THE DUTY TO MAINTAIN SPOUSE AND CHILDREN DURING MARRIAGE

This article surveys the current issues on the law of maintenance during the subsistence of a marriage. On the duty of a husband to maintain his wife, we have the 1968 High Court appellate decision that it rests on proof of the husband's culpability. Is this good law? Even if it was good law then, is it still good law after the 1980 amendments? The law permits "any married woman" to apply for maintenance; who is she? What is the effect of annulment and divorce on her ability to apply? On the duty of a parent to maintain his children, who is a "child" for this purpose? Does an order in favour of a child terminate on his reaching the age of twenty-one? The statutory provisions and case law are studied in some detail.

TWO separate provisions in the Women's Charter[1] provide for the duty to maintain one's family: section 61 (including section 62) which operates, in the main, while the marriage is still subsisting; and section 107 (including section 121) which only operates when the matrimonial jurisdiction of the High Court has been attracted by the presentation of a petition for divorce, judicial separation or nullity of marriage. At this time it is not entirely clear whether the two provisions are completely separate one from the other such that it would not be possible for both to be available to any particular applicant at any one time, or, for that matter, whether the rules as to the manner in which the court should handle a claim for maintenance under each of the provisions are different or not. This essay concentrates on section 61. The intention is to provide an overview of the law regarding the duty to maintain during the subsistence of a marriage.

The duty to maintain may neatly be divided into two: the duty between spouses *inter se* and the duty of the spouses as parents to maintain their children.[2] There is an obvious difference between these two relationships which is worthwhile repeating because it is often forgotten and neglected. It is simply that the spousal relationship is much easier to terminate than that between parents and children. The frequency of divorce and annulment surely far outweighs that of adoption. It bears remembering that while divorce and annulment permanently sever the spousal relationship they have minimal effect in law on the continuing relationship between the divorced parties and their children. We would thus expect the law regarding the duty of parents to maintain their children to be more or less the same whether the question is raised during the continuance of a marriage or after its termination pursuant to a court order. While there may be persuasive reasons to limit the duty of ex-spouses to maintain each other after they have had their relationship terminated by the court this fact should not alter the continuance of their duty towards their children.

1 Cap. 353, 1985 (Rev. Ed.) Statutes of the Republic of Singapore hereinafter referred to as the "Act".

2 There is a view that it is irrational to separate them in this way where the parent who is also the caregiver is himself or herself in receipt of maintenance because the proper discharge of the parent's duty towards the children also requires that the caregiver's needs be adequately met: see Eekalaar and Maclean, *Maintenance After Divorce* (1986).

I. MAINTENANCE OF SPOUSES

The Act is completely one-sided with regard to this matter. Section 61(1) places a duty on a husband to maintain his wife without placing a corresponding duty on her. It reads:

> Any married woman whose husband neglects or refuses to provide her reasonable maintenance may apply to a District Court or Magistrate's Court and such court on due proof thereof may order the husband to pay a monthly allowance or lump sum for her maintenance.

It is not possible to suggest that the choice of gender in the nouns is not deliberate and that the masculine should include the feminine and *vice versa*[3] for the following reasons: as we shall see it has never been the law in Singapore that a wife may be liable to maintain her husband during the subsistence of the marriage[4] whether under the common law as it applied here or under the various statutory provisions that preceded section 61(1), and it is clear from reading the whole Act that whenever it is not intended to be gender-specific neutral terms such as "any person" or "any party to the marriage" are used instead.

(1) Is Section 61(1) A Substantive Provision?

It may be possible because of the High Court decision (on appeal) in *Quek Ah Chian* v. *Ng Guan Chng*[5] to put forward a view that section 61(1) is not a substantive provision standing on its own right but rather only a procedural provision which enables the court to enforce the duty a husband owes his wife under the common law. That duty was rather more limited than section 61(1) read literally. It is thus critical to ask whether the provision is to be limited by the common law in this regard. We cannot suggest an answer to this without tracing the history of the law regarding the husband's duty.

At common law,[6] the husband's duty to maintain his wife flowed from consortium.[7] The duty was owed for only so long as consortium existed such that if the wife should grossly misbehave she would no longer be entitled to consortium and would also no longer be entitled to be maintained by her husband. The commission of the matrimonial offence of adultery, even just once, would terminate the husband's duty. The commission by the wife of the other matrimonial offence, desertion, would also severely affect her right in that as long as it continued he was not legally obliged to maintain her. The other point to note about the common law was that the husband's obligation could not be enfored by applying for a court order directing the husband to discharge his obligation. All that the common law permitted the wife was the right to pledge her husband's credit for the necessaries of life such as food, basic clothes and shelter. While the law is that this

3 See s. 2(1) of the Interpretation Act, Cap. 1, 1985 (Rev. Ed.).

4 Although the previous s. 114(2) of the Act did make a wife who petitioned for divorce on the ground of his insanity liable to be ordered to maintain him. This provision was deleted in 1980: *vide* Act 26 of 1980.

5 [1968] 1 M.L.J. 255.

6 That the common law relating to the family was received into the Straits Settlements is beyond question. See *inter alia* the Privy Council decision in *Khoo Hooi Leong* v. *Khoo Chong Geok* [1930] A.C. 346.

7 See *Wilson* v. *Glossop* (1888) 20 Q.B.D. 353.

"agency of necessity" was irrevocable by the husband it must in practice have been highly inconvenient for the wife as the enforcement of the husband's obligation depended to a large degree on the will of the merchants. Many might not have thought it worth their while to take the risk of non-payment (should it turn out that the wife had committed adultery), or even to accept the inconvenience of having to seek payment from the husband and thus to the extent that this might have been so the common law obligation was of imperfect enforcement.

The first local statute on maintenance was the Straits Settlements Summary Criminal Jurisdiction Ordinance,[8] section 45 of which provided:

> I. If any person neglects or refuses to maintain his wife or legitimate child unable to maintain itself, it shall be lawful for the Court of Quarter Sessions or for a Magistrate upon due proof thereof, to order such person to make a monthly allowance for the maintenance of his wife or such child as aforesaid, in proportion to the means of such person, as reasonable, and
>
> II. If any person neglects or refuses to maintain his illegitimate child unable to maintain itself, it shall be lawful for the Court of Quarter Sessions, or for a Magistrate, on due proof thereof, to order such person to make such monthly allowance not exceeding ten dollars, as to the Court or Magistrate may seem reasonable....
>
> III. No wife shall be entitled to receive an allowance from her husband under this Section, if she is living in adultery or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by consent.

Two points should be noted at this stage about the relationship between this provision and the obligation which the common law placed upon the husband to maintain his wife. First, subsection (1) refers both to the obligation of a husband to support his wife as well as to the obligation of a parent to maintain his children. In as much as the common law did not require a parent to maintain his children[9] such that this provision created that duty, the juxtaposition of this newly created duty with that of the husband's duty to maintain his wife may be said to suggest that the legislature intended this statutory duty to supersede that which existed at common law. It should also be noted, however that subsection (III) retains the limits that the common law set to the husband's duty although it adds to it the situation where the spouses are "living apart by consent." That this is so may also suggest that the legislature did not intend this provision to supersede the common law but rather only to provide for a more efficient means of enforcement than the use of the agency of necessity.

In 1906, this provision was replaced by section 39 of the Minor Offences Ordinance.[10] Interestingly enough, the legislature amended the abovementioned subsection (HI) such that a wife would henceforth no longer be entitled to maintenance only if "she is living in adultery or if without any sufficient reason she refuses to live with him" such as to bring these exceptions closer to those at the common law. In the 1926 Revision of the

8 Straits Settlements Ordinance No. XIII of 1872.

9 *Infra.*

10 Straits Settlements Ordinance No. XIII of 1906.

Laws of the Straits Settlements this provision, without alteration, became section 38.[11] Further in 1949 this provision was removed from Ordinance No. 96 and reproduced, again without alteration, within the Married Women and Children (Maintenance) Ordinance.[12] In the 1955 Revision of the Laws of the Colony of Singapore, the Married Women and Children (Maintenance) Ordinance was renumbered, without any material alteration to this particular provision.[13]

In 1961, the Ordinance was repealed with the enactment of the Women's Charter. In its place, section 62 (as the provision was then numbered) of the Act read:

> (1) Any married woman whose husband —
>
> (a) has been convicted of an offence under Chapter XVI of the Penal Code against her or any of her children;
>
> (b) has deserted her;
>
> (c) has neglected to provide reasonable maintenance for her and her children whom he is liable to maintain;
>
> (d) has treated her or any of her children with cruelty;
>
> (e) is a habitual drunkard; or
>
> (0 is living in adultery with another woman,
>
> may apply to a District Court or Magistrate's Court and such Court on due proof thereof may order the husband of such married woman to make a monthly allowance for her maintenance in proportion to his means as to the Court seems reasonable...

It should be noted that this provision is conceptually completely different from either the common law or the earlier statutory provision. While the common law and the earlier statutory provisions imposed a blanket duty upon the husband, section 62 imposed a duty on him only on proof of one of the causes specified therein; also, while the common law and the earlier statutory provisions provided complete defences which the husband could avail himself of when faced with his wife's claim for maintenance, section 62 did not appear to provide complete defences. It was thus open to a court to find section 62 so removed from the common law that by the time this provision was enacted it was substantive and not dependent upon the common law.

Such an opportunity did present itself in the watershed case of *Quek Ah Chian* v. *Ng Guan Chng.*[14] The parties were married in December 1965 but the marriage was so unhappy that four months later the wife left the matrimonial home and returned to her own parents' home. In April 1967, she applied to the subordinate courts for a maintenance order under section 62(l)(c) and (d) of the Act. The Magistrate hearing the case had found both grounds proven and had made an order in favour of the wife. The husband appealed to the High Court on two grounds: (I) that the Magistrate erred in fact and in law in holding that he had treated his wife with cruelty, and (2) that the Magistrate erred in law in holding that, he had neglected to maintain his wife. The High Court on appeal agreed with the husband

11 Straits Settlements Ordinance No. 96.
12 Straits Settlements Ordinance No. 26 of 1949.
13 Cap. 44 of the 1955 Rev. Ed. of the Laws of the Colony of Singapore.
14 *Supra,* note 5.

on both counts and the matter was to be remitted to another Magistrate to be re-tried. The first ground of appeal does not concern us here.

> On the second ground, Wee Chong Jin C.J. said:
>
> Counsel for the husband contends that there must be proof of culpable omission on the part of the husband to maintain the wife before it can be held under section 62(l)(c) that a husband "has neglected to provide reasonable maintenance for her." It is not enough, counsel argues, to prove merely that at time of the application the husband has failed to provide reasonable maintenance for her... In my judgment, it is necessary that an applicant must prove not only an omission to maintain her but also that it was a *culpable omission.*[15]

What this meant for the wife was that since she had refused to reside in the matrimonial home there must be evidence that she was justified in so refusing.

It is submitted, with all due respect, that this decision of Wee Chong Jin C.J. on what is the proper interpretation of "neglected to provide reasonable maintenance" is open to criticism. His Lordship gave no reason why he felt it necessary to read culpability into the words which, in their literal interpretation, are divorced from notions of fault. The norms of interpretation require that his Lordship, in taking some other than a literal reading of these clear unambiguous words, should give reasons why he is doing so. The failure to give such reasons undermines the strength of his Lordship's view.

Although his Lordship never referred to the common law it is suggested that his reading of culpability into "neglected to provide reasonable maintenance" is a throw-back to common law in this area. As indicated earlier, at common law, a husband was obliged to maintain his wife for only so long as she remained virtuous. Neglecting to maintain a virtuous wife is culpable and thus legally reprehensible while neglecting to maintain a non-virtuous wife is not culpable and thus not legally reprehensible. The old case of *Wilson* v. *Glossop*[16] which is often cited in textbooks as leading authority is instructive. In that case, a husband was being sued for necessaries supplied to his wife. His defence was that she had committed adultery but the wife's answer was that the husband had connived in her commission and was thus precluded from raising it as a defence. The English Court of Appeal agreed with the lower appellate tribunal that, having connived in the commission of her adultery, the husband was precluded from relying upon the adultery to exonerate himself from his duty to maintain her. The effect of the decision was thus that at common law the husband's duty exists for only so long as it would be culpable or blameworthy of him not to discharge it. Where a wife commits adultery of her own accord, it would not be cupable of the husband to refuse to maintain her. Where, however, the wife's commission is shown to have been with the husband's connivance or condonance it would again be culpable of him to refuse to maintain her. It would thus be correct to characterise the common law obligation as one which exists only on proof that it would be culpable of the husband to refuse to discharge it. Wee Chong Jin C.J. may therefore be said to have read the common law into

[15] *Ibid.,* at p. 257 (emphasis added).
[16] *Supra,* note 7.

section 62(2), and through it into the entire provision. The fault is that he did not give reasons why he felt he had to.

The decision is unfortunate also for having ignored the history behind the then section 62. It would not seem from the judgment that an argument, and it is submitted a plausible one, was made that the evolution of the provision suggests that it was separate or separated from the common law. As has been noted above the first such provision was enacted within a section of a statute that created the duty of parents to maintain their children. It would have been odd of the legislature to have used one section to achieve two purposes *viz.* to create the duty of parents to support their children, and also to provide for a more efficient mechanism for the enforcement of the common law duty upon husbands to maintain their wives. It would be more reasonable to suggest that one section only was used because the duty of the husband was also newly created and that it superseded that which he owed at common law. It is also of note that the statutory duty placed upon husbands was amended several times quite independently of the duty at common law. In fact, the change in 1961, which brought the very section the Court was reviewing into being, was the most sweeping of all. As has been noted section 62 of the 1961 version of the Act both made the husband's duty available to the wife only on proof of one of the enumerated causes, and also removed the defences which the earlier statutes had expressly provided for him. The latter change may be said to have removed the factor of "culpability" which originated in the common law and had been preserved by the earlier statutes. It is a little hard to see how despite these substantive changes, the provision can still be said merely to enforce the common law obligation. And, if it is not the case that the entire provision merely enforces the common law, then one would have to argue that the Court's view was that only one of the subsections enforces the husband's common law duty while the other subsections are independent substantive provisions — a view which would be extremely difficult to justify. It also follows that reading culpability into the section or any part of it reintroduces the very defences which the legislature had deleted from the predecessor provision when enacting this section. The judgment thus thwarted the effort of the legislature of removing defences from the provision.

It may also have been that the Court was influenced by the state of the law of maintenance in England at the relevant time. The Matrimonial Causes Act 1965 provided one way in which a wife could apply to court for maintenance. Section 22 of this English Act read:

> (1) Where —
>
> (a) a husband has been guilty of *wilful neglect* to provide reasonable maintenance for his wife ... the court may on the application of the wife order the husband to make to her such periodical payments as may seem just. (emphasis added)

The English High Court in the case of *Gray* v. *Gray*[17] decided that a wife who admitted having committed adultery which the husband had neither connived at nor condoned loses her entitlement to be maintained by him just as she would have under the common law. It is speculation whether

[17] (1976) Fam. 324. It should be noted that, *semble,* this is no longer the law of maintenance in England and misconduct does not in itself disentitle a wife from maintenance from her husband: see Cretney, *Principles of Family Law* (4th ed., 1984), pp. 863-864.

the state of the English law at the time had any effect upon the High Court in *Quek Ah Chian's* case. If it had it is submitted that this would have been wrong because the crucial limitation "wilful" within the English provision is not found within the then section 62.

The then section 62 was renumbered section 60 in the 1970 Revision of the Laws of Singapore. Section 60 was amended significantly in 1981 *vide* the Women's Charter (Amendment) Act[18] and this amended version is now renumbered section 61 in the 1985 Revision of the Laws of Singapore. The interesting question now is whether the decision in *Quek Ah Chian*'s case is still good law. It is submitted that the decision should no longer be seen to be good law for the following reasons.

The intention behind the amendment of the then section 60 was made clear by the then Acting Minister of Social Affairs. During the deliberations of the Select Committee of Parliament on the Women's Charter (Amendment) Bill (Bill No. 23/79) the Minister said:

> The existing Section 60 is not entirely satisfactory and this is borne out by the criticisms by the YWCA, Ms Leong Wai Kum, the Lawyer's Christian Fellowship and Mr Michael Hwang. Therefore, a new Section 60 is to be enacted to lay down principles for a Court to grant maintenance for the wife and children. *These principles are similar to those laid down in the new Part IX of the Women's Charter.*[19]

Part IX of the Act deals with matrimonial relief and the most significant change was to the law of divorce. While the grounds of divorce had hitherto been based on the "fault theory" under which a petitioner must prove that the failure of the marriage was due solely to the fault of the respondent while he or she has been blameless throughout, the Amendment Act substituted these grounds with one which is based on the "irretrievable breakdown of marriage theory" under which a petitioner need only show clear evidence that the marital relationship is beyond retrieve without having to show who was the cause thereof.[20] The "fault theory" has long been discredited because experience shows that in reality both spouses are probably roughly equal in blame and thus no good purpose is served in trying to place fault on one spouse or the other. The new thinking reflected in our divorce legislation is thus to keep considerations of misconduct to a minimum. This is reflected *inter alia* in section 108 which lays down the principles which guide the court "in determining the amount of any maintenance to be paid by a man to his wife or former wife." It is quite clear that a wife need not lose her claim for maintenance just because she has conducted herself badly during the course of the marriage although, of course, the court may take this into account in considering the quantum or the duration of the order. The commission of adultery or desertion need no longer disqualify a needy wife from an order for maintenance from her former husband. The reference to this new thinking by the Minister is thus of much significance. Surely if a man may be ordered to maintain a woman who is no longer his wife despite the fact that she misconducted herself during the course of the marriage there is all the more reason to make him maintain her while she is still his wife. To the extent that the Minister's state-

18 Act 26 of 1980 w.e.f. 1 June 1981.

19 Report of the Select Committee of Parliament on the Women's Charter (Amendment) Bill, Appendix IV, C 4 (emphasis added).

20 S. 88 of the Act.

ment reflects the intention of Parliament it may be suggested that fault and culpability are no longer central to the then amended section 60. And it is submitted that it does so reflect the intention of Parliament as this amendment was received without debate when the Bill was presented for its third reading.

The actual change made to the then section 60 may also be significant. The entire subsection (1) which lays down the various grounds on which a wife may apply for maintenance was deleted and substituted with:

> (1) Any married woman whose husband neglects or refuses to provide her reasonable maintenance may apply to a District or Magistrate's Court and such court on due proof may order the husband to pay a monthly allowance or lump sum for her maintenance.

This provision is close to the former section 62(1)(c) but there are differences: it substitutes "neglects or refuses" for "has neglected", and it deletes "and her children whom he is liable to maintain." It is more important to note that all the other grounds which were deleted had to do with some blameworthy conduct on the part of the husband: for example, conviction of an offence against the wife or against her children, desertion by him, cruelty by him *etc.*

This amended section 60(1) is now renumbered section 61(1) in the 1985 Revision of the Laws of Singapore. It remains, however, in exactly the same formulation. It is thus submitted that the statement of the Minister during the deliberations of the Select Committee as well as the actual change made to the then section 60(1) are still relevant to the interpretation of the present section 61(1). These, it is further submitted, lend support to the view that *Quek Ah Chian*'s case no longer represents the present law. The former shows that the amendment was directed by the desire to remove the concept of fault and culpability as the basis of the law in this area while the latter shows that the change was towards "need" as the new basis — a wife whose husband neglects or refuses to provide her reasonable maintenance is in need and may therefore apply for an order and, since she is in need, her application should not fail just because she has misconducted herself. The new role of fault and culpability is no longer to determine the incidence of the liability as *Quek Ah Chian* had decided with reference to the original section 62 in the 1961 version of the Act but rather only to be a factor for consideration by the court when it gets down to deciding the actual amount and duration of the order. It is hoped that there will soon be an opportunity for the courts to review this matter.

Before leaving this area one should ask what is the current status in Singapore of the "agency of necessity." As stated earlier, this was the indirect means by which the common law permitted the wife to enforce her husband's duty to maintain her. This agency was irrevocable by the husband and to that extent it differs from the common agency he might bestow upon his wife which would be revocable in the same manner as any other common agency *viz.* by his giving due notice of the revocation of her authority. Once the court began to permit the wife to enforce her husband's duty directly by applying to court for an order for maintenance, the agency of necessity was increasingly eclipsed. In England by 1970 the agency of necessity had become obsolete and it was abolished by section 41 of the Matrimonial Proceedings and Property Act 1970. Surprisingly, the agency of necessity has not yet been abolished in Singapore despite the long history of the power

of the court directly to enforce the husband's duty to maintain his wife. Could it be that the agency of necessity is still operative in Singapore such that a married woman may choose whether to enforce her husband's duty directly or indirectly? Until the legislature abolishes the mechanism, it is always possible for a court to decide that it survives the enactment of the power of direct enforcement. It may also be possible, however, to argue that section 60 is intended by the legislature to be the exclusive means of enforcing the husband's duty. It could be said that the provision is so broad and so easy to invoke that the legislature must have intended that the other indirect means of enforcement be abrogated. Hardingham argues this in the context of Australia where most of the states are in a situation similar to Singapore's.[21]

(2) *What is the Scope of Section 61(1)?*

Section 61(1) allows "any married woman" to apply to court for an order for maintenance from her "husband". Reading this together with section 3(1) which provides that the Act applies to "all persons in Singapore" it would seem as if any woman married under any law who is now present in Singapore may use the provision. The presence of the applicant is sufficient to attract the jurisdiction of the Court. The vital question becomes "who is a 'married woman' in Singapore?" Section 2 of the Act provides this definition: "a woman validly married under any law, religion, custom or usage". It seems clear that the definition includes polygamous marriage systems as well as monogamous ones. In fact, women married under Muslim law in Singapore or elsewhere are clearly included within this definition and they may make use of section 61 since section 3(2) which excepts the application of certain provisions of the Act from such persons does not cover section 61 or any of the sections in Part VII of the Act.[22] The definition, however, requires that the woman must be able to convince the court that Singapore law regards her marriage as being valid. Proof that the marriage is not valid should lead to a dismissal of her application.

Section 99 of the Act spells out all the various grounds on which the validity of a marriage may be attacked in court in Singapore. This is not the place to Survey the entire law of nullity but, simply put, a marriage solemnised in Singapore is not valid if either party was alreadv married to anv person at the date of the subsequent marriage, or either party was below eighteen (unless special authorisation had been obtained), or the parties were related within the prohibited degrees (unless special authorisation was obtained) or where the marriage was not solemnized in the proper form. A marriage solemnized outside Singapore is invalid "(i) for lack of capacity; or (ii) by the law of the place in which it was celebrated." It would be open to a husband whose wife applies for a maintenance order to use any of these to show that she is not really a "married woman" for the purposes of maintenance.

An illustrative case is *Tan Anna* v. *Lawrence Au Poh Weng*.[23] An order for maintenance had been made against the husband. He subsequently petitioned for divorce but the petition was dismissed on the basis that the parties were never validly married to each other in the first place. Armed with this, the husband applied to have his maintenance order rescinded under

[21] Hardingham, "A Married Woman's Capacity to Pledge Her Husband's Credit for Necessaries" (1980) 54 A.L.J. 661.

[22] "Parts II to VI and Part IX and ss. 181 and 182 shall not apply to any person who is married under ... the provisions of the Muslim law ...."

[23] [1981] 2 M.L.J. 57.

section 64 of the Act. The order was rescinded and this was upheld by the High Court on appeal. The point is that there is no power to make an order under section 61 unless the parties are validly married to one another. It may be possible though, for the wife here, to apply for maintenance under Part IX of the Act since the matrimonial jurisdiction of the High Court had been invoked.

Similarly, it would be thought that a woman who was party to a valid marriage but whose marriage was terminated by a decree of divorce would no longer be a "married woman" at the date of application and thus not be able to apply under section 61. However, in the 1979 case of *V.S.T. Letchme* v. *K.N.V. Gopal,*[24] Rajah J., in what was clearly an *obiter dictum,* said:

> [A]s against an erring husband, a wife has a remedy for her maintenance and in seeking to enforce this remedy she can elect either to go to the Subordinate Courts or to the High Court depending on whether the maintenance sought is (1) the primary and only relief she is seeking or (2) whether it is ancillary to proceedings, under Part IX of the Women's Charter, affecting her marital status. If it is the former she can only use the Subordinate Courts as her forum, if the latter then the High Court is her forum.[25]

That this is mere *obiter* is clear when we look at the facts of the case. The husband and wife had been married since 1970. In November 1976 the wife petitioned for divorce but she did not include a prayer for maintenance in her petition. In December 1976 she started maintenance proceedings under the then section 60 against her husband. In March 1977 the Registrar of the Subordinate Courts made a consent order of maintenance whereby the husband would make monthly payments to his wife. At the time of application by the wife for maintenance, therefore, and even at the time the application ended successfully the applicant was still a "married woman" as required by the then section 60. Subsequent to this the wife's petition for divorce was granted and the decree was made absolute in October 1977 without the fact of the maintenance order ever being brought to the High Court's attention. The husband began the present proceedings in the subordinate courts in March 1979 praying that the maintenance order be rescinded under the then section 62 of the Act because his marriage had been dissolved. The Magistrate did indeed rescind the order. He held that the then section 62 requires every maintenance order to be rescinded whenever the parties cease to be husband and wife. Rajah J., on appeal, disagreed with the Magistrate and, it is submitted, he was correct in so disagreeing. As will be argued more fully later, section 64 does not require every maintenance order to be rescinded upon proof that the marital relationship has been dissolved; rather, the section allows the court the discretion to decide if it would be proper to do so. In the result his Lordship overturned the Magistrate's order such that the maintenance order would continue despite the divorce.

As the applicant was still married at the relevant time it was unnecessary for his Lordship to have commented on what the position would have been if the facts had been different and the wife had obtained a decree of divorce

[24] [1980] 1 M.L.J. 143.
[25] *Ibid.,* at p. 144.

before applying for maintenance. It will now be argued that his Lordship's dictum was incorrect. It is submitted that the power of the court under section 61 is different from the power of the High Court under Part IX, not only because the latter is ancillary to the High Court's matrimonial jurisdiction as his Lordship pointed out, but also because the power in section 61 can only be invoked while the marriage still subsists and is no longer available once the marriage is ended by a court order. There are two reasons for this. First, section 61 is clear and unambiguous and should be read as it was drafted. The literal meaning of the term "married woman" would surely not include someone who was a married woman at some time but who has since ceased to be one. A divorcee at the time of application cannot come within the provision unless the term "married woman" should be given some other than its literal reading and there is no good reason for doing this. Secondly, as was seen from the evolution of the section provided earlier, the section first appeared in the Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872. At that time, the courts did not yet have the power to grant decrees of divorce. Almost four decades were to pass before the first statute was enacted "to confer upon the Supreme Court jurisdiction in Divorce and Matrimonial Causes".[26] It was thus only in 1910 with the enactment of the Straits Settlements Divorce Ordinance[27] that the forerunner of the present power of the High Court to make a maintenance order under Part IX of the Act, *i.e.* section 107, was first created. The underlying bases of these two powers are therefore quite different — section 61 was first enacted to allow a married woman to obtain maintenance from her husband during the course of the marriage while section 107 was first enacted to allow a court which had been given the power to dissolve a marriage the power also to ensure that the woman would not be left destitute. The two provisions developed separately and the first time they were placed together was when the Women's Charter was enacted in 1961 and even then there was nothing to indicate that the legislature intended both provisions to be available simultaneously either in the situation his Lordship had in mind or any other. The better view probably is that the provisions operate distinctively and cannot both be available to an applicant at the same time.

That the provisions in section 61 and 107 operate in different circumstances does not, however, mean that we can never have a maintenance order made under section 61 continue to operate after the woman has been divorced. In fact, this was the situation in *Letchme* v. *Gopal* and, as indicated above, Rajah J. decided that the order in favour of the wife, which had been made while she was still married, should continue despite her divorce and that the Magistrate below was wrong to have thought that it was mandatory to rescind the order in such a circumstance. Rajah J. in effect decided that the mistake of the Magistrate in not knowing that the law leaves him a discretion was so serious as to justify the appellate court substituting its decision for the lower court's. The cause of the Magistrate's mistake was the confusing of what the law requires when the power is sought to be invoked with the life of the order once the power has successfully been invoked. "It is plain that the foundation for the making of a maintenance order under section

[26] Straits Settlements Divorce Ordinance XXV of 1919, long title.

[27] S. 30 read: "(1) On any decree absolute for dissolution of marriage or for nullity of marriage, or on any decree of judicial separation obtained by a wife, the Court may, if it thinks fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money ...;
(2) [or] such monthly or weekly sum for her maintenance as the Court may think reasonable ...."

60(1) [as it then was] is that the [applicant] is married to the person against whom she is seeking an order for maintenance"[28] but once an order has been made, the lifespan of the order is not determined by nor dependent upon section 61. The order continues for as long as it was ordered to continue unless the Act provides for a shorter lifespan. The only provision in this regard is section 64 which allows the court "on the application of any person receiving or ordered to pay a monthly allowance" to "rescind the said order...as it thinks fit."[29] The *ratio decidendi* of *Letchme* v. *Gopal* is thus that section 64 leaves a measure of discretion with the court when faced with an application for rescission on the ground that the marriage has been dissolved. This result was arrived at by his Lordship on a literal reading of section 62 (as it then was) and it is submitted that his Lordship was correct in so doing. Thus, while I disagree with his Lordship's remark regarding the relationship between the power of the court under section 61 and that under section 107, I fully agree with his interpretation of section 61 read with section 64.

In the course of his judgment Rajah J. cited with approval the English Court of Appeal's decision in *Wood* v. *Wood.*[30] It was held in that case that the English provision, (equivalent to our section 64), which reads "A court ... may ... upon cause being shown to the satisfaction of the court ... discharge any ... order"[31] allows the court discretion as well. The wife had obtained a maintenance order against her husband. He later obtained a decree of divorce from Nevada and then applied to a Magistrate's Court in England for a discharge of the maintenance order. The Magistrate decided that although the foreign divorce should be recognised under the English conflict of laws rules, the maintenance order should not be discharged as that would be contrary to justice. The Divisional Court had overturned this decision but the Court of Appeal held that the exercise by the Magistrate of his discretion had not been shown to have been so wrong as to justify the appellate court interfering with it. In the result, the Magistrate's order that the application for discharge be dismissed was reinstated.[32]

Wood's case raises another interesting point. The decree of divorce had been obtained in Nevada; the Magistrate, in the husband's application for discharge of the maintenance order, was therefore required to decide whether the foreign decree would be recognised under the English rules of conflict of laws. English law in this area is still rather in a state of flux and thus the resolution of this issue can be problematical. Can a subordinate court resolve such an issue involving the conflict of laws, or must the court leave

28 *Per* Kulasekaram J. in *Tan Anna* v. *Lawrence Au Poh Weng, supra,* note 23 at p. 57.

29 *Cf.* a maintenance order made in England which terminates upon the remarriage of the wife: s. 4(2) of the Domestic Proceedings and Magistrates' Courts Act 1978.

30 [1957] P. 254.

31 S. 7 of the U.K. Summary Jurisdiction (Married Women) Act 1895.

32 Professor A.L. Goodhart in a comment on the judgment of the Divisional Court in (1957) 73 L.Q.R. 29, at p. 32, criticized the decision. He was in favour of the Magistrate's decision and, *semble,* would have supported the Court of Appeal. He used the concept of "divisible divorce": "There is much to be said for the American doctrine of divisible divorce, as it provides that a marriage which has been terminated by the courts of one state, having proper jurisdiction, must be regarded as terminated in all states, so that no problems of bigamy or illegitimacy can arise in the case of subsequent marriages, but it does not follow from this that a husband should be enabled, by obtaining such an *ex pare* divorce, to avoid all the financial obligations which he may owe to his former wife."

such an issue to the High Court? In England,[33] as well as in Singapore,[34] it is always possible for a subordinate court, where it feels "the matters in question between the parties or any of them would be more conveniently dealt with by the High Court", to refuse to make an order. This would leave the applicant to try again at the High Court which would then be able to resolve the tricky issue of recognition of a foreign decree. In *Wood*'s case, the Magistrate did not adopt such a measure and must be taken to have been comfortable with having to resolve the issue. More importantly, neither the Divisional Court nor the Court of Appeal had any criticism of this.

This question came up in Singapore in an unreported decision called *Sithy Fatima Zafrullah* v. *Hareed Mohamed Zafrullah.*[35] Sithy Fatima and Hareed Mohamed, both Sri Lankan Muslims, were married in a monogamous civil marriage in Australia in 1979. They lived in Malaysia for a while during which time a child was born. While on a holiday in Sri Lanka prior to coming to live in Singapore the husband left his wife and child. He then applied for and obtained a decree of annulment of the civil marriage from the Quazi Court of Kandy. The husband then came to Singapore as planned. The wife applied to the subordinate court for orders of maintenance for the child and for herself. The court granted the former but dismissed the application for maintenance for the applicant herself. The Magistrate decided that the decree of annulment is recognised under Singapore's rules of conflict of laws and that the applicant was therefore no longer a "married woman".

In so deciding the Magistrate rejected the argument that, since it is only the High Court that has jurisdiction to entertain petitions for annulment,[36] it is also the High Court only that may decide on whether a foreign decree of annulment should be recognised in Singapore. It is submitted that the Magistrate was correct. There is no statutory provision nor precedent which suggests that any area of conflicts of laws is beyond the jurisdiction of the subordinate courts and indeed it would be highly inconvenient if it were so. While the Act allows the subordinate court to decide not to make an order on the basis that it would be more convenient for the High Court to do so, there is no good reason why the subordinate court must always so decide just because there is an issue of recognition of foreign judgments involved. To support his view the Magistrate cited the example of *Sivarajan* v. *Sivarajan.*[37] There too, in the course of hearing an application for maintenance, it was necessary for the Magistrate to decide whether a foreign decree (of divorce, this time) should be recognised in Singapore. In the result, the Magistrate decided it should not be recognised and therefore proceeded to make an order for maintenance for the benefit of the wife. On appeal before Winslow J., the husband did not argue that it was improper for the Magistrate to have decided on the recognition issue but only that his decision on this issue was wrong in law. The appeal was dismissed. It may thus be said that his Lordship approved of the Magistrate's handling of the conflict of laws issue and that, therefore, it should not always be necessary for a subordinate court to dismiss an application just because it involves such issues.

33 See U.K. Summary Jurisdiction (Married Women) Act 1895, s. 10.
34 See s. 66 of the Act read together with s. 71.
35 MSS 10% of 1983.
36 See Part IX of the Act and, in particular, ss. 86 and 98.
37 [1972] 2 M.L.J. 231.

One other point is noteworthy about *Sithy Fatima Zafrullah*'s case and this relates to what has been said earlier on. The husband raised a preliminary objection that the court should not entertain an application for maintenance just because the "married woman" was in Singapore at the time. To do this, he said, would be to allow "any dissatisfied wife from any part of the world ... to come to Singapore and institute proceedings against her husband who happened to be in Singapore". Borrowing a well-known phrase from the conflict of laws in regard to matrimonial reliefs, he suggested that section 3(1) of the Act (which determines the scope of application of section 60) should not be read literally so as to enable any married woman who is in Singapore to make application under section 60 but rather only those women here who can prove a "real and substantial connection" with Singapore. Presumably, his argument would have been that the wife was not such a person and that therefore her application must be dismissed. The Magistrate was not persuaded: "To my mind the words of the section (3(1)] are clear and the history of its various amendments would show that its scope has been deliberately enlarged. The parties before me fell within this scope."[38] It is submitted that this reading of the provision is correct and that there is no justification for the limitation proposed by the husband.

How should an application for maintenance be handled by the court? Section 61 does not give any target that the court should aim towards, but in subsection (4), it does direct that the court "shall have regard to all the circumstances of the case" and, in particular, it enumerates four considerations *viz.* "the financial needs of the wife or child; the income, earning capacity (if any), property and other financial resources of the wife or child; any physical or mental disability of the wife or child; and standard of living enjoyed by the applicant before the husband or father neglected or refused to provide reasonable maintenance for the wife or child." This direction being so broad, it becomes crucial to look at how courts approach their duty and, in this regard, it is lamentable that judgments of subordinate courts are not routinely reported. There has, fortunately, been an important decision of the High Court handed down rather recently on an appeal from the subordinate courts called *Sengol* v. *De Witt.*[39]

Here the marriage was a particularly short-lived one. The parties were married in March 1984 but were living apart from each other either from December 1984 or, at the latest, by April 1985. There was no child of the union. Both spouses worked during the short cohabitation as well as after. The wife applied for an order for maintenance in June 1985 and obtained an award in August 1985 that the husband should pay her a monthly sum of $350 as from the date of the filing of the application. The husband appealed against: (1) the quantum, claiming that it should be no more than nominal and (2) the date of the filing of the application as the time for the commencement of the order, claiming that it should instead have been the date the order was made by the court. Chan Sek Keong J.C. was partially persuaded by the husband's arguments on (1) and proceeded to vary the order to a monthly sum of $300 but his Lordship rejected the husband's

[38] S. 3(1) had been amended previously in 1967, and then again in 1980. For a discussion of the problems raised by the former formulations of the provision see Rowena Daw, "Some Problems of Conflict of Laws in West Malaysia and Singapore Family Law" (1972) 14 Mal. L.R. 179.

[39] [1987] 1 M.L.J. 201.

argument on (2). In the course of his judgment, his Lordship made several points which are worth noting and they will be considered in turn.

What is the proper reading of section 61(4)? Are the enumerated considerations the only ones that the court may have in mind? In particular, it may be noted that section 61(4) differs from section 108 which gives direction to the High Court when it addresses the question of the maintenance of the wife after it has entertained a petition for matrimonial relief. Besides giving the High Court a specific target which, as has been said, section 61(4) fails to do, section 108 also enumerates several more considerations for the court to bear in mind. Does this mean that those considerations which were omitted should not be made relevant in an application under section 61? It is not immediately apparent why those considerations which had been left out of section 61(4) were left out. While one of them clearly cannot apply while the marriage is still alive (paragraph (g): "the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring"), it is not so with the others. His Lordship was in fact required to decide if "the duration of the marriage", (which is in section 108 but omitted from section 61) may not be taken into account in an application under section 61 (although here, this phrase would mean the duration of the *de facto* marriage inasmuch as the parties had not yet petitioned for a decree of divorce). It was the argument of the husband that since this was a short childless marriage between two young persons each of whom is capable of earning a living the only appropriate order was a nominal one. The court was referred to the English case of *Graves* v. Graves.[40] His Lordship agreed with the husband to the extent that this consideration is relevant:[41]

> [S]ection 60(4) says that the subordinate court shall have regard to all the circumstances of the case ... In my view, the use of an all embracing formula "all the circumstances" in both sections indicate that the same principles should govern both sets of proceedings save for paragraph (g) which is applicable only in divorce proceedings. Secondly, by virtue of section 66 of the Charter, the High Court has the same jurisdiction and powers which belong to one exercisable by any subordinate court in relation to maintenance orders. It is most unlikely that a High Court exercising jurisduction to make a maintenance order is required to apply different principles according to whether the application is made prior to (section 60(4)) or consequent upon (section 102) matrimonial proceedings: see Wood J. in *Macey* v. *Macey* (1982) 3 F.L.R. 7 as to the English position.

This is remark of some significance and, it is submitted, the view cannot be faulted. It may, however, have been a little unfortunate that his Lordship used the English position as part of the reason for his view of our provisions because the law in England is different to the extent that their equivalent of section 61(4) and 107 are *in pan materia* one with the other unlike our provisions. *Macey* v. *Macey* is thus not very strong authority for the way our provisions should be read. It is nevertheless submitted that his Lordship's view of section 61(4) has merit as being a reasonable way of reading the provision and it is hoped that it will serve as a guide to subordinate courts in the future.

[40] (1973) 117 S.J. 679.

[41] *Op. cit.,* at p. 204.

The High Court did not, however, make the nominal order the husband wanted because the court held that a nominal order is only proper if the applicant had not suffered adverse financial consequences as a result of the marriage on account of the marriage having been short and childless. A nominal order is not necessarily proper where the marriage may have been short and childless but where the wife had suffered financially. This, the court found, was the position in the present application. The proof of this was a letter the wife produced from the Central Provident Fund Board which indicated that while she had withdrawn a sum of $11,228.50 from her account with the Board to purchase a Housing and Development Board flat which was to be their matrimonial home she was only able to return a sum of $3,987.00 when she surrendered the same flat due to her inability to complete the purchase. In other words she lost $7,241.50 from her CPF account which loss may be attributed to her marriage. The husband contended that this loss from her CPF account should be disregarded in an application for maintenance because it was never current income and thus did not affect her ability to maintain herself. The court was thus required to decide if a loss in the amount that an applicant for maintenance had contributed to the CPF is to be taken into account. The court decided in favour of doing so:[42]

> I am of the view that the loss of $7,241.50 is relevant ... Section 60(4) of the Charter enjoins me to have regard to all the circumstances of the case, and in particular to (a) the financial needs of the wife and (b) to her earning capacity, property and other financial resources. Here the wife has lost not only the HDB flat which would have been her matrimonial home (but for the separation due to the conduct of the respondent) but also a considerable part of her CPF savings. It is a real loss of an existing financial resource even though it is not available to her for immediate use. The complainant should be allowed to replenish this loss and to do that she will need to set aside about $300 for 24 months from her current income.

Having thus decided that there had been financial loss on the part of the wife on account of the marriage, the next question was what the effect of this should be given that the marital relationship was short and had not produced any children. His Lordship found some guidance from the English decision of *Hayes* v. *Hayes*.[43] There the English High Court reiterated the principle, which has since become even more firmly rooted in their law regarding maintenance upon the termination of marriage,[44] that wherever possible, the order should be for a relatively short period to enable the wife to adjust to the situation and thereafter to achieve a "clean break" from her

[42] *Ibid.*, also at p. 204.

[43] (1981) 11 EL. 208.

[44] The UK. Matrimonial and Family Proceedings Act 1984 overhauled the direction to the courts in considering applications for maintenance upon the termination of marriage provided in s. 25 of the UK. Matrimonial Causes Act 1973, and it added a new s. 25A which says: "(1)... it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable .... (2)... to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party. (3) ... [I]f the court considers that no continuing obligation should be imposed ... the court may dismiss the application with the direction that the applicant shall not be entitled to make any future application in relation to that marriage...." For a full account of the changes see Cretney, *Principles of Family Law* (4th ed., 1984), pp. 760-827.

ex-husband. This principle obviously needs some modification when it is sought to be applied to a marriage which has not been terminated but it may well make as much sense to a marriage which exists in name alone. In the present application it seemed clear that all involved proceeded on the basis that the marriage had irretrievably broken down and, it may be surmised, it may just be procedural difficulties which hindered the parties from seeking divorce.[45] It seemed proper then to approach the application as the means of offering the wife some assistance in her adjustment to the circumstances and to help her become self-sufficient again.

Should the High Court remit the case back to the subordinate court for it to calculate a proper sum of maintenance using the principles the High Court had elucidated? The court held that this would not be necessary as it had all the evidence it needed to make a computation. This would, it should be noted, save some time and costs to the parties and the courts. His Lordship decided that a fair order would be that the husband pay a monthly sum of $300 to his wife for a period of two years. It is also worth noting that earlier on, in the part of his Lordship's judgment quoted above, he had said that for the wife to make up her loss from her CPF account she would have to set aside $300 per month for two years.

The court easily dismissed the husband's second ground of appeal on the basis that it was within the power of the Magistrate to make the order take effect from June 1985, which is the date at which the wife first made the application, rather than August 1985, which is the date the order was made. In fact, the High Court held, on the basis of *Thevathasan* v. *Thevathasan,*[46] that the Magistrate could even have ordered that it take effect earlier — from the date the wife claimed the husband first neglected to maintain her. In *Thevathasan* the Magistrate had ordered that the order commence from the date when it appeared the desertion began. The High Court on appeal altered this to a later date — when the wife made the application — for the reason that until that later date there was no evidence that the husband had refused to maintain her.

A wife who succeeds in obtaining a maintenance order has only won the first battle as she is still very much at the mercy of her husband who can choose to be difficult by not obeying the order with any diligence. The various means of enforcing a maintenance order have been surveyed in an article by a member of the subordinate judiciary before[47] and it is not proposed to do so here. There has, however, been an interesting recent decision on the question of how far back a court may order arrears to be paid. In *Gomez nee David* v. *Gomez*[48] the wife applied to the subordinate court for an enforcement order for payment of arrears three years after the first default and she asked that the order be from the first default. The question was thus whether the court can order arrears of up to three years back. The Magistrate decided it could not. He felt that he should follow the English practice on this matter which is said to be:[49]

[45] For instance, the "three year" rule. Under s. 87 of the Act, the parties would not be able to present a petition for divorce until three years from March 1984.

[46] [1960] 2 M.L.J. 255.

[47] S. Chandra Mohan, "Maintenance Proceedings in Singapore and the Report of the Committee on Crime and Delinquency: Some Observations" (1974) 16 Mal. L.R. 230.

[48] [1985] 1 M.L.J. 27.

[49] *per* Lord Merriman in *Pilcher* v. *Pilcher (No. 2)* [1956] 1 W.L.R. 298.

> as a matter of practice but not of law courts which are asked to enforce orders of this sort, usually consider that there should be a time limit retrospectively. The custom in this Division is not to enforce arrears for more than a year backwards.

On appeal to the High Court, however, the court disagreed with the Magistrate. Coomaraswamy J. first pointed out that in a subsequent English case a judge had cautioned against taking a rigid approach. In *Ross* v. *Pearson,*[50] it was said:

> I would not want this decision [referring to the earlier one] to be taken by magistrates' courts as an indication that there was a universal absolute rule that justices should never go back further than the last year's arrears.

Moreover, his Lordship reminded, courts in Singapore must take greater care before accepting English practice as proper for Singapore. His Lordship pointed out that while there was a provision in England which did not permit the magistrates to enforce arrears of maintenance for more than one year backwards without the leave of the High Court or county court,[51] we do not have similar provision here; conversely, we have section 61(3) which provides that the maintenance order shall be payable from such date as the court directs, and section 115 which provides that arrears of up to three years may be recovered as a debt. Although section 115 is not directly in point inasmuch as it refers to recovery by way of a suit for a debt as opposed to an enforcement order, his Lordship nevertheless thought that the reference to three years is "indicative of the broad intention of the Legislature as to time limits."[52] His Lordship therefore thought the English practice, which in any case he had found to be considerably weakened, to be inappropriate for Singapore. He, however, was in favour of the factors that English courts had decided to be relevant in considering how far back arrears should be ordered. His Lordship found these to be:

(a) the fact that the sums ordered are for maintenance and do not constitute property to be hoarded;
(b) the situation and conduct of the parties;
(c) the nature and causes of the applicant's inaction or acquiescence;
(d) the question of hardship on the respondent;
(e) the large sum that may have accrued when the respondent believed that there was no liability to pay;
(0 that it is always preferable to have in force an order for such a sum as the respondent will pay rather than go to prison.

His Lordship made the observation that these factors are by no means exhaustive. In the present case, however, he felt that factor (c) figured prominently. The wife was residing in India with her daughter who was also a beneficiary of the maintenance order. It was thus difficult for her to travel to Singapore to seek enforcement and the court felt that this should have been considered by the Magistrate. In the end the High Court remitted the case back to the Magistrate for reconsideration with the direction that he should not feel bound to limit himself to one year's arrears and to consider the factor of her being a resident of India.

50 *Per* Latey J., [1976] 1 W.L.R. 224.
51 U.K. Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 13.
52 *Supra,* note 46 at p. 29.

II. MAINTENANCE OF CHILDREN

The common law never saw fit to place an obligation upon parents to maintain their children. Blackstone remarked that the law was content to leave this to the parents' own sense of morals.[53] At most a mother might find it possible to pledge her husband's credit for necessaries to meet the children's needs and, to that extent, to force her husband to discharge his moral obligation to the children. The Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872, which has been referred to earlier, was thus the origin of the parents' duty to maintain their children. It is worthy of note that from the beginning the duty has been squarely placed on both father and mother.

This duty has gradually been extended from that time. As may be seen from the relevant part of the Summary Criminal Jurisdiction Ordinance quoted earlier that provision created only a very limited duty towards illegitimate children. For such children the maximum award was ten dollars a month. In 1949, this maximum was raised to forty dollars a month.[54] It was not until 1961, with the enactment of the Women's Charter, that this ceiling was finally removed such that illegitimate children were put on the same footing as legitimate children for the purpose of being maintained by their parents.[55] In 1980 the parents' duty was further extended to children who were not their own but whom they had accepted as a member of the family.[56] The present law, then, is that a person is liable to maintain his biological children, whether they are legitimate or illegitimate, and he is also liable to maintain any child whom he has accepted into his family.

The latter category is very wide and may include a person's stepchildren, his spouse's illegitimate children and any other child who has once been permitted to stay with the family. The key to the provision is, no doubt, "accepted...as a member of his family". There has been no local decision on the proper way to read this phrase but the English case of *M.* v. *M (Child of the Family)*[57] may be instructive The Court of Appeal there decided that one must take a rather broad view of the facts and not be unduly concerned to interpret each word of the phrase. Ormrod L.J. said:

53 "[T]his moral duty is laid on them by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as this lies, that the life which they have bestowed shall be supported and preserved.": *Commentaries on the Laws of England* 1.16 (7th ed., 1775).

54 S. 2(2) of the Straits Settlements Married Women and Children (Maintenance) Ordinance No. 26 of 1949.

55 The present s. 61(2) is, for this purpose, unchanged from its original form.

56 The then s. 60A read: "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 so ...." This section is now renumbered section 62.

57 (1981) 2 F.L.R. 39. It should be noted, however, that the actual phrase in the English provision is "treated by both of those parties as a child of their family" and that, in fact, a change to this had been made from the phrase "accepted as one of the family by the other party" which is arguably closer to ours. Ormrod J. said that there are material differences between these phrases but, it is submitted, that the part of his observations quoted above is applicable to both and thus relevant to understanding our provision.

> We have to interpret this definition in accordance with the normal rules. The words used are all very ordinary words, each of which carries to an ordinary person a fairly clear meaning. I think that any ordinary person, reading the..."child of the family" in its present form, would understand what Parliament was getting at ... It becomes very much more complex when we, as lawyers, proceed to analyse [it] word for word...It is really a great mistake and clearly contrary to the whole meaning of the legislation to create ... an artificial and legalistic situation in such a sensitive area of family life. I think the court should look at this question ... broadly and answer it broadly ...[58]

The facts in that case were rather unusual. The parties had married in September 1970 but had separated by April 1971. After the separation the wife became pregnant as a result of a casual liaison. The child was born in April 1972. The wife, who was living with her Catholic parents at the time, was anxious that her family not know that the child was not the husband's. The husband, who lived alone, was prepared to let it appear as if he were the father. He occasionally gave the child gifts and was not too particular about the use of the term "Dad" in relation to him. The Court of Appeal found on these facts that the child did not fall within the term "child of the family" because there was no family to speak of. Walton J. pointed out that over a period of five years the husband saw the child for something like fifteen days at the most and that that did not suffice to make out treating him as a member of a family.

It may seem strange, also, that we have yet to have a definitive interpretation of a "child" for the purposes of maintenance. Is the term a reference to the biological tie such that it would be possible to have a thirty year old "child" who is unable to maintain himself claim maintenance from his parents; or is it a reference to a person who is under the age of majority which, at the common law, is twenty-one? It is submitted that while the former may have been plausible before the 1980 amendment, adding the then section 60A to the Act (now renumbered section 62), has severely undermined the plausibility of this proposition. Section 62, as has been said above, makes a person liable to maintain a "child" who is not his own but whom he has accepted as a member of the family. On the basis that the word "child" must be read consistently throughout this part of the Act, at the very least, the term cannot be said to refer to the existence of the biological tie.

In Malaysia this question appears to have been settled by the High Court appeal in *Kulasingam* v. *Rasammah*.[59] Referring to the claim of the twenty year old daughter against her father Hashim Yeop A. Sani J. said:[60]

> In the Shorter Oxford Dictionary, Third Edition, the term "childhood" is explained to mean "The state or stage of life of a child; the time during which one is a child; the time from birth to puberty." In ordinary concept a person is either a child or an adult.

There is an Age of Majority Act in Malaysia which provides that it shall be at eighteen. His Lordship thus decided that a "child" is someone under eighteen years of age.

58 *Ibid.,* at pp. 43 and 45.
59 [1981] 2 M.L.J. 36.
60 *Ibid.,* at p. 37.

Applying that reasoning to section 61 would lead to the view that a "child" is someone who has not reached the age of majority. While the Act has not affected the common law as to the age of majority which is twenty-one years, the Act does provide its own definition of a "minor" as "a person who is under the age of twenty-one years and who is not married or a widower or widow." This definition may be accepted by the courts as the proper interpretation of "child" under section 61 and, it is submitted, it makes sense that a person who regards himself capable of the responsibilities of marriage should no longer have recourse against his parents for his own maintenance. The problem, however, is that this definition is rather threadbare and was probably not designed to provide answers to the particular questions that may arise with regard to maintenance. For example, what is the situation with regard to minors who are already working and are self-sufficient; should they still be able to apply for maintenance orders? Conversely, what about adult children who are still financially dependent while completing their education; should they not still be able to apply for maintenance orders? If the Act's definition of "minor" is accepted as the proper interpretation of "child" in section 61, this would require an affirmative response to the earlier question and a negative response to the later one. It may be that neither is the desired result and that we may wish to have the term "child" defined with these particular questions in mind. It should, however, be said that, just as a maintenance order made in favour of a "married woman" may continue after she ceases to hold such a status, so too it may well be that a maintenance order made in favour of a "child" may continue after the child reaches the age of majority. Similarly, just as a woman who can only claim once to have been a "married woman" has no *locus standi* so too an adult child cannot apply for a maintenance order.

There is one other provision in the Act which may also be relevant to this issue of the proper interpretation of "child" under section 61. This is section 125 which is to be found in a later part of the Act entitled "Financial Provisions Consequent on Matrimonial Proceedings" and which purports to provide for the duration of maintenance orders made in favour of children by the High Court after the court has terminated their parents' marriage by way of a decree of nullity, or divorce, or judicial separation. Section 125 reads:

> Except where an order for ... maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire —
>
> a) on the attainment by the child of the age of 21 years;
>
> b) upon the child obtaining gainful employment; or
>
> c) where the child is under any physical or mental disability, on the ceasing of such disability, whichever is the later.

It is not immediately clear whether this provision is relevant to section 61. The provision relates to the incidental powers of the High Court once its matrimonial jurisdiction is invoked by the presentation of a petition for nullity, divorce or judicial separation. A maintenance summons under section 61 is almost always a proceeding before a subordinate court and there is no question of invoking the matrimonial jurisdiction of the High Court. There are, however, two reasons why this may be rejected as largely a technical problem thus opening the way for section 125 to be read into section 61. First, although it is true that a maintenance summons under section 61 is almost always a subordinate court proceeding, section 71 of the Act does

allow the High Court the same powers available to a subordinate court.[61] Thus, as was said earlier on, a subordinate court may well decide that a particular case should be remitted to the High Court because there are difficult points of law. Second, probably a stronger reason, there is the judicial approval of the High Court for reading provisions from the "Financial Provisions Consequent on Matrimonial Proceedings" together with section 61. In *Sengol* v. *De Witt,*[62] a case discussed earlier, Chan Sek Keong J.C. said that it was perfectly proper to read section 108, in that case, into section 61.

If it is indeed proper to read section 125 together with section 61 this will put an end to the suggestion that there may be no upper age limit to the parents' duty to maintain their children. It should be emphasized that section 125, being a provision on the duration of maintenance orders, goes even further than the definition of "minor" as being someone under the age of majority. Section 125 actually directs that the maintenance order *shall expire* at a specified time whereas, as was discussed earlier, that only minors may apply does not in itself require the maintenance order once made to terminate upon the attainment of majority. Moreover, section 125 in using the phrase "shall expire" leaves no room for suggesting anything else than what is mandated at the specified time.

What does section 125 provide? Its construction is a little inelegant and thus there may be dispute about its meaning. It is submitted, however, that it pivots on the attainment of twenty-one years of age. It provides that a maintenance order shall expire on the attainment of twenty-one years unless: the child obtains "gainful employment" before that time, in which case, it shall expire on the obtaining of such gainful employment; or, the child has any "physical or mental disability," in which case, the maintenance order will continue until the physical or mental disability ceases; or the now normal child attains twenty-one years whichever is later.

There are, at least, two main problems with this provision. The first relates to whether National Service is "gainful employment". It is not clear whether courts would take a literal approach and hold that any salary earned, whatever the amount and whether or not it allows the child financial self-sufficiency, will suffice as "gainful employment". It should be remembered that National Servicemen are young men between the ages of eighteen and twenty or twenty-one, and they are paid salaries according to the rank they occupy. Even if the view is taken that during the period of National Service these young men are gainfully employed and are not in need of maintenance the provision in section 119 may still be unfortunate because it ignores the fact that a sizeable number of these young men resume their education at tertiary institutions upon the completion of the period of National Service by which time they would be around the critical twenty-one years of age.

This relates to the larger problem with section 125 *viz.* it fails to create an exception in the case of children beyond the age of twenty-one who are still receiving education. Should not their parents still be liable to maintain them? It is anomalous that there ought not to be a legal liability in a socie-

[61] Section 71 reads: "The High Court shall have the jurisdiction and powers which belong to and are exercisable by any District Court or Magistrate's Court under this Part [VII. Maintenance of Wife and Children]."

[62] *Supra,* note 39.

ty as committed to education and training as Singapore. Of course the absence of legal liability does not mean that the parents do not discharge this tail-end of their moral duty of giving their children the benefit of the fullest education they are capable of receiving. On the contrary, the lack of public outcry at the state of the law may be said to indicate that the moral duty is in fact discharged by most parents. Even so, the law should reflect what society expects of parents.

By way of providing a comparison, it may be noted that in 1978,[63] some such exception was first introduced into the equivalent law in England. The statute concerned provided that although the duty of parents should normally terminate upon the child reaching the age of eighteen years,[64] it should be possible for a court to make an order beyond that age,

> if it appears to the court —
> (i) that the child is, or will be, or if such order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or
> (ii) that there are special circumstances which justify the making of the order or provision.

This exception was first introduced into the law of maintenance applied by the subordinate courts and it was only in 1984[65] that the law applied by the superior courts was put on an equal footing.

In summary, we eagerly await judicial elucidations on the limits of section 61 as it relates to the duty of parents to maintain their children, particularly as to the interpretation of "child" and to the duration of maintenance orders made in favour of children. It also appears desirable that the law be amended to permit the legal duty to continue until the child. has completed receiving his education at the tertiary level.

III. POSTSCRIPT

The essay above has shown that our law on maintenance has come a long way from the common law. I should like, however, to end with two questions which I think we shall soon have to face. The first concerns the one-sidedness of the obligation of one spouse to maintain the other. We must soon ask if this is still justifiable. Whether or not women in Singapore earn as much as their husbands is not the issue. Neither is it relevant to ask how often it might be, if the law permitted it, that a wife may be ordered to maintain her husband. The issue is whether it is still permissible now, when in nearly every important way a wife is treated on an equal footing with her husband, she should have the privilege never to be required by law to support a husband who is proven to be in need and who can prove that she is able to maintain him. As long as this one-sidedness continues, the law falls a little short of its expectation that "[u]pon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union..."[66]

63 *Vide* the Domestic Proceedings and Magistrates' Court Act, s. 5.
64 Which is the age of majority in England *vide* the 1969 Family Law Reform Act, s. 1.
65 *Vide* the Matrimonial and Family Proceedings Act, s. 5, which was incorporated into the 1973 Matrimonial Causes Act as the present s. 29.
66 S. 45 of the Act.

We will soon also have to ask what exactly the relationship ought to be between the duty of one spouse to maintain the other and the duty to maintain the children. Hitherto, we have always separated them for different treatment and the law has not clearly shown if one of them predominates. It may be unrealistic and artificial to separate financial obligations in the context of a family and we do this at the peril of missing the total picture and thereby increase the chance of making awards which lead to consequences we do not wish. To give an example: suppose we have a situation of a wife who has not been exemplary and whom a court might feel should be penalized by reducing the award of maintenance from the husband to her. It is not impossible that the children may live with her. While the award of maintenance to the children may have been carefully calculated to meet their needs, the reduced award to their mother inevitably affects them as well so that the children may be reduced to a much lower standard of living than planned. The English Parliament has recently made an initial move towards the resolution of this problem[67] but, in an exciting new book, two academic lawyers explore this problem in some detail and show that much more needs to be thought through.[68] They suggest that where the children are in the care of the spouse who is herself (or himself, as is possible in England) in receipt of a maintenance award, then, the proper approach is to subsume the caregiver's financial needs within that of the children's because the reality is that the children's needs include the needs of the caregiver. That is the only way to ensure that what is meant for the children need not be funnelled off to the caregiver. Someday we will also have to address our minds to this matter and, perhaps, we will then begin seriously to view the family as one whole and not as a collection of relationships.

LEONG WAI KUM*

67 The recently amended s. 25(1) of the English Matrimonial Causes Act 1973 directs that a court should "have regard to all the cirumstances 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."

68 Eekalaar and Maclean, *Maintenance After Divorce* (1986).

*LL.B (Hons.) (Malaya), LL.M. (Harv.), Senior Lecturer, Faculty of Law, National University of Singapore.