IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 39

Civil Appeal No 172 of 2015

Between

(1) YAP CHAI LING
(2) YAP SWEE JIT

… *Appellants*

And

HOU WA YI (M.W.)

… *Respondent*

In the matter of Registrar's Appeal (State Courts) No 110 of 2014

In the matter of Section 99(2) of
the Women's Charter (Cap 353)

And

In the matter of Divorce Suit
No D2201 of 2005/B

Between

(1) YAP CHAI LING
(2) YAP SWEE JIT

… *Appellants*

And

HOU WA YI (M.W.)

… *Respondent*

Version No 1: 27 Oct 2020 (22:39 hrs)

JUDGMENT

[Family law] — [Divorce] — [Decree absolute and decree nisi]
[Conflict of laws] — [Recognition of foreign divorce judgment]
[Res judicata] — [Issue estoppel]

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Yap Chai Ling and another
v
Hou Wa Yi

[2016] SGCA 39

Court of Appeal — Civil Appeal No 172 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Quentin Loh J
13 May 2016

5 July 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an unusual and unfortunate case, notwithstanding the important point of law that arises. It is unusual because a decree *nisi* ("the Decree *Nisi*") issued by a Singapore court pursuant to an uncontested divorce petition is now sought to be rendered a nullity in circumstances where *the husband has already passed away*. It is unfortunate, not only because of the husband's death, but also because there appears to be a high degree of animosity and acrimony between the parties. This may, in part at least, explain why the proceedings have been so vigorously prosecuted from the district court right up to this court despite the relatively small amount that is actually at stake.

2 The applicants ("the Appellants"), who are seeking, *inter alia*, a declaration that the Decree *Nisi* is null and void, are the executors of the husband's ("the Husband") estate and are the beneficiaries of the bulk of this estate under the Husband's will dated 26 January 2002 ("the Will"). If the Appellants are successful in this appeal (and their application), the wife ("the Respondent") will receive only what she is entitled to under the Will and will receive nothing from the ancillary orders that were made pursuant to the Decree *Nisi* (which the Respondent has also appealed against (see *Hou Wa Yi v Yap Kiat Cheong* [2009] SGDC 464 and below at [21])).

3 Against this backdrop, the issue which arises in this appeal is whether the Decree *Nisi* is a nullity on the basis that the marriage between the parties had, at the time the Decree *Nisi* was issued, already been dissolved by a prior divorce judgment issued by the Shanghai court ("the Shanghai divorce judgment"). This issue raises an important point of law as to whether or not the Shanghai divorce judgment is *against public policy* and should therefore *not* be recognised by the Singapore courts. If the Shanghai divorce judgment is recognised by the Singapore courts, the Decree *Nisi* would be a nullity and consequently, the Respondent would not be entitled to receive her share of the matrimonial assets pursuant to the ancillary orders made by the Singapore court on the back of the grant of the Decree *Nisi*.

4 We should pause to note – as we did at the outset of oral submissions before this court – that the issue with respect to recognition of the Shanghai divorce judgment is one of two main strings to the Appellants' legal bow. The other main string is in the Appellants' argument that the Decree *Nisi* had been granted contrary to relevant facts which, in turn, cast doubt on the factual basis for the grant of the Decree *Nisi* (*ie*, that the Husband and the Respondent had lived apart for four years before the filing of the divorce petition). As we

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intimated to counsel during oral submissions before us, we are of the view that both the District Judge ("the DJ") and the High Court judge ("the Judge") were correct in rejecting this argument and we therefore do not say anymore on this, save to make brief references where relevant. We are thus left with the first string which raises the question of whether the Shanghai divorce judgment is against public policy and should accordingly not be recognised in Singapore (which we will hereafter refer to as "***Issue 1***").

5 *However*, as we mentioned during oral submissions to counsel for the Appellants, Mr Koh Tien Hua ("Mr Koh"), *even if* we were to hold that the Shanghai divorce judgment ought to be recognised (contrary to the views of both the DJ and the Judge), this would *not necessarily* conclude the appeal in favour of his clients. There is a further issue, which the Judge had also alluded to, which is whether, on the assumption that the Appellants are acting as *the Husband's personal representatives*, they are (due to *the Husband's* actions which would be attributed to them as his personal representatives) guilty of an abuse of process of the court under the well-established doctrine of extended *res judicata* and are, as a result, barred from raising the Shanghai divorce judgment as part of their case (we will hereafter refer to this as "***Issue 2***").

6 When faced with the difficulties with his clients' case arising from Issue 2, Mr Koh then argued at the oral hearing – *contrary to* what was stated in the original application *and* what he had maintained in the proceedings below – that the Appellants should be considered as having brought the application for declaratory relief in their *personal capacities* so that any actions by the Husband could not be attributed to them (we will hereafter refer to this as "***Issue 3***").

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7 Before proceeding to consider each of these issues *seriatim*, we set out in more detail the facts and background as well as the respective decisions of the DJ and the Judge in the courts below.

The facts

The marriage

8 On 21 August 1991, the Husband, a Singapore citizen, married the Respondent, a Chinese national, and registered their marriage in Shanghai ("the Shanghai Ceremony"). The married couple subsequently moved to Singapore.

9 The Husband then applied for the marriage to be registered in Singapore. He had, however, overlooked the fact that at the time of his marriage to the Respondent in Shanghai, he was still legally married to his previous wife. The Husband married his previous wife in Singapore on 28 September 1959. At the time of the Shanghai Ceremony, he had only obtained a decree *nisi* (as opposed to a decree absolute) in respect of his previous marriage. For this, he was charged with bigamy in January 1992 and the Respondent was deported. The charge was later dropped.

10 On 1 June 1992, a decree absolute was granted dissolving the Husband's previous marriage in Singapore. This paved the way for the Respondent's return to Singapore. The Husband and the Respondent then solemnized and registered their marriage in Singapore on 30 September 1992 ("the Singapore Ceremony"). They lived in Singapore thereafter.

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The divorce proceedings

11 Unfortunately, the marriage broke down. From July 2000 onwards, the Husband and the Respondent began living in separate rooms. On 25 April 2001, the Husband commenced, in Singapore, Divorce Petition No 601380 of 2001 seeking a dissolution of the marriage due to the Respondent's unreasonable behaviour. This petition was contested by the Respondent and the Husband subsequently withdrew it on the understanding that they would proceed with the divorce on an uncontested basis. In November 2002, the Respondent left Singapore and returned to Shanghai for good.

The Shanghai divorce proceedings

12 On 13 July 2004, the Husband commenced divorce proceedings in the Min Xing District People's Court in Shanghai ("Shanghai first instance court"). The Respondent contested the proceedings on the basis that the marriage in Shanghai was null and void since the Husband was still legally married to his previous wife at the time of the Shanghai Ceremony. In addition, she took the position that divorce proceedings should be commenced in Singapore instead of Shanghai.

13 On 24 March 2004, the Shanghai first instance court ruled against the Respondent and granted the divorce (*ie*, the Shanghai divorce judgment). The court agreed with the Respondent that the marriage was not valid at its inception but held that it became valid *from* 1 June 1992, when the Husband obtained the decree absolute in respect of his previous marriage in Singapore.

14 Dissatisfied, the Respondent appealed against the Shanghai divorce judgment. On appeal, the Respondent argued substantially the same points while the Husband adopted the reasoning of the court below. She argued that

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by reason of the decree absolute, "the situation causing the marriage to be void was no longer in existence, thus the marriage registration of both parties in Shanghai had become a valid marriage".

15 On 20 June 2005, the Shanghai No 1 Intermediate People's Court ("the Shanghai appellate court") dismissed the appeal. The Shanghai appellate court explained that the marriage law "stipulates that the People's Court shall not grant an application for a declaration that a marriage is void when the situation causing the marriage to be void is no longer in existence at the time of the application". Thus, the Shanghai appellate court held that the marriage in Shanghai, while invalid at its inception, became valid *from* 1 June 1992 when the decree absolute was granted in Singapore.

16 Both at first instance and on appeal, the Husband and the Respondent stated that they did not want the Shanghai courts to divide the matrimonial assets. At a separate point in time afterwards, the Husband applied to the Chinese courts for division of the matrimonial assets. On 11 June 2006, the Chinese courts ordered a division of the Chinese assets only, leaving the Singapore assets untouched.

Singapore divorce proceedings

17 On 20 May 2005, the Respondent filed Divorce Petition No 2201 of 2005 ("D 2201"), citing the Husband's unreasonable behaviour as the reason for the irretrievable breakdown of the marriage. The Husband responded by filing a summons to strike out D 2201 but subsequently withdrew it. One year later, the Respondent amended the petition by deleting the reference to the Husband's unreasonable behaviour. This time, she cited as the basis for the divorce the fact that she and the Husband had lived apart for a continuous

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period of at least four years prior to the filing of D 2201. Following this, the matter proceeded on an uncontested basis and the court granted the Decree *Nisi* on 29 September 2006.

18 When the parties attended before a district judge for the hearing of the ancillary matters on 17 December 2007, the judge raised concerns over the effect of the Shanghai divorce judgment.

19 The Husband then filed two successive applications for a declaration that the Shanghai divorce judgment had dissolved the marriage and that D 2201 should therefore be struck out and the Decree *Nisi* rescinded because at the time D 2201 was filed, there was no subsisting marriage for the Singapore courts to dissolve. The first application was an originating summons filed on 2 June 2008 in the High Court. This application was withdrawn on 30 September 2008. The second was a summons filed in D 2201 itself and was withdrawn on 3 April 2009.

20 After these two applications were withdrawn, the court ruled on the ancillary matters. During the hearing, the Husband and the Respondent informed the court that the Chinese assets had been divided by the Shanghai courts and that there was an agreement between the parties that no further orders should be made in respect of those properties. Accordingly, the court gave orders in respect of the division of the Singapore assets only. The Husband subsequently requested for further arguments to be presented to the effect that a shophouse, worth $1.7m, should be excluded from the pool of matrimonial assets since the Respondent had agreed to this. On 19 November 2009, this request was granted and the ancillary orders were varied to exclude the shophouse from the pool of matrimonial assets. The assets remaining in the matrimonial pool comprised property, shares and several sums of money in

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bank accounts. Under the ancillary orders made, the Respondent was awarded $62,176.87 as her share in the matrimonial assets and lump sum maintenance of $14,400, adding up to a total of $76,576.87. Dissatisfied with the ancillary orders made, the Respondent appealed.

Events following the Husband's death

21 On 8 February 2011, while the Respondent's appeal against the ancillary orders was pending, the Husband passed away. On 22 March 2011, the appeal against the ancillary orders was adjourned indefinitely.

22 In the Will, the Husband left the bulk of his estate to the Appellants, who were his niece and nephew. As mentioned at the outset of this judgment, they were also named as the executors of the estate. Letters of probate were granted on 29 March 2011. Under the Will, the Respondent was to receive $1,000.

23 On 3 June 2011, the Appellants applied, as interveners in D 2201, for the Decree *Nisi* to be made absolute. The application was rejected by the district court on the ground that the marriage had been dissolved by the death of the Husband and, hence, the court had neither the jurisdiction nor the power to grant a decree absolute. The Appellants appealed to the High Court and their appeal was dismissed on 27 March 2012 (see *Hou Wa Yi v Yap Kiat Cheong (Yap Chai Ling and another, interveners)* [2012] 2 SLR 995 ("*Hou Wa Yi 2012 HC*")). We will return to this decision shortly as it is germane to Issue 3.

24 Meanwhile, on 18 August 2011, the Respondent commenced a suit in the district court against the Appellants, as executors of the Husband's estate, for maintenance of her daughter ("M"). M was born in November 2003 and

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the Respondent alleged that M was the biological child of the Husband and his estate therefore had a duty to maintain her. In response, the Appellants filed a defence denying that M was the Husband's child. This action has been discontinued for want of prosecution.

The present application

25 On 22 July 2013, the Appellants filed the present application seeking the following prayers:

(a) An order that the Decree *Nisi* be declared null and void (*ie*, the prayer for declaratory relief).

(b) Further and in the alternative, an order that the Decree *Nisi* be rescinded and/or set aside.

(c) Consequently, that the ancillary orders be rescinded or set aside.

26 As previously mentioned, the main argument that was run by the Appellants was that the Shanghai divorce judgment had dissolved the marriage and that, by the time the matter came before the Singapore court in D 2201, there was no subsisting marriage for the court to dissolve. The Appellants also argued that there had been material facts that had not been placed before the court granting the Decree *Nisi*. These facts, which were extracted from the various documents filed in the convoluted divorce proceedings and the maintenance application for M, demonstrated that the Respondent and the Husband had not, in fact, lived apart for the requisite period of four years. The Appellants averred that the Decree *Nisi* was therefore granted on the basis of facts which have now been shown to be untrue. The Decree *Nisi*, and

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consequently the ancillary orders made pursuant to it, should therefore be declared null and void or rescinded.

The respective decisions in the courts below

The decision of the District Court

27 The decision of the District Court may be found in *Yap Chai Ling and another v Hou Wa Yi* [2014] SGDC 299. The DJ began by considering if there was a marriage to dissolve in D 2201. She held that there was a marriage to dissolve in D 2201. In her view, it was "abundantly clear that the Shanghai court was hearing the husband's application to dissolve the Shanghai marriage" given that "[t]here was no reference whatsoever to the Singapore marriage either in the Shanghai court or the Shanghai appellate court judgements [*sic*] or record of proceedings" (at [23]). The question to her mind was "whether the dissolution of the Shanghai marriage dissolved all marriage relationship between the husband and wife even though there is the Singapore marriage" (see *ibid*). This issue turned on whether the Shanghai divorce judgment ought to be recognised in Singapore as having dissolved the marriage relationship between husband and wife.

28 The DJ held that the Shanghai divorce judgment was repugnant to Singapore law and contrary to public policy. While both Chinese law and Singapore law had a policy against bigamous marriages, there was a crucial difference in so far as Chinese law accepted that the bigamous marriage between the Husband and the Respondent became valid when the Husband obtained a decree absolute for his previous marriage. Under Singapore law, a marriage that was bigamous in its inception could not become valid by a subsequent dissolution of the subsisting marriage (at [23]). As a result, the DJ held the Shanghai divorce judgment ought not to be recognised in Singapore.

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29 Turning to the second argument, the DJ found that there was no basis to conclude that the Husband and the Respondent did not live apart for four years (at [30]). First, the Appellants' assertions were not based on any personal knowledge of the marital affairs of the Husband and the Respondent. Secondly, the Husband, who was legally advised at all times, had himself relied on separation since July 2010 as the ground for divorce in his Shanghai divorce petition. Thirdly, the Husband did not contest the divorce proceedings, which were instituted by the Respondent on the basis that there had been separation between them for at least four years. Finally, in both his applications to have the Decree *Nisi* declared void, the only ground raised was that the marriage had already been dissolved by the Shanghai courts and the Husband stated that he and the Respondent had lived apart for four years (at [31]).

30 The DJ also considered that grave prejudice and injustice would be suffered by the Respondent if the Decree *Nisi* were to be set aside. She noted that the Husband had "in his lifetime ... applied to rescind the Decree *Nisi* … after the divorce was granted and in any event he withdrew his applications" (at [32]). If the Appellants were successful, the Respondent would be denied her share of the matrimonial assets pursuant to the ancillary orders made by the court and would only receive $1,000 under the Will. For all the above reasons, she dismissed the Appellants' application with costs.

The decision of the High Court

31 The decision of the High Court may be found in *Yap Chai Ling and another v Hou Wa Yi* [2016] 1 SLR 660 ("the GD"). The Judge began her analysis with a discussion of s 99(2) of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act"), which was the section that the Appellants' application

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was expressed as being taken out under. The Judge identified four constituent parts of s 99(2) of the Act ("s 99(2)"): (a) the jurisdictional requirement; (b) the standing requirement; (c) a substantive requirement; and (d) a discretionary component (see the GD at [31]).

32 In so far as the jurisdictional requirement was concerned, the Judge referred to the decision of this court in *Sivakolunthu Kumarasamy v Shanmugam Nagaiah and another* [1987] SLR(R) 702 ("*Sivakolunthu*") for the proposition that divorce proceedings do not abate upon the death of one of the parties to the marriage such that the court is deprived of jurisdiction over all subsequent matters in relation to the marriage. The key question was whether further proceedings could be taken and this depended on the nature of the further proceedings and the relevant statutory provisions engaged. The Judge found that, despite the death of the Husband, s 99(2) was still applicable because the Appellants were challenging the enforceability of the ancillary orders and not merely the status of the marriage (see the GD at [34]–[35]).

33 In so far as the standing requirement was concerned, the Judge undertook a comprehensive survey of the historical origin of s 99(2) and agreed with both counsel that, under s 99(2), any member of the public, *save for the parties to the marriage*, had standing. There were two reasons for this. First, proceedings for divorce were not merely a personal matter but were also a matter of public importance and members of the public should be allowed to show cause why a decree should not be made absolute, especially in light of the fact that parties to an unhappy marriage had an incentive to collude to procure a divorce. It has been the longstanding position in England, from which s 99(2) has its roots, that parties to the marriage could not avail themselves of this provision. Second, to allow the parties themselves to mount an attack on a decree *nisi* under s 99(2) would be to allow them a further

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opportunity to re-litigate a matter to which they had been a party, and this would therefore engage the doctrine of *res judicata* (see the GD at [37]–[45]).

34 Despite this, the Appellants maintained that they were acting as personal representatives. They claimed to have standing because they had a legitimate expectation that an order by the court is one that is sound and correct and not procured by misrepresentation. The Judge disagreed and found that, if they were bringing the action as personal representatives, they would not have standing. However, the Judge went on to rule that they could be allowed to bring their action under s 99(2) in their own names and allowed them to do so in that capacity (see the GD at [53]).

35 Turning to the substantive requirement, the Judge read the words "any person may show cause why the [decree *nisi*] should not be made [final] by reason of material facts not having been brought before the court" appearing in s 99(2) as raising the following three questions: (a) are the facts material in that they relate to the grant of the decree *nisi*; (b) were these facts before the court that granted the decree *nisi*; and (c) has sufficient cause been shown in that the facts raised must be completely incompatible with or must vitiate the basis for the grant of the decree *nisi*? Finally, even if the substantive requirements were fulfilled, the court nevertheless retained a discretion whether or not to set aside the decree *nisi* granted (see the GD at [54]–[56]).

36 On the issue concerning the effect of the Shanghai divorce judgment, the Judge expressed her difficulty with the structure of the Appellants' prayer for declaratory relief because, even though it was purportedly brought under s 99(2), there was no mention of that section in the submissions. The Appellants' submission appeared to rest merely on the fact that there was no marriage to be dissolved by the Singapore courts and, on this point alone, the

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Decree *Nisi* should be set aside. The Judge opined that this was not crucial and proceeded to reframe the Appellants' argument as one under s 99(2).

37 Before analysing whether the Shanghai divorce judgment should be enforced, a clarification was made by the Judge in respect of the marital status of the Husband and the Respondent. The DJ appeared to suggest that there could be multiple subsisting marriage relationships which could exist in parallel with each other and could be dissolved separately (see above at [27]). The Judge noted that, in so far as the DJ suggested the proposition just mentioned, it was clearly wrong (see the GD at [61]). The Judge referred to the Singapore High Court decision of *Noor Azizan bte Colony (alias Noor Azizan bte Mohamed Noor) v Tan Lip Chin (alias Izak Tan)* [2006] 3 SLR(R) 707 for the proposition that there can only be one marriage relationship between the parties, even though husband and wife undergo two or more marriage ceremonies. Marriage concerns the legal status of those who have entered into the marital union and, as a corollary, a divorce, which effects the dissolution of the marital union, operates on the marital status and not on the ceremonies or solemnizations preceding the formation of the marriage as such. The Judge thus held that the purport of the Shanghai divorce judgment was the determination of the marital status of the Husband and the Respondent (see the GD at [62]).

38 In so far as the Shanghai divorce judgment was concerned, the Judge found that its presence was indeed a material fact which should have been brought before the court. However, the Judge found that it was not incompatible with the grant of the Decree *Nisi* since the Shanghai divorce judgment ought *not* to be recognised on grounds of public policy. In her view, the regularisation of a bigamous union after the legal impediment to such a marriage no longer existed was contrary to our public policy against bigamous

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marriages, which is a cornerstone of our marriage law. To recognise the Shanghai Divorce Judgment would be to recognise that a bigamous marriage could be regularised (see the GD at [67]–[71]). The Appellants thus failed in respect of this argument.

39 On the facts relating to the four years separation, the Judge found that sufficient cause had not been shown as the facts alleged did not vitiate the foundation of the Decree *Nisi*. The facts had not shown that the Husband and the Respondent resumed the *consortium vitae* and, even if they did, there was no evidence that this lasted for a period of six months or more (see the GD at [78]–[80]).

40 The Judge concluded her decision with a discussion of the discretionary component in s 99(2) even though her analysis up to that point was sufficient to dispose of the appeal. She explained that she would *not*, in any event, have rescinded the Decree *Nisi*. First, the Respondent would have been denied ancillary relief in respect of the Singapore assets even though both the Husband and she agreed that the Singapore assets were to be dealt with by the Singapore courts. Secondly, it was an abuse of process to raise these facts now since they should properly have been raised at the hearing for the grant of the Decree *Nisi*. Finally, the conduct of the Appellants in applying for the Decree *Nisi* to be made absolute should also be held against them since they had failed to act with reasonable expedition, causing further delay with consequential detriment to the Respondent. For all of these reasons, the Judge dismissed the appeal.

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Our decision

Issue 1

41 To recapitulate, Issue 1 is whether the Shanghai divorce judgment is against public policy and should therefore not be recognised. As already noted above, both the DJ and the Judge had held that this divorce judgment was against public policy and should therefore not be recognised.

42 We digress, for a moment, to make three brief observations. First, we are in complete agreement with the Judge in relation to her analysis of the marital status of the Husband and the Respondent (see above at [37]). To reiterate, although there were two different ceremonies in this case (*ie*, the Shanghai Ceremony and the Singapore Ceremony), there remained but one marriage between the Husband and the Respondent. References to the "Shanghai marriage" and the "Singapore marriage" were merely convenient shorthand ways of denoting the different *possible* commencement dates of the union between the Respondent and the Husband.

43 Secondly, we also agree that the purport of the Shanghai divorce judgment was to terminate the marital status of the Husband and the Respondent. Counsel for the Respondent, Ms Dorothy Chai ("Ms Chai"), submits that the Shanghai divorce judgment dissolved only the "Shanghai marriage" as it made no reference to the "Singapore marriage" or the Singapore Ceremony. We reject this submission. It is apparent to us that the Shanghai court was pronouncing a divorce over the status of the parties. This is consistent with the fact that marriage is a legal status and there can only be one marriage between the parties (see above at [42]). Furthermore, there seems to us to be no reason for the Shanghai court to have referred to the Singapore Ceremony, once it had decided that there was a valid marriage

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between the parties from 1 June 1992 (*ie*, the date the Husband obtained a decree absolute for his previous marriage). Since, through the legal lenses of the Shanghai court, the marriage started from that date, there was no need to refer to the "Singapore marriage" or Singapore Ceremony which was held later (on 30 September 1992).

44 Finally, we address the Judge's difficulty with the manner in which the Appellants' framed their argument for declaratory relief (see above at [36]). The Judge noted that no reference was made to s 99(2) in the submissions of the Appellants but nevertheless recharacterised the argument as being brought under s 99(2). It appears to us that the Appellants were not relying on s 99(2) in their arguments. Rather, they were relying on the more fundamental premise that the grant of the Decree *Nisi* was a complete nullity because there was no subsisting marriage to dissolve after the Shanghai divorce judgment. Assuming that the Appellants' arguments were premised on s 99(2), the Judge opined that, if the Appellants were acting in their capacity as personal representatives of the Husband (as Mr Koh had maintained), they would not have the requisite standing. Nevertheless, the Judge allowed the Appellants to canvass this point before her on the basis that they were acting in their own capacities and not as personal representatives (see above at [33]–[34]). In our view, the Appellants are mounting the argument that the Decree *Nisi* is a nullity *qua* ***personal representatives*** and *not* in their personal capacities. That the Appellants are acting in that capacity is clearly stated in the originating summons. Indeed, during the oral submissions before us, Mr Koh took the position that the Appellants were acting as personal representatives until we highlighted that there may be a further barrier for his clients to surmount in the form of the doctrine of extended *res judicata.* This prompted him to take the position instead that the Appellants were acting in their personal capacities.

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For these reasons, we shall proceed on the footing that the Appellants were acting as personal representatives (as noted earlier, we will deal with Mr Koh's argument that the Appellants were, instead, acting in their personal capacities in our analysis of Issue 3).

45 Returning to the main issue, which is whether the Shanghai divorce judgment ought to be recognised, it is critical, in our view, to clarify what the precise issue was before the courts below and, of course, what it is before us now. In this regard, it is of paramount importance to appreciate that the concept of public policy is not one that can – particularly in the context of cross-jurisdictional disputes in the conflicts of laws sphere (as is the case here) – be applied liberally. This should be unsurprising as there is also the countervailing (and no less) vital consideration of the concept of comity of nations. Additionally, the concept of public policy is itself inherently difficult. In the oft-cited words of Burrough J in the leading English decision of *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294 (at 252 and 303, respectively), public policy is:

> [A] very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from the sound law.

46 And, in the decision of this court in *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609, this court, after citing the observation of Burrough J in the preceding paragraph, proceeded to observe as follows (at [34]−[35]):

> 34 Not surprisingly, the ebullient Lord Denning MR was far more optimistic than Burrough J. Again, in observations which are well-known and oft-cited (see also [*Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674] at [40]) in the English Court of Appeal decision of *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591, the learned Master of the Rolls observed thus (at 606):

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> With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.
>
> 35 Notwithstanding Lord Denning MR's optimism, the fact remains that the concept of public policy is indeed an unruly horse and must therefore be applied wisely. It might also be useful to note that, in the English High Court decision of *Tinline v White Cross Insurance Association, Limited* [1921] 3 KB 327, Bailhache J not only noted Lord Halsbury's view in the House of Lords decision of *Quinn v Leathem* [1901] AC 495 (at 506) that "the law is not always logical" but also (and more importantly for the purposes of the present case) proceeded to observe (at 331) that "[i]f the law is not logical, public policy is even less logical".

47 In the present appeal, the precise issue is whether this court ought to recognise *the Shanghai divorce judgment* (which purported to dissolve the *marriage* between the Husband and the Respondent which was registered on 21 August 1991 (*ie*, the Shanghai Ceremony) but only became valid on 1 June 1992 (*ie*, the date of the grant of the decree absolute for the Husband's previous marriage)).

48 The logically prior question to this is whether or not there was a valid marriage between the Husband and the Respondent at the time the Shanghai divorce judgment was rendered, keeping in mind that there can only be one marriage relationship between husband and wife. As evidenced by the Shanghai court decisions, under Chinese law, there was a valid marriage from 1 June 1992. Under Singapore law, there was a valid marriage from 30 September 1992 (*ie*, the Singapore Ceremony). Therefore, ***at the time of the Shanghai divorce judgment,*** it cannot be gainsaid that there was indeed a marriage between the Husband and the Respondent.

49 The next question is whether the Shanghai divorce judgment would be effective, *as a matter of Singapore law*, to bring to an end the marriage between the Husband and the Respondent. The answer would appear to be in

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the affirmative, especially when s 7(*b*) of the Act is considered. Section 7 of the Act itself reads as follows:

> **Continuance of marriage**
>
> **7.** Every marriage solemnized in Singapore after 15th September 1961, other than a marriage which is void under the provisions of this Act, shall continue until dissolved —
>
> (*a*) by the death of one of the parties;
>
> (*b*) by ***order of a court of competent jurisdiction***; or
>
> (*c*) by a declaration made by a court of competent jurisdiction that the marriage is null and void.
>
> [emphasis added in bold italics]

Ms Chai does not dispute that the Shanghai court was a court of competent jurisdiction. It is also clear that this was the view adopted by the Judge given that Shanghai was the domicile of the wife (see the GD at [65]). As explained in Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) ("*International Issues in Family Law*"), recognition of foreign matrimonial proceedings is governed by the common law and the court will recognise foreign decrees made by a court of competent jurisdiction (at para 5.47). It is further explained that the position now, with the abolition of the wife's dependent domicile (see s 47 of the Act), is that it is sufficient that a foreign decree is granted by a court of either party's domicile (see the Singapore High Court decision of *Asha Maudgil* v *Suresh Kumar Gosain* [1994] 2 SLR(R) 427 at [18] as well as *International Issues in Family Law* at para 5.53). As Shanghai was the wife's domicile, the Shanghai divorce judgment is an order of a court of competent jurisdiction. All of this points towards recognition.

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50 However, Ms Chai, relying on the Singapore High Court decision of *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 1 SLR(R) 485 (at [53] and [68(g)]), argues that recognition should be refused as enforcement would be manifestly contrary to public policy. She submits that the *law* in Shanghai is *different from* that in Singapore inasmuch as the former viewed the Husband's lack of capacity to marry as but a temporary legal obstacle to the validity of his marriage registered in Shanghai – this legal obstacle could be (and was) cured by the grant of a decree *absolute* in respect of the Husband's previous marriage. Under Singapore law, on the other hand, no such curing or regularisation was possible. Hence, the argument went, that to recognise the Shanghai divorce judgment would be repugnant to public policy as it would be tantamount to accepting that a bigamous marriage can be regularised.

51 We note, on the other hand, Mr Koh's citation of the decisions of both the Singapore High Court and this court in *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat* [2004] 2 SLR(R) 436 and *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 2 SLR(R) 690, respectively. In the former decision, Lai Siu Chiu J observed, in the context of the attempted enforcement of a judgment debt in relation to a wagering contract, that "the fact that if the present contract between the parties had been governed by Singapore law the contract could be invalid or void … does not mean that it, being governed by Nevada law and valid under that law, may not be enforced in Singapore". Hence, by parity of reasoning, the fact that Chinese law adopts a different legal position in respect of monogamous marriages which were bigamous in their inception from Singapore law does *not necessarily* entail a finding that Chinese ***public policy*** is contrary to Singapore ***public policy***.

52 What is crucial, in our view, is what the ***public policy*** in relation to marriage is in both jurisdictions. When viewed in this light, it is indubitable

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that the ***public policy*** in ***both*** jurisdictions is ***the same***. Simply put, both the Chinese ***and*** the Singapore legal systems ***only recognise a regime of monogamous marriages***. The corollary of this is that ***both*** these legal systems would ***not*** recognise ***bigamous*** marriages. The only (*specific*) difference lay in the approach adopted in a situation where one of the parties to the marriage had only obtained a decree *nisi* in respect of a previous marriage as opposed to a decree absolute. As we have already noted, under *Chinese* law, such a marriage could be rendered valid (or cured) when the decree absolute is eventually obtained, whereas there was no provision under *Singapore* law to this effect. However, this (particular) difference does *not*, in our view, lead to the conclusion that the respective ***public policies*** in China on the one hand and Singapore on the other are thereby *in conflict*. Indeed, even the "curative" approach adopted pursuant to Shanghai law is *intended to ensure that the (non-negotiable) rationale of* ***monogamy*** *is maintained.* We therefore, respectfully, disagree with the Judge that recognition of the Shanghai divorce judgment would be contrary to public policy.

53 In any event, we fail to see how recognition of the Shanghai divorce judgment "would be tantamount to acknowledging that a bigamous marriage may be regularised" (see the GD at [68]). It is important to once again emphasise the fact that the *difference* between the *laws* of Shanghai and Singapore is one that relates, in substance and effect, to ***the date of the commencement of the marriage***, ***whereas***, as already noted earlier in this judgment, the ***precise issue*** in the present appeal relates, instead, to whether ***a foreign divorce judgment*** (*ie*, the Shanghai divorce judgment) ought to be recognised by the Singapore courts. As we have explained, it is incontrovertible that the Husband and the Respondent were legally married (regardless of the precise date of commencement of the marriage) at the time

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of the Shanghai divorce judgment. Recognising the Shanghai divorce judgment would *only* require the Singapore courts to recognise that there was a ***subsisting marriage*** between the parties at the date of the said divorce judgment. Recognition does not require the court to acknowledge that the marriage had indeed commenced on 1 June 1992, as declared by the Shanghai courts. We emphasise that there already was, at the very least and as a matter of Singapore law, a marriage between the parties ***from*** 30 September 1992. Therefore, recognition of the Shanghai divorce judgment does not amount to an acknowledgement that bigamous marriages may be regularised.

54 We pause to note, however, that whether differences between jurisdictions on matters of public policy are engaged in questions of enforcement ***must depend on the particular facts in question***. By way of illustration, the public policy in relation to *regularisation of bigamous marriages* would, in our view, have been engaged if the Shanghai court had awarded maintenance to the wife for the period between the grant of the decree absolute in respect of the Husband's previous marriage and the registration of the Husband and Respondent's marriage in Singapore and the Respondent had sought to enforce that maintenance judgment in Singapore. The Singapore court would then have had to decide if maintenance *during that period*, which hinges on the regularisation of a bigamous marriage, was contrary to our public policy. ***As observed, that is <u>not</u> the situation in our case.***

55 *However*, the fact that the Judge was, with respect, wrong in holding that the Shanghai divorce judgment is manifestly contrary to public policy and should therefore not be recognised is (as we have already pointed out above) ***not*** conclusive of the present appeal in favour of the Appellants. If the Appellants could be demonstrated (via the relevant actions of the Husband

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when he was alive) to have abused the process of the court in bringing the present application and appeal, then the Singapore courts (including this court) can *disregard* Issue 1 in so far as it ought to have been raised in earlier proceedings. It is to that issue (*viz*, Issue 2) that our attention must now turn.

Issue 2

56 As alluded to in the preceding paragraph, Issue 2 raises a relatively straightforward point. In essence, why was the grant of the Decree *Nisi* not challenged during the divorce proceedings between the Husband and the Respondent on the basis that the Shanghai divorce judgment had already dissolved their marriage and that there was therefore no legal basis upon which the district judge could grant the Decree *Nisi*?

57 We begin by highlighting certain salient aspects of the manner in which the Singapore divorce proceedings transpired. At the outset, when D 2201 was commenced by the Respondent on 20 May 2005 (after delivery of the Shanghai divorce judgment), the Husband ***filed a summons to strike out that petition, but subsequently withdrew it***. Initially, the reason stated for the irretrievable breakdown of their marriage was the Husband's unreasonable behaviour. One year later, the Respondent amended the petition by deleting the reference to the Husband's alleged unreasonable behaviour, citing instead the fact that she and the Husband had lived apart for a continuous period of at least four years prior to the filing of the said petition as the factual basis for the divorce. We note, parenthetically (as we did right at the outset of this judgment (see above at [4])), that the Appellants had also sought to attack the grant of the Decree *Nisi* on the ground that there had not in fact been a period of separation of at least four years. In our view, both the DJ and the Judge correctly rejected this argument (see also above at [29] and [39]).

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58 ***Significantly*** for our purposes, *the district judge had*, during the hearing of the ancillary matters (on 17 December 2007), *questioned the parties as to the legal effect of the Shanghai divorce judgment*. It is pivotal in the context of the present issue to note that *the Husband then proceeded to* ***file two successive applications for declarations that the Shanghai divorce judgment had dissolved the marriage and that, therefore, the Respondent's divorce petition filed in the Singapore court should be struck out and the Decree*** **Nisi** ***that had been granted ought to be rescinded on the basis that at the time D 2201 was filed, there was no subsisting marriage for the Singapore courts to dissolve*** (see above at [18]–[19]). In our view, it is clear beyond any reasonable doubt that this is ***exactly*** what the Appellants are now arguing. ***More importantly***, whilst the ***first*** application was filed on 2 June 2008 in the High Court, it was ***withdrawn*** on 30 September 2008. *Similarly*, whilst the ***second*** application was filed in relation to D 2201 itself, it was ***also withdrawn*** by the Husband on 3 April 2009. After these two applications had been withdrawn, the district judge proceeded to determine the ancillary matters arising from the divorce.

59 Given the circumstances outlined above, the doctrine of extended *res judicata* as set out (most notably) in the oft-cited English decision of *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 applies to prevent the Appellants, who are acting in the capacity as personal representatives of the Husband, from arguing that the grant of the Decree *Nisi* was a nullity. To permit them to now mount such an argument would be to allow them to abuse the process of the court. Indeed, this court, in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another*

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appeal [2015] 5 SLR 1104 ("*TT International*"), explained as follows (at [129]):

> … But, in principle, we do not see why a belated attempt in a civil case to attack the jurisdiction of a court or tribunal cannot be an "abuse of process", with the result that the litigant attempting to make such an attack would be estopped from doing so. …

60 The following observations in *TT International* (at [104]) are also apposite:

> This may be contrasted with the higher degree of flexibility available to the courts when faced with the "extended" forms of cause of action and issue estoppel. Lord Bingham of Cornhill, in the House of Lords decision of *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (at 31D), saw the question of whether a litigant should be estopped from taking a point that could have been raised in earlier proceedings between the same parties not as a "dogmatic" inquiry, but rather, as a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case". This idea was echoed in [*Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453] at [53], where it was noted that "a court should determine whether there is an abuse of process by looking at all the circumstances of the case", including whether there is fresh evidence that might warrant re-litigation or whether there are *bona fide* reasons why a matter was not raised in the earlier proceedings. In this regard, the court is not to "adopt an inflexible or unyielding attitude" (see likewise *Goh Nellie* at [53]).

61 Considering all the circumstances, it is clear, in our view, that notwithstanding our decision with respect to Issue 1, the Appellants cannot prevail in the present appeal, which should be dismissed based on our decision on Issue 2. It is noteworthy that the Judge herself briefly mentioned that she too would have arrived at the same result (see the GD at [93]).

62 We should add that when confronted with the doctrine of extended *res judicata*, Mr Koh attempted to argue that if his clients were entitled to succeed under Issue 1, we ought to consider the ***injustice*** that would be occasioned to

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the Appellants who ought to succeed in the appeal and therefore decline to find an abuse of process. The simple response to this is that "***finality***… ***is itself a no less important aspect of the overall concept of '<u>justice</u>"*** [emphasis in original] (*TT International* at [215]).

63 As was noted, Mr Koh then sought to argue that his clients should be taken as seeking declaratory relief in the present case in their *personal capacities* so that the Husband's actions (as set out above) could not be attributed to them and that there therefore is no abuse of the process of court under the extended doctrine of *res judicata*. That is, in fact Issue 3 – to which our attention now turns.

Issue 3

64 We begin by noting that the Judge had held – correctly, in our view – that s 99(2) could *not* apply to the Husband or the Respondent (who was the wife); it could only apply to *third parties*. Indeed, we endorse the Judge's comprehensive rendition as well as analysis of the historical backdrop to s 99(2). We also consider that the Appellants had brought these proceedings as ***personal representatives of the Husband*** (see above at [44]). As personal representatives, they could be in no better position than the Husband himself and they could not avail themselves of s 99(2).

65 The Judge, who was cognisant of this difficulty, nevertheless proceeded to hear the appeal from the DJ's decision on the basis that the appeal had been taken out by the Appellants in their *personal capacities* under s 99(2). Having been confronted with the difficulties in relation to his clients' case due to the doctrine of extended *res judicata*, Mr Koh sought to raise the effect of the Shanghai divorce judgment under s 99(2) and on the footing that

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his clients were bringing this application in their personal capacities. In this way, the Husband's actions could not be attributed to them and they would be able to circumvent the doctrine of extended *res judicata*.

66 Even if we allow Mr Koh to submit, contrary to what he maintained before the Judge (see the GD at [51]; see also above at [44]) and what he initially stated at the hearing before us, that the Appellants are acting in their personal capacities, we find that his clients *cannot* succeed in respect of Issue 3. In our view, s 99(2) ***cannot apply*** in the first place to the ***present facts*** even if the Appellants took out the present application in their personal capacities. As an aside, this also lays to rest the Appellants' argument that the Decree *Nisi* ought to be rescinded because material facts which showed that there had not in fact been a separation of at least four years prior to the filing of D 2201 were not brought to the attention of the court granting the Decree *Nisi*.

67 The applicability of s 99(2) after the death of the Husband was a matter specifically considered by the Judge (see the GD at [32]–[35]; see also above at [32]). The Judge referred, correctly in our view, to this court's decision in *Sivakolunthu* for the proposition that whether further proceedings can be taken in a divorce suit upon the death of one of the parties to the marriage depends on two interrelated matters: (a) the nature of the further proceedings sought to be taken; and (b) the true construction of the relevant statutory provision or provisions. We would add that discerning the true construction of the relevant statutory provision must of course include a consideration of the purpose behind the enactment of that provision.

68 The purpose of the enactment of s 99(2) was squarely addressed by the Judge in the following passage (see the GD at [39]):

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> The rationale behind [s 99(2)] was explained by Bucknill J in *W v W* [1936] P 187 at 198:
>
> > [T]he the Legislature by the various statutes that have been passed has clearly indicated that *proceedings for divorce are not merely a personal matter but are also a matter of public interest. … It is a matter of public interest that a decree for dissolution of marriage should not be obtained on evidence which has been manufactured* so as to indicate adultery where none in fact has taken place. [emphasis added]

69 We agree with the Judge's view. Marriage, being a matter of public interest, ought not to be brought to an end when the grounds for dissolution have not been met. Given the incentive for married parties who have fallen out to collude and procure a divorce, third parties are given standing to show cause why the dissolution should not be made final after a decree *nisi* has been declared (see also the GD at [38]). In our view, this all points to s 99(2) being concerned with the ***status*** of the parties' marriage.

70 The nub of the Judge's reasoning as to why she thought s 99(2) could apply is to be found in the following passage of the GD (at [35]):

> On the present facts, it was clear to me that what the appellants sought to do was to rescind the Decree *Nisi* in order that there may be the consequential rescission of the Ancillary Orders. ***At its core, the object of the appellants' application was the enforceability of the Ancillary Orders, and not simply the determination of the Parties' marriage***. The former was not dependent on the Husband being alive. On this basis, I did not agree with Ms Chai that this application should be dismissed because the status of the marriage had already been determined. ***There was still a res before the court over which the court may exercise its jurisdiction***... [emphasis added in bold italics]

71 With respect, we are unable to agree with the reasoning set out in the preceding paragraph. As has been explained, the purpose of s 99(2) is for third parties to a marriage to challenge the ***status*** of the marriage in circumstances where a decree *nisi* has been granted. A third party would, ordinarily, have no

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interest in the ancillary orders made as between the parties to the marriage. Ancillary orders in divorce proceedings generally concern only the parties to the marriage and cannot by any measure be said to be a matter of *public importance*, unlike the ***status*** of the marriage. The only reason the Appellants have an interest in this case is because they are also the beneficiaries under the Will. Given that s 99(2) is concerned with the ***status*** of the marriage, we are unable to see how it continues to apply once a party to that marriage has *passed away*. The death of one of the parties dissolves a marriage (see s 7(*a*) of the Act, also reproduced above at [49]). The status of the marriage has thus already been conclusively determined by the death of the Husband. In these circumstances, s 99(2) no longer remains applicable given that its very purpose concerns the ***status*** of the marriage. What the Judge thought to be the core of the appellants' application (*ie*, the enforceability of the Decree *Nisi*) is, in our view, more properly described as the *motive* for their application. But the Appellants' motive in bringing the present application *cannot* change the fact that the *status* of the marriage had been determined by the death of the Husband and that, as a result, s 99(2) no longer has any application.

72 In a similar vein, in *Hou Wa Yi 2012 HC*, Choo Han Teck J held that the court no longer had any power to make absolute a decree *nisi* after the death of one of the parties to the marriage. The appellants in that case, who, incidentally, are the Appellants in the present appeal, attempted to rely on s 99(3) of the Act to make this very Decree *Nisi* absolute. Section 99(3) reads as follows:

> Where an interim judgment of divorce has been granted and no application for it to be made final has been made by the party to whom it was granted, then, at any time after the expiration of 3 months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court and on that application the court may —

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> (*a*) notwithstanding subsection (1), make the judgment final;
>
> (*b*) rescind the interim judgment;
>
> (*c*) require further inquiry; or
>
> (*d*) otherwise deal with the case as it thinks fit.

73 Choo J held that once death of one of the parties to the marriage intervened, s 99(3) no longer had any application (at [6]). In our view, this must be correct since s 99(3) also concerns the ***status*** of the marriage. As the Judge herself perceptively pointed out, there is a logical unity to ss 99(2) and (3) of the Act (see the GD at [45]). We find it to be incongruous (indeed, a contradiction in terms) if a decree *nisi* cannot be made absolute once death of a party to the marriage intervenes, but can be set aside by all and sundry, except the parties. If, in fact, this were the case, then it would mean that, in the present case, while the Decree *Nisi* cannot be made absolute, it would remain under constant threat of challenge. There is nothing preventing other unrelated third parties from bringing an application under s 99(2) to set aside the Decree *Nisi*. In the usual course of things, the parties to a marriage can put an end to the possibility of their marital status being challenged by third parties by applying for the decree *nisi* to be made absolute. Once the death of one party intervenes, this path is no longer open to them, and we cannot accept that, notwithstanding this, a decree *nisi* obtained *always* remains susceptible to attack by third parties.

74 That having been stated, we (like Choo J) would also add the caveat that our purposive reading of s 99(2) leads only to the conclusion that the provision is inapplicable on the ***present set of facts***; it does not in any way determine the effect of the Husband's death on the appeal in relation to the ancillary matters, as that is not in issue before us (see *Hou Wa Yi 2012 HC* at [8]).

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75 For completeness, we add that had the Appellants brought the present application for declaratory relief in their *personal capacities* ***without more***, such an application would ***fail*** for ***lack of standing, simply because they were not asserting a right personal to them; the rights at stake resided in the Husband and the Respondent instead*** (see the decision of this court in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 at [15]).

76 In the premises, the Appellants must fail in respect of Issue 3.

Conclusion

77 For the reasons set out above, the appeal is dismissed. The parties are to submit written arguments (not exceeding 10 pages) on the issue of the costs of the present appeal to this court no later than two weeks from the date of release of the present judgment. The costs orders below are to stand.

Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal	Quentin Loh Judge

Koh Tien Hua and Yoon Min Joo (Harry Elias Partnership LLP) for the appellants;
Dorothy Chai Li Li (Dorothy Chai Law Practice) for the respondent.

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