Karunairajah a/l Rasiah v Punithambigai a/p Ponniah: The Need to Amend Section 95 of the Law Reform (Marriage and Divorce) Act 1976?

Sridevi Thambapillay[*]

Introduction

The recent Federal Court decision in *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*[1] (hereafter referred to as "the present case") could be described as one that has shattered the hopes of children above the age of 18 years who are financially dependent on their divorced parents for the purpose of completing their tertiary education. Their hopes were raised by the Court of Appeal's decision in the case of *Ching Seng Woah v Lim Shook Lin*,[2] which was followed by the High Court and the Court of Appeal in the present case. In *Ching Seng Woah v Lim Shook Lin*, the Court held that the involuntary financial dependence of a child of the marriage for the purpose of pursuing and/or completing tertiary and/or vocational education came within the exception of physical or mental disability under section 95 of the Law Reform (Marriage and Divorce) Act 1976[3] (hereinafter referred to as "the LRA") so as to entitle the child to maintenance beyond the age of 18 years.

Section 95 of the LRA stipulates as follows:

> Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the

[*] LLB (Hons) (Malaya), LLM (Malaya), Advocate & Solicitor (Non-Practising); Lecturer, Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia.

[1] [2004] 2 MLJ 401.

[2] [1997] 1 MLJ 109.

[3] Act 164.

age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later.

The objective of this article is to examine whether there is a need to amend section 95 of the LRA in light of the Federal Court decision in *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*. The writer intends to achieve this objective by reviewing the decisions of the High Court, Court of Appeal and the Federal Court in the present case.

The facts of the present case

The petitioner and the respondent's marriage was dissolved in 1997. They had three children from the marriage. Pursuant to a consent order dated 30 January 1997, the respondent made monthly maintenance payments for all the three children (at RM 1,400 per child) until April 1998. In May 1998, the respondent indicated that he would cease payment for the eldest child, Anitha a/p Karunairajah, as she had attained the age of 18 years. The consent order, however, did not stipulate that the maintenance payments should cease upon the child attaining the age of 18 years. Thus, the petitioner sought an order from the court to compel the respondent to continue making maintenance payments to Anitha, and by necessary implication to the other two children until the completion of their tertiary education.

The petitioner cited section 95 of the LRA in support of the argument that the maintenance for 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 section 95 of the LRA. In stating this, the petitioner relied on the Court of Appeal's decision in the case of *Ching Seng Woah v Lim Shook Lin*.[4]

The respondent, on the other hand, argued that under section 95 of the LRA the duty to maintain a child would cease upon the child

[4] *Supra*, n 2.

attaining the age of 18 years, or where the child was under physical or mental disability, on the ceasing of such disability, whichever was the later. Section 87 of the LRA was raised. This section provides that a "child" means a child of the marriage who is under the age of 18 years. As both sections 87 and 95 come under Part VIII of the LRA, therefore the meaning of "a child" in section 87 shall apply to section 95. However, the respondent conceded that an exception could arise for a child under a physical or mental disability. He relied on the decisions in *Kulasingam v Rasammah*[5] and *Gisela Gertrud Abe v Tan Wee Kiat*[6] in maintaining that a maintenance order for a child could not be extended beyond the age of 18 years. In rebutting the petitioner's argument, the respondent contended that the Court of Appeal's decision in *Ching Seng Woah v Lim Shook Lin*[7] with regard to involuntary financial dependence was merely *obiter* and would not bind the High Court. Hence it may be disregarded.

The decision of the High Court[8]

The issue before the High Court was whether the involuntary financial dependence of a child of the marriage for the purposes of pursuing and/or completing tertiary education in order to obtain a first degree came within the exception of physical disability under section 95 of the LRA so as to entitle the child to maintenance beyond the age of 18 years.

Low Hop Bing J, in order to arrive at a proper interpretation of section 95 of the LRA, referred to the authorities relied on by the respondent. The first case referred to was the case of *Kulasingam v Rasammah*. His Lordship stated that the focus in that case was on the definition of a child, the age of minority and the attainment of the age of majority under the Married Women and Children (Maintenance) Ordinance 1950[9] exclusively. With regard to the LRA, reference was

---

[5] [1981] 2 MLJ 36.

[6] [1986] 2 MLJ 58 (High Court); [1986] 2 MLJ 297 (Federal Court).

[7] *Supra*, n 2.

[8] [2000] 5 CLJ 21.

[9] No 36 of 1950. This Ordinance was revised in 1981 as the Married Women and Children (Maintenance) Act 1950 (Act 263).

made only to sections 2 and 87. There was no reference to section 95 and thus the court did not have the opportunity of interpreting section 95. Hence, his Lordship held that *Kulasingam v Rasammah* was not an authority on section 95 and therefore would not render any assistance to the respondent.

The second case relied on by the respondent was *Gisela Gertrud Abe v Tan Wee Kiat*. Both the High Court and the Supreme Court in that case held the legal duty of a parent to maintain his or her child ceased when the child attained the age of 18 years. The parties in the above case did not put forward any view relating to the application of the exceptions under section 95 of the LRA, in particular, whether a child's involuntary financial dependence for the purposes of pursuing and/or completing tertiary education in order to obtain a first degree came within the meaning of physical disability in section 95 of the LRA. Therefore, both the High Court and the Supreme Court in the above case did not have the opportunity to decide on the issue as to what amounted to physical disability under section 95, which was the issue for determination by the court in the present case. Thus, both the cases cited by the respondent were of no assistance to the court.

His Lordship next considered the Court of Appeal decision in *Ching Seng Woah v Lim Shook Lin*, where it was 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:[10]

> 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.

The last sentence in the above statement indicates that if section 95 of the LRA is given a narrow interpretation, it may produce negative results as children above the age of 18 will not be able to look to their parents for money. Mahadev Shankar JCA further stated:[11]

---

[10] *Supra*, n 2 at p 120.
[11] *Ibid.*

> As to its wider implications, our view is that the powers provided for the protection of children by Pt VIII of our Act are additional to and not restrictive of the powers contained in Pts VI and VII. Part VIII, Section 95 in particular, 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 Section 92[12] 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.
>
> ... The court's powers under Section 52[13] are very wide and transcend the limitations contained in Section 95, because Section 52 operates in a situation where the family is being legally disintegrated.

Low Hop Bing J in the present case, in referring to the above case, held the opinion that the combined effect of sections 95, 52 and 92 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 (at least towards obtaining a first degree) even though such education might extend beyond the

---

[12] S 92 of the LRA provides:

> Except where an agreement or order of court otherwise provides, it shall be 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, either by providing them with such 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.

[13] S 52 of the LRA provides:

> If husband and 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.

age of 18 years. The judge further stated that as the Court of Appeal's decision in *Ching Seng Woah* focused specifically on the interpretation of the phrase "physical disability" which was directly and pertinently on the same issue before the court in the present case, it was bound to follow that decision. Prior to arriving at this decision, his Lordship referred to the following observation made by Mahadev Shankar JCA:

> A 19 year old computer whiz-kid who is a wheel chair case and therefore well able to earn a living at that age could here be contrasted with another 18 year old who is physically and mentally fit but otherwise totally unable to fend for himself on the job market ... However, we must take note 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 now entrenched in our laws, the rights of the dependent young persons in these assets is yet to receive proper articulation ... we are inclined to view that in appropriate cases, involuntary financial dependence is a physical disability under Section 95 of the Act.[14]

His Lordship in the present case also stated that although the husband in *Ching Seng Woah* had undertaken to maintain the children of the marriage until they received their first degree, whereas the respondent in the present case had no such undertaking, the difference was insignificant. This was because the court could have directed the husband to provide for his daughters until their tertiary degree, even if he did not undertake to do so.

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 as their involuntary financial dependence for purposes of pursuing and/or completing their tertiary education constituted a physical disability under section 95.

The decision of the Court of Appeal[15]

The Court of Appeal unanimously dismissed the appellant's (the husband's) appeal in upholding the High Court's decision. Abdul Kadir

[14] *Supra*, n 2.

[15] [2003] 2 MLJ 529.

Sulaiman JCA, who delivered the judgment of the court, stated the following reasons.

First, the Court of Appeal agreed with the High Court's views as to the decision in the case of *Gisela Gertrud Abe* that the matter of disability of the child under section 95 of the LRA was not in issue in that case. Hence, it was not an authority on the interpretation of section 95, in particular, matters concerning the disability of a child of the marriage which formed an exception to the section. His Lordship, in connection with this, stated as follows:[16]

> ... by virtue of s.95 of the Act, counsel submitted that the said order shall *pro tanto* expire on the attainment by each child of the age of 18 years unless the child suffers a physical or mental disability. He relied heavily on *Gisela Gertrud Abe*. But as stated by the learned judge with whose view we agree, this case can easily be distinguished as the courts there applied the general principle in s.95 without having the benefit of argument on the disability exception contained in the section.

Secondly, the court agreed with the Court of Appeal's view in *Ching Seng Woah* that, in appropriate cases, involuntary financial dependence was a physical disability under section 95 of the LRA. His Lordship went one step further in the present case and said that involuntary financial dependence could also be taken as a mental disability under section 95 of the LRA for the purpose of the child of the marriage pursuing his or her tertiary education in order to be better equipped in his or her future working life. The child requires an able body and mind to undergo a tertiary education. Parents aspire to give their children the best opportunities for a tertiary education.

Thirdly, the court in construing the intention of the Parliament in incorporating section 95 into the LRA stated:[17]

> It is indeed unfortunate for the appellant and the respondent to have to undergo the break up in [sic] their marriage. But for that their

[16] *Ibid,* at p 537.

[17] *Ibid,* at pp 537-538.

> children should not be penalized. They would have wished that their parents would remain together with them under the same roof until such time they could fend for themselves in the work market. For the break up of the marriage, they have to sacrifice their educational talent to pursue their studies at the tertiary institution because the father has refused to make provisions for them to do so hiding behind the strict interpretation of s 95 of the Act. The pertinent question to ask is, if their marriage had not gone to the rocks, would the appellant had [sic] left his children to wander in the street to fend for themselves upon the attaining the age of 18 years? Surely not. No sensible parents would have done that to their children. ... It is our view, ... that it could not have been the intention of the legislator in incorporating the provisions of s 95 into the Act to make the children worst off [sic] 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.

The court reiterated its stance that maintenance payments by the appellant would cease the moment the children were able to fend for themselves on their attaining the age of 18 years, without any physical or mental disability. However, if the children were incapable of fending for themselves upon attaining the age of 18, and would have been deprived of an opportunity to further their education, they could not be divested of maintenance payments by their parents.

Finally the court stated that, in a given situation such as the present case, section 95 should be construed in a more liberal fashion in light of the duty imposed upon the parent to maintain their children as embodied in section 92 of the LRA. Thus, the court agreed with the views expressed by Low Hop Bing J in the High Court on this matter and dismissed the appeal.

It is submitted that the liberal interpretations given by the High Court and the Court of Appeal to the exception in section 95 are highly commendable. However, the interpretation given by the Court of Appeal is wider than the High Court's interpretation as the former has stated that involuntary financial dependence falls under physical disability as well as mental disability. Further, the Court of Appeal has examined

the intention of the legislature in enacting section 95 to find out the true purpose of Parliament.

It is indeed heartening to note that both the courts above have infused new life to the exception in section 95 in order to safeguard the educational needs of children above the age of 18 from broken homes who are keen in pursuing their education. The writer agrees with the opinion of the Court of Appeal that it could not have been the intention of Parliament in enacting section 95 "to make the children worst off [sic] 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".[18]

The decision of the Federal Court[19]

The appellant further appealed to the Federal Court. The question posed to the Federal Court was whether upon a proper construction of section 95 of the LRA, the involuntary financial dependence of a child of the marriage for the purposes of pursuing and/or completing tertiary and/or vocational education came within the exception of physical or mental disability so as to entitle the child to maintenance beyond the age of 18 years. The question was worded in a slightly different manner as the words "in order to obtain a first degree" which were inserted after the words "tertiary education" in the lower court were omitted in the question posed to the Federal Court, thereby not limiting the financial dependence for the purpose of pursuing and/or completing tertiary education in order to obtain a first degree only.

The Federal Court examined the cases referred to by the High Court and the Court of Appeal in arriving at their respective decisions. With regard to the High Court's interpretation of the phrase "involuntary financial dependence" falling within the exception provided by section 95 of the LRA, that is, "where the child is under a physical or mental

---

[18] *Ibid.*

[19] *Supra*, n 1.

disability", Abdul Hamid Mohammad FCJ (who delivered the judgment of the court) stated as follows:[20]

> What it means is that a child who gains admission into an institution of higher learning suffers from physical or mental disability until she obtains his or her first degree. I dread to think of the connotation of such an interpretation.

Next, his Lordship examined the two cases which were held by both the High Court and the Court of Appeal as irrelevant to the facts of the present case - *Kulasingam v Rasammah* and *Gisela Gertrud Abe v Tan Wee Kiat*. His Lordship agreed that *Kulasingam* is not an authority for the interpretation of the exception in section 95 of the LRA. The decision in *Gisela Gertrud Abe*, according to his Lordship, clearly showed that the learned judge considered the general principle in section 95 of the LRA but had not considered the exception (which was the contention of the learned judges in the High Court and the Court of Appeal in the present case). But his Lordship expressed his view that anyone who read section 95 would definitely not have missed the exception as it was a one-sentence section, thereby saying that the learned judge in the above case would have considered the exception though it was not stated in the judgment.

His Lordship then went on to examine *Ching Seng Woah v Lim Shook Lin* which was followed by the High Court and the Court of Appeal in the present case. Having looked at the facts of that case, the Federal Court stated that a very important point must be noted about that case, that is, the husband undertook an oath to maintain his daughters until they received their first degree. The Court of Appeal in that case, taking this fact into consideration, held that "[i]t is a fundamental doctrine of law that a person cannot be permitted to reprobate what he has approbated".[21]

His Lordship in the present case stated that that was the *ratio* of *Ching Seng Woah v Lim Shook Lin*. Anything more said about sec-

---

[20] *Ibid*, at p 403.

[21] *Supra*, n 2 at p 119.

tion 95 was mere *obiter*. His Lordship however disagreed with the Court of Appeal's decision in the above case for the following reasons.

First, personal views on the state of the law and moral obligations on the part of parents towards their children should be disregarded. A case must be decided according to the law as it stands, irrespective of a judge's personal view on it and moral obligations could never take precedence over the law. What the law should be would be a matter for the legislature.

With due respect, it is submitted that his Lordship had erred in stating that in deciding a case a judge's personal views on the state of the law and moral obligations should be disregarded. It is not disputed that what the law should be is a matter for the legislature, but nevertheless it should not be forgotten that the judiciary's duty is to interpret the law enacted by Parliament. In doing so, a judge may consider factors including the intention of the legislature, moral obligations, and the present condition as was done by the judges in the High Court and the Court of Appeal here.

Secondly, the court looked at whether financial dependence fell within the meaning of the phrase "physical or mental disability". His Lordship referred, *inter alia*, to a Saskatchewan Court of Appeal's decision in the case of *Penner v Danbrook*[22] where the court stated:

> ... the term disability... must connote some physical or mental incapacity, usually arising from injury or disease, although it might arise from other causes. Mere lack of knowledge or training or an unfulfilled wish to improve one's self are not, in the ordinary language, considered to be disabilities. To extend the meaning of the term disability to such matters would make the section of such broad application that anyone of any age, education or experience could fit into it, and the age limitation imposed by the legislature would be rendered meaningless.

Thus the Federal Court in the present case stated that "disability" in section 95 referred only to "physical" and "mental" disability. It does

[22] 39 RFL (3rd) 286.

not cover financial dependence. Further, the word "child" was defined in section 87 of the LRA to mean a child under the age of 18 years. Both sections 87 and 95 are a part of Part VIII of the LRA. Therefore the definition in section 87 applied to the word "child" in section 95.

It is submitted that the above decision of the Court of Appeal from Saskatchewan should be limited to its facts as the judge in that case had stated that if the meaning of the term disability was extended to anyone of any age, education or experience, the age limitation imposed by the legislature would be meaningless. The Court of Appeal in the present case, however, had expressly stated that involuntary financial dependence which fell under physical disability in section 95 only applied to children above the age of 18 who intend to pursue their education and it ceases once they have obtained their first degree. The court further stated that such an interpretation would not be applicable to children who upon attaining the age of 18, without any physical or mental disability, were able to fend for themselves. Thus, the Court had qualified its ruling and there was no cause for the concern expressed in *Penner's* case.

Thirdly, the Federal Court stated that the High Court and the Court of Appeal in the present case as well as the Court of Appeal in *Ching Seng Woah* placed a lot of reliance on section 92 in arriving at their conclusions. According to the Federal Court, section 92 was a general provision which merely declared the duty of a parent to maintain or contribute to the maintenance of his or her child and spelt out what the parent should provide for the child, whereas section 95 was a specific provision on the duration of the maintenance order, which was not mentioned in section 92. Therefore, his Lordship stated:[23]

> Thus, I do not see how s 92 can qualify s 95. Indeed, to hold that s 92 qualifies or overrides s 95 would render the provisions of s 95, a specific provision for the particular purpose, nugatory.

The Federal Court further stated that sections 52 and 93 of the LRA, which were also relied on by the lower courts, were of no assistance in interpreting section 95. Hence, his Lordship held that

[23] *Supra*, n 1 at p 409.

there was no legal basis for interpreting the exceptions in section 95 to include financial dependence for the purpose of pursuing tertiary and/or vocational education after the "child" had completed the age of 18 years. The only basis for such an interpretation was moral basis, which could not override the clear provisions of the law in deciding a case. The function of a judge was to apply the law, whatever his personal view about the law may be.

His Lordship next went on to examine other laws to prove the point that if Parliament had intended that a parent should provide maintenance to his or her child after the child had attained the age of 18 years if it was necessary to enable the child to complete his education, it would have expressly stated so in section 95 of the LRA.

First, the court examined section 79 of the Islamic Family Act 1984.[24] The section provides:

> Except-
>
> (a) where an order for 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 such order is made in favour of –
>
> (i) a daughter who has not been married or who is, by reason of some mental or physical disability, incapable of maintaining herself;
> (ii) a son who is, by reason of some mental or physical disability, incapable of maintaining himself,
>
> the order for maintenance shall expire on the attainment by the child of the age of eighteen years, but the Court may, on 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.*[25]

[24] Act 303.

His Lordship, in noting that the Islamic Family Law Act 1984 was more advanced than its civil counterpart, thought that the respondent in the present case had wanted the court to "legislate as an amendment" the italicised words in the existing provisions of s 95. His Lordship held that the court would not do such a thing as it was not the function of the court. It was for Parliament to legislate an amendment. If the court did as was requested by the respondent, it would amount to usurping the powers of Parliament, which would then defeat the doctrine of separation of powers.

Secondly, his Lordship referred to the relevant provisions in the Singapore Women's Charter on maintenance.[26] His Lordship also referred to the decision in *PQR (mw) v STR*,[27] which resulted in the amendment to the Women's Charter. A similar issue arose in the above case in which section 125 of the Women's Charter was examined.[28] The learned judge in that case held that a parent's legal duty to provide maintenance ceased when the child attained the age of 21 years. The learned judge also stated that if the law was unsatisfactory, it was up to Parliament to address the problem and not the courts. Subsequently, the Women's Charter was amended and the new subsection (5) of section 69 now provides that:

> The court shall not make an order under subsection (2) for the benefit of a child who has attained the age of 21 years or for a period that extends beyond the day on which the child will attain that age unless the court is satisfied that the provision of the maintenance is necessary because-
>
> (a) of a mental or physical disability of the child;
> (b) the child is or will be serving full-time national service;
> (c) the child is or will be or (if an order were made under subsection (2)) would be receiving instruction at an educational establishment or undergoing train-

---

[25] Emphasis added.

[26] His Lordship referred to ss 125, 116 and 61 of the Women's Charter.

[27] [1993] 1 SLR 574.

[28] S 125 of the Women's Charter is similar to s 95 of the LRA, save that it is 21 years of age in the former whereas it is 18 years in the latter.

ing for a trade, profession or vocation, whether or not while in gainful employment; or

(d) special circumstances, other than those stated in paragraphs (a), (b) and (c), exist which justify the making of the order.

Finally, his Lordship referred to an Australian case *In the Marriage of Mercer*[29] where section 76(3) of the Australian Family Act was examined. This provision empowers the court to make a maintenance order after the child has attained the age of 18 years if it is necessary to enable the child to complete his education (including vocational training or apprenticeship).

Thus the Federal Court in the present case held that it should decide in accordance with our law as it now stood and not order the parent to provide maintenance to his child to enable him or her to complete his or her tertiary education just because it was done in other countries. Therefore the Federal Court had clearly stated that the onus was on Parliament to address this problem as was done in Singapore. In view that our Parliament and the State legislatures had already done so in relation to the Islamic Family Law Act 1984, there would be nothing to prevent the same as regards the LRA. The Federal Court therefore allowed the appellant's appeal.

Possible Implications of the Federal Court's decision

The Federal Court's decision in the present case has limited the interpretation given by the High Court and the Court of Appeal to the phrase "physical or mental disability" in section 95 of the LRA. The Federal Court merely gave a literal interpretation to this phrase. The implications of this decision can be stated as follows.

First, a divorced parent's legal duty to provide maintenance for his or her child ceases when the child attains the age of 18 years, unless the child is physically or mentally disabled. The parent does not have

[29] (1996) ALR 237.

to worry about financially supporting the child through his or her tertiary education.

Secondly, a child whose parents are divorced would not receive maintenance from his parents once he attains the age of 18 years. He would then have to find his own means of support to help finance his tertiary education.

Thirdly, section 95 of the LRA provides for the maintenance as well as the custody of a child. As a result of the above decision, a parent who has been given the custody of his or her child is no longer under a duty to look after the child once the child attains the age of 18 years, unless the child is under a physical or mental disability. Thus, in the words of Mahadev Shankar JCA for the Court of Appeal in the case of *Ching Seng Woah*:[30]

> ...every able bodied child of 18 can be turfed out into the streets with impunity! 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.

Fourthly, we should do away with section 12 of the LRA, since a child at the age of 18 is no longer being maintained by the father or mother or a guardian. Therefore a child of 18 should be allowed by the law to enter into a marriage without the need to seek the consent of the father.[31]

---

[30] *Supra*, n 2 at p 120.

[31] S 12 provides that before marrying, a person who has not completed his or her twenty-first year shall be required to obtain the consent in writing of one of the persons below:

(a) his or her father; or

(b) if the person is illegitimate or his or her father is dead, his or her mother; or

(c) if the person is an adopted child, his or her adopted father, or if the adopted father is dead, his or her adopted mother; or

(d) if both his or her parents (natural or adopted) are dead, the person standing in *loco parentis* to him or her before he or she attains that age, but in any other case no consent shall be required.

It is submitted that if the phrase "physically or mentally disabled" in section 95 is given a literal interpretation as was done by the Federal Court in the present case, the effect on children who have attained the age of 18 years would be as described above by the learned judge. This is because when the court examines section 95, it should bear in mind that it is dealing with children from broken homes where the parents are divorced. When the parents divorce, 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.[32] Although statutes such as the LRA and the Age of Majority Act 1971[33] 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, are 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 a child who has attained the age of 18 years. One might argue that a child could always get a scholarship to complete his or her tertiary education, but it should be borne in mind that not every applicant is successful in obtaining a scholarship.

Therefore, the question that arises next is what happens to those who are unsuccessful? On the one hand they have failed in getting a scholarship and on the other hand, they cannot turn to their divorced parents for financial support as under section 95 of the LRA the parents are no longer under any legal duty to provide maintenance to them. Furthermore, it should also be noted that unlike the Western countries, Malaysia is not a welfare state. Thus, a child who aspires to pursue tertiary education will be deprived of the golden opportunity just because his parents are divorced and according to section 95 of the LRA, they are not under any legal duty to provide maintenance to him upon his attaining the age of 18 years. It is further submitted that this will lead to drastic consequences in view of the fact that the crime rate in Malaysia is rather high and most of the crimes such as gangsterism and robberies are committed by youths from broken homes.

---

[32] Cases such as *Re Satpal Singh, An Infant* [1958] MLJ 283, *Allen v Allen* [1951] 1 All ER 724, *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 support this view.

[33] Act 21.

As mentioned earlier, the Federal Court in the present case stated that it is not the function of the courts to "legislate as an amendment" the existing provisions of section 95 and if the court does so, it will amount to usurping the function of Parliament. It is submitted that the decision of the Court of Appeal in the present case is to be preferred to that of the Federal Court regarding 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 the tertiary level because their father had refused to make provisions for them to do so, hiding behind the strict interpretation of section 95. If there had been no divorce, no sensible parent would have left their children to wander in the street to fend for themselves upon their attaining the age of 18 years. Therefore, in the words of the learned judge in the Court of Appeal - "it could not have been the intention of the legislator in incorporating the provisions of s. 95 into the Act to make the children worst off [sic] 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".[34] At the same time, the Court of Appeal qualified its statement such that the maintenance payments would cease once the children were able to fend for themselves. In the writer's opinion, it is submitted that this would mean that the maintenance payments would cease once the children have completed their first degree. At the same time, a parent is no longer under a duty to pay maintenance to his or her child if the latter, upon reaching the age of 18 years, does not intend to pursue his or her education at tertiary level and starts working.

The dissatisfaction with the duration of an order for maintenance in section 95 of the LRA was also expressed by the late Professor Dato' Dr Mimi Kamariah Majid in her book *Family Law in Malaysia* where she stated as follows:[35]

> Although this provision is an improvement over the 1950 Act, it is still lacking as it assumes that all children, other than the disabled, aged 18

[34] *Supra*, n 15 at p 538.

[35] Mimi Kamariah Majid, *Family Law in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1999) at p 336.

> and above are able to fend for themselves and therefore do not need maintenance. At a time when tertiary education or higher studies is the aim of many youngsters, the law should provide the support by requiring the mother or father to provide maintenance in suitable cases even though the child may have reached 18 years.
>
> It is therefore heartening that the Court of Appeal in *Ching Seng Woah v Lim Shook Lin* held that in appropriate cases, involuntary financial dependence is a physical disability under section 95 of the LRA ...

In conclusion, according to the Federal Court, it is now up to the Parliament to address the problem, that until Parliament amends section 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 will not interfere. It is submitted that the Federal Court has failed to note the fact that the LRA was enacted way back in 1976, that is, 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 section 95, the court is applying the cost of living and education in the 1970s to the present time.

Conclusion

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

1. Parliament should take a positive step to amend section 95 of the LRA as was done in Singapore following the case of *PQR (mw) v STR*. Section 95 of the LRA may perhaps be amended to provide 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 eighteen 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 section 79 of the Islamic Family Law Act 1984. It is hoped that Parliament would amend section 95 to include the provision of maintenance to children who have reached the age of 18 years to cover their tertiary education or training. In doing so, it will be a great relief to those children who not only have to bear the consequences of their parents' divorce, but also fend for themselves once they are 18 years of age.

Alternatively, we will 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 the Court of Appeal's decisions in the present case.

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

Akta Kanak-Kanak 2001: Penguatkuasaan Semula Tugas dan Tanggungjawab Ibu Bapa atau Penjaga?

Jal Zabdi bin Mohd Yusoff & Zulazhar bin Tahir***

Pengenalan

Kanak-kanak merupakan aset negara yang sangat penting kerana kepada merekalah segala harapan dan cita-cita negara disandarkan selaku pemimpin di masa hadapan. Kanak-kanak juga adalah golongan yang perlu diberi perlindungan kerana di dalam keadaan-keadaan tertentu, mereka mungkin terdedah kepada pelbagai bahaya sama ada mereka menjadi mangsa atau terlibat dengan perlakuan jenayah. Menyedari hakikat ini, maka pertimbangan utama di dalam segala tindakan yang menyentuh hal ehwal kanak-kanak adalah kebajikan dan kesejahteraan kanak-kanak berkenaan. Ini boleh dilihat di dalam pelbagai undang-undang yang terdapat di negara ini. Walau bagaimanapun, permasalahan mengenai kanak-kanak masih terus berlaku di merata tempat sama ada di dalam atau luar negara. Dalam hal ini kita sering mendengar atau membaca bahawa terdapat kanak-kanak yang diabaikan, ditinggalkan di perhentian bas, di bawah pokok, ada yang ditinggalkan di dalam kereta tanpa penjagaan sewajarnya. Kita juga mendengar bahawa perlakuan jenayah oleh kanak-kanak semakin menjadi-jadi. Jika dulunya perlakuan jenayah oleh kanak-kanak hanyalah jenayah yang kecil atau *petty offences* tetapi pada masa sekarang terdapat kanak-kanak yang berani melakukan rompakan bersenjata, merogol bahkan ada yang berani membunuh. Persoalannya sekarang ialah siapakah yang harus dipersalahkan jika perkara ini berlaku kepada kanak-kanak di negara ini? Apa yang pasti ialah kanak-kanak ini tidak harus dipersalahkan seratus peratus kerana apa yang berlaku mungkin disebabkan oleh

* DPA (UITM), LLB (Hons) (Malaya), LLM (Malaya); Pensyarah Kanan, Fakulti Undang-Undang, Universiti Malaya.

** LLB (Hons) (Malaya), LLM (Malaya); Pensyarah, Fakulti Undang-Undang, Universiti Malaya.