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# Domicile and divorce

Malaysia has a dual legal system, based on both English common law and Islamic Sharia law. This article will focus on family law governing non-Muslims as regulated by the Law Reform (Marriage & Divorce) Act 1976 (the 'Act').

The general power of the Malaysian High Court to entertain divorce petitions is stated in section 48 of the Act, which reads:

> 'Nothing in this Act shall authorise the court to make any decree of divorce except:
> a) Where the marriage has been registered or deemed to be registered under this Act;
> b) Where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
> c) Where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.'

Hence, the power of our courts is limited by section 48 of the Act to grant a Decree of Divorce in cases where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

## Domicile

Section 3(2) of the Act provides that, for the purposes of the Act, a citizen in Malaysia deemed to be domiciled in Malaysia unless the contrary is proved. This presumption is rebuttable upon proof to the contrary. Unfortunately, neither the Act nor the Interpretation Act 1976 provides any definition of the word 'domicile'.

Therefore, section 3 of the Civil Law Act 1956 operates to apply English common law, prevailing as at 7 April 1956. Section 3 states:

> '(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
> a) In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered or in force in England on the 1st day of April 1956…'

There are three categories of domicile, namely of origin, of choice and matrimonial. For one to change his/her domicile from the one of origin to that of choice, that individual has to express his/her intention and take active steps to acquire a domicile of choice.

## Domicile of dependence/matrimonial domicile

Applying English common law, in West Malaysia, a married woman acquires her husband's domicile during the subsistence of the marriage. This common law position has been given statutory recognition in section 48(1)(c) of the Act, before the Court can entertain proceedings for a decree of divorce.

This position that upon marriage, a wife acquires a domicile of dependence was affirmed in the case of *Charnley v Charnley and Betty* (1960) MLJ 29, where it was held 'The domicile of a married woman is that of her husband while the marriage subsists, even though the parties may be living apart.'

In contrast with Malaysia, other Commonwealth jurisdictions have legislated for laws more reflective of gender equality, repealing the applicability of this common law rule. For example, England, by section 4 of the Domicile and Matrimonial Proceedings Act of 1973, and Singapore, by section 45A of the Women's Charter (1980), have given wives an independent domicile.

## Some local cases

As to the material time of proof of domicile in the context of divorce proceedings, this was held by the Supreme Court in *Tan Hock v Khor Chai Heah* (1990) 1 MLJ 422, to be at the time of the presentation of the petition. The relevant passage from the pronouncing judgment:

> '... The Petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court could exercise its powers under s 48 of the Act to grant any relief to the parties.'

On the issue of the burden of proof to be discharged, in *Joseph Wong Phui Lun v Yeah Loon Gait* (1978) 1 MLJ 236, the court held that the burden is one beyond a mere balance of probabilities:

> '... clear evidence is required to establish a change of domicile. In particular, to

displace a domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.'

The distinction in the concepts of domicile and nationality was re-emphasised in *Ang Geck Choo v Wong Tiew Yong* (1997) 3 MLJ 467; (1997) 3 CLJ 201:

'It is accepted law that the concept of nationality and the issue of domicile are two totally different concepts which deserve different and separate treatments. A person may change his place of domicile but yet not be divested of his nationality. It would be fallacious to think that the terms "domicile" and "residence" as being synonymous…'

The court in *Melvin Lee Campbell v Amy Anak Edward Sumek* (1988) 2 MLJ 338 had occasion to consider whether parties were of Malaysian domicile on a divorce petition presented by an American husband and a Sarawak native (Malaysian). The husband asserted that he had abandoned his domicile of origin and acquired a Malaysian domicile of choice, having lived in Malaysia for more than ten years prior to the presentation of the joint petition. Apart from his residence, the court considered the fact that the husband had neither bought any property nor made any actual investments in Malaysia, and that his previous business enquiries were exploratory in nature. The court viewed the evidence with care and caution and was not satisfied that his domicile of origin had been abandoned:

'... the provision of Section 48(1) in my view requires that the court must be satisfied that at the time is presented, the domicile of both the petitioners was in Malaysia… Taking into consideration all factors both in favour and against the husband petitioner in the light of all the relevant circumstances, and giving due consideration to his assertion that he intended to make Malaysia his permanent home, and also bearing in mind that the burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the husband petitioner, I have, with regret, come to the conclusion that the husband petitioner has not succeeded in showing to my satisfaction that at the time of the presentation of the joint petition his domicile was in Malaysia. Accordingly, I rule that in relation to the instant joint petition, the court has no jurisdiction to entertain it.'

In *Gurcharan Singh a/l Karnal Singh v Mninder Kaur a/p Piara Singh* (2010) 6 MLJ 405, the High Court was presented with a petition for registration of a foreign divorce order, which the Malaysian husband had obtained in Arizona after a short residence of three weeks. The court refused the husband's application for a declaration to recognise the foreign divorce decree, holding:

'As the marriage was solemnised in Malaysia, the foreign decree obtained by the petitioner in this case required a court order declaring it to be valid. Malaysia does not have any specific provision in the LRA 1976 or any other legislation for the recognition of a foreign divorce, so the Malaysian court would need to refer to the UK common law position pursuant to s 3 of the Civil Law Act 1956 and also s 47 of the LRA 1976. According to English case law, the true test of jurisdiction to dissolve a marriage was the domicile of the married pair. Thus a divorce granted by a court of another country would not be recognised as valid in England unless the parties were domiciled in that country.

Similarly, by applying the relevant common law principle, a Malaysian court should only recognise a foreign decree of divorce to dissolve a Malaysian marriage if it was granted by the court of the parties' domicile.'

## Exceptions to the domicile requirement

Section 49 of the Act provides exceptions to the general rule that only parties domiciled in Malaysia may file a petition for divorce (joint or contested).

This section mitigates the harshness of section 48 of the Act caused to a wife (not a husband). Strict application of section 48 may result in injustice caused to the wife who has been deserted or whose husband has been deported from Malaysia, and whose husband was, before the desertion or deportation, domiciled in Malaysia.

The wife would be able to commence proceedings although the husband is no longer domiciled or resident in Malaysia at the time when the petition is presented. This is subject to the pre-condition that the wife must have been resident in Malaysia for two years immediately preceding the commencement of the proceedings and that her husband must have been domiciled in Malaysia before the act of desertion or deportation.

This protects a wife who, by virtue of her marriage, had acquired a domicile of

dependence in Malaysia or had her domicile of origin in Malaysia by her husband transformed into a domicile of dependence because of her marriage.

This section also applies equally to such a wife who has not undergone any change in her Malaysian domicile because the parties to the marriage were domiciled in Malaysia at the time of marriage but now faces a possible change in her domicile of dependence as her husband has acquired a domicile of choice in another country.

## Domicile, CEDAW and the Federal Constitution

The issue of domicile in the context of section 48 is presently being revisited by the Malaysian Court of Appeal in *Pauline Chai Siew Phin v Tan Sri Khoo Kay Peng*.

### *English proceedings*

The wife had filed a divorce petition in London in February 2013, alleging that she had acquired English domicile. The husband applied to strike out the petition and the issue of the English court's jurisdiction to hear the petition has been fixed for hearing in October 2014.

### *Malaysian proceedings*

On 11 December 2013, the husband obtained an order from the Malaysian High Court where the judge had allowed the husband to dispense with the requirement of referring the matrimonial difficulty to the Reconciliatory Tribunal, with leave issue a divorce petition. The wife applied to stay said exemption but this was dismissed. The High Court judge had held that the husband could file his divorce petition in Malaysia as the wife's domicile was dependent on his.

Legal arguments advanced by the wife's counsel on appeal have, inter alia, approached the issue from two angles. These are:

a) that section 48 of the Act and the application of the English common law position on domicile, is discriminatory of women and unconstitutional, by contravening Article 8(2) of the Malaysian Federal Constitution:

   Article 8(2): 'Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, gender or place of birth in any law…'

b) that Malaysia has allegedly breached its international obligations under Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on the issue of the acquisition of domicile of choice by a wife.

By way of background, in 1995, Malaysia had acceded to CEDAW with a number of reservations by the Malaysian government specifically in areas that conflicted with domestic laws (ie, Federal Constitution/ Sharia laws). The government's reservation in the context of this case, included Article 16(1)(c) and the relevant passage is reproduced below:

> 'On 19 July 2010, the Government of Malaysia, notified the following:
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> "... , the Government of Malaysia, [...] withdraws its reservations in respect of articles 5 (a), 7 (b) and 16 (2) of the Convention; ... ."
>
> The previous reservation reads as follows:
>
> 'The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles [5(a), 7(b), 9(2), 16(1)(a), (c), (f), (g), (h), and 16(2)] of the aforesaid Convention.'
>
> Article 16(1)(c) of CEDAW:
>
> "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ….;
>
> (c) The same rights and responsibilities during marriage and at its dissolution;"[1]

The husband's counsel submitted that, due to the Malaysian government's reservation to Article 16(1)(c) of CEDAW:

a) CEDAW does not apply to the Act which governs marriage and divorce laws of non-Muslims. The current law presumes that a wife's domicile is dependent on her husband's, ie, Malaysia;
b) The application of the landmark High

Court case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832, which recognised that '… CEDAW had the force of law and was binding on member states, including Malaysia' was distinguished and restricted to areas where the Malaysian government has not expressed any reservations.

c) In any event, any discriminatory effect of sections 48–49 of the Act on the domicile of a wife/spouse would be the role of legislature to address and not be on a piece-meal basis by way of judicial intervention.

In the meantime, family practitioners eagerly await the Court of Appeal's judgment in *Pauline Chai Siew Phin v Tan Sri Khoo Kay Peng* on this issue which were fixed for 24 April 2014.

**Note**

1 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#71.

# International surrogacy and same-sex partners: the Israeli approach

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## Introduction

In my article in the September 2013 edition of Family Law Newsletter, 'The Israeli family court: judicial powers and therapeutic interventions', I briefly described the jurisdiction, principles and practices of the Israeli family courts.

In this article I show how these principles and practices are applied by reporting on a case decided in March 2014 by the Family Court in Tel-Aviv.[1] The court was able to deal with a novel situation involving a same-sex couple and international surrogacy, even in the absence of specific legislation.[2]

## The facts

The plaintiffs, A and G, are two males who have lived together since 2006, and married (outside Israel; Israel has not yet passed legislation for same-sex marriages) in 2009. In 2010, they wished to expand their family, and entered into an agreement whereby they would obtain ova from an anonymous donor, fertilise the ova with sperm from each of them, and have the fertilised ova implanted in a surrogate's womb, in the hope that two children would be born. They made a surrogacy agreement in California, US, with a woman whom they chose. After the pregnancy had been confirmed, they also made and signed a parenting agreement, which included provisions that the child or children to be born would have both of the plaintiffs as parents for all purposes, irrespective of the identity of the genetic father, and detailed arrangements about custody, visitation and child support in the event that the relationship between them should come to an end. One daughter was born and, in accordance with the law of California, both the donor of the ova and the surrogate waived any legal relationship with the child, and the plaintiffs were recognised and registered jointly as the parents of the child.

## The case before the court

After returning to Israel, the plaintiffs requested registration and recognition as parents under Israeli law.

After DNA testing proved that G was the genetic father of the child, and he was duly registered as father, the plaintiffs jointly applied to the Family Court under section 1(4) of the Family Courts Law for a paternity declaration, namely that A was also the father of the child.[3]

The Attorney-General, representing the state, was the defendant to the action. The response given was in essence that the State