

# CASE UPDATE ON TBZ V TCA [2017] SGHCF 18 - MAINTENANCE AND ASSET DIVISION IN ANCILLARY PROCEEDINGS

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## Introduction

The decision in *TBZ v TCA SGHCF 18* (“**TBZ**”) deals with ancillary matters following upon divorce proceedings between the Plaintiff (the “**Husband**”) and the Defendant (the “**Wife**”). The parties were married sometime in 1991, and divorce proceedings were commenced after more than 20 years of marriage. Both parties prospered financially throughout their marriage and accumulated a substantial portfolio of real estate over the years. They had three children from the marriage, all above 21.

The issues remaining for the ancillary stage related to the division of matrimonial assets and maintenance for two of the adult children. At the time of the hearing for the ancillaries, the value of the matrimonial asset pool of the parties was about S\$21 million.

## Decision of the High Court

During the ancillary proceedings, a wide variety of issues were raised and debated before the High Court. In relation to the division of assets between the parties, some of the issues that were canvassed include, amongst others, the operative date for the delineation of assets, the valuation of immovable properties,

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dissipation of assets, the division of movable and immovable properties, and the direct and indirect financial contributions of the parties.

On the topic of maintenance, the Court addressed issues relating to its power to order maintenance, the quantum of maintenance and the proportion of contribution required from each parent.

This article draws attention to two issues of interest that were discussed in the judgment of *TBZ*: the first issue was whether a monetary gift from the Wife's late father should be excluded from the value of one of the assets for the purpose of subsequent division, and the second issue relates to the eligibility of adult children in claiming maintenance from either parent during the ancillary proceedings, and the apportionment of maintenance contribution between the parents.

## Gift from the Wife's Father

In 2005, the Wife received a monetary gift from her Father. According to the Wife's account, the monetary gift was deposited in a bank account which was in her sole name and subsequently converted to a joint account with the Husband a year later. The Husband disputed that there was a sole account in the Wife's name in the first place. In any event, the monies were not kept separate from the other funds that were deposited into the account by the Husband. The combined funds were used for investment purposes but later channeled by the Wife to her purchase of a private apartment.

During the ancillary proceedings, the Wife argued that the monetary value of the gift from her Father did not constitute part of the matrimonial pool of assets, and should be deducted from the value of the apartment for the purpose of asset division between the parties. The Husband, on the other hand, argued that the monetary gift had already been co-mingled with funds in the joint bank account and no longer retained its original character of a gift. For this reason, the monetary gift should not be deducted from the value of the apartment.

The Court in *TBZ* referred to the principles that were set out in an earlier case, *Chen Siew Hwee v Low Kee Guan (Wong Yong Yee, respondent)* 4 SLR(R) 605 ("**Chen Siew Hwee**") on the factors that are relevant to the Court's determination of whether a gift will constitute a matrimonial asset:

1. Whether the recipient of the gift has demonstrated an intention that the gift should form part of the matrimonial asset pool;
2. If the gift was no longer in its original form (e.g. a monetary gift that has been used for investment in shares), whether the new asset can be traceable to the assets which constituted the original gift.

In *Chen Siew Hwee*, the issue in dispute was whether assets derived from a gift of several shares in a company, which was received by the Husband from his Father before the marriage, should form part of the matrimonial asset pool. The Court held that it did not for two reasons: First, the Husband had never at any time indicated that the shares would form part of the matrimonial asset pool. At the time of divorce, the gift of shares, while no longer in its original form due to court-ordered liquidation of the companies, was also

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clearly traceable to its original asset. Therefore, the true nature of the gift of shares remained intact and did not form part of the matrimonial asset pool.

Applying these principles to the present case, the Court agreed with the Husband's submission that the gift should not be excluded from the value of the apartment and would fall within the pool of matrimonial assets. As the gift was not kept separate, it was no longer possible to trace the monetary gift due to the comingling of the gift with other funds in the joint account. Therefore, the Court would not be in a position to ascertain whether any part of the combined funds in the account could be considered as a 'gift' from the Wife's Father. The fact that the funds were used for investment purposes and later for the purchase of a private apartment were also factors that contributed to the Court's position.

## Maintenance

On the subject of maintenance, there were two main issues that were raised before the Court: whether maintenance can be awarded to adult children at the ancillary stage and the significance of a marital agreement in apportioning the contribution of each parent to the maintenance of the children.

### Maintenance of adult children

When this issue was being heard, the Husband raised an objection stating that the Court does not have the general power to order maintenance for adult children as part of the ancillary orders. After examining the applicable provisions of the Women's Charter and the existing authorities, the Court held that it would only be able to consider whether maintenance should be ordered for adult children if the application was made by the children themselves.

#### 1. The position under the Women's Charter

Under s 69(2) – (3) of the Women's Charter, the Court has the power to order a parent to provide maintenance for a child if there is evidence to show that the parent has neglected to do so for a child who is unable to support himself. An application for maintenance of a child can be made by the following persons:

1. A person who is a guardian or has actual custody of the child; or
2. by the child himself if he is 21 years and above; or
3. by the child's siblings who are aged 21 years and above if the child himself is below the age of 21; or
4. by a person appointed by the Minister.

However, the above is qualified by s 69(5), which states that the Court shall not make an order for maintenance for a child who has attained the age of 21 years and above unless the Court is satisfied that maintenance is necessary for the following reasons:

1. If the child has a mental or physical disability; or
2. if the child is or will be serving full-time national service; or

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3. if the child is or will be undertaking his studies at an educational establishment or training for any vocation; or
4. any other special circumstances that may justify an order.

In respect of ancillary proceedings, s127 of the Women's Charter states that the Court only has the power to order maintenance only for a child below the age of 21 years.

1. The decision of the Court

Based on the relevant provisions of the Women's Charter and the existing decisions of *Wong Ser Wan v Ng Cheong Ling* 1 SLR(R) 416 ("**Wong Ser Wan**"), and *Thery Patrice Roger v Tan Chye Tee* SGCA 20 ("**Thery**"), the Court clarified that in relation to s 69(3)(a) of the Women's Charter, a parent of an adult child cannot be considered a "guardian" or one that is in "actual custody" of the child. Therefore, a parent of an adult child will not be in a position to apply for maintenance on behalf of the child, and any adult child seeking maintenance from a parent would have to file an application with a supporting affidavit under s 69 of the Women's Charter on his own. In *Wong Ser Wan*, the Court was willing to make an exception by ordering maintenance even though the mother had filed the summons on behalf of her son, because the child was unable to do so due to the mental disorders he was suffering from.

The Court therefore requested that the maintenance application be filed by the children themselves, and only proceeded to consider the quantum of maintenance to be awarded to each child after they had done so.

## **Proportion of contribution from each parent to the maintenance of a child**

After ascertaining the quantum of maintenance to be awarded to each child, the Court also had to decide on the proportion that each parent would be expected to contribute towards such quantum. The Wife submitted that in accordance with a prior marital agreement between the parties, the Husband would be responsible for the full sum of the children's education and living expenses in the UK, and the younger son's and daughter's maintenance until they graduate from university. While the Husband did not dispute the existence of the agreement, he submitted that based on the factual circumstances surrounding the relationship between the parties and children, the parties should bear an equal proportion of the children's maintenance.

The Court took the opportunity to lay down some useful guiding principles in relation to this issue. It started by reiterating the fundamental principle that every parent has a duty to maintain or contribute to the maintenance of his or her children (per the Court of Appeal in *AUA v ATZ* SLR 674 at ).

In addition, the following principles were also held to be instructive:

1. Court must have regard to "all the circumstances of the case" when deciding the proportion of contribution from each parent;
2. The welfare of the child is the overriding objective in the Court's decision on maintenance;

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3. A parent will not be allowed to abdicate his or her responsibility of providing parental support to their children.

Bearing in mind these principles, the Court expressed that while a marital agreement may be a relevant factor in the Court's apportionment of contribution between both parents, it will ultimately be considered in the context of all the circumstances of the case at hand. If the agreement fails to provide the children with adequate financial support or apportions the contribution of each parent in a way that deviates from the principle that each parent has common but differentiated responsibilities, the Court will exercise its power to ensure a just and fair outcome that serves the best interests of the children.

After examining all the circumstances of the case, the Court held that the payment arrangement stipulated in the marital agreement would place an excessive burden on the Husband in a manner that would be inconsistent with the principle of common but differentiated responsibilities. To ensure a fair allocation, the Husband and Wife were each ordered to bear the remaining educational expenses for the elder son and the younger son respectively.

## Conclusion

*TBZ* has clarified important issues relating to matrimonial gifts and maintenance for adult children, and the practical points that parties should note for the purpose of ancillary proceedings are as follows:

1. In order for a matrimonial gift to remain in its original nature as a gift and set apart from the other assets available for division in the matrimonial pool, the recipient of the gift must be able to demonstrate that there was no intention for the gift to form part of the matrimonial asset pool, and that the gift has remained traceable even if it has been converted to other forms of asset.
2. If an adult child is seeking maintenance from his/her parent during ancillary proceedings, the parent will not be able to file the application on behalf of the child and the child would have to file the maintenance application on his own.
3. The key objective in the apportionment of contribution between parents is to ensure that the burdens of parenthood are evenly distributed and that the children's best interests are served. A marital agreement apportioning the contribution between the parents, while relevant, would not be the sole or overriding factor in the Court's final determination.

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