

EB v EC (divorce: maintenance of stepchildren)
[2006] SGHC 44

Case Number : D 603972/2003
Decision Date : 15 March 2006
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Christopher Yap (Christopher Yap & Co) for the petitioner; Pauline Anthony (Pauline Anthony & Co) for the respondent
Parties : EB — EC (divorce; maintenance of stepchildren)

Family Law – Maintenance – Child – Wife leaving matrimonial home with children and filing for divorce – Wife applying for maintenance for children pending hearing of divorce petition – Whether husband under duty to maintain wife's children from wife's previous marriage after wife leaving matrimonial home with children – Whether court having power to order husband to pay maintenance for wife's children from wife's previous marriage – Sections 70(1), 70(2), 127(1) Women's Charter (Cap 353, 1997 Rev Ed)

15 March 2006

Judgment reserved.

Woo Bih Li J:

Background

1 This matrimonial case raises a number of interesting issues. I will first set out the background.

2 On 13 May 2000, Mr EC ("the respondent") and Mdm EB ("the petitioner") were married. They lived together with the petitioner's two children, A and B, from an earlier marriage. The respondent and the petitioner have one child from their marriage, C, born in 2002.

3 In November 2003, the petitioner left the matrimonial home. On or about 6 November 2003, she filed a petition for divorce. The respondent answered and cross-petitioned. Both petitions were based on the unreasonable behaviour on the part of the other party. After a contested hearing, a decree *nisi* was granted on 27 May 2005 based on the petition and cross-petition. On 12 October 2005, District Judge ("DJ") Valerie Thean made orders in respect of various ancillary matters. The respondent then appealed to the High Court on some of the orders made by DJ Thean. However, before his appeal was heard, the respondent restricted his appeal to only one aspect, *ie*, the maintenance of \$300 for A and B each which he had been ordered to pay by DJ Regina Ow on 24 March 2004. I should say something more about that order and the developments since then until DJ Thean's order of 12 October 2005 when DJ Thean stopped the maintenance for A and B but declined to make that order with retrospective effect.

4 The petitioner had filed an application by way of Summons in Chambers No 652363 of 2003 seeking maintenance for herself and the three children pending the hearing of the divorce petition. On 24 March 2004, DJ Ow made an order for the respondent to pay maintenance of \$1,000 per month for the three children comprising:

- (a) \$300 for A;

(b) \$300 for B; and

(c) \$400 for C.

Being dissatisfied with that order, the respondent filed an appeal to the High Court. However, he withdrew that appeal.

5 Instead, on or about 9 November 2004, the respondent filed an application by way of Summons in Chambers No 651776 of 2004 to rescind or vary DJ Ow's order. On 1 February 2005, DJ May Loh dismissed the respondent's application.

6 As I have mentioned, a decree *nisi* was eventually granted by DJ Thean on 27 May 2005. Her decision on ancillary matters was given on 12 October 2005.

7 The respondent's counsel, Ms Pauline Cynthia Anthony, had taken the point before DJ Thean that the respondent was not liable to maintain A and B, who are not his biological children, because of s 70(2) of the Women's Charter (Cap 353, 1997 Rev Ed). She submitted that as the petitioner had taken away A and B, with C, in November 2003, the respondent was no longer under a duty to maintain A and B. Quite clearly, s 70(2) must be read together with s 70(1).

8 These provisions state:

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.

(2) The duty imposed by subsection (1) shall cease if the child is taken away by his father or mother.

9 DJ Thean was of the view that s 70(2), which comes under Part VIII of the Women's Charter, does not apply when there is a petition for divorce under Part X. DJ Thean concluded that s 127(1) (under Part X) of the Women's Charter, which allows the court to order a parent to pay maintenance during the pendency of any matrimonial proceeding for the benefit of his child, prevails. As for s 127(2), DJ Thean was of the view that it does not incorporate s 70 because, in her view, "the relevant sections in Part X have specifically laid out the varied circumstances in which the court is allowed to order maintenance".

10 Sections 127(1) and 127(2) state:

127.—(1) During the pendency of any matrimonial proceedings or when granting or at any time subsequent to the grant of a decree 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.

(2) The provisions of Parts VIII and IX shall apply, with the necessary modifications, to an application for maintenance and a maintenance order made under subsection (1).

11 DJ Thean also noted that "child" is defined under s 122 of the Women's Charter to mean "a child of the marriage as defined in section 92 but who is below the age of 21 years". In turn, s 92 defines "child of the marriage" as meaning:

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[.]

The court's reasons and conclusion

12 Although the respondent had initially disputed that he had accepted A and B as members of his family, DJ Thean found otherwise. In the appeal before me, the respondent did not pursue this contention. Therefore, A and B are children of the respondent's marriage as defined in s 92 and hence they are also his children as defined in s 122 and for the purpose of s 127(1).

13 The first issue is whether s 70 applies to Part X and in particular to s 127(1). If so, Ms Anthony submitted that in view of s 70(2), the respondent's duty to maintain A and B ceased when the petitioner left the matrimonial home with them.

14 Before me, Ms Anthony further submitted that the duty to maintain children is not found in Part X but in Part VIII of the Women's Charter. Ms Anthony relied, *inter alia*, on Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) which states, at pp 855–856:

The Women's Charter, after the Women's Charter (Amendment) Act 1980, provided for two groups of adults liable for this duty, *viz.*, a parent of the child and a person who has accepted the child as a member of his or her family. The duty, because of the way the provisions developed, was still divided into two distinct periods, *viz.*, while the parents' marriage subsisted and after the parents' marriage was terminated by decree. The former had begun in the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872 while the latter not until the Straits Settlements Divorce (Amendment) Ordinance 1941. The duties developed fairly independently of each other. The anomaly of having separate provisions of the same duty by keeping these two periods apart, was noted in 1987 ...

The Select Committee on the Women's Charter (Amendment) Bill [Bill No. 5/96] accepted the suggestion from two representors to correct this anomaly. By a series of amendments, the Women's Charter (Amendment) Act 1996 removes all substantive provisions on maintenance of a child from Part X of the Women's Charter on 'Welfare of Children' upon termination of their parents' marriage, retains the more useful provisions in Part VIII on 'Maintenance of Wife and Children', and makes consequential adjustments to the provisions retained. As a result of this fairly major formal change, the substantive provisions on maintenance of a child are all in Part VIII of the Women's Charter. No substantive provisions and, what is more important, none to suggest the duty is different at another time, appears in any other Part. All that Part X has are provisions which allow the court, upon or after granting a decree to annul or terminate a marriage, to address the question whether to order any person to provide maintenance for a child affected by the decree.

15 Having considered the above and Part VIII and Part X, I am of the view that this submission is correct. The duty to maintain a child is stated in various provisions under Part VIII. Section 68(1) under Part VIII stipulates the duty of a parent to maintain his children but this applies only to his biological children. The definition of "child of the marriage" in s 92 applies only to Part X and not Part VIII. Accordingly, Part VIII has an additional provision to cover non-biological children and this additional provision is s 70(1). Part X and, in particular, s 127(1), does not stipulate the duty to maintain but what the court may do in matrimonial proceedings. True, s 127(1) states that the court

may order a parent to pay maintenance during the pendency of any matrimonial proceedings, but this must, in my view, be premised in the first place on a duty to maintain. In other words, the court has no power to order a parent to pay maintenance if that parent has no duty to maintain. As I have mentioned, the duty to maintain a child is stipulated in s 68(1) and in s 70(1), but not in s 127(1).

16 From the overall scheme of things, s 70 does apply in principle to any matrimonial proceeding. This is reinforced by s 127(2) which, in my view, does expressly incorporate Part VIII, and in particular s 70, in principle, to an application under s 127(1). Accordingly, I am of the view that DJ Thean had erred and, in principle, s 70 does apply to a s 127(1) application.

17 However, that is not all. Ms Anthony had assumed that if s 70(2) applies in principle, the respondent would be able to avail himself of s 70(2) since the petitioner had left the matrimonial home with A and B. I was not so certain about this conclusion. What does "taken away by ... his mother" in s 70(2) mean?

18 On a literal interpretation, Ms Anthony appeared to be correct that since the petitioner had left the matrimonial home with A and B, this meant that she had taken them away. However, what would be the result if the petitioner had not left with the children and it was the respondent who had left the matrimonial home? Again, on a literal interpretation, that would mean that s 70(2) is not available to the respondent. In my view, such a result is anomalous and the cessation of the duty to maintain, say, a stepchild, cannot depend on whether that stepchild is taken from the matrimonial home or is left behind. Furthermore, if s 70(2) is available to a person who has left a stepchild behind, it would be easy for that person to cast aside that duty simply by leaving the stepchild behind.

19 It seems to me that s 70(2) is meant to cover the situation where the biological parent is not part of the family of the person who has accepted, say, a stepchild as a member of his family, and the biological parent then comes and removes that child from the custody of the person who had accepted the stepchild as a member of his family. Accordingly, the respondent cannot avail himself of s 70(2) as the petitioner was a member of the respondent's family.

20 However, Ms Anthony raised another argument relying on p 861 of *Principles of Family Law in Singapore* ([14] *supra*) which states:

The underlying basis of this duty differs from that of a parent. A parent is, naturally, liable for his or her child's maintenance. The basis of a parent's duty lies, if one likes, in the decision to be a parent in the first place. The basis under section 70(1), though, is the person voluntarily assuming this responsibility when he or she had a real choice whether to do so. By accepting the child as a member of his or her family, he or she has represented to the child that he or she accepts the duty of maintenance of the child. If the child's parents fail in it, the courts may enforce the responsibility which the adult had assumed. If the basis of the liability is a voluntary assumption of responsibility, it would appear that this responsibility cannot be enforced as resolutely as the duty of a parent. The duty is, as discussed below, subordinated to a parent's duty but, even without those express limits, it seems right in principle that the person cannot be forced to discharge this responsibility *for a long time* after he or she has clearly indicated that he or she no longer accepts it. [emphasis added]

21 Ms Anthony was suggesting that the respondent cannot be liable to maintain A and B after he has indicated he no longer wishes to accept this responsibility. I note that the above passage does not suggest an immediate cessation of responsibility as the phrase "for a long time" is used. In any event, I am of the view that once a person has accepted a child as a member of his family and hence has accepted the responsibility under s 70(1), he cannot abandon the responsibility simply by

changing his mind. Otherwise, what would happen if, for example, the petitioner had passed away before any serious marital discord with the respondent had arisen and the biological father cannot be found? Would the respondent have been able to claim subsequently that he wished no longer to maintain A and B? Surely not.

22 However, that is not all. It will be recalled that s 70(1) imposes a duty on the respondent to maintain A and B so far as "the father or the mother" of A and B "fails to do so". These two phrases raise some more issues.

23 First, the use of the conjunction "or" suggests that so long as either one of the biological parents fails to maintain the children, the respondent is under a duty to maintain since he had accepted A and B as members of his family. If that is correct, another anomaly arises. For example, if the biological father maintains A and B but the petitioner does not, the respondent is still under a duty to maintain them as well, so long as the petitioner does not do so. Likewise, if the petitioner maintains A and B but the biological father does not, the respondent's duty to maintain remains. This cannot be right. In my view, what s 70(1) means is that so long as neither biological parent maintains A and B, then the respondent's duty to maintain arises. In other words the conjunction "or" therein should be read as "and" and the clause should be read as "so far as the father and the mother of the child fail to do so".

24 What then does a failure to maintain mean? For example, if the petitioner can provide some but not full maintenance, is there a failure to maintain? I think so. The failure to maintain does not mean a total failure. In the present circumstances, the petitioner is not able to fully maintain A and B in the lifestyle they were used to on her own. Her take home pay is \$1,703 per month and she has to maintain herself and help maintain C as well. Ms Anthony, however, submitted that the petitioner should seek maintenance for A and B from their biological father. As it was, when a decree *nisi* was granted for the petitioner's first marriage on or about 4 March 1999 (10 March 1999 being the filing date thereof) the petitioner had only obtained an order for the biological father to pay nominal maintenance for A and B at \$2 per month.

25 In such circumstances, can it be said that the biological father has failed to maintain A and B within the meaning of s 70(1)? I think so. The omission of the petitioner to obtain an order for substantive maintenance from him does not change the fact that he too is not fully maintaining them. Therefore, technically, the respondent's duty to maintain A and B had arisen and it had not ceased under s 70(2) for the reasons I have stated.

26 However, the duty to maintain does not always lead to an order to maintain. The power to order maintenance under s 127(1) also includes the power not to order maintenance. In the circumstances, should DJ Ow have ordered the respondent to pay maintenance for A and B on 24 March 2004? The issues under ss 70(2) and 70(1) were not raised before DJ Ow. Neither were they raised before DJ Loh. Before DJ Thean and before me, Ms Anthony, who was the respondent's new counsel, relied on s 70(2) for a cessation of the respondent's duty. She also argued that the petitioner should be seeking more substantive maintenance from the biological father although she did not rely on s 70(1) until some time later in the course of arguments before me.

27 Mr Christopher Yap, counsel for the petitioner, referred me to para 15 of the petitioner's affidavit filed on 8 March 2004. In that paragraph, the petitioner said:

I have sought nominal maintenance from my previous husband as he agreed not to see the children as shown in the Decree Nisi. I agreed with [these] terms because he would be of bad influence to them and also I thought I could cope financially.

28 When I asked Mr Yap why the petitioner had thought she could cope financially in March 1999 when the nominal maintenance order was made against the biological father, Mr Yap could only say that since then she had left her job to help the respondent in a snack house business. Although the respondent had disputed that the snack house business was his, DJ Thean found that he had a stake in the business. I see no reason to disagree with that finding. However, even on that finding, the point is that the petitioner is no longer helping out in that business and has found a job with a take-home pay of \$1,703 a month. Mr Yap was not able to furnish me with a comparison of the petitioner's financial situation in 1999 (when the decree *nisi* for her first marriage was granted) and at present. However, I note from a perusal of the petitioner's affidavits that she said that since July 2003, she was no longer deriving rental of \$900 per month from an HDB flat which she owns as she was cautioned by HDB about unauthorised subletting. Perhaps this was the reason why she had thought in March 1999 that she could cope financially without seeking an order for substantial maintenance against the biological father. However, even if that were so, and even if the circumstances have changed, should she not be seeking maintenance from the biological father instead of the respondent? Presumably, the reasons for not seeking a variation of the maintenance order against the biological father remain the same. In the circumstances, it does not seem right to me that the burden should then be permanently imposed on the respondent by making an order of maintenance against him until A and B are 21. DJ Thean was of a similar view. As mentioned above, she decided to stop the maintenance for A and B but only from 17 October 2005, the date when she made her decision on the ancillary matters. She thought it was right to expect the respondent to assist to tide over A and B's difficulties temporarily. Hence, DJ Thean declined to order the petitioner to return the \$11,400 which the respondent had so far paid under DJ Ow's order for A and B's maintenance.

29 I take into account the fact that the respondent had accepted A and B as members of his family. He had been prepared to and did assist in maintaining them without assistance from the biological father, whether or not he knew then about the actual terms of the order for maintenance against the biological father. When the respondent's marriage with the petitioner failed, it is not reasonable for him to expect to withdraw his financial support for A and B immediately when the petitioner left the matrimonial home with them. Secondly, the respondent had not raised s 70 earlier. Thirdly, according to para 14 of the petitioner's affidavit of 18 January 2005, she had stopped working in a part-time job because she was receiving maintenance from the respondent (presumably pursuant to DJ Ow's order). In the circumstances, I agree with DJ Thean's decision to stop the maintenance for A and B only from the date of her order and not to make her order with retrospective effect, although some of my reasons differ from hers.

30 I come now to another point made by DJ Thean in support of her decision. She said that the respondent should have appealed against DJ Ow's order. She noted that in fact he did appeal but withdrew that appeal. Accordingly, she was of the view that he could scarcely complain. It seems to me, without my deciding the point, that since DJ Ow's order was an interim one pending a final decision on the ancillaries, the respondent's recourse might not have been limited to filing an appeal and he might have been entitled to raise issues under ss 70(1) and 70(2) of the Women's Charter before DJ Thean, especially since such issues had not been decided by DJ Ow or by DJ Loh. The situation would be more complicated if either of these two judges had already decided on such issues. If such a situation should arise in the future, the losing party should seek, from the court making an interim maintenance order, clarification whether he may raise the issues again at the hearing of the ancillaries, rather than risk facing an argument about issue estoppel on points of law.

31 Accordingly, I dismiss the appeal of the respondent. I will hear the parties on the costs of the appeal and on any other outstanding matter.

