

Taming the Unruly Public Policy Horse in Private International Law in Family Law: A Pragmatic Singaporean Approach to the Recognition of Foreign Same-Sex Marriages and Divorces

Abstract:

With the legalisation of same-sex marriages by more states, it is a matter of time before jurisdictions that have yet to do so will need to decide on the recognition of foreign same-sex marriages and divorces. Public policy – the unruly horse – peers its head out again even if these marriages and divorces pass the muster of the common law private international law rules. This article explores the role of public policy in such situations and proposes a framework for the balancing of the claimed rights, comity, and public policy. Applying the proposed framework, even if there is a public policy against same-sex marriage, this public policy should play a diminished role in private international law such that foreign same-sex marriages and divorces can be recognised by the forum.

Leon Vincent **CHAN**

LLB (Hons) (National University of Singapore); LLM (University of Toronto)

Advocate and Solicitor (Singapore)

Research Associate, Centre for Asian Legal Studies

National University of Singapore, Faculty of Law

I. INTRODUCTION

Jeremy, a Canadian, is domiciled in Toronto. Ryan is a Singaporean living in Toronto. They met and became a couple when Ryan was studying at the University of Toronto in 2003. When same-sex marriages were legalised in Canada in 2005,¹ they married. However, as a result of the continued gun violence in Toronto that peaked in 2009 since their marriage, the couple became increasingly determined to move to a country where guns are illegal. In 2009, on noticing that Singapore's economy had survived the global economic crisis relatively well and the couple's finance expertise were transferrable, the couple decided to move, with their two children from surrogacy, to Singapore. Unfortunately, in 2020, COVID-19 struck. As a result of working from home and the constant contact between Jeremy and Ryan, animosity festered, and they decided to divorce. Even though they have been habitually resident in Singapore for more than 3 years, they did not apply for a divorce from the Singapore Courts under the Women's Charter² because their same-sex marriage would *prima facie* be deemed void.³ As such, Jeremy flew back to Toronto after Singapore's 'circuit breaker' to obtain a divorce decree from the Ontario Courts. Having set up their home in Singapore for most of the marriage (more than two thirds of their 15-year marriage), most of their assets are based in Singapore. Soon after, Jeremy brought the Ontario divorce decree to Singapore so that the Singapore Courts may recognise the decree and deal with the ancillaries (including the division of matrimonial assets and child-related orders) under Chapter 4A of Part X of the Women's Charter ("**Chapter 4A**").

The situation described above is not unthinkable;⁴ fiction is not too far from fact. Globalisation has allowed the movement of people around the world. Inevitably, this has changed the face of all laws, including conventionally domestic laws like family law. Nothing is spared. Marriages are no longer confined to parties from the same origin, state, or country, and parties may set their matrimonial homes up far from their birthplaces. As a small nation-state, Singapore continues to rely on foreign talent to supplement its local workforce, making international marriages common. On 17 November 2020, Singapore's Prime Minister Lee Hsien Loong ("**PM Lee**") pitched at the Singapore Tech Forum 2020 for lesbian, gay, bisexual, transexual, and queer ("**LGBTQ**") foreign talents to contribute to Singapore's tech industry and that they too can be "*valued members of society*".⁵ This propelled the issues surrounding same-sex couples to the fore. Singapore and many other countries that still have not legalised or recognise same-sex marriages can no longer avoid the effects of globalisation, including issues arising from foreign LGBTQ talent. Consequently, private international law has become

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¹ Canada's Civil Marriage Act (SC 2005 c 33) ("**Canada CMA**").

² Section 93(1)(a) of the Women's Charter (Cap 353, 2009 Rev Ed).

³ At the point of marriage, subject to proof and / or arguments otherwise, Ryan, as a Singaporean citizen, is deemed to be domiciled in Singapore under section 3(5) of the Women's Charter. Although the same-sex marriage is void, they may still be entitled to ancillary relief under section 112 of the Women's Charter. The Singapore Court of Appeal has held that a void heterosexual marriage is entitled to such ancillary relief in *ADP v ADQ* [2012] 2 SLR 143 at [65].

⁴ *BNS v BNT* [2015] 3 SLR 973 at [1].

⁵ PM Lee spoke at the "Keynote & Q&A: Technology as Singapore's Strategic National Priority" session at the virtual Singapore Tech Forum 2020 on 17 November 2020 <<https://www.pmo.gov.sg/Newsroom/Dialogue-by-PM-Lee-Hsien-Loong-at-the-Singapore-Tech-Forum>> accessed on 19 November 2020.

more important in our current age as compared to before because issues surrounding LGBTQ couples' rights flowing from their marriage will surface when they join the Singapore workforce.

With more countries legalising same-sex marriages and / or civil unions, including close neighbours like Thailand and Taiwan,⁶ this issue will need to be confronted at some point or another. In this regard, this paper will endeavour to extensively explore this issue from a Singaporean lens, focusing on the common law rules of private international law (the “**common law rules**”) in relation to the recognition of both foreign same-sex marriages and divorces. One issue cannot be divorced from the other; both must be considered since the recognition of foreign same-sex divorces will necessarily beg the question of the recognition of the underlying foreign same-sex marriages. Without a valid marriage to begin with, there is no divorce. Therefore, the author will also consider a situation where Jeremy and Ryan seek a divorce and ancillary relief under Part X of the Women’s Charter (“**Part X**”) from the Singapore Courts in addition to a Chapter 4A application.⁷ While the issues surrounding the recognition of foreign same-sex marriages and divorces are different, this article will consider these differences where appropriate but the focus is on the overlapping public policy in both situations – the public policy against the formation of same-sex marriages in Singapore. In the context of this article, unless stated otherwise, foreign same-sex marriages and divorces will be between a Singaporean and a non-Singaporean (i.e. Jeremy and Ryan’s situation). At the outset, even though same-sex divorces can technically be recognised under the existing common law rules in Singapore, it encounters the same public policy consideration (and issue) as the recognition of same-sex marriages – the public policy against same-sex marriages – albeit implicitly. Where the application of public policy differs, they will be considered separately. This article will then propose a framework that should be applied to the consideration of public policy under these two similar yet different common law recognition rules in relation to foreign marriages and divorces. Finally, this article will consider how public policy should be considered and balanced within the proposed framework for both marriages and divorces. As the issues on the recognition of same-sex divorce and public policy are being discussed, the scenario between Jeremy and Ryan provided at the beginning of this article will be used to explicate the concepts.

II. THE COMMON LAW RULES TO PRIVATE INTERNATIONAL LAW

Like the common law jurisdiction in Canada,⁸ Singapore continues to apply the common law rules in family law.⁹ The respective common law rules applicable to the recognition of same-sex marriages and same-sex divorces are different and should be explored separately, before considering their adoption and application in Singapore. Thereafter, this article will only briefly analyse the issues same-sex couples encounter when these common law rules are applied, since the focus of this article is on the public policy issues. For the purposes of this article, the

⁶ As of 28 October 2019, 30 countries (including territories) have legalised same-sex marriages. In July 2020, Thailand’s Cabinet approved the draft Civil Partnership Bill paving way for same-sex civil partnerships. This Bill is currently awaiting Thai parliamentary approval. See Muntarbhorn V, “Thailand’s same-sex civil partnership law — a rainbow trailblazer?” (East Asia Forum, 2 September 2020) < <https://www.eastasiaforum.org/2020/09/02/thailands-same-sex-civil-partnership-law-a-rainbow-trailblazer/>> accessed on 2 December 2020; and Masci D, Sciupac E, and Lipka M, “Same-Sex Marriage Around the World” (Pew Research Center, 28 October 2019) < <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/>> accessed on 2 December 2020.

⁷ Chapter 1 of Part X of the Women’s Charter provides for the jurisdiction of the Singapore Courts to grant a divorce. Chapters 4 and 5 of Part X of the Women’s Charter provide for the ancillary relief that are contingent on the divorce order being granted by the Singapore Courts.

⁸ In Quebec, Canada, private international law is codified in the 9th book of the Civil Code of Quebec (SQ 1991, c 64).

⁹ *Yap Chai Ling and another v Hou Wa Yi* [2016] 4 SLR 581 (“**Yap Chai Ling**”) at [49]; and Ong DSL, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) (“**Ong (2015)**”) at [5.47].

sufficiency and / or validity of these common law rules will not be considered in detail. Instead, they will be taken as stated.

A. **General Principles for the Recognition of Foreign Same-sex Marriages**

Since 1858, a marriage is only valid if the aspects of formal validity and essential validity have been complied with.¹⁰ Formal validity refers to the formal requirements of the forum where the marriage is contracted at, while essential validity refers to the capacity of parties to enter into the marriage. The traditional common law choice of law rule governing the formal validity of marriage is the *lex loci celebrationis*. In exceptional situations, the marriage can be regarded as formally valid if it were conducted in accordance with a common law form of marriage,¹¹ or if there was evidence of cohabitation and repute as husband and wife.¹² On the other hand, the traditional common law choice of law rule for essential validity of the marriage is the antenuptial domiciles of both parties, also known as the dual domicile rule. Other alternative common law rules have also been applied by the English Courts to essential validity such as the intended matrimonial home,¹³ the alternative reference test,¹⁴ *lex loci celebrationis*,¹⁵ and the state with a real and substantial connection.¹⁶

Thus far, the Singapore Courts have only adopted the *lex loci celebrationis* for the issue of formal validity, and the dual domicile rule for essential validity.¹⁷ The rule governing formal validity is uncontroversial. With respect to essential validity, Debbie Ong Siew Ling (“**Debbie Ong**”) drew from the “*intended domicile*” after marriage rule in section 183(2) of the Women’s Charter and advocated for the use of the intended matrimonial home rule by the Singapore Courts because it “*provides a realistic connection between the marriage and the country which laws determines its validity*”.¹⁸ While there are concerns of unworkability,¹⁹ the author takes the position that the inclusion of the intended matrimonial home rule as an alternative, as opposed to a replacement of the dual domicile rule, is in line with international comity insofar as it allows for more marriages to be recognised. Effectively, this could be also seen as an application of the alternative reference test since it requires either the dual domicile rule or the intended matrimonial home rule to apply for the marriage to be essentially valid.²⁰

Unfortunately, foreign same-sex marriages between a Singaporean and non-Singaporean (i.e. Jeremy and Ryan) are likely to encounter the additional issue of not fulfilling the traditional common law dual domicile rule (i.e. both parties’ antenuptial domiciles)²¹ for the marriage to

¹⁰ Prior to *Brook v Brook* in 1858, the common law rules would regard the marriage as valid if it were in accordance to the *lex loci celebrationis*; there was no separation. See *Brook v Brook* (1858) 3 Sm & G 481; (1861) 9 HLC 193; and Lord Collins of Mapesbury and Harris J QC, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell 2012) (“**Collins (2012)**”) at [17.002].

¹¹ *R v Millis* (1843-1844) 10 Cl & F 534; and *Isaac Penhas v Tan Soo Eng* [1953] MLJ 73.

¹² *Carolis de Silva v Tim Kim* [1905] SSLR app 8.

¹³ *Radwan v Radwan (No. 2)* [1973] 1 Fam 35.

¹⁴ *Lawrence v Lawrence* [1985] 1 Fam 106.

¹⁵ This was advocated by Geoffrey Chevalier Cheshire on the basis that the lack of consent is a ‘contractual defect’ which nullifies the agreement and the ceremony of the marriage. See Cheshire GC, *Cheshire’s Private International Law* (Butterworth & Co 1965) at p 320 – 322.

¹⁶ *Vervaeke (formerly Messina) v Smith and others* [1983] 1 AC 145 (“**Vervaeke v Smith**”) at 165 – 166.

¹⁷ *In re Maria Huberdina Hertogh; Inche Mansor Adabi v Adrianus Petrus Hertogh* [1951] MLJ 164 (“**Maria Hertogh**”); and *Arpinya Rongchotiawattana v Wee Oh Keng* [1997] 3 SLR(R) 378 (“**Arpinya**”) at [16] – [18].

¹⁸ See Ong (2015) at [3.62] – [3.63]; and section 183(2) of the Women’s Charter.

¹⁹ See Ong (2015) at [3.62].

²⁰ *Lawrence v Lawrence*.

²¹ In Singapore, only the dual domicile rule has been adopted thus far. See *Maria Hertogh; Arpinya* at [18]; and *Moh Ah Kiu v Central Provident Fund Board and other appeals* [1992] 2 SLR(R) 440 at [12].

be recognised before the public policy issue is even engaged.²² Section 3(5) of the Women's Charter presumes that Singapore citizens are domiciled in Singapore, until the contrary is proven.²³ Such marriages will be *void ab initio* based on Singapore's conflict of laws rules.²⁴ This is also the likely outcome in England and Wales,²⁵ and Australia²⁶ prior to the legalisation of same-sex marriages in both jurisdictions. While Jeremy and Ryan may try to rely on the *Sottomayer* exception,²⁷ it is unlikely to provide much headway. In *Sottomayer, Otherwise De Barros v De Barros (The Queen's Proctor Intervening)*, a Portuguese man domiciled in England married his first cousin, a Portuguese lady domiciled in Portugal, in England. Their marriage was invalid under Portuguese law because of incapacity from consanguinity – parties were first cousins – unless the Pope's dispensation had been obtained. The English Court affirmed Albert Venn Dicey's original proposition that “[a] marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which though enforced by the law of his or her domicile is of a kind to which [the English] Courts refuse recognition.”²⁸ As noted by Lye Kah Cheong and Ervin Tan,²⁹ the Singapore High Court, in dicta, may have unintentionally widened the application of the *Sottomayer* exception when it held that “a foreign marriage recognised as valid in the foreign place of celebration will not be regarded as valid in Singapore unless by either of the parties' respective domicile, the essential requirements are also met i.e. the *lex domicilii* imposes no personal incapacity on the parties”.³⁰ However, it is submitted that the Singapore Courts should be slow to read the *Sottomayer* exception too widely because it is not the original holding from *Sottomayer*.³¹ As Debbie Ong noted, the *Sottomayer* exception should be read narrowly insofar as the case targeted the “injustice caused to a party domiciled in the forum who had married ***in the forum***” [emphasis added].³²

For completeness, the other alternative tests that have not been applied by the Singapore Courts will only be broadly considered because they are not within the scope of this article. Even if the broader ‘intended matrimonial home’ rule or the real and substantial connection test for essential validity were to be adopted by the Singapore Courts, they provide little assistance since parties have moved to and lived in Singapore for more than two thirds of the marriage. As Lord Simon of Glaisdale held in *Vervaeke (formerly Messina) v Smith and others (“Vervaeke v Smith”)*, the “territorial law with which a marriage has the most real and substantial connection will often be the law of the prospective matrimonial home”.³³ In Jeremy and Ryan's case, it would be difficult to show that Singapore is not the intended matrimonial

²² Prior to the legalisation of same-sex marriages in the England and Wales, such marriages faced the same issue of lack of capacity based on parties' domicile if the party's domicile is of a country that does not permit same-sex marriages. See *Wilkinson v Kitzinger* [2007] 1 FLR 295.

²³ Section 3(5) of the Women's Charter states that: “For the purposes of this Act, a person who is a citizen of Singapore shall be deemed, until the contrary is proved, to be domiciled in Singapore.”

²⁴ Collins (2012) at [18-119].

²⁵ *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).

²⁶ ‘The Validity of Marriages and Other Adult Relationships’ in Mortensen R, Garnett R, and Keyes M (eds) in *Private International Law in Australia* (LexisNexis Butterworths, 4th Ed, 2019) (“**Mortensen (2019)**”) at [13.56] – [13.57].

²⁷ *Sottomayer, otherwise De Barros v De Barros (The Queen's Proctor Intervening)* (1879) 5 PD 94 (“**Sottomayer**”); *Maria Hertogh*.

²⁸ *Sottomayer* at 104.

²⁹ Lye KC and Tan E, ‘Gay Marriage and the Common Law Conflict of Laws Rules A Singapore Perspective’ (2015) 45:3 Hong Kong Law Journal 1 at 24 – 26.

³⁰ *Wong Kai Woon alias Wong Kai Boon and Another v Wong Kong Hom alias Ng Kong Hom and Others* [2000] SGHC 176 at [49].

³¹ c.f. Lord Collins and Jonathan Harris' conceptualisation of the *Sottomayer* exception at Collins (2012) at [17E-107]: “[t]he validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.”

³² Ong (2015) at [3.54].

³³ *Vervaeke v Smith* at 166.

home especially since parties have lived here for the majority of the duration of the marriage. This factor will weigh heavily against the fact that the marriage was solemnised in Toronto.

Lastly, while the adoption of the *lex loci celebrationis* as an additional rule for essential validity will allow Jeremy and Ryan's marriage to be recognised by the Singapore forum, this alternative has several drawbacks. In the interest of simplifying this area of law, Joseph Henry Beale argued that adopting the *lex loci celebrationis* as a single rule "avoids the difficulty, without injustice to any party, and without discouraging marriage by interposing any risk of nullity because of some unsuspected provision of a foreign law".³⁴ He appears to limit this to nullification as a result of evasion of fraud in circumstances where parental consent for marriage has not been obtained from the minor's parents.³⁵ With respect, this limitation is misconceived. There are other essential validities that may be intentionally circumvented by parties, such as in this case: the need for marriages in Singapore under the Women's Charter to be between a man and a woman.³⁶ On the other hand, the *lex loci domicilii* "contemplate[s] the possibility of a marriage being held good in one country and invalid in another".³⁷ However, Tan Yock Lin rightly highlights that the "[i]ncreased mobility [between countries] renders the claim of *lex loci celebrationis* fortuitous as much as it makes evasion attractive".³⁸ In the twenty-first century where parties can travel from opposite ends of the earth in less than twenty-four hours, adoption of the *lex loci domicilii* increases the ability of parties to evade the essential validity rules under their respective domiciliary law.³⁹ This potential abuse of the *lex loci celebrationis* rule should tip the balance in favour of adhering to the traditional dual domicile rule instead of adopting this alternative. This concern of evasion is not new. To drive home this point, Lord Campbell's prophetic words from 1861 in the House of Lords in *Brook v Brook* remain relevant:⁴⁰

*"If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering into another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful."*⁴¹

As seen from the discussion above, same-sex marriages like Jeremy and Ryan's will not fulfil the traditional dual domicile rule for essential validity, even though it satisfies the *lex loci celebrationis* rule for formal validity. Although same-sex marriages will be void under the Women's Charter, the Singapore Court of Appeal has held that void marriages may still obtain the court's jurisdiction for ancillary relief.⁴² Nonetheless, as alluded to in the introduction, the author will still consider the overlapping public policy considerations against same-sex marriages, along with same-sex divorces, in the next section.

B. General Principles for the Recognition of Foreign Same-sex Divorces

Since the Hague Convention on the Recognition of Divorces and Legal Separations was concluded on 1 June 1970 ("**Hague Convention on Divorce Recognition**"), only twenty

³⁴ Beale JH, 'The Law of Capacity in International Marriages' (1901-2) 15 Harvard Law Review 382 ("**Beale (1901-2)**") at 388 – 389.

³⁵ Beale (1901-2) at 391 – 392.

³⁶ Section 12(1) of the Women's Charter.

³⁷ Beale (1901-2) at 391.

³⁸ Tan YL, *Conflicts Issues in Family and Succession Law* (Butterworths, 1993) ("**Tan (1993)**") at 207.

³⁹ Tan (1993) at 207; and Ong (2015) at [3.65].

⁴⁰ *Brook v Brook* (1861) 9 HLC 193.

⁴¹ *Brook v Brook* at 219.

⁴² *ADP v ADQ*.

countries have contracted to the convention.⁴³ Even fewer countries have codified the private international law rules in relation to these recognition rules. England and Wales is one of the few common law jurisdictions that has codified the Hague Convention on Divorce Recognition and their common law rules. Up until 1972, the common law rules governed the recognition of foreign divorces and legal separations obtained outside the British Isles. The Recognition of Divorces and Legal Separations Act 1971 (“**1971 Act**”) was promulgated only in 1972 to implement the Hague Convention on Divorce Recognition. Subsequently, the 1971 Act was repealed and replaced by Part II of the Family Law Act 1986 (“**1986 Act**”) which now provides for the recognition of foreign divorces.⁴⁴ Although much of the common law rules has been codified, there is suggestion that English Courts will look to common law decisions in the consideration of public policy grounds under section 51(3)(c) of the 1986 Act.⁴⁵

Specifically, in relation to the recognition of foreign divorce decrees, section 121B of the Women’s Charter provides that foreign divorce decrees issued by a court of competent jurisdiction will be “*recognised as valid in Singapore under Singapore law*”. The Singapore Court of Appeal in *UFN v UFM and another matter* has unequivocally pronounced that “*Singapore law*” refers to the common law rules of private international law.⁴⁶ Under the common law rules in Singapore, for foreign divorce decrees to be recognised, parties must show that the foreign court had the jurisdiction to grant the order. The foreign court is held to be jurisdictionally competent if it can be shown that parties to the marriage were domiciled in the same foreign country when the divorce proceedings were initiated there,⁴⁷ the foreign divorce decree is recognised or granted by the court of parties’ domicile,⁴⁸ the foreign court had assumed the same jurisdiction as the *lex fori*,⁴⁹ or the presence of a “*real and substantial connection*” between either party and the foreign jurisdiction granting the divorce decree.⁵⁰ Some factors that indicate a real and substantial connection include residence,⁵¹ domicile,⁵² and nationality.⁵³ In *Mayfield v Mayfield*, the English Court recognised the divorce decree because the wife in that case was both resident and a national of the foreign jurisdiction;⁵⁴ the presence of more factors will strengthen the real and substantial connection between the party and the foreign jurisdiction. What is common amongst all three common law rules is that they seek to establish a nexus between one of the parties and the forum granting the divorce. Recognition is important because parties may then obtain ancillary relief from the Singapore Courts under Chapter 4A, assuming they fulfil the requirements for leave.⁵⁵

It is trite law that for the purposes of recognising the foreign divorce decree, the basis for which the foreign court has assumed jurisdiction over the matter,⁵⁶ and the grounds on which a

⁴³ Hague Conference on Private International Law, *Status Table: 18: Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations* (HCCH, 4 June 2014) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=80>> (accessed 20 Oct 2020).

⁴⁴ Section 68(2) and schedule 2 of the Family Law Act 1986. For the full history, see Torremans P, *Cheshire, North & Fawcett Private International Law* (Oxford University Press, 15th Ed, 2017) (“**Torremans (2017)**”) at 1000 – 1003; and Collins (2012) at [18-070] – [18-084].

⁴⁵ Torremans (2017) at 1030; and *Chaudhary v Chaudhary* [1985] 1 Fam 19 at 29.

⁴⁶ *UFN v UFM and another matter* [2019] 2 SLR 650 (“**UFN v UFM**”) at [19].

⁴⁷ *Harvey v Farnie* (1882) 8 App Cas 43; and *Le Mesurier v Le Mesurier* [1895] AC 517.

⁴⁸ *Armitage v Attorney-General* [1906] P 135; and *Warrender v Warrender* (1835) 2 Cl & Finn 488.

⁴⁹ *Travers v Holley* [1953] P 246 (CA).

⁵⁰ *Indyka v Indyka* [1969] 1 AC 33; and *Sivarajan v Sivarajan* [1972] 2 MLJ 231.

⁵¹ *Brown v Brown* [1968] P 518; *Angelo v Angelo* [1968] 1 WLR 401; *Munt v Munt* [1970] 2 All ER 516.

⁵² *Indyka v Indyka* at 111 – 112.

⁵³ *Mayfield v Mayfield* [1969] P 119.

⁵⁴ *Mayfield v Mayfield* at 121.

⁵⁵ See sections 121B – 121G of the Women’s Charter.

⁵⁶ *Indyka v Indyka* at 66; *Robinson-Scott v Robinson-Scott* [1958] P 71 at 88; and Tan (1993) at 370.

divorce decree was granted⁵⁷ are both irrelevant and immaterial.⁵⁸ The Singapore Court of Appeal has stated in *Yap Chai Ling and another v Hou Wa Yi* (“**Yap Chai Ling**”) that the current established rule on the recognition of foreign divorces in Singapore is that “a foreign judgment of divorce will be recognised as valid if it is granted by a court of either party’s domicile”.⁵⁹ Upon such proof, “[a]ll of this points towards recognition” by the Singapore Courts.⁶⁰ However, this recognition may be refused if it is contrary to public policy.⁶¹ Alex Mills notes that the “application of [the forum’s] public policy as a basis for refusing to apply a foreign law thus constitutes a rejection of the ordinary application of the choice-of-law rule, the selection of foreign law, in favour of [the forum’s] norms. The application of public policy is essentially an implicit and overriding choice of [the forum’s] law.”⁶²

In *Yap Chai Ling*, the issue was whether the foreign Shanghai divorce decree should be recognised by the Singapore Courts. The Shanghai jurisdiction adopted a different legal position with respect to the marriage that was bigamous at its inception but subsequently rectified or ‘cured’ retrospectively. The Singapore Court of Appeal found that the “different legal position in respect of monogamous marriages which were bigamous in their inception ... does not necessarily entail a finding that the [foreign] public policy is contrary to Singapore public policy”.⁶³ The recognition of “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” [emphasis in original];⁶⁴ it does not require a recognition of the different commencement date of the marriage. This sentence requires dissecting and contextualising because of the possible interpretation that the “subsisting marriage” needs to be valid based on Singapore’s law on capacity. The author submits that the “subsisting marriage” emphasised by the Singapore Court of Appeal, refers to the validity of the subsisting marriage based on Shanghai law. At the start of the sentence in which “subsisting marriage” was used, it began with the “Shanghai divorce judgment”. Logically, this “subsisting marriage” would therefore refer to the underlying marriage from which the “Shanghai divorce judgment” was obtained. The penultimate sentence of that paragraph supports the author’s point: “[the Singapore Court of Appeal] 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” [emphasis added].⁶⁵ If the validity of the “subsisting marriage” was intended to be based on Singapore law, the Singapore Court of Appeal would not have drafted “Singapore law” into the penultimate sentence to emphasise that it was also a valid marriage recognised by Singapore’s law (i.e. Singapore’s common law rules for the recognition of foreign divorces and not Women’s Charter).⁶⁶ This understanding is consistent with the conclusion that the

⁵⁷ *Bater v Bater* [1906] P 209; and *Manning v Manning* [1958] 1 All ER 291 at 296.

⁵⁸ *Vervaeke v Smith* at 162; Collins (2012) at [18-065]; McClean JD, *Recognition of Family Judgments in the Commonwealth* (Butterworths, 1983) (“**McClean (1983)**”) at [2.04] and [2.13]; and Tan (1993) at 370. See also *Josef v Josef* [1953] 2 All ER 710 where the English Court of Appeal refused recognition of a unilateral religious divorce in accordance to the husband’s religion which is not from the domicile of the parties.

⁵⁹ *Yap Chai Ling* at [49]; *UFN v UFM* at [19]; *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 1 SLR(R) 485 (“**Ho Ah Chye**”) at [53] and [68(g)]; *Asha Maudgil v Suresh Kumar Gosain* [1994] 2 SLR(R) 427 at [18]; and Ong (2015) at [5.47] and [5.53].

⁶⁰ *Yap Chai Ling* at [49]. Yeo Tiong Min argues that the “obligation to obey the judgment is independent of the original obligation that had been enforced by the foreign court”. See Yeo TM, “Statute And Public Policy In Private International Law: Gambling Contracts And Foreign Judgments (*Liao Eng Kiat v. Burswood Nominees Ltd*)” [2005] 9 Singapore Year Book of International Law 133 (“**Yeo (2005)**”) at 133.

⁶¹ *UFN v UFM* at [19]; and *Ho Ah Chye* at [53] and [68(g)].

⁶² Mills A, “The Dimensions of Public Policy in Private International Law” (2008) 4 Journal of Private International Law 201 at 202 and 207 – 208.

⁶³ *Yap Chai Ling* at [51].

⁶⁴ *Yap Chai Ling* at [53].

⁶⁵ *Yap Chai Ling* at [53].

⁶⁶ See *UFN v UFM* at [19].

recognition would not be “*tantamount to acknowledging that a bigamous marriage may be regularised*” which is incompatible with the public policy of the *lex fori*, Singapore law.⁶⁷ By parity of reasoning, the recognition of the foreign divorce decree would not be an endorsement of the underlying same-sex marriage.

This reaffirms the longstanding principle that defences to recognition should remain narrow.⁶⁸ In this regard, the forum will not look into the jurisdiction of the foreign court over the matter, or the basis of the divorce decree granted on the foreign law’s grounds. Looking at the current common law rules listed above, they all seek to establish a link or connection between the parties and the foreign forum exercising jurisdiction to divorce parties. It is submitted that this commonality between them is the focus. Therefore, strictly applying the common law rules, the forum should not be concerned with the type of marriage (i.e. whether it is of a same-sex nature or not), the validity of the foreign marriage under the foreign law, or whether the marriage is valid under the *lex fori*. In the spirit of comity, the forum should only concern itself with whether the foreign forum had jurisdiction to grant a valid divorce decree to the parties, based on parties’ connection to that foreign jurisdiction. Logically, in exercising its jurisdiction to grant the divorce based on its foreign laws, the foreign forum had presumptively already considered and determined the validity of the foreign marriage. Consequently, the issue of the validity of marriage could now be said to be *res judicata*, and parties should not be allowed to forum-shop, re-litigate and / or have a second bite of the cherry after the matter has been decided by the foreign forum to allow for finality,⁶⁹ certainty, predictability, and justice. Tan Yock Lin took this argument one step further: the mere finality of the foreign judgment should be the “*key consideration*” by the local forum to recognise the foreign judgment.⁷⁰

This argument is not without merit and appears to have been the basis for the English case of *Lee v Lau*.⁷¹ In that case, the husband had entered into a Chinese customary marriage which was potentially polygamous in Hong Kong. Subsequently, after he and his wife agreed to divorce in Hong Kong, he moved to England to live and became domiciled in England. The husband then sought a declaration that he had the capacity to marry. The English Court held that the potentially polygamous nature of the marriage did not prevent it from determining that the marriage had been validly dissolved in Hong Kong.⁷² The English Court further held that the validity of the divorce could be decided on without deciding on the validity of the underlying marriage.⁷³ As such, the Hong Kong divorce was recognised as valid since it would be recognised by the Hong Kong Courts.⁷⁴ Following *Lee v Lau*, it is further submitted that therefore, as a matter of principle, the forum should not consider the issue of the validity of the underlying foreign marriage at all when recognising the foreign divorce decree. In the alternative, it should *only* be considered when deciding whether recognition of the foreign divorce decree is against the forum’s public policy. This will accord respect to the spirit of comity, certainty, and finality because the matter has already been decided by the foreign forum; its judgment should therefore be respected, subject to the forum’s limited public policy considerations. To do otherwise would result in limping marriages and / or divorces, and potentially encourage parties to forum-shop, albeit implicitly.

⁶⁷ *Yap Chai Ling* at [53].

⁶⁸ *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR(R) 111 at [27] – [28]; and Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Ancillary Orders after Foreign Divorce or Annulment* (July 2009) (“**LRC Report (2009)**”) at [20].

⁶⁹ *Republic of the Philippines v Maler Foundation and others* [2008] 2 SLR(R) 857 at [59] and [72].

⁷⁰ Tan YL, ‘Recognition and Enforcement of Foreign Judgments’ in Teo KS et al (eds), *Current Legal Issues in International Commercial Litigation* (National University of Singapore, 1997) at 297 and 326.

⁷¹ [1967] P 14

⁷² *Lee v Lau* at 22.

⁷³ *Lee v Lau* at 22 – 23.

⁷⁴ *Lee v Lau* at 25.

III. THE ROLE OF PUBLIC POLICY IN THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES AND DIVORCE

Having considered the common law rules above, this section will consider the role that public policy should take and how it should be balanced. Public policy has always been an uneasy area to delve into because of its uncertainties. Burrough J famously euphemised public policy as a “*very unruly horse*” because it is uncertain where it would take the rider.⁷⁵ It is no wonder that courts seek to limit its application as much as possible. Lord Denning MR, however, was more optimistic in remarking that “[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.”⁷⁶ To this end, the Singapore Court of Appeal nonetheless cautioned that this does not detract from the nature of public policy as still an “*unruly horse and must therefore be applied wisely*”.⁷⁷

In the specific context of the recognition of foreign divorce decrees, the House of Lords in *Vervaeke v Smith* have held that it “*will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved. There is little authority for refusing, on the ground of public policy, to recognise an otherwise conclusive foreign judgment*”.⁷⁸ Similarly, the Singapore Court of Appeal agreed in *Yap Chai Ling* that “*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 [t]here) – be applied liberally*”.⁷⁹ In that case, the Singapore Court of Appeal sought to distil whether there was in fact any real conflict of interest between the Shanghai jurisdiction and Singapore’s.⁸⁰ The Singapore Court found that it was “*indubitable that the public policy in both jurisdictions is the same. ... [both] only recognise a regime of monogamous marriages*” [emphasis in original].⁸¹ In obiter, it further held that public policy is considered in limited situations such as a maintenance claim for the overlapping period between the husband’s first and second marriage; the “*Singapore Court would then have had to decide if maintenance during that period*” [emphasis in original].⁸² This limited engagement of public policy shows the Singapore Court of Appeal’s approach in adhering to comity by invoking the discretionary public policy exception narrowly; even if invoked, it would operate with “*less vigour than public policy in the domestic law*”⁸³ if there is a real conflict of laws, so as to prevent the exception from becoming the rule.⁸⁴ In this section, the author will consider the general framework for the analysis of the public policy doctrine where there are conflicting local public policies from *UKM v Attorney-General* (“*UKM*”)⁸⁵. Thereafter, modifications to this framework will be proposed to allow for it to be applied in the private international law context.

⁷⁵ *Richardson v Mellish* [1824 – 34] All ER Rep 258 at 266.

⁷⁶ *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591 at 606.

⁷⁷ *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [35].

⁷⁸ *Vervaeke v Smith* at 164; *Cheni v Cheni* at 99; and affirmed by the Singapore Court of Appeal in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690 (“*Burswood*”) at [27].

⁷⁹ *Yap Chai Ling* at [45].

⁸⁰ *Yap Chai Ling* at [51] – [54].

⁸¹ *Yap Chai Ling* at [52].

⁸² *Yap Chai Ling* at [54].

⁸³ The principle is the same in non-family law cases. See *Burswood* at [41].

⁸⁴ Mills A, ‘The Dimensions of Public Policy in Private International law’ (2008) 4:2 Journal of Private International Law 201 (“*Mills (2008)*”) at 205.

⁸⁵ *UKM v Attorney-General* [2019] 3 SLR 874 (“*UKM*”) at [103] – [127] and [162].

A. **The Applicable Framework for the Consideration of Public Policy**

In 2018, a three-judge coram of the Singapore High Court⁸⁶ in *UKM* dealt with a situation involving a Singaporean father in a same-sex relationship with a non-Singaporean man, applying to adopt his biological child born overseas from gestational surrogacy. While this matter implicated international elements such as the foreign conception of the child through surrogacy in the USA and the presence of the foreign same-sex partner, they were not engaged by the Singapore High Court. Instead, the Court focused on the competing *local* public policy issue in the adoption application because the international issues did not affect the claimed statutory right – the adoption of the child.

The adoption application was intended to establish a “*legal nexus*” between the father and the child to improve the child’s chances of acquiring Singapore citizenship or permanent residency.⁸⁷ The adoption application under the Adoption of Children Act (“**ACA**”),⁸⁸ engaged section 5(b) of the ACA and section 3 of the Guardianship of Infants Act (“**GIA**”).⁸⁹ This meant that “*the child’s welfare should play at least a prominent role in determining the outcome of disputes relating to his custody and upbringing*”.⁹⁰ Therefore, “*when a certain outcome is shown to be for the welfare of the child, the court should generally make an order which achieves that outcome unless there are compelling reasons to do otherwise.*”⁹¹ The role of public policy depended on whether the law is judge-made or statutory, and whether it is in respect to socio-economic policies or legal policies. The Singapore High Court identified four categories of public policy as illustrated in the table reproduced from the judgment below:⁹²

⁸⁶ The three-judge coram comprised Chief Justice Sundaresh Menon, Judith Prakash JA and Debbie Ong J, the Presiding Judge of the Singapore Family Justice Courts. This is effectively a *de facto* Singapore Court of Appeal sitting albeit as a bench of the Singapore High Court because of the constitution and number of judges on the bench, the rarity of such a constitution on the Singapore High Court bench, and the novelty and importance of the legal issue. See *TUC v TUD* [2017] 4 SLR 1360 at [10] – [14]; *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 at [45] – [50]; and *Public Prosecutor v Lam Leng Hung and others* [2018] SGCA 7 at [56] – [57].

⁸⁷ *UKM* at [13].

⁸⁸ Section 5(b) of the Adoption of Children Act (Cap 4, 2012 Rev Ed) provides that: “[t]he court before making an adoption order shall be satisfied that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant”.

⁸⁹ Section 3 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) provides that: “[w]here in any proceedings before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father.”

⁹⁰ *UKM* at [38].

⁹¹ *UKM* at [57].

⁹² *UKM* at [111].

Matrix of Legal Contexts ⁹³		Type of Public Policy	
		Socio-economic	Legal
Type of Law	Judge-made law	Category 1A	Category 1B
	Statutory law	Category 2A	Category 2B

Socio-economic public policy refers to arguments for the common good of society in general, “especially from a social, economic, cultural and political perspective”.⁹⁴ On the other hand, legal public policy refers to arguments relating to the “conduct and consequences of legal practice”.⁹⁵

As *UKM* dealt with socio-economic public policies arising from a statute, the ACA, the Singapore High Court provided the following framework for the consideration of Category 2A cases that seek to curtail a claimed statutory right⁹⁶ on the basis of public policy (the “**Balancing Framework**”): first, the court must undertake a “forensic exercise”⁹⁷ to identify whether the alleged public policy exists through the examination of “appropriate authoritative sources”⁹⁸ that are “clearly expressed in order to be persuasive”⁹⁹, and “relevant to establishing that policy”.¹⁰⁰ Second, if giving effect to the claimed right would violate the identified public policy,¹⁰¹ the court will undertake a “balancing exercise” to consider the weight to be given to the identified policy and any countervailing concern in favour of giving effect to the claimed statutory right respectively, before reasoning “towards an outcome which strikes the proper balance between the competing considerations”.¹⁰² In determining the weight to be given to the claimed right and the countervailing public policy consideration, the court must consider how “connected or proximate” the public policy is to the legal issue,¹⁰³ whether the public policy or value “emanates from the applicable statutory regime”,¹⁰⁴ and the extent of the violation of the countervailing public policy if the claimed right were given effect.¹⁰⁵

Based on the above framework, the Singapore High Court held that two public policies existed and were engaged – first, a public policy in favour of parenthood within marriage after

⁹³ Reproduced from *UKM* at [111].

⁹⁴ *UKM* at [111].

⁹⁵ *UKM* at [111].

⁹⁶ The Singapore High Court drew a distinction between the use of public policy to “justify the existence and scope of a claimed right” and the curtailment of a claimed right. See *UKM* at [117] – [119].

⁹⁷ *UKM* at [136], and [162].

⁹⁸ Appropriate authoritative sources include primary legislation, subsidiary legislation, statements made by Cabinet Ministers, and judicial decisions. With respect to judicial decisions, “only those which express long-held values which concern in some way a fundamental purpose for which the law exists and on which reasonable persons may be presumed to agree” will be considered. See *UKM* at [138] – [143]; and *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 (“**Desert Palace**”) at [112].

⁹⁹ *UKM* at [144] – [145].

¹⁰⁰ *UKM* at [146].

¹⁰¹ *UKM* at [147].

¹⁰² *UKM* at [136], [148] – [162], and [242] – [249].

¹⁰³ *UKM* at [154].

¹⁰⁴ *UKM* at [155].

¹⁰⁵ *UKM* at [156] – [159].

examining the Singapore Parliamentary Debates from 2007 in relation to the repeal of section 377A of the Penal Code,¹⁰⁶ and section 46(1) of the Women’s Charter;¹⁰⁷ and second, a public policy against the formation of same-sex family units from examining the same Parliamentary Debates in relation to the repeal of section 377A of the Penal Code,¹⁰⁸ and section 12(1) of the Women’s Charter.¹⁰⁹ The Court was also very clear that the public policy in favour of parenthood within marriage is “*not the same as a public policy against other forms of parenthood. In fact, there is indication to the contrary [from the ACA]*”.¹¹⁰ The decision therefore turned on the second public policy (i.e. the formation of same-sex family units). In this case, after applying the balancing exercise, the Singapore High Court held that an adoption order would violate the public policy against the formation of same-sex family units. However, the adoption order was still granted:

*“On balance, it seems appropriate that we attribute significant weight to the concern not to violate the public policy against the formation of same-sex family units on account of its rational connection to the present dispute and the degree to which this policy would be violated should an adoption order be made. However, **having regard to all the circumstances before us, we think that neither of these reasons is sufficiently powerful to enable [the Court] to ignore the statutory imperative to promote the welfare of the [c]hild, and, indeed, to regard his welfare as first and paramount.** That statutory imperative [i.e. the welfare of the child] is not only intrinsically weighty, having emanated from the Legislature, but is also supported by the evidence, which shows that the welfare of the [c]hild, which is the value opposed by the countervailing public policy consideration in this case, would be materially advanced by our making an adoption order.”* [emphasis added]¹¹¹

¹⁰⁶ During the 2007 Parliamentary Debates on whether section 377A of the Penal Code should be repealed, PM Lee stated that following:

*“... Singapore is basically a conservative society. **The family is the basic building block of our society. It has been so, and, by policy, we have reinforced this and we want to keep it so. And by ‘family’ in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit.** ... This is the way Singapore society is today. **This is the way the majority of Singaporeans want it to be. So, we should strive to maintain a balance, to uphold a stable society with traditional, heterosexual family values, but with space for homosexuals to live their lives and contribute to the society.***

*... We were right to uphold the family unit when western countries went for experimental lifestyles in the 1960s ... But I am glad we did that, because today if you look at Western Europe, the marriage as an institution is dead. Families have broken down, the majority of children are born out of wedlock and live in families where the father and the mother are not the husband and wife living together and bringing them up. **And we have kept the way we are. I think that has been right.**”* [emphasis in original by the Singapore High Court in UKM at [187]]

See *Parliamentary Debates Singapore: Official Report*, vol 83 at cols 2397 – 2400 and 2406 – 2407 (23 October 2007) (PM Lee).

¹⁰⁷ Section 46(1) of the Women’s Charter provides that: “[u]pon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.”

¹⁰⁸ Section 377A of the Penal Code provides that: “[a]ny male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.”

¹⁰⁹ Section 12(1) of the Women’s Charter provides that: “[a] marriage solemnized in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void.”

¹¹⁰ UKM at [192].

¹¹¹ UKM at [248].

For completeness, despite finding the existence of the two public policies discussed above, it should be noted that the Singapore High Court explicitly rejected the Guardian-in-Adoption's other arguments that there are public policies against surrogacy,¹¹² and planned and deliberate parenthood through the use of artificial reproductive technology or surrogacy.¹¹³ However, these rejected public policies will not be examined in detail because they were not engaged or had not influenced the outcome of the judgment.

B. Modifications to the Balancing Framework to Tame the Unruly Horse in Private International Law

As can be seen, the original Balancing Framework conceived by the Singapore High Court in *UKM* did not involve private international law. This naturally leads to the question of comity's role in the Balancing Framework. In the realm of private international law, Adrian Briggs has elegantly stated that the principle of comity is "*the essence, the rule, of the common law of private international law*",¹¹⁴ and involves "*a duty of self-restraint*"¹¹⁵ by the local forum to defer to the more appropriate foreign forum's decision. In *Harjit Kaur d/o Kulwant Singh v Saroop Singh a/l Amar Singh* ("**Harjit Kaur**"), the Singapore High Court explicitly stated that the "**fundamental rule of comity as between courts of competent jurisdiction**" [emphasis added] must be regarded when determining the exercise of ancillary powers under Chapter 4A.¹¹⁶ The Singapore Court of Appeal in *Yap Chai Ling* has similarly held that comity is a "*countervailing (and no less) vital consideration*".¹¹⁷ In this respect, the author submits that the Balancing Framework must be modified to include the consideration of comity in two respects: first, as an overarching principle that public policy should only be used in exceptional situations; and second, as a commitment towards an international legal order that prevents limping marriages and / or divorces. A further modification is also needed when undertaking the 'forensic exercise' to identify the existence of public policies in private international law situations, international sources must be considered, including international treaties that Singapore has acceded to.

(i) Comity as an overarching principle to limit public policy

As noted above, the Singapore Court of Appeal's direction in *Yap Chai Ling* that public policy is an "*unruly horse*" which should not be allowed to ride roughshod over well-established principles and not be applied liberally.¹¹⁸ This echoes the House of Lords' caution in *Vervaeke v Smith* for public policy to be invoked "*slower ... in the field of conflict of laws*".¹¹⁹ This affirms Alex Mills' caution that excessive application of the public policy exception may lead to the exception "*swallow[ing] the rule ... [and] risk undermining the very existence of rules of private international law*".¹²⁰ He further notes that "*the recognition that public policy is effectively an exceptional choice-of-law rule, whose operation must be constrained by the ordering principles which operate behind other choice-of-law rules*".¹²¹ Therefore, following *Vervaeke*

¹¹² *UKM* at [167] – [186].

¹¹³ *UKM* at [193] – [201].

¹¹⁴ Briggs A, 'The Principle of Comity in Private International Law' (2012) 354 *Recueil des cours* 65 ("**Briggs (2012)**") at 82.

¹¹⁵ Briggs (2012) at 143 and 161.

¹¹⁶ *Harjit Kaur d/o Kulwant Singh v Saroop Singh a/l Amar Singh* [2015] 4 SLR 1216 ("**Harjit Kaur**") at [25].

¹¹⁷ *Yap Chai Ling* at [45].

¹¹⁸ *Yap Chai Ling* at [45]; and Tan (1993) at 58.

¹¹⁹ *Vervaeke v Smith* at 164.

¹²⁰ Mills (2008) at 205.

¹²¹ Mills (2008) at 210.

*v Smith*¹²² and *Yap Chai Ling*¹²³, comity would demand that public policy play a more diminished role in private international law in the form of a residual power that should be exercised in a restrained manner *vis-à-vis* non-cross-jurisdictional disputes;¹²⁴ public policy should only be used when the forum's *fundamental* public policy is contravened. This is because too much reluctance to recognise decrees valid by the law of the domicile is against the interests of comity.¹²⁵

The author's submission that comity leans in favour of recognition and the narrow application of public policy is supported by the Singapore Court of Appeal's decision in *Liao Eng Kiat v Burswood Nominees Ltd* ("**Burswood**")¹²⁶ involving the registration of a foreign judgment on a dishonoured cheque obtained in an Australian Court under the Singapore Reciprocal Enforcement of Commonwealth Judgments Act ("**RECJA**").¹²⁷ While the local public policy under the Singapore Civil Law Act¹²⁸ prohibits the recovery of gambling debts,¹²⁹ the Singapore Court of Appeal held that the domestic public policy against the enforcement of gambling debts is not "*so important to form part of the core of essential principles of justice and morality shared by all nations, thus raising it to the level of 'international' public policy*".¹³⁰ *Burswood* demonstrates the distinction between domestic and international public policy, for which only the latter should be applied in private international law cases. It further strengthens the argument for the recognition of foreign same-sex divorce decrees since it is also a recognition of a foreign judgment. Although doubts in obiter have been casted on *Burswood*'s reasoning by the subsequent Singapore Court of Appeal (with an entirely different composition) in *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* that the foreign judgment in *Burswood* should not have been registered, *Burswood* has not been overruled and remains good law in Singapore.¹³¹

(ii) Comity as a commitment towards an international legal order

In addition to the narrow application of public policy, comity plays a dual role as a substantive factor to be considered in the modified Balancing Framework if public policy is to be applied. Comity can also be seen as a commitment towards an international legal order that prevents limping marriages and / or divorces from resulting. The two propositions – comity as a countervailing factor and a commitment towards an international legal order – suggested here will be unpacked in turn.

It is submitted that comity can be seen as a commitment towards an international legal order that prevents limping marriages and / or divorces. This argument is not without merit since the

¹²² *Vervaeke v Smith* at 164, affirmed by the Singapore Court of Appeal in *Burswood* at [27].

¹²³ *Yap Chai Ling* at [45].

¹²⁴ See also *Burswood* at [41].

¹²⁵ *Ho Ah Chye* at [30]; and *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR(R) 111 at [26].

¹²⁶ [2004] 4 SLR(R) 690.

¹²⁷ Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("**RECJA**"). It should be noted that the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 was gazetted on 1 October 2019 to repeal RECJA, as of 1 December 2020, it has yet to come into force. See *Burswood* at [18] – [21].

¹²⁸ Cap 43, 1994 Rev Ed.

¹²⁹ *Burswood* at [23] – [24]; *Desert Palace* at [112]; and *The Star Entertainment QLD Ltd v Wong Yew Choy and another matter* [2020] SGHC(I) ("**Star Entertainment**") 15 at [43] – [45] and [53] – [57].

¹³⁰ *Burswood* at [42]. See also *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at [115] and [168]; and Yeo (2005) at 133.

¹³¹ *Desert Palace* at [111] – [114]. It should be noted the recent Singapore International Commercial Court did not decide on the correctness of *Burswood* in this respect but highlighted how enforcing the local public policy against the recovery of gambling debts allows Singaporean gamblers to evade foreign gambling debts. It is beyond the scope of this paper to discuss the correctness of *Burswood*. See generally *Star Entertainment* and [60]; Yeo (2005).

Hague Convention on Divorce Recognition, which embodies the common law rules, was designed to correct and prevent limping marriages;¹³² the ideal situation is one where every nation acceded to this Convention would prevent limping marriages from resulting.¹³³ Lord Collins of Mapesbury stated that recognition will address “*the real problem [which] is to prevent limping marriages*”.¹³⁴ In a similar vein, Tan Yock Lin adopted a more pragmatic position that a “*liberal policy of recognition also helps to ensure that limping marriages are kept to a minimum*”.¹³⁵ Having limping marriages or divorces does not cohere with the spirit of comity because of the uncertainties and different marriage statuses these couples will have, depending on the jurisdiction they are in.¹³⁶ The author builds on these eminent scholars’ arguments to add that a liberal recognition policy of foreign marriages will prevent or keep limping marriages *and* limping divorces to a minimum. This is important because the status of parties – whether they can re-marry – will be left in limbo if their marriage and / or divorce is recognised in some jurisdiction but not in others. It cannot be belaboured that parties’ statuses are crucial because of their third-party repercussions.

Further, if we consider the development of the common law rules for the recognition of foreign divorces, the trend from *Harvey v Farnie*¹³⁷ to *Armitage v Attorney-General*,¹³⁸ *Travers v Holley*,¹³⁹ and finally *Indyka v Indyka*,¹⁴⁰ has been that the tests have continually evolved to become more inclusive.¹⁴¹ A more liberal recognition policy is in line with this trend and will support the “*norm of international comity to all jurisdictions that the community of nations should work towards the orderly resolution of disputes in different jurisdictions*”.¹⁴² In the worst-case scenario, if the issues of the division of matrimonial assets and / or child maintenance are not decided by the courts as a result of a limping marriage or divorce, Singapore may be used by persons from same-sex marriages as a jurisdiction to escape their parental obligations or the division of matrimonial assets;¹⁴³ children may not be sufficiently provided for and may result in becoming the state’s responsibility.¹⁴⁴ With respect to spousal maintenance, while the Women’s Charter does not cater to the context of same-sex relationships, this should not inhibit their application. Provisions in relation to spousal maintenance can be read purposively in line with the equitable doctrine of substantial compliance for them to be gender neutral.¹⁴⁵

In considering the history of the common law rules of recognition, Ormrod J similarly deduced two fundamental desiderata in the earlier decision of *Vervaeke v Smith*: the need to avoid limping marriages, and the need to protect the standards of marriage in the UK against perceived laxer standards in the foreign forum.¹⁴⁶ In that case, the specific circumstances of the case resulted in the inevitable and unfortunate outcome of a limping marriage. *Vervaeke*

¹³² *Quazi v Quazi* [1980] 1 AC 744 at 804.

¹³³ *Vervaeke (formerly Messina) v Smith and others* [1982] 2 WLR 855 at 871. See also Lord Pearce’s decision that is based on this issue of limping marriages in *Indyka v Indyka* at 77 – 91.

¹³⁴ Collins (2012) at [18-071].

¹³⁵ Tan (1993) at 370.

¹³⁶ McClean (1983) at [2.04]; and Mortensen (2019) at [14.47].

¹³⁷ (1882) 8 App Cas 43.

¹³⁸ [1906] P 135.

¹³⁹ [1953] P 246 (CA).

¹⁴⁰ [1969] 1 AC 33.

¹⁴¹ See also McClean (1983) at [2.09].

¹⁴² Chng (2018) at 150; and Harris J, ‘Recognition of Foreign Judgments at Common Law – The Anti-suit Injunction Link’, (1997) 17 Oxford Journal of Legal Studies 477 at 480.

¹⁴³ Free MDA, ‘Marriage and Divorce in England’ (1995) 29:3 Family Law Quarterly 549 at 564.

¹⁴⁴ Stark B, ‘4. Divorce’ in Stark B and Heaton J (eds), *Routledge Handbook of International Law* (Routledge: 2019) (“**Stark (2019)**”) at 64.

¹⁴⁵ Ideally, these provisions should be amended legislatively. See sections 113 and 127 of the Women’s Charter.

¹⁴⁶ *Messina (formerly Smith orse Vervaeke) v Smith and others* [1971] 1 P 322 at 334.

v Smith involved a prostitute (domiciled in Belgium) who married an Englishman to acquire British nationality. Thereafter, she married an Italian man who passed away at the wedding reception. The woman needed her first marriage to be void so that her second marriage to the Italian would be valid, allowing her to inherit the Italian's sizeable estate. Her initial application to the English Courts failed to show that her first marriage to the Englishman was void. The woman then brought the same application in the Belgian Courts and succeeded in arguing that the first marriage was contrary to public policy, and therefore void. With the Belgian nullity decree, she returned to the English Courts for their recognition of the first marriage's nullity. The House of Lords, however, refused recognition on the grounds of *res judicata* and that English public policy operated to prevent the recognition of the Belgian decree. From the House of Lords' judgments, the woman's intentional exploitation of a loophole – by going to the Belgian Courts after her original application was dismissed by the English Courts – appeared to weigh heavily in their Lordships' minds. Specifically in relation to the ground of public policy, Lord Hailsham of St Marylebone held that “*in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties' personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities*”; this public policy applies “*at least*” to marriages celebrated in England between Britons.¹⁴⁷

Lord Simon of Glaisdale (“**Lord Simon**”) took it further in holding that *res judicata* is “*no more than an application of English public policy*”, and that public policy in there “*denotes consideration of wider social interests*”.¹⁴⁸ This is because there is “*little authority for refusing, on the ground of public policy, to recognise an otherwise conclusive foreign judgment-no doubt because the conclusiveness of a judgment of a foreign court of competent jurisdiction is itself buttressed by the rule of public policy*”.¹⁴⁹

In *Vervaeke v Smith*, English and Belgian public policies were contradictory as to the validity and consequences of the ‘sham’ marriage in question. While agreeing with precedents that public policy should be invoked with “*extreme reserve*” in conflict of laws situations because of comity,¹⁵⁰ Lord Simon balanced the two jurisdictions’ public policies and held that English public policy is preferred to Belgian public policy regarding this ‘sham’ marriage because of the certainty from validating registered and formally correct marriages in England, and that English law was the proper choice of law to be applied since England was the *lex loci celebrationis* and that it had the most real and substantial connection to the marriage.¹⁵¹ *Vervaeke v Smith* demonstrated the additional difficulty in determining the public policies between competing jurisdictions. In other words, the unfortunate outcome of a limping marriage only resulted because the Belgian woman had intentionally tried to circumvent the initial decision by the English Courts that rejected her nullity application by seeking out the same before the Belgian Courts; the limping marriage was effectively created by the Belgian woman’s own actions. Read in this light, *Vervaeke v Smith* should not be seen as condoning limping marriages when local public policy is contravened.

It bears highlighting that marriages and divorce decrees are status-altering in nature and have third-party repercussions. In the case of marriages, the parties are no longer unrelated and

¹⁴⁷ The House of Lords affirmed Ormrod J’s finding that public policy provides that “*if the parties exchange consents to marry with due formality, intending to acquire the status of married persons, it is immaterial that they intend the marriage to take effect in some limited way or that one or both of them may have been mistaken about or unaware of some of the incidents of the status which they have created. To hold otherwise would impair the effect of the whole system of law regulating marriages in this country, and gravely diminish the value of the system of registration of marriages upon which so much depends in a modern community.*” See *Vervaeke v Smith* at 152.

¹⁴⁸ *Vervaeke v Smith* at 161.

¹⁴⁹ *Vervaeke v Smith* at 164.

¹⁵⁰ *Vervaeke v Smith* at 164.

¹⁵¹ *Vervaeke v Smith* at 165 - 166.

therefore obtain new rights not available to strangers (such as intestacy or immigration benefits). Conversely, a divorce informs the world that the parties are no longer related and consequently, have no claim over benefits that are reserved for marriages. As a result of the nature and consequences of marriages and divorces, courts should uphold comity and limit the applicability of local public policy. In a situation where foreign same-sex marriages or divorces are refused recognition, one party to the marriage may be able evade their responsibilities by submitting themselves to the Singapore Courts' jurisdiction since the Singapore Courts will not adjudicate on their marriage and / or their ancillary issues, which will result in a limping marriage or divorce for the couple and children.¹⁵² Broadly, this unjust outcome should be avoided because this unintended encouraging of forum-shopping would fly in the face of legal certainty and finality in both the recognition of same-sex marriages and divorces. *Vervaeke v Smith* has demonstrated that legal certainty, finality, and the principle of *res judicata* are important to ensure fairness. Parties should not be allowed to have a second bite of the cherry when the outcome from the foreign forum is not favourable.¹⁵³ Considered from this perspective, comity can be seen as a commitment towards an international legal order which is substantive in nature because its consequences must be considered before the blunt tool of public policy is applied to prevent recognition. In this regard, Tan Yock Lin succinctly sums the importance of certainty and finality as follows:

*“There are also considerations of finality which cannot be ignored. Finality is held so important an objective that upon it rests the doctrine of res judicata. Finality serves not only party interests and reliance on the part of third parties on the decree as pronounced, it enhances the judicial integrity by minimizing expressions of judicial disagreement.”*¹⁵⁴

For completeness, arguably, the concern of forum-shopping may be less pressing for the recognition of both foreign same-sex marriages and divorces because of the in-built jurisdiction requirements. With respect to the recognition of a foreign same-sex marriage for the purposes of a Part X application, section 93(1) of the Women's Charter provides that the Singapore Courts would only assume its divorce jurisdiction if one party to the marriage is “domiciled in Singapore at the time of the commencement of the proceedings”, or if one party has been “habitually resident in Singapore for a period of 3 years immediately preceding the commencement of the proceedings”.¹⁵⁵ Similarly, for the recognition of foreign same-sex divorces for the purposes of a Chapter 4A application, section 121C of the Women's Charter explicitly limits the Singapore Courts' jurisdiction to applicants who are domiciled in Singapore at the time of application, or to applicants who have been habitually resident in Singapore for a “continuous period of one year immediately preceding” the application.¹⁵⁶ Given the high threshold for the proof of change to a Singapore domicile, it can be argued that only parties with a nexus to Singapore will be able to obtain the adjudication of the Singapore Courts for the purposes of divorce and / or ancillary relief under Part X or Chapter 4A.

Although *UKM* only involved conflicting local public policies, the balancing of public policies in *UKM* is not new to the conflict of laws in family law. As discussed above, in *Yap Chai Ling*, the Singapore Court of Appeal undertook similar steps to identify the public policy that was engaged and then determined if there was a real conflict of laws in the first place. If there was a real conflict of public policies (such as the hypothetical provided in dicta), the court will undertake a balancing exercise.¹⁵⁷ In considering public policy in the context of private international law, the Singapore Court of Appeal held that comity is a “countervailing (and not

¹⁵² McClean (1983) at [2.04].

¹⁵³ *UFN v UFM* at [48]; and *Harjit Kaur* at [30] – [32].

¹⁵⁴ Tan (1993) at 370.

¹⁵⁵ Sections 93(1)(a) – (b) of the Women's Charter.

¹⁵⁶ Sections 121C(a) – (b) of the Women's Charter.

¹⁵⁷ *Yap Chai Ling* at [54].

less) *vital consideration*".¹⁵⁸ The operative word 'countervailing' suggests that this will necessarily require a comparison and / or balancing exercise where comity is pitted against the public policy in question; one public policy is not always subservient to the other.¹⁵⁹ Although *Yap Chai Ling*'s facts did not require the balancing of public policies and comity, at the very least, it shows that the use of comity as a factor in the balancing approach has not been / was not dismissed.¹⁶⁰

At this juncture, it is worth considering how the modified Balancing Framework interplays with Bernard Currie's popular development – interest analysis.¹⁶¹ At first glance, *Yap Chai Ling* appears to have applied interest analysis to some extent in its balancing.¹⁶² The Singapore Court of Appeal first identified the rule and policy of each forum before considering whether the state has an interest in the application of its rule.¹⁶³ Subsequently, it undertook a "*more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied*" for each conflicting policy.¹⁶⁴ This process resulted in the conclusion that the public policies in Singapore and Shanghai do not conflict, and was, in Bernard Currie's terms, a false conflict. This limited reading of public policies appears to be in the spirit of comity that the Singapore Court of Appeal implicitly observed when it sought to identify the common ground between public policies in Shanghai and Singapore – namely, the recognition of only monogamous marriages. Arguably, the Singapore Court of Appeal's *ex hypothesi* lamentation in obiter is equivocal in whether it would follow Bernard Currie's framework by rigidly applying the *lex fori* where there is a real conflict of laws, since the issue was left open.¹⁶⁵ Regardless, it did not confine itself to necessarily applying the *lex fori* where a real conflict of public policies exists, but for it to be dealt with when the occasion arises. There is currently no indication on the direction or balancing that the Singapore Courts will undertake in this case or subsequent cases involving the recognition of foreign divorce decrees. However, Peter Machin North cautions the applicability of interest analysis in this regard since it was introduced to respond to problems created by archaic statutes and the lack of clarity found in tort policies.¹⁶⁶ Tan Yock Lin supplements North and argues that the application of interest analysis to "*questions of essential validity will not yield that certainty that parties to a proposed marriage need*".¹⁶⁷

Arguably, the approach taken in *Yap Chai Ling* is closer to *Vervaeke v Smith* where the English House of Lords sought to *identify* the public policy that was being engaged instead of the state interests.¹⁶⁸ In this regard, the proposed modified Balancing Framework does not face the issues encountered in Bernard Currie's interest analysis or *Vervaeke v Smith*, as exemplified by *Yap Chai Ling*. Applying the modified Balancing Framework only engages Singapore's public policy since recognition is being sought in Singapore's jurisdiction, where the parties are most connected to. In this case, stronger connections to Singapore can be seen from Ryan's nationality as a Singaporean, the jurisdictional threshold under section 121C of the Women's Charter is satisfied, and most of their marriage (including working and raising of their

¹⁵⁸ *Yap Chai Ling* at [45].

¹⁵⁹ See also *Indyka v Indyka* at 58.

¹⁶⁰ It should be noted that in the separate case of *BAZ v BBA and others and other matters* [2018] SGHC 275, the Singapore High Court adopted and applied the Balancing Framework from *UKM* in the context of arbitration. This was not overturned on appeal.

¹⁶¹ Currie B, *Selected Essays on the Conflict of Laws* (Duke University Press, 1963) ("**Currie (1963)**").

¹⁶² Currie (1963) at 177 – 187; and Tan (1993) at 215.

¹⁶³ Jamie Ratner summarises Currie's interest analysis framework succinctly. See Ratner JR, 'Using Currie's Interest Analysis to Resolve Conflicts Between State Regulation and the Sherman Act' (1990) 30 *William & Mary Law Review* 705 at 728 – 732.

¹⁶⁴ Currie B, 'The Disinterested Third State' (1963) 28 *Law & Contemporary Problems* 754 at 757.

¹⁶⁵ *Yap Chai Ling* at [54].

¹⁶⁶ North PM, (1980) I *Hague Recueil* at 36.

¹⁶⁷ Tan (1993) at 216.

¹⁶⁸ *Vervaeke v Smith* at 151 – 153 and 164 – 167.

children) being in Singapore.¹⁶⁹ *Vervaeke v Smith* and *Yap Chai Ling* demonstrate that the importance of these connections to the forum cannot be underestimated since these connections engage the forum's public policy (where recognition is sought for foreign decrees), more than the *lex loci celebrationis* or the foreign divorcing court. Unlike interest analysis and *Vervaeke v Smith*, the foreign forum's public policy is not engaged in the author's proposed modified Balancing Framework, so there is no need to demonstrate the conflict of policies between the two states. Another stark contrast from interest analysis (which automatically finds the path of least resistance by applying the forum's public policy where there is a real conflict of interests) is that the author's proposed framework will consider the consequences (including those affecting the children and parties to the marriage, and comity) of denying recognition of the marriage or divorce when balancing the claimed statutory right against the countervailing public policy. This important difference will ensure that limping marriages or divorces are avoided as far as possible. As noted by Lord Pearce, "[i]f comity be allied to common sense and a desire to make things work, one should not, while taking rights over the subjects of other countries who reside here, refuse to acknowledge the rights of other countries to do likewise".¹⁷⁰

(iii) International treaties are appropriate authoritative sources to be considered in the Balancing Framework

Lastly, when conducting a 'forensic exercise' to identify the existence of public policies in private international law situations international sources (including international treaties that Singapore has acceded to) as "*appropriate authoritative sources*".¹⁷¹ In the hypothetical provided, the only relevant international treaty engaged would be the United Nations Convention on the Rights of the Child ("**UNCRC**"),¹⁷² since children are involved. Since acceding to the UNCRC, Singapore has implemented the international norms embodied within it in her legislations.¹⁷³ While the UNCRC is relevant whenever the welfare of the child is engaged, it is regrettable that these international norms were not discussed in *UKM*. Nonetheless, it is submitted that the UNCRC is even more relevant in private international law situations because it embodies international norms shared by a community of states, to which Singapore has committed to adhere to. Singapore's accession to the UNCRC therefore elevates and strengthens the principle of the child's best interests because of this 'international' element.¹⁷⁴ Comity will therefore require more weight to be given to these international norms that have become part of local norms.¹⁷⁵

As a final note on the modification of the Balancing Framework from *UKM*, the author's proposition will build on the English and Singapore Courts' consensus that reliance on the forum's public policy to deny recognition to foreign decrees should also be with "*extreme reserve*" while also acknowledging that there may still be very limited situations where it might be necessary despite this being against comity. As noted by Tan Yock Lin, comity is "*not a*

¹⁶⁹ Section 121F(2) of the Women's Charter.

¹⁷⁰ *Vervaeke v Smith* at 84.

¹⁷¹ *UKM* at [138] – [143].

¹⁷² United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3/[1991] ATS 4/28 ILM 1456 (1989) (entered into force on 2 September 1990) ("**UNCRC**").

¹⁷³ Singapore acceded to the UNCRC on 5 October 1995 and has since implemented it in her domestic legislations including the Women's Charter, Children and Young Persons Act (Cap 38, 2001 Rev Ed), Administration of Muslim Law Act (Cap 3, 2009 Rev Ed), Protection from Harassment Act (Cap 256A), Family Justice Act 2014 (No 27 of 2014), and Child Development Co-Savings Act (Cap 38A, 2002 Rev Ed).

¹⁷⁴ See *Burswood* at [42].

¹⁷⁵ Notably, in situations not involving children, the UNCRC will not be considered. However, this does not lead to the immediate conclusion that recognition should be refused because this only forms a part of the balancing exercise in the modified Balancing Framework.

matter of absolute obligation ... and is certainly no panacea".¹⁷⁶ This means that local public policy is not necessarily always subservient to the "*fundamental rule of comity*" though a "*significant consideration*";¹⁷⁷ the public policy doctrine is still needed to "*safeguard human rights and community norms*".¹⁷⁸ The Singapore Court of Appeal demonstrated this restraint in *Yap Chai Ling* by reading the actual conflict of public policies from the Shanghai divorce decree narrowly.¹⁷⁹

IV. APPLYING THE MODIFIED BALANCING FRAMEWORK: FOREIGN SAME-SEX MARRIAGES AND DIVORCES SHOULD BE RECOGNISED ON BALANCE

Having considered the Balancing Framework and its necessary modifications, this section will apply the framework by first identifying the claimed statutory right(s) and the countervailing public policy. It will then balance the competing interests for both the recognition of same-sex marriages and divorces, before discussing how the recognition of same-sex divorces can be limited. Finally, this section will show how the alternatives to recognition are unsatisfactory. In balancing the competing interests, inspiration will be drawn from the use of public policy in the context of polygamous marriages¹⁸⁰ on how to best situate and consider the role of public policy against same-sex marriages. Since the public policy engaged in the recognition of foreign same-sex marriages and divorce decrees overlap, they will be discussed together.¹⁸¹

A. Identifying the Claimed Statutory Right(s) and Countervailing Public Policy

As noted in the introduction, this paper will consider two situations: one, where Jeremy and Ryan seek the recognition of their foreign same-sex marriage for divorce and ancillary relief in Singapore under Part X; and two, where Jeremy and Ryan seek the recognition of their foreign same-sex divorce decree for their application for ancillary relief under Chapter 4A. What predicates their Chapter 4A application is the recognition of their foreign same-sex divorce decree from Toronto, and implicitly, the recognition of their foreign same-sex marriage. In both situations, the ancillary relief would be for custody, care and control, spousal and child maintenance, and division of matrimonial assets. What also results from the recognition of the foreign same-sex marriage or divorce is the respective creation or recognition of the new status of the parties as single, separate individuals. Although there is overlap between the two claimed statutory rights, the two actions remain distinct from one another and will be analysed separately where necessary.

(i) Claimed Statutory Right(s) under Part X and Chapter 4A

In the first situation where there is an application for divorce under Part X, the Singapore Courts will have jurisdiction to hear the divorce proceedings, since Ryan is domiciled in Singapore,¹⁸² and both parties have habitually resided in Singapore three years prior to the commencement of proceedings.¹⁸³ Although they have fulfilled the jurisdictional requirements

¹⁷⁶ Tan (1993) at 6.

¹⁷⁷ Tan (1993) at 6; and *Hilton v Guyot* as cited in *Re Jackson* [1903] 1 Ch 821 at 829.

¹⁷⁸ Chng K, 'A theoretical perspective of the public policy doctrine in the conflict of laws' (2018) 14:1 Journal of Private International Law 130 ("**Chng (2018)**") at 151.

¹⁷⁹ *Yap Chai Ling* at [51] – [54].

¹⁸⁰ The Singapore Court of Appeal has found that the Singapore legal system "*only recognise[s] 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*". See *Yap Chai Ling* at [52].

¹⁸¹ The author recognises that the recognition of foreign same-sex marriages will encounter the issue with the application of the dual domicile rule. However, for the purposes of the public policy discussion that follows, it is assumed that this is not an issue.

¹⁸² Section 93(1)(a) of the Women's Charter.

¹⁸³ Section 93(1)(b) of the Women's Charter.

under section 93(1) of the Women’s Charter, public policy is engaged because of the nature of their marriage – a same-sex marriage. The granting of the divorce order, and later, the ancillary relief for the division of matrimonial assets,¹⁸⁴ maintenance,¹⁸⁵ and custody, care and control orders,¹⁸⁶ are substantive statutory rights that will directly affect the welfare of the children of the marriage. The Singapore Court of Appeal¹⁸⁷ has affirmed Leong Wai Kum’s proposition¹⁸⁸ that, applications involving the custody and upbringing of the children will necessarily engage section 3 of the GIA, which requires the Singapore Courts to “*regard the welfare of the [child] as the first and paramount consideration*”. In this regard, the international norms within the UNCRC, particularly Article 3 concerning the child’s best interests, are also engaged as a result. It is worth noting that the concept of the welfare of the child is inexhaustive and includes the “*physical, intellectual, psychological, emotional, moral and religious well-being*” of the child.¹⁸⁹ At the very least, the divorce order will indirectly affect the child’s welfare in addition to the direct impact of the ancillary relief, as regularly witnessing tensions between their parents will significantly affect the children negatively.

On the other hand, an application for ancillary relief under Chapter 4A requires the Singapore Courts to recognise the foreign divorce decree so that leave of court may be obtained for parties to obtain the same substantive relief as an application for divorce under Part X in Singapore. This is slightly different from the application for divorce and ancillary relief under Part X from the Singapore Courts as the recognition of the foreign divorce decree only requires an *implicit* recognition of the underlying same-sex marriage. Linda Silberman refers to such instances as an “*involving an ‘incidental question’ because the validity of the marriage is not the direct object of the suit*”.¹⁹⁰ In this situation, the welfare of the child is again engaged because the same ancillary relief sought will directly affect the children.

In any case, in both situations, even if there are no children, the relief sought will allow parties to the marriage to move on and start a new life, have a clean break, and alter the parties’ statuses from married persons to singles with capacity to enter into new marriages. Despite directly affecting only the couple (and their new partners if they do remarry), the importance of these outcomes cannot be overstated because these outcomes allowed by the recognition of the marriage and / or divorce prevents limping marriages and / or divorces, which are detrimental to the international legal order.

(ii) Countervailing Public Policy

As stated above, the question of divorce cannot exist without a valid marriage. It follows that the public policy from the recognition of foreign same-sex marriages will also apply to the recognition of foreign same-sex divorces. In *UKM*, the Singapore High Court identified a public policy against the formation of same-sex family units because of the Singapore Government’s “*evident unwillingness*” to repeal section 377A of the Penal Code, and the invalidity of same-sex marriages since they are void under section 12(1) of the Women’s Charter.¹⁹¹ In Jeremy and Ryan’s situation, there is no need to narrow the public policy to family units. Their situation does not involve the *formation of a same-sex family unit* by virtue of the marriage, but the direct and / or indirect recognition of their foreign same-sex marriage such that they can obtain the divorce and / or ancillary relief under Part X or Chapter 4A.

¹⁸⁴ Section 112 of the Women’s Charter.

¹⁸⁵ Sections 113 and 127 of the Women’s Charter.

¹⁸⁶ Section 125 of the Women’s Charter.

¹⁸⁷ *BNS v BNT* [2015] 3 SLR 973 at [19]; and *UKM* at [50].

¹⁸⁸ Leong WK, *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018) (“**Leong (2018)**”) at [7.058] and [9.128].

¹⁸⁹ *UKM* at [45].

¹⁹⁰ Silberman L, ‘Same-Sex Marriage: Refining the Conflict of Laws Analysis’ (2005) 153 *University of Pennsylvania Law Review* 2195 (“**Silberman (2005)**”) at 2203.

¹⁹¹ *UKM* at [206].

In particular, section 12(1) of the Women’s Charter is axiomatic in establishing a public policy against same-sex *marriages*. The section deals directly with the same-sex nature of a marriage. Therefore, the public policy in this case should be the public policy against same-sex marriages. As a corollary point, the author takes the position that the retention of section 377A of the Penal Code should not be given similar weight as in *UKM*¹⁹² in identifying this public policy. *TIG v TIH* has demonstrated that the presence of penal consequences against polygamous marriages does not bar Singapore Courts’ jurisdiction of divorce and ancillary relief.¹⁹³ Regardless, whether section 377A of the Penal Code can be used as a justification at all is in flux since its constitutionality is currently challenged on appeal in the Singapore Court of Appeal,¹⁹⁴ in light of new academic arguments advanced by the former Singapore Chief Justice Chan Sek Keong,¹⁹⁵ and new evidence released from the British archives and examined by Chua Jun Yan.¹⁹⁶

B. Balancing the Competing Public Policy and the Claimed Statutory Right

At the onset, it is worth noting that the implications from the recognition of the same-sex marriage and divorce are different but significant. Following *UKM*, significant weight should be given to the countervailing public policy against same-sex marriages for the divorce and ancillary relief application under Part X. This is because the public policy is very closely connected to,¹⁹⁷ and emanates from, the very issue of same-sex marriages and the statute that the recognition applications are based on.¹⁹⁸ In this case, recognition of the same-sex marriage to grant the claimed rights will violate the countervailing public policy in its entirety. This is because, applying the common law rules, the recognition of the foreign same-sex marriage requires the consideration of the marriage’s validity, the very object that the public policy seeks to counter. Effectively, this could be seen as an endorsement of the underlying nature of the marriage.

Before balancing the identified public policy against the claimed statutory rights, the author will first explore how public policy is considered in the context of polygamous marriages, since it also goes to the capacity of parties to enter into a valid marriage. Divorces for polygamous or potentially polygamous marriages tend to face two concurrent issues: the unilaterality of the divorce, and the incompatibility of divorce methods with the underlying marriage. For the purposes of this article, the unilaterality of the divorce is not relevant; the focus will be on the underlying polygamous nature of the marriage.

Although comity demands that the public policy be considered exceptionally, significant weight must still be given to the public policy against same-sex marriages “*on account of its rational connection*”¹⁹⁹ to the claimed statutory rights, and the degree to which this policy would be violated if both the foreign same-sex marriage and divorce were to be recognised. Applying the modified Balancing Framework, on balance, it would be in the family and child’s welfare

¹⁹² *c.f.* *UKM* at [205] – [206].

¹⁹³ It should be recalled that *TIG v TIH* dealt solely with ancillary relief; the divorce judgment was not reported.

¹⁹⁴ As of 1 January 2021, the constitutionality of section 377A of the Penal Code has not been heard by the Singapore Court of Appeal. See *Ong Ming Johnson v Attorney-General and other matters* [2020] SGHC 63 (“*Ong Ming Johnson*”).

¹⁹⁵ Chan SK, ‘Equal Justice Under the Constitution and Section 377A of the Penal Code – The Roads Not Taken’ (2019) 31 Singapore Academy of Law Journal 773.

¹⁹⁶ These arguments will not be extensively discussed further since they are outside the scope of this paper. See Chua JY, ‘The Strange Career of Gross Indecency: Race, Sex, and Law in Colonial Singapore’ (2019) Law and History Review 1.

¹⁹⁷ *UKM* at [243].

¹⁹⁸ *UKM* at [244].

¹⁹⁹ *UKM* at [248].

for the marriage and divorce to be recognised because the claimed statutory rights would give the couple access to ancillary relief under the Women’s Charter. Recognition also coheres with the spirit of comity, the public interest to attract foreign talent (including LGBTQ persons), and international norms under the UNCRC that Singapore acceded to. Adherence to these international norms is vital to ensure that Singapore lives up to its commitment to the international community that the “*best interests of the child shall be a primary consideration*”.²⁰⁰ This is important to allow Jeremy, Ryan, and their children to move on after the divorce and prevent a limping marriage or divorce as part of Singapore’s commitment to an international legal order. As noted by Ann Laquer Estin, limping marriages or divorces have “*the potential to cause enormous difficulty for families*”.²⁰¹

Further, Singapore is also the most connected and suitable jurisdiction for the divorce order to be obtained and / or for the ancillary issues to be considered. Comity and the status-altering nature of foreign marriages and divorces demand respect to be given to the foreign marriages and divorce decrees issued by other jurisdictions. In addition, to attract foreign talent, merely stating that LGBTQ persons that they will not be harassed or that they can live their lives in private is not enough. It is important to ensure that the rights of LGBTQ persons (at least to the extent of granting a divorce and ancillary relief) are also protected. Finally, this section will also argue that the alternatives to recognition are not principled and sufficient to assist parties in foreign same-sex marriages, and would result in limping marriages or divorces.

(i) Inspiration from the public policy against polygamous marriages

Previously, the English Courts strongly upheld its public policy against polygamous or potentially polygamous marriages, and would not adjudicate or provide relief to them.²⁰² In *Hyde v Hyde and Woodmansee* (“**Hyde v Hyde**”), Lord Penzance refused jurisdiction to provide direct matrimonial relief to the polygamous marriage. However, he was also clear to qualify that this did not include succession and legitimacy rights.²⁰³ Effectively, this meant that these two rights do not rely on the validity of the marriage. For the sole purpose of establishing the English public policy against polygamous marriages, Lord Penzance’s famous quote from *Hyde v Hyde* is helpful:

*“I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”*²⁰⁴

In the same judgment, Lord Penzance expounded on how polygamous marriages are incompatible with the English notion of Christian marriages:

*“We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.”*²⁰⁵

It is clear from *Hyde v Hyde* that there is an accepted public policy against polygamous marriages such that subsequent English Courts struggled to provide any form of ancillary relief

²⁰⁰ Article 3 of the UNCRC.

²⁰¹ Estin AL, ‘Marriage and Divorce Conflicts in International Perspective’ (2017) 27 Duke Journal of Comparative and International Law 485 at 489 and 517.

²⁰² *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 (“**Hyde v Hyde**”).

²⁰³ *Hyde v Hyde* at 138.

²⁰⁴ *Hyde v Hyde* at 133.

²⁰⁵ *Hyde v Hyde* at 136.

to polygamous couples, be it through the recognition of the divorce or marriage. Despite this, English Courts continued to recognise marriages that are against public policy for limited purposes such as legitimacy,²⁰⁶ property rights,²⁰⁷ and nullity of subsequent marriages in the forum.²⁰⁸ Before the introduction of an amendment to the Matrimonial Causes Act in 1965²⁰⁹, and, later, the promulgation of the English Matrimonial Proceedings (Polygamous Marriages) Act 1972 (“**Polygamous Marriages Act**”), which was incorporated into the Matrimonial Causes Act 1973, the English Courts followed *Hyde v Hyde*’s authority and denied relief to polygamous and potentially polygamous marriages under English matrimonial law.²¹⁰ Trevor Hartley argues that this change in attitudes in the Polygamous Marriages Act is “*partly as a result of the change in political status of the countries concerned, and increasing secularisation of society has diminished the influence of religion ... together with the improvement in the status of women in polygamous countries*”.²¹¹

Up until *Maher v Maher*, the English Courts were adamant in not recognising a unilateral *talak* (a form of Muslim divorce) as a “*method of divorce which is appropriate to a polygamous union*”.²¹² Arguably, some English Courts²¹³ resorted to legal gymnastics²¹⁴ to distinguish *Hyde v Hyde* and its successor, *Rex v Hammersmith Superintendent Registrar of Marriages* (“**Hammersmith**”).²¹⁵ The turning point seemed to have appeared in *Yousef v Yousef*²¹⁶ and *El-Riyami v El-Riyami*²¹⁷ where *Maher v Maher* and *Hammersmith* were distinguished, and the valid *talak* divorces obtained in the respective foreign forums were recognised. The English Court of Appeal in *Russ (Orse Geffers) v Russ (Orse Geffers DeWaele intervening)* (“**Russ v Russ**”)²¹⁸ in 1962 confirmed the new position from *Yousef v Yousef* and *El-Riyami v El-Riyami*,²¹⁹ that a *talak* divorce of an English marriage obtained in a foreign forum may be recognised if there is evidence showing that such divorce is effective in that foreign forum.²²⁰ The Polygamous Marriages Act cemented this position that the English Parliament “*decided to recognise polygamous marriages for the purposes of [the English] matrimonial legislation*”.²²¹ It is important to establish this timeline because it shows the evolution of English law’s attitudes towards polygamy. While English domiciles are still unable to enter into polygamous marriages, the English Courts are now able to provide adjudication and relief under its matrimonial laws.

In *Cheni (orse Rodriguez) v Cheni* (“**Cheni v Cheni**”), it involved a potentially polygamous marriage between a maternal uncle and his niece. Such a marriage is prohibited in England but valid in Egypt based on their religious law where both parties were domiciled. The English Court held that, at the time of marriage, it was potentially polygamous, but became

²⁰⁶ *Sinha Peerage* [1946] 1 All ER 348n.

²⁰⁷ *Coleman v Shang* [1961] AC 481 at 483.

²⁰⁸ *Baindail (orse Lawson) v Baindail* [1946] P 122.

²⁰⁹ Matrimonial Causes Act 1965 (Commonwealth), No. 99 of 1965.

²¹⁰ See *Muhammad v Suna* 1956 SC 366; *Ohochuku v Ohochuku* [1960] 1 WLR 183; *Sowa v Sowa* [1961] P 70; and *Cheni v Cheni*.

²¹¹ Hartley TC, ‘Polygamy and Social Policy’ (1969) 32 Modern Law Review 155 at 161.

²¹² *Maher v Maher* [1951] P 342 at 346.

²¹³ See e.g., *Lee v Lau*; *Ali v Ali* [1966] 2 WLR 620; and *Radwan v Radwan (No. 2)* [1972] 3 WLR 939 at 948.

²¹⁴ Collins (2012) at [18-018] – [18-020]. See also the use of monogamisation by the English Court in *Cheni v Cheni* to distinguish *Hyde v Hyde*.

²¹⁵ [1917] 1 KB 634.

²¹⁶ [1957] CLY 515; *The Times*, 1 August 1957.

²¹⁷ [1958] CLY 497; *The Times*, 1 April 1958.

²¹⁸ *Russ (Orse Geffers) v Russ (Orse Geffers DeWaele intervening)* [1962] 1 P 315 (“**Russ v Russ**”).

²¹⁹ It should be noted that *Yousef v Yousef* and *El-Riyami v El-Riyami* were not referred to in *Russ v Russ*, but the substance of both cases was followed.

²²⁰ *Russ v Russ* at 324 – 328.

²²¹ *Hussain v Hussain* [1983] Fam 26 at 32.

monogamous as at the date of initiation of proceedings.²²² Matrimonial jurisdiction was therefore granted to the couple. With respect to public policy, the English Court held that the public policy against such incestuous relations was “*expressly limited to marriages in England and affords no guidance on how [English law] would regard foreign marriages good by their proper law*”.²²³ In relation to the public policy against bigamy, the English Court held that it “*does not prevent [their] recognising and generally giving effect to polygamous marriages valid by their proper law; and it would be strange if public policy demanded our rejection of marriages constituted by a relationship of which [English] criminal law takes no notice. In any event, the law proceeds charily where grounds of public policy are invoked.*”²²⁴ In concluding, Sir Jocelyn Simon P surmised that the threshold for not recognising a marriage that is valid by the law of the parties’ domicile based on public policy needs to be “*so offensive to the conscience of the English court*”:

“... *If domestic public policy were the test, it seems to me that the arguments on behalf of the husband, founded on such inferences as one can draw from the scope of the English criminal law, prevail. Moreover, they weigh with me when I come to apply what I believe to be the true test, namely, whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance. In my view it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation. Nor do I think that I am bound to consider such marriages merely as a generality. On the contrary, I must have regard to this particular marriage, which, valid by the religious law of the parties' common faith and by the municipal law of their common domicile, has stood unquestioned for 35 years. I must bear in mind that I am asked to declare unmarried the parents of a child who is unquestionably legitimate in the eyes of the law: *In re Bischoffsheim, Cassel v. Grant*. In my judgment, injustice would be perpetrated and conscience would be affronted if the English court were not to recognise and give effect to the law of the domicile in this case. I therefore reject so much of the prayer.” [emphasis added]²²⁵*

In this respect, the author agrees with PRH Webb that the English Court’s position is “*forward-looking and that the result is sociologically desirable*”.²²⁶ *Cheni v Cheni* demonstrated how public policy should only be applied in exceptional circumstances in accordance to comity, since respect must be given to the marriages that would have been valid by the parties’ domicile. It also showed that the consequences from the refusal to recognise the marriage were also considered in determining whether the public policy should deny recognition.

Contrasting the English situation with Singapore, Singapore did not undergo this evolution because polygamy was allowed up until 1961, when the Women’s Charter was introduced, rendering polygamous marriages illegal. The case of *TIG v TIH*²²⁷ demonstrated that the Singapore Courts did not face this dilemma and showed that it would still provide divorce and ancillary relief under the Women’s Charter to foreign polygamous marriages, despite the public policy and criminal penalties against polygamous marriages under the Women’s Charter.²²⁸ In this exceptional case, the Singapore High Court was faced with the division of matrimonial

²²² C.f. *Hyde v Hyde* where the relief was sought when the marriage was still actually or potentially monogamous. See *Cheni v Cheni* at 89.

²²³ *Cheni v Cheni* at 97.

²²⁴ *Cheni v Cheni* at 97.

²²⁵ *Cheni v Cheni* at 99.

²²⁶ Webb PRH, ‘Potentially Polygamous Marriages and Capacity to Marry (Based on *Cheni (Orse. Rodriguez) v. Cheni*)’ (1963) 12:2 *The International and Comparative Law Quarterly* 672 at 679.

²²⁷ [2016] 1 SLR 1218.

²²⁸ Sections 6 – 6A of the Women’s Charter.

assets involving a polygamous marriage that was celebrated in Malaysia in the 1970s. At the time of the marriage, polygamous non-Muslim marriages were still permitted in Malaysia and parties did not dispute the validity of both marriages to the same husband. It appears that prior to the Singapore High Court's decision for the ancillaries, their uncontested divorce was heard in Singapore, even though polygamous marriages would be void under the Women's Charter.²²⁹ The Singapore High Court was satisfied to still utilise its power under the Women's Charter to grant the divorce and decide on the ancillary issues arising from this foreign polygamous marriage.²³⁰ This stemmed from its reference to its jurisdiction to hear the divorce application previously, and consider the ancillaries of this foreign polygamous marriage, arising from section 93 of the Women's Charter.²³¹ More crucially, the Court found that it "may still be required to consider the ancillaries in cases where **polygamous marriages have been validly entered into** ... because parties were **married under the laws of other countries which **once permitted polygamous marriages or which presently still do****" [emphasis added].²³² This reference to the recognition of validly contracted polygamous marriages in foreign forums suggests that in the spirit of comity, the Singapore Courts will grant divorces for foreign marriages that are not valid under the Women's Charter so long as they were validly contracted at the date of the marriage and / or valid in the foreign jurisdiction.

This position from *TIG v TIH* appears to be similar in position with *Cheni v Cheni*, which is a marked departure from *Hyde v Hyde*.²³³ This puts Singapore's jurisprudence in a unique position since it is not inhibited or limited by the archaic principles from *Hyde v Hyde*. It is submitted that extrapolating this principle and reasoning from *TIG v TIH*, a foreign same-sex marriage should similarly be granted a divorce in Singapore so long as the dual domicile rule for recognition is fulfilled and parties have satisfied one of the jurisdiction requirements under section 93 of the Women's Charter is fulfilled. Notably, this would mean that the outcome may be different if Jeremy and Ryan were both Canadians and / or domiciled in Toronto at the time of their marriage in 2015. This is premised on the foreign same-sex marriage having been validly entered into under the laws of foreign countries "*which presently still*" allow the formation of same-sex marriages. This is not a stretch since polygamous marriages,²³⁴ like same-sex marriages,²³⁵ are expressly disallowed in the Women's Charter because of the parties' lack of capacity. A possible argument can be made that the Singapore Courts will be more open to adjudicating polygamous marriages because it used to be a part of Singapore's family law tapestry prior to the introduction of the Women's Charter. However, the author believes that this distinction should not matter since they are both *now* invalid under the Women's Charter, which governs all non-Muslim marriages in Singapore since 1961. In fact, arguably, the contracting of polygamous marriages is more frowned upon because of the penal consequences flowing from their *formation*;²³⁶ there is no equivalent for same-sex marriages.²³⁷ While Singapore still criminalises "*any act of gross indecency*" between two males under section 377A of the Penal Code,²³⁸ this is distinct from a penalty against the formation of a same-sex marriage.

²²⁹ The divorce application between the parties in this case is not reported. See *TIG v TIH* at [4].

²³⁰ *TIG v TIH* at [3].

²³¹ The Singapore High Court likely assumed jurisdiction for the divorce because the husband is now a naturalised Singaporean. See *TIG v TIH* at [3]; and section 93(1)(a) of the Women's Charter.

²³² *TIG v TIH* at [2].

²³³ It should be noted that this did not appear to be a consideration in *TIG v TIH* at the ancillary stage.

²³⁴ See title of Part II of the Women's Charter for "Monogamous Marriages"; and sections 4 – 5 of the Women's Charter.

²³⁵ Section 12 of the Women's Charter.

²³⁶ Sections 6 – 6A of the Women's Charter. The English Courts do consider that public policy stems from criminal law as well. See *Cheni (orsee Rodriguez) v Cheni* [1965] P 85 ("**Cheni v Cheni**") at 99.

²³⁷ There are no penalties in Singapore for the formation of same-sex marriages although they will be void under the Women's Charter.

²³⁸ Penal Code (Cap 224, 2008 Rev Ed).

The conundrum faced by polygamous marriages is not too different from same-sex marriages. Both are invalid under the Women's Charter in Singapore since both go to the *essential capacity* (or lack thereof) of parties to enter into the marriage. If inspiration were drawn from the archaic and stricter common law rule regarding the inapplicability of ancillary relief to polygamous marriages,²³⁹ this would mean that, at the very least, relief relating to property, nullity, succession rights and legitimacy should be given to same-sex marriages in Singapore. The author submits that denying this extension of the relief would be incongruous with the granting of the same to foreign polygamous marriages as in *TIG v TIH* since both types of marriages are invalid under the Women's Charter. However, the author submits that the more consistent approach would be to grant the same adjudication and ancillary relief to same-sex marriages. As demonstrated by *TIG v TIH*, foreign polygamous marriages have been granted relief by the Singapore Courts where the foreign polygamous marriage is valid under the *lex domicilii* of parties at the time of the marriage. Effectively, since both polygamous marriages and same-sex marriages suffer from the same defect – the lack of capacity of parties to marry – they ought to be treated in the same manner for consistency. The English Law Commission succinctly puts it in their Working Paper No. 83 of 1971 which led to the Polygamous Marriages Act:²⁴⁰

“... it is rightly argued that immigrants to England are not in a privileged position and are expected to conform to English standards of behaviour. However, it seems to us that parties to polygamous marriages are more likely to conform to English standards if English law imposes on them, so far as is practicable, the same family rights and obligations as are imposed on other married people. The denial of all relief cannot achieve any change in the standards of behaviour of people who have made their home in England. On the contrary, denial of relief not only permits parties to escape from their obligations, lawfully entered into under another legal system, but tends to perpetuate the polygamous situation because the marriage cannot be ended.”

Finally, in the alternative, with respect to foreign same-sex divorces, if the principle from *TIG v TIH* cannot be applied to explicitly recognise the same-sex marriage for a Part X application, the foreign same-sex divorce should be recognised for the purposes of a Chapter 4A application since it is merely an *implicit* recognition of the underlying marriage. *Lee v Lau* has shown that the validity of the foreign divorce could be decided without the English Court's adjudication of the underlying marriage. On a narrower reading, it is submitted that *Lee v Lau* could also be seen as standing for the principle that the forum may recognise foreign divorces whose underlying marriages would otherwise be void in the forum because it is only an implicit recognition of the underlying marriage. This notion of implicit recognition can also be distilled from *KSI and Others v KSH and Others*,²⁴¹ where the Singapore Tribunal for the Maintenance of Parents (the “**Tribunal**”) grappled with the duty of children from polygamous marriages to maintain the patriarch of the four families. The Tribunal held that the polygamous nature of the marriage did not affect this duty because the marriages were contracted before the enactment of the Women's Charter in 1961, which then prohibited polygamy. Although this case involved parental maintenance, it showed the Tribunal's willingness to implicitly recognise the underlying polygamous marriage to establish the parent-child relationship,²⁴² so that the statutory duty to maintain parents could be enforced. Following this logic, this same principle can be extrapolated as a precedent for the *implicit* recognition of same-sex marriages for the purposes of a Chapter 4A application.

²³⁹ *Hyde v Hyde* at 138.

²⁴⁰ Law Commission, Family Law Report on Polygamous Marriages (London: HMSO, 1972) at 14.

²⁴¹ [1998] SGTMP 1.

²⁴² The definition of ‘child’ for the act includes illegitimate, adopted and stepchild. See section 2 of the Maintenance of Parents Act (Cap 167B, 1996 Rev Ed).

(ii) Recognition is in the spirit of comity

Comity would demand that foreign same-sex marriages and divorces be recognised by the forum. In this respect, the author proposes that comity be considered in two aspects – an overarching principle to limit public policy and as a substantive factor in the modified Balancing Framework. Dealing first with comity as an overarching principle, it has been a long-standing principle that public policy should not be applied liberally because of uncertainty.²⁴³ As noted in Section III(B)(i) above, the respective English and Singaporean apex courts in *Vervaeke v Smith*²⁴⁴ and *Yap Chai Ling*²⁴⁵ are in consensus that public policy takes on a more diminished role in private international law. Therefore, as a general principle, public policy is residual in nature and should only be used in exceptional situations to refuse recognition when fundamental public policy is being undermined; liberal use of public policy may result in it becoming the rule instead of an exception, which would be contrary to comity and certainty. Generally, public policy has only been used in situations involving the breach of natural justice,²⁴⁶ or the intentional furnishing of false evidence as to jurisdiction.²⁴⁷ Therefore, although significant weight should be given to the actual public policy against same-sex marriages because of its strong nexus to the issue and statute, it is submitted that comity would demand that this public policy not be applied at all in the realm of private international law rules because it is not a fundamental public policy that would warrant the refusal of recognition. In the alternative, if necessary, this strong public policy should only be applied in extremely limited circumstances such as those in *Vervaeke v Smith* where there is a deliberate intention to subvert the earlier unfavourable English decision by the Belgian woman.

Second, if the public policy against same-sex marriages is applied, as a substantive factor that is balanced against public policy under the modified Balancing Framework, comity will lean in favour of the recognition of both foreign same-sex marriages and divorces. Considering first the situation involving the recognition of the foreign same-sex marriage under a Part X application, the common law rules for the recognition of foreign marriages require the marriage to be valid by the *lex domicilii* of the parties and the *lex loci celebrationis*. This essentially requires the forum to recognise and sanction the validity and nature of the marriage. In Jeremy and Ryan's situation, the involvement of a Singaporean in the marriage presumes that his domicile is in Singapore; it would be difficult to show that the marriage is valid flowing from the Singaporean acquiring a different domicile. However, if the intended matrimonial home or real and substantial connection rules are applied instead, their marriage would be valid; the burden would be on parties to argue for the application of these alternative recognition rules alongside the dual domicile rule. For the sake of argument, Jeremy and Ryan are assumed to have shown that their marriage is valid at the time it was entered into, or alternatively, that Jeremy and Ryan are Canadians.

The consequences of refusing recognition based on the public policy against same-sex marriages in Singapore is contrary to the forum's commitment towards an international legal order. The consideration of the outcome of denying the claimed rights is not new and can be seen in the original Balancing Framework in *UKM*, where the Singapore High Court deliberated the consequences of denying the adoption application in favour of the local public policy.²⁴⁸ When balancing substantive factors, it will necessarily beg the question of the effects of the weight given to each factor on the outcomes. In this case, refusing recognition would

²⁴³ *Richardson v Mellish* (1824) 2 Bing 229 at 252; *Tinline v White Cross Insurance Association, Limited* [1921] 3 KB 327 at 331; and *Quinn v Leathem* [1901] AC 495 at 506.

²⁴⁴ *Vervaeke v Smith* at 164.

²⁴⁵ *Yap Chai Ling* at [45].

²⁴⁶ *Rudd v Rudd* [1924] P 35 at 45; and *McClellan* (1993) at [2.13]. The English Court has cautiously refused to go beyond procedural issues. See *Re Meyer* [1971] P 298.

²⁴⁷ *Bonaparte v Bonaparte* [1892] P 402; and *McClellan* (1993) at [2.13].

²⁴⁸ *UKM* at [136], [148] – [162], and [242] – [249].

result in a limping marriage which would in turn be contrary to comity because the marriage is valid in the foreign forum but not in Singapore, where parties have the strongest nexus to. Further, *TIG v TIH* has shown that the Singapore High Court will still grant a divorce for a foreign polygamous marriage, even though the justification for the public policy against polygamous marriages is stronger since there are penal consequences for entering into these marriages. However, the lack of a reported judgment for the divorce proceedings does not illumine how the issue of public policy was dealt with by the Singapore Courts: was the validity of the foreign polygamous marriage based on the *lex loci celebrationis* and both parties' antenuptial domicile and the consideration of comity sufficient to debunk public policy considerations? Setting aside Jeremy and Ryan's situation for a moment, following *TIG v TIH*, would the Singapore Courts therefore similarly recognise a foreign same-sex marriage between two foreigners whose domicile permits same-sex marriages? From the discussions above, the answer should be in the affirmative. Recognising the same-sex marriage, at least to this extent (i.e. between two foreigners), will be in the spirit of comity because it would allow for certainty, fairness, justice, and uniformity of decisions. More practically, it would also ensure that parties do not capitalise on similar public policies to evade their responsibilities to the family.

As alluded to above, comity operates differently in the recognition of foreign same-sex marriages and divorces. For marriages, it is a recognition of a marriage that is granted by an administrative act of the foreign forum's governmental institution. On the other hand, for divorces, the issue of the validity of the marriage has been adjudicated by the foreign forum when it granted the divorce decree to dissolve the marriage. Recognition will only require the recognition of the foreign judgment made by the foreign forum. The Singapore Courts should not be re-examining the validity of the underlying marriage since the issue is *res judicata*. Therefore, the author submits that a stronger argument can be made for ancillary relief under Chapter 4A to be extended to foreign same-sex divorces regardless of the parties' domiciles: first, there is nothing in the Chapter 4A that distinguishes between the nature of marriages underpinning the foreign divorce; and second, following *Lee v Lau*, the recognition of a foreign same-sex divorce is not against public policy.

First, in the Report of the Law Reform Committee on Ancillary Orders after Foreign Divorce or Annulment ("**LRC Report**") which led to the Chapter 4A amendment, the Singapore Law Reform Committee ("**LRC**") raised their concerns regarding civil unions.²⁴⁹ Notably, the LRC utilised same-sex civil unions as an example of civil partnerships that are "*not regarded as acceptable having regard to the fundamental values of the majority in its society, it would not be appropriate to extend legal protection to similar foreign relationships*". Read narrowly, this concern could be limited to target the specific issue of *civil unions* only which may not have been in line the Singapore's societal values (that relationships should be in the form of marriages) in 2009. This should not be read as recommending a bar against same-sex marriages. As of the time the LRC Report was prepared in 2009, same-sex marriages had already been legalised in at least seven countries or states, including the Netherlands on 1 April 2001; Massachusetts, United States on 17 May 2004; Canada on 20 July 2005;²⁵⁰ Norway on 1 January 2009; and Sweden on 1 May 2009. This is not an implausible inference since the LRC had also referred to Canadian cases in the LRC Report.²⁵¹

On the other hand, even if the LRC had meant same-sex relationships in general (including same-sex marriages and civil unions), it is submitted that the basis for the conclusion drawn by the LRC – that same-sex relationships are against "*the fundamental values of the majority*"

²⁴⁹ LRC Report (2009) at [48].

²⁵⁰ Prior to the federal government enacting the Canada CMA on 20 July 2005, Ontario was the first province to legalise same-sex marriages on 10 June 2003. British Columbia soon followed on 8 July 2003.

²⁵¹ The Canada CMA was enacted by the Canadian parliament on 20 July 2005.

in Singapore – is no longer a strong justification.²⁵² According to the most recent research conducted by the Institute of Policy Studies (“IPS”) in 2019 (“**IPS Working Paper 2019**”),²⁵³ Singaporeans have become increasingly accepting towards same-sex marriages and the formation of same-sex family units as compared to 2013. Specifically, in relation to attitudes towards same-sex marriages, the number of respondents who indicated that such marriages were ‘always wrong’ or ‘almost always wrong’ fell from 74.2 per cent in 2013 to 60.0 per cent in 2019.²⁵⁴ Similarly, in relation to attitudes towards the adoption of children by a same-sex couple, the number of respondents who indicated that such adoptions were ‘always wrong’ or ‘almost always wrong’ fell from 61.8 per cent in 2013 to 53.4 per cent in 2019.²⁵⁵ Attitudes towards having a child through surrogacy or artificial reproductive techniques by a same-sex couple was similar at 56.6 per cent.²⁵⁶ These results suggest that Singaporeans are becoming “*more open towards, and accepting of issues to do with homosexual couples desiring children and forming a family unit through artificial reproductive means*”.²⁵⁷ Following global trends, it is clear from the general trends identified by IPS that the aversion towards same-sex marriages and the formation of same-sex family units will soon fade,²⁵⁸ and it is only be a matter of time before this Singaporean public policy towards same-sex marriages will no longer exist.

In fact, when introducing the Chapter 4A amendment to the Singapore Parliament, the then-Minister for Community Development, Youth and Sports, Dr Vivian Balakrishnan, made no distinction between the types of foreign divorces (i.e. same-sex or not), nor whether it is limited to marriages that are valid in Singapore. He only noted in Parliament that the Chapter 4A amendment was intended to plug the gap and allow those “*who have a relevant connection to Singapore to seek relief*” from the Singapore Courts after they have been granted divorces in “*overseas courts which are also recognised in Singapore*”.²⁵⁹ The absence of any qualifier or limitation by the Singapore Parliament shows that there is no intention to limit relief under Chapter 4A to foreign monogamous heterosexual divorces only; the relief is available so long as parties “*have a relevant connection to Singapore*”. Regardless, following *TIG v TIH* which allowed the divorce of a valid foreign polygamous marriage and subsequently provided ancillary relief, it should be no different for a valid foreign same-sex divorce.

Second, the common law rules for the recognition of foreign divorces do not require the forum to consider the validity of the underlying marriage to begin with. In *Lee v Lau*, the English Court demonstrated that the recognition of the divorce decree could be decided on without looking at the validity of the underlying marriage. The Court held that the potentially polygamous nature of the underlying marriage did not bar the recognition of the foreign divorce that was valid in the law of the foreign forum, Hong Kong.²⁶⁰ Alex Mills has also argued that it is the “*choice-of-law rule that is attentive to the substantive content of the applicable law*”,²⁶¹ in this case, the foreign forum. Additionally, there is no indication from past judgments that the Singapore Courts would consider the underlying marriage before recognising the foreign divorce decree. In any case, taking the argument at its highest, the recognition of same-sex

²⁵² It should be noted that the Singapore High Court in *UKM* relied on PM Lee’s parliamentary statement which discussed Singaporeans’ attitudes towards homosexuality. See *UKM* at [187].

²⁵³ Mathews M, Lim L and Selvarajan S, Institute of Policy Studies, *IPS Working Papers No. 34: Religion, Morality and Conservatism in Singapore* (May 2019) (“**Mathews (2019)**”).

²⁵⁴ See Table 1 of Mathews (2019) at 23.

²⁵⁵ See Table 1 of Mathews (2019) at 23.

²⁵⁶ This question was not part of the 2013 survey conducted by IPS. See Table 1 of Mathews (2019) at 23.

²⁵⁷ Mathews (2019) at p 24.

²⁵⁸ Mathews (2019) at p 8.

²⁵⁹ *Parliamentary Debates Singapore: Official Report*, vol 87 at cols 2048 – 2049 (10 January 2011) (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports).

²⁶⁰ *Lee v Lau* at 25.0020

²⁶¹ Mills (2008) at 209.

divorces will only require an *implicit* recognition of the underlying same-sex marriage. Arguably, this *implicit* recognition of the underlying same-sex marriage does not violate public policy at all. Even if so, it is significantly less egregious in its contravention of public policy as compared to the explicit recognition of the foreign same-sex marriage for the purposes of a divorce application under Part X. Considering it from this angle, it would be more compelling to recognise the foreign same-sex divorce since there is no directly contravention of public policy, to allow the forum to adhere to the spirit of comity by preventing a limping divorce.

Notwithstanding the arguments above, it is important to also note that Singapore is also the most appropriate jurisdiction for Jeremy and Ryan to obtain their divorce order and ancillary relief under Part X, or ancillary relief under Chapter 4A. Having stayed in Singapore for a substantial period of their marriage, Jeremy and Ryan have accumulated significant assets (both immovable and movable) in Singapore only.²⁶² COVID-19 has also reduced their ability to find jobs in Toronto, so they are likely to continue staying and working in Singapore. Further, their children also know Singapore as their home since they grew up there.²⁶³ These connections make Singapore their home and the most appropriate forum to deal with their ancillaries under Chapter 4A or Part X. The refusal to allow the parties' application, be it under Part X or especially under Chapter 4A, will go against comity given Singapore is the most appropriate forum.²⁶⁴ As such, it is submitted that in situations where there are no children involved, the justifications above sufficiently show that comity – which both demands a limited application of public policy and is a commitment to an international legal order – in and of itself will suffice to outweigh public policy and require the recognition of both foreign same-sex marriages and divorces to prevent them from limping.

(iii) Recognition is in the welfare of the children

Although the author's primary position is that the public policy against same-sex marriages should not be applied in private international law in the first place, for completeness, this paper will explore the situation where public policy is narrowly applied, since it is such an unruly horse. Granting the claimed rights in this case would directly violate public policy. Therefore, there is a need to balance these violations of public policy against the welfare of the children from granting the divorce application and / or obtaining ancillary relief, which is paramount.²⁶⁵ In both situations, allowing the claimed rights will allow all parties (including the children) to move on with their lives and start afresh by having a clean break. The ancillary relief will allow the children of the marriage to re-establish stability and routine after child arrangements and maintenance have been ordered so that they can begin a new 'normal' after their parents' divorce. Specifically, in the case of the recognition of the same-sex marriage for the purposes of obtaining a divorce order under Part X, there is an additional indirect benefit to the emotional welfare of the children. The children will no longer need to witness their parents' quarrels and / or feel the need to choose sides when living in the same household. Leong Wai Kum argued that the decision to not recognise a foreign same-sex marriage "*may adversely affect a child being raised by the same-sex couple*".²⁶⁶ Mark Strasser also highlighted that "*an important element of marriage for some families involves the benefits that the relationship can bring for children who are being raised within that family. This is yet another policy reason in favour of recognizing same-sex marriage – the stability afforded by marriage will benefit children being raised within that setting.*"²⁶⁷ While these statements were made in non-divorce contexts, they

²⁶² *BDA v BDB* [2013] 1 SLR 607 at [29].

²⁶³ *TDX v TDY* [2015] 4 SLR 982 at [17]; and *Re A (an infant)* [2002] 1 SLR(R) 570.

²⁶⁴ Briggs (2012) at 121.

²⁶⁵ *VDZ v VEA* [2020] 2 SLR 858 at [79].

²⁶⁶ Leong WK, 'Towards the elimination of prescriptive sexual regulation in Family Law in Singapore' (2016) 46:1 Hong Kong Law Journal 131 at 147.

²⁶⁷ Strasser M, '1.4 Family, Same-Sex Unions and the Law' in Eekelaar J and George R (eds), *Routledge Handbook of Family Law and Policy* (Routledge: 2020) ("**Strasser (2020)**") at 51 – 52.

remain relevant when parties are seeking divorce or ancillary relief since these benefits transcend the paradigm of a married family unit. Parental responsibility continues even after divorce.²⁶⁸ Stability, and, in turn the child's welfare, can be achieved if the same-sex marriage is recognised so that the Singapore Courts can exercise its ancillary powers under Part X or Chapter 4A to provide a workable child arrangement that is the best interests of the child moving forward.

Following *UKM*, the violation of the public policy against same-sex marriages is not “*sufficiently powerful to enable [the courts] to ignore the statutory imperative to promote the welfare of the [c]hild, and indeed, to regard [their] welfare as first and paramount*”.²⁶⁹ In that case, the Singapore High Court had noted that the “[t]he statutory imperative is not only intrinsically weighty, having emanated from the [l]egislature, but is also supported by the evidence, which shows that the welfare of the [c]hild, ... would be materially advanced” by granting the claimed rights – the adoption order.²⁷⁰ Arguably, the imperative for the best interests of the child is stronger in Jeremy and Ryan's case since it is an international situation and not one that merely domestic. International situations will necessarily engage international authoritative sources such as the UNCRC, which Singapore has acceded to. If the claimed statutory rights are not granted, it would be against the welfare of the children, which is not just a strong local public policy, but also an international norm between a community of states under the UNCRC. In situations regarding a divorce and ancillary relief application under Part X, it would result in a limping marriage, where the marriage is valid and recognised in the *lex loci celebrationis* but null and void in other jurisdictions,²⁷¹ for the family. This outcome is undesirable, not beneficial, and even detrimental to the child's welfare because of the great uncertainty and limbo to their family situation, circumstances, and status. As discussed above, this lacuna may also be abused by some parents who may use Singapore's jurisdiction (or lack thereof) to evade their maintenance obligations, which will worsen the already unsatisfactory circumstances caused by the family's limbo.

Similar detriments to the child's welfare from situations involving the recognition of same-sex marriages will also result in the recognition of same-sex divorces since both seek the same substantive rights – ancillary relief – albeit under different provisions in the Women's Charter; the principles for ancillary relief are the same. Correspondingly, not granting the statutory rights for an application for ancillary relief application under Chapter 4A, will result in a limping divorce where the divorce decree is valid and recognised in the *lex fori* and some jurisdictions but null and void in other jurisdictions.

C. Recognition of Same-Sex Marriages and Divorces is not Carte Blanche but Limited

Understandably, there may be resistance in Singapore to recognise the same-sex marriage because of the fear that the explicit recognition of the marriage is an endorsement of the alleged 'lifestyle'. Therefore, to balance these fears and the protection of persons in same-sex marriages, the author submits that for pragmatism and / or practicality, limited recognition should at least be given to both foreign same-sex marriages and divorces for specific purposes. In any case, at minimum, it would be less controversial for recognition to be given to foreign same-sex divorce decrees since they only require an *implicit* recognition of the underlying marriage of the divorce decree.

²⁶⁸ Leong (2018) at [7.051] – [7.052]; Ong DSL, 'Parents and Custody Orders – A New Approach' (1999) Singapore Journal of Legal Studies 205 at 205; *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 [24].

²⁶⁹ *UKM* at [248]. See also section 3 of the GIA; and *VDZ v VEA* at [79].

²⁷⁰ *UKM* at [248].

²⁷¹ See *Warrender v Warrender* at 541 – 547; and *McClellan* (1983) at [2.02].

Even if foreign same-sex marriages and divorces are not recognised for the purposes of divorce and / or ancillary relief under the Women’s Charter, the author submits that same-sex marriages should be recognised for limited benefits for the family. As Linda Silberman notes, states can choose to confer some benefits on the same-sex couple while withholding other specific rights.²⁷² She argues that the prohibition of same-sex marriages under the local laws “does not necessarily mean that all economic benefits should be denied ... [since] societal judgment may play out in different ways when it comes to determining whether same-sex couples may obtain rights and benefits”.²⁷³ Indeed, this is evident from the IPS Working Paper 2019,²⁷⁴ which showed the difference in attitudes towards same-sex marriages, and adoption by same-sex couples in Singapore. The number of respondents who indicated that same-sex marriage was ‘always wrong’ or ‘almost always wrong’ fell from 74.2 per cent in 2013 to 60.0 per cent in 2019 while those who indicated that adoption of children by a same-sex couple was ‘always wrong’ or ‘almost always wrong’ fell from 61.8 per cent in 2013 to 53.4 per cent in 2019.²⁷⁵ These results suggest that despite Singaporean society becoming more inclusive and amenable to adoption by same-sex couples, there is greater hesitation towards elevating the status of same-sex relationships to that of heterosexual marriages. Therefore, a balance is struck by conferring only important rights to same-sex couples such as divorce and / or ancillary relief, as compared to benefits such as baby bonuses, and / or grants and subsidies for public housing. In this regard, the series of recent Hong Kong decisions in relation to same-sex couples’ rights are useful guides.

Like Singapore, Hong Kong’s society embraces a ‘traditional’ understanding of marriage – one that is between a man and woman only to the exclusion of others (“**traditional heterosexual marriage**”).²⁷⁶ Hong Kong does not allow or recognise same-sex marriages regardless whether they were celebrated in its jurisdiction or not.²⁷⁷ However, this has not prevented the Hong Kong Courts from recognising same-sex relationships for the specific and limited purposes of public housing,²⁷⁸ visa applications,²⁷⁹ and tax benefits.²⁸⁰ In the most recent Hong Kong Court of Final Appeal case of *Leung Chun Kwong v Secretary for the Civil Service & Ors (No. 3)* (“**Leung Chun Kwong**”), the male civil servant was in a same-sex marriage with a New Zealander that was validly entered into in New Zealand. He sought to have his marriage recognised by the Hong Kong government for the purposes of obtaining employment and tax benefits but was refused because his marriage was not recognised. While affirming that the traditional heterosexual marriage²⁸¹ is a legitimate aim by the Hong Kong government,²⁸² the Hong Kong Court of Final Appeal unanimously held that the appellant was unjustifiably “*treated differently to a heterosexual married man*”.²⁸³ The court further held that the extension of employment and tax benefits to same-sex couples would not undermine traditional heterosexual marriages because the differential treatment in question did not promote

²⁷² Silberman (2005) at 2206.

²⁷³ Silberman (2005) at 2209.

²⁷⁴ Mathews M, Lim L, and Selvarajan S, Institute of Policy Studies, *IPS Working Papers No. 34: Religion, Morality and Conservatism in Singapore* (May 2019) (“**Mathews (2019)**”).

²⁷⁵ See Table 1 of Mathews (2019) at p 23.

²⁷⁶ *Leung Chun Kwong v Secretary for the Civil Service & Ors (No. 3)* [2019] 4 HKC 281 (“**Leung Chun Kwong**”) at [59] – [61].

²⁷⁷ Section 40(2) of the Marriage Ordinance 1971 (Cap 181); and Sections 2 and 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179)

²⁷⁸ *Infinger, Nick v Hong Kong Housing Authority* [2020] 3 HKC 41.

²⁷⁹ *Director of Immigration v QT* [2018] 4 HKC 403 (“**QT**”).

²⁸⁰ [2019] 4 HKC 281.

²⁸¹ Although it is outside the scope of this paper, it is worth noting that Marco Wan’s argument that the notion of a traditional heterosexual marriage is fallacious. See Wan M, ‘The invention of tradition: Same-sex marriage and its discontents in Hong Kong’ (2020) 18:2 ICON 539.

²⁸² *Leung Chun Kwong* at [60] – [61].

²⁸³ *Leung Chun Kwong* at [46].

heterosexual marriages.²⁸⁴ In fact, the tax statute in question had extended the definition of ‘marriage’ to polygamous marriages,²⁸⁵ which were also void under Hong Kong law. This further proved that there was no rational justification of the legitimate aim. This outcome was similar to that in *Director of Immigration v QT* (“*QT*”) where the Hong Kong Court of Final Appeal upheld the lower court’s decision that denying a dependant visa, a higher immigration status as compared to a visitor, is discriminatory towards the foreign same-sex couple who were in a civil union that is valid in the UK. The court further held that the denial of the dependant visa is not rationally connected to the Hong Kong government’s aim of attracting talented foreigners to Hong Kong or immigration control.²⁸⁶ Notably, in both cases, there was no distinction between a same-sex marriage between two foreigners or between a local and resident.

It is submitted that the positions from *Leung Chun Kwong* and *QT* could similarly be applied in Singapore. The recognition of foreign same-sex marriages or divorces for the purposes of divorce and ancillary relief under Part X or Chapter 4A will not undermine the institution of the heterosexual marriage in Singapore; it merely extends the relief to an additional type of marriage – same-sex marriages. This extension of relief is limited insofar as it does not allow for a same-sex marriage to be celebrated in Singapore, in line with its public policy espoused within the Women’s Charter. To assuage the conservative groups of society, following *Leung Chun Kwong* and *UKM*, the Singapore Courts could take the additional prudential step to emphasise that the recognition of foreign same-sex marriages and divorces is limited solely to the extent and for the purposes of divorce and / or the accompanying ancillary relief. This extension of its divorce jurisdiction and ancillary relief is not an endorsement of the same-sex marriages or family units *per se* or an indication that the definition of ‘marriage’ in Singapore should include same-sex marriages. Instead, it is merely the provision of divorce jurisdiction and / or ancillary relief that are currently available to traditional heterosexual marriages to an additional stratum of marriages. The extension of these benefits to same-sex marriages is not at the expense of the traditional heterosexual marriage and these benefits are not mutually exclusive. As Mark Strasser concisely puts it, “*the state has interests implicated in assuring an orderly dissolution of the relationship, including an equitable distribution of property, the provision of support in appropriate cases, and visitation and custody awards where children are involved. The state’s interests in assuring an orderly breakdown of long-term relationships are implicated whether the couple is composed of individuals of the same sex or of different sexes*”.²⁸⁷ This is a good balance between upholding the local public policy and obtaining of necessary relief by same-sex couples.

D. Alternatives to the Divorce and Ancillary Relief under Part X or Chapter 4A are Inadequate

Under the Balancing Framework, the Singapore High Court in *UKM* considered the consequence of not granting the adoption order in its balancing exercise to reach its conclusion.²⁸⁸ In this regard, the consequences of not recognising the foreign same-sex marriage or divorce are that Jeremy and Ryan may not have access to ancillary relief under Part X or Chapter 4A, and would result in a limping marriage or divorce. Regrettably, they would have to consider alternatives such as obtaining ancillary relief as a void marriage under the Women’s Charter, or from the Ontario Courts instead, and then enforcing the ancillary orders in Singapore. Alternatively, the parent with whom the children will be living may apply for maintenance against the other parent under the GIA.

²⁸⁴ *Leung Chun Kwong* at [72].

²⁸⁵ *Leung Chun Kwong* at [75].

²⁸⁶ *QT* at [90] – [100].

²⁸⁷ Strasser (2020) at 55.

²⁸⁸ *UKM* at [248] – [249].

First, as stated in Section II(A) above, if Jeremy and Ryan had applied for a divorce in Singapore, the Singapore Courts are likely to find that the marriage was void.²⁸⁹ In *ADP v ADQ*, the Singapore Court of Appeal held that courts may grant ancillary relief under the Women's Charter to void marriages. Unfortunately, it did not provide guidance on how this power should be exercised – whether the power should be exercised in the same way as marriages terminated by divorce. In this regard, Leong Wai Kum advocates that the power to divide matrimonial assets under section 112 of the Women's Charter should be exercised differently for void marriages and marriages terminated by divorce, unless there are exceptional circumstances.²⁹⁰ The author proposes that in this case, the powers under section 112 of the Women's Charter should not be treated differently from usual void marriages, which typically happens about three years after solemnisation.²⁹¹ In this case, Jeremy and Ryan's marriage was a relatively long marriage of about 15 years. However, allowing same-sex marriages this 'backdoor' to have access to ancillary relief is unprincipled insofar as this was a valid marriage in countries that have legalised same-sex marriages, but not Singapore. In a similar vein, this may also attract the same or similar public policy considerations before the Singapore Courts exercises its ancillary powers.

Second, obtaining a foreign judgment in relation to ancillary relief under Chapter 4A or Part X²⁹² would likely engage the *in rem* principle.²⁹³ In particular, foreign orders in relation to the division of assets are *in rem* if they relate to the declaration of title to property (including the status, sale, and proceeds from the sale of the property),²⁹⁴ and will therefore be unenforceable in Singapore.²⁹⁵ This is “*effectively an application of the lex situs principle ... [u]nder the existing common law, only [in personam] money judgments are enforceable*”.²⁹⁶ Following Debbie Ong's suggestion,²⁹⁷ one pragmatic solution to circumvent this issue is if Jeremy and Ryan had significant or equal amounts of matrimonial assets in both Toronto and Singapore; the Ontario Courts could grant one party a greater share of the Toronto assets upon obtaining the value of family property.²⁹⁸ This way, Jeremy and Ryan do not need to obtain ancillary relief under Chapter 4A. However, this is unlikely since most of their assets are in Singapore. Even if the Ontario Courts utilise their discretionary powers to order Jeremy to obtain the shortfall value from equalisation as a debt from Ryan (the “**Ontario Order**”),²⁹⁹ the RECJA and Reciprocal Enforcement of Foreign Judgments Act (“**REFJA**”)³⁰⁰ provide little assistance.³⁰¹ This is because Canada is not a jurisdiction for which RECJA and REFJA

²⁸⁹ *Lim Ying v Hiok Kian Ming Eric* [1991] 2 SLR(R) 525 at [62]; *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467; *Bellinger v Bellinger (Attorney General intervening)* [2002] 1 Fam 150; *Wilkinson v Kitzinger*; and *Corbett v Corbett (or se Ashley)* [1971] P 83.

²⁹⁰ Leong (2018) at [15.081].

²⁹¹ *ADP v ADQ* at [43].

²⁹² i.e. relief for the division of matrimonial assets, maintenance, and custody, care and control.

²⁹³ Admittedly, the foreign ancillary order with respect to the division of matrimonial assets may be *in personam* if the foreign forum merely declares the interest of parties or “*compels a party to do a certain act in respect of property*”. See *UFN v UFM* at [50]; *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and others* [2007] 4 SLR(R) 565 at [31] – [34]; and *Pattni v Ali and another* [2007] 2 AC 85 at [21] – [29].

²⁹⁴ *British South Africa Company v Companhia de Moçambique* [1893] AC 602.

²⁹⁵ Collins (2012) at [23R-062]; Ong (2015) at [6.34] and [6.78] – [6.79].

²⁹⁶ LRC Report (2009) at [26]; affirmed by the Singapore Court of Appeal in *UFN v UFM* at [50].

²⁹⁷ Ong (2015) at [6.34], affirmed by the Singapore Court of Appeal in *UFN v UFM* at [51].

²⁹⁸ Under the Ontario Family Law Act (RSO 1990, c F-3), section 5 provides for the equalisation of net family property between spouses. (“**Ontario FLA**”). See Chan LV, ‘The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore’ (2018) 30 Singapore Academy of Law Journal 797 at [53].

²⁹⁹ This assumes that the Ontario Order is *in personam* and that Jeremy's assets are less than the amount required for equalisation of net family profit. See section 97 of the Ontario FLA.

³⁰⁰ Cap 265, 2001 Rev Ed.

³⁰¹ The outcome would be the same if the Ontario Court granted a consent order instead. See section 9(2)(b) of the Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed).

applies; Jeremy will have to utilise the common law rules for the recognition of foreign judgments to enforce the Ontario Order, and potentially face the same public policy issues regarding the recognition of his foreign divorce order. Furthermore, even if Ontario is a reciprocating party-state under RECJA, Jeremy will still encounter the same issues with public policy under the act because section 3(2)(f) of RECJA provides that a foreign judgment shall not be registered if it is against the registering forum's "*public policy or for some other similar reason could not have been entertained by the registering court*". Similarly, section 5(1)(a)(v) of REFJA provides the same. Jeremy is also unlikely to be able to utilise REFJA to enforce the debt against Ryan since the debt stems from the divorce. Section 2(2)(a) of REFJA explicitly provides that money judgments *in personam* that can be enforced under it do not include matrimonial matters.

Lastly, while maintenance for the children can be resolved under the GIA following *UKM*, it is a pragmatic solution that is not principled because the children were from a marriage, albeit one that is not approved of or valid in Singapore. Regardless, it will likely face similar issues since it also requires an implicit recognition of the same-sex relations between the couple.³⁰²

V. CONCLUSION

Singapore needs to continue pursuing globalisation and attract foreign talent because of its small population and declining birth rates. Inevitably, issues surrounding same-sex relationships will come under the spotlight and they need to be tackled soon to ensure that talented LGBTQ persons do not shun Singapore on this basis. Specifically, with respect to the breakdown of the family, access to divorce and ancillary relief under Part X or Chapter 4A does not solely benefit the couple, it benefits the international legal order, the children of the marriage, as well as the society that the family is part of – Singapore – through the prevention of limping marriages and / or divorces. Whether one agrees with the type of family or not, the reality is that a family unit has broken down. It is now important to allow the family and the children of the marriage the opportunity to move on with their respective lives and heal. Divorce and ancillary relief will help with that. Not recognising the marriage or divorce denies the family the relief that it needs and further destabilises the family unit. This inevitably goes against the notion of therapeutic justice advocated by the Singapore Family Justice Courts,³⁰³ because parties and children of the marriage will not be able to heal and move on, even if this is not a type of marriage that is valid in Singapore. As demonstrated by *UKM*, therapeutic justice may require that public policy be subservient to the welfare of the child and family.

The proposed modified Balancing Framework avoids the pitfalls of Bernard Currie's interest analysis and *Vervaeke v Smith* by not pitting conflicting public policies from different jurisdictions against the other. Instead, it focuses on the connections between parties and the jurisdiction to identify which jurisdiction's public policy should be applied. Since the local forum is being requested to recognise the foreign same-sex marriage and / or divorce, and parties are most connected to the forum, its public policy is engaged instead of foreign public policy. In this regard, comity not only demands that public policy be applied sparingly in exceptional circumstances, but also seeks to prevent limping marriages and / or divorces from resulting. The author submits that public policy should only be considered when it is the forum's fundamental public policy that is violated. Even the public policy against same-sex marriage is considered, comity would outweigh the public policy because of the greater need to prevent limping marriages and / or divorces as a commitment to an international legal order. Where there is a child from the marriage, the best interests of the child embodied within local statutes

³⁰² It is outside the scope of this paper to extensively explore the issues faced by a maintenance application.

³⁰³ Debbie Ong J, "Today is A New Day", speech at the Singapore Family Justice Courts Workplan Speech 2020 (21 May 2020) at [18] and [39].

and international norms such as the UNCRC will almost certainly demand recognition. This will ensure that the unruly horse of public policy is tamed and not allowed to run amok.

It is equally important to note that recognition does not imply that foreign influences are driving local policies or morality. The recognition of same-sex marriages and / or divorces, as discussed above, is not an endorsement of the type of family. It is meant to protect and accommodate the children and parties to these families. Short of legalising and recognising same-sex marriages or unions, the author's proposal will allow for an incremental shift towards acceptance while respecting the status quo. The author agrees with Debbie Ong³⁰⁴ that the most principled way would be to abolish section 377A of the Penal Code to ensure that the Singapore laws are coherent and not contradictory. Ultimately, the recognition of foreign same-sex marriages or divorces does not undermine the broader principle of safeguarding heterosexual family units.³⁰⁵ This is not a zero-sum game since persons who are not homosexual will not form same-sex marriages in the first place.³⁰⁶ Private international law can be a tool to both protect same-sex families and safeguard the traditional public policy while remaining principled. Linda Silberman eloquently argues that "*with greater sensitivity to the genuine concerns of conflict of laws[,] a better accommodation of competing state policies would result*".³⁰⁷ In any case, persons who are in same-sex family units are not going to contribute to the formation of heterosexual marriages or family units. Perhaps adapting a leaf from the Catholic pastoral approach of the law of graduality³⁰⁸ might be useful – the law should meet same-sex families where they are and support them, instead of denying these families necessary help by unyieldingly expecting them to conform to the rest of society.³⁰⁹

³⁰⁴ Ong (2015) at [3.72].

³⁰⁵ Cahill LS, 'Same-sex Marriage and Catholicism' in Hornbeck JP II et al, *More than a Monologue Volume 2: Sexual Diversity and the Catholic Church – Inquiry, Thought, and Expression* (Fordham University Press, 2014) at 143.

³⁰⁶ An Indiana study found that the recognition of same-sex unions did not lead to a reduction in heterosexual marriages. See Neely M, 'Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed', (2008) 41 *Indiana Law Review* 245; and Strasser (2020) at 54.

³⁰⁷ Silberman (2005) at 2212.

³⁰⁸ James Keenan SJ notes that Pope John Paul II acknowledged the law of graduality in 1981 with respect to Catholics following the teaching on birth control: "*He argued that the Church as teacher also had to be a compassionate mother and in the latter role referred to the law of graduality favourably. He differentiated the practice from the gradualization of the law, that is, moderating the universality and /or force of the law itself. the law had already expressed itself; it was for the laity to gradually adhere to it*". See Keenan JF SJ, *A History of Catholic Moral Theology in the Twentieth Century* (Bloomsbury, 2010) at 146 – 151; Reese T, 'Law of graduality: living with the imperfect' (National Catholic Reporter, 31 October 2014) <<https://www.ncronline.org/blogs/faith-and-justice/law-graduality-living-imperfect>> accessed on 12 December 2020; Pope John Paul II, *Familiaris Consortio* (Vatican, 22 November 1981) <http://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jpii_exh_1981_1122_familiaris-consortio.html> accessed on 12 December 2020 at [34]; and Pope John Paul II, Homily at the Close of the Sixth Synod of Bishops (25 Oct 1980), 8: AAS 72 (1980), 1083.

³⁰⁹ It should be noted that this is an adaption of the Catholic Church's understanding of the law of graduality that builds on Josef Fuchs SJ's arguments. See Fuchs J SJ, *Christian Morality: The Word becomes Flesh* (Georgetown University Press, 1987) at 33 – 37.