

TIME RESTRICTION ON DIVORCE IN SINGAPORE

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In Singapore, no petition for divorce is permitted in the first three years of marriage unless leave of court is given on the basis that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. This article examines the purpose of the three-year restriction on divorce and whether its retention in Singapore continues to promote the best interests of family members affected. It suggests that a shorter period of restriction, without exceptions, be adopted. A brief survey of the marriage relationship and the recent patterns of divorce in Singapore is also made here.

I. INTRODUCTION

The *Women's Charter*,¹ section 95, provides that “either party to a marriage may petition for divorce on the ground that the marriage has broken down irretrievably”. However, the court shall not hold a marriage to have broken down irretrievably unless it is satisfied of one or more of the facts laid down in section 95(3)(a) to (e).² Further, no petition for divorce shall be made in the first three years of marriage unless leave to present is granted by the court.³ The court may grant leave to allow the presentation of the petition

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¹ Cap. 353, 1997 Rev. Ed. Sing. [*Charter*].

² *Charter, ibid.*, s. 95(3) provides: “The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts:

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.
- (c) that the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition;
- (d) that the parties to the marriage have lived apart for a continuous period of at least 3 years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
- (e) that the parties to the marriage have lived apart for a continuous period of at least 4 years immediately preceding the presentation of the petition.”

³ *Charter, supra* note 1, s. 94.

“on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent”.⁴ The three-year restriction to divorce was introduced in Singapore in the 1980, modeled after the English restriction first introduced in England by the Matrimonial Causes Act 1937.⁵

This article examines the rationale of the three-year restriction on divorce and whether its retention in Singapore continues to promote the best interests of family members affected.

II. THE ENGLISH POSITION

It may be useful to consider the equivalent provision in English law. The three-year restriction on divorce was first introduced in England in 1937, which counterbalanced the liberation of the grounds of divorce by the Matrimonial Causes Act 1937.⁶ The restriction was reviewed in 1946 by the Denning Committee⁷ and again in 1956 by the Morton Commission.⁸ In 1966, a Group appointed by the Archbishop of Canterbury reviewed the restriction and advocated its retention.⁹ The Law Commission in “The Field of Choice” also recommended its retention.¹⁰ Finally, in 1982 the Law Commission scrutinized the restriction in “Time Restrictions on Presentation of Divorce and Nullity Petitions” and recommended a substitution of the three-year restriction with a one-year absolute restriction.¹¹ This was implemented by section 1 of the Matrimonial and Family Proceedings Act 1984,¹² amending section 3 of the Matrimonial Causes Act 1973.¹³ Thus the present law in England imposes an absolute one-year restriction on divorce.

The English Law Commission had earlier stated that the three-year restriction aimed to “shape an attitude of mind”¹⁴ and that it is “a useful safeguard against irresponsible or trial marriages and a valuable external buttress

⁴ *Charter*, *supra* note 1, s. 94(2).

⁵ 1 Edw. 8 & 1 Geo. 6, c. 57.

⁶ *Ibid.* Prior to the 1937 Act, divorce was available only to the innocent spouse who had been wronged by the other spouse who had committed adultery. The 1937 Act extended the grounds for divorce, providing as grounds the other spouse’s adultery, cruelty, desertion for three years or more, or incurable insanity.

⁷ Committee on Procedure in Matrimonial Causes, Second Interim Report (1946).

⁸ The Report of the Royal Commission on Marriage and Divorce (1956).

⁹ *Putting Asunder: A Divorce Law for Contemporary Society* (1966).

¹⁰ The Law Commission Report on *Reform of the Grounds of Divorce: The Field of Choice*, Law Com. No. 6 (1966).

¹¹ The Law Commission Report on *Time Restrictions on Presentation of Divorce and Nullity Petitions*, Law Com. No. 116 (1982).

¹² c. 42.

¹³ c. 18.

¹⁴ Law Com. No. 116 (1982), *supra* note 11, para. 2.14.

to the stability of marriages during the difficult early years.”¹⁵ Nevertheless, there are arguments against the retention of the three-year restriction. These have been stated in the Law Commission report on “Time Restrictions on Presentation of Divorce and Nullity Petitions”.¹⁶ One of the most vigorous criticisms is that the effect of the provision is to encourage the petitioner to make the most unpleasant allegations possible about his or her spouse in order to make out a case of exceptional hardship on the petitioner or exceptional depravity on the part of the respondent. It becomes ironical, therefore, that the present law of divorce designed to reduce bitterness, distress and humiliation also requires parties to make allegations which are very likely to cause bitterness, distress and humiliation. Further, making an application for leave is capable of producing considerable ill-will and suffering and consequently, the effect of an unsuccessful application for leave is to defer rather than deter divorce.¹⁷ Another difficulty with the provision lies in knowing what standards to use in assessing exceptional hardship and depravity, both of which involve value judgments of unusually subjective character.¹⁸ Coupled with the reluctance of the courts to define what these terms encompass,¹⁹ judges are expected to continue to achieve a just and consistent application with little guidance. Further, there is little evidence in England to support the view that such a restriction had any long term effect on the divorce rate.²⁰

The Law Commission responded to criticisms with the recommendation of an absolute bar of one year:

The justification is one of public policy; it would devalue the institution of marriage to make divorce readily obtainable within days of the marriage. The present law is on this view based on a sound principle, but is objectionable because of the unsatisfactory nature of the exceptions whereby the court may allow a petition to be presented on proof of exceptional hardship or depravity ... We recommend that the present restriction should be replaced by an absolute bar on petitions for one year from the date of the marriage ... this would be a long enough period to assert the public interest in restricting precipitate divorce and also

¹⁵ Law Com. No. 6 (1966), *supra* note 10, para. 19.

¹⁶ Law Com. No. 116 (1982), *supra* note 11.

¹⁷ Law Com. No. 116 (1982), *supra* note 11, para. 2.8.

¹⁸ Law Com. 116 (1982), *supra* note 11, para. 2.6; see also Ormrod J.’s remarks in *C v. C* [1980] Fam. 23, 26–27.

¹⁹ See Lord Scarman’s remarks on this in *Fay v. Fay* [1980] 3 W.L.R. 206, 212 that “any attempt to define a meaning would be a betrayal of the deliberate imprecision favoured by Parliament in entrusting the court with the power to grant leave to present an early petition”.

²⁰ See The Law Commission Working Paper on *Time Restrictions on Presentation of Divorce and Nullity Petitions*, Law Commission Working Paper No. 76, para. 56.

to have some influence in restraining impulsive or ill-considered proceedings prompted by initial problems or disappointment. Equally, we believe that one year would not be so long a period as to be unendurable for people in genuine situations of marital breakdown.²¹

A similar one-year restriction should be seriously considered in Singapore.

III. SINGAPORE: *WONG PEE WEI*

Currently, the three-year restriction continues to apply in Singapore. A typical case where leave to petition for divorce in the first three years of marriage is examined here.

In the recent unreported decision of *Wong Pee Wei v. Anna Laurene Ho Soo Hua*,²² the parties were married in April 2001 and had a daughter in October 2001. In 2002, the husband sought the leave of court to present a divorce petition before three years have passed since the date of the marriage for the following reasons:

(a) the marriage was doomed to fail from day one. Parties had never lived together and fought when they met. They were destroying and would continue to destroy each other as long as they stay married; (b) both parties were young and both parties agreed that the marriage could not be salvaged. They should therefore not be shackled by a marriage and be allowed to pursue their own happiness; (c) if the divorce was not allowed, the ancillary matters such as the custody of the child and the disposition of the matrimonial home could not be resolved; (d) based on the psychiatrist report, even though the Husband was not currently suffering from a psychiatric condition, there was a possibility that if the current situation were to continue, the Husband could suffer from depression and this would affect his career.²³

The court applied the principles in *Winter v. Winter*²⁴ and *W v. W*.²⁵ *Winter* held that a judge was only required to consider whether or not the allegations were such that if proved would amount to exceptional hardship or depravity. *W v. W* held that in considering exceptional hardship, the court could take into account hardship arising from the conduct of the other spouse, present hardship and hardship arising from having to wait until the specified period had elapsed. Applying the principles, the court was not persuaded that there was anything exceptional in the degree of hardship suffered by the

²¹ Law Com. No. 116 (1982) *supra* note 11, paras. 2.30 and 2.32.

²² O.S. No. 650076, unreported decision of the Subordinate Court dated 13 September 2002.

²³ *Ibid.* at para. 9.

²⁴ [1944] p. 72.

²⁵ [1966] 2 All E.R. 889.

husband. It held that his allegations were commonplace in divorce petitions based on unreasonable behaviour. The court said of section 94:

the aim of section 94 was to promote the sanctity of marriage and ensure that parties do not rush into and out of marriage capriciously. Allowing the parties here to divorce after only 1 year of marriage, in which parties hardly lived together, simply because they felt that there was no hope of reconciliation would defeat the purpose of the provision.²⁶

The court also made an interesting remark at the end of the judgment:

[I]f the Husband was so worried about risking his future promotion prospects, it was incumbent on him to attempt to settle all matters peacefully and amicably with the Wife so as to remove the stress factors, instead of rushing into a divorce barely one year into the marriage, when a divorce was not the only solution.²⁷

Wong Pee Wei applied the rationale of the section 94 and held that there is some hardship in virtually all marital breakdowns involving unreasonable behaviour. Leave to present a divorce petition was refused. The law expects spouses to work much harder at building a stable marriage.

What does section 94 achieve in a case such as *Wong Pee Wei*? The parties appeared to have reached the decision to get married because the wife was pregnant. They had lived in different countries for the majority of their married lives, there may have been a third party involved with the husband at some point,²⁸ and both parties wished to be divorced after just a year of marriage. At the very least, it is a marriage built on a very unsteady foundation. The law must choose which direction to take: to save the marriage by insisting on the parties remaining married and making greater efforts at reconciliation (at the risk of merely deferring the divorce and prolonging the agony) or to “give a decent burial with the minimum of embarrassment, humiliation and bitterness”²⁹ of a marriage which is practically unsalvageable?

The Law Commission’s report in “The Field of Choice” began with the view that a good divorce law should:

(i) buttress, rather than undermine, the stability of marriage; and (ii) when regrettably, a marriage has irretrievably broken down, to enable the empty

²⁶ *Ibid.* at para. 13.

²⁷ *Ibid.* at para. 15.

²⁸ The court said that “the Wife said that she had stumbled upon the Husband behaving in an intimate manner with another woman that night and she had therefore confronted him. The Husband got angry and attacked her, resulting in her suffering ‘scratches and sprains’ and obtaining three days’ medical leave. These allegations were not rebutted by the Husband”, *ibid.* at para. 7.

²⁹ The Law Commission Working Paper No. 76, *supra* note 20, para. 44.

shell to be destroyed with the maximum fairness, and the minimum bitterness and humiliation.³⁰

Instead of focusing only on how the law can enforce permanent marriage unions by ensuring that divorce is not too easily available, the Law Commission presented the issue in a new light: how to use divorce laws to buttress marriage instead of allowing them to undermine marriage. The issue with respect to the time restriction on divorces is no different; shortening the period of restriction does not necessarily undermine marriage. It is proposed that with sufficient focus on supporting the positive legal obligations of marriage partners as well as establishing strong extra-judicial marriage support services, an absolute one-year restriction best serves the various interests.

IV. STRENGTHENING THE MARRIAGE INSTITUTION

A. *Marriage Institution: Expectations*

The public policy reason that a restriction may protect the dignity of marriage and shape an attitude of mind is strong. Marriage is devalued if divorce is easily available within days of it. If a restriction could shape an attitude that marriage is an institution not to be undermined by irresponsible parties rushing in and out of it, it is based on sound principle.

What is the marriage and family institution which we must jealously protect? The Family Court of Singapore adopts this philosophy:

Families are the threads from which the fabric of society is woven. Children are the seeds of the nation's progress and prosperity. The philosophy of the Family Court is to *protect family obligations* so that family ties may be strengthened and preserved. Family obligations are those duties that have to be discharged by each spouse to the other, by a parent to his child, and vice versa, and by all persons to their family members. These include a parent's responsibility to maintain, nurture and care for his children, an adult child's duty to maintain his parent, a husband's duty to maintain his wife, and the duty of all family members to treat each other with care, concern and respect.³¹

What does the law expect of marriage partners? Obviously much more than a commercial contract, a marriage gives rise to obligations under the

³⁰ Law Com. No. 6 (1966), *supra* note 10, para. 15.

³¹ Published in the Family Court of Singapore Website, online: Family Court of Singapore <http://www.familycourtofsg.gov.sg/philosophy/justice_model.htm>.

law. Section 46 of the *Women's Charter*³² provides that

- (1) Upon 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 and in caring and providing for the children.
- (2) The husband and the wife shall have the right separately to engage in any trade or profession or in social activities.
- (3) The wife shall have the right to use her own surname and name separately.
- (4) The husband and the wife shall have equal rights in the running of the matrimonial household.

It has been said that

Section 46 enshrines our hopes of how the two spouses conduct themselves. It says that society expects they will co-operate with one another to safeguard their union and for the well-being of their children, that each should respect the other and, most of all, that in the running of their family, each should have an equal right ... It helps spouses be moral people by teaching each how to behave towards the other.³³

Section 46 sets out society's aspiration of how marriage partners should behave. No sanction is provided for the breach of section 46, but it remains a legal provision of importance. The law expects spouses to take their marriage seriously as a permanent union which they should safeguard together. This means that spouses must make efforts to resolve their disagreements amicably and treat each other with respect. In *LSJ v. LKK*³⁴ Rajah J.C. said of the meaning of "cooperate" in section 46:

The word "co-operate" requires the husband and wife to work together, collaborate, connive, unite, contribute, lend assistance or act in concert.³⁵

Dickinson and Leming present the marriage partnership in this way:

A good marriage is a relationship in which two people respect and like each other, become friends, and agree on mutual values and goals. They learn that crises are an important element within marriage—a crisis may be an opportunity for growth. They are willing to work together for a successful relationship that combines quality and stability ... [this] suggests

³² *Charter*, *supra* note 1.

³³ *The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore: Butterworths, 1999) at 357; Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths, 1997) at 357.

³⁴ [1992] 2 S.L.R. 813.

³⁵ *Ibid.* at 815.

the importance of cooperation and commitment in making a marriage a satisfying experience for both wife and husband most of the time.³⁶

Other legal obligations further support this exhortation. Husbands are expected to maintain their wives.³⁷ As parents, spouses must also care and provide for their children.³⁸ They must act in the best interests of their children,³⁹ which necessitates co-operating with each other to promote their best interests, even when it seems difficult to do so.⁴⁰ Further, the law does not tolerate acts or threats of violence between spouses and protects the innocent spouse from family violence by providing swift recourse to protection orders.⁴¹ Spouses are also expected to include a sexual dimension in their relationship which is exclusive to them. Where a marriage is not consummated, it is possible to seek an annulment of the marriage,⁴² and where one spouse commits adultery, the other spouse is entitled to rely on that fact in seeking a divorce.⁴³ Section 49 of the *Women's Charter* further supports the obligations in section 46 by imposing a duty on the judge hearing proceedings for divorce, judicial separation, property disputes between spouses, family violence and maintenance applications to consider and encourage reconciliation of the parties.⁴⁴

The restriction in section 94 reinforces the law's expectation by requiring that in the early foundation years of marriage at least, spouses ought to live by the exhortation in section 46 and should not even be permitted to consider the possibility of a divorce. The ironical aspect of section 94 is, however, that the spouses are permitted the option of divorce if they are able to show exceptional hardship or exceptional depravity. Thus the concept of a restriction in section 94 usefully serves a purpose but its exception may have the effect of throwing the baby away with the bath water.

³⁶ George E. Dickinson and Michael R. Leming, *Understanding Families, Diversity, Continuity, and Change*, (Boston: Allyn and Bacon, 1990) at 228.

³⁷ *Charter, supra*, note 1, s. 69.

³⁸ *Charter, supra*, note 1, ss. 46(1) and 68.

³⁹ *Charter, supra*, note 1, s. 68 provides that parents must maintain their children while section 125 of the *Women's Charter* and section 3 of the *Guardianship of Infants Act* (Cap. 122, 1985 Rev. Ed. Sing.) provide that the court when hearing matters involving children shall regard the welfare of the infant as the first and paramount consideration.

⁴⁰ It has been argued elsewhere that the law should encourage joint parenting and cooperation between spouses: see Debbie S.L. Ong, "Parents and Custody Orders—A New Approach" [1999] S.J.L.S. 205.

⁴¹ *Charter, supra*, note 1, s. 65.

⁴² *Charter, supra*, note 1, s. 106.

⁴³ *Charter, supra*, note 1, s. 95(3)(a).

⁴⁴ *Charter, supra*, note 1, s. 49(1)(a) and (b).

B. *Balancing the State's Interest in a Permanent Union Against the Spouses' Autonomy and Freedom*

Apart from some of these fundamental expectations, the law avoids over-regulation, particularly over the less essential aspects, such as whether to have children or how to divide the roles in the running of the household. In *Kwong Sin Hwa v. Lau Lee Yen*,⁴⁵ the court held that

the law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, so long as such agreement does not seek to enable them to negate the marriage or resile from the marriage ... In particular, the law does not forbid them to agree as to how they should live and conduct themselves as husband and wife, when and where they would commence to live as husband and wife, when they would consummate their marriage, when they would have a child or children and how many children they would have. Such agreements made between husband and wife are not illegal or immoral or against public policy.⁴⁶

What may be against public policy is an agreement not to live together as husband and wife after the marriage, such as the pre-nuptial agreement in *Brodie v. Brodie*.⁴⁷

The law seeks to maintain a balance in regulating moral behaviour against respecting privacy and autonomy in the intimate spousal relationship. In a way, the lack of direct sanction in section 46 goes towards achieving this balance. It sets out what the law expects of spouses, but does not over-regulate. Hence despite its lack of enforceable rights,

... [t]he judicious use of these expressions of expectations encourages proper behaviour and teaches as well, if not better, as the provision of legally enforceable rights. Besides, in these intimate relationships, concern for the privacy of the members may make legally enforceable rights inappropriate while expressions of expectations are almost always appropriate.⁴⁸

This role of the law should not be underestimated. If the availability of divorces sends the message that marriages need not be permanent unions, section 46 teaches the opposite. It is not unthinkable that there may be a

⁴⁵ [1993] 1 S.L.R. 457.

⁴⁶ *Ibid.* at 469.

⁴⁷ [1916–17] All E.R. 237. In *Brodie v. Brodie*, the man agreed to marry the woman expecting his child on the condition that they would always live apart as if they were not married.

⁴⁸ *The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore: Butterworths, 1999) at 356–357; Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths, 1997) at 356–357.

correlation between attitudes towards divorce and the quality of the marital relationship. It was found in an American study that

... [a]lthough most ... continue to value marriage, the belief that an unrewarding marriage should be jettisoned may lead some people to invest in less time in their marriages and make fewer attempts to resolve marital disagreements. The result may be a gradual decline in marital happiness. Ironically, by adopting attitudes that provide greater freedom to leave unsatisfying marriages, people may be increasing the likelihood that their marriages will become unsatisfying in the long run.⁴⁹

The availability of divorce is not of itself a serious threat to the institution of marriage, but liberal divorce laws may lead to attitudes which undermine marriage. One extreme course to curb such attitudes is to abolish divorce entirely, but a more humane and realistic position is to counter these attitudes, while permitting divorce, by building up marriage laws which clearly set out legal expectations, such as those in section 46 and 49 of the *Women's Charter*. A time restriction on divorce is another way to add some stability to marriage. Strict proof of irretrievable breakdown of marriage also serves to ensure that divorce laws and procedures are not too liberal.⁵⁰

While family law encourages mutual cooperation and reconciliation, it should, when spouses reach a point where that becomes practically unachievable, permit a course of action which takes on a new goal, such as permitting a divorce in a manner which causes the least bitterness, humiliation and trauma. While there is no direct remedy which restores marital harmony to the spouse who has from suffered a breach of section 46 by the other spouse, a divorce is available to end the union which has irretrievably broken down. Similarly, while section 94 can have the effect of strongly encouraging the spouses to remain married and work things out, the present law also recognizes that where there is exceptional hardship or exceptional depravity, the more humane course is to permit a divorce. On the one hand, the law plays the pedagogical role of expressing how spouses are expected to behave, and on the other, it refrains from doing more harm by requiring the spouses to remain in a difficult marriage and reach what is unlikely to be achievable. The law must search for that equilibrium on which these two interests meet. To remove the time restriction on divorce altogether may appear to also remove any attempt to support and encourage legal and moral expectations. Yet an absolute three-year restriction may possibly go too far beyond the equilibrium. The present law in section 94 attempts to balance

⁴⁹ Paul Amato and Stacy Rogers, "Do Attitudes Toward Divorce Affect Marital Quality?" [1999] 20 *Journal of Family Issues* 69–86, at 85.

⁵⁰ For instance, presently, irretrievable breakdown must be established by evidence of at least one of the facts in section 95(3) of the *Charter*, *supra* note 1.

the two interests by imposing a three-year restriction subject to exceptions. It has been pointed out earlier that the exceptions which require the parties to prove exceptional hardship or exceptional depravity ironically encourage more acrimony instead of the spirit of reconciliation. It is therefore sensible that the English Law Commission has settled on a one-year absolute time bar for divorces in England.

V. PLACE OF A RESTRICTION IN SINGAPORE

While there is a strong policy reason in imposing some restriction to divorce in the early years of marriage, it is argued that the present qualified three-year restriction does not convincingly demonstrate that it promotes the best interests of families in Singapore.

A. *An Unstable Start With More Challenging Times Ahead*

The Scottish Law Commission, in rejecting a similar restriction to divorce, remarked that

Where the spouses' incompatibility is revealed during the early days of marriage, the balance of social advantage clearly lies with the speedy termination of the marriage. This is not to approve of irresponsible or trial marriages. Most persons ... enter into marriage without considering the terms of the law of divorce and upon the assumption that their relationship will be permanent.⁵¹

1. *Difficulties in the Early Marital Relationship*

One would have thought that the first years of marriage would be "honeymoon years" where a couple is still basking in the glow of courtship. Cox has pointed out that

dissatisfaction with the marital relationship tends to increase with the length of the marriage. Marital satisfaction appears highest early in the marriage, drops, and then, if the marriage survives, increases again during the latter years of the marriage (Glenn 1990, 818-3).⁵²

However, the early stage of married life has been known to present characteristic difficulties as well. Family sociologists theorize that marital failure

⁵¹ *Divorce—The Grounds Considered*, Scot. Law Com. No. 6 (1967), para. 30.

⁵² Frank D. Cox, *Human Intimacy: Marriage, the Family and Its Meaning*, 6th ed. (Minneapolis: West Publishing Company, 1993) at 480 [Frank D. Cox].

in the early years of married life can be attributed mainly to the failure to renegotiate family status:

Marriage requires that two people renegotiate together a myriad of issues they have previously defined individually, or that were defined by their families of origin, such as when and how to eat, sleep talk, have sex, fight, work, and relax. The couple must decide about vacations, and how to use space, time, and money. There are also the decisions about which family traditions and rituals to retain and which ones the partners will develop for themselves.⁵³

In Singapore, a high percentage of divorces occur in the earlier stages of marriage:

*Number of Divorces by duration of marriage*⁵⁴

Year	1999	2000	2001	2002
Total number of divorces	3924 (100%)	3336 (100%)	3491 (100%)	4006 (100%)
Duration of marriage	–	–	–	–
Under 5 years	620 (15.8%)	553 (16.6%)	533 (15.2%)	624 (15.6%)
5–9 years	1084 (27.6%)	1054 (31.6%)	1204 (34.5%)	1365 (34.1%)
10–14 years	639 (16.3%)	596 (17.8%)	570 (16.3%)	737 (18.4%)
15–19 years	464 (11.8%)	415 (12.4%)	434 (12.4%)	479 (12%)
20–24 years	352 (8.9%)	300 (9%)	365 (10.5%)	359 (9%)
25–29 years	231 (5.9%)	261 (7.8%)	233 (6.7%)	276 (6.9%)
30 and over years	131 (3.3%)	157 (4.7%)	152 (4.4%)	166 (4.1%)

The greatest percentage of divorces falls in the range where marriages are between five to nine years in duration. More than 30% of divorces in 2002, 2001 and 2000 occur in this stage of married life. It is plausible to estimate that a large number of marriages of this duration have begun breaking down a few years before the time of divorce, possibly in first five years of marriage. A proportion of these divorces are likely to have involved spouses who have lived apart for three or more years prior to the divorce. In 2002, nearly 50% of the divorces were based on the fact that the spouses had lived apart for three years or more; in 2001, the percentage was 46% and in 2000, 51% of the divorces cited that fact of living apart. Thus these spouses

⁵³ Carter & McGoldrick, *The Changing Family Life Cycle, A Framework for Family Therapy*, 2nd ed. (Boston: Allyn and Bacon, 1989) at 16, 209–210 [Carter & McGoldrick].

⁵⁴ Statistics on Marriages and Divorces 2002, Singapore Department of Statistics, Ministry of Trade & Industry, Republic of Singapore (2003) at 65 [Statistics 2002].

would have “informally ended” their marital relationship by living apart some years before the divorce, suggesting marital breakdown much earlier in the marriage.

Another interesting reason that may be offered for the high number of divorces in this group of marriages (between five to nine years in duration) is that some spouses defer marriages in early years in order to avoid financial losses due to the surrender of their Housing and Development Board (HDB) flats. It has been suggested elsewhere that in Singapore, spouses who own HDB flats often defer divorces because of the losses they are likely to incur if they must give up their flat before five years have elapsed since allocation of the flat.⁵⁵ The unique situation in Singapore where more than 80% of Singaporeans live in HDB flats creates this cluster of divorce cases. These marriages may have already broken down in the first five years of marriage, but divorces are sought only after the couples are able to sell their flat at market price.

The decline in marital satisfaction in the first nine years of marriage may have a few explanations. One ascribes the decline to the demands of raising young children. This is further discussed below.⁵⁶ However, statistics in 2002 show that of the 1989 divorced couples of marriages nine years or less in duration, only 610 of them had at least one child.⁵⁷ Thus 30% of these couples had at least one child and 70% did not have any children. In 2001, 25% of divorced couples of marriages nine years or less had at least one child.⁵⁸ For the majority of the couples in this group, children did not contribute to the marital stresses. Other factors may have contributed to the decline in marital satisfaction. Strong, DeVault, Sayad and Cohen suggest that:

Traditionally, researchers have attributed decline in marital satisfaction to the arrival of the first child ... attributing the decline to children creates a single-cause fallacy—that is, attributes a complex phenomenon to one factor when there are probably multiple causes ... The most persuasive alternative is the duration-of-marriage effect ... (which is)

⁵⁵ “Where parties are able to obtain a divorce, they will no longer be able to retain their (flat) ... As flats directly purchased from HDB can be sold to the public only after 5 years, parties generally suffer losses 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 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”. See Debbie S.L. Ong, “HDB Policies: Shaping Family Practice” [2000] S.J.L.S. 110 at 112–113.

⁵⁶ See Part V.A.(2).

⁵⁷ Statistics 2002, *supra* note 54. Also see table of statistics under Part B, *infra*.

⁵⁸ Statistics on Marriages and Divorces 2001, Singapore Department of Statistics, Ministry of Trade & Industry, Republic of Singapore (2002) [Statistics 2001]; see table of statistics under Part B, *infra*.

most notable during the first stage of marriage ... This early decline may reflect the replacement of unrealistic expectations about marriage by more realistic ones—a challenge to be intimate and loving in the everyday world. Because beginning marriages requires us to undertake numerous relational tasks, the transition from singlehood to marriage is a time filled with challenges ... Social factors are important ingredients in marital satisfaction. Income level, for example, is a significant factor ... Psychological factors also affect marital satisfaction ... marital success seems to depend on partners' being similar in their psychological makeup and personalities.⁵⁹

The public policy reason behind section 94 is to preserve the value of the marriage institution and prevent couples from abandoning their marriage at the first sign of trouble. However, a restriction alone cannot achieve the goal of stabilizing marriages without other support. The family justice system must continue to strengthen marriages by encouraging early therapy intervention. Thus, when a divorce is contemplated by parties, reconciliation and other counselling services must be readily available to the couple. It is only when it is clear that the marriage has irretrievably broken down that a divorce should be given.

The Singapore Family Court has established Project HEART (Healing And Reconciliation Therapeutic programme) in its commitment to save and strengthen marriages in Singapore:

In partnership with Eagles Mediation and Counselling Centre, selected lawyers, and counselling agencies in the community, the Family and Juvenile Justice Centre is piloting a project aimed at assisting couples to salvage their marriages. Where couples have contacted selected lawyers for legal advice, but have not decided to commence divorce proceedings, the lawyers will refer the couples to the relevant agencies for assessments. In appropriate cases, the couples will be referred for counselling, and other marriage enrichment programmes, so as to work at their problems. The effectiveness of the pilot scheme will be evaluated, and considered for extension to referrals from all lawyers doing family work in Singapore.⁶⁰

Where couples have marital problems and are considering divorce, referrals may be made to the Family and Juvenile Justice Centre for marital therapy. The spouses' areas of conflict will be identified and the therapist will help

⁵⁹ Strong, DeVault, Sayad and Cohen, *The Marriage and Family Experience, Intimate Relationships in a Changing Society*, 8th ed. (Belmont: Wadsworth, 2001), at 376–377 [Strong, DeVault, Sayad and Cohen].

⁶⁰ Online: Family Court of Singapore <<http://www.familycourtofsg.gov.sg/programmes/projHeart.htm>>.

them to see how these conflicts may be resolved. The spouses will then make informed decisions as to whether to remain in the marriage or to proceed with the divorce. Once it is clear that the spouses have put in their best efforts to reconcile but are still unable to save the marriage, they should be permitted an early divorce with the minimum of acrimony and bitterness.

Social scientists such as Gottman and Holman have made studies which help to predict marital outcomes.⁶¹ Such studies may contribute to increased effectiveness in marital therapy and aid therapists in identifying those marriages which are unlikely to be saved. Hamburg believes that “compatible” couples can be more easily helped so that therapy can save their marriages, whereas couples who are not compatible are unlikely to be reconciled permanently, even with therapy.⁶² He suggests that couples who do not have the three dimensions to compatibility (i.e. the practical, the sexual and the wavelength dimensions) will have great difficulty saving their marriages.⁶³ If it is possible to identify marriages which are irretrievable, it is socially more beneficial to permit the couples to divorce.

The legal effect of a three-year period of restriction on divorce will not achieve as much as extra-judicial marriage support services in saving marriages. What a restriction achieves is asserting the public interest in restraining impulsive actions, but marriage support services better serve the long-term goal of helping couples to keep their marriages strong and intact. Reducing the period of restriction enables the public interest to be served but marital therapy must be available to assist in stabilizing marriages.

2. Phase After the First Three Years: Arrival of Children

Serious cracks in the marriage in its first years do not inspire confidence that the relationship will be able to weather stormier times to come when there are possibly increased stresses from caring for young children and managing higher financial burdens. Family therapy field has studied family stress at transition points from one stage to another in the “family life cycle”. While

⁶¹ See John Mordechai Gottman, *What Predicts Divorce? The Relationship Between Marital Processes and Marital Outcomes* (Hillsdale, N.J.: Lawrence Erlbaum Associates, Publishers, 1994) and Thomas B. Holman, *Premarital Prediction of Marital Quality or Breakup, Research, Theory, and Practice* (New York: Kluwer Academic/Plenum Publishers, 2001).

⁶² Sam R. Hamburg, *Will our Love Last? A Couple's Road Map* (New York: Scribner, 2000).

⁶³ *Ibid.*, at 29–39: “Similarity on the practical dimension is important because, to the degree that marital partners are not similar on it, their day-to-day life together will be harder ... Similarity on the sexual dimension is important because, to the extent that partners are not close on it, they feel that life is passing them by ... Similarity on the wavelength dimension is important because, to the degree that partners are on the same wavelength, they continue to feel a sense of companionship with each other. To the degree that they are not on the same wavelength, they feel lonely in the relationship.”

the family life cycle patterns change over time, the main stages may be set out as follows:⁶⁴

- Stage 1: The launching of single young adults
- Stage 2: The joining of families through marriage: the new couple
- Stage 3: Becoming parents: families with young children
- Stage 4: Families with adolescents
- Stage 5: Launching children and moving on
- Stage 6: Families in later life

The stages which appear to present the most difficulties are Stages 3 and 5, that is, when couples first adjust to raising young children and in the later stage of launching their grown-up children.⁶⁵ Stage 2 is the period when a couple is married and adjusting to their new married status in the early years of marriage. Stage 3 brings on the phase where children are added to the couple. Surviving a tumultuous Stage 2 does not guarantee easier times in Stage 3. In fact, Stage 3 presents greater challenges to a couple. According to sociologists Carter and McGoldrick,

The central struggle of this phase [Stage 3]... in the modern two-paycheck ... marriage is the disposition of child-care responsibilities and household chores when both parents work full-time. The pressure of trying to find adequate child care when there is no satisfactory social provision for this family need produces serious consequences: the two full-time jobs may fall on the woman; the family may live in conflict and chaos; ... or the woman may give up her career to stay home or work part-time. This problem is at the center of most marital conflict presented at this stage, and often leads to complaints of sexual dysfunction and depression. It is not possible to work successfully with couples at this phase without dealing with the issues of gender and the impact of sex-role functioning that is still regarded as the norm for most men and women. It is not surprising that this is the family life cycle phase that has the highest rate of divorce.⁶⁶

In Singapore, the phase of marriage which has the highest percentage of divorces occur in marriages between five to nine years in duration, which

⁶⁴ Carter & McGoldrick, *supra* note 53 at 13–20. Some sociologists classify the cycles differently. For example, Strong, DeVault, Sayad and Cohen, *supra* note 59 at 364–365 presents the family life cycle in this way: Stage 1: Beginning Families where the married couple has no children; Stage 2: Childbearing families where there are new births in the family; Stage 3: Families with pre-school children; Stage 4: Families with schoolchildren; Stage 5: Families with adolescents; Stage 6: Families as launching centre, where the first child is launched into the adult world; Stage 7: Families in the middle years which is the period from the time the last child is launched to retirement; Stage 8: Aging families.

⁶⁵ Carter & McGoldrick, *supra* note 53 at 17, 18–19.

⁶⁶ Carter & McGoldrick, *supra* note 53 at 17.

is likely to coincide with this phase of the family life cycle.⁶⁷ As discussed earlier, the presence of young children and the duration-of-marriage effect combine to make this phase one of the most difficult.⁶⁸

Sociologists have long recognized the toll that raising young children can have on marital relationships:

The effect that children have on marriage is complicated and involves many factors ... Regardless of the state of preparation and readiness, the actual transition to parenthood involves a number of costs to parents: 1. The physical demands associated with caring for the child are usually greater than the parents anticipated. 2. Unforeseen strains are placed on the husband-wife relationship. Many studies suggest that the presence of children in the family lowers the marital happiness or satisfaction of the parents ... Many couples report that the happiest times in their marriage occurred before the arrival of the first child and after the departure of the last ... The personal elements of the marital relationship—friendship, romance, and sex—tend to become less satisfying as the relationship becomes focused more on instrumental functions ... than on emotional expression. The time that the childless couple has used to nurture their personal emotional relationship is displaced by the time demands of the child ...⁶⁹

Of course there are joys in parenthood which can lead to an increased sense of family cohesiveness. They are likely to be experienced when both parents are able to work together to strengthen family bonds and capitalize on the new “phase” of their married lives. But when the marriage partners are not able to cooperate well, and in fact are experiencing serious marital problems in the early years of marriage which cannot be resolved even through therapy, it is more compassionate and beneficial to permit the option of divorce. Forcing the couple to enter the next phase which is thought to present even more challenging times is unfruitful and may even be destructive to the family members involved.

B. *Considering the Children of Divorced Couples*

One of the obvious victims of broken families is the child of divorced couples. Gottman reveals that

[t]here is now convincing evidence to suggest that marital distress, conflict, and disruption are associated with a wide range of deleterious effects

⁶⁷ See table of statistics under Part A, *supra*.

⁶⁸ See discussion under V.A.1 and Strong, DeVault, Sayad and Cohen, *supra* note 59.

⁶⁹ Frank D. Cox, *supra* note 52 at 478, 480–481.

on children, including depression, withdrawal, poor social competence, health problems, poor academic performance, and a wide variety of conduct-related difficulties.⁷⁰

When a couple divorces earlier in their marriage before they have any children, no innocent third party is involved in the trauma of the marital breakdown. If permitting earlier divorces of unsalvageable marriages may mean preventing more victims of divorce, there is merit in the argument that not all early divorces do more harm than good. It has been said of divorces in marriages where the couple is newly married with no children:

Divorce is the least disruptive at this phase of the life cycle. Fewer people are involved, less distinct roles have emerged, fewer social ties as a couple have been formed ... Without children the complex process of role definition is vastly altered.⁷¹

The State and the law must support spouses in making good and responsible choices. If a couple's marriage has already broken down in its early years before they even have children, it makes good sense to allow them the option of divorcing before children are possibly added to their already unstable relationship.⁷² It may well be that not many spouses will be able to establish irremediable breakdown of marriage in the early years of marriage since there will be fewer facts of breakdown to rely on. The few genuine cases of breakdown can at least be given the remedy of divorce.

The longer a couple is married, the greater the statistical probability that they will have children. According to the Statistics on Marriages and Divorces 2002,⁷³ 19% of divorced couples of marriages less than five years had at least one child, 35% of divorced couples of marriages between five to nine years had at least one child while 60% of divorced couples of marriages between 10 to 14 years had at least one child. In 2001,⁷⁴ 14% of divorced couples of marriages less than five years had at least one child, while 30% of divorced couples of marriages between five to nine years had

⁷⁰ John Mordechai Gottman, *supra* note 61 at 4. Some examples are given in Carter & McGoldrick, *supra* note 53 at 349, 353: "Divorce is very hard on pre-schoolers ... Developmentally they are starting to move away from home, towards peers and school. They have the beginnings of a sense of morality, combined with difficulty in distinguishing between their thoughts and reality, and thus are especially vulnerable to guilt and confusion ... children six to eight seem to have the hardest time of any age group, as they are old enough to realize what is happening but do not have adequate skills to deal with the disruption. They often feel a sense of responsibility, tremendous grief, and have a pervasive sadness and yearning for the departed parent ... When the divorce is bitter, children may be at risk psychologically if involved in loyalty conflicts."

⁷¹ Carter & McGoldrick, *supra* note 53 at 347.

⁷² See part A, *supra*.

⁷³ Statistics 2002, *supra* note 54.

⁷⁴ Statistics 2002, *supra* note 58.

at least one child. The percentage increases to 50% in marriages between 10 and 14 years. These statistics are summarized in the following table:

*Number of divorces and number of children under 18 years of age*⁷⁵

Duration of marriage	2000		2001		2002	
	Total number of divorces	Divorces with 1 or more children	Total number of divorces	Divorces with 1 or more children	Total number of divorces	Divorces with 1 or more children
Under 5 years	553	85 (15%)	533	77 (14%)	624	121 (19.4%)
5 to 9 years	1054	376 (36%)	1204	362 (30%)	1365	489 (35.8%)
10 to 14 years	596	337 (56.5%)	570	286 (50%)	737	442 (60%)

It is not unknown that there are couples who think that having a child can help them bond together and overcome their marital troubles. Davidson and Moore warn that

[m]any persons believe that marriages can be improved by having a child, since the wife and husband work together on child rearing. They idealize that the marriage will be strengthened as parents themselves grow by modelling kindness, empathy, and less self-centredness. They insist that having a child will cause spouses to become more committed to solving relationship problems (Viorst, 1985) ... Adding a child to a failing marriage actually compounds the problem. For example, if the relationship does not improve and ultimately culminates in divorce, not only is the child at risk, but both parents must then cope with the additional responsibilities and complexities of custody issues.⁷⁶

The consequence we should avoid is increasing the number of innocent victims of marital failure, the children. When spouses discover their serious incompatibility so early in their relationship, it is more humane to allow a divorce before the children arrive.

⁷⁵ Statistics on Marriages and Divorces 2002, 2001 and 2000, Singapore Department of Statistics, Ministry of Trade & Industry, Republic of Singapore.

⁷⁶ J. Kenneth Davidson, Sr and Nelwyn B. Moore, *Marriage and Family* (Dubuque, IA: Wm.C.Brown Publishers, 1992) at 200.

C. Nullity Decrees an Alternative

1. Conceptual Inconsistency

It was said of the three-year restriction in England:

There is an inconsistency between the law of divorce and nullity ... If sexual incompatibility results in a total failure to consummate the marriage, nullity proceedings can be started immediately, but if there has been a single act of consummation nullity proceedings are not available, and divorce proceedings will (unless the court grants leave on the basis of exceptional hardship or depravity) have to be delayed until the three year period has expired.⁷⁷

In Singapore, section 106 of the *Women's Charter* permits the presentation of a petition for a nullity decree if the marriage 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.⁷⁸ Thus, a marriage can be annulled at any time, even in the first months of the marriage as long as section 106(a) or (b) is established. The absence of sexual incompatibility is such a serious defect in the marriage that it can be avoided on that basis alone. In such a case, no longer does the law require the parties to put in greater efforts or seek professional help to reconcile and overcome that problem, but permits parties to get out of the marriage. However, if a couple has had one act of consummation but are unable to have sexual relations after that, they would have to seek a divorce since they can no longer rely on section 106. Is sexual incompatibility alone sufficient to establish exceptional hardship or depravity? It is unlikely to be sufficient. This inconsistency weakens the case for a three-year restriction on divorce. Given that on principle, the absence of sexual relations permits a couple to end their marriage, what justification exists for a three-year restriction for cases which show irretrievable breakdown of marriage but which fall just short of exceptional hardship or depravity?

⁷⁷ The Law Commission Working Paper No. 76, *supra* note 20, para. 52.

⁷⁸ *Charter*, *supra* 1, s. 106 provides: "A marriage which takes place after 1st June 1981 shall be voidable on the following grounds only: (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it; (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it; (c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise; (d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Disorders and Treatment Act (Cap. 178) of such a kind or to such an extent as to be unfit for marriage; (e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form; (f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner"

2. Practical Alternative to Early Divorce: Misuse of Nullity Law

The availability of nullity decrees based on the grounds in section 106 appears to permit an alternative route to end a marriage. Of the five grounds for avoiding a marriage, non-consummation is most easily established. In 2002, 282 cases or 98% of the annulments were made on the ground that the marriages was not consummated.⁷⁹ In 2001 and 2000 respectively, 231 cases or 92% and 212 cases or 98% of the annulments were based on the ground of non-consummation.⁸⁰ While the three-year restriction in section 94 arguably protects the institution of marriage by preventing irresponsible parties from rushing in and out of marriage, the availability of annulments based on non-consummation provides a possible escape route which undermines what section 94 attempts to achieve.

Most annulments occur in the first three years of marriage. The following table shows the number of annulments in the first five years of marriage:

*Number of Annulments by duration of marriage*⁸¹

Duration of marriage	1999	2000	2001	2002
Under 1 year	25	19	20	28
1 year	90	67	97	99
2 years	72	84	68	81
3 years	29	35	45	33
4 years	11	6	10	20
5 years & over	22	6	12	26
Total	249	217	252	287

Thus in 2002, 84% of annulments occurred in the first three years of marriage; in 2001, 91% of annulments occurred in the first three years of marriage.

In the unique nature of matrimonial proceedings, the adversarial system of litigation does not always ensure full investigation and revelation of all relevant facts. Where both parties desire an annulment, there is little reason for the respondent to contest the petitioner's allegations of non-consummation. Although *Kwong Sin Hwa*⁸² has said that the court requires proof of the relevant fact in section 106 and will not rubber stamp petitions, the court is

⁷⁹ Statistics 2002, *supra* note 54 at 16.

⁸⁰ Statistics 2001, *supra* note 58 at 16; Statistics on Marriages and Divorces 2000, Singapore Department of Statistics, Ministry of Trade & Industry, Republic of Singapore (2001) at 26.

⁸¹ Statistics 2002, *supra* note 54 at 85.

⁸² See *Kwong Sin Hwa v. Lau Lee Yen*, *supra*, note 45.

not always able to ensure that parties will not conceal or misrepresent some facts in order to obtain what they desperately seek.

It was reported in the Statistics on Marriages and Divorces 2001 that:

The number of annulments under the *Women's Charter* increased from 213 in 1981 and peaked at 606 in 1991. Thereafter, it fell to an all-time low of 140 in 1993, before rising to 252 in 2001. *The lower numbers in recent years could be attributed to stricter rules being applied by the Family Court in granting annulments to 'marriage not consummated'.*⁸³

Indeed, the court had to apply stricter rules in response to the tendency for parties to treat nullity decrees as an alternative to divorce. The court is wary of this attitude. For instance, in *Chua Ai Hwa v. Low Suan Loo*,⁸⁴ the petitioner sought a nullity decree based on the fact that the marriage was not consummated due to the willful refusal of the husband to do so. The petition failed to furnish particulars of the facts relied on to prove the respondent's wilful refusal to consummate the marriage. Punch Coomaraswamy J. held that

On the basis of the facts pleaded in the petition as a basis for relief, this petition could not be granted. The non-consummation alleged was at the date of the marriage, not after the marriage. The real reason why the petitioner wanted an end to the marriage was the parties were incompatible and that she had decided that each should go his or her own way. That, by itself, is no basis for any relief in matrimonial causes. All it meant was the parties made a mistake in getting married.

In a case such as *Chua Ai Hwa*, a nullity decree ought not to be granted to release the parties from the marriage. If the marriage has irretrievably broken down, then the appropriate matrimonial relief is divorce.

Similarly, in *Tang Yuen Fong v. Poh Wee Lee Jerry*,⁸⁵ the learned judge remarked that he "drew the inference that the parties in this case by agreement were converting a case for divorce into one of nullity as the latter is speedier and carries no stigma."⁸⁶

Tang Yuen Fong involved a petition by the wife seeking that her marriage be declared null and void on the ground of non-consummation due to the wilful refusal of the husband. The parties were married in March 1994 and the petition was presented in August of the same year. The petition stated that the parties had agreed not to consummate their marriage until they had gone through a ceremony of marriage according to Chinese customary rights but no particulars were given as to who was to make arrangements or when

⁸³ Emphasis added. *Ibid.*, at 15.

⁸⁴ Unreported judgment dated 8 June 1993. Divorce Petition No. 1626 of 1992.

⁸⁵ [1995] 3 S.L.R. 359.

⁸⁶ *Ibid.*, at 360.

such arrangements were to be made. The petition stated that in June 1994 there was a quarrel between the parties but nothing more was said about the cause of the deterioration of the relationship or the quarrel. The blank memorandum of appearance that was served on the husband stated that “a copy of a petition by your wife for a divorce is delivered herewith” and the husband said he was not contesting the petition. The court was of the view that the parties casually treated the case as a petition for divorce and failed to prove the ground for avoiding the marriage. The learned judge pointed out that

a petition for nullity and divorce is not merely a matter between the spouses. There is a third interest which must be kept in mind, namely, that of the state. The court must not, especially in an uncontested petition, act as a rubber stamp and grant the petition as a matter of course. The court must be vigilant to ensure that parties do not circumvent the requirements of a petition for divorce and avoid its stigma by filing a ‘consent’ petition for nullity.⁸⁷

Despite the court’s vigilance in requiring satisfactory proof, it is still limited in its investigative powers. On a practical level, non-consummation does not seem difficult to prove where two parties desire to end the marriage. In *Heng Joo See v. Ho Pol Ling*,⁸⁸ the parties were married in August 1991 and the wife in January 1993 filed a petition for nullity on the ground of non-consummation by reason of wilful refusal by the husband to consummate the marriage. The husband indicated that he did not wish to answer the petition and stated that he agreed to the two further prayers in the petition. The petition was heard as an uncontested petition in April 1993. In the petition, the petitioner had pleaded that at no time did she and the respondent live or cohabit as husband and wife. She also stated the incidences when she had wanted to consummate the marriage but the respondent refused. The respondent was absent at the hearing of the petition. On her evidence, the court concluded that there was no consummation because the husband refused sexual relations with the petitioner and that he did so willfully and granted a nullity decree. The *decree nisi* was extracted in April 1993. In August 1993, solicitors for the respondent entered an appearance for the respondent and took out an application seeking to vary the order the court made on an ancillary matter. The matter was heard in open court and the evidence of the petitioner on the ancillary matter was heard. The respondent said that the petitioner was no longer a virgin because he had sex with her after the marriage. This took place at times in his bedroom. He added that sexual intercourse between him and his wife took place at least three times in the first six months of their marriage. The petitioner was recalled and she

⁸⁷ *Ibid.*, at 361.

⁸⁸ [1993] 3 S.L.R. 850.

admitted that she had sex with the respondent during the first six months of the marriage. Since it transpired that the facts which grounded the *decree nisi* were untrue, the court rescinded the nullity decree.

Thus despite the requirement of stricter proof, it was still possible to obtain a nullity decree through misrepresentation in *Heng Joo See v. Ho Pol Ling*.⁸⁹ It would be interesting to find out, if at all possible, how many other nullity decrees have been sought on facts similar to *Tang Yuen Fong v. Poh Wee Lee Jerry* and *Heng Joo See v. Ho Pol Ling*.⁹⁰ Given that there is some evidence of attempts to misrepresent facts in order to find a way out of very short marriages by establishing non-consummation of the marriage, it may be suggested that some of these cases could have proceeded more appropriately as cases of divorce if the three-year restriction on divorce in section 94 did not prevent the presentation of a divorce petition. While it is possible that couples may have preferred an annulment as it does not carry the stigma of divorce, it is also possible that some of these cases could not have proceeded as divorces because of the restriction in section 94. A modification of section 94 can permit divorce petitions in some of the cases, which will remove the incentive to misrepresent facts in the desperate bid to obtain an annulment to end the marriage. A divorce petition in cases similar to *Tang Yuen Fong v. Poh Wee Lee Jerry* and *Heng Joo See v. Ho Pol Ling*⁹¹ will also more appropriately reveal the true reasons why a marriage has broken down. Let us call a spade a spade.

VI. CONCLUSION

The idea that the institution of marriage should not be devalued by permitting early divorces is an attractive one. But it should not prevent us from reviewing what is good for families and the society as the whole, even if it means adjusting our expectations to accept a position which is not the ideal, but one that is at least more realistic and humane. A one-year absolute restriction sufficiently sends the message that the marriage institution is a serious one which spouses must not undermine by embracing and abandoning too quickly. Further, the removal of the exception of “exceptional hardship . . . or . . . depravity” also removes the incentive for spouses to make allegations of severe misconduct.

Spouses in marriages which have irretrievably broken down in the first year of marriage will have to wait out a year before divorcing, which is not an intolerably long period of time. For troubled marriages which have not irretrievably broken down in the early years, divorces are still not available

⁸⁹ *Ibid.*

⁹⁰ [1995] 3 S.L.R. 359; [1993] 3 S.L.R. 850.

⁹¹ *Ibid.*

since the ground of divorce in section 95 is irretrievable breakdown of marriage. In such marriages, conciliation counselling in the Family Court and early referrals to community-based counselling services may strengthen the marriage and, even if the parties are unlikely to be reconciled, these services can help the couple to accept and come to terms with their failed relationship and teach them how to move on.⁹² It is also possible to consider a hybrid model which combines the English and the Australian provisions. In Australia, there is just one ground of divorce, that is, the irretrievable breakdown of marriage as established by the separation of the spouses for a continuous period of at least 12 months.⁹³ However, an application for dissolution of a marriage of less than two years' duration must not be filed without leave of court unless it is accompanied by a certificate stating that the parties have considered reconciliation with the assistance of a family counselor or approved organization.⁹⁴ Leave to petition⁹⁵ may be given if the court is satisfied that there are special

⁹² See Janet Walker & Peter MaCarthy, "Marriage support services and divorce: a contradiction in terms?" (2001) 16 *Sexual and Relationship Therapy* 329 where "research evidence indicates that marriage support services at the time of divorce can help some people to work on saving their marriage; offer a gateway into their counseling process; or enable people to come to terms with the end of a marriage and move forward to a new future;" also refer to Project HEART in the Singapore family justice system at Family Court of Singapore Website at <<http://www.familycourtofsg.gov.sg/programmes/projHeart.htm>>, *supra*, note 60.

⁹³ Section 48, *Family Law Act 1975*, Act No. 53 of 1975, provides: "(1) An application under this Act for a decree of dissolution of a marriage shall be based on the ground that the marriage has broken down irretrievably. (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and a decree of dissolution of the marriage shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage."

⁹⁴ Section 44(1B), *Family Law Act 1975*, *ibid.*, provides: "An application for dissolution of a marriage shall not, without the leave of the court granted under subsection (1C), be filed within the period of 2 years after the date of the marriage unless there is filed with the application a certificate in the form prescribed by the applicable Rules of Court: (a) stating that the parties to the marriage have considered a reconciliation, with the assistance of a specified person or organization, being: (i) a family and child counsellor or an approved counselling organisation; or (ii) another suitable person or organisation nominated by the Principal Director of Court Counselling of the Family Court or by an appropriate officer of a Family Court of a State; and (b) signed by that person or on behalf of that organisation, as the case may be."

⁹⁵ Section 44(1C), *Family Law Act 1975*, *supra*, note 93, provides: "Notwithstanding subsection (1B), if the court is satisfied that there are special circumstances by reason of which the hearing of an application for dissolution of a marriage should proceed notwithstanding that the parties have not considered a reconciliation with assistance of the kind referred to in subsection (1B), the court may: (a) if the application has not been filed—give leave for the application to be filed; or (b) if the application has been filed—at any time before or during the hearing of the application, declare that it is so satisfied; and, where the court makes a declaration under paragraph (b), the application shall be deemed to have been duly filed and everything done pursuant to that application shall be as valid and effectual as if the court had, before the application was filed, given leave under paragraph (a) for the application to be filed."

circumstances justifying it, such as where the other party to the marriage cannot be found, or is incapable of compliance by reason of mental incapacity, or refuses to consider reconciliation. An attractive model is to adopt an absolute one-year bar to divorce, and where the marriage is less than 3 years in duration, the petition must be accompanied by a certificate stating that the parties have considered reconciliation. The aim of the latter is to ensure that as far as possible, that parties in the early years of marriage have seriously explored whether their marriage can be salvaged.

Reducing the period of restriction from three years to one year does not necessarily mean a liberalization of divorce laws; strict proof of irretrievable breakdown of marriage is always required. Where a marriage is very short, it will generally be more difficult to adduce evidence establishing one of the facts in section 95. Section 95(3)(c), (d) and (e) will not be available since these require separation for two, three or four years respectively. Only the “grounds” of adultery and unreasonable behaviour can be relied on for very short marriages. In establishing unreasonable behaviour, the petitioner must find within that short span of time of marriage, sufficient evidence that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, which may prove difficult. The reduction of the period of restriction will help give relief to genuine cases of unsalvageable marriages and as argued above, there are societal and personal benefits to the early but harmonious end of marriages in appropriate cases.