

HDB POLICIES: SHAPING FAMILY PRACTICE

The housing policies of the Housing and Development Board (HDB) apply to more than 80% of Singapore's population who live in HDB flats. This article discusses selected aspects of family law practice which have been affected by some of these policies. It raises concerns involving the way the practice of family law has been shaped mainly by the eligibility conditions imposed for HDB flat dwellers.

I. INTRODUCTION

FORTY years ago, on 1 Feb 1960, the Housing and Development Board (HDB) was set up as a statutory board.¹ By the nineteen nineties, the HDB had built some 700,000 flats housing about 86% of the population. The HDB prides itself as the public housing authority in Singapore which provides affordable housing of quality. One of its objectives is to “formulate and implement housing policies which support the building of communities”.² In order to carry out the objectives, the Minister may make rules with respect to, *inter alia*,

the terms and conditions for the sale of any flat, house or other building...the person to whom the flat, house or other building may be sold and the persons who are allowed to stay in it, including the qualifications as to income, the minimum number in the family, citizenship of and ownership of any other properties by all any such persons.³

Here, selected aspects of family law practice affected by the housing policies are discussed.

¹ S 3 of the Housing and Development Act (Cap 129, 1997 Ed) set up the Housing and Development Board.

² Publicized in the form of posters and brochures, available on <http://www.hdb.gov.sg>, as at 4 February, 2000.

³ S 65 of the Housing and Development Act, *supra*, note 1.

II. PREPARATION AND PURCHASE OF THE FIRST MATRIMONIAL HOME

One of the most well-known policies of the HDB is that the applicant must form a family nucleus with the co-applicant or occupiers in order to be eligible for a flat.⁴ A consequence of this requirement is that couples considering marriage in the future begin preparing for the purchase of their HDB matrimonial home years before the contemplated time of marriage. Previously, proof of marriage was required at the time of *application* of an HDB flat. Since the time period between the application of a flat and the allocation of a flat ready for occupation is between 2 to 5 years, couples solemnize and register their marriage long before the time they intend to live as husband and wife. The HDB has responded to this concern by establishing a relatively new scheme called the Fiance/Fiancee Scheme. Under this scheme, HDB requires proof of marriage only upon the *allocation* of the flat. This scheme, however, requires couples to pay a registration deposit of \$5000 at the time of application. If the couple purchases the flat, this sum is considered part of the payment towards the purchase of the flat. If the couple withdraws the application or becomes ineligible to retain the application, the sum is forfeited. The applicant cannot remove the fiance or fiancee originally named and replace with a new fiance or fiancee or parent.

Despite the introduction of this new scheme, it is understood that many couples continue to solemnize and register their marriage by the time of application. A few reasons may be offered for this. First, the registration deposit may make this scheme practically unattractive. Another reason may be that couples do not sufficiently appreciate the serious legal and moral effects of the marriage solemnization process at the Registry of Marriages. The solemnization is treated as an engagement ceremony and the marriage is viewed as an arrangement which can be nullified for non-consummation if the relationship does not work out subsequently.⁵ It may also be plausible that it is simply in the nature of relationships that parties want to be married first before they will commit to a joint purchase of a flat.

Thus, to ensure that they will obtain a matrimonial flat at the time they intend to live together as a married couple, many parties succumb to the

⁴ The Singles Citizen Scheme is an exception to this. It permits single persons who are at least 35 years old to purchase a 3-room flat.

⁵ See the insightful observations made by Leong Wai Kum a decade ago in 1990 in *The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore, Butterworths, 1999) at F15-16. See also, for an elaboration of these points, Carol GS Tan, "'We are registered': Actual Processes and the Law of Marriage in Singapore", (1999) 13 IJLPF 1.

pressure of committing to marriage long before they are ready. It may be convenient here to identify the behavioural reactions to the policy described. Two behavioural types emerge.

One group comprises couples who view their registry marriage as nothing more than an engagement and do not live as husband and wife until after they have undergone their customary or religious ceremonies.⁶ In the first years after solemnization, if they decide to break the relationship and not undergo the ceremonies, they may seek nullity decrees by proving non-consummation of their marriage.⁷ The parties may allege that one party has wilfully refused to consummate the marriage. This may be shown by the existence of an agreement not to consummate the marriage until after the religious or customary ceremonies coupled with a refusal by one party to undergo the ceremonies. Many nullity decrees can be traced to such a history.⁸ The couple becomes ineligible to retain the HDB flat if the marriage is annulled.

The second group constitutes couples who live as husband and wife after the solemnization of the marriage but find that the relationship has broken down after a few years. They cannot petition for a nullity decree on the ground of non-consummation as the marriage has already been consummated.⁹ The alternative is to seek a decree of divorce. However, a petition of divorce of a marriage of less than 3 years cannot be presented unless exceptional hardship or depravity can be proven.¹⁰ Thus if they have been married for no more than 3 years, it will be difficult to obtain a divorce.

Where parties are able to obtain a divorce, they will no longer be able to retain their application. Some parties may have been allocated a flat and put in substantial sums of money renovating the flat in preparation for occupation. As flats directly purchased from HDB can be sold to the public only after 5 years, parties generally suffer a loss if the flat is surrendered to the HDB within the 5-year period because the price at which the flat is surrendered is far lower than its market value. Thus if parties are determined

⁶ See materials in note 5, *ibid*. See also cases in note 8, *infra*.

⁷ A marriage which "has not been consummated owing to the incapacity of either party to consummate it" or "owing to the wilful refusal of the respondent to consummate it" is voidable and can be annulled at the option of relevant parties: s106(a) and (b), Women's Charter, Cap 353, Statutes of the Republic of Singapore, 1997 Ed.

⁸ See *Tan Siew Choon v Tan Kai Ho* [1973] 2 MLJ 9, *Ng Bee Hoon v Tan Heok Boon* [1992] 2 SLR 112, and *Kwong Sin Hwa v Lau Lee Yen* [1993] 1 SLR 457.

⁹ The court will be cautious in requiring evidence of non-consummation so that parties do not defraud the court: see *Kwong Sin Hwa v Lau Lee Yen*, *ibid*, and *Tang Yuen Fong v Poh Wee Lee Jerry* [1995] 3 SLR 359.

¹⁰ S 94, Women's Charter, *supra*, note 7.

to keep the flat, they must remain married in order to retain the requisite family nucleus and may choose to postpone their divorce until 5 years have elapsed.

Divorce petitions are withdrawn when parties realize the implication of the divorce on their eligibility to retain the HDB flat. Despite the fact that their marriage has broken down and no reconciliation is intended, they often choose to defer the divorce for a few years in order to maximize their financial position. The alternatives available to them are: obtain a divorce and suffer financial losses, or defer the divorce and make profits from the sale of the flat in the open market. The former is highly unattractive and the latter is probably more tolerable to most. In such circumstances, most divorce petitions are withdrawn and fresh petitions are begun after 5 years have elapsed. The Women's Charter (Matrimonial Property Plan) Rules 1998¹¹ was implemented partially as a response to this pattern of behaviour. Petitions presented on or after 1 January 1999 must be accompanied by the proposed or agreed matrimonial property plan, which requires the filing of answers to enquiries made to the HDB and the Central Provident Fund Board (CPF Board). In the matrimonial property plan, the HDB states the ways the HDB flat can be dealt with after the divorce and the CPF Board provides information on the parties' utilization of CPF funds in financing the purchase of the flat. The filing of the plan helps parties to appreciate the financial implications of divorce on the HDB property before the divorce petition is filed. Parties are better placed to decide whether to proceed on the divorce after knowing the implications on their eligibility to retain or sell the HDB flat.

A practical consequence of the 5-year rule is that parties contest divorce petitions of marriages which have already irretrievably broken down, not because the marriage is salvageable, but in order to postpone the divorce until 5 years have elapsed. A typical case may involve a petitioner who has not expended much financially towards the acquisition of the flat and is keen on a divorce, and a respondent who has paid up substantial amounts towards the flat and is determined to minimize his losses. It may well be that the respondent agrees that the marriage has irretrievably broken down and concedes to the facts which evidence the breakdown of the marriage, but nevertheless contests the divorce to preserve their eligibility to retain the flat.

To alleviate the hardships of such parties, it may be appropriate to review the price at which the flat is surrendered to ensure that the divorced parties

¹¹ S 579 of 1998.

do not incur losses. Renovation costs may be factored into the calculation of the price applicable when the flat is surrendered to the HDB. The change need not affect the policy which prevents functioning families from taking advantage of the rules for financial gains.

A strong marriage requires the commitment of both parties who are sufficiently mature to consider the full extent of responsibilities imposed by marriage. It may be appropriate to examine whether the policies discussed have the effect of encouraging parties to enter into marriages before they are ready for it. If they do, then one way of minimizing the problem is to consider whether the waiting period between the application and allocation of flats could possibly be shortened to no more than one year. The HDB must, without doubt, have good reasons for the long waiting period. But these reasons must be weighed against considerations in family law. The shortening of the waiting time could weed out cases of couples who are driven to an earlier marriage in order to obtain an occupant-ready flat at the time they intend to live as husband and wife. The advantage of this over the fiance/fiancee scheme is that couples need not even take the enormous step of applying for a flat as “fiance/fiancee” until much nearer the time they intend to live as a married couple. Further, in cases involving non-consummation, parties can no longer use the ready-made reason that they had married in order to join the HDB queue early and had not intended to consummate the marriage until they had undergone the ceremonies.¹²

If the parties have consummated¹³ the marriage (even if they have not lived together in the same home), they should be treated as a married couple and be subjected to the 3-year bar to divorce in section 94. In *Fisher v Fisher*,¹⁴ Bucknill LJ said that the purpose of the English equivalent of the 3-year bar is

not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of a marriage as soon as they discover that their marriage was not what they expected.

If there is even a single act of sexual intercourse after the solemnization of the marriage, it would be fraudulent for parties to allege non-consummation by constructing a case that they had not consummated the marriage, having

¹² See cases in note 8, *supra*.

¹³ For what constitutes consummation, see *L v L* [1956] 22 MLJ 145. See also *The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore, Butterworths, 1999) at 331.

¹⁴ [1946] P 263.

lived in separate homes with an agreement that there will be no consummation until after the religious or customary ceremonies. When *both* parties desire the marriage to be annulled, the court does not have the benefit of the adversarial process to assist its fact finding. The HDB policy provides a reason which support their story on why they had solemnized the marriage at a time when they had not yet intended to live as husband and wife. Eliminating this reason may have the effect of freeing the court to inquire into the real reason for wanting a nullity decree and whether or not there was in fact consummation. In *Kwong Sin Hwa v Lau Lee Yen*,¹⁵ the court cautioned that

in uncontested matrimonial causes, it is wrong for parties to assume that the courts merely rubber stamp their petitions and grant the decree sought. It must be remembered that even in such proceedings the material allegations must be proved to the satisfaction of the court.

III. DIVORCED COUPLES: CUSTODY, CARE AND CONTROL OF CHILDREN

A typical family nucleus comprises the applicant, the spouse and children (if any), or where the applicant is not married, a family nucleus can be formed with a parent. Where parties are divorced, the divorced parties can no longer form a family nucleus together. A divorced spouse can, however, form a nucleus with his or her children if he or she has custody, care and control of them. The children must be “legally under his custody” in order to constitute the nucleus.

Surprisingly perhaps, the term “‘custody’ does not have a settled legal meaning”.¹⁶ The scope of the powers possessed by the parent with custody has been explored elsewhere.¹⁷ Generally, “custody” can be contrasted with “care and control”; the former term referring to control over important aspects of the child’s life and the latter referring to control over daily matters concerning the child. The parent without care and control is likely to have rights of “access” which permits him or her to spend time with the children,

¹⁵ Note 8, *supra*. See also *Chua Ai Hwa v Low Suan Loo*, Divorce Petition No 1626 of 1992 (unreported).

¹⁶ *Yasmin Yusoff Qureshi (mw) v Aziz Tayaballi Samiwalla*, Originating Summons 799 of 1990 (unreported).

¹⁷ See Debbie Ong, “Parents and Custody Orders – A New Approach” [1999] SJLS 205. See also Leong Wai Kum, “Restatement of the Law of Guardianship and Custody in Singapore” [1999] SJLS 432.

perhaps for one or two days a week. It is understood that, for purposes of eligibility to purchase or retain an HDB flat, a divorced parent with sole custody of the child is able to form the requisite family nucleus. Where there is no order of custody, the parent with care and control of the children may form a family nucleus. Where both parents have joint custody, it appears that only the parent with care and control may form the requisite family nucleus.

For this reason, divorced parties who are desirous of retaining or buying an HDB flat will be keen to have custody, care and control of the children. It will be a sad day for family justice when the driving reason for contesting custody, care and control is to retain eligibility for a flat when the paramount consideration in determining those issues ought clearly to be the welfare of the children.¹⁸ Some parties may be minded to split up custody, care and control of siblings in order that both parties can form a family nucleus with at least one child each. Unless there are clearly good reasons why siblings should be separated, it is not in the children's welfare to have siblings live apart from one another. In such arrangements, children of divorced parents lose not only one parent, but sibling support as well.

It has been argued¹⁹ elsewhere that custody should always be joint. Alternatively, there should be no order of custody so that both parents retain parental responsibility over the children. The consequence of such a position is that, as both parents have responsibilities to the children, both have a family nucleus. Thus where parties have joint custody over the children, it is possible to treat both parties as possessing family nuclei. Where there is no order of custody, parties with either "care and control" or "access" should be treated as having formed the requisite family nucleus. Parents without daily care and control will usually have weekly access to the children. Such "access" parents should be encouraged to maintain a home for their children. In particular, those with "overnight access" ought to be encouraged to set up a bedroom for their children who stay over during periods of access. Maintaining a bedroom for the child in order that the child feels he is "at home" in both parents' homes encourages bonding and hence, good parenting. We can no longer treat families of divorced couples in

¹⁸ Section 3, Guardianship of Infants Act, Cap 122, Statutes of the Republic of Singapore, 1985 Ed, provides: "Where in any proceedings before any court or upbringing of an infant ...is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration...". Section 125(2), Women's Charter, *supra*, note 7, provides: "In deciding whose custody a child should be placed, the paramount consideration shall be the welfare of the child".

¹⁹ See articles in note 17, *supra*.

the same light as single applicants with no children or even divorced couples with no children. HDB rules should take into consideration the unfortunate circumstances of divorced parents and endeavour to formulate housing policies which support the building of strong families. It can do much to support good parenting in circumstances where children are separated from one parent by the unfortunate event of divorce.

IV. DIVORCED WITH LITTLE FINANCIAL RESOURCES

Once parties are divorced, they are no longer part of a family nucleus and will not be able to retain the HDB flat in joint names. They must either sell the flat, surrender the flat to the HDB at the relevant price, or have one party retain the flat. The last option requires one party to transfer or sell his or her share to the other party desirous of retaining the flat. The party who retains the flat must be able to form a family nucleus in order to remain eligible.²⁰ He or she can form a family nucleus with the children if he or she has custody, care and control of them. However, there may be yet another hurdle to keeping the HDB flat.

The problem may be illustrated with this hypothetical case: W has been a homemaker caring for the family for a substantial period of time during the marriage of 15 years. W and H are now undergoing divorce proceedings. They have 3 children who are 12, 10 and 8 years old. As they will be divorced, W and H can no longer hold the HDB flat jointly. W is given care and control of the children while H is given access. As W needs a shelter for herself and her children, it makes sense for her to retain the HDB flat. It is also in the interest of the children to remain in the flat as they are comfortably settled down in that neighbourhood and are placed in nearby schools. To illustrate the financial realities, the following figures are used:

- Original purchase price: \$100,000.
- H has paid up \$85,000 and a total of \$50,000 must be refunded to his Central Provident Fund (CPF) account.
- Market value of flat in the open market: \$360,000.
- HDB valuation: \$340,000.
- Loan outstanding: \$20,000.

²⁰ See *Chia Chew Gek v Tan Boon Hiang* [1997] 2 SLR 209 for an example of the problem faced by parties where consent orders are made on some wrong assumption that they could purchase another HDB flat.

- Net value after deducting loan outstanding: \$340,000.

Section 112 of the Women's Charter empowers the court to divide matrimonial assets "in such proportions as the court thinks just and equitable".²¹ Suppose it is fair to divide this asset valued at \$340,000 equally between the 2 parties. H is therefore entitled to \$170,000 out of which \$50,000 must be refunded into his CPF account.

If H transfers his share of the flat to her, it is understood that the maximum loan amount is 80% of the *original selling price*. In this case, it is \$80,000 (80% of \$100,000). W will have her credit assessed in order to determine the loan amount that will be granted to her. In W's case, having been a homemaker for 15 years and already well into her forties, it is unlikely that she will immediately be able to find a job which yields a substantial salary. On her credit assessment she may get much less than the maximum loan sum of \$80,000. Bearing in mind that she must raise \$170,000 for H's share, the task seems near impossible. The amount withdrawn from H's CPF account (including interest due) for the purpose of acquiring the HDB flat must be refunded to his CPF account. It is unlikely that W will have sufficient funds to refund this amount, which is about \$50,000 in this case. As H is entitled to \$170,000, W must still pay H some \$120,000 after refunding the requisite sum into H's CPF account.

The maximum loan amount which may be granted to W in the case of a *sale* of the interest by H to W is 50% (since it represents H's share) of 80% of the *valuation price* which, in this case, is \$136,000 (0.5 X [0.8 X \$340,000]). Again, it may be too optimistic to expect that she will be granted this sum on her credit assessment. Even if she can obtain this loan amount, which is unlikely, she will still have to raise \$34,000 herself (\$170,000 - \$136,000). In the case of a sale of interest, she is treated as having purchased a flat and this purchase is taken into account for purposes of determining her eligibility for purchases in future.

The emotional trauma and sense of loss in the unfortunate event of divorce already heavily burden the parties.²² Any financial relief which could be offered would serve to encourage the parties to focus on carrying on with life normally and raising the children well. One way of alleviating the difficulties is to permit the parties to remain as joint tenants despite the divorce. In the case above, H can remain as joint tenant and continue to

²¹ S112(1), Women's Charter, *supra*, note 7.

²² See *Chan Choy Ling v Chua Che Teck* [1995] 3 SLR 667 where the court considered the needs of the children and made an order which relieved the wife of paying a sum claimed by the husband.

pay towards the loan instalments. The flat may be sold only when all the children reach the age of majority or at least 18 years of age. Where a court hearing the divorce makes such an order, HDB should permit parties to carry out such an arrangement.²³ It is noted that this arrangement may seem harsh to H who is precluded from purchasing another HDB flat for himself or his new family if he remarries. Sometimes a choice has to be made between the devil and the deep blue sea. While H is no longer married to W, he remains a parent of his 3 children. His obligation to provide them a home is crucial in their infant years and he must fulfil his responsibilities as a parent and put their needs before his own, at least until they reach the age of majority.

V. CONCLUSION

The thrust of this discussion is that divorced spouses and their children should be given separate attention in having their housing needs met. This may require some standard policies to be varied to accommodate their plight. While family law concerns are not the only policy factors that HDB has to consider, it is hoped that the issues raised here will influence policy-making. Strong family units are the foundations of a strong society. Bearing in mind that one of HDB's objectives is to "formulate and implement housing policies which support the building of communities", these concerns merit fresh attention.

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²³ There may be an apparent conflict between the objectives of family law (Women's Charter) and the HDB in such circumstances. In considering this problem, guidance may be sought from *Lam Chih Kian v Ong Chin Ngoh* [1993] 2 SLR 253 which has resolved the perceived conflicts between the objectives of the Central Provident Fund and the Women's Charter.

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