



Maintenance - Not easy to maintain a family

Family Law (Universiti Malaya)

Maintenance

MARRIED WOMEN AND CHILDREN (MAINTENANCE) ACT 1950

- Applies to Peninsular Malaysia and Sarawak.
- **Section 13:** Act shall not apply to any person professing the religion of Islam and whose wife or whose legitimate/illegitimate child as the case may be, professes the religion of Islam.
 - Each of the states in Peninsular Malaysia has enacted that this Act shall not apply in the case of any claim for maintenance made by a Muslim against a Muslim.
- **Section 3(1):** allows a wife or a legitimate child of a man to apply for maintenance if that man has neglected or refused to maintain them.

If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as to the court seems reasonable.

Mui Siu Heng v Lee Hong Kee (before LRA)

- Whether the term 'wife' includes secondary wives in instances where secondary wives are lawful and recognized by law.
- Magistrates should have power under section 37 of Minor Offences Ordinance to grant maintenance to secondary as much as to principal wives.
- The term 'child' has been used in s.3 without any further explanation, except that the child has to be the legitimate child of the person who neglects or refuses to maintain him.

Kulasingam v Rasanunah

- Child in question was already over 20 years on the date of the maintenance order issued by magistrate.
- The judge said since the 1950 Act is silent on the meaning of 'child', the Age of Majority Act should apply.
- The term 'child', that is, 'which is unable to maintain itself' to rule that a child is anyone who is unable to maintain itself, irrespective of age.

- He is, of course, **has to be a child of the person** who has been issued the maintenance order.
- Hence, if the child is aged 30 years and is **mentally retarded**, and therefore unable to maintain itself, the child should be **eligible to be maintained**.
- Similarly, a child who is **mentally sound** and who is **pursuing tertiary education**, and therefore unable to maintain itself, should be eligible to be maintained.

Raquiza v Raquiza

- For as long as the wife is alive and willing to continue to live with him, the husband has to maintain her.
- Husband's common law duty to maintain his wife, and the onus is upon him to show that for some good reason, he is excused from the performance of that duty.
- Such reason would be if he could show that his wife is:
 - (a) Living in adultery
 - (b) Refuses to live with her husband without any sufficient reason

Thevathesan v Thevathesan

- The issue was whether the potential earning capacity of the wife should have been taken into consideration in assessing maintenance.
- Ambrose J took the view that the wife should go out to work in her own interest, and the fact that she was partly blame for the breakup of the marriage was an additional reason for the breakup of the marriage was an additional reason for taking her potential earning capacity into account.
- The learned judge reduced the maintenance from \$450 per month to \$300 per month

S3(2) If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, **may order** such person to make such **monthly allowance**, as to the court seems reasonable.

S3(3) allowance ordered by the court under subsection(1) or (2) shall be payable from the **date** of such neglect or refusal or from such later date as may be specified in the order.

Amrick Lall v Sombaivati (one year)

- Noted that although in law the wife might be entitled to enforce payment of the whole of the arrears available, a practice had grown up in the Divorce Division that arrears should not be enforced for a period of more than 12 months.
- The custom was not to enforce arrears for more than a year backwards.

Gangagharan v Sathiavati (one year)

-the rationale for the practice of the courts in England to order arrears for maintenance not longer than one year was mentioned by the court.

Lee Yu Lan v Lim Thian Thye (from the date of refusal)

-the court would not form making any order for past maintenance by virtue of the Married Women and Children Act 1950, from an antecedent date of neglect or refusal to maintain.

S5- If any person, against whom an order has been applied for or made for the maintenance of his wife, offers to maintain his wife on condition of her living with him, and his wife refuses to do so, the court shall consider any grounds of refusal stated by such wife, and may make or enforce the order aforesaid, notwithstanding such offer, if it is satisfied that such person is living in adultery or for any other reason it is just so to do.

Chong Hooi v Tee Ngi

3 questions must be answered in a case like this:

- Did the appellant husband at any time offer to maintain his wife on condition of her living with him?
- If so, did the wife refuse to live with him?
- If so, did the wife have sufficient reason for refusing to live with him?

Marimuthu v Thiruchitambalam

Husband married another and brought her to stay in one house with first wife.

- The first wife could not tolerate second wife's presence.

High court found: - It is humiliating for a first wife than to be assaulted in the presence of a second wife.

- A wife is entitled to live with that amount of decency and dignity which prevails in her class, and if the treatment of the husband towards her does not permit her to lead such a life, his conduct amounts to a neglect and refusal to maintain.

S5(2)- No wife shall be entitled to receive an allowance from her husband under this Act if **she is living in adultery**, or if, without any sufficient reason, she refuses to live with her husband. (adultery)

Rajalatchmi v Sinniah

- Magistrate dismissed her claim for maintenance but allowed maintenance for their children in her custody.
- Wife's adultery does not affect the court's discretion to make an order for maintenance with respect to children

S6(1)- On the application of any person receiving or ordered to pay a monthly allowance under this Act, and on **proof of a change in the circumstances** of such person, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which such order was made, may rescind the order or may vary it as to it seems reasonable. (Isteri and suami boleh memohon)

Lee Swee Ping v Koon Kum Keng

- The respondent husband was ordered to pay to the appellant wife \$50 a month for maintenance of their children.
- He applied to the magistrate's court to rescind or vary the same order.
- His only ground was unable to pay \$50 per month.
- The court noted that the husband was drawing a salary of \$262 a month, married and had to support an old mother of 61 years.
- Court held that there must have evidence before the court either of change in circumstances of the person applying for rescission or variation of the order, or of some good cause.
- In this case, there was no evidence whatsoever of a change in the circumstances of the applicant husband. Thus the appeal allowed.

S6(2) Without prejudice to the extent of the discretion conferred upon the court by subsection (1), the court may, in considering any application made under this section, take into consideration any change in the general cost of living which may have occurred between the date of the making of the order sought to be varied and the date of the hearing of the application.

S4: If any person wilfully neglects to comply with any order made under the Act, the court which made such order may, for every breach thereof, by warrant, direct the amount due to be levied in the manner by law provided for levying fines imposed by such court, Or may sentence him to imprisonment for a term which may extend to **one month for each month's allowance remaining unpaid**.

Married Women and Children (Enforcement of Maintenance) Act 1968

Application

S2. This Act shall apply to the States of Peninsular Malaysia only

S3- “earnings”, in relation to a defendant, means any sums payable to him—

(a) by way of wages or salary, including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service;

(b) by way of pension, including gratuity and an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment;

S4- Power of court to make an attachment of earnings order

4. (1) Notwithstanding any written law to the contrary, the court may, upon application by the person for whose maintenance the order is made or the guardian of such person, make an attachment of earnings order, if the court considers it just so to make.

S5 Nature of attachment of earnings order

5. (1) An attachment of earnings order shall require the person to whom the order in question is directed, being a person appearing to the court to be the defendant’s employer, to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order.

(2) The amount to be prescribed in an attachment of earnings order shall be such sum as to the court shall seem reasonable after taking into account the resources and needs of the defendant and the needs of persons for whom he must or reasonably should provide.

S6- effect of the attachment of earning orders

(2) The court by which an attachment of earnings order has been made may, if it thinks fit, on the application of the defendant or a person entitled to receive payments under the related maintenance order, make an order discharging or varying the attachment of earnings order.

S7- majikan mesti ikut perintah sangkutan (Duty of defendant and employer to comply with attachment of earnings order)

(1) A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other written law but subject to this Act, comply with the order or, if the order is subsequently varied under section 6, with the order as so varied.

S12(1) – penalty

12. (1) Any person who—

(a) fails to comply with subsection 7(1) or (4) or an order of a court under subsection 8(1); or

(b) gives such a notice as is mentioned in subsection 7(4) or a statement in pursuance of an order of a court under subsection 8(1), which notice or statement he knows to be false in a material particular; or

(c) recklessly gives such a notice or statement which is false in a material particular, shall, subject to subsection (2) be liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or to both.

S13 Order to make payment to court

13. (1) Where a defendant is a person whose income is derived from sources other than earnings, the court may on the application of the person for whose maintenance the maintenance order is made or on the application of the guardian of such person, make an order that any sum of money payable under the maintenance order be paid direct to the court on such day as the court may fix; and upon receipt of the payment of such sum the court will then pay the said sum to the person for whose maintenance the maintenance order is made or to the guardian of such person.

Maintenance Orders (facilities for enforcement) Act 1949

-It applies in whole Malaysia

-Facilitate the enforcement in Malaysia of maintenance orders made in reciprocating countries and vice versa.

- Reciprocating countries means any country or territory including England, Wales and Northern Ireland to which the Act applies and which is specified in the Schedule

S3- Enforcement in Malaysia of maintenance orders made in reciprocating countries

3. Where a maintenance order has, whether before or after the commencement of this Act, been made against any person by any court in a reciprocating country, and a certified copy of the order has been transmitted to the Minister charged with responsibility for the judiciary, the Minister shall cause a copy thereof to be sent to the appropriate local Court for registration, and, on receipt thereof, the order shall be registered in the prescribed manner and shall, from the date of the registration, be of the same force and effect and, subject to this Act, all proceedings may be taken on the order as if it had been an order originally obtained in the local Court, and that Court shall have power to enforce the order accordingly

S4- Transmission of maintenance orders made in Malaysia

4. Where a local Court has, whether before or after the commencement of this Act, made a maintenance order against any person, and it is proved to the Court that the person against whom the order was made is resident in a reciprocating country, the Court shall send to the Minister charged with responsibility for foreign affairs for transmission to the appropriate authority in the reciprocating country a certified copy of the order.

Law Reform Act (Marriage and Divorce) Act 1976

Wife

S77(Power for court to order maintenance of spouse)

77. (1) The court may order a man to pay maintenance to his wife or former wife—

- (a) during the course of any matrimonial proceedings;
- (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
- (c) if, after a decree declaring her presumed to be dead, she is found to be alive.

Husband

S77(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order

Maintenance

S78-Assessment of maintenance

In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

Goh Kim Hwa v Khoo Swee Huah (fault principle) (rejected)

-The court rejected the husband's allegation that the wife was to be blamed for the breakdown of their marriage.

Lee Yu Lan v Lim Thian Chye (accepted)

-The court taken into account that the responsibility on the part of the respondent husband for the breakdown of the marriage, in connection with the co-respondent, among the other factors before arriving at an appropriate sum of the maintenance.

Leow Kooi Wah v Ng Kok Seng (accepted)

Agreement

S80& 84- Power for court to vary agreements for maintenance

S84. Subject to section 80, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the appointed date, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

Lim Thian Kiat v Thereza Harsook

-High Court held that the separation deed between the parties in the case concerning maintenance of the respondent and then children were subject to variation by the court as provided under section 80, 84 and 97 of the LRA.

Lost hak untuk Nafkah

S82(2)-The right of any divorced person to receive maintenance from his or her former spouse under an agreement shall cease on his or her marriage to or living in adultery with any other person unless the agreement otherwise provides.

Pengubahan dan pembatalan perintah

S83- Power for court to vary orders for maintenance

83. The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether **secured or unsecured**, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of **secured maintenance**, of the legal personal representatives of the latter, where it is satisfied that the order was based on any **misrepresentation or mistake** of fact or where there has been any **material change in the circumstances**.

Gisela Gertrud Abe v Tan Wee Kiat

- Broaden the meaning of 'vary'

- include power to 'suspend' the maintenance order or any provisions therein temporarily and revive the operation of the maintenance order or any provisions so suspended.

- Both parties are legally entitled to remarry and to start a new family

- On the other hand, if the wife remarries, her right to periodical payments in the form of maintenance shall cease as the wife will secure a new legal right to be supported and the maintenance order for the normal child of the marriage shall expire on the child attaining the age of eighteen years.

Anna Tay Siew Hong v Joseph Ng (material change)

- The respondent filed an application for a rescission of the said maintenance order citing material changes in circumstances since the order was issued. He was 60 years old, suffering from several ailments, had no permanent work for property and was dependent on his second wife for financial support.

- The court allowed the application and satisfied that there has indeed been material changes in the circumstances both of the respondent and the petitioner based on the facts in the case.

Lim Bee Kee v Leong Ah Chuan

- The respondent had been paying RM600 maintenance for the petitioner and the three children reduced to RM300 a month.

- The court dismissed the application as the respondent had failed to prove on the balance of probabilities that there had been a material change in the circumstances since the making of the order for maintenance.

S85-Maintenance payable under order of court to be inalienable

85. Maintenance payable to any person under any order of court shall not be assignable or transferable or liable to be attached, sequestered or levied upon for, or in respect of, any debt or claim whatsoever.

S86(3)- No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

Maintenance of Child (LRA)

S87-Meaning of “child” 87. In this Part, wherever the context so requires, “child” has the meaning of “child of the marriage” as defined in section 2 who is under the age of eighteen years.

S92-Duty to maintain children

92. Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

S93(1)

93. (1) The court may **at any time** order a man to pay maintenance for the benefit of his child— (a) if he has refused or neglected reasonably to provide for the child;

(b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

Saraswathy v Palakrishnan (any time)

-The court held that there was no need for a divorce petition to be filed before section 93 could be invoked in favour of children.

S93(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

Wong Kim Foong v Teau Ah Kan

-The court ordered the mother to pay RM400 per month towards the maintenance of her son, while the father had to pay RM800 per month. Payment was directed to be advanced to the petitioner as the son was staying with her.

Leow Kooi Wah v Ng Kok

-Ruled that where both parents are earning, both have a liability to maintain their children, each according to his or her means.

S93(3)- (3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

S98-Recovery of arrears of maintenance

98. Section 86 shall apply, mutatis mutandis, to orders for the payment of maintenance for the benefit of any child.

S95-Duration of orders for custody and maintenance

95. Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, or is pursuing further or higher education or training, on the ceasing of such disability or completion of such further or higher education or training, whichever is the later.

Case: Ching Seng Woah v Lin Shook Lin

- Held that involuntary financial independent is a physical liability under s95.

S96-Power for court to vary orders for custody or maintenance

96. The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

S97-Power for court to vary agreement for custody or maintenance

97. The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary

in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

S99-Duty to maintain child accepted as member of family

99. (1) Where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain such child while he or she remains a child, so far as the father and the mother of the child fail to do so, and the court may make such orders as may be necessary to ensure the welfare of the child: Provided that the duty imposed by this subsection shall cease if the child is taken away by his or her father or mother.

(2) Any sums expended by a man maintaining such child shall be recoverable as a debt from the father or mother of the child.

S100-Court to have regard to advice of welfare officers, etc.

100. When considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

S102(1)(c) an order for maintenance has been made under section 77 or 93 and has not been rescinded; or

(2) For the purposes of this section— “disposition” includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money’s worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made; “property” means property of any nature, movable or immovable, and includes money.