REPORT OF THE LAW REFORM COMMITTEE

ON

ANCILLARY ORDERS AFTER FOREIGN DIVORCE OR ANNULMENT

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

See executive summary below.

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I. Executive Summary

1 A matrimonial order of divorce, nullity or legal separation is often followed by ancillary orders relating to division of matrimonial property, custody of children and maintenance. Under Singapore law, many of the court's powers in respect of these types of orders depend on the court having jurisdiction to pronounce on the status of the marriage. If an order made by a foreign court is recognised to have annulled or dissolved the marriage, then it is not possible for the Singapore court to assume jurisdiction in respect of the marriage; there is no marriage to speak of anymore. The legal consequence is that the court will lack certain crucial powers to grant ancillary orders. The size of the problem caused by this lacuna in the law depends on a number of factors.

2 Firstly, the wider the rules of Singapore's private international law on the recognition of foreign matrimonial decrees, the larger will be the scope of the problem because such recognition effectively ousts the court's powers to grant ancillary relief. The trend in Singapore law has been an expansion of the grounds of recognition, broadly in line with international developments.

3 Secondly, the more restricted the law is on the enforceability of foreign ancillary orders, the more pressing will be the need to close the gap in the Singapore court's ancillary matrimonial jurisdiction. Generally, the law does not recognise foreign custody orders because the court's own view on the welfare of the child is of paramount importance. Foreign maintenance orders have limited enforcement channels within Singapore. Foreign orders affecting property generally have no effect on rights in property situated outside the jurisdiction of the court granting the order; the *lex situs* rule is an ancient and established one. Except in the case of foreign maintenance orders (which is the subject of another paper), there are generally good reasons why these rules are restrictive. In any event, reform in these areas will only partially address the problem, as the foreign court may have made no orders at all.

4 Thirdly, common law courts apply the doctrine of natural forum, under which it may decline to exercise jurisdiction if there is another court of competent jurisdiction which is in a better position to deal with the dispute in the interests of the parties and the ends of justice. This doctrine applies to the matrimonial jurisdiction too, and this is also broadly consistent with developments in other commonwealth countries. The result of declining jurisdiction in matrimonial proceedings is that a foreign court will dissolve the marriage, depriving the Singapore court of powers to grant ancillary relief.

5 Fourthly, the problem will be minimised to the extent that there are powers which are not dependent on the court having power to pronounce on the marriage in question. Thus, the problem is most acute in respect of financial relief in the form of division of matrimonial property and maintenance after the dissolution of a marriage, where there is little or no power outside this ancillary jurisdiction. On the other hand, the court has fairly wide independent powers to deal with the custody of children.

6 Practically, the seriousness of the problems caused by the lacuna depends on the social pattern of cross-border marriages and divorces actually taking place affecting people who will need access to the Singapore courts. It may be noted that the number of marriages between Singaporeans and foreigners has been rising. A Singaporean may marry a foreigner in a foreign country and they then live in Singapore in a matrimonial home registered in the sole name of one of the parties. If one spouse obtains a divorce from a foreign court which makes no financial provisions, and that decree is recognised under Singapore law, the other spouse will have no financial remedies in Singapore, whether in terms of division of matrimonial assets or maintenance claims.

7 It is proposed that the Women's Charter be amended so that the Singapore court will have the power to order financial relief after a foreign divorce or annulment of marriage or legal separation. The powers will be co-extensive with and exercised on the same discretionary grounds as if the court had original matrimonial jurisdiction. All circumstances will be taken into consideration, including the foreign dimensions of the case and the existence and effectiveness of orders (if any) made by the relevant foreign court. There is a risk of abuse of the expanded powers, so certain safeguards are also recommended. Thus, the applicant must first seek permission to apply for this relief, and permission may be denied if the parties do not have sufficient connections with Singapore, or if the applicant has not demonstrated substantial grounds for relief, or Singapore is not the appropriate venue to provide such relief.

II. Terms of Reference

8 When parties have obtained, or are in the course of obtaining, a matrimonial decree from the Singapore court, the court has the power to grant important ancillary orders to deal with the aftermath of the break-up. The most important of these are orders for the maintenance of the wife and children, the custody of children of the marriage and the division of matrimonial assets. However, if the parties have already obtained a matrimonial decree from abroad and that decree is entitled to recognition under the private international law of Singapore, then such powers, being ancillary to the matrimonial jurisdiction of the Singapore court which can no longer be invoked, do not exist under the current legislative framework. Put simply, if a foreign court has validly pronounced that a marriage is a nullity or has terminated, there is no marriage for the Singapore court to deal with, and therefore the court has no power to grant any order that is ancillary to its matrimonial jurisdiction. The sub-committee is asked to consider whether, and if so, how, the jurisdiction of the court should be extended to cover these situations.

9 The problem under consideration is exemplified in the case of *Ng Sui Wah Novina v Chandra Michael Setiawan*.[1] W, a Hong Kong citizen, married H, an Indonesian citizen, in Indonesia in 1978, and lived there until 1984 when W left with

1 *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR 839 ("*Setiawan*").

their child for Hong Kong. W subsequently left for Canada in 1986 and became a citizen there. H had commenced divorce proceedings in Jakarta in 1986, and W was not present when the court granted a divorce in 1987. In the decree, custody of the child was awarded to W and H had agreed to pay monthly maintenance for the child. In 1991, W commenced proceedings in Singapore against H (who was then a permanent resident of Singapore), asking for maintenance for herself and the child. The High Court dismissed W's claim, on the basis that the power to order maintenance for a former wife or a child of a dissolved marriage was ancillary to its matrimonial jurisdiction, which could not be invoked in this case because the Indonesian divorce decree was recognised in Singapore.

10 Whatever the merits of the case itself,[2] this decision demonstrates that irrespective of the merits of the case, the Singapore court has no power to grant ancillary relief once a foreign matrimonial decree is recognised. Although they did not arise in that case, it is possible that the court in such circumstances may also be requested to make custody orders or orders in respect of the division of matrimonial assets. Such cross-border problems are likely to become more common, with the increasing mobility of the population in Asia and elsewhere in the world, and especially as the external wing of the Singapore economy grows and the population becomes more cosmopolitan and widely-travelled, and as Singapore welcomes more and more foreigners. The number of cross-border marriages in Singapore has been on the rise.[3]

11 In *Ho Ah Chye v Hsinchieh Hsu Irene*,[4] H, a Singapore citizen and domiciliary, had married W, then a Taiwanese national, in 1980 in New Jersey, USA, where H had been a student. The marriage was subsequently registered in Singapore, and they made their matrimonial home in Singapore. It is not clear how long the couple lived in Singapore after that, but by 1987, W was living in California and had obtained a divorce decree there which was recognised under Singapore private international law. The Californian proceedings were uncontested, and the parties agreed before the Californian court that they held no matrimonial property in community, which was of course technically true. H then applied to the Singapore court for the division of the matrimonial home (held in their joint names) in Singapore. This case is somewhat problematic because the court assumed that it had the jurisdiction to do so in spite the recognition of the foreign divorce (a point addressed at paragraphs 15–16), but it is thought that there is a lacuna in the law if the Singapore court is unable to act in these circumstances. Given the increasing number of Singapore residents marrying foreign spouses, there is an increasing risk of social problems arising from foreign spouses subsequently obtaining foreign divorce decrees leaving the Singapore spouse, who may not have the resources to contest foreign proceedings, with no effective remedy under

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2 See para 40.

3 See, *eg*, "French dad? Local mum? You're right at home in S'pore: If you have both a Singaporean dad and a Singaporean mum, you may soon be in the minority in Singapore", *New Paper* (24 August 2008), where it was reported that only 57% of babies born in Singapore today have both parents of Singapore nationality.

4 *Ho Ah Chye v Hsinchieh Hsu Iren*e [1994] 2 SLR 316.

Singapore law.[5] As another example, a male Singapore citizen may marry a foreign female in a foreign country, and the female then becomes a citizen and they both live in Singapore in a home owned in the name of the husband. Years later, the husband obtains a divorce from a foreign country (which may or may not be the same foreign country) and that divorce is recognised under Singapore law. There being no marriage for the Singapore court to assume jurisdiction over, the divorced wife will have no remedies in Singapore.

12 In this report, the sub-committee first outlines the existing legal framework and the gaps in the law before examining the policy question whether the gap should be filled, and if so, the options for reform. The recommendations are contained in the final part of this report.

III. The Existing Law

A. Ancillary orders

13 The Women's Charter provides for various ancillary powers to deal with the aftermath of the breakdown of a marriage. The court may order a man to pay maintenance to his wife or ex-wife during the course of matrimonial proceedings or when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity.[6] The court may also order a parent to pay maintenance for his or her child in the course of pending matrimonial proceedings or when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity.[7] The court may make a custody order in respect of a child at any stage of matrimonial proceedings for divorce, judicial separation or nullity, or after such a final judgment has been given.[8] The court

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5 One important motivation for the English law reform discussed below was "the presence, in the United Kingdom, of a large number of people who have a sufficient connection with a foreign country, such as Pakistan, probably by citizenship and domicile, to enable a man to take proceedings for divorce in that country, although his wife and children are, and may for many years have been, resident in England." Sir Ralph Gibson, "The Recent Proposals of the Law Commission for Reform in Family Law" (1983) Law Lectures for Practitioners 121 at 124–125, <http://sunzi1.lib.hku.hk/hkjo/view/14/1400054.pdf> (accessed 8 March 2009).

6 Section 113 of the Women's Charter (Cap 353, 1997 Rev Ed) states:

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

7 "During the pendency of any matrimonial proceedings or when granting or at any time subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, the court may order a parent to pay maintenance for the benefit of his child in such manner as the court thinks fit": Women's Charter (Cap 353, 1997 Rev Ed) s 127(1).

8 "In any proceedings for divorce, judicial separation or nullity of marriage, the court may, at any stage of the proceedings, or after a final judgment has been granted, make such orders as it thinks fit with respect to the welfare of any child and may vary or discharge the said orders, and may, if it thinks fit, direct that

(*cont'd on the next page*)

may also order the division of matrimonial property when or after granting a judgment of divorce, judicial separation or nullity.[9]

14 These powers all depend on the invocation of the matrimonial jurisdiction of the Singapore court.[10] As a preliminary point, the issue of ancillary relief is a matter governed by Singapore law, as statutory power in Singapore legislation is being invoked.[11] As illustrated in the *Setiawan* case, such powers cannot be invoked where there is a foreign divorce or nullity decree preventing the invocation of the matrimonial jurisdiction.

B. Bare declarations

15 These ancillary powers of the court also do not apply in the case of an application for a bare declaration that the marriage is a nullity or has been dissolved. It is therefore not open to a party to rely on the foreign decree in order to seek a declaration from the Singapore court to invoke the ancillary powers. However, in *Ho Ah Chye v Hsinchieh Hsu Irene*,[12] the High Court appeared to have proceeded on the assumption that it had jurisdiction to decide on the division of matrimonial property upon granting a declaration of marital status following the recognition of a foreign divorce decree. The jurisdictional point was, however, not argued.

16 In the domestic context, there is no reason to extend the ancillary powers to cases of bare declarations, as petitions for nullity should be the normal route, and bare

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proceedings be commenced for placing the child under the protection of the court": Women's Charter (Cap 353, 1997 Rev Ed) s 124.

9 "The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable": Women's Charter (Cap 353, 1997 Rev Ed) s 112(1).

10 Section 93 of the Women's Charter (Cap 353, 1997 Rev Ed) states:

> (1) Subject to subsection (2), the court shall have jurisdiction to hear proceedings for divorce, presumption of death and divorce, judicial separation or nullity of marriage only if either of the parties to the marriage is—
>
> (*a*) domiciled in Singapore at the time of the commencement of the proceedings; or
>
> (*b*) habitually resident in Singapore for a period of 3 years immediately preceding the commencement of the proceedings.
>
> (2) In proceedings for nullity of marriage on the ground that the marriage is void or voidable, the court may, notwithstanding that the requirements in subsection (1) are not fulfilled, grant the relief sought where both parties to the marriage reside in Singapore at the time of the commencement of the proceedings.
>
> (3) For the purposes of proceedings for nullity of marriage, "marriage" includes a marriage which is not valid by virtue of any of the provisions of this Act.

11 *TQ v TR* [2009] 2 SLR 961 at [42].

12 *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 2 SLR 316 at [40].

declarations should be allowed only in very exceptional situations, as where the party seeking the declaration is not a party to the marriage.[13] Bare declarations therefore do not present a practical problem for domestic cases. The problem whether parties are to be allowed to seek the assistance of the court after a foreign matrimonial judgment should be confronted outright and not resolved through this route because of the side-effect on domestic cases.

IV. Extent of the Problem

17 The extent that the ancillary nature of the abovementioned powers presents a practical problem in Singapore is affected by four other legal factors: firstly, the extent to which foreign matrimonial decrees will be recognised in Singapore; secondly, the extent to which foreign orders relating to maintenance, custody or division of property (whether in their nature ancillary to a foreign decree of status or not) can be recognised or enforced in Singapore; thirdly, the extent to which non-ancillary or independent powers of the Singapore court can be invoked in such situations; and fourthly, the extent to which matrimonial and related disputes involving foreign elements are stayed in favour of litigation in foreign jurisdictions.

A. Recognition of foreign decrees on matrimonial status

18 The size of the lacuna in Singapore law is defined by the extent to which the matrimonial jurisdiction of the Singapore court is ousted by the recognition of a foreign status decree. The legal trend in Singapore shows the facilitation of greater recognition of foreign decrees.

19 The question of the recognition of foreign matrimonial decrees in Singapore is today governed entirely by common law principles.[14] A foreign matrimonial decree will be recognised if it originates from a court of competent jurisdiction and is not otherwise impeached for fraud, breach of natural justice or contravention of the fundamental public policy of the forum. Under Singapore law, the foreign court will be regarded as jurisdictionally competent if it is the court of the domicile of either party to the marriage,[15] or if the foreign court had assumed jurisdiction on facts that if they had been transposed to Singapore the Singapore court would have assumed matrimonial

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13 See, eg, *Racaza Juliet S v Caton David Andrew* [2004] SGDC 275 at [38], citing *Moh Ah Kiu v Central Provident Fund Board* [1992] 2 SLR 569.

14 Section 108 of the Women's Charter (Cap 353, 1997 Rev Ed) preserves the application of private international law to questions of the validity of a marriage, which foreign divorce and nullity decrees clearly affect: see *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 2 SLR 316. After 1996, following the Women's Charter (Amendment) Act 1996 (Act 30 of 1996) repealing the ambiguous s 85 of the Women's Charter, which required the application of English law in specified circumstances, the problem whether English legislation expanding the common law grounds of recognition could be applied in Singapore no longer vexed Singapore law.

15 *Asha Maudgil v Suresh Kumar Gosain* [1994] 2 SLR 709.

jurisdiction (reciprocity) or if there is a real and substantial connection between the foreign country and either party to the marriage.[16] These grounds are not necessarily exhaustive, as the courts have not been asked to consider whether residence of either party, where it does not also fall within the reciprocity or real and substantial connection grounds, would be a sufficient jurisdictional basis.[17] Even without further expansion, the established grounds of recognition are already wide.

20 The defences to recognition, on the other hand, will remain narrow as long as the Singapore court continues to take the approach that it will be very reluctant to criticise the standards of justice applied by foreign courts,[18] and this trend appears very likely to stay if recent authorities outside the family law context on the amount of respect to be given to pronouncements by foreign courts are any guide.[19]

21 While this means that the courts in Singapore are taking a laudable broad-minded approach towards the recognition of foreign matrimonial pronouncements and thereby avoiding as much as possible the problem of limping marriages, one side-effect is that the scope for invoking the court's own matrimonial jurisdiction is thereby restricted, and with it the powers of the court ancillary to such jurisdiction. As a matter of policy, however, it is not desirable to narrow the grounds of jurisdictional competence of the foreign court or to expand the scope of defences in order to allow for greater scope for the use of the ancillary powers of the local matrimonial jurisdiction; it is simply the wrong tool.

B. Recognition and enforcement of foreign orders

22 The lack of powers of the court in its ancillary matrimonial jurisdiction will not be so serious if foreign orders can be recognised or enforced in the forum. This will alleviate the gap in Singapore law to the extent that the foreign court has indeed made such orders, and such orders have legal effect in Singapore. However, there are serious restrictions on the legal effect of such orders under Singapore law.

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16 *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 2 SLR 316.

17 For example, where only the petitioner was resident in the foreign country, and for only three months preceding the commencement of the foreign proceedings (this will fall outside s 93(1) of the Women's Charter in the case of divorce proceedings and s 93(2) in the case of nullity proceedings).

18 See *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR 839 at 846–847, [27]–[28].

19 *Liao Eng Kiat v Burswood Nominess Ltd* [2004] 4 SLR 690 (CA); *Wu Shun Foods Co Ltd v Ken Ken Food Manufacturing Pte Ltd* [2002] 4 SLR 877. It is widely acknowledged, however, that the content of the forum's fundamental public policy is such that it will probably be found applicable in more family law cases than in commercial law cases.

(1) Maintenance

23 In a separate report, the sub-committee has dealt with the difficulties relating to the reciprocal enforcement of foreign maintenance orders in Singapore. It is not so easy to enforce a foreign maintenance order in Singapore if it is not from a gazetted country.

24 It is not clear whether the foreign maintenance order, at least where the foreign court had international *in personam* jurisdiction over the defendant according to the private international law of Singapore, can create an issue estoppel that the defendant owes the plaintiff an obligation of maintenance, which can then be sued upon like any other obligation in the Singapore court. Whether this is possible depends on whether the foreign maintenance order was giving effect to an antecedent substantive right to maintenance, or was creating a relief. An estoppel is only possible in the former case; no estoppel can arise in respect of the judicial relief of the foreign court. Even so, suing on the obligation in the forum will challenge the limits of characterisation in private international law, for there is practically no corresponding cause of action in domestic Singapore law: almost all maintenance claims are a matter of judicial relief only,[20] the only substantive maintenance obligation (parents' duty to maintain a child) is purely defined by statute and governed by Singapore law.[21] Further difficulties arise even if the characterisation hurdle is cleared. If the claim is governed by Singapore law, only the child is protected. If the claim is governed by foreign law, then it can run into the difficulty that a claim that requires considerations of factors which are peculiarly within the domain or competence of a foreign tribunal may not be exigible in the forum.[22]

(2) Custody

25 There is some uncertainty surrounding the recognition or enforcement of foreign custody orders in Singapore law. The traditional approach in the common law is that the principle of the paramountcy of the welfare of the child is a mandatory principle in the private international law sense, and that therefore foreign custody orders will not be regarded as binding in the forum, although due respect will be given to the foreign order. However, the subordinate court in Singapore appears to have suggested that a foreign custody order is capable of having binding effect in Singapore if it is from the country of the habitual residence of the child.[23] While this case may be read as giving legal effect to a foreign custody order, what the court actually did was, in the course of applying Singapore law under its ancillary power to deal with custody, to say that the paramountcy principle of the forum required that the decision on custody by the court of the habitual residence of the child should generally be followed unless there were exceptional circumstances.[24] Whether as a matter of principle, the

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20 See paras 29 and 31. The same for the maintenance claims under the ancillary matrimonial jurisdiction: see para 11.

21 See para 30.

22 *Phrantzes v Argenti* [1960] 2 QB 19.

23 *AB v AC* [2004] SGDC 6.

24 *AB v AC* [2004] SGDC 6 at [21].

paramountcy principle can be so constrained is a matter of doubt.[25] In any event, a foreign custody order even from habitual residence of the child will not be directly enforceable, and requires the invocation of either the (ancillary) jurisdiction under the Women's Charter – which will not be possible if there is no longer a marriage for the Singapore court to deal with – or the independent jurisdiction under the Guardianship of Infants Act which requires a sufficient jurisdictional connection between the child and Singapore.[26]

(3) Division of assets

26 The legal effect in the forum of a foreign order as to the division of matrimonial assets depends on the nature of the order itself. Insofar as it is an order *in rem* declaring title to property (or the sale of property and title to proceeds), the judicial order will be recognised as a judgment *in rem* if the property, whether movable or immovable, lies within the territorial jurisdiction of the foreign court at the time of the commencement of the proceedings. This is effectively an application of the *lex situs* principle. In so far as the order compels a party to do a certain act in respect of property, whether movable or immovable and wherever situate, it is an order *in personam*, and the rules for the recognition and enforcement of *in personam* orders apply. Under the existing common law, only money judgments are enforceable.[27] Thus, a foreign order dividing up property situated in the forum will not be enforceable in the forum.[28] Recourse to the Singapore court after a foreign matrimonial judgment is most likely to be in respect of assets in Singapore, but these are cases where the foreign orders are least likely to have any legal effect in Singapore.[29]

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25 In *Re J (a child)* [2005] 3 WLR 14, [2005] UKHL 14, it was held that the English courts should not extend the principles of the Hague Convention on Child Abduction to countries beyond the Convention. Outside of the Convention, the common law paramountcy principle requires that each case should be examined on its own merits.

26 See para 34. In *AB v AC* [2004] SGDC 6, the child was a citizen of Singapore.

27 Contrast, however, the law of Canada: *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612; 2006 SCC 52.

28 Especially for immovable property in the forum: *Duke v Andler* [1932] SCR 734. Community matrimonial property regimes call for separate considerations which do not arise here. See, *eg*, *Murakami Takako v Wiryadi Louise Maria* [2007] 1 SLR 1119 and [2007] 4 SLR 565 (CA) at [45]. *Murakami Takako v Wiryadi Louise Maria* is itself an unusual case as it dealt with an order from the court of the country which law was held to govern the issue of matrimonial property; in so far as it suggests any broader proposition as to the *enforcement* of foreign *in personam* orders to transfer property, it must be understood from in the context of (a) the concession by counsel of the enforceability of such orders; (b) the application of the law governing matrimonial assets; and (c) the interlocutory nature of the decision in allowing certain amendments to the pleadings in the case. Similarly, the observation in *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR 508 (CA) at [36] that an Indonesian judgment ordering the transfer of property in Australia can be enforceable in Australia (which applies similar common law conflict of laws rules as Singapore) is premised on the basis that the Australian court recognises Indonesian law to govern the issue of matrimonial property in respect of the property in Australia (see *Murakami v Wiryadi* [2006] NSWSC 1354 at [48]–[49]).

29 See, however, text to n 52. The *in personam* rights to property in Singapore pronounced by the foreign court may, however, be *recognised* by the Singapore court if the foreign court had international jurisdiction over the party sought to be bound by the right pronounced under the *in personam* order: *Pattni v Ali* [2007] 2 WLR 102 (PC, Isle of Man) at [27]. It is not clear, however, whether this international jurisdiction is established by the rules for *in personam* judgments generally (*ie*, presence, residence or

(*cont'd on the next page*)

27 It is possible for the foreign judgment to create an *in personam* estoppel with respect to an antecedent substantive obligation to transfer property. However, division of matrimonial assets almost invariably involves the creative jurisdiction of the court in the transfer of title.

C. Independent powers

28 If the ancillary powers of the courts cannot be resorted to, then it may still be possible for the party to invoke such powers of the court that are not ancillary to the matrimonial jurisdiction. To the extent that this can be done, the lacuna in Singapore law becomes less serious a practical problem. However, such independent powers of the court are not as extensive as the powers found in the court's matrimonial jurisdiction.

(1) Maintenance of wife

29 Under the Women's Charter, the court may order a husband to provide maintenance for his wife upon an application by the wife.[30] This appears to be a matter of judicial relief so only the law of the forum is applicable. The jurisdictional scope is unclear. In any event, the provision is confined to an application by a "married woman", and the woman would no longer have that status upon the recognition of a foreign decree of nullity or divorce.[31] This provision will therefore not be of assistance to an ex-wife in Singapore. However, if the woman had obtained a maintenance order from the Singapore court prior to the grant of the final foreign decree, the order is probably still valid for the order does not necessarily lapse upon change of marital status,[32] at least until remarriage.[33]

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submission), or that it is merely parasitic to the main matrimonial jurisdiction of the foreign court to which the division order was ancillary. See *Murakami Takako v Wiryadi Louse Maria* [2007] 4 SLR 565 at [46], but it is not clear what the basis of the international jurisdiction was. It is also not clear whether the foreign obligation to transfer property recognised under the conflict of laws rules of the forum causes beneficial title to shift in respect of property in the forum (*ie*, the *lex situs*); see n 75.

30 "Any married woman whose husband neglects or refuses to provide her reasonable maintenance may apply to a District Court or a Magistrate's Court and that Court may, on due proof thereof, order the husband to pay a monthly allowance or a lump sum for her maintenance": Women's Charter (Cap 353, 1997 Rev Ed) s 69(1).

31 This was the case in *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR 839.

32 *Wood v Wood* [1957] P 254 (CA). The ex-wife may further apply for variation as such applications are not linked to her status at the time of such application (s 72).

33 Women's Charter (Cap 353, 1997 Rev Ed) s 117.

(2) Maintenance of child

30 Under the Women's Charter, the court may order a parent to provide reasonable maintenance for his or her child.[34] Although the child's entitlement to maintenance in this provision is a substantive right conferred by statute,[35] because it is a right specifically created by statute without any common law antecedents, whether there is choice of law in respect of such a right is a matter of statutory construction, and the current wording appears to leave no room for the application of any law but the law of the forum.[36] The jurisdictional scope of this provision is unclear. On the face of it, the Act applies to all persons in, or domiciled in, Singapore.[37] It is not clear whether jurisdiction is to be tested with reference to the applicant, the respondent, or the child, or a combination thereof. On the face of it, transient presence of the petitioner[38] would satisfy the test of being "in" Singapore. Thus, on one interpretation, it was open to the ex-wife in a case like *Setiawan*, being in Singapore and having actual custody of the child,[39] to make an application against her ex-husband under this provision for the maintenance of the child, but this requires a broad interpretation, perhaps too broad, of the territorial scope of the statute. The territorial scope of the provision is very ambiguous, and an interpretation that is consistent with international comity may require a stronger jurisdictional link between the forum and the child.

31 Under the Guardianship of Infants Act, the court may, upon the application of either parent or a guardian appointed under the Act, order the payment towards maintenance of an infant.[40] This appears to be a matter of judicial relief so no choice of law is applicable. There is no visible clue as to its territorial scope within the statute, but it has been assumed that the statute tracks the common law inherent jurisdiction of the court as the ultimate guardian of all children falling under the protection of its sovereign.[41] This inherent jurisdiction is premised on the child being a national of the state, or being resident or present in the jurisdiction at the time of the commencement of the proceedings. The purpose of the statute is to look after the interests of the child as such, and so the jurisdiction connection is naturally focussed on the child. This

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34 "A District Court or a Magistrate's Court may, on due proof that a parent has neglected or refused to provide reasonable maintenance for his child who is unable to maintain himself, order that parent to pay a monthly allowance or a lump sum for the maintenance of that child": Women's Charter (Cap 353, 1997 Rev Ed) s 69(2).

35 Women's Charter (Cap 353, 1997 Rev Ed) s 68.

36 Women's Charter (Cap 353, 1997 Rev Ed) ss 68–69. Tan Yock Lin, *Conflicts Issues in Family and Succession Law* (Butterworths Asia, 1993) at p 298.

37 Women's Charter (Cap 353, 1997 Rev Ed) s 3(1).

38 The respondent was apparently resident in Singapore.

39 Women's Charter (Cap 353, 1997 Rev Ed) s 69(3)(*a*).

40 "The court may, upon the application of either parent or of any guardian appointed under this Act, make orders as it may think fit regarding the custody of such infant, the right of access thereto and the payment of any sum towards the maintenance of the infant and may alter, vary or discharge such order on the application of either parent or of any guardian appointed under this Act": Women's Charter (Cap 353, 1997 Rev Ed) s 5.

41 *Re Sinyak Rayoon* (1888) 4 Ky 329.

provision may not be available in a situation like the *Setiawan* case (where the child was not so connected to Singapore), where the main objective of the Singapore litigation was to deal with the aftermath of a marital break-up.

32 Maintenance may also be ordered against parents in favour of children under the Children and Young Persons Act,[42] but these are specific to situations where the child is being protected by the court, and do not apply to the situations under consideration in this paper.

33 The question whether it is possible to sue independently on a maintenance obligation as a cause of action subject to the conflict of laws has been discussed above.[43]

(3) Custody of child

34 Under the Guardianship of Infants Act, the court may, upon the application of either parent or a guardian appointed under the Act, make any order in respect the custody of an infant.[44] The same jurisdictional and choice of law considerations discussed above in relationship to maintenance under this Act[45] apply.

35 It should also be noted that for the purpose of maintenance and custody of children, the respective scope of protection under the ancillary matrimonial jurisdiction of the Women's Charter and under the Guardianship of Infants Act are not identical. While in the latter, only parents[46] and guardians have standing to make applications to the court,[47] the former extends its protection to children from a previous marriage, and also children who may turn out not to be the biological child of one of the parties to the marriage. Thus, even if the jurisdictional differences do not have much practical significance, a lacuna could still arise in situations where the issues involve step-children or possibly a non-biological parent.

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42 Children and Young Persons Act (Cap 38, 2001 Rev Ed) ss 49 and 84.

43 See para 24.

44 "The court may, upon the application of either parent or of any guardian appointed under this Act, make orders as it may think fit regarding the custody of such infant, the right of access thereto and the payment of any sum towards the maintenance of the infant and may alter, vary or discharge such order on the application of either parent or of any guardian appointed under this Act": Guardianship of Infants Act (Cap 122, 1985 Rev Ed) s 5.

45 See para 31.

46 The natural meaning would be a biological parent. However, s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) contains a legal presumption that a child born in wedlock is the child of the parties to the marriage unless it can be shown that the parties had no access to each other at the time of conception. On the other hand, DNA evidence had been accepted in matrimonial disputes to determine the biological parenthood of a child born in wedlock: *Re A (an infant)* [2002] 1 SLR 310. See Debbie Ong & Valerie Thean, "Family Law" (2002) 3 SAL Ann Rev 224 at 235–236, paras 13.23–13.24.

47 Guardianship of Infants Act (Cap 122, 1985 Rev Ed) s 5.

(4) Division of property

36 The Singapore court has no power to divide matrimonial assets apart from its power ancillary to the matrimonial jurisdiction. Although there is independent power to decide any question between husband and wife as to the title to or possession of property,[48] this power is declaratory only.[49] It provides a procedure for the court to pronounce on their existing property rights in accordance with the law (including choice of law where applicable), but does not allow the courts to alter property rights between the parties. Moreover, the procedure is limited to questions between "husband and wife" only, a relationship that is dissolved by the recognition of a foreign divorce or nullity decree.

D. Natural forum

37 The Singapore court applies the doctrine of natural forum in matrimonial cases. The court will stay matrimonial proceedings commenced in Singapore if there is a clearly more appropriate forum available elsewhere unless substantive justice will be denied by the stay of proceedings.[50] Matrimonial proceedings that are stayed in favour of foreign proceedings are only suspended, and therefore the Singapore court maintains its matrimonial jurisdiction theoretically, and the jurisdiction may be revived if the stay is lifted for any reason. However, that jurisdiction can no longer exist once a foreign status decree is obtained and is recognised in Singapore so that there is no longer a marriage for the Singapore court to deal with.

38 While it is commendable that the Singapore court respects international comity in this way in matrimonial proceedings, one side-effect of the application of the natural forum doctrine is to increase potentially the size of the problem in the gap in the ancillary powers of the Singapore courts. However, there is no good reason to sacrifice the natural forum doctrine merely for the sake of regaining the power to grant ancillary orders. There is tremendous force in the argument that the forum that is most appropriate to hear the matrimonial proceedings should indeed hear the case, and that generally such a forum should also hear all ancillary matters relating to the termination of the marriage as the court.[51] Any problem with the gap in the ancillary powers of the Singapore court is rightly a factor in the balance of convenience and justice, and its weight depends on the facts of individual cases. Although earlier cases may not have

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48 "In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to any Judge of the High Court, and the Judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit, or may direct the application to stand over, and any inquiry touching the matters in question to be made in such manner as he thinks fit": Guardianship of Infants Act (Cap 122, 1985 Rev Ed) s 59(1).

49 *PQR (mw) v STR* [1993] 1 SLR 574 at 576–577, [6]–[8].

50 See, *eg*, *Mala Shukla v Jayant Amritanand Shukla (Danialle An, co-respondent)* [2002] 3 SLR 295 and *Low Wing Hong Alvin v Kelso Sharon Leigh* [2001] 1 SLR 173.

51 *Low Wing Hong Alvin v Kelso Sharon Leigh* [2001] 1 SLR 173 at [20]–[21]; *C v D* [2002] SGHC 98 at [57].

been as clearly alerted to this issue relating to the gap in the ancillary powers of the Singapore court,[52] more modern authorities have been more sensitive to the restrictive effect of foreign orders in Singapore.[53]

39 The negative aspect of the natural forum doctrine is that the forum has no control over proceedings in foreign countries, short of indirect control through the use of the anti-suit injunction to restrain a party personally from continuing with foreign proceedings. This remains an exceptional remedy (in the absence of a valid and enforceable exclusive choice of forum court agreement)[54] in view of the indirect interference with the proceedings in foreign courts. The upshot is that one party can effectively emasculate the court of the forum of its powers to grant ancillary orders by taking proceedings in another jurisdiction to judgment.[55] This could turn into an unseemly race to be the first to grant the matrimonial judgment.[56]

V. Reform

A. Maintaining current law as an option

40 The main arguments to maintain the existing legal framework are the policies underlying the natural forum doctrine, finality of litigation, and abuse of process. These concerns can be observed in the *Setiawan* case. The court was not sympathetic to W, on the basis that W should have asked for her own maintenance in the Indonesian divorce proceedings, and enforced the Indonesian maintenance order (in favour of the child) in Indonesia itself. The attitude of the court demonstrates the downside of the court of forum granting ancillary relief after a foreign matrimonial decree. The court granting the matrimonial decree is in most cases best placed to make orders as to such ancillary matters, and to enforce such orders. The Singapore court should not allow itself to be used as a hub where parties can have a second bite at ancillary relief after obtaining their matrimonial decree elsewhere. Neither should the Singapore court be used as an appellate process against ancillary orders of foreign courts.

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52 See, *eg*, *Low Wing Hong Alvin v Kelso Sharon Leigh* [2001] 1 SLR 173 at [21] and *Marilyn June Shearer v Michael Howard Shearer* Divorce Petition 3348/1999 (5 July 2000) (unreported), both apparently assuming that a foreign court order dividing matrimonial assets can be given effect to under Singapore law. See Debbie Ong & Valerie Thean, "Family Law" (2000) 1 SAL Ann Rev 180 at 181–184.

53 *C v D* [2002] SGHC 98 at [61] confining the legal effect in Singapore to foreign orders for the payment of money.

54 Such agreements are rare in the matrimonial context, and may in any event not be enforced by the court. For example, agreements between spouses on the division of matrimonial property or maintenance or custody do not tie court's discretion.

55 Assuming that the decree from the foreign court will be recognised under the private international law of Singapore – the rules of recognition are, as noted at paras 18–19, very wide.

56 See *Torok v Torok* [1973] 1 WLR 1066.

B. Reasons for reform

41 It could be argued that, as a matter of principle, the recognition that the foreign decree has legally changed the status of the parties should put the parties in the same position as if the decree had been made by the court of the forum itself, and the parties should be entitled to the same social and economic protection of the state. However, this argument suffers from the ambiguity inherent in the word "recognition".[57] It could mean that the recognising forum acknowledges the change of personal status and nothing more, it could mean the recognising forum additionally accords the parties such legal rights as if the change had been effected by the court of the forum, or it could extend to the recognition of the legal rights of the parties accorded by the law under which the decree was granted.

42 On the other hand, as a matter of policy, there could be legitimate reasons for the Singapore court to provide ancillary relief after a foreign matrimonial decree. For example, one party may have adequate notice of the foreign divorce proceedings such that it would not be possible to invoke the natural justice defence against the recognition of the status decree, but proceedings for ancillary relief could have taken such a surprising turn that it may be unfair to leave the respondent at the mercy of those orders. If the matrimonial assets are substantially in Singapore and the foreign court has ordered little by way of maintenance[58] in favour of one party because it is ordering substantial matrimonial assets to be transferred to that party, then there may be a case for the Singapore court to act. If all parties have severed their ties with the foreign jurisdiction altogether, and are now residing and holding all assets in Singapore, the "natural forum" for ancillary relief (for example, the adjustment of maintenance or custody in view of change of circumstances) may have shifted to Singapore. If something drastic has occurred in the foreign jurisdiction (revolution, civil unrest, *etc*) rendering it practically impossible for the parties to return to the foreign court for fresh ancillary relief or adjustment of ancillary orders, then there may also be a case for intervention by the Singapore courts. Further, if one party, through no fault of his or her own, has rendered himself/herself unable to seek relief in the foreign court (for example, political persecution), then there may be a case for the Singapore court to act. Additionally, it may well be that all parties are agreeable to have ancillary matters heard in the court of the forum. Moreover, hardship could be caused if the foreign court granting the matrimonial decree has very limited powers to deal with ancillary relief.[59]

43 Finality of litigation is not as strong a policy consideration in the matrimonial context as it is in the commercial context. Indeed, it is generally recognised in the matrimonial context that continuing judicial intervention is a matter of course especially in view of changes of circumstances. Thus, any perception that the forum is

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57 See Willis L M Reese, "The Hague Conference on Private International Law: Draft Convention on the Recognition of Foreign Divorces and Legal Separations" (1965) 14 ICLQ 692 at 695–696.

58 Which may be enforceable in Singapore under the conditions discussed above.

59 See, *eg*, *Torok v Torok* [1973] 1 WLR 1066 (foreign court could not deal with foreign immovable matrimonial property (in the forum) and rarely provided for maintenance for the wife).

acting as an appellate court over foreign proceedings is an exaggerated one, given that in the matrimonial context, finality needs to be weighed against the justice of the case.

44 Abuse of process, on the other hand, is a real danger that must be guarded against if reform is thought necessary. If the foreign court had denied ancillary relief or had crafted ancillary relief in a certain way, the reasons should be investigated. The foreign decree may also create an issue estoppel in respect of the underlying facts of a contested decree. A guiding principle could be that that the foreign decree should generally be accorded the same respect as a decree of a local court,[60] and an application for ancillary relief should be treated on the same basis as if the original decree (and its ancillary orders or lack of such orders) had been granted by the local court.

45 There is a further policy consideration whether the Singapore forum should intervene at the risk of being regarded as an "international busybody",[61] or leave it to the original foreign court to deal with all the problems arising from its own decree; if the foreign court is powerless to act effectively, then so be it.[62] However, the hands-off attitude of the Singapore courts in commercial cases should not be a reliable guide for the matrimonial context. In the former situations, litigation tends to be a one-off affair, the losses entirely pecuniary, and commercial entities involved in cross-border transactions are generally better able to take care of their economic interests. On the other hand, in matrimonial cases, the effects of a matrimonial decree can be long-lasting and non-pecuniary as well as pecuniary, and may have deleterious effects on the substratum of Singapore society if one or more of the parties are connected to Singapore. The case for judicial intervention in this context is much stronger. Any reform in this area should, however, take into account the concerns expressed above regarding the appropriateness of the forum for granting the relief, and guarding against the abuse of process.

46 English judges had recognised the need for power to deal with ancillary matters after a foreign matrimonial decree,[63] and had referred to the lacuna as a "dangerous gap in the existing legislation",[64] a gap which has since been plugged in the law of the

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60 Unless there are exceptional reasons, *eg*, breach of natural justice or contravention of public policy in respect of a specific ancillary order.

61 See the analogous concern of the Singapore court in the non-matrimonial context in *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206 at [12].

62 See, *eg*, the analogous attitude of the English court in the non-matrimonial context: *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (forum will not grant anti-suit injunction in aid of litigation in natural forum; it is up to the natural forum to deal with such issues). In Singapore, see *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206 (the Singapore court will leave it to the contractually chosen forum to protect its own proceedings). See also *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 (CA) (suggesting that the Singapore court's asset-preservation orders may be confined to cases where the substantive cause of action will be litigated in the forum; so if the litigation is proceeding in the foreign natural forum for the main dispute, it is up to that court to deal with – or not – the matter).

63 *Moore v Bull* [1891] P 279 at 281–282.

64 *Torok v Torok* [1973] 1 WLR 1066 at 1067.

United Kingdom.[65] There is also international recognition that the question of ancillary relief presents a problem in the cross-border effects of matrimonial decrees which needs to be addressed.[66] It was partly because of the existence of conventions dealing with such matters, as well as the fear of introducing complications which might prejudice consensus, that the Hague Convention on the Recognition of Divorces and Legal Separations[67] was not extended to ancillary orders.[68]

C. Reform option 1: Expanding scope of powers to grant ancillary relief

47 A possible model for such reform for Singapore law is to extend the powers presently found in the court's ancillary matrimonial jurisdiction to cases where a matrimonial decree has already been obtained in a foreign country and that decree is recognised under the private international law of Singapore. Such reform has been effected in the United Kingdom, in Part III of the Matrimonial and Family Proceedings Act 1984 (c 42) (see Annex A),[69] and can serve as a useful model for Singapore to consider. Academics in Singapore are in favour of reform in this direction.[70] Of particular note in the United Kingdom legislation are the safeguards to ensure that the court of the forum has an interest to act in the case, in addition to the considerations of natural forum. Ancillary relief after divorce or nullity is not available as comprehensively as under the normal ancillary matrimonial jurisdiction since the court cannot make an order unless it is satisfied that it is appropriate to do so, particularly having regard to the connections between the former spouses and England, and leave of the court to apply for such order is necessary.

48 One important policy consideration in such reform is the question of the extent to which the Singapore court should extend its aid to civil partnerships not amounting to what Singapore law recognises as a marriage but which may be accorded a similar status as a marriage under foreign legal systems. In the United Kingdom, civil

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65 See para 47.

66 See, *eg*, Convention on the Law Applicable to Obligations Towards Children (Convention No 8, 24 October 1956); Convention Concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations Towards Children (Convention No 9, 15 April 1958); Convention on the Law Applicable to Maintenance Obligations (Convention No 24, 2 October 1973); Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (Convention No 23, 2 October 1973); and Convention on the Recognition and Execution of Decisions Concerning Alimentary Obligations Towards Children.

67 Convention on the Recognition of Divorces and Legal Separations (Convention No 18, 1 June 1970) Art 1.

68 R H Graveson, K M H Newman, E Anton & D M Edwards, "The Eleventh Session of the Hague Conference of Private International Law" (1969) 18 ICLQ 618 at 628.

69 Following The Law Commission, *Financial Relief after Foreign Divorce* (Law Com No 117, 1982) and Scottish Law Commission, *Report on Financial Provision after Foreign Divorce* (Scot Law Com No 72, 1982).

70 Leong, "Division of Matrimonial Assets: Recent Cases and Thoughts for Reform" (1993) Sing JLS 351 at 400; Ong, "Financial Relief in Singapore after a Foreign Divorce" (1993) Sing JLS 431.

partnerships between parties of the same sex are given similar protection.[71] However, as Singapore (unlike the United Kingdom) does not protect such relationships within its domestic law because such relationships are not regarded as acceptable having regard to the fundamental values of the majority in its society, it would not be appropriate to extend legal protection to similar foreign relationships.

49 A different question of policy arises on whether a provision similar to that in the English legislation barring remedy to a party who has subsequently formed a civil partnership[72] should be adopted. On one hand, such a party is practically in the same situation as a person who has remarried. On the other hand, one could be accused of unfairness in recognising a civil partnership for some purposes (to the detriment of a party) but not in others (where the party is claiming the benefit of it). A further difficulty is that if the phrase "civil partnership" is to be used in the legislation it ought to be defined, and that could be a source of some difficulty since there is no definition under domestic Singapore law. One alternative is to refer only to a subsequent remarriage, as in the case of the English legislation before amendments were made pursuant to changes to United Kingdom law on civil partnerships.[73] Subsequent formations of civil partnerships or analogous relationships (for example, stable cohabitation) could still be taken into account on a case by case basis by the court in determining the nature and quantum of the orders to be made.

50 An important practical advantage of dealing with the problem within an expanded ancillary matrimonial jurisdiction of the Singapore court is that the court will be dealing with the claims for ancillary relief using familiar principles in the Women's Charter, and subject to the limitations of the Women's Charter. Thus, the courts will not have to deal with unfamiliar claims like maintenance claims by husbands against wives, and claims in respect of co-habitants and other forms of civil partnerships. On the other hand, the discretionary approach of the courts towards ancillary relief is broad enough to take into consideration any relevant foreign connections in the case. For example, wielding such a power to divide matrimonial assets, the Singapore court will no doubt have regard to any applicable foreign community property regime or foreign orders as to the division of matrimonial property in determining what would be a fair division of matrimonial property within the effective control of the Singapore court. The parties' expectations during the course of their marriage under a foreign legal system should also be taken into account.

51 Further, such an expanded ancillary jurisdiction will carry a risk of double jeopardy, if the Singapore court grants an order on the premise that the foreign court order is ineffective, and the applicant manages to find a jurisdiction where both the foreign and Singapore orders can be effective. This is, however, not a major problem,

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71 Schedule 7 of the UK Civil Partnership Act 2004 (c 33) makes similar provisions for the English court to grant ancillary relief after foreign dissolutions of civil partnerships.

72 Matrimonial and Family Proceedings Act 1984 (c 42) (UK) s 12(2): see Annex A.

73 Civil Partnership Act 2004 (c 33) (UK) s 261(1), Sched 27, para 90(2), amending Matrimonial and Family Proceedings Act 1984 (c 42) (UK) s 12(2) (see Annex A).

and can easily be circumvented by making the Singapore order conditional upon an undertaking not to enforce the foreign one anywhere.

D. Reform option 2: Expanding scope of recognition and enforcement of foreign relief

52 One way of reducing the scope of the problem of the lack of power in the Singapore court to grant ancillary relief after a foreign matrimonial decree is to increase the extent to which the forum will recognise and enforce foreign orders (whether originating in the foreign court's ancillary jurisdiction or otherwise). Orders for the payment of money are not difficult to enforce, and there is scope for greater facilitation of enforcement of foreign maintenance orders. The legal framework already exists and it is a matter of expanding it.

53 Foreign custody orders raise a more fundamental issue. There is a strong argument for the forum to retain ultimate control over questions of custody of children, as reflected in the entrenched principle that the welfare of the child is of paramount importance. It should be up to the court of the forum to determine for itself what is required by the welfare of the child, and care should be taken not to fetter this decision-making process of the court by rigid rules of recognition.

54 Where orders to divide matrimonial assets are concerned, the *lex situs* rule for the recognition of foreign *in rem* judgments is very strongly entrenched and should not be disturbed. Property rights are at stake, and third party interests may be affected. While it is possible to reform the law to enforce foreign *in personam* orders to divide assets,[74] and it might also be possible to circumscribe such reform to orders from courts with jurisdictional competence in the matrimonial sense and to restrict it to the context of division of matrimonial assets in the aftermath of the break-up of a marriage, the recognition of such orders may nevertheless have an *in rem* effect. Since a local judgment ordering the division of matrimonial assets take effect immediately by shifting the beneficial interest in the relevant assets situated in Singapore (either because the court order actually shifts the interest or because equity deems as done what ought to be done),[75] it is arguable that a foreign judgment ordering the same, once recognised as binding and effective under Singapore law, will have the same effect. If so, any step in this direction should be taken with considerable caution.

55 In any event, this mode of law reform can only be a partial solution at best, because it does not address the situations where the foreign court which granted the matrimonial order had made no orders for ancillary relief.

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74 The common law of Canada is moving towards the enforcement of non-money judgments: see *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612; 2006 SCC 52.

75 Similar to an order for the specific performance of a contract to transfer property with nothing left to be done under the contract. In respect of court orders to transfer matrimonial assets, see *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR 201 (CA) at [101]–[106].

E. Reform option 3: Expanding scope of independent powers in respect of ancillary relief

56 Another method of narrowing the gap caused by the inability of the Singapore court to order ancillary relief after a foreign matrimonial decree is to expand the scope of the powers of the court to make similar orders which are not ancillary to the matrimonial jurisdiction. However, expanding the independent powers is a general step and there will be wide-ranging implications for domestic as well as cross-border cases in respect of each power that is expanded. This method is a very blunt instrument to deal with the present problem of the aftermath of marital break-up, whenever that marriage may have been judicially declared to be ended.

VI. Recommendations

57 In summary, there is clearly a gap in Singapore law in the lack of judicial power to grant ancillary relief upon the recognition of a foreign matrimonial decree under its private international law. The size of this problem depends partly on the practical consideration of the likelihood of incidents where a marriage is terminated in a foreign country and this has cross-border effects and at least some of the aftermath is felt in Singapore. Given the globalisation trends in this country and elsewhere, particularly in the region, the cross-border effects of marital break-ups look set to increase. The size of the problem also depends on the legal considerations of:

(a) the scope of the rules of recognition of foreign decrees;

(b) the extent to which foreign orders relating to the break-up of marriages will be recognised and enforced in Singapore;

(c) the extent to which the Singapore court has independent powers to deal with such matters; and

(d) the extent to which the Singapore court will give effect to the principle of natural forum in matrimonial cases.

58 We have demonstrated that the gap problem is acute only when there is reliance on the matrimonial jurisdiction which predicates a subsisting marriage for its subject matter, namely when the petitioner relies on the maintenance jurisdiction and the property division jurisdiction of the Women's Charter. We suggest that the best mode of reform is to deal with the problem directly and to expand ancillary matrimonial jurisdiction of the court, along the lines of the law reform effect in the United Kingdom

(Annex A). The proposed draft provisions can be found at Annex B.[76] This would also remove a present anomaly in the application of the reciprocal enforcement of maintenance orders schemes in Singapore which arises in that an ancillary maintenance order made in England in respect of a foreign divorce is registrable and enforceable in Singapore but there is at present no question of an equivalent order being made in Singapore and being transmitted for registration and enforcement in England.

59 We do not for the time being suggest that the court should also be empowered to intervene where foreign ancillary maintenance orders have been made. Whether these orders should be enforced with or without variation will continue to depend on the application of the reciprocal enforcement legislation or the common law. Nor do we for the time being suggest that the jurisdiction to grant ancillary relief after divorce or nullity should be extended to cover compensation for loss of succession rights or rights to the other spouse's pension or assignments of life insurance or capital redemption policies or purchased life annuities. Such matters therefore cannot under our suggestion be raised as independent grounds for ancillary relief but can perhaps be taken into account by the court exercising the jurisdiction to grant an ancillary property division order.

60 With respect to property distribution or division, there is necessarily a gap problem even where a foreign ancillary property order has been made if the subject matter is properly characterised as immovable property situated in Singapore. Our recommendations ensure that a former spouse will be able to enjoy the benefits of section 112 of the Women's Charter provided of course that the conditions for ancillary relief which we have recommended are met.

61 We have noted above the necessity of guarding this proposed expansion of the powers of the Singapore courts against abuse of process. We propose three levels of safeguards along the lines of the law in the United Kingdom. The applicant should have to satisfy the court that:

(a) the parties have a genuine connection with Singapore, and

(b) there are substantial grounds upon which the court could be asked to exercise its new powers, in order to obtain leave to commence proceedings;

and when these jurisdictional requirements are satisfied,

(c) the court must be satisfied that Singapore is the appropriate venue before it makes the ancillary orders for financial relief.

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76 The sub-committee gratefully acknowledges the assistance of the Attorney-General's Chambers of Singapore in the drafting of the Bill.

62 We are of the view that there is sufficient connection between the parties and Singapore if either of the parties to the marriage was domiciled in Singapore at the date of application for leave or the date on which the foreign change of status took effect, or if either of the parties have been habitually resident in Singapore for one year before the date of such application or the date the foreign change of status took effect. On the other hand, the connection based on the mere existence of a prior matrimonial home in which either party maintains beneficial interest under the United Kingdom model (section 15(1)(*c*)) is thought to be too tenuous a connection for the Singapore court to assume jurisdiction where the parties have otherwise no other connection with Singapore, even if the resulting orders are only in relation to that property.

63 We recommend that the applicant should have to establish substantial ground for the making of the financial relief in order to obtain leave to commence proceedings. The purpose of this requirement is to allow the court to assess the applicant's prospects of success. This requirement at the jurisdictional stage has proven in practice to be useful in sieving out unmeritorious applications in the United Kingdom.[77]

64 We recommend that the court should dismiss the application if, in spite of the connections of the parties to the marriage with Singapore, Singapore is not the appropriate venue for making the orders. Guidelines for the determination of this point are provided in clause 121F(2) of the proposed draft bill. These factors are consistent with the doctrine of natural forum.

65 Application for leave of court that is required to commence proceedings must necessarily be *ex parte* in nature. We are mindful that the procedure ought to be fair to both parties on the one hand, and should be as expeditious as possible on the other. Even at the commencement of the proceedings, the applicant should have to set out fully all the facts and matters relied upon in support of the application for relief, in order to establish that there are substantial grounds of relief. The *ex parte* leave application should entail the usual requirement of full and frank disclosure of all

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77 The case law has repeatedly emphasised that the expanded powers of the court were not intended to provide an ex-spouse with "a second bite of the cherry". For *eg*, leave was refused in *Holmes v Holmes* [1989] Fam 47 (CA) on the ground that the applicant's dissatisfaction with the ancillary relief orders of the New York court which had examined the relevant issues and was the natural forum for the dispute did not amount to any substantial ground; leave was denied in *M v M (financial provision after foreign divorce)* [1994] 1 FLR 399, among other reasons, because the applicant was seen to be attempting to re-litigate issues fully ventilated in the French court; and in *Jordan v Jordan* [2000] 1 WLR 210 (CA) it was held that leave should not have been given where the California court was the primary jurisdiction to grant and enforce the ancillary orders and there were insufficient connections between the parties and England. On the other hand, "substantial ground" does not require the applicant to prove hardship and injustice: *Jordan v Jordan* [2000] 1 WLR 210 (CA). In contrast, leave was granted in *A v S (Financial relief after overseas US divorce and financial proceedings)* [2002] EWHC 1157 (Fam), [2003] 1 FLR 431 where the English court thought there was an issue of the wife allegedly relying on the husband having made a promise or statement of intention which was not ventilated in the foreign court; in *M v L (Financial relief after overseas divorce)* [2003] EWHC 328 (Fam), [2003] 2 FLR 425, leave was thought appropriate because the issue of maintenance (in contrast to property division) had not been addressed by the foreign court decreeing the divorce.

relevant matter. We also recommend that in granting leave the court should be able to impose conditions.

66 We propose that once leave is granted, the hearing should generally move on to the *inter partes* substantive hearing, where the court will determine, on the evidence from both parties (assuming the application is contested): (a) whether Singapore is the appropriate forum for granting the relief sought; and if so, (b) what orders are appropriate on the facts. In contrast, at the *ex parte* stage, only the evidence of the applicant is available, and the key question is the prospect of succeeding at the *inter partes* stage ("substantial ground for the making of an application"[78]). Since the applicant's success at the *inter partes* stage depends on both natural forum considerations as well as the merits of the case, both must therefore be relevant at the *ex parte* stage during the application for leave, though the burden at the *ex parte* stage must necessarily be lower. This provides a way for the system to filter out potential abuses of the expanded powers of the court.

67 At first blush, this procedure may sound counter-intuitive because it may be thought that ordinarily a successful *ex parte* application for leave to commence proceedings should potentially be followed by a challenge to the leave on the same grounds on which the leave was granted. We would, however, restrict the challenge at this stage to jurisdictional grounds (*ie*, the connections of the parties to the marriage to Singapore required under clause 121C of the proposed draft bill). This type of challenge should be allowed because the jurisdiction of the court goes to the root of the claim. Further, this challenge is based on well-established principles of law and not subject to discretionary considerations. To go further to allow challenges based on prospects of success or natural forum considerations before getting to the substantive hearing itself will, we fear, increase the cost and complexity of the process and prolong the proceedings.[79] At present, we do not think that the clear procedural division in civil and matrimonial proceedings between establishing jurisdiction through nexus and exercise of jurisdiction on one hand and the merits of the claim on the other is necessarily a good thing in this expanded jurisdiction of the court.

68 In summary, the procedure we recommend is this. The plaintiff commences proceedings by filing an originating summons and takes out an *ex parte* application by way of summons in chambers for an order for financial relief. In the affidavit in support of the *ex parte* application, the plaintiff needs to show that:

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78 Clause 121D(1) of the proposed draft bill.

79 A similar concern was expressed in *Jordan v Jordan* [2000] 1 WLR 210 (CA) at 222 in the context of the corresponding English procedure. An analogy was drawn from judicial review cases where once *ex parte* leave is granted, attempts to discharge leave *inter partes* is strongly discouraged.

(a) the jurisdictional connections under 121B are satisfied;

(b) there are substantial grounds for commencing the proceedings and making the application; and

(c) Singapore is the appropriate venue.

If *ex parte* leave is not granted, the usual avenue(s) of appeal should be available. If *ex parte* leave is granted, and process is served on the defendant, the defendant may challenge the leave only on the first ground, without prejudice to the right to challenge on the other grounds. The usual rules relating to the onus on a party making an *ex parte* application would apply. The usual avenue(s) of appeal should also be available at this stage. If there is no challenge (in which case the defendant should be taken to have submitted to the jurisdiction and to be thereby estopped from challenging the jurisdiction of the court) or the challenge fails, then the matter proceeds for an adjudication on the second and third questions. Parties will attend before the court for directions on the filing of affidavits relating to the second and third questions, and thereafter, the court will hear arguments *inter partes* on the second and third questions, and dispose of the matter accordingly. Once again, the usual avenue(s) of appeal should be available.

69 We recommend no change to the current law that dissolution of Muslim marriages should fall within the domain of the Syariah courts. We do not make any recommendations in respect of, and our recommendations do not affect, the law and practice of the Syariah courts in Singapore. Presently, the civil courts in Singapore have concurrent jurisdiction with the Syariah Court in respect of ancillary orders after divorce or annulment of Muslim marriages.[80] In domestic law practice, the Syariah courts deals with practically all ancillary matters after divorce, and the concurrent jurisdiction of the civil court is mostly invoked to enforce orders made by the Syariah Court. Under the Administration of Muslim Law Act,[81] there is no division of primary and ancillary *jurisdiction* when it comes to ancillary matters after dissolution of a marriage,[82] so it does not appear to have its hands tied like the civil courts after it recognises a foreign divorce. Where the Syariah Court makes such orders, there is no problem with the Family Court lending its usual assistance in their enforcement. We have therefore excluded matters falling within the Syariah jurisdiction from our proposals.

70 The United Kingdom legislation which we recommend as a model applies in cases where a divorce is obtained in "judicial and other proceedings" in a foreign

80 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) s 17A(2).

81 Administration of Muslim Law Act (Cap 3, 1999 Rev Ed).

82 Administration of Muslim Law Act (Cap 3, 1999 Rev Ed) s 35.

country. The legislative regime for family law in the United Kingdom distinguishes three types of divorces:

(a) the divorce obtained in judicial proceedings which is the western norm;

(b) the divorce obtained by taking extra-judicial steps and not involving any legal proceedings at all (for example, the *talak* in many countries which recognise it); and

(c) the divorce obtained by taking extra-judicial steps which involves some legal proceedings, but which proceedings involve no investigation or determination (the Jewish *ghet*, Muslim *talak*, and other types of administrative divorces in some countries).

Under the Family Law Act 1986, broad statutory grounds[83] for the recognition of foreign divorces obtained in "judicial or other proceedings" apply to heads (a) and (b) above but narrower grounds (more restrictive than the common law)[84] apply to head (c) above. It is easy to understand the reluctance of the United Kingdom parliament to extend the broad grounds of recognition to divorces not obtained through judicial proceedings, but it is less easy to understand why they distinguished between heads (b) and (c) above. It follows from the application of narrower recognition grounds to (c) that there is wider scope for the court to assume matrimonial jurisdiction in such cases, and therefore there is a comparatively lesser need for the expanded ancillary jurisdiction to apply in such cases. It is, however, to be noted that the Law Commission which authored the report leading to the 1986 legislation had actually recommended that "other proceedings" should also encompass acts of divorce which are done in and recognised by the law of that country,[85] but this recommendation had not been followed in parliament or subsequent case law. It is understandable that there should be consistency within the broader family law regime within the United Kingdom on the meaning of the phrase "judicial and other proceedings".

71 Under Singapore law, the common law applies to the issue of recognition of foreign non-judicial divorces and other changes to matrimonial status.[86] Since non-

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83 The decree obtained in a foreign country will be recognised if at the date of the commencement of the proceedings, either party to the marriage was habitually resident or domiciled or was a national in that country: Family Law Act 1986 (c 55) (UK) s 46(1).

84 An extra-judicial divorce (or annulment or legal separation) obtained in a foreign country and valid under its law will be recognised if at the date it was obtained one party to the marriage was domiciled in that country and the other party was domiciled in that country or domiciled in a country whose law recognised the divorce (*etc*), provided that neither party had been habitually resident in the UK for one year immediately before that date: Family Law Act 1986 (c 55) (UK) s 46(2).

85 *Private International Law: Recognition of Foreign Nullity Decrees* (SLC88) (Cmnd 9347, 1984) at 122, cl 12(1) of the draft bill.

86 The Women's Charter constrains non-Muslims within its scope of application to have recourse to judicial proceedings for divorce if they want to divorce *in* Singapore. While it is not clear to what extent it prevents

(*cont'd on the next page*)

judicial changes to matrimonial status are recognised on the same status theory as judicial divorces,[87] the rules of recognition are presumably the same. Omission of Muslim marriages and consequently the *talak* from our proposal will not be a problem because the Syariah Court can assume jurisdiction anyway (and its orders can be enforced with the usual assistance of the Family Court). However, as Islamic law is not the only system of personal law that recognises extra-judicial divorces, it is thought that the proposal should extend to non-Muslim extra-judicial divorces, and that there is no benefit in trying to distinguish between such divorces which involve some proceedings and those which do not involve any proceedings. We do not make any recommendations on, and our recommendations do not affect, the recognition rules for non-judicial divorces or other changes to matrimonial status; our recommendations only affect the consequences for the ancillary relief jurisdiction of the Singapore court if and when such a divorce or other change to matrimonial status is recognised.

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foreign non-Muslim domiciliaries from invoking non-judicial divorce in Singapore (see Tan Yock Lin, *Conflicts Issues in Family and Succession Law* (Butterworths Asia, 1993) at p 399), it does not prevent the issue of the recognition of non-judicial divorces taking place in *foreign* countries from arising.

87 *Qureshi v Qureshi* [1972] Fam 173 at 199; *Dicey, Morris and Collins: The Conflict of Laws* (L Collins *et al* eds) (14th Ed, 2006) at para 18-095.

ANNEX A:

MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984 (C 42) (UK)

PART III

Financial Relief in England and Wales after Overseas Divorce etc

Applications for Financial Relief

12 Applications for financial relief after overseas divorce etc

(1) Where—

(a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and

(b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,

either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.

(2) If after a marriage has been dissolved or annulled in an overseas country one of the parties to the marriage forms a subsequent marriage or civil partnership, that party shall not be entitled to make an application in relation to that marriage.

(3) The reference in subsection (2) above to the forming of a subsequent marriage or civil partnership includes a reference to the forming of a marriage or civil partnership which is by law void or voidable.

(4) In this Part of this Act except sections 19, 23, and 24 "order for financial relief" means an order under section 17 or 22 below of a description referred to in that section.

13 Leave of the court required for applications for financial relief

(1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.

(2) The court may grant leave under this section notwithstanding that an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.

(3) Leave under this section may be granted subject to such conditions as the court thinks fit.

14 Interim orders for maintenance

(1) Where leave is granted under section 13 above for the making of an application for an order for financial relief and it appears to the court that the applicant or any child of the family is in immediate need of financial assistance, the court may make an interim order for maintenance, that is to say, an order requiring the other party to the marriage to make to the applicant or to the child such periodical payments, and for such term, being a term beginning not earlier than the date of the grant of leave and ending with the date of the determination of the application for an order for financial relief, as the court thinks reasonable.

(2) If it appears to the court that the court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (c) of section 15(1) below the court shall not make an interim order under this section.

(3) An interim order under subsection (1) above may be made subject to such conditions as the court thinks fit.

15 Jurisdiction of the court

(1) Subject to subsection (2) below, the court shall have jurisdiction to entertain an application for an order for financial relief if any of the following jurisdictional requirements are satisfied, that is to say—

(a) either of the parties to the marriage was domiciled in England and Wales on the date of the application for leave under section 13 above or was so domiciled on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

(b) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

(c) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated in England or Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

(2) Where the jurisdiction of the court to entertain proceedings under this Part of this Act would fall to be determined by reference to the jurisdictional requirements imposed by virtue of Part I of the Civil Jurisdiction and Judgments Act 1982 (implementation of certain European conventions) or by virtue of Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or then—

(a) satisfaction of the requirements of subsection (1) above shall not obviate the need to satisfy the requirements imposed by virtue of that Regulation or Part I of that Act; and

(b) satisfaction of the requirements imposed by virtue of that Regulation or Part I of that Act shall obviate the need to satisfy the requirements of subsection (1) above;

and the court shall entertain or not entertain the proceedings accordingly.

16 Duty of the court to consider whether England and Wales is appropriate venue for application

(1) Before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.

(2) The court shall in particular have regard to the following matters—

(a) the connection which the parties to the marriage have with England and Wales;

(b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;

(c) the connection which those parties have with any other country outside England and Wales;

(d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;

(e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

(f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission;

(g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made;

(h) the extent to which any order made under this Part of this Act is likely to be enforceable;

(i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.

Orders for financial provision and property adjustment

17 Orders for financial provision and property adjustment

(1) Subject to section 20 below, on an application by a party to a marriage for an order for financial relief under this section, the court may—

(a) make any one or more of the orders which it could make under Part II of the 1973 Act if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in England and Wales, that is to say—

(i) any order mentioned in section 23(1) of the 1973 Act (financial provision orders); and

(ii) any order mentioned in section 24(1) of that Act (property adjustment orders); and

(b) if the marriage has been dissolved or annulled, make one or more orders each of which would, within the meaning of that Part of that Act, be a pension sharing order in relation to the marriage.

(2) Subject to section 20 below, where the court makes a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order under subsection (1) above, then, on making that order or at any time thereafter, the court may make any order mentioned in section 24A(1) of the 1973 Act (orders for sale of property) which the court would have power to make if the order under subsection (1) above had been made under Part II of the 1973 Act.

18 Matters to which the court is to have regard in exercising its powers under s 17

(1) In deciding whether to exercise its powers under section 17 above and, if so, in what manner the court shall act in accordance with this section.

(2) The court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(3) As regards the exercise of those powers in relation to a party to the marriage, the court shall in particular have regard to the matters mentioned in section 25(2)(a) to (h) of the 1973 Act and shall be under duties corresponding with those imposed by section 25A(1) and (2) of the 1973 Act where it decides to exercise under section 17 above powers corresponding with the powers referred to in those subsections.

(3A) The matters to which the court is to have regard under subsection (3) above—

(a) so far as relating to paragraph (a) of section 25(2) of the 1973 Act, include any benefits under a pension arrangement which a party to the marriage has or is likely to have (whether or not in the foreseeable future), and

(b) so far as relating to paragraph (h) of that provision, include any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring.

(4) As regards the exercise of those powers in relation to a child of the family, the court shall in particular have regard to the matters mentioned in section 25(3)(a) to (e) of the 1973 Act.

(5) As regards the exercise of those powers against a party to the marriage in favour of a child of the family who is not the child of that party, the court shall also have regard to the matters mentioned in section 25(4)(a) to (c) of the 1973 Act.

(6) Where an order has been made by a court outside England and Wales for the making of payments or the transfer of property by a party to the marriage, the court in considering in accordance with this section the financial resources of the other party to the marriage or a child of the family shall have regard to the extent to which that order has been complied with or is likely to be complied with.

(7) In this section—

(a) "pension arrangement" has the meaning given by section 25D(3) of the 1973 Act, and

(b) references to benefits under a pension arrangement include any benefits by way of pension, whether under a pension arrangement or not.

19 Consent orders for financial provision or property adjustment

(1) Notwithstanding anything in section 18 above, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application.

(2) Subsection (1) above applies to an application for a consent order varying or discharging an order for financial relief as it applies to an application for an order for financial relief.

(3) In this section—

"consent order", in relation to an application for an order, means an order in the terms applied for to which the respondent agrees;

"order for financial relief" means an order under section 17 above; and

"prescribed" means prescribed by rules of court.

20 Restriction of powers of court where jurisdiction depends on matrimonial home in England or Wales

(1) Where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England and Wales of a dwelling-house which was a matrimonial home of the parties, the court may make under section 17 above any one or more of the following orders (but no other)—

(a) an order that either party to the marriage shall pay to the other such lump sum as may be specified in the order;

(b) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of a child of the family, or to such a child, such lump sum as may be so specified;

(c) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be so specified for the benefit of such a child, the interest of the first-mentioned party in the dwelling-house, or such part of that interest as may be so specified;

(d) an order that a settlement of the interest of a party to the marriage in the dwelling-house, or such part of that interest as may be so specified, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(e) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage so far as that settlement relates to an interest in the dwelling-house;

(f) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement so far as that interest is an interest in the dwelling-house;

(g) an order for the sale of the interest of a party to the marriage in the dwelling-house.

(2) Where, in the circumstances mentioned in subsection (1) above, the court makes an order for the payment of a lump sum by a party to the marriage, the amount of the lump sum shall not exceed, or where more than one such order is made the total amount of the lump sums shall not exceed in aggregate, the following amount, that is to say—

(a) if the interest of that party in the dwelling-house is sold in pursuance of an order made under subsection (1)(g) above, the amount of the

proceeds of the sale of that interest after deducting therefrom any costs incurred in the sale thereof;

(b) if the interest of that party is not so sold, the amount which in the opinion of the court represents the value of that interest.

(3) Where the interest of a party to the marriage in the dwelling-house is held jointly or in common with any other person or persons—

(a) the reference in subsection (1)(g) above to the interest of a party to the marriage shall be construed as including a reference to the interest of that other person, or the interest of those other persons, in the dwelling-house, and

(b) the reference in subsection (2)(a) above to the amount of the proceeds of a sale ordered under subsection (1)(g) above shall be construed as a reference to that part of those proceeds which is attributable to the interest of that party to the marriage in the dwelling-house.

21 Application to orders under ss 14 and 17 of certain provisions of Part II of Matrimonial Causes Act 1973

(1) The following provisions of Part II of the 1973 Act (financial relief for parties to marriage and children of family) shall apply in relation to an order under section 14 or 17 above as they apply in relation to a like order under that Part of that Act, that is to say–

(a) section 23(3)(provisions as to lump sums);

(b) section 24A(2), (4), (5) and (6) (provisions as to orders for sale);

(ba) section 24B(3) to (5) (provisions about pension sharing orders in relation to divorce and nullity);

(bb) section 24C (duty to stay pension sharing orders);

(bc) section 24D (apportionment of pension sharing charges);

(bd) section 25B(3) to (7B) (power, by financial provision order, to attach payments under a pension arrangement, or to require the exercise of a right of commutation under such an arrangement);

(be) section 25C (extension of lump sum powers in relation to death benefits under a pension arrangement);

(c) section 28(1) and (2) (duration of continuing financial provision orders in favour of party to marriage);

(d) section 29 (duration of continuing financial provision orders in favour of children, and age limit on making certain orders in their favour);

(e) section 30 (direction for settlement of instrument for securing payments or effecting property adjustment), except paragraph (b);

(f) section 31 (variation, discharge etc of certain orders for financial relief), except subsection (2)(e) and subsection (4);

(g) section 32 (payment of certain arrears unenforceable without the leave of the court);

(h) section 33 (orders for repayment of sums paid under certain orders);

(i) section 38 (orders for repayment of sums paid after cessation of order by reason of remarriage);

(j) section 39 (settlements etc. made in compliance with a property adjustment order may be avoided on bankruptcy of settlor); and

(k) section 40 (payments etc under order made in favour of person suffering from mental disorder).

(l) section 40A (appeals relating to pension sharing orders which have taken effect).

(2) Subsection (1)(bd) and (be) above shall not apply where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England or Wales of a dwelling-house which was a matrimonial home of the parties.

(3) Section 25D(1) of the 1973 Act (effect of transfers on orders relating to rights under a pension arrangement) shall apply in relation to an order made under section 17 above by virtue of subsection (1)(bd) or (be) above as it applies in relation to an order made under section 23 of that Act by virtue of section 25B or 25C of the 1973 Act.

(4) The Lord Chancellor may by regulations make for the purposes of this Part of this Act provision corresponding to any provision which may be made by him under subsections (2) to (2B) of section 25D of the 1973 Act.

(5) Power to make regulations under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Orders for transfer of tenancies

22 Powers of court in relation to certain tenancies of dwelling-houses

(1) This section applies if—

(a) an application is made by a party to a marriage for an order for financial relief; and

(b) one of the parties is entitled, either in his own right or jointly with the other party, to occupy a dwelling-house situated in England or Wales by virtue of a tenancy which is a relevant tenancy within the meaning of Schedule 7 to the Family Law Act 1996 (certain statutory tenancies).

(2) The court may make in relation to that dwelling-house any order which it could make under Part II of that Schedule if—

(a) a divorce order,

(b) a separation order, or

(c) a decree of nullity of marriage,

had been made or granted in England and Wales in respect of the marriage.

(3) The provisions of paragraphs 10, 11 and 14(1) in Part III of that Schedule apply in relation to any order under this section as they apply to any order under Part II of that Schedule.

Avoidance of transactions intended to prevent or reduce financial relief

23 Avoidance of transactions intended to defeat applications for financial relief

(1) For the purposes of this section "financial relief" means relief under section 14 or 17 above and any reference to defeating a claim by a party to a marriage for financial relief is a reference to preventing financial relief from being granted or reducing the amount of relief which might be granted, or frustrating or impeding the enforcement of any order which might be or has been made under either of those provisions at the instance of that party.

(2) Where leave is granted under section 13 above for the making by a party to a marriage of an application for an order for financial relief under section 17 above, the court may, on an application by that party—

(a) if it is satisfied that the other party to the marriage is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition.

(3) Where an order for financial relief under section 14 or 17 above has been made by the court at the instance of a party to a marriage, then, on an application made by

that party, the court may, if it is satisfied that the other party to the marriage has, with the intention of defeating the claim for financial relief, made a reviewable disposition, make an order setting aside the disposition.

(4) Where the court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (c) of section 15(1) above, it shall not make any order under subsection (2) or (3) above in respect of any property other than the dwelling-house concerned.

(5) Where the court makes an order under subsection (2)(b) or (3) above setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(6) Any disposition made by the other party to the marriage (whether before or after the commencement of the application) is a reviewable disposition for the purposes of subsections (2)(b) and (3) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(7) Where an application is made under subsection (2) or (3) above with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

(a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or

(b) in a case falling within subsection (3) above, that the disposition has had the consequence,

of defeating a claim by the applicant for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

(8) In this section "disposition" does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

(9) The preceding provisions of this section are without prejudice to any power of the High Court to grant injunctions under section 37 of the Supreme Court Act 1981.

24 Prevention of transactions intended to defeat prospective applications for financial relief

(1) Where, on an application by a party to a marriage, it appears to the court—

(a) that the marriage has been dissolved or annulled, or that the parties to the marriage have been legally separated, by means of judicial or other proceedings in an overseas country; and

(b) that the applicant intends to apply for leave to make an application for an order for financial relief under section 17 above as soon as he or she has been habitually resident in England and Wales for a period of one year; and

(c) that the other party to the marriage is, with the intention of defeating a claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property,

the court may make such order as it thinks fit for restraining the other party from taking such action as is mentioned in paragraph (c) above.

(2) For the purposes of an application under subsection (1) above—

(a) the reference to defeating a claim for financial relief shall be construed in accordance with subsection (1) of section 23 above (omitting the reference to any order which has been made); and

(b) subsections (7) and (8) of section 23 above shall apply as they apply for the purposes of an application under that section.

(3) The preceding provisions of this section are without prejudice to any power of the High Court to grant injunctions under section 37 of the Supreme Court Act 1981.

ANNEX B:

WOMEN'S CHARTER (AMENDMENT) BILL

Women's Charter (Amendment) Bill

Bill No. 00/2009.

Read the first time on ……20xx.

A BILL

i n t i t u l e d

An Act to amend the Women's Charter (Chapter 353 of the 1985 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the Women's Charter (Amendment) Act 2008 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

New Chapter 4A

2. The Women's Charter is amended by inserting, immediately after section 121, the following Chapter:

"CHAPTER 4A — FINANCIAL RELIEF CONSEQUENT ON OVERSEAS MATRIMONIAL PROCEEDINGS

Definitions

121A. In this Chapter, unless the context otherwise requires—

"applicant" means the person who applies for an order for financial relief;

"country" includes a territory;

"judicial or other proceedings" include acts which constitute the means by which a divorce may be obtained in a country and which are done in compliance with the law of that country;

"matrimonial asset" has the same meaning as in section 112(10); and

"order for financial relief" means an order under section 121G of a description referred to in that section.

Applications for financial relief after overseas divorce etc.

121B. (1) Where—

(*a*) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country; and

(*b*) the divorce, annulment or legal separation is entitled to be recognised as valid in Singapore,

either party to the marriage may apply to the court in the manner prescribed by the Rules of Court for an order for financial relief under this Chapter.

Jurisdiction of court

121C. The court shall have jurisdiction to hear an application for an order for financial relief only if—

(*a*) either of the parties to the marriage was domiciled in Singapore on the date of the application for leave under section 121D or was so domiciled on the date on which the divorce, annulment or judicial separation obtained in a country outside Singapore took effect in that country; or

(*b*) either of the parties to the marriage was habitually resident in Singapore throughout the period of 1 year immediately preceding the date of the application for leave under section 121D or was so resident throughout the period of 1 year immediately

preceding the date on which the divorce, annulment or judicial separation obtained in a country outside Singapore took effect in that country.

Leave of court required for applications for financial relief

121D. (1) No application for an order for financial relief shall be made unless the leave of the court has been obtained in accordance with the Rules of Court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.

(2) The court may grant leave under this section notwithstanding that an order has been made by a court of competent jurisdiction in a country outside Singapore requiring the other party to the marriage to make any payment or transfer any matrimonial asset to the applicant or a child of the marriage.

(3) Leave under this section may be granted subject to such conditions as the court thinks fit.

Interim orders for financial provision

121E. (1) Where leave is granted under section 121D and it appears to the court that the applicant or any child of the marriage is in immediate financial need, the court may make an interim order for—

(*a*) a man to make financial provision for his former wife or any child of the marriage; or

(*b*) a parent to make financial provision for any child of the marriage.

(2) An interim order under subsection (1) may be made for such term, being a term beginning not earlier than the date of the grant of leave and ending with the date of the determination of the application for an order for financial relief, as the court thinks reasonable.

(3) An interim order under subsection (1) may be made subject to such conditions as the court thinks fit.

Duty of court to consider whether Singapore is appropriate forum for application

121F. (1) Before making an order for financial relief, the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in Singapore, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.

(2) The court shall in particular have regard to the following matters—

(*a*) the connection which the parties to the marriage have with Singapore;

(*b*) the connection which those parties have with the country in which the marriage was dissolved by a decree of divorce, nullity or judicial separation;

(*c*) the connection which those parties have with any other country outside Singapore;

(*d*) any financial benefit which the applicant or a child of the marriage has received, or is likely to receive, in consequence of the divorce, annulment or judicial separation, by virtue of any agreement or the operation of the law of a country outside Singapore;

(*e*) in a case where an order has been made by a court of competent jurisdiction in a country outside Singapore requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the marriage, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

(*f*) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside Singapore, and if the applicant has omitted to exercise that right the reason for that omission;

(*g*) the availability in Singapore of any matrimonial asset in respect of which an order under section 121G in favour of the applicant could be made;

(*h*) the extent to which any order under section 121G is likely to be enforceable; and

(*i*) the length of time which has elapsed since the date of the divorce, annulment or judicial separation.

Orders for financial relief

121G. (1) On an application by a party to a marriage for an order for financial relief, the court may make any one or more of the orders which it could make under sections 112(1), 127(1), or 113 in like manner as if a decree of divorce, nullity or judicial separation in respect of the marriage had been granted in Singapore.

(2) Sections 112(2) to (10), 127(2) and 114 to 121 shall apply, with necessary modifications, to an order under subsection (1) corresponding to orders respectively under sections 112(1), 127(1) and 113.

(3) Where the court makes a secured order under subsection (1), then on making that order or at any time thereafter, the court may make any order which the court would have the power to make if the secured order had been made under section 112, 127 or 115.

Saving

121H. Nothing in this Chapter shall apply to proceedings or any decree, order or judgment made or given in any such proceedings on or before the date of entry into force of these provisions.

121I. Nothing in this Chapter shall apply to a marriage falling within the Administration of Muslim Law Act (Cap 3, 1999 Rev Ed)."

Amendment of section 132

3. Section 132(1) of the Women's Charter is amended—

(*a*) by deleting the word "or" at the end of paragraph (*c*);

(*b*) by deleting the coma at the end of paragraph (*d*), and substituting the word "; or"; and

(*c*) by inserting, immediately after paragraph (*d*), the following sub-paragraph:

"(*e*) an order has been made under section 121E or 121G and has not been rescinded or complied with,".