co-parenting that the weekly alternated arrangement requires, the fractured relationship of the parties, the evidence of problems that the arrangement has given rise to and that the girls are of school-going age for whom disruption

> of their routines would be more inconvenient under that arrangement, … Their care and control should vest in one parent.

15.31 Shared care and control can give the child the greatest opportunity to grow up with the love, support and guidance of both parents, and in appropriate circumstances, should be ordered if it best serves the welfare of the child. Where difficulties such as those enunciated in *ZO v ZP* [2009] SGDC 33 arise, the next best arrangement which still supports bonding with both parents is to award care and control to one parent and very generous access to the other, including overnight access. In *QV v QU* [2009] SGDC 97, the court reinstated the arrangement in a prior consent order, which gave the mother care and control and generous access to the father, from Saturday at 6pm to Tuesday, amounting to three nights of overnight access weekly. This arrangement borders near shared care and control. The District Court noted that "generally, as a boy grows older, he will need his father's guidance more than his mother's: *Re G (custody of an infant)* [2003] 4 SLR(R) 34 at [26]". This factor may be significant in cases involving fathers who desire more time with their sons (for comments on this point in *Re G (custody of an infant)*, see (2003) 4 SAL Ann Rev 243 at 249, para 13.20). Whatever the terms used, the pursuit is of an arrangement that enables the child to spend as much time with both parents as possible.

Access

15.32 *JN v JO* [2009] SGDC 109 reminds parents that access time is intended for the child to spend time with the parent having access. In this case, the District Court found that the father "was not utilising the full extent of his access time with the child". The mother had alleged, amongst other things, that the father had spent only one to two hours with the child, leaving the child with the paternal grandmother and maid during the rest of the access time, which included overnight weekend access. The court noted that the private investigator's report illustrated the father's pattern of behaviour during access periods which supported the mother's allegation that he did not spend much time with the child. The child had Asperger's Syndrome and had been on medication and undergoing therapy. The court reduced the father's access time to Saturdays only, recognising the special needs of the child to have a consistent routine and to sleep in his own bed every night, including weekends.

15.33 The father in *JN v JO* [2009] SGDC 109 left the child with the paternal grandmother for most of the access time. While there are certainly positive effects of having a child spend time with the grandparents, access time is precious in the post-divorce family and is primarily meant for the child to spend time with his parent, not

grandparent. In *CZ v DA* [2004] 4 SLR(R) 784 at [8], the High Court held:

> … a grandmother is, without more, not entitled to apply for an order for access to her grandchild. Admittedly, in *Re C (an infant)* [2003] 1 SLR(R) 502, the paternal grandmother was granted limited access to her grandson but this was due to the very special circumstances in that case, namely, that the child's mother had been killed by his father, who was imprisoned for the crime.

15.34 This is not to say that grandparents have no place in their grandchildren's lives. On the contrary, it was demonstrated in Ong & Quah, "Grandparenting in Divorced Families" [2007] Sing JLS 25, that grandparents played a vital role in supporting divorced families. In *Re C (an infant)* [2003] 1 SLR(R) 502 at [25], the Court of Appeal remarked that "(k)inship is a vital aspect of human life", noting that contact with the paternal grandmother was "useful to enable the child to know, as he grows up, that his father is still around" (since the father was in prison). However, a child whose parents have split up must now divide his time between two parents when before, he could have enjoyed spending time with both parents concurrently, leaving him with more time to spend with his grandparents or his friends. Translated into practical terms, grandparents commonly help with childcare during weekdays when the parent with care and control is at work, but the parent with access is less likely to be able to give his own parents much time to spend with their grandchild.

Paternity: Section 114 and maintenance

15.35 The issue of proof of paternity has been discussed in previous reviews (see (2002) 3 SAL Ann Rev 224 at 235–236, paras 13.23–13.24; (2005) 6 SAL Ann Rev 259 at 265–269, 13.18–13.25).

15.36 In *WX v WW* [2009] 3 SLR(R) 573, the High Court was once again faced with the use of DNA evidence in the course of proving paternity. In this case, the respondent mother sought maintenance for her young child from the appellant whom she alleged to be the child's biological father. She alleged that during the period of time in which the child was likely to have been conceived, she had sexual relations with both the appellant as well as H, whom she married after she discovered she was pregnant. When the baby was born, it became apparent from her blood group that H (her husband) could not be the child's biological father. A DNA test was procured which results excluded H as the child's biological father. The marriage between the respondent and H was annulled subsequently. The appellant, however, refused to undergo a DNA test.

15.37 The appellant argued that as the child was born during a valid marriage between the respondent and H, s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) applied, and this fact was conclusive proof that the child was the legitimate child of H. Section 114 provides that:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

15.38 The court observed (*WX v WW* [2009] 3 SLR(R) 573 at [14]):

> Section 114 of the Act clearly operates where a person seeks to prove that a child born during the continuance of a valid marriage between his mother and any man is the legitimate child of that man (in the absence of proof that they had no access to each other at the relevant period). This accords with the historical origin of the common law rule. But the appellant is seeking to derive a collateral application to the rule, which would in effect turn a rule established for the purpose of protecting a child in one set of circumstances to deny a child in another set of circumstances of the protection accorded to him under the Charter. In my view the appellant's position is not supported by the words in s 114 nor by any consideration of the policy and historical origin of the rule. For the reasons given above, I concluded that s 114 only applies to confer legitimacy in the circumstances set out in the provision, and not to rebut or invalidate evidence that a man is the biological father of a child.

15.39 The High Court refused to apply s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) to invalidate the evidence that the appellant was the biological father of the child and affirmed the decision of the District Court below.

15.40 The High Court's reasoning was as follows: The DNA test proved that H was not the child's biological father, and since the court also accepted that the respondent had sexual intercourse with only H and the appellant, the appellant is proven the biological father of the child. Therefore, the appellant's reliance on s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) was for a purpose that the court described as "to rebut or invalidate" this proven fact.

15.41 Problems arise with this analysis. Section 114 of the Evidence Act (Cap 97, 1997 Rev Ed), like the other provisions in that Act, is a gatekeeper on whether any evidence is admissible. It reads quite clearly that, when a child is born during the subsistence of the mother's valid marriage, no evidence may be admitted which has the effect of suggesting that her husband is not the father except where it is proven that the mother and her husband had "no access" to each other at the

probable time of the child's conception. Not only was there no such evidence of "no access", the court had no reason to disbelieve the respondent's claim that she had engaged in sexual intercourse with H. The appellant was therefore not using s 114 to rebut proof that he was the child's biological father. He was using s 114 as the provision was intended to be used, which is to keep out any evidence which suggests the husband is not the biological father. The DNA test result cannot be admitted in evidence and no one other than the husband is at this stage accepted as the father of the child. It follows then that it is not accurate to say that s 114 is used "to rebut" proof that he was the "proven" biological father. The appellant was in fact right to invalidate the admission of the DNA test which excluded H as the child's father.

15.42 The court's conclusion appears to have been reinforced by its interpretation of Parliament's intention behind the maintenance provision in s 69(2) of the Women's Charter (Cap 353, 1997 Rev Ed) (*WX v WW* [2009] 3 SLR(R) 573 at [17]):

> Considering s 69(2) of the Charter in the context of the duty in s 68 on a parent to maintain his children, be they legitimate or illegitimate, it would be rather surprising if Parliament had intended that the rights intended to be vested in an illegitimate child *vis-à-vis* his biological father does not extend to the situation where his mother was legally married to another man at the time of his birth. Were that to be the case, even if the mother had divorced her husband or he had died, the child still would not enjoy the protection under s 68 and s 69 *vis-à-vis* his biological father. It is difficult to see how Parliament, in promulgating these provisions more than half a century after s 114 of the Act was enacted, could have intended that this duty be relieved in the case of the biological father of a child whose mother happened to be married to another man at the time of birth.

15.43 It is noted that s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) pre-dated s 68 of the Women's Charter (Cap 353, 1997 Rev Ed), which holds all parents primarily responsible for their children's maintenance. Following from the analysis above, there was no proof of who the biological father of the child was. There was only a presumption that H was the biological father and this presumption had not been rebutted by evidence of "no access". Section 68 of the Women's Charter thus holds both the husband and the respondent primarily responsible for the child's maintenance. This result may seem illogical and unsatisfactory, but it is for Parliament to amend the law if a different result is to be reached. The High Court had in fact remarked that (*WX v WW* [2009] 3 SLR(R) 573 at [6]):

> … this rule of evidence has for its basis, social policy rather than scientific reality. The appellant's position offends both justice and commonsense, but if the provision were free from ambiguity and clearly applies to the facts of the present case then I would be

> constrained to make that holding no matter how unsatisfactory the result may be.

15.44 The current provision requires the court to find that H is proven to be the child's father, a result which offends "both justice and commonsense" when one factors in the DNA test result, but it is the result required by an outdated presumption of paternity that only allows evidence of "no access" as rebuttal.

15.45 The court had understandably attempted to find an "escape valve" that would enable the appellant to be held liable for the maintenance of the child who, from all the evidence, had they been admissible, appeared to be his biological child (see use of "escape valve" in *AD v AE (minors: custody, care, control and access)* [2005] 2 SLR(R) 180 ("*AD v AE*"); (2005) 6 SAL Ann Rev 259 at 265–269, paras 13.18–13.21). This case shows up, once again, the outdated character of s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) and the court's impossible task of reaching a logical and just result under the circumstances. In trying to reach a result it thought was logical and fair, the court used an analysis which unfortunately caused a different inconsistency. At common law, a child is legitimate only if his biological parents are married *to each other*. When the mother and the father of the child are validly married to each other at the child's conception or latest at the child's birth, the common law substantive rule provides that the child is bestowed with the status of being their legitimate child. (See Lowe & Douglas, *Bromley's Family Law* (Oxford University Press, 10th Ed, 2006) at pp 311 and 341–342.) Legitimacy and paternity are inextricably linked. Section 114 of the Evidence Act, despite its claim to being an irrebuttable presumption, is not a substantive rule. It does not displace the substantive law on legitimacy, but provides an evidentiary aid which excludes certain means of proving paternity. Proof of "no access" is the only proof admissible to rebut the presumption in the section. Such evidence of "no access" goes towards proving that the husband of the mother is excluded as the biological father. In the face of such evidence, the substantive rule on legitimacy applies and the child is not presumed legitimate by s 114. Section 114 recognises and supports the substantive law of legitimacy but gives the benefit of doubt of less reliable evidence to the child. It "was promulgated at a time when it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%. It was intended to avoid bastardising children and the social stigma that attached to it, more so in the past than today, perhaps" (*WX v WW* [2009] 3 SLR(R) 573 at [7], quoting *AD v AE*; see also Ong, "Proof of Paternity and Access to Non-biological Child: *Re A (An Infant)*" (2003) 15 SAcLJ 399).

15.46 The High Court also noted from an English case that the presumption of legitimacy "goes back for centuries, long before blood tests" (*WX v WW* [2009] 3 SLR(R) 573 ("*WX v WW*") at [8]) in days where the determination of paternity relied on circumstantial evidence. Further, it noted that illegitimacy was a grave stigma, more so in the past than in modern times. The High Court in *AAE v AAF* [2009] 3 SLR(R) 827 at [25] observed that the court in *WX v WW* "reasoned that the presumption of legitimacy in s 114 is confined to the status of the child alone; paternity of itself – whether the child is an issue of the husband – is a different matter and falls outside the provision. The distinction was made to get around the evidential restriction in s 114". If the evidential restriction in s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) is driving the courts to make problematic distinctions, then it is apt that a review of the law in this area is made as soon as possible.

Division of matrimonial assets

Purchase of assets with pre-marital assets

15.47 In *AAE v AAF* [2009] 3 SLR(R) 827, two properties were purchased with money from pre-marriage assets. X was the matrimonial home, and as such a matrimonial asset. For Y, counsel attempted to draw an analogy between gifts and assets purchased with proceeds from the sale of pre-marriage assets. The court pointed out that gifts from third parties and assets purchased with money obtained from pre-marriage assets are "two completely different matters". This holding is in line with s 112(10)(*b*) of the Women's Charter (Cap 353, 1997 Rev Ed), which clearly includes as matrimonial asset any asset acquired during marriage by one or both parties.

15.48 In respect of counsel's argument that Y should be traced to a gift, the High Court held that at best a one-sixth share could be traced to an original gift, and that the husband's conduct vitiated any argument that the pre-marriage character of the previous asset was retained in the new asset. Here, the husband registered the wife as a joint tenant, showing his intention for the property to become a matrimonial asset. In so holding, the court followed the decision of the Court of Appeal in *Chen Siew Hwee v Low Kee Guan* [2006] 4 SLR(R) 605. This new test of intention, which was a departure from previous Court of Appeal decisions, was commented upon in (2006) 7 SAL Ann Rev 257 at 264–265, paras 14.22–14.23. Using one party's intention as the premise may not be aligned to s 112(10) of the Women's Charter (Cap 353, 1997 Rev Ed), which recognises only substantial improvement by the other party or both parties.

Duty of full and frank disclosure

15.49 In *AAE v AAF* [2009] 3 SLR(R) 827, the wife failed to disclose her assets aside from two properties for which she sought a share. The court estimated her total assets at $965,040 after a protracted process of discovery sought by the husband. Of this sum, $629,000 had been given to her by the husband. The court reminded that such gifts, following from *Yeo Gim Tong Michael v Tianzon Lolita* [1996] 1 SLR(R) 63, were subject to division. In this case, there was also evidence via CPF payments, that she was working and had income, which she did not disclose. She also admitted being the sole proprietor of a small business since 2005, a partner in another business, and involved in two other companies. She was conversant in business and not the weak and docile wife that she had made herself out to be.

15.50 Based on her non-financial contribution to the marriage, the court awarded her 25% of the matrimonial home. She asked for a premium for being out of occupation, but the court in this case refused, as her indirect contributions to home and family waned before the divorce proceedings started, leaving the husband to care for the child and the home while she was frequently overseas. In view of her material non-disclosures, the court awarded her 15% of the other assets.

15.51 The duty of full disclosure also played a central role in *ABP v ABQ* [2009] SGHC 192. In this case, the respondent claimed a share in a property purchased six years after the parties separated (the Serangoon property). This property was held by the petitioner jointly with his mother, who was the legal owner of a 75% share. The High Court concluded that the mother, a hospital attendant, had no financial means to make any substantial financial contribution to the property, holding that the petitioner was the beneficial owner of the property.

15.52 The High Court also did not believe the petitioner's claim that he had no assets, finding that the petitioner had dissipated his assets in order to prevent the respondent from getting a share of them. To bolster his claim that he had sold his shares in Campo Research, his only known business asset, the petitioner called two of its directors as witnesses. The High Court, however, found the story told by the three men "incredible" and their testimonies "utterly discredited" (*ABP v ABQ* [2009] SGHC 192 at [14]):

> The directors were more like paid actors: none of them had any experience, finance or knowledge of the company's finances and business. Teo and Shum only realized they had become shareholders of Campo Research when they conducted a company search for the purpose of applying for a cell phone in the name of the company.

15.53 The court ordered that the Serangoon property be sold, and an 80% share of the proceeds be apportioned to the wife.

15.54 At first blush this could be a surprising result: there was in issue another property, "the Toh Yi property", purchased at the time the parties separated, which was held in the respondent's sole name. No order was made on this property although it was not disputed that the petitioner had made some payments towards this (although the parties disputed the number of instalments he paid). Probably, his share of the $333,000 purchase was small; and the respondent, a homemaker, was taking care of the child throughout the period of separation. And thus, the 80% order was a pragmatic approach. The court emphasised, in making the order, that this was purely on grounds that the court had no idea what assets the petitioner had, and that the Serangoon property was the only asset which could realistically be apportioned (*ABP v ABQ* [2009] SGHC 192 at [16]):

> I emphasize that this award is not intended as a punishment – that is not the court's concern in these proceedings. The award is premised upon my finding that the petitioner has assets which he refuses to divulge.

Division and the working mother

15.55 In *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935, the Court of Appeal dealt with a long marriage and the case of the working mother.

15.56 This case concerned a 32-year marriage in which the parties had raised two children. The marriage broke down sometime in 2004, after 30 years. During the course of their marriage, the parties managed their family finances by way of a joint account. Both parties deposited their respective monthly incomes into the joint account, from which withdrawals were made. There were two properties, division of which was in dispute, "Neptune Court" and "Sennet Road". The High Court awarded the wife 20% of Neptune Court and 40% of Sennet Road. For Neptune Court, the judge found that the husband had paid for the property wholly, and for Sennet Road, the judge held that the husband had made the major financial contribution. At the same time, the judge decided that the wife had not made any significant indirect contribution as a result of having worked full-time throughout the marriage.

15.57 The Court of Appeal made two significant variations. First, it found that the wife had contributed in *some* way financially towards the Neptune Court property. This was because, although the mortgage and conservancy charges were deducted out of the husband's salary, the property tax was paid out of the couple's joint account. Thus, the Court of Appeal decided that her financial contribution could not be said to be

nil. This was an important recognition of the fact that the couple had ordered their financial affairs in a joint way, and their conduct reflected in general an intention of joint co-operation.

15.58 The second variation related to the wife's indirect contributions and the issue of employed home help. The Court of Appeal endorsed the High Court's statement in *Lee Cheng Meng Joseph v Krygsmani Juliet Angela* [2000] 3 SLR(R) 965 at [41] (*Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 at [18]) that:

> Whether the wife was the main care-giver was an inference that the judge could rightly draw from the evidence before her. Having a maid in the household, or a number of maids for that matter, does not mean abdication of parental responsibility toward the child.

15.59 The High Court had made a finding that the wife's indirect contribution was "more fiction than real" owing to her full-time work and the use of maids. After making an observation that there was no evidence that the wife had sacrificed herself and her family at the altar of work, the Court of Appeal stated (*Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 at [20] and [21]):

> Indeed, for all intents and purposes, this was a long marriage which only broke down towards the end. In fact, for the better part of 32 years, this marriage could be described as a successful one. This point alone militates against a finding that either party did not contribute towards the well-being of the family. Although there can, of course, be exceptional cases, for a couple to successfully raise and establish a family (as the parties did in the instant case), both husband and wife must contribute, albeit often in unequal proportions, towards the non-financial needs and requirements of the marriage and the family. The evidence in the present case bears testimony to the correctness of this proposition. Whilst it might have been true that the wife might have contributed relatively less towards the welfare of the family for the period from 1974 to 1983 (when the family resided with the husband's parents), we are of the view that the situation was quite different following the family's move to the Neptune Court apartment. From then onwards, the wife had to, *inter alia*, train, manage and supervise the execution of duties assigned to the maids. The wife, in other words, took on a managerial role in ensuring the smooth running of the household (with all the accompanying logistical requirements). This role is at least as essential and important as the direct performance of the chores itself. Further, it is clear, in our view, that the wife also, when required, personally looked after the needs of the two children. Considering that she managed to do all these while holding down a regular full-time job, the wife should be accorded the credit that is due to her. It is ironic, therefore, that the husband endeavoured to use this last-mentioned fact to assert that the wife had made no indirect contributions to the purchase of the two properties.

> It should also be pointed out that *indirect* contributions are, by their very nature, not given to easy ascertainment as well as valuation; they contain an inherent as well as irreducible *qualitative* factor which stands in stark contrast to the *quantitative or mathematical* nature of *direct* financial contributions. However, what *is* clear is that such (indirect) contributions cannot be either gainsaid or undervalued.
>
> [emphasis in original]

15.60 In a slight variation, the help of a paternal *grandmother* came under discussion in *ACM v ACN* [2009] SGDC 411. The District Court was asked to attribute the husband's mother's contribution to the husband. The court (rightly) disagreed, stating that while parties were lucky to have the willing assistance of the children's paternal grandmother, this could not be attributed in any way to the husband as his indirect contribution. The court held it to be a factor in determining the extent of the wife's indirect contribution.

15.61 Whether the allegation be that a working mother received assistance from helpers, grandmothers or others, perhaps the issue may best be reframed in terms of the effort put into the marriage by each party, whether husband or wife. The amount of help received should be considered as part of the factual matrix and context in which both parties' contribution to the family are assessed. The Court of Appeal in *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 recognised, with substantial pragmatism, that (see [18]) many married couples are in "precisely such a situation" (where couples rely on the contribution of various kinds of home help), and "it would not necessarily follow that the husband and/or the wife would thereby be unable to contribute indirectly towards the marriage in general and the family in particular".

Maintenance

Duty to maintain a non-biological child

15.62 *AAE v AAF* [2009] 3 SLR(R) 827 continued the discussion started in *EB v EC* [2006] 2 SLR(R) 475 ("*EB v EC*") on the duty of a father to maintain a child of whom he was not the biological father. *EB v EC* held that once a person has accepted a child as a member of his family, he has accepted the responsibility under s 70(1) of the Women's Charter (Cap 353, 1997 Rev Ed).

15.63 In *AAE v AAF* [2009] 3 SLR(R) 827 ("*AAE v AAF*"), the husband was misled by the wife, throughout the 13 years of marriage, about the identity of the biological father of the child. The High Court held that the key question was whether the husband had treated the child as a member of the family after he found out that he was not the

biological father. On the facts, after the DNA test results, the father still openly accepted the child as a member of his family and continued to care for the child while the mother was overseas. *AAE v AAF* also followed the approach of *EB v EC* [2006] 2 SLR(R) 475 in treating the non-biological father as a secondary, rather than a primary, source of maintenance, holding that past a certain point, it is good sense that a mother should seek maintenance from the biological father. In *AAE v AAF*, the mother and biological father were still in a relationship, and there was no evidence that the wife would not be financially able to maintain the child. The High Court thus made no order on the request for maintenance for the child.

Duty of estate to maintain illegitimate child

15.64 In *AAG v Estate of AAH, deceased* [2010] 1 SLR 769, the Court of Appeal decided the issue whether illegitimate children were entitled to claim support under the Inheritance (Family Provision) Act (Cap 138, 1985 Rev Ed) ("IFPA"). Here, the appellant sought maintenance on behalf of her two daughters from the estate of the deceased. The court held that, in interpreting s 3(1) of the IFPA, "son" or "daughter" did not include illegitimate children. This finding was necessitated by the construction of the section itself, and that under the common law reference in a statute to a child would *prima facie* mean a legitimate child. Secondly, that other statutes made specific provision for adopted children, and a son or daughter of a deceased *en ventre sa mere*. Thirdly, the Intestate Succession Act (Cap 146, 1985 Rev Ed) only entitled legitimate children to make a claim against their natural parent's estate. To permit an illegitimate child to claim maintenance under the IFPA would indirectly allow the child to claim for a share in the intestate parent's estate, contrary to the provisions of the Intestate Succession Act.

15.65 In so deciding, the Court of Appeal urged the Legislature to seriously consider making the necessary reforms to enable an illegitimate child to claim for maintenance under the Inheritance (Family Provision) Act (Cap 138, 1985 Rev Ed). The court also concluded that it was unfair to punish innocent children by denying them maintenance which a legitimate child would receive upon his father's death.

Misrepresentation on the part of a party to proceedings

15.66 In *XZ v YA* [2009] SGHC 51, the High Court reduced the maintenance payable by the husband on the basis that the wife had misled him that she was not working. In fact, she had converted her full-time employment to part-time.

15.67 This case shows the damaging effect a misrepresentation on a court document could have on a party's credibility. Here, the dispute centred on whether the consent order was premised on the wife's representation to her husband that she would stop work for the children. In the complaint where the wife filed for maintenance, she indicated "unemployed" in her sworn application. The High Court accepted that the husband never saw the complaint and that it did not affect his decision. The key issue was that of *credibility*. In fact, the wife never left the employment of her employer, but did convert to part-time employment with the same employer. The irresistible inference was that the wife, having earlier informed the husband that she had either quit her job or would quit her job in order to obtain a larger amount in maintenance, had to maintain that façade by her statement in the complaint. The High Court concluded that the document supported the husband's contention that the wife gave him the impression that she had stopped working or was about to stop working.

15.68 Similarly, in *AAE v AAF* [2009] 3 SLR(R) 827, the wife deliberately misled the District Court into believing she was a housewife with no income. This "tarnished her credibility" in respect of her request for maintenance in the High Court. Prior to the ancillary hearing, the original maintenance order of $800 *per* month was varied by the District Court to $1 *per* month, on the basis of her earlier deception. The High Court held that the evidence indicated that she was financially independent, and made no order for maintenance.

Relevant and irrelevant considerations

15.69 *XZ v YA* [2009] SGHC 51 concerned sums spent on children aside from the court order. The High Court pointed out that the non-custodial parent's expenses on his children, during weekend access and for other reasons, should be taken into account in determining the appropriate sum he could afford as maintenance. It was not correct to label these payments, as the District Court had, as "voluntary". The question of the appropriate quantum to be allowed for this was a separate issue to be scrutinised and determined. This pragmatic approach to the sums that a non-custodial parent necessarily and reasonably spends on his child during periods of access was explained thus (at [22]):

> The appellant was just reminding the respondent, and in turn the court, that such expenses should not be disregarded when determining the appropriate sum he could afford as maintenance for the upkeep of the respondent and his children. Putting it specifically, he was saying he had to feed and support the two children for at least eight days in a month and such expenses must be given due recognition in the overall calculation. His contention was that, in determining the appropriate maintenance to be paid to the respondent, what must not be forgotten

> was that he needed to spend on the children too, including feeding them, during the periods of access, in the same sense that the respondent needed to spend on herself and the children during the period when they were under her care and control. It would not be correct to refer to such expenses which needed to be spent by the appellant on the children as 'voluntary'. The question of the appropriate quantum to be allowed for this would be a separate issue and where the quantum was in dispute, it would have to be scrutinised and determined.

Option of a lump sum

15.70 *Smith Brian Walker v Foo Moo Chye Julie* [2009] SGHC 247 gave courts sensible guidance in situations where the court may be unaware of whether the husband is able to afford a lump sum. In this case, the husband of 57 years was ordered to pay maintenance of $2,000 a month over a multiplier of five years, to a 47-year old wife whose earning capacity had been affected by cancer. The High Court gave the husband the option of paying the maintenance in a lump sum, at a 20% discount for immediate payment. He was given 21 days to elect his option, with a three-month period to raise the lump sum if he chose that option.

Family procedure

Caveatable interests

15.71 *The Singapore Academy of Law Annual Review of Singapore Cases 2004* detailed the varied High Court approaches as to whether a spouse's interest was caveatable ((2004) 5 SAL Ann Rev 281 at 295–296, 13.36–13.37). To summarise, in *Lim Kaling v Hangchi Valerie* [2003] 2 SLR(R) 377, it was held that until a court exercised its powers under s 112 of the Women's Charter (Cap 353, 1997 Rev Ed) to order a division of assets, a spouse who had made no financial contribution to the purchase price of the property would only have an inchoate expectation. In that case, it was held that an injunction would be necessary to give the defendant a caveatable interest. In *Eu Yee Kai Alexander Junior v Hanson Ingrid Christina* [2004] 4 SLR(R) 586, the High Court held that an interim order of the Family Court that the husband should not dispose of the property pending decision on ancillary matters was sufficient.

15.72 In *Tan Huat Soon v Lee Mee Leng* [2009] SGHC 199, the plaintiff was the sole registered owner of the property purchased in 1997. The plaintiff contended that the parties had separated in 1994. In 2006, the defendant obtained a decree for judicial separation and lodged a caveat against the property. The parties divorced in July 2009. The High Court

held that once a decree *nisi* has been obtained, legitimate claims may be made upon the property. The spouse who is not a registered co-owner would by virtue of her entitlement to claim a share, have an equitable interest in the property.

15.73 While the High Court in *Tan Huat Soon v Lee Mee Leng* [2009] SGHC 199 ("*Tan Huat Soon*") expressed agreement with *Eu Yee Kai Alexander Junior v Hanson Ingrid Christina* [2004] 4 SLR(R) 586 ("*Eu Yee Kai Alexander Junior*"), it, in fact, went further than the latter case. In *Eu Yee Kai Alexander Junior*, there was an interim order that the husband should not dispose of the property pending resolution of ancillary matters. The existence of the interim order was an important reason for the court's decision in *Eu Yee Kai Alexander Junior* because any action on the part of the husband to sell the property would amount to a breach of a court order. In that sense, the interim order was similar to an injunction, which is specified in s 115(3)(*b*) of the Land Titles Act (Cap 157, 1994 Rev Ed) and accepted by the court in *Lim Kaling v Hangchi Valerie* [2003] 2 SLR(R) 377 as a situation where a caveat could be maintained. In *Tan Huat Soon*, there was no similar order.

Concurrent proceedings to circumvent ancillary proceedings

15.74 In *Ho Kiang Fah v Toh Buan* [2009] 3 SLR(R) 398, proceedings were struck out as the High Court held that they had been brought for a collateral purpose of circumventing ancillary proceedings in the Family Court.

15.75 In the divorce case between the parties, interim judgment had already been obtained. Both parties had filed their affidavits of assets and means for the purposes of dealing with ancillary matters in the proceedings. Subsequently, the plaintiff filed proceedings in the High Court relating to a property ("the property") which had been registered in the names of both parties as joint tenants during their marriage. The plaintiff then followed on with a summary judgment application.

15.76 Counsel for the defendant argued that the property (along with three other matrimonial assets) were subject to division in a just and equitable manner under s 112 of the Women's Charter (Cap 353, 1997 Rev Ed); as such, the parties' respective direct and indirect contributions to the property would be important.

15.77 Two previous High Court cases where, when divorce proceedings were pending, the courts declined to deal with assets which would likely come under the ancillary jurisdiction were mentioned with approval: *Quek Jun-Ling Patricia v Chang Koon Yuen* [1996] SGHC 52 and *Yap Hwee May Kathryn v Gek Thien Ee Martin* [2007] 3 SLR(R) 663.

15.78 The High Court agreed with counsel for the defendant that by the proceedings, the plaintiff sought to isolate the property and insulate it from other matrimonial assets subject to the just and equitable regime of s 112 of the Women's Charter (Cap 353, 1997 Rev Ed). While the plaintiff had mounted arguments on debt based on overpayment of a loan, there was no realistic debt against the defendant and no cause of action in contract was pleaded in relation to the property. Section 59 of the Women's Charter, which the plaintiff sought to use in support, was irrelevant as the parties' proprietary interest as joint tenants were not in dispute. The timing of the suit and service thereof affirmed that it was brought solely for the collateral purpose of unilaterally removing the property from the ancillary proceedings. The plaintiff's sole purpose in bringing the proceedings was to subject the declaration of each party's share in the ownership of the property to the principles of property law, and to persuade the court to embark on an exercise which was properly a matter for judicial determination by the Family Court. In the result, the proceedings were struck out as "a blatant abuse of the judicial proceedings" (*Ho Kiang Fah v Toh Buan* [2009] 3 SLR(R) 398 at [23]).