

Family law essay

[Law](#), [Criminal Justice](#)



(a) Voidable marriages are those marriages which exist in the eyes of the law and shall remain valid until annulled (Lim 18). Under the Section 20B of the MCO, the parties who contracted a voidable marriage will enjoy the rights and the duties of a married couple until a decree of nullity has been made absolute by the court. The difference between a void and voidable marriage is that in voidable marriages, even if there are factors which exist to make a marriage voidable and the parties are allowed to choose to continue with the marriage despite the existence of the factors. However, in the event that one of the parties wants to terminate their marriage, such party should apply to the court for a decree of nullity to be granted.

The marriage of Francis and Elma falls within the definition of voidable marriage. A voidable marriage is one which is valid in all intents and purposes until it is declared null and void by the court of law (Lim 22). Based on the facts of the case, at the time of the marriage, Elma was already pregnant and the father of the unborn child is another man, and not her husband Francis. Such condition is one of the factors of a voidable marriage under Section 20(2) of the MCO since Elma was pregnant by some other person other than the husband. Francis is allowed under the law to annul their marriage, provided that the application for nullity is applied within three (3) years from the date of their marriage. After the period of three (3) years has elapsed, the law will presume that the parties have chosen to continue with the marriage. In the event that one of the parties will choose to terminate the relationship after the lapse of three (3) years, the only way to terminate the marriage is to file for divorce.

It bears stressing that where a marriage is voidable, one of the defenses is

the general equitable defense. The Supreme Court ruling in the case of *Scott v. Scott* [1959] 1 All E 531, provides that the petitioner knew that there is a remedy available to have the marriage avoided but still conducted himself in relation to the respondent as to lead her to believe that he will not seek to annul the marriage is deemed to have approved the defects in the marriage.

(b) Elma can file a petition for divorce under Section 11A (2) of the MCO based on the following grounds: 1.) adultery; 2.) unreasonable behaviour in such a way that petitioner cannot reasonably be expected to live with the respondent and desertion; and 3.) desertion (Lim 52).

Based on the facts of the case, Francis no longer spends time with his wife and children since he stays away from home most of the time and spends overnights elsewhere. Francis is suspected to be committing adultery since he no longer engages in sexual intercourse with his wife and may be having sex with other women. Francis, who is currently one of the most sought-after actors, is being swarmed by female admirers who are usually beautiful women and models which made him pay little attention to his wife. Such facts will show that the marriage has deteriorated based on the unreasonable behavior of Francis and he no longer fulfills his matrimonial obligations as a good husband should.

Unreasonable behavior refers to acts that amount to physical or mental mistreatment of the wife, children or any of the family members. In the case of Francis, his unreasonable behavior can be illustrated in several occasions when he just leaves home without telling Elma his whereabouts and the reason why he has to go out of the house and spend overnights. This is considered as a mental torture on the part of the wife since the husband no

longer engages in sexual intercourse with her and is believed to be having affairs with other women.

He failed to give time not only to his wife, but also his children. Francis is also guilty of desertion since he has neglected his children by not spending time with them. Desertion is the intentional permanent forsaking and abandonment of one spouse by the other without reasonable cause and the consent of the other spouse, and without the consent or fault of the spouse who is asking for relief (Lim 57).

In the case of *Williams v. Williams* [1943] 2 AER 746, desertion is a course of conduct and a continuing matter. Desertion can be proven by the following elements:

1.) There is separation; 2.) The respondent had the intention to live separately from the petitioner on a permanent basis; 3.) The petitioner did not give his or her consent to the separation; 4.) The other party did not have good or reasonable cause for the separation; and; 5.) That the separation between the petitioner and the respondent had lasted for at least one year (Lim 58).

Based on the facts of the case, Elma accidentally received an e-mail message that was intended to be for Francis that came from one of their mutual friends which contains the intention of Francis to live separately from the petitioner on a permanent basis for his intention to annul or divorce Elma and pay maintenance of her and their daughter Ellie. He does not intend to support their son Franco for he believes that he is not the father and fears that one day all his fortune may be taken up by this boy.

Therefore, Elma can successfully file a petition for divorce against Francis based on adultery, unreasonable behaviour and desertion.

(c) Yes, Elma can apply for maintenance pending suit (MPS) while the petition for nullity or divorce is filed and being heard by the court of law for the time being.

Maintenance Pending Suit or MPS refers to the order of the court for either party to the marriage to make to the other party such periodical payments for his or her maintenance, which may be paid weekly or monthly, or whenever the court deems appropriate. The order of the court should be for a periodical payment from one party to the other, beginning from the date of the divorce petition, date of nullity application or date of joint application for divorce (Lim 94). Such order should meet the criterion of “reasonableness” as determined by the court where the case is pending.

The factors that will be considered by the court are enumerated in the case of HJFC v KYC, CACV127/2011, it was held that the principles that guide the judges to ensure fairness shall be: 1.) The single criterion is “reasonableness” or “fairness”; 2.) In order to determine fairness, the marital standard of living shall be taken into account and 3.) In a maintenance pending suit application, the court shall determine a particular maintenance pending suit budget that should be followed, but does not cover the capital or long-term expenditure, which will only be decided during the final hearing.

In the case of V. v. V [1982] 12 HKLJ 83, the High Court held that the court is not required by law to make a detailed investigation and look into the financial position of the parties before making a maintenance order pending

suit. What is only required by law is to satisfy the criterion of what is reasonable by having due regard to the needs of the applicant of the MPS (Lim 94).

In the case of *Wong Che Wai, Raymond v Wong Chung Yee Fung Helen* [1983] 1 HKC 556, it was held that the court is only required to fix a reasonable figure for maintenance by taking into account the immediate needs of the wife and the children and the ability of the husband to pay. In this given case, the court will take into consideration the needs of Elma and the children and the income of Francis, who is a famous actor.

The court has the power to grant the custody of the child to either the husband or the wife until the children reaches 18 years of age (Lim 36).

However, in the case of *Franco and Ellie*, there is a greater chance that the court will grant the custody to their mother since their father was the one who committed the matrimonial wrong. In effect, Francis is the guilty spouse, which is a strong evidence to convince the court that it will be for the best interest of the children if the mother is granted the custody of the children.

Francis cannot raise the issue that he is not the biological or natural father of the Franco since Elma was already pregnant by another man at the time of the celebration of the marriage. Here, the court must take into account S2 of MPPO which defines child to include also adopted or illegitimate child and child of the family, which includes a child who has been treated by the parties as their own child, whether blood relatives of both or one party or non blood relatives of either party. Franco falls within the definition of a child under the law, who shall be entitled for support. The law under MPPO and MCR provides that even illegitimate child can succeed on intestacy of a

deceased parent and have all the rights and benefits. After providing evidence before the court that Franco is a child of family, the legal consequences will attach to the parents, which include the right to be supported by Francis.

d). For the financial arrangements the court will make on divorce, the court should take into consideration the maintenance for spouse and child, custody of child under 18 or receiving education and division of assets between the spouses. The financial provision order also known as ancillary relief under Sections 3, 4, 5, 6 and 6A of the MPPO allows Elma to demand maintenance and asset re-arrangement from Francis. The court will render a fair maintenance order and fair asset re-arrangement order in such a way that will maintain the living standards, conditions and environment of children before the separation of their parents (Lim 96). In the case of *White v. White* (2001) 1 A. C. 596, the House of Lords ruled that the wife can apply for ancillary relief to continue maintaining her living conditions, future needs and requirements.

The spouses can enter into financial arrangements or maintenance agreements under Section 14(2) of the MPPO which will include payments for the use and disposition of property and education of the children (Lim 97). In rendering the decision, the court will take into consideration the factors under Section 7(1) of the MPPO for spouse and Section 7(2) for children based on financial factors, obligation factors and physical factors. The financial factors will include income, earning capacity, property and financial resources. The obligation factors will include the financial needs, obligations and responsibilities, standard of living and contributions to the family. On the

other hand, the physical factors cover the age of the spouses during the marriage, the duration of the marriage, among others (Lim 102-103).

In case of the arrangements for matrimonial home, the court usually grants an order that will require the property to be sold based under Section 6(1) (a) (e) and 6A(1) of the MPPO (Lim 111). In the event that selling of the matrimonial home is not possible for the reason that the children are still young, the court may order the transfer of the property to the spouse who will raise the children for the benefit of the children pursuant to Section 6(1) (a) of MPPO.

In the case of *Prest v Petrodel* (2003) UKSC 340, the court held that any property that the parties to the marriage are entitled to, may be transferred to the other party or the child of the family or a specified person for the benefit of the child under Section 6 (1) (b) of MPPO (Lim 99).

In the case of *Elma* and her children, they may continue to occupy the home and order that any sale of the home be postponed as provided under Section 17 of MPPO. This ruling was settled in the case of *Hui I Mei v Cheng Yau Shing* (1996) 4 HKC 145 where the court may allow the parent with the parent to occupy the home and order that any sale of the home be postponed until a later date, or until the children will reach 18 years of age.

The amount of ancillary relief will be calculated based on the principle of fairness as decided in the case of *DD v LKW* (2008) HKC 134, where the court ruled that the division of matrimonial assets shall proceed on the basis of fairness (Lim 105). The spouses shall be entitled to an equal share of the assets of the partnership unless there is a valid reason to the contrary. The application of the fairness principle shall be based on the computation of

valuable assets, property, income, earning capacity and financial resources that the parties will have in the future.

The principle of need shall cover the financial needs, obligations and responsibilities of the parties, the standard of living of the family, age of the parties, or any physical or mental disability of the parties under Sections 7(1) (b, c, d and e) (Lim 107). On the other hand, the principle of compensation include financial disadvantage that the parties may face upon divorce as the result of such decision, the financial disadvantage that any party may have suffered and any loss of potential pension rights under Section 7 (1) (g) (Lim 107).

The principle of sharing shall include the contributions of each party to the welfare of the family under Section 7(1)(f); the duration of the marriage under Section 7(1)(e); and the conduct of the parties that will be inequitable to disregard. The equal sharing principle will mean that the marriage is a partnership of equals where the husband and the wife lived and worked together to acquire the assets and entitles them to equal shares (Lim 107).

However, in the case of Francis and Elma, the law states that three (3) years of marriage is considered as a short time for the duration of the marriage.

Thus, the financial arrangement shall not be equally shared and shall be dependent on the contribution of the parties. Here, since Francis is the bread winner of the family, he is entitled to a greater share in the financial settlement that is ordered by the court. However, the states that not only the souse who is earning money in the workforce market should be entitled to receive more since the one is staying at home to take care the children and family will fall as a contribution to the family.

The formula to calculate how much the parties will receive based on the financial arrangement shall be based on the traditional formula or the “one-third rule” that may be used on computing the division of the joint assets of the spouses during the marriage (Lim 105). This means that the wife will get 1/3 of the joint monthly income of the spouses. The rationale behind this ruling is that the wife must not be entitled to receive half of the husband’s assets and earnings as part of their settlement (Lim 105).

Child Maintenance under Section 7(2) of MPPO shall be based on the financial needs of the children, the income, earning capacity, property and financial resources of the child if any, the standard of living of the family, the child’s education or any physical or mental disability of the child.

In this given case, the court will make a ruling based on the benefit of the two children by granting custody to Elma, who is their mother who shall raise and rear the children who are still young. The court must allow Elma and the children to continue to occupy the home in mid-level and provide maintenance order for Elma, Franco and Ellie. Franco shall still be entitled to support since he falls under the legal meaning of child under Section 2 of MPPO. The law defines child to include also adopted or illegitimate child and child of the family, which includes a child who has been treated by the parties as their own child, whether blood relatives of both or one party or non blood relatives of either party. Any illegitimate child is allowed by law to succeed on intestacy of a deceased parent and have all the rights and benefits under MPPO and MCR after proving before the court that he is a child of the family. Hence, as part of the legal consequences of Francis,

being the parent of Franco and Ellie, Francis needs to give them financial support.

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