ADP *v* ADQ
[2011] SGHC 60

Case Number	: Divorce Suit No 4261 of 2004 (Registrar's Appeal from the Subordinate Courts No 103 of 2009/E)
Decision Date	: 18 March 2011
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu J
Counsel Name(s)	: Tan Cheng Han SC and Lim Kim Hong (Kim & Co) for the appellant; Imran H Khwaja and Renu Rajan Menon (Tan Rajah & Cheah) for the respondent
Parties	: ADP — ADQ

Family law

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 62 of 2011 was allowed by the Court of Appeal on 18 October 2011. See [2012] SGCA 6.]

18 March 2011 Judgment reserved.

Kan Ting Chiu J:

1 This appeal touches on an issue of significant legal interest – whether, in divorce proceedings under the Women's Charter (Cap 353, 2009 Rev Ed) ("the Charter"), in making a judgment of nullity, the court can make orders for maintenance for the female party and for the division of the parties' assets.

The parties and proceedings

2 The petitioner/appellant in these proceedings is ADP ("the Appellant") and the respondent is ADQ ("the Respondent"). They will be referred to collectively as "the parties". They were married in Hong Kong on 26 October 1995 ("the Hong Kong marriage"), and had a child, B in 1997. At the time of the Hong Kong marriage, the Appellant already had a child, C from a previous relationship with one D.

3 The Appellant was previously married to one E in Japan in 1989 ("the Japanese marriage"). The Japanese marriage had broken down by the time the Appellant and the Respondent contracted the Hong Kong marriage. At that time, the Appellant was informed by E (whom she believed) that the Japanese marriage had been dissolved around June 1995, but that was not legally accurate because under Japanese law a divorce is not final for a period of six months and the divorce was thus only finalised on 7 December 1995. The unfortunate result of the Appellant's mistaken belief was that she was still married to E when she contracted the Hong Kong marriage, and that the Hong Kong marriage was void because the laws of Hong Kong do not allow bigamous marriages.

4 The parties came to know about this legal impediment when their own marriage had broken down, and they were in the midst of divorce proceedings. The discovery complicated and slowed down the progress of the proceedings. At this time, it is not necessary to list the various steps taken, except to state that at the hearing of the present Divorce Petition on 15 August 2006, the Family Court declared the Hong Kong marriage void on the ground that the Appellant was already married when she contracted the Hong Kong marriage, and the Court directed that the ancillary matters

(including the Appellant's claim for maintenance for herself and for C, and for a division of matrimonial assets) be adjourned for further hearing.

5 Those matters came on for hearing before a District Judge ("the DJ") in 2009 who ruled: [note: 1]

(a) The Court does not have powers to order payment of maintenance to the petitioner or deal with the division of assets in view of the fact that a judgment for nullity has been granted on the ground that the marriage is void.

(b) The respondent is not liable to maintain C.

6 The DJ's reasons for ruling (a) above were:

(a) in the case of a void marriage no marriage is in existence; [note: 2]

(b) the Appellant had not acquired the status of a wife that is necessary for the court to order payment of maintenance to her under s 113 (all the statutory provisions referred to hereafter are provisions of the Charter); [note: 3] and

(c) when a marriage is void, there is no marriage and the court has no power to order the division of matrimonial assets under s 112 even though it has the jurisdiction to grant a judgment of nullity in respect of the void marriage [note: 4].

Courts' power to order maintenance and division of matrimonial assets

7 The courts derive the power to order maintenance and effect a division of matrimonial assets under ss 112(1) and 113. Section 112(1) provides that:

> 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.

and s 113 provides that:

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

8 The bare reference to "nullity of marriage" in s 112(1) has given rise to uncertainty because two classes of marriages come within the term, void marriages and voidable marriages, and there is a significant conceptual distinction between them.

9 Nullity of marriage is dealt with under Part X Chapter 3 of the Charter. The first provision thereof, s 104, provides that any husband or wife may file a writ claiming for a judgment of nullity in respect of his or her marriage. Section 105 then sets out the grounds which render a marriage void.

(The present case is concerned with one ground, that the marriage is solemnised when one of the parties is already married.) Section 106 sets out the grounds which render a marriage voidable. Reading these three sections together, it is clear that a judgment of nullity may be made in respect of a void marriage or a voidable marriage.

10 The difference between a void and a voidable marriage is explained with admirable clarity in an article by D Tolstoy, "Void and Voidable Marriages" (1964) 27 MLR 385. At pp 385 – 386, Tolstoy wrote:

> There is now a clear distinction between a void and a voidable marriage. A void marriage is one which, owing to the presence of an impediment at the time of the ceremony, will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; the decree in the case of a void marriage is in essence a declaration that no marriage had come into existence and any person having sufficient interest in a declaration of nullity can petition for a decree at any time, even after the death of one or both parties. A voidable marriage is one that will be regarded by every court as a valid, subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction, which can be done only at the instigation of one of the parties during the lifetime of both parties. Thus, in the case of a void marriage, no valid marriage ever comes into existence and the parties to it never acquire the status of husband and wife, whereas in the case of a voidable marriage the parties acquire that status and the marriage is valid unless and until annulled during the joint lives of the parties at the instance of one of them. It follows, therefore, that if one party dies without a decree of nullity having been pronounced the voidable marriage cannot thereafter be questioned, but is for ever valid.

This passage was cited by Judith Prakash J in *Tan Ah Thee and another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) v Lim Soo Foong* [2009] 3 SLR(R) 957.

11 A similar view on void marriages is taken by Professor Leong Wai Kum in her book, *Elements of Family Law in Singapore* (LexisNexis, 2007) ("*Elements*") where she stated at p 38:

> Where the marriage is void, the marital relationship that would have been created between the spouses, which was the purpose of forming the marriage, is not created. The parties are therefore still unmarried persons and free to marry anyone.

12 When the Charter refers to "nullity of marriage" in s 112(1), did that have the effect of doing away with the distinction between a void marriage and a voidable marriage? The wording of the provision offers no indication. In the case of the dissolution of a *voidable* marriage, assets acquired up to the dissolution are matrimonial assets, and the court has the power to order the division of matrimonial assets in the course of dissolving such a marriage. The question is whether a court is empowered to make orders for the division of matrimonial assets when dissolving a *void* marriage with a judgment of nullity, when in law, there has not been a marriage, and the assets acquired by the parties cannot be matrimonial assets.

13 It is noted by Professor Leong Wai Kum that there is no case that determined whether the exercise of the court's powers under s 112 and s 113 should be attenuated where a marriage is void (see *Elements* at p 76). It can be added that there is also nothing in the official record of the parliamentary debates which touches on this issue.

14 There are strong reasons which suggest that this issue is not best resolved on a "yes" or "no"

basis. A marriage can be rendered void for different reasons. Even if we restrict ourselves to the present case where a marriage that is void because one party is already married when the marriage is contracted, a party's knowledge and culpability may vary. A party may have acted in good faith out of ignorance or that party may have acted with full knowledge of the impediment and with the intention to deceive the legal authorities and the other party. Following from that, the nullity of the marriage ought to have different effects according to the facts. For example, an innocent party may be accorded rights and liabilities as though the marriage was legal, and a "guilty" party may be denied of any rights, and be subject to the liabilities. Needless to say, there will be many variations to the facts which require the different treatments, and legal, sociological and public policy considerations will have to be taken into account.

15 It is not appropriate for a court to extrapolate an answer as these matters should be addressed by the legislature. I will therefore focus my attention on the governing provisions of the law. Section 112(1) states that the court shall have the power to order a division of *matrimonial* assets. Against the backdrop that a void marriage is not a marriage, the parties were not in a state of matrimony and there can be no matrimonial assets to be divided. If the assets that are acquired in the course of the relationship have to be divided, that can be done on the application of property contract, trust or other relevant principles of law.

16 Similarly, when s 113 states that a court may order a man to pay maintenance to his *wife* or *former wife*, that is predicated on the claimant being one or the other. In the case of a void marriage, the claimant is neither. Even if we assume that the court can overlook that as a technicality, there is no one correct solution. A 'wife' who is unaware of the impediment would have a moral claim for maintenance, but a 'wife' who suppressed the impediment so as to deceive the other party and the marriage authorities would have a weak claim.

17 In the circumstances, I affirm the DJ's approach to the question, and I uphold her ruling that the Appellant is not entitled to maintenance.

18 It must be a disappointment for the Appellant to be denied her claim when she was unaware of her impediment (it would have been worse if the marriage was void because of the Respondent's impediment or deception). Can there be any other basis for a person like the Appellant to seek maintenance? It may be argued that an innocent party may seek maintenance although there is no marriage in law if the parties had maintained their relationship in the belief that there was a legal marriage with the attendant rights and liabilities with regard to maintenance. As the Appellant had not made her claim on the basis and this was not brought up or argued, this possibility must remain as food for thought.

19 The next issue is the claim for maintenance for C. There is some background to this claim. The Appellant had made an application for interim maintenance in the proceedings and had obtained an order that the Respondent was to pay maintenance of US$1,300 a month for C and US$300 a month for the joint expenses for C and B. The Respondent appealed against the order and a Judge of the High Court ("the Judge") set aside the order on the ground that the Respondent is not liable to maintain C as she is not his child.

20 This claim comes under two sections: s 70(1) and s 127(1). Section 127(1) provides that:

> 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.

In construing s 127(1), two definitions apply. Section 122 provides that:

> *In this Chapter*, wherever the context so requires, "child" means a child of the marriage as defined in section 92 but who is below the age of 21 years. [emphasis added]

and "child of the marriage" is defined in s 92 as:

> ... any *child of the husband and wife*, and includes any adopted child and any other child (whether or not a child of the husband or of the wife) who was *a member of the family* of the husband and wife at the time when they ceased to live together or at the time immediately preceding the institution of the proceedings, whichever first occurred; and for the purposes of this definition, the parties to a purported marriage that is void shall be deemed to be husband and wife; [emphasis added]

For the purpose of s 127(1), a child can either be a child of the couple or a child who is accepted as a member of the family.

21 Under s 70(1):

> Where a person has accepted a child who is *not his child* as a *member of his family*, it shall be his duty to maintain that child while he remains a child, so far as the father or the mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child. [emphasis added]

The definition of "child" in s 122 does not apply to s 70(1) because s 70(1) is not in the same chapter of the Charter as s 122. The "child" in s 70(1) is a child who is not a child of the couple, but has been accepted as a member of the family.

22 The DJ dismissed the application for maintenance for C at the conclusion of the proceedings. She stated in her grounds of decision:

> 45. The [Appellant] contended that the [Respondent] had accepted [C] as his child initially and it was only during the present nullity proceedings that he disputed that [C] is a child of the family. Counsel claimed that as [the Judge's] order was made pursuant to interim proceedings this court is not estopped from making final orders for maintenance for [C] at the ancillary hearing.
>
> 46. I noted that it is in the same proceedings that this issue has been raised and argued. The High Court has made a decision on a substantive point. In the circumstances, res judicata applies and the [Appellant] is estopped from further raising this issue.
>
> 47. Further, this being an order of the High Court, I am bound by it. I therefore reiterated [the Judge's] order by ordering that the respondent is not liable to maintain [C].

23 The DJ had rejected the claim solely on the basis that the claim was disbarred under the doctrine of *res judicata*, but the correctness of her decision is questionable.

24 In her reference to *res judicata*, the DJ was referring to issue estoppel that prohibits a party from raising an issue which has been determined conclusively. Issue estoppel was discussed and explained by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157, where it held (at [14] – [15]) that for issue estoppel to arise four conditions must be fulfilled:

(a) there must be a final and conclusive judgment *on the merits of the issue* which is said to be the subject of the estoppel;

(b) that judgment must be by a court of competent jurisdiction;

(c) the parties in the two actions being compared must be identical; and

(d) there must be identity of subject matter in the two actions.

25 The first condition was further explained in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 by Sundaresh Menon JC (at [28]):

> Finality for the purposes of *res judicata* simply refers to a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined: [K R Handley, *Spencer Bower, Turner and Handley: The Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996)] at para 154. Whether the decision in question is a final and conclusive judgment on the merits may be ascertained *from the intention of the judge* as gathered from the relevant documents filed, the order made and the notes of any evidence taken or arguments made. [emphasis added]

26 It is quite clear that the first condition was not satisfied. The Judge's finding that C is not the Respondent's child did not address the question of her being a member of the family. That decision was not a judgment on the merits of the issue of her entitlement to maintenance because C could be entitled to maintenance if she is a member of the family, without being the Respondent's child.

27 The DJ's summary rejection of the claim for maintenance for C on the basis of issue estoppel is set aside and the claim is remitted to her to be decided on its merits.

28 In view of the mixed results, each party should bear its own costs in the appeal.

[note: 1] [2009] SGDC 489 at [10]

[note: 2] [2009] SGDC 489 at [35]

[note: 3] [2009] SGDC 489 at [37]

[note: 4] [2009] SGDC 489 at [40]

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