NOTES OF CASES

OF CHRISTIAN MEN WITH POLYGAMOUS INCLINATION

In the Estate of Pang Soo Ho, Deceased [1]

This case continues the local saga of Chinese Christian men who, despite their religious beliefs, did not feel constrained from taking more than one woman as wife and fathering several offspring with them.

The case arose in this way. Pang Soo Ho passed away intestate on 18 August 1981. He was domiciled in Singapore. Pang Fei Ling and Pang Hwee Giok petitioned for Letters of Administration from the High Court of Singapore. They applied as the lawful children of the deceased as their mother, Madam Tan Loo Teck, was his lawful widow. However, soon after that, a Madam Chia Lee Peng and her child Pang Hwee Min entered a caveat claiming respectively to be the third wife and lawful child of the deceased. A second caveat was entered by a Madam Lim Pab Hup and her children Peng Chee Chiang, Peng Chee Lip and Peng Chee Seng claiming respectively to be the second wife and lawful children of the deceased, The petition was thus referred to a Judge of the High Court for his decision on the status of the women and children *vis-a-vis* the deceased.

The facts may be summarised as follows. It was undisputed that Pang Soo Ho was a Singapore domiciliary and that he was a Christian at all material times. During his lifetime he established three households. On 30 June 1942 he married Madam Tan Loo Teck. who was also a Christian, at the Holy Trinity Church Singapore under the Christian Marriage Ordinance of 1940. Pang Fei Ling and Pang Hwee Giok were born of this union. In her affidavit Madam Lim Pab Hup claimed that on 12 July 1952 she and Pang Soo Ho went through a wedding ceremony according to Chinese customary rites in Singapore. Peng Chee Chiang, Peng Chee Lip and Peng Chee Seng were born of this union and, although she and the deceased separated in 1965, he continued to maintain his children for another 10 years (by which time presumably the children had grown up). In her affidavit Madam Chia Lee Peng claimed that she met the deceased in 1953 and their relationship developed such that by 1955 they acknowledged each other to be man and wife. She was introduced to his friends as his wife and indeed in 1958 she was even introduced to the deceased's parents as his wife. Pang Hwee Min was born of this union. There was no allegation that any of these 3 unions was ever officially terminated.

It would appear from the judgment that there was no serious dispute as to the allegations in the affidavits of Madam Lim Pab Hup

[1] [1982] 2 M.L.J. 147.

and Madam Chia Lee Peng. The petitioners' contention was, rather, that, as the deceased's marriage to their mother was under the provisions of the Christian Marriage Ordinance of 1940, it was a monogamous marriage and therefore the deceased had no legal capacity to validly enter into subsequent marriages, whether principal or secondary, while the monogamous marriage subsisted. For the caveators it was contended that the deceased's marriage under the Christian Marriage Ordinance of 1940 did not incapacitate him, a Chinese whose personal law at that time permitted polygamy, from contracting valid subsequent marriages with two women as secondary wives.

These being the contentions of the parties the two issues before the court were, one, assuming that the parties had in fact complied with the formal requirements of a Chinese customary marriage, were Madam Lim Pab Hup and Madam Chia Lee Peng lawful secondary wives of the deceased and, two, if the answer to the first was in the negative, were the children of these women nevertheless the legitimate children of the deceased? The first issue may be further broken up into the following: What was the essential characteristic of a marriage solemnized in 1942 under the Christian Marriage Ordinance of 1940? Was the marriage monogamous such that, while it subsisted, the man may not marry someone else again even though his personal law permitted polygamy? Or, on the contrary, was the statute silent on this matter in which case the Chinese male could possibly claim to exercise his right under his personal law to marry again?

Was the marriage in 1942 under the Christian Marriage Ordinance of 1940 monogamous?

The Christian Marriage Ordinance has the distinction of being the first local legislation on marriage. Mr. Justice Chua in his judgment referred to its long history and in order to understand the problem raised by the first issue, we do well to trace the history of the Ordinance and the changes it underwent.

The first Christian Marriage Ordinance was promulgated in 1898. It was amended in 1903,[2] 1909[3] and again in 1915.[4] In 1920 the Ordinance and its amendments were consolidated into one.[5] This Ordinance was further amended in 1921 [6] and 1922.[7] This Ordinance and its amendments were also consolidated in 1936.[8]

Although each of these Ordinances varied in its details for our purposes, they were similar in one crucial respect — they only made provision for the formalities in solemnizing a Christian marriage and did not provide for any of the matters regarding capacity to marry such as minimum age, prohibited degrees of affinity or consanguinity, whether the marriage is monogamous etc. In fact the observation of Thomson C.J., as he then was, in the celebrated case of *Re Loh Toh*

2 *vide* Ord. 25 of 1903.
3 *vide* Ord. 7 of 1909.
4 *vide* Ord. 26 of 1915.
5 Ord. 60, Laws of the Straits Settlements, 1920 Rev. Ed.
6 *vide* Ord. 26 of 1921.
7 *vide* Ord. 32 of 1922.
8 Cap. 82, Laws of the Straits Settlements, 1936 Rev. Ed.

Met, Deceased[9] with reference to the 1936 version of the Christian Marriage Ordinance could just as well be made of the others:

> "... the whole object, purpose and scope of the Ordinance is to provide a code of law governing the solemnization of Christian... marriages.... It was nothing whatsoever to do with such matters as capacity to marry...."

In 1940 the Ordinance re-appeared as Ordinance 10 of 1940. Then, in 1941, an amending Act introduced the first provisions on capacity to marry into the Ordinance.[10] Taking effect from 23rd May 1941 the provision which is more relevant for our purposes, *viz.* section 42, which Marginal Note reads "Contracting a bigamous marriage", provides:

> "(1) Any person, married according with the provisions of this Ordinance, who during the continuance of such marriage purports to contract a valid marriage with a third person under any law, custom, religion or usage shall be deemed to commit the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code...."

To understand this provision we need to divert and consider what the then section 494 of the Penal Code is about.[11] It read:

> "Whoever, having a husband or wife living, marries in any case in which *such marriage is void by reason of its taking place during the life of such husband or wife,* shall be punished...."[12] (emphasis added)

The legal effect of section 42(1) is therefore to provide that a person who marries under the Christian Marriage Ordinance is not capable, while the marriage subsists, of validly contracting a subsequent marriage under any law, custom, religion or usage and that if he should attempt to do so the subsequent marriage is void and he thereby commits the offence of bigamy. By the insertion of this new provision into the Ordinance the Legislature, somewhat circuitously but no less effectively, puts the stamp of monogamy on marriages contracted under the Christian Marriage Ordinance and prohibits any such married party, male or otherwise, Chinese or otherwise, from validly contracting subsequent marriages, principal or secondary. To press the point of monogamy further, the other new provision inserted into the Ordinance reads:

> "Any marriage purported to be solemnized under this Ordinance shall be invalid if either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party."[13]

To complete the history of the Ordinance (although this is not material to our discussion), it was further amended in 1952.[14] The Ordinance, with section 42 intact, together with its amendments was consolidated in 1955.[15] It remained in that form until it was repealed by the Women's Charter.[16]

[9] (1961) 27 M.L.J. 234, 245.
[10] *vide* Christian Marriage (Amendment) Ordinance 16 of 1941, ss. 6 and 42.
[11] S. 494, Penal Code, Cap. 20, Laws of the Straits Settlements, 1936 Rev. Ed.
[12] This provision is reenacted, substantially intact, as s. 494 of the present Penal Code, Cap. 103, Singapore Statutes, 1970 Rev. Ed.
[13] S. 6.
[14] *vide Ords.* 27 and 37 of 1952.
[15] Cap. 37, Laws of the Straits Settlements, 1955 Rev. Ed.
[16] Ord. 18 of 1961.

The state of the Christian Marriage Ordinance being what it was in 1942 when Pang Soo Ho married Madam Tan Loo Teck. one would have expected the court's decision on the first issue to be short and simple. There can be no doubt that, on the basis of section 42(1), Pang Soo Ho had no legal capacity to contract subsequent marriages, secondary or not, while the Christian marriage subsisted. Madam Lim Pab Hup and Madam Chia Lee Peng were never, at law, his lawful wives and in fact in attempting to take them as his lawful wives the deceased had committed two counts of bigamy. That they were never lawfully married is undoubtedly the law whatever their expectations and beliefs may have been and indeed despite the assumption made in Justice Chua's judgment that the parties had satisfied the formalities or the procedural requirements of marriage according to local Chinese custom.

It is well to comment here that the assumption was a proper one to have been made. The formalities or the procedural requirements of marriage according to local Chinese custom, at least to a secondary wife, were progressively relaxed by the courts until in 1965 in the case of *Re Lee Gee Chong, Deceased*,[17] the Federal Court of Malaysia on appeal from Singapore held that no ceremony of any sort is mandatory and that all that is necessary is good evidence, of whatever nature, of a common intention to form such a marriage. Wee Chong Jin C.J. said,

> "Counsel... contended before us that... it follows that a woman who claims to be a lawful secondary wife of a Chinese must *inter alia* prove that the marriage was performed or celebrated in accordance with the customs and rites of the Chinese inhabitants here... this contention I am unable to accept.
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> It seems to me on the issue [of what formalities are required] the Privy Council found [in the case of *Khoo Hooi Leong* v. *Khoo Chong Yeok* [18]] that the evidence did not justify any such finding and if any principles can be extracted from the judgment of the Board it seems to me they are *first that the parties to such a union must intend their union to be permanent in its nature and secondly that no form of marriage ceremony is necessary for creating the position or status of a secondary wife."*[19] (emphasis mine)

This decision from the highest court in Singapore[20] justifies the assumption made that there was sufficient evidence to find a common intention in both cases of Pang Soo Ho and Madam Lim Pab Hup and Pang Soo Ho and Madam Chia Lee Peng to form permanent unions. In the former, their participation in some ceremony of marriage and the birth of children together with their maintenance by their father is good evidence of such intention; in the latter, the public and private acknowledgment of the woman as wife, the introduction of her as such to his parents, and the birth of a child are all good evidence.

To return to the decision of Justice Chua, instead of resolving the first issue in the short and direct manner which, as said earlier,

[17] [1965] 1 M.L.J. 102.
[18] [1930] A.C. 346.
[19] [1965] 1 M.L.J. 102, 111.
[20] When Singapore was a constituent of the Federation of Malaysia, from 31 August 1963 to 9 September 1965, the Federal Court was the highest local court of Singapore.

the Christian Marriage Ordinance of 1940 by section 42(1) allows, the learned judge first sought assistance from five previous decisions. It is submitted that these decisions were, for one reason or another, either irrelevant to the issue or unsatisfactory and that reference to them did not help in resolving the issue.

Chia Teck Leong & Four Ors. v. *Estate & Trust Agencies (1927) Ltd.*[21] was not concerned with a Christian marriage at all, and the statute raised in argument, the Christian Marriage Ordinance of 1936, was a different statute altogether. In *Re Henry Lee Fow Lee, Deceased*[22] the court was concerned with the same Ordinance as in the instant case but the issue was the altogether different one of whether the Ordinance compels all Christians, Chinese and others, to choose it as a marriage system such that the Chinese Christian cannot opt to marry under local Chinese custom. In any case the court's decision on this point has been expressly overruled by *Re Loh Toh Met, Deceased.*[23] The learned judge also looked to this case for guidance and it may be doubted if he found any since the case concerned a different issue and a different Ordinance, *i.e.* that of 1936 (which fact the learned judge himself noted a little later in his judgment).[24] Moreover, as has been said earlier,[25] the observations of the court with regard to the Ordinance of 1936 are wholly inappropriate when considering the Ordinance of 1940 as amended in 1941. The learned judge also looked to the case of *Re Ding Do Ca, Deceased*[26] This case is also not helpful because, although the issue was exactly that which was raised in the instant case, the marriage there was under the Christian marriage statute of another state, *viz.* the Christian Marriage Enactment of Perak, which did not have a provision similar to section 42(1) of the Christian Marriage Ordinance of 1940. Thus the decision that Ding Do Ca was legally capable of contracting a second, customary marriage was correct on its facts, but would not have helped resolve the instant dispute. The last case looked to was *Dorothy Yee Yeng Nam* v. *Lee Fah Kooi.*[27] This case is perhaps the only useful one the learned judge could have looked to; it concerned the same Ordinance as in the instant case and although the issue was different, the court in *Dorothy Yee's* case had to ask itself what the essential characteristic of a marriage contracted in December 1941 was under the Ordinance. It should be remembered from our earlier discussion that by December 1941, the 1941 amendments to the Ordinance were in force. Unfortunately, Thomson J., as he then was, was not directed to these amendments and his judgment proceeded as if there had not been the insertion of sections 6 and 42 into the Ordinance. His decision was that the Ordinance did not provide that a marriage under it shall be monogamous but that it clearly contemplated that the marriage shall be monogamous. This decision resolved the dispute in *Dorothy Yee's* case well enough but it was clearly *per incuriam* sections 6 and 42 which indisputably though somewhat circuitously provided that a marriage under the Ordinance *shall* be

[21] (1939) M.L.J. 118.
[22] (1953) M.L.J. 106.
[23] See n. 9.
[24] At p. 150.
[25] See *supra.*
[26] [1966] 2 M.L.J. 220.
[27] (1956) 22 M.L.J. 257.

monogamous. It would appear from Justice Chua's judgment that the learned judge was not directed to this taint in *Dorothy Yee's* decision.

It was only after discussing these cases that Justice Chua referred to the provisions of the Christian Marriage Ordinance of 1940 as amended in 1941 and, in particular, *inter alia* to sections 6 and 42 thereof. His decision on the first issue was that by virtue of these provisions a Chinese Christian male who chose to have his marriage solemnized under this Ordinance was legally incapable, while this marriage subsisted, of contracting valid subsequent marriages under local Chinese custom. In so deciding, he impliedly overruled *Dorothy Yee's* case.

The effect of Justice Chua's decision is that it clearly lays down that all Christian marriages solemnized in Singapore after 23 May 1941, and indeed (for Singapore's purposes) all Christian marriages solemnized in the other Straits Settlements, *viz.* Penang and Malacca, between 23 May 1941 and 1 August 1957 when the Federation of Malaya Christian Marriage Ordinance, 1956 came into force,[28] are monogamous marriages.

Were the Children of the "Secondary Wives" Legitimate Children?

The second issue raised in this case was whether, in spite of the invalidity of their parents' marriages, the children born of Pang Soo Ho and Madam Lim Pab Hup and Madam Chia Lee Peng were nevertheless legitimate by virtue of section 93 of the Women's Charter.[29] This provision has been changed dramatically in its relatively short history, and it is both interesting and useful to trace these changes.

In the original Women's Charter, 1961 sections 92(3) and 94 were merely reenactments of provisions from the then-repealed Divorce Ordinance.[30] These sections were comparatively restrictive. Section 92(3) read:

> "Any child born of a marriage avoided pursuant to paragraph (g) or (h) of subsection (1) of this section shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided."

Paragraphs (g) and (h) of subsection (1) provide, as grounds for annulment, where either party was at the time of marriage of unsound mind or subject to recurrent fits of insanity or epilepsy, and where the other party was at the time of marriage suffering from venereal disease of a communicable form. Although the original Women's

[28] This repealed the Christian Marriage Ordinance of 1940. The new Ordinance did not have provisions similar to ss. 6 and 42 and instead had the extremely limited s. 29(1)(c) which it is submitted does not even cover the scope of s. 6, much less that of ss, 6 and 42. It reads "any marriage purported to be solemnized under this Ordinance shall be void if either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party and such marriage would under any other written law or rule of law in force in the Federation applicable to such party or parties be unlawful by reason of such subsisting marriage." There has not been any reported decision interpreting this provision.

[29] Cap. 47, Singapore Statutes, 1970 Rev. Ed.

[30] Cap. 40, Laws of the Straits Settlements, 1955 Rev. Ed.; ss. 14(3) and 16.

Charter did not expressly state that these grounds render the marriage voidable only, instead of being void *ab initio,* on principle, this is no doubt the case and indeed the present Women's Charter[31] makes this clear.

Section 94, equally restrictive, read,

> "Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, children begotten before the decree *nisi* is made shall be specified in the decree and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract."

In 1967,[32] these sections were repealed and replaced by the following, as section 93:

> "Where a marriage is annulled, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled at the date of the decree shall be deemed to be their legitimate child, notwithstanding the annulment."

There is no doubt that this provision applies only to voidable marriages as it is only such marriages which may be dissolved instead of being annulled. There can be no question of a marriage which is void *ab initio* being dissolved. It would seem therefore that the Legislature substituted the former section 92(3) with a more liberal provision and removed the former section 94 without substituting another in its place.

This omission was rectified in 1969 when section 93 was re-numbered section 93(1) and a new subsection (2) was inserted.[33] This provision is remarkable in its width, and it read:

> "The child of a void marriage, whether born before or after the commencement of this Act, shall be deemed to be the legitimate child of his parents."

The width of this provision may be appreciated when we note (i) that it is applicable to all children born at any time, and (ii) the only requirement is proof that the child's parents attempted to marry but that the marriage failed to be valid; there need be no proof of the *bona fides* of their attempt.

As may be expected, this provision (perhaps, inadvertently, made so wide) was restricted in 1975[34] when it was substituted with:

> "The child of a void marriage born on or after the date of the commencement of the Women's Charter (Amendment) Act, 1975 *[i.e. 2* May 1975] shall be deemed to be the legitimate child of his parents if at the date of such void marriage both or either of the parties reasonably believed that the marriage was valid."

In the recent Reprint of the Women's Charter 1981, sections 93(1) and (2) are preserved intact as sections 99(1) and (2) although in section 99(2) the date of operation of the section is made clear.

31 Reprint of the Women's Charter, 1981; see s. 94(c), (d), and (e).
32 *vide* Women's Charter (Amendment) Act 9 of 1967 w.e.f. 2 June 1967.
33 *vide* Statute Law Revision Act 14 of 1969 w.e.f. 2 January 1970.
34 *vide* Women's Charter (Amendment) Act 8 of 1975 w.e.f. 2 May 1975.

The question raised by the second issue is, then, whether any one or more of these provisions apply to the children so that they may be deemed legitimate. We may immediately eliminate those provisions referring to voidable marriages as there can be no doubt that in the instant case Pang Soo Ho's subsequent "marriages" are void because of his legal incapacity to contract them. Of the provisions referring to void marriages, section 94 is clearly inapplicable as there was never any annulment of the "marriages" nor any question of any belief that Madam Tan Loo Teck was dead. Similarly, section 93(2) of 1975 and the present section 99(2) are not applicable as none of the children involved were born on or after 2 May 1975. But, what of section 93(2) as it existed between 1969 and 1975?

It was the caveators' allegation that this provision applied to the children and they were therefore deemed to be Pang Soo Ho's legitimate children. The contention was simply that their parents' marriages were void marriages because of their father's incapacity to marry and, as the provision did not specify when the children need have been born, it applied to all of them.

It is submitted that on principle and on a literal reading of section 93(2), this reasoning cannot be challenged. The fact that the section has been repealed does not endanger rights acquired under the repealed section as section 16 of the Interpretation Act reads:[35]

> "Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not — (c) affect any right, privilege,... accrued ... under any written law so repealed. ..."

It is not altogether clear from Justice Chua's judgment if he would have agreed that, despite its repeal, section 93(2) could be applicable to the parties. At the end of his judgment, the learned judge said that in any case the section was not applicable to the children but this statement was made immediately after discussing a precedent binding upon the court which required the court to hold that the section was not applicable, not because of its repeal, but because marriages such as Pang Soo Ho's invalid subsequent marriages did not come within the term "void marriage" in the section concerned. It is still open to suggestion that, by virtue of section 16 of the Interpretation Act, section 93(2) could have been applicable if the subsequent marriages fall within the term "void marriage".

The binding precedent Justice Chua discussed was *Re Estate of Liu Sinn Min, Deceased* where both the High Court[36] and the Court of Appeal[37] in a unanimous decision, held that a Chinese secondary marriage which was invalid because each party was legally incapacitated by statute from marrying a second time while a previous marriage subsisted did not come within the term "void marriage" in section 93(2). There is no doubt that Justice Chua was obliged by this binding precedent to come to the decision he did; that since their parents' marriages were not void marriages within the meaning of section 93(2), the children were not entitled to be deemed legitimate and were therefore Pang Soo Ho's illegitimate children. And being illegitimate, they were not entitled to a share in their father's intestate

[35] Cap. 3, Singapore, 1970 Rev. Ed.
[36] [1974] 2 M.L.J. 9.
[37] [1975] 1 M.L.J. 145.

estate.[38] There is equally no doubt, however, that the decisions of both the High Court and the Court of Appeal may be discredited. There is no need to recapitulate the arguments of the judges in these two courts as each of their arguments has been devastated in a leading article on this area of the law in Singapore.[39] The author argues, and it is submitted most convincingly, that both as a matter of principle and public policy as well as on the basis of pure interpretation of the section these decisions are wrong and that children of invalid Chinese secondary marriages (such as Pang Soo Ho's) should be held to be deemed legitimate. To those arguments may be added that Pang Soo Ho's marriages were invalid because he lacked the legal capacity to marry by virtue of section 42(1) of the Christian Marriage Ordinance of 1940 and this section refers to section 494 of the Penal Code which expressly renders "such [subsequent] marriage... void."[40]

The result that Justice Chua was obliged to arrive at once again brings home the unfairness of the decision in *Re Estate of Liu Sinn Min, Deceased.* The decision subverts the purpose behind the enactment of section 93(2) which, it is submitted, was that whatever may be the moral impropriety behind their parents' attempted marriages, the children who are clearly innocent of such impropriety should not have to bear the burden of their parents' wrongdoing. Further Pang Soo Ho may never have been aware that his marriages to the two women were invalid; he certainly acknowledged their children to be his own and, it may be thought, he expected them to benefit from his estate after his death. To the extent that the law of intestacy ought to approximate the deceased's expectations as to the distribution of his estate, the decision in *Re Estate of Liu Sinn Min, Deceased* is also undesirable as it subverts this purpose.

It may be noted here that the Legislature recently passed up an opportunity to correct this situation. Among the private representations submitted for the consideration of Parliament's Select Committee on the Women's Charter (Amendment) Bill, 1979 was one which suggested that the term "void marriage" ought to be defined in the statute and that, *inter alia,* marriages made invalid by reason of section 42 of the Christian Marriage Ordinance of 1940 should be specifically included within the definition.[41] If this suggestion had been accepted and acted upon, it would have overruled the decisions in *Re Estate of Liu Sinn Min, Deceased.* It is hoped that in the near future this undesirable situation with regard to such children as Pang Soo Ho's will be reviewed either by the Legislature or an appeal court and the decisions in *Re Estate of Liu Sinn Min, Deceased* be overruled.

In summary, the result that Justice Chua arrived at was the only one he could have reached according to the law as it has been interpreted by the courts. It was, nevertheless, an unsatisfactory result; one which, it is submitted, is not warranted by the statute concerned.

LEONG WAI KUM

[38] See Intestate Succession Act, Cap. 37, Singapore Statutes, 1970 Rev. Ed., Rule 3 of s. 7 and the definition of a "child" in s. 3.
[39] Wee, Kenneth K.S., "The Law of Legitimacy in Singapore" (1976) 18 Mal. L.R. 1.
[40] See *supra.*
[41] See *Report of the Select Committee on the Women's Charter (Amendment) Bill No. 23 of 1979* at p. A43.