

# Recent Developments in Malaysian Family Law

Sridevi Thambapillay\*

## I. Introduction

On the outset, it is to be noted that this paper deals solely with the developments in Malaysian family law concerning non-Muslims. In the past decade, there have been encouraging forward, as well as unfortunate retrogressive, movements in the sphere of family law in Malaysia. The aim of this paper is to examine some of the important changes and highlight some trends from the year 1997.

## II. Amendment to the Distribution Act 1958<sup>1</sup>

In a situation where a person dies without leaving a will (dying intestate), his or her estate will be distributed in accordance with the Distribution Act 1958. This Act was amended in 1997 *via* Act A1004/97. Amendments were made to ss 3 and 6.

The amendment to s 6 could be described as a significant one. This is because prior to the amendment, s 6 provided that when a woman died intestate leaving a husband and children, her husband took the whole of her estate. This was based on the presumption that the children's father was the best person to take care of their future and their interests. This resulted in a lot of problems when widowed husbands deserted children of the marriage, especially upon remarriage.

---

\* LLB (Hons), LLM (Mal), Advocate and Solicitor; Lecturer, Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia.

<sup>1</sup> Act 300.

On the other hand, according to the same section, if the husband died, the wife only took either  $\frac{1}{3}$  or  $\frac{1}{2}$  of his estate, depending on whether they had children. If the husband had more than one wife, all the wives would have to share equally.

As a result of the above inequality, Parliament finally amended s 6 in 1997. Under the new s 6(1), the property or the proceeds of an intestate deceased is distributed as follows:

- (i) if an intestate dies leaving a spouse and no issue and no parent or parents, the surviving spouse shall be entitled to the whole of the estate;
- (ii) if an intestate dies leaving no issue but a spouse and a parent or parents, the surviving spouse shall be entitled to one half of the estate and the parent or parents shall be entitled to the remaining one half;
- (iii) if an intestate dies leaving issue but no spouse and no parent or parents, the surviving issue shall be entitled to the whole of the estate;
- (iv) if an intestate dies leaving no spouse and no issue but a parent or parents, the surviving parent or parents shall be entitled to the whole of the estate;
- (v) if an intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds;
- (vi) if an intestate dies leaving no spouse but issue and a parent or parents, the surviving issue shall be entitled to two-thirds of the estate and the parent or parents the remaining one-third;
- (vii) if an intestate dies leaving a spouse, issue and parent or parents, the surviving spouse shall be entitled to one-quarter of the estate, the issue shall be entitled to one-half of the estate and the parent or parents the remaining one-quarter.

Therefore, the amendment to s 6 seems to be more equitable and less discriminatory. Subsequently, Article 8(2) of the Federal Constitution was amended to include "gender" as an additional ground of non-discrimination.<sup>2</sup> It is thus submitted that the amendment to s 6 of the Distribution Act is in line with the spirit and intendment of the constitutional guarantee of equality before the law as provided in Article 8.

However the Distribution Act does not mention about illegitimate children. Reference will have to be made to s 11(1) of the Legitimacy Act 1961,<sup>3</sup> which provides that where the mother of an illegitimate child dies intestate as respects to all or any of her property, and does not leave any legitimate issue surviving her, the illegitimate child, or if he is dead his issue, shall be entitled to take any interest therein to which he or his issue would have been entitled if he had been born legitimate. Hence an illegitimate child's right to his mother's property is limited as he would only be entitled to her property if she (the mother) does not have any legitimate issue surviving her. It would be advisable for the mother to provide for such illegitimate child in a valid will.

### **III. Equality of Parental Rights under the Guardianship of Infants (Amendment) Act 1999**

Since the 1960s, there has been a long struggle by many groups, especially the women's group, for the Guardianship of Infants Act 1961 (Revised 1988) (hereafter referred to as "GIA")<sup>4</sup> to be amended

---

<sup>2</sup> Article 8(2) provides as follows: "Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment".

<sup>3</sup> Act 60.

<sup>4</sup> Act 351.

in order to give women equal parental rights, making them legal guardians of their children. However, the GIA was only amended in 1999. The controversial provision in the GIA was s 5, which provided in no uncertain terms that:

The father of an infant shall be the guardian of an infant's person and property.

The above provision resulted in various problems, one of them being young girls and boys being deprived of the freedom of movement, *ie* traveling abroad, as their mothers, who are either divorced or deserted by their husbands, were unable to apply for passports for them. Although the GIA is just under 45 years old, it could be described as a "doddering dinosaur" in its ideas. This dinosaur has finally become extinct as of 1 October 1999, much to the relief of those who have over the years lobbied for such a change.

"Guardianship" should not be confused with "custody". A guardian is one who has powers over a child's upbringing, care, discipline and religion. "Custody" refers to the state of having certain rights over a child, which rights may include care and control of the child. A parent may be granted custody of a child whilst the other parent may be granted its care and control.<sup>5</sup>

In *Dipper v Dipper*,<sup>6</sup> Ormrod LJ remarked that it was a misunderstanding that a parent having custody has the right to control the children's education. Neither parent had any pre-emptive right over the other. If there was a disagreement as to the education of the children, or their religious upbringing, or any other major matter in their lives, that disagreement had to be decided by the court. His Lordship said:<sup>7</sup>

---

<sup>5</sup> Mimi Kamariah Majid, *Family Law in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1999) at p 252.

<sup>6</sup> [1980] 2 All ER 722.

<sup>7</sup> *Id* at p 731.

In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.

Thus, the decision in the above case denotes that custody need not include care and control. Section 4 of the GIA further explains the duties of a guardian of the property of the infant. He has the control and management of the infant's property and has to deal therewith as carefully as a man of ordinary prudence would deal with his own property. He may, subject to the GIA, do all acts which are reasonable and proper for the realization or protection of the infant's property.

The courts usually give the custody of the child to the mother. This is as a result of s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 (hereafter referred to as "LRA"),<sup>8</sup> which provides that there shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother, but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by the change of custody.<sup>9</sup>

However, while the mother generally has physical custody and care of the child, the rights and responsibility of guardianship are with the father.<sup>10</sup> This means that not only has the father to pay maintenance, but he also has the ultimate say in virtually every major decision pertaining to the child. The mother would have to carry out those

---

<sup>8</sup> Act 164

<sup>9</sup> Refer to *Manickam v Intheranee* [1985] 1 MLJ 56; *Re Thain* [1926] Ch 676; and *Goh Kim Hwa v Khor Swee Huah* [1986] 2 MLJ 156.

<sup>10</sup> The GIA however complicates matters by providing in s 3 that the guardian of an infant shall, *inter alia*, have the custody of the infant. Thus, it is suggested that s 3 of the GIA be amended to exclude the words "the custody of the infant", so that a guardian's duties are confined to the support, health and education of the infant. It would perhaps be better to confine custodial matters to the provisions in the LRA.

decisions. An inconvenience that can be mentioned as an example of this unfair position is the application for a passport for the child. The father must show up at the Immigration Department and in cases of acrimonious separations, it may not be easy to get the father to do this. He may have even disappeared altogether.

Thus, to overcome these problems, the amendments should be fundamental in nature, and should relook at provisions like the one which makes the mother guardian if the father is dead but at the same time allows the court to appoint another person as a joint guardian. Prior to the amendment, it was extremely difficult for the mother to apply for guardianship rights. The GIA required the existing guardian, *ie* the father, to be first removed. "To remove" implies that a strong case and exceptional circumstances must be made out. This is extremely difficult unless the father is not interested in guardianship at all.

As a result of the complaints received from women who were directly affected, as well as concerns voiced by non-governmental organisations, particularly women's organisations, the Guardianship of Infants (Amendment) Act 1999 was finally passed. This amendment came into force on 1 October 1999. The new s 5 reads as follows:

- (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of the mother and father shall be equal.
- (2) The mother of an infant shall have the like powers of applying to the court in respect of any matter affecting the infant as are possessed by the father.

The abovementioned amendments are timely in view of the high numbers of women who are joint breadwinners of the family and who play crucial roles in bringing up their children. The equality in

parental rights will be of particular use when the father is absent from the family. It is a great relief to single mothers, as it will enable them to apply for birth certificates and passports for their children.<sup>11</sup>

However, if the court allows the mother to be a joint guardian, initial complexities may arise. For instance, the issue of religion, which is a highly sensitive issue in a multi-religion state. A child follows the religion of his or her father. However, where the mother professes a different religion and is a joint guardian, she might want to teach the child her religion. This might end in an unhappy situation of the child observing one religion when with his mother and another when with his father. This problem could be solved by giving the court powers to decide whose religion the child should be brought up with if the situation warrants it. For instance, if the child is already a teenager and has always followed his father's religion, it might be better to allow him to continue so.

This above issue was raised in *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*.<sup>12</sup> The plaintiff wife and the defendant husband were both Hindus at the time of their marriage. There were two children of the marriage aged two years and four years respectively. The defendant husband converted to the Islamic faith in 2002 and the two children were converted by the defendant husband alone. The court took note of the equality of parental rights under s 5 of the GIA. Section 5 provides that the mother of an infant shall have the like powers of applying to the court in respect of any matter affecting the infant as are possessed by the father. Additionally, in relation to the custody and upbringing of an infant, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of the mother and father shall be equal. In this case, the children were still infants under the GIA.

---

<sup>11</sup> See Form IM 42-Pin 1/97 issued by the Immigration Department for passport applications. This form, in Part E (Declaration), clearly provides that a mother could be one of the parties allowed to apply for a passport for a child below the age of 18 years.

<sup>12</sup> [2004] 1 CLJ 505 (HC).

However, the High Court in the above case also referred to Article 12(4) of the Federal Constitution, which provides that the religion of a person below the age of 18 shall be decided by his parent or guardian, and to s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), whereby the phrase used is "his parent or guardian consents". Both the above provisions have used the singular word "parent". The consent of a single parent was enough to validate the conversion of a minor to Islam. Further, s 5 of the GIA did not apply to the defendant husband here as he was now a Muslim.<sup>13</sup> The court therefore dismissed the plaintiff's application and held that only the Syariah Court had the competency and the expertise to determine the issue of conversion here.

One issue that was not addressed by the amendment was whether the GIA applied to illegitimate children. This is because the definition of a "child" means a legitimate child in English law, unless specifically stated to include illegitimate children. This issue was addressed in *Sinnakaruppi a/p Periakaruppan v Bathumalai a/l Krishnan*.<sup>14</sup> The plaintiff, who was the natural mother of an illegitimate infant, applied to the court for a declaration that she was the lawful guardian and was therefore entitled to the custody and care of her child. A preliminary objection was raised as to the court's jurisdiction to entertain this application under the GIA. The defendant suggested that the plaintiff should have proceeded by wardship proceedings. The learned judge held that the courts were not unanimous in holding whether the GIA was applicable to illegitimate children and that the mother seeking custody should do so by way of wardship proceedings. The preponderant view, however, was that s 24 of the Courts of Judicature Act 1964<sup>15</sup> had conferred jurisdiction to the courts to grant custody and guardianship of both legitimate and illegitimate infants, regardless of the GIA. Jeffrey Tan J stated:<sup>16</sup>

---

<sup>13</sup> Section 1(3) of the GIA, *inter alia*, states: "Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State ..."

<sup>14</sup> [2001] 6 MLJ 29.

<sup>15</sup> Act 91.

<sup>16</sup> *Supra* n 14 at p 34.

Indeed in the light of the latest amendment to the Guardianship of Infants Act (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s 5 by an altogether new s 5 providing for equality of parental rights, there is less reason to doubt that the GIA in the present form does not apply to illegitimate children.

#### IV. Enactment of the Child Act 2001

The Child Act 2001<sup>17</sup> is a welcomed piece of legislation as it is an important step forward in creating a more humane, peaceful and progressive society. This Act repealed three other statutes<sup>18</sup> and consolidated the laws relating to the care, protection and rehabilitation of children.<sup>19</sup>

A comparison will now be made between relevant legislative provisions relating to family law and the relevant provisions in the Child Act to examine if the latter has strengthened the laws on the protection of children and in safeguarding their interests. The matters that would be examined are custody, adoption, maintenance and the establishment of a Court for Children.

##### A. *Custody of a child*

Although the Child Act does not expressly provide for guardianship or custodial rights or loss of such rights, this can be inferred from certain sections in Part V of the Act. Section 18 provides for the taking of a child in need of care and protection<sup>20</sup> into temporary custody by any Protector<sup>21</sup> or police officer.

---

<sup>17</sup> Act 611.

<sup>18</sup> The Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991.

<sup>19</sup> Section 130 and the Preamble of Act 611.

<sup>20</sup> See s 17 of the Child Act as to the meaning of a "child in need of care and protection".

<sup>21</sup> "Protector" is defined in section 2 of the Child Act as:

Section 19(1) provides that a child who is taken into temporary custody shall be produced before the Court For Children within 24 hours. Sub-section (2) provides that if it is not possible to produce the children before the Court for Children within the time specified, the child shall be brought before a Magistrate who may direct that the child be placed in a place of safety or in the care of a fit and proper person until such time as the child can be produced before the court. Once the child is placed in a place of safety or in the care of a fit and proper person, such person shall have control over the child as the parent of the child would have had, and be responsible for the maintenance of the child according to s 19(3)(a). Sub-section (3)(b) further states that notwithstanding that the child is claimed by his parent or guardian or any other person, the child shall continue in the care of the person referred to in sub-s (3)(a). Therefore, it can be assumed that s 19(3) (a) and (b) reflect a temporary loss of guardianship or custodial rights of a parent or guardian over a child who is in need of care and protection. The overriding principle of the best interest of the child is paramount, particularly so in situations where the child needs care and protection which are not forthcoming from the parent or guardian or any other person.

When the child is produced before the Court For Children under s 19 or s 25,<sup>22</sup> the court may make an appropriate order according to s 30(1). For the purposes of this paper, the writer intends to focus on s 30(1)(b),(d) and (e).

- 
- (a) the Director-General;
  - (b) the Deputy Director-General;
  - (c) a Divisional Director of Social Welfare, Department of Social Welfare;
  - (d) the State Director of Social Welfare of each of the states;
  - (e) any Social Welfare Officer appointed under s 8.

<sup>22</sup> Section 25(1) provides as follows:

A child who is taken into custody under s 18 and is medically examined or treated under s 21 shall be brought before a Court For Children within twenty-four hours -

- (a) of the completion of such examination or treatment; or
- (b) if the child is hospitalised, of his discharge from the hospital.

1. *Section 30(1)(b)*

Paragraph (b) empowers the court to make an order to place the child in the custody of a fit and proper person for a period specified by the court. Therefore, it is up to the court to decide on the period in which the child should be in the custody of the "fit and proper person". The question that arises is whether the parent or guardian of the child would lose his or her guardianship and custodial rights once such an order is made? It is submitted that the parent or guardian of the child does not lose the abovementioned rights as paragraph (b) of s 30(1) provides that the court would specify a period to place the child in the custody of a fit and proper person. Therefore it could be presumed that the placement of the child in the custody of a fit and proper person is merely for a certain period, and therefore suspending the guardianship or custodial rights of the parent or guardian is only for that period.

2. *Section 30(1)(d)*

Paragraph (d) empowers the court to make an order placing a child in a place of safety for three years from the date of the order or until he reaches 18 years, whichever is shorter. The issue that arises again is whether the parent or guardian of the child loses his or her guardianship or custodial rights during this three year period?

At this juncture, reference may be made to s 10 of the GIA,<sup>23</sup> which empowers the court or a judge to remove a guardian from his guardianship, whether a parent or otherwise, and may appoint from time to time another person to be the guardian in his place. This section clearly states that the court may remove the guardian and appoint someone else. However the GIA does not expressly provide the grounds for such a removal. If a comparison is made between s 10 of the GIA and s 30 (1)(b) and (d) of the Child Act, it is observed that the latter merely gives the court the power to place the child in

---

<sup>23</sup> *Supra* n 4.

the custody of someone else without stating whether the parent or guardian would lose their guardianship or custodial rights. It would be interesting to see how the courts would interpret s 30(1) in respect of guardianship and custodial rights.<sup>24</sup> It is once again submitted that it is a mere suspension of those rights in the circumstances.

### 3. *Section 30(1)(e)*

Section 30(1)(e) provides for placing a child, who has been abandoned by his parent or guardian, in the care, custody and control of a foster parent for two years or until he reaches 18 years, whichever is shorter. In such a case, the Act clearly indicates in s 30(4) that the parent or guardian of the child may still claim the child, thereby suggesting that they have not lost their guardianship or custodial rights. In the event that no such claim is made, the court may make an order placing the child for adoption by the foster parent or any person who wishes to adopt the child<sup>25</sup> and dispense with the consent of the parent or guardian for the adoption.

A provision in the GIA which is similar to s 30(1)(e) of the Child Act is s 8A. Section 8A stipulates that:

- (1) If an infant –
  - (a) has been abandoned by his parent or guardian; or
  - (b) has no parent or guardian,  
and no other suitable person is willing and able to care for him, the Court –
    - (aa) shall appoint a Protector to be a temporary guardian of the infant's person and property or either of them until such time as a guardian of the infant's person and property can be appointed;
    - (bb) shall determine the extent of the powers and duties of the Protector as a temporary guardian in relation to the infant's person and property; and

<sup>24</sup> Refer also to s 30(8) where the parent or guardian is still allowed to visit the child.

<sup>25</sup> Having satisfied the conditions in s 30(4)(a) and (b).

(cc) may impose such other terms and conditions as having regard to the welfare of the infant, the Court thinks fit.

(2) Subsection (1) shall apply whether or not an infant is placed –

- (a) in a place of safety; or
- (b) in the care, custody and control of a foster parent, pursuant to any law relating to the care and protection of an infant.

As “pursuant to any law relating to the care and protection of an infant” in sub-s (2) above would now include the Child Act, s 8A of the GIA would apply in addition to s 30(1)(e) of the Child Act.

Section 30(5) of the Child Act states that in deciding a case, the court shall take into account the best interests of the child as the paramount consideration. As such, what is the criterion that decides the “best interests of the child”? The answer to this perhaps could be seen in s 30(6)(a) which lists the matters the court would look into in deciding what the best interest of the child would be, *ie* family background, general conduct, home surrounding, school record and medical history of a child. The GIA too has a similar provision. Section 11 of the GIA states that the court or judge in exercising the powers conferred by the Act shall have regard primarily to the welfare of the infant. This section was discussed in the case of *Re Satpal Singh, An Infant*<sup>26</sup> where the child’s father applied for custody. Buttrose J stated that the court must consider the welfare of the child as a whole. It is more than merely the question of whether the child would be happier in one place compared to another place. It is the child’s general well being which should be the main criterion. “Welfare” means physical as well as moral welfare.

---

<sup>26</sup> [1958] MLJ 283.

Section 30(5) and (6) of the Child Act may also be compared to s 88(2) of the LRA<sup>27</sup> which provides that when deciding in whose custody the child should be placed, the court shall consider the welfare of the child as the paramount consideration.

### B. *Adoption*

The provisions on the adoption of a child in the Child Act could be compared with the Adoption Act 1952<sup>28</sup> in the following respects.

#### 1. Parents' consent to adoption

The Child Act allows the Court For Children to make an order placing the child for adoption by the foster parent or any person who wishes to adopt the child if the parent or guardian has not claimed the child. Section 30(1)(e) and (4) state that in making such an order, if the court is satisfied that the Protector has taken reasonable steps to trace the parent or guardian of the child, it shall dispense with the parent's or guardian's consent for the adoption (which is generally required). This is similar to the consent to adoptions provision in s 5(1)(a) and (c) of the Adoption Act. A case that may be referred to in this connection is *TPC v ABU* where the court stated:

The burden will be on the proposed adopters to show that consent ought to be dispensed with. Where ... it is alleged that the natural mother is untraceable, the court must insist that all reasonable steps to trace her have been taken.<sup>29</sup>

---

<sup>27</sup> *Supra* n 8.

<sup>28</sup> Act 257.

<sup>29</sup> [1983] 2 MLJ 79 at p 84.

## 2. Role of a Protector

Section 30(6) of the Child Act provides that the Protector is responsible to investigate the details of the child's background, prepare a report and submit it to the court before the court makes an order placing the child for adoption. The Protector's duty here is similar to the duty of a guardian *ad litem*<sup>30</sup> under s 13(1) of the Adoption Act. The guardian *ad litem* is responsible to investigate as fully as possible all the circumstances of the child and the applicant, and all other matters relevant to the proposed adoption, in order to safeguard the interests of the child before the court.

## 3. Valuable consideration for adoption of child

Section 48(1) of the Child Act provides that anyone who takes part in any transaction, the object of which is to transfer or confer, wholly or partly, temporarily or permanently the possession, custody or control of a child for any valuable consideration, commits an offence. It is however, a defence under sub-s (4) if the transfer took place in contemplation of or pursuant to a *bona fide* adoption and at least one of the natural parents or the guardian of the child was a consenting party to the adoption and had expressly consented. The issue that arises here is, if the transfer of the child is in contemplation of or pursuant to a *bona fide* adoption, is the giving of a valuable consideration for the adoption permitted?

Section 48(4) is silent on the issue of "valuable consideration" in the case of a *bona fide* adoption. It is submitted that if the transfer is for a *bona fide* adoption, the party who transfers the child should not be permitted to receive any valuable

---

<sup>30</sup> A "guardian *ad litem*" is appointed by a Court under s 12 (1) of the Adoptions Act once an application for an adoption order is made to the Court.

consideration. Reference is made to s 6 of the Adoption Act in support of this submission. This section provides that before the court grants an adoption order, one of the factors that it has to be satisfied is that no payment was made in consideration of the adoption except such as the court may sanction.

The above issue was raised in *Re Sim Thong Lai*.<sup>31</sup> The issue here was whether a red packet containing \$200 given by the petitioners to the natural parents constituted unlawful consideration. Taylor J stated that the true nature of the payment must be ascertained because:

The gifts in kind, and even money if it were a merely nominal sum, may fairly be regarded as tokens or customary or courtesy gifts but in relation to the means of these parties, \$200 is a substantial amount and if it were given in consideration of the adoption without sanction it is unlawful.<sup>32</sup>

### C. Maintenance

The Child Act provides strict penalties for parents or guardians or any person who has the care of a child for failing to maintain the child properly. Thus, this emphasizes the importance of the duty to maintain a child.

Chapter 3 of Part V of the Child Act contains the relevant provisions on maintenance. Section 31(1)(a) provides that a person having the care of a child would be committing an offence if he, *inter alia*, neglects the child in a manner likely to cause him physical or emotional injury or causes or permits him to be so neglected. Upon conviction, the person is liable to a fine not exceeding RM20,000 or to imprisonment for a term not exceeding 10 years or both.

---

<sup>31</sup> [1955] MLJ 25.

<sup>32</sup> *Id* at p 27.

Section 31(4) explains the phrase "neglect a child". A parent or guardian or other person who is legally liable to maintain a child who fails to provide adequate food, clothing, medical or dental treatment, lodging or care for the child, is said to have neglected a child. This clearly explains the situations where the parent or guardian or any person having the care of the child has neglected to maintain him.

The above provision may be compared to other legislation on maintenance. For example, reference could be made to s 3(1) and (2) of the Married Women and Children (Maintenance) Act 1950 (hereafter referred to as "the 1950 Act").<sup>33</sup> Section 3(1) of the 1950 Act provides that the court may order any person who neglects or refuses to maintain his legitimate child to make a monthly allowance for the maintenance of such a child. One difference that may be noted between these two provisions is that s 31 of the Child Act clearly explains the meaning of "neglect a child" whereas s 3(1) of the 1950 Act does not do so. Apart from s 3(1) of the 1950 Act, s 3(2) clearly states that the parent has a duty to maintain an illegitimate child of his which is unable to maintain itself. As to whether the Child Act applies to illegitimate children as well, reference could be made to the definition of a "child" in s 2. This section merely defines a "child" as a person below the age of 18 and in relation to criminal proceedings, a person who has attained the age of criminal responsibility as prescribed in s 82 of the Penal Code. It is thus not clear as to whether illegitimate children fall under the Child Act. It is submitted that since the Child Act was passed to strengthen the laws pertaining to the care, protection and rehabilitation of children, it should include illegitimate children too.

A comparison may also be made between s 31 of the Child Act and s 92 of the LRA. Section 92 of the LRA provides that it is the duty of a parent to maintain or contribute to the maintenance of his or her children either by providing them with such accommodation,

---

<sup>33</sup> Act 263.

food, clothing and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof. This provision could be said to be similar to s 31(4) of the Child Act as it states similar situations in which the duty arises.

Apart from the above duty to maintain his child, the Child Act also imposes penalties on the failure to comply with that duty. Section 31(1) provides that the court may impose a fine not exceeding RM20,000 or imprisonment not exceeding 10 years or both. In addition to this, sub-s (2) states that the court may order the person convicted to execute a bond with sureties to be of good behaviour for such period as the court thinks fit and may include in the bond such conditions as the court thinks fit. If any of the conditions are not complied with, the court may impose a further fine not exceeding RM10,000 or to a further imprisonment not exceeding 5 years. Section 31(5) further provides that a person may be convicted of an offence under this section notwithstanding that suffering or injury to the health of the child in question or the likelihood of such suffering and injury was avoided by the action of another person, or the child in question had died. This shows the seriousness of the offence because although the suffering or injury was indeed avoided by some other person, the court can still convict the person having the care of the child of an offence. According to the 1950 Act, when any person wilfully neglects to comply with an order made under the Act, the court may either impose a fine or sentence the person to imprisonment under the Act.<sup>34</sup> However, the LRA does not contain a similar penalty provision. It is submitted that although the LRA is silent on this matter, it would amount to a contempt of court if a maintenance order issued by the court was not complied with.

#### D. *Court For Children*

The Child Act has constituted a Court For Children to hear matters that arise from the provisions of the Act. Section 11 of the Child Act

---

<sup>34</sup> Section 4 of the 1950 Act.

provides for the jurisdiction of the Court For Children. The question that arises is in regard to paragraph (b) which states, *inter alia*, that this Court may exercise any other jurisdiction conferred on it by any other written law. As such, the question is whether Parliament would amend other written laws pertaining to children, in order to confer jurisdiction on this Court to hear matters which arise from those legislation as well. It is submitted that this Court should be conferred jurisdiction to hear all family law matters concerning children, whether it falls under this Act or any other written law, the reason being that the environment in this court would be more conducive for a child. This can be seen in s 12 of the Child Act.

In reading s 12, it is obvious that the drafters have taken extra care in drafting it. They have taken into account the fact that if matters concerning children are heard in the same courtroom as adults, this will have an adverse impact on the child's emotions and psychology. It is also stipulated that if the Court For Children sits in the same building as other courts, the entrance and exit to this Court should be different to enable the children to be brought to and from the Court separately. As such, a child's privacy is protected through this section.

Further, s 11(2) of the Child Act states that the Court For Children shall consist of a Magistrate who shall be assisted by two advisers to be appointed by the Minister from a panel of persons resident in the State. Sub-section (3) provides that one of the two advisers shall be a woman. This is perhaps due to the fact that a female would be in a better position to understand a child's emotions and feelings. Taking note of these facts, it is reiterated that the Court For Children should indeed be conferred jurisdiction to hear all family law cases concerning children. Judges sitting in the Court For Children could be specialised or more exposed to family matters, especially concerning child law.

The provisions of the Child Act have in principle strengthened the laws on the protection of children and in safeguarding their interests. The Act may also be viewed as supplementing the gaps existing in other legislation on family law, particularly those which fail to provide penal provisions whenever there is a default.

## V. Registration of Customary Marriages under the LRA

The preamble to the LRA provides for, *inter alia*, monogamous marriages and solemnisation and registration of such marriages and matters incidental thereto. From the preamble, it could be noted that registration of marriages is one of the reasons for the enactment of the LRA. Prior to 1 March 1982 (the date of coming into force of the LRA), not all marriages had to be registered. This in turn caused hardship to parties to a marriage, especially a customary marriage, when it came to the issue of proving that their marriage had taken place. They had to produce expert evidence, wedding invitations and photographs to prove that their marriage had taken place.

In the past decade, a particular provision in the LRA, *ie* s 34, had caused mischief as it was applied by the courts to validate a marriage which was not registered. Section 34 reads as follows:

Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

There have been a few cases which discussed this issue. In 1993, the High Court in *Tam Ley Chian v Seah Heng Lye*<sup>35</sup> held that the marriage solemnised under the Chinese custom in 1986 but not registered was void. It must, however, be noted that both parties conceded this point.

Four years later, in *Chong Sin Sen v Janaki Chellamuthu*<sup>36</sup> the respondent sued the appellant on behalf of her husband who died in a road crash. Her marriage was not registered but there was a customary marriage in 1991. The judge ruled that the word "wife" in

---

<sup>35</sup> [1993] 3 MLJ 696.

<sup>36</sup> [1997] 5 MLJ 411.

the Civil Law Act 1956<sup>37</sup> was not restricted to women whose marriages were registered.

In 1999, this issue once again arose before the High Court in *Leong Wee Shing v Chai Siew Yin*.<sup>38</sup> The plaintiff contended that she married the deceased according to Chinese customary rites. She tendered as exhibits her wedding invitation card, wedding photographs of herself and the deceased and photographs taken at the wedding dinner as proof of her marriage to the deceased. The defendant (the plaintiff's mother-in-law) contended that the wedding dinner referred to by the plaintiff would not validate the marriage. The fact that the marriage was not registered at the registry of marriage proved that there was no valid marriage between the plaintiff and the deceased. The defendant relied on s 27 of the LRA which provides as follows:

The marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date shall be registered pursuant to this Act.

The High Court held that in enacting the LRA, Parliament would not have intended to nullify all marriages that had occurred before 1 March 1982 for want of registration as the consequences would be disastrous. Hence s 34 was introduced to validate such marriages that were not registered before 1 March 1982. It is submitted that the learned judge need not have applied s 34 to validate marriages prior to 1 March 1982 as s 4(2) of the LRA clearly states that such marriages, if they were valid under the law, religion, custom or usage under which they were solemnised, shall be deemed to be registered under the LRA.

The High Court referred to s 5(4) of the LRA which makes it mandatory for marriages after 1 March 1982 be solemnised as

---

<sup>37</sup> Act 67.

<sup>38</sup> [2000] 5 MLJ 162.

provided in Part III of the LRA. The learned judge then looked at the relevant provisions in Part III that applied to the present case, *ie* ss 22(1)(c) and 24(1) concerning solemnisation and s 25 concerning registration of marriages. However, the learned judge merely looked at whether the marriage in the present case was properly solemnised according to s 22(1)(c) and did not examine whether the requirement in s 25 concerning registration was complied with.

It is respectfully submitted that the learned judge ought to have examined the wordings in s 25 of the LRA, *ie* “... the Registrar shall enter the prescribed particulars in the marriage register”, thereby making it mandatory on the part of the Registrar to register the marriage immediately after the solemnisation. On the other hand, his Lordship merely stated that non-registration in the present case is of no consequence as s 34 takes care of that and validates the marriage. It is further submitted that the court ought to have also looked at s 27 of the LRA which makes it mandatory for every citizen, resident or domiciliary of Malaysia to register their marriage, which takes place after 1 March 1982, pursuant to the LRA.

Thus, if the High Court’s approach is to be accepted and followed, it would render ss 25 and 27 otiose. If registration is not considered important in a marriage which takes place after 1 March 1982, it would defeat one of Parliament’s main reasons in enacting the LRA, *ie* to register non-Muslim marriages.

The defendant appealed to the Court of Appeal<sup>39</sup> which agreed and upheld the High Court’s decision. The learned judge in the Court of Appeal stated that if Parliament had intended registration to have an effect on the validity of a marriage, it should have clearly stated so in the LRA. To the contrary, Parliament has expressly stated that non-registration would not affect the validity of a marriage. The appeal was therefore dismissed.

---

<sup>39</sup> *Chai Siew Yin v Leong Wee Shing* [2004] 1 CLJ 752.

Both the High Court and the Court of Appeal in this case seem to indicate that s 34 does not make registration of customary marriages compulsory, so long as the marriages are solemnised in accordance with the requirements in Part III of the LRA. It is respectfully submitted that both the courts in the present case have failed to take into consideration that s 25<sup>40</sup> is also part of the solemnisation procedure in Part III. Both courts referred to s 5(4) which states that all non-Muslim marriages must be solemnised according to Part III of the LRA. Thus, if the marriage was not registered pursuant to s 25, the parties could not be said to have complied with Part III.

By holding that s 34 validates unregistered customary marriages, the courts are taking the law back to the pre-1 March 1982 era. As mentioned earlier, the Court of Appeal held that if Parliament had intended to nullify a marriage for want of registration, it should have stated it in very clear language in the LRA. It is respectfully submitted that the absence of such express terms in the LRA does not mean that Parliament had no intention of making registration compulsory.

Reference can indeed be made to s 33 of the LRA which provides for optional registration of marriages solemnised under any religion or custom before 1 March 1982. In the same way, if Parliament had intended to make registration optional for marriages solemnised under any religion or custom after 1 March 1982, it would also have stated as above. The fact that this was not done so results in the presumption that Parliament did not intend registration to be optional for post 1 March 1982 marriages.

---

<sup>40</sup> Section 25 of the LRA provides as follows:

- (1) Immediately after the solemnisation under section 23 or 24 is performed, the Registrar shall enter the prescribed particulars in the marriage register.
- (2) Such entry shall be attested by the parties to the marriage and by two witnesses other than the Registrar present at the solemnisation of the marriage.
- (3) Such entry shall then be signed by the Registrar solemnising the marriage.

Section 31 of the LRA provides that a citizen or domiciliary of Malaysia who marries abroad, not in the Malaysian Embassy, High Commission or Consulate, has to register this marriage within six months after the date of such marriage or if either or both parties return to Malaysia before the expiry of the six months, register the marriage within six months of arrival in Malaysia. Section 31(4) provides that if the parties fail to register, they would have to pay a penalty. Further thereto, s 35 provides that omission to appear before the Registrar within the prescribed time required by s 31 would attract imprisonment for a term not exceeding one year or to a fine not exceeding RM100 or to both. Hence, the issue that arises is that if parties who marry overseas according to custom or religion have to register their marriages, failing which they will be penalised, why should parties who also marry according to custom or religion not be imposed a similar penalty if they fail to register their marriages?

Non-registration of marriages would also cause hardship when it comes to ancillary matters like maintenance, legitimacy, division of matrimonial assets, guardianship and custody. Parties intending to claim any of the above would first have to prove that there was a valid marriage. If they have not registered their marriage and intend to cite the ruling in *Leong Wee Shing v Chai Siew Yin* as an authority to prove that their marriage was validated by s 34, it would cause hardship as they would have to produce their wedding invitations, wedding photographs and may even have to call expert witnesses to prove that their marriage was solemnised according to custom. This would be similar to the position prior to the enforcement of the LRA.<sup>41</sup>

The question that arises next is how s 34 should be interpreted? The writer agrees with the interpretation given by Mr Balwant Singh Sidhu in his article *Married or Not Married? – That is the Question*.<sup>42</sup> He states that s 34 has two possible implications:<sup>43</sup>

---

<sup>41</sup> See the cases of *Re Lee Siew Kow* [1952] MLJ 184, and *Yeap Leong Huat v Yeap Leong Soon & Anor* [1989] 3 MLJ 157.

<sup>42</sup> [2002] 3 MLJ cxxix.

<sup>43</sup> *Id* at p cxxxvii.

- (i) the Act does not render valid any marriage which is otherwise invalid, merely by reason of its having been registered;
- (ii) the Act does not render invalid any marriage which is otherwise valid, merely by reason of its not having been registered.

He further states that the second implication is the cause of the mischief, when compared to the first:

It is perfectly correct to say that a marriage may be valid even if it was not registered under the Act, in certain situations. For example, if the marriage was solemnised in a foreign jurisdiction in accordance with the laws of that country (but not solemnised in our embassy in that country in accordance with s 26 of the Act), and if the parties fail to register that foreign marriage within 6 months before the nearest available Registrar overseas under s 31(1) of the Act; or where either or both parties return to Malaysia within 6 months and fail to register the marriage here. Such marriages would be recognised as valid, if valid according to the *lex loci celebrationis* (the law of the place of celebration). Their non-registration under the Act would not render them invalid. Section 34 would come to aid, in the interest of the comity of nations.

Therefore it is submitted that s 34 should be interpreted to validate marriages which have been solemnised as mentioned above, and not be used to approve marriages which are solemnised, but not registered in Malaysia.

However, when the appellant appealed to the Federal Court against the Court of Appeal's decision, the Federal Court, consisting of Federal Court Justices, Pajan Singh Gill and Rahmat Hussain, and Court of Appeal Justice, Richard Malanjum, unanimously overturned the decisions of the Court of Appeal and the High Court, ruling that customary marriages after 1 March 1982, which were not registered, were not recognised under the law.

Pajan Singh Gill FCJ said that s 34 of the LRA should be read in harmony with the other provisions of the LRA, which encapsulates the overall intention to "provide for monogamous marriages and the

solemnisation and registration of such marriages". "We are not in agreement with the reasoning of the judgments both in the High Court and the Court of Appeal", said Pajan Singh Gill FCJ in his oral decision.<sup>44</sup>

Thus, it is submitted that the above Federal Court decision conforms with the intention of the drafters of the LRA, in that it recognises that registration of marriages was one of the reasons for the enactment of the LRA, apart from providing for monogamous marriages and the solemnisation of such marriages. It is hoped that the dilemma as to the registration of customary marriages after 1 March 1982 is put to rest by the decision of the apex court as above.

## VI. Maintenance of Children above the Age of 18 Years

It is the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, by providing them with such accommodation, clothing, food and education as may be reasonable. This is provided for under s 92 of the LRA. However, this duty generally ceases when the child reaches the age of 18 years, unless the child is under physical or mental disability. If the child is physically or mentally disabled, the duty to maintain continues until the disability ceases. This is the situation under s 95 of the LRA. "Child" is defined in s 87 of the LRA as meaning a child below the age of 18 years.

Pursuant to the above provisions, it seems that a child who reaches the age of 18 years without any disability cannot look to his parents for maintenance thereafter. The law expects him to be able to fend for himself. The question that arises in this situation is what about the children above the age of 18 years of age who intend to pursue their tertiary education, bearing in mind that the cost of tertiary education is not cheap. The situation is worse for a child from a broken home. The answer to the above question was given in a positive manner in the Court of Appeal's decision in *Ching Seng*

---

<sup>44</sup> Federal Court Civil Appeal No 02-10 of 2003 (W).

*Woah v Lim Shook Lin*.<sup>45</sup> The court here held that maintenance should extend to a child's tertiary degree, beyond the age of 18 years.

Mahadev Shankar JCA, in considering the effect of no maintenance beyond the age of 18 years, stated as follows:<sup>46</sup>

When parents divorce, the children suffer the most ... Not only can they not look to their parents thereafter for money but also by inference for shelter in the matrimonial home! Section 95 could thus become the *bohsia's* charter.

His Lordship further stated:<sup>47</sup>

[S]ection 95 ... has to be viewed in the context of a child who is not simultaneously faced with the break-up of the family homestead. The parental duties in this context are spelt out by s 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

[T]he Court's powers under s 52<sup>48</sup> are very wide and transcend the limitations contained in s 95, because s 52 operates in a situation where the family is being legally disintegrated.

---

<sup>45</sup> [1997] 1 MLJ 109.

<sup>46</sup> *Id* at p 120.

<sup>47</sup> *Ibid*.

<sup>48</sup> Section 52 of the LRA provides that if the husband and the wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.

The learned judge then went on to compare an 18 year-old in a Western country and Malaysia. He stated that unlike the United Kingdom and many other European countries, Malaysia is not a welfare state. Whilst married women's claim to a share of the matrimonial assets is entrenched in our laws,<sup>49</sup> the rights of dependent young persons in those assets (the assets of his or her parents) are yet to receive proper articulation. There is no specific statute providing that a dependent young person, above the age of 18 years, could claim financial aid from his or her parents. Therefore his Lordship held that in appropriate cases, for example where the young person is pursuing his or her tertiary education, involuntary financial dependence is a physical disability under s 95 of the LRA.

The above decision was followed by the High Court and the Court of Appeal in *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*.<sup>50</sup> Pursuant to the dissolution of the petitioner's and respondent's marriage and a consent order, the respondent made maintenance payments monthly for all their three children. When their eldest child reached the age of 18 years, the respondent indicated that he would cease payment. The consent order however did not stipulate that the maintenance payments should cease upon the child attaining the age of 18 years. The petitioner referred to *Ching Seng Woah*<sup>51</sup> and cited s 95 in support of the argument that maintenance of a child of the marriage would not stop at the age of 18 years but would continue until the child has obtained a first degree through tertiary education. This was because involuntary financial dependence was a physical disability within one of the exceptions to s 95.

---

<sup>49</sup> For example, the Married Women Act 1957 (s 11) and the LRA (s 76) provide that a married woman has a right to claim her share in the matrimonial property and she could do so by making an application to the court either during the continuance of her marriage or during a matrimonial proceeding.

<sup>50</sup> [2000] 5 CLJ 121 (HC); [2003] 2 MLJ 529 (CA).

<sup>51</sup> *Supra* n 45.

In response to the petitioner's argument, the respondent argued that under s 95 of the LRA, the duty to maintain a child would cease upon the child attaining the age of 18 years or if the child was under a physical or mental disability, on the ceasing of such disability, whichever was later. The respondent referred to the decisions in *Kulasingam v Rasammah*<sup>52</sup> and *Gisela Gertrud Abe v Tan Wee Kiat*<sup>53</sup> to support the contention that a maintenance order for a child cannot be extended beyond the age of 18 years. The respondent further stated that the decision of the Court of Appeal in *Ching Seng Woah* pertaining to involuntary financial dependence was merely *obiter* and thus did not bind the High Court.

The High Court<sup>54</sup> held that the two cases above did not decide on the issue as to what amounted to physical disability under s 95, which was the issue for determination by the court in the present case. The learned judge, Low Hop Bing J then referred to *Ching Seng Woah* which was cited by the petitioner and stated that the combined effect of ss 95, 52 and 92 of the LRA would be that a child of the marriage should be provided with maintenance for the purpose of realising the opportunity, right or access to education including tertiary education even though such education, at least towards obtaining a first degree, extends beyond the age of 18 years.

Therefore the High Court eventually held that it was fair and reasonable for the respondent to maintain his children until they obtained their first degree due to their involuntary financial dependence for purposes of pursuing and/or completing their tertiary education which constituted a physical disability under s 95.

The husband appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal and upheld the High Court's decision. His Lordship, Abdul Kadir JCA, went one step further and said that in addition to falling within the meaning of physical disability,

---

<sup>52</sup> [1981] 2 MLJ 36.

<sup>53</sup> [1986] 2 MLJ 58 (HC); [1986] 2 MLJ 297 (FC).

<sup>54</sup> *Supra* n 50.

“involuntary financial dependence” could also be taken to come within the meaning of mental disability in s 95 of the LRA. This is because the child of a marriage, pursuing his or her tertiary education, required both an able body and mind to undergo a tertiary education. Parents would not want their children to miss this golden opportunity of a tertiary education to be given to them and indeed would be aspiring for it.

The learned judge then went on to construe the intention of the Parliament in incorporating s 95 into the LRA. He stated that children living together with their parents would definitely not be left to wander in the street to fend for themselves upon attaining the age of 18 years. Therefore it could not have been the intention of the legislator in incorporating the provisions of s 95 into the LRA to make the children worst off in the event of the break-up of the marriage of their parents compared to children living together with their parents under the same roof.

Finally, the Court of Appeal stated that s 95, in a given situation such as the present case, should be construed in a more liberal fashion in the light of the duty imposed upon the parent to maintain their child as embodied in s 92 of the LRA. It is indeed heartening to note that the above decisions have infused new life into the exception in s 95 in order to safeguard the educational needs of children above the age of 18 years, especially those from broken homes, who are keen in pursuing their education.

However, the hopes of the children above the age of 18 years which were raised by the High Court and the Court of Appeal in *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah* were shattered by the decision of the Federal Court in the same case. The Federal Court overruled the High Court and the Court of Appeal's decision. The Federal Court, *inter alia*, disagreed that the exception in s 95, *ie* “physical or mental disability” should be extended to include involuntary financial dependence. The court merely gave a literal interpretation to this phrase.

It is respectfully submitted that if the phrase "physically or mentally disabled" in s 95 is given a literal interpretation, the effect on the children above the age of 18 years would be disastrous. This is because when the court examines s 95, it should bear in mind that it may be dealing with children from broken homes where the parents may be divorced or separated. When the parents are divorced, the children suffer the most. The courts have held that they should always consider the welfare of the children as the paramount consideration in deciding family issues.<sup>55</sup> Although statutes such as the LRA and the Age of Majority Act 1971<sup>56</sup> provide that children are those below the age of 18 years, it is submitted that it cannot be taken for granted that all children, upon reaching the age of 18 years would be able to fend for themselves. This is a very critical stage as it is at this stage when a child, who intends to pursue his or her tertiary education, needs financial support from his or her parents. The cost of tertiary education too is not within the means of an 18 year old child.

The Federal Court further stated that it was not the function of the courts to "legislate as an amendment" to the existing provisions of s 95 and if the court does so, it would amount to usurping the function of the Parliament. It is submitted that the decision of the Court of Appeal in the present case is preferred to that of the Federal Court on the intention of the legislature. The Court of Appeal held that the children, whose parents were divorced, should not be penalised for the break-up of the marriage. They should not be made to sacrifice their educational talent to pursue their studies at a tertiary level because the father had refused to make provisions for them to do so, hiding behind the strict interpretation of s 95. At the same time, the Court of Appeal qualified its statement that maintenance payments would cease once the children were able to fend for themselves.

---

<sup>55</sup> See cases including *Re Satpal Singh, An Infant* [1958] MLJ 283; *In re Thain* [1926] Ch 676; *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59; *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234.

<sup>56</sup> Act 21.

The Federal Court, in conclusion, stated that it was now up to the Parliament to address this problem and not leave it to the courts. In other words, the Federal Court was of the view that until Parliament amends s 95 of the LRA to include provision of maintenance to children who have reached the age of 18 years to enable them to complete their degree education, the court would not interfere.

It is submitted that the Federal Court has failed to note the fact that the LRA was enacted way back in 1976, *ie* about 30 years ago, when tertiary education was not as expensive as it is now. As such, by giving a literal interpretation to the exception in s 95, the court was applying the cost of living and education in the 1970s to the present time.

At this juncture it is pertinent to note that even the Government has policy to encourage parents to support their children's tertiary education at higher institutions of learning by giving tax deductions. This is seen in s 48 of the Income Tax Act 1967.<sup>57</sup> In the 2006 Budget, s 48 of the Income Tax Act was amended to enable parents to claim a tax deduction for their children's tertiary education. Considering that the expenses incurred for a child's tertiary education are normally more than RM4,000 per year and to simplify tax-filing procedures, the Government proposed that an automatic child relief of RM4,000 be granted for each unmarried child over the age of 18 receiving full time tertiary education at a recognised local institution of higher learning at diploma level and above. It was also proposed that the automatic child relief for tertiary education of RM4,000 be extended to each unmarried child receiving full-time instruction at a recognised institution of higher learning outside Malaysia at degree level and above.

In order to resolve the above problem, it is hoped that one of the following would take place:

---

<sup>57</sup> Act 53.

(i) Parliament should take a positive step to amend s 95 of the LRA as was done in Singapore following the case of *PQR (mw) v STR*.<sup>58</sup> Section 95 could perhaps be amended to read as follows:

Except –

- (a) where an order for custody or maintenance of a child is expressed to be for any shorter period; or
  - (b) where any such order has been rescinded; or
  - (c) where any order is made in favour of a child who is under physical or mental disability,
- the order for custody or maintenance shall expire on the attainment by the child of the age of 18 years, but the Court may, on the application by the child or any other person extend the order for maintenance to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training.

The suggestion made above is similar to s 79 of the Islamic Family Law Act 1984.<sup>59</sup> The above amendment would be a great relief to those non-Muslim children who not only have to bear the consequences of their parents' divorce but also fend for themselves once they reach the age of 18 years. Furthermore, it would also be in accordance with the spirit and intentment of Article 8(1) of the Federal Constitution, which guarantees that all persons are equal before the law.

(ii) Alternatively, we would have to wait for another Federal Court decision in the near future to overrule the Federal Court's decision and to uphold the High Court and Court of Appeal's decisions in *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*.

It is hoped that one of the above two matters would take place as soon as possible in the interest of youths of today who are the leaders of tomorrow.

---

<sup>58</sup> [1993] 1 SLR 574.

<sup>59</sup> Act 303.

### VII. Conclusion

As has been discussed above, the past decade has seen many developments in Malaysian family law. While a certain extent of such developments may be regarded as a step forward, there have also been some steps backward. It is hoped that such retrogressive movements will be addressed by the courts or perhaps by legislation in the near future, so as to enable Malaysian family law to advance and develop further in providing more protection and benefits for those who fall within the sphere of family law.

