Singapore Journal of Legal Studies
[1993] 351 – 400

DIVISION OF MATRIMONIAL ASSETS: RECENT CASES AND THOUGHTS FOR REFORM

Since 1981 Singapore courts have the power, upon granting a decree which terminates a marriage, to order the division between the spouses of matrimonial assets which they had acquired during the course of their marriage. This article discusses this power as part of the law on the effect of marriage upon the ownership of assets. It examines the scope of the power as it has been developed by the courts and suggests improvements should an amendment be contemplated.

SECTION 106 of the Women's Charter[1] (hereafter the 'Act') allows the High Court, upon hearing a petition for matrimonial relief, to order the division between the spouses of matrimonial assets acquired during the marriage. This power was introduced into the Act in 1981[2] pursuant to the then reform of the family law. The provision was innovative. England, the traditional source of inspiration of much of our family law, still does not have any provision equivalent in terms of the scope of our court's power. The English Parliament had, in 1973, introduced a power in their courts only to 'adjust' property interests upon hearing a petition for matrimonial relief.[3] This power to 'adjust' is, as will be suggested, narrower than our power to 'divide'. To appreciate this, it may be helpful to provide an overview of the variety of 'matrimonial property'[4] regimes which exist today.

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1 Cap 535, 1985 Rev Ed of the Statutes of the Republic of Singapore.

2 *Vide* Amendment Act 26 of 1980 *wef* 1 June 1981.

3 The (English) Matrimonial Causes Act 1973 introduced the present s 24 which still reads: "On granting a decree ... the court may make ... an order that a party to a marriage shall transfer to the other party [or] to any child of the family ... such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or in reversion ...."

4 There is controversy over whether it is proper to use the term 'matrimonial property' in English law when the basic principle is that marriage has minimal effect on the acquisition of interests in the property of the other spouse: see next few paragraphs of text. In Singapore the term does not appear anywhere in the Women's Charter although the marginal notes to s 106 describe the section as "Power of court to order division of matrimonial assets". P Coomaraswamy J criticised the use of the terms 'matrimonial assets' and 'family assets' in *Neo Heok Kay* v *Seah Suan Chock* [1993] 1 SLR 230, 233 as they appear to suggest that marriage has a greater effect on property interests than may be true. The terms have,

I. Overview of Matrimonial Property Regimes

The powers to 'adjust' or to 'divide' matrimonial assets only come into operation, if at all, upon the granting of a decree in a petition for matrimonial relief. The law with regard to matrimonial property may also arise at some earlier time during the course of the marriage. The law of matrimonial property refers to both periods of time – during the subsistence of the marriage and upon its termination by decree of court.

There is a variety of matrimonial property regimes because each legal system responds slightly differently to the question: what effect should marriage have on the acquisition, and use, of property between the spouses *inter se*? There are infinite variations possible which variations are, perhaps, best appreciated as different points along the same continuum. It is possible, however, to identify the extreme ends of this continuum.

A. *'Separation of Property' Regime*

The English law, through developments in equity which were enacted in a series of Married Women's Property Acts,[5] created the regime commonly called "separation of property".[6] Under this regime, marriage has minimal effect on the acquisition of interests in property held by either spouse. Under the general principles of property law, the spouse who paid for the property is, usually, the owner in law and in equity. Lord Upjohn in the House of Lords in the classic case of *Pettitt* v *Pettitt* had described the law thus:

> the rights of the parties [to a marriage] must be judged on the general principles applicable in any court of law when considering questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of the relationship.[7]

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however, become part of the language of the law and are convenient in referring to the bundle of property owned by married persons in respect of which may be asked the question of whether one of them becomes entitled to a part thereof by reason only of being married to the property owner. It is on this basis that the terms are used in this article.

5 Of 1870, 1882, 1884, 1893, 1907 and 1908. See *Bromley's Family Law* (7th ed, 1987), at 498-501.

6 See Max Rheinstein & Mary Ann Glendon, "Persons and Family" in *International Encyclopaedia of Comparative Law,* Vol IV at 40-47.

7 [1970] AC 777, 813.

English law has not changed much even with regard to the matrimonial property after the marriage is terminated by a court decree. When English courts were first given the power to pronounce decrees of divorce in 1857,[8] the ancillary power was also created to allow the court to order that some property be settled by the husband for the benefit of his, now, ex-wife or his children. It was not until 1973 that this power became broadened into the present power to 'adjust' property holding between spouses. Despite being broader than the former power to order or to vary settlements, however, this power of adjustment continues to affirm the premise of the 'separation' regime, viz, the property is regarded as having been acquired only by the spouse who paid for it. The power merely allows the divorce court to order this owner-spouse to transfer a part of it to the other spouse. This means that the efforts of the spouse who was the homemaker or who continued to work but subordinated his or her career,development to cater to the needs of the family will continue be undervalued. He or, more likely, she will have earned little or nothing and probably contributed nothing in money to the purchase of property. The consequence is that he or she will not be regarded as having contributed to the acquisition of the property through his or her particular efforts. This 'separation' regime with the power to 'adjust' continues to be the law in England today,[9] and in Australia.[10]

B. *'Community of Property' Regime*

The civil law countries adopted a completely different regime commonly called the 'community of property'[11] wherein marriage has a significant effect on the holding and use of property. For instance, the French Civil Code has since 1804 a provision whereby movable property and all property acquired during the course of the marriage become pooled into a community which both spouses co-own. Both spouses are regarded as having contributed to the acquisition of such community property. Compared with the 'separation' regime the 'community' regime may be said to recognise better the spouses' equal contribution whichever role each performs within their marriage partnership – either as the breadwinner, or the homemaker, or a mix of these.

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[8] *Vide* the (English) Matrimonial Causes Act 1857.
[9] See, generally, *Bromley's Family Law* (7th ed), note 5, *supra,* Chaps 15 & 20.
[10] See (Australia) Family Law Act 1975 s 79.
[11] See *International Encyclopaedia of Comparative Law,* note 6, *supra,* at 47-48.

C. *Shortcomings*

Over time the shortcomings of both extremes became obvious. The 'separation' regime treated the spouses perfectly equally but, in so doing, it ignored the reality of the different roles spouses discharge. The dominant homemaker was shortchanged should the marriage partnership run aground. As this role is, generally, the female spouse's the 'separation' regime became accused of treating married women equally but inequitably *vis-a-vis* their husbands. At any rate the 'separation' regime did fail to give due recognition to the homemaker and, thus, failed to acknowledge the true partnership of marriage wherein each spouse does what he or she can do best.

The 'community' regime had a more defensible view of marriage as a partnership of different efforts. It had one serious shortcoming though: to say that both spouses co-owned the partnership property should have meant that both had equal power to deal with the community fund. This was cumbersome and would have made it almost impossible for third parties safely to deal with married persons. To ease this, a variety of means were devised most of which tended to leave the power of dealing with the community fund with the husband alone. Thus the regime was criticised as being clumsy in operation and of giving too much power to the husband.

D. *'Deferred Community of Property' Regime*

A breakthrough came when some countries saw the advantage of a combination of the 'separation' regime while the marriage subsists with the 'community' regime when the marriage is terminated – this came to be called the 'deferred community'[12] regime. The Scandinavian countries were the innovators of the 'deferred community' regime. Since 1920[13] the law of Sweden, for instance, has provided that during the course of the marriage each spouse owns and administers his or her own property even as he or she retains a certain right in the marital property of the other while the primary effect of the rules on marital property come into play only at the end of the marriage.[14]

The Scandinavian 'deferred community' regime has been adopted by many countries from the civil law and, even, the common law tradition. Among them are the former West Germany,[15] several states of Canada

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[12] See *International Encyclopaedia of Comparative Law,* note 6, *supra,* at 48-49.
[13] (Swedish) Marriage Code.
[14] See present (Swedish) Marriage Code 1987, Part Three, Chaps 7-13.
[15] (West German) Equality Law 1957.

including Quebec[16] and Ontario,[17] and New Zealand.[18] Singapore may be counted among them since 1981, and Malaysia since 1982.[19]

This overview of the major developments, simplistic as it is, serves to place the Singapore regime within the global context. It allows us to appreciate that the introduction of section 106 in 1981 was innovative as not many countries had adopted the 'deferred community' regime at that time especially countries of the common law tradition. It was not until as recent as 1976 that New Zealand led the common law countries towards this change. England and Australia, as mentioned, are still continuing with the 'separation' regime coupled with a power to 'adjust'.

It is possible to suggest that there is no practical difference between the power to 'adjust' and that to 'divide' property. It may be said that an extremely bold judge could use a power to 'adjust' to order the owner-spouse to transfer half of his property to the other while an extremely timid judge could use his power to 'divide' to apportion only a minor portion to the homemaker spouse. While these results are possible, it is submitted that they are not probable. There are, at least, two advantages of a power to 'divide' over a power to 'adjust' if we accept that both spouses ought to be equally recognised whatever roles they play within a marriage. First, it is far more likely that a power to 'divide' will be used to achieve a division more or less approaching 50:50. Second, equally if not more importantly, the language of a power to 'divide' says to the whole society that the law acknowledges the different but equal contribution of the homemaker to the partnership of marriage and its acquisition of wealth. The law, besides providing commands, also tells us stories about ourselves. In this respect, it tells us how we perceive the roles spouses perform within marriage. It is irrefutable that the better story is that both spouses are equally valued whether he or she concentrates on the economic or the homemaking role as both roles must be performed equally well if the partnership is to flourish. The power to 'divide' matrimonial assets between the spouses when the partnership ends, which stems from the premise that each spouse has by his or her particular efforts contributed equally to the acquisition of family wealth, is one manifestation of this story.

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[16] The 1969 Act Respecting Matrimonial Regimes which brought about changes to the Quebec Civil Code. See, generally, Bartke RW "Community Property Law Reform in the United States and in Canada – A comparison and critique" (1976) 50:2 Tulane Law Review, 213-256.

[17] Pursuant to the 1974 Report on the Family Law Act by the Ontario Law Reform Commission, changes were made which are now contained in the (Ontario) Family Law Act 1986.

[18] Changes were effected by the (New Zealand) Matrimonial Property Act 1976.

[19] Changes were effected by the (Malaysian) Law Reform (Marriage and Divorce) Act 1976 which came into effect only on 1 March 1982.

II. 'Matrimonial Property' Regime of Singapore

During the course of the marriage property interests between spouses are determined almost without regard to their relationship as husband and wife, such interests being determined almost as if they were strangers. This 'separation' principle had been established by the High Court as far back as 1973 in the case of *Evelyn Tan* v *Tan Lim Tai*.[20] The court considered section 56 of the Act which reads:

> In any question between husband and wife as to the title or possession of property, either party may apply by summons or otherwise in a summary way to any Judge of the Supreme Court, and *the Judge may make such order with respect to the property in dispute* and as to costs of and consequent on the application *as he thinks fit...* (emphasis added).

It decided that the section should be read in the same way a similar provision is read in England, *viz,* it offers disputing spouses only a procedural advantage over disputing strangers, and the discretion in the judge does not go as far as the determination of property interests between the spouses but only "to the enforcement of the proprietary or possessory rights of one spouse in any property against the other ...."[21]

This also means that developments in England in this area of the law are likely to be followed here. The latest reaffirmation of our law in this regard was the Court of Appeal decision in *Tan Thiam Lake* v *Woon Swee Kheng Christina*.[22]

The respondent (plaintiff) and appellant (defendant) contemplated marriage without the respondent realising that the appellant was already married. He promised to marry her as soon as he divorced his wife. A property was purchased with monies provided by the appellant. He told the respondent the property was for her absolutely but the property was conveyed in both their names as joint tenants. The respondent subsequently terminated the relationship. She started proceedings for an order for sale of the property and division of the proceeds of sale. The trial judge found that the appellant had expressly agreed to purchase the property for the respondent absolutely. On this basis, he found that the appellant held his half-share, as joint tenant, on trust for the respondent. The judge proceeded to make an order declaring the respondent the sole beneficial owner of the property and that the entire of its proceeds of sale should be paid to her.

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[20] [1973] 2 MLJ 92.

[21] *Per* Lord Diplock in *Pettitt* v *Pettitt* [1970] AC 777, 820.

[22] [1992] 1 SLR 232. *Chia Kum FattRolfston* v *Lim Lay Choo* [1993] 3 SLR 833 is consistent with the Court of Appeal's decision even though this was not cited in the judgment.

At the Court of Appeal the appellant argued that the trial judge's decision was wrong, not only because he did not hold his half-share for the respondent, but that she held her half-share for him. He claimed that as the sole provider of funds for the purchase of the property, he was the sole beneficial owner. While this argument was rejected, the appellant was partially successful.

The Court of Appeal agreed that the trial judge was, indeed, wrong. Following the rules established in the series of English decisions from *Pettitt* and *Gissing* v *Gissing*[23] to the latest House of Lords pronouncements in *Lloyds Bank plc* v *Rosset & Anor,*[24] the Court of Appeal held that the trial judge's finding that the appellant told the respondent that he bought the property for her absolutely only amounted to an imperfect gift to her which the court could not perfect. An oral agreement between them that she should own the property absolutely did not suffice to create a trust of the appellant's half-share for her benefit. Such agreement had to be acted upon by her to her detriment before a constructive trust could arise. There being no such acting to her detriment there was no trust for her benefit. The result was that the property was owned beneficially as it was held at law. The Court of Appeal varied the trial judge's order to the extent that the appellant and the respondent were declared joint tenants beneficially, as in law, and that the proceeds of sale were to be divided between them in equal proportions.

It is the first reported decision concerning the 'love nest' of unmarried cohabitants and it is noteworthy that the Court of Appeal decided that exactly the same principles determine the holding of interests in such property as between married persons. Previous cases only concerned the latter and, most of these, the matrimonial home. That the same principles apply is not surprising. It follows from *Pettitt* and *Gissing.* If spouses who dispute over ownership of property only obtain a procedural advantage, it follows that cohabitants who so dispute will also have their claim resolved by reference to the same principles even though they will not enjoy the spouses' procedural advantage.

In the Court of Appeal, Justice LP Thean (as he then was) in *Tan Thiam Lake* was content to quote Lord Bridge in *Lloyd's Bank Plc* with approval as reflecting present Singapore law. Lord Bridge had divided the situations giving rise to good claims of constructive trust into two depending on whether there was an agreement between the parties on respective shares. Where there is such agreement or common intention at the time of acquisition of the property, the court need only be further persuaded that this agreement or intention was subsequently acted upon by the other to

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[23] [1971] AC 886.
[24] [1991] 1 AC 107.

his or her detriment. Where there is no such agreement or common intention, however, Lord Bridge opined that only direct contributions to the purchase price by the party who is not the legal owner, whether initially or by payment of mortgage instalments, will permit the finding of a constructive trust. With the acceptance of *Lloyds Bank Plc* by the Court of Appeal it would appear that, in arguing that a spouse had become entitled to some interest in property acquired by the other, it is critical to support the argument by reference to an agreement or, at least, a common intention between the spouses formed at the time of the acquisition of the property to share beneficial interest as well as by evidence of the spouse acting in reliance upon this agreement or common intention to his or her detriment.

Upon the termination of the marriage by court decree, however, section 106 of the Act can be invoked to permit the court to divide the matrimonial assets between the spouses. The critical parts of the provision are as follows:

> (1) The court shall have power, when granting a decree of divorce, judicial separation or nullity of marriage, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts ....
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> (2) In exercising the power ... the court shall have regard to –
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> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
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> (b) any debts by either party which were contracted for their joint benefit; and
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> (c) the needs of the minor children (if any) of the marriage, and, subject to those considerations, the court shall incline towards equality of division.
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> (3) The court shall have power ... to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage ....
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> (4) In exercising the power conferred by subsection (3) the court shall have regard to –
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> (a) the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or by caring for the family; and

(b) the needs of the minor children, if any, of the marriage, and, subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

For those interested in the source of inspiration for the section which was neither of the traditional sources of England and Australia, Crown[25] has traced this to two African countries: Kenya, where the Law Commission had discussed at length the Scandinavian 'deferred community' regime, and Tanzania which passed a statute largely based on the draft suggested by the Kenyan Law Commission. These developments had come to our attention *via* the (Malaysian) Law Reform (Marriage and Divorce) Act 1976. Interesting as this revelation is, it is not suggested that we track further developments of the similar provision in the Tanzanian law. Quite apart from the problem of access to Tanzanian law reports, it is obvious that a power such as that in section 106 must be interpreted and used in a manner appropriate to our local context. It is one thing for different societies to share the same general view of the effect marriage should have on the holding of property but quite another to think that the details of that view can or should be exactly the same. It has been said:[26] "[The rules in this area] are closely related to the prevailing ideology of marriage and to prevailing views on the status of women. In fact, it is remarkable how much of marital property 'law' consists of ideological statements about marriage and the roles of the spouses." We have to adapt the 'deferred community' concept to our own specific needs. While what is happening in other countries may be relevant, this cannot circumvent our own quest to find a set of rules ideal for our needs.

III. Section 106 as Interpreted up to 1990[27]

It is fair to say that our courts have interpreted section 106 with the same bold spirit as prompted its introduction into the Act.[28] In fact the very first case reported under it, *Fan Po Kie* v *Tan Boon Son,*[29] did not even begin

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[25] Crown BC "Property Division on Dissolution of Marriage" (1988) 30 Mal LR 34.

[26] Glendon MA, "Matrimonial Property: A Comparative Study of Law and Social Change" (1974) 49 Tulane Law Review 21, 23.

[27] In 1990 the book *Family Law in Singapore* written by the author was published where the law up to then was presented in some detail.

[28] See the author's "Division of Matrimonial Property Upon Termination of Marriage" [1989] 1 MLJ xiii.

[29] [1982] 2 MLJ 137.

as an application under the section but, as allowed by the High Court, both parties argued as if it were. The court's order was a section 106 order. With the benefit of hindsight we might say that this portended the impressive use our judges were to make of their power.

Several points of law may be said to have been established. Every decision had been based upon what was 'fair' or 'equitable' or 'reasonable' in the circumstances.[30] That the terms 'fair' and 'equitable' are not even in the section itself only emphasises the judges' reading of the purpose of the section to divide matrimonial assets fairly between the spouses upon the termination of their marriage.

At the same time the courts took a sensible approach to interpreting the section. The infelicities in drafting have been pointed out before.[31] It is heartening that the courts had, generally, applauded the provision despite these infelicities and worked to overcome most of them. The courts have, generally, divided the wealth of the family as a whole instead of individual pieces of property item by item. The more sensible approach is to use the power thus. The courts had not seriously attempted to categorise matrimonial assets into that acquired by sole effort and that acquired by joint effort. To have attempted to do so, in the light of the law of property and of trusts, might have called for minute scrutiny of the conduct and efforts of both spouses as the smallest relevant contribution would require a categorisation as jointly acquired property. Such minute scrutiny would be inappropriate within an application of this nature. The courts had also decided that, despite the separation of matrimonial assets into that solely acquired and that jointly acquired, there really was minimal difference between them as far as the ultimate result is concerned. The section directs that with that jointly acquired the court "shall incline towards equality" while with that solely acquired the court "may divide ... in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion". The courts had seen fit to reduce this differentiation to insignificance by observing that they may award "up to 49% of the matrimonial assets acquired by the sole

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[30] See "I consider it equitable in the circumstances of this case that the defendant should be ordered ..." *per* Abdul Wahab Ghows J in *Fan Po Kie* v *Tan Boon Son* [1986] 2 MLJ ccxix, and "[t]aking into account all the relevant circumstances a fair division would be ..." *per* LP Thean J in *Shirley Koo* v *Kenneth Mok Kong Chua* [1989] 2 MLJ 264. Recent cases are similar. See the Court of Appeal's "[i]n these circumstances, we are of the view that a reasonable order would be ..." *per* Lai Kew Chai J in *Hoong Khai Soon* v *Cheng Kwee Eng* [1993] 3 SLR 34, 40, and the latest Court of Appeal's "making the best judgment we can, in all the circumstances, we are of the view that a division of 15% of the known and disclosed assets of the husband to the wife would be reasonable" *per* Karthigesu JA in *Koh Kim Lan Angela* v *Choong Kian Haw* [1994] 1 SLR 22, 31.

[31] Crown BC, "Property Division on Dissolution of Marriage", note 25, *supra.*

effort [of the other]."[32] In other words there is power to divide 50:50 for jointly acquired assets and 49:51 for solely acquired assets.

The courts had noted the failure of the provision to define 'matrimonial assets' but, generally, cast their net wide. In a ground-breaking case in 1989, the High Court had included not only the parties' matrimonial home but also another apartment, cash balances in bank accounts and, even, the benefits of membership in a country club.[33] Recent cases,[34] as will be discussed, continue this approach by including Central Provident Fund monies, a matrimonial home even though it had been a gift from parents and business assets within matrimonial assets liable to be divided.

Among the factors named within the section the courts singled out consideration of the efforts of the homemaker for special treatment. One of the clearest expressions of this, made recently but reflective of the older decisions as well, is: "the enactments are meant ... to provide for a just apportionment for the 'homemaker' (invariably the wife)."[35] This, it is submitted, is deserved as it may be said that it was this particular factor which prompted the enactment of the entire provision.

It may be fair to say that, from the outset, the courts consistently gave the provision its best possible reading. Although conscious of the provision's ambiguities and some internal inconsistencies the courts were persuaded by the correctness of its general direction to give a fair share of the wealth of the family to each partner upon the termination of the partnership.

The recent cases which contribute to our understanding will now be surveyed. Those which merely reaffirm established principles will not be discussed in any detail.

IV. Recent Cases

A. *Nature of this Ancillary Power*

Two cases affirmed two known principles about section 106: that it is in the nature only of a power resting in the court, and that this power is ancillary to the court hearing a petition for annulment, judicial separation or divorce.

The Court of Appeal in *Lim Tiang Hock Vincent* v *Lee Siew Kim*

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[32] *Per* Chan Sek Keong J in *Ong Chin Ngoh* v *Lam Chih Kian* [1992] 2 SLR 414 is representative, even, of the older decisions.

[33] *Shirley Koo* v *Kenneth Mok Kong Chua* [1989] 2 MLJ 264.

[34] *Lam Chih Kian* v *Ong Chin Ngoh, Cheng Kwee Eng* v *Hoong Khai Soon* and *Koh Kim Lan Angela* v *Choong Kian Haw,* see the discussion on 363 *et seq.*

[35] *Per* Rubin JC in *Wong Amy* v *Chua Seng Chuan* [1992] 2 SLR 360, 370.

Virginia[36] affirmed that "[t]here is nothing in [section 106(1)] which makes it mandatory that the power shall be exercised ... the court may defer the exercise of such power to a later date ...." The court below, after considering the needs of the parties and their minor children, had decided that the matrimonial home should not be sold until the younger child reached 21 years and that, until then, the mother and the children should have exclusive possession although the parties would be at liberty to apply for review. The Court of Appeal approved of this order and was only prepared to modify it in view of the fact that the husband would reach the age of 55 years before the child reached 21 years. It ordered that his reaching 55 years would be an appropriate time for review of the order. This decision thus confirmed that the section permits the court to make any order it sees fit including an order that the status quo as to use of the property remain until a more appropriate time.

In *Ng Sui Wah Novina* v *Chandra Michael Setiawan*[37] the High Court, *inter alia,* affirmed that the ancillary powers to make financial orders in Part IX including section 106 (on the division of matrimonial assets) and section 107 (on the maintenance of ex-wife and children) may only be used if the matrimonial relief were obtained in Singapore. The husband had divorced his wife by way of a court order from Jakarta Indonesia and was now a remarried Singapore permanent resident. The former wife, now a Canadian citizen, applied under section 107 for maintenance for herself and their child. The application was dismissed. The outcome would have been similar if she had applied for a division of matrimonial assets under section 106.

It is submitted that there can be no doubt that this was correct. Our courts do not, as yet, have the power to rearrange aspects of ex-spouses lives if the court decree terminating the relationship had not been made in Singapore. This would be so even if the ex-spouses are Singapore domicilaries. In fact, even if the decree were made in Singapore, the application for the exercise of these powers has generally to be made before or during the hearing of the petition for matrimonial relief. This can be gathered from a reading of the provisions and is confirmed by rule 37 of the Women's Charter (Matrimonial Proceedings) Rules.[38] Rule 37 provides that, where an application had not been made in the petition or the answer, the application may be made subsequently but only "(a) by the leave of the court ...; or (b) where the parties are agreed upon the terms of the proposed order ...." It may be that such leave is not given unless

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[36] [1991] 1 MLJ 274.

[37] [1992] 2 SLR 839. For a much fuller discussion see Debbie Ong, "Financial Relief in Singapore After a Foreign Divorce" [1993] SJLS 431.

[38] GNS 232/81, Subsidiary Legislation of the Republic of Singapore 1990 Rev Ed.

the party applying can give good reasons why he or she did not apply at the more appropriate time. It is worth thinking whether sections 106 and 107 ought to be widened to enable persons who have substantial connection with Singapore (here, domiciliaries would come to mind) to apply under them even when their marriage had been terminated somewhere else. The requirement of obtaining the leave of the court would, it is thought, ensure sufficient control in the court.

Then, there was a case where, faced with a fairly unusual situation, the High Court decided that the power in section 106 can only be exercised during the lifetime of both spouses. In *Lily Wong Yuk Fong* v *Menezes (Menezes Daniel Matthew, Intervener)*,[39] after the court had made an order under section 106, counsel asked for an opportunity to present further arguments and the court acceded. This was done and the court reserved judgment. Before its decision could be given, the ex-husband passed away. The question thus was whether the court should proceed to give judgment despite his decease. The deceased's son intervened to argue, citing the Court of Appeal's decision in *Sivakolunthu Kumarasamy* v *Shanmugam Nagaiah,*[40] that the court could proceed. The petitioner alleged the matter had abated with the death of one of the ex-spouses. Justice Chao Hick Tin agreed with the petitioner. In the circumstances, the matter was only part heard when the respondent died and there was, as yet, no enforceable order. This was, thus, radically different from *Sivakolunthu Kumarasamy* where the husband committed suicide after an enforceable order had been made although before it had been executed. Citing the words of section 106 itself, his Honour said "[t]he wording ... that 'the court shall have power ... to order the division *between the parties* of any assets ...' does suggest that this jurisdiction of the court is personal to the parties and should only be exercised if both parties are alive."

The property thus fell to be divided according to the law of succession instead. It is submitted that the section does not support any other reading but the decision does underscore the need to review the law of succession together with section 106 for the purpose of ensuring that a surviving spouse is not treated any worse than a divorced one.

B. *What Assets are Included ~ Central Provident Fund Account Monies*

It is well-known that all employees compulsorily contribute a set proportion of their salaries into their accounts with the Central Provident Fund and their employers also contribute another set proportion into their employees' accounts. In time, these accounts become hefty and are often used towards

[39] [1992] 2 SLR 839.
[40] [1988] 1 MLJ 341.

the purchase of the one valuable piece of property most Singaporeans own, *viz,* their home. There were two opposing views in the High Court on whether these monies, *viz,* cash balances and monies withdrawn for approved uses which must be returned to the CPF member's account, are included within matrimonial assets liable for division. The Court of Appeal has, however, settled the issue by deciding that they are, indeed, matrimonial assets. All the cases will be discussed since the Court of Appeal judgment on the point is rather brief.

Justice LP Thean (as he then was) in *Cheng Kwee Eng (mw)* v *Hoong Khai Soon*[41] and Justice Chan Sek Keong in *Ong Chin Ngoh* v *Lam Chin Kian*[42] on the one hand, had taken the view that CPF monies are included while Justice P Coomaraswamy in *Neo Heok Kay* v *Seah Suan Chock*[43] had decided otherwise. In *Cheng Kwee Eng,* LP Thean J said:

> [T]he respondent had a credit balance of $54,281.28 ... This amount was accumulated after his marriage and, in my opinion, is an asset acquired by him.... This amount is held subject to the Central Provident Fund Act and he cannot charge, alienate or in any way dispose of it or any part thereof until he reaches the age of 55. He can only use and enjoy the benefit of it to the extent and in the manner as permitted by the Act. Notwithstanding these statutory constraints, this amount represents an asset of the Respondent, and, in my judgment, ought to be taken into account in the computation of assets for the purpose of division ....

The total value of the matrimonial assets in the form of the CPF monies, two insurance policies and some shares was $75,281.28. Considering that they were solely acquired by the husband while noting that the wife had contributed considerably to the welfare of the family and been a good mother to the children, his Honour decided that a fair division would be 45% to the wife and 55% to the husband. His Honour then noted that it would not be fair to require the wife to wait until the CPF monies became available (upon his reaching 55 years) as the husband appeared to be able to raise the cash for her immediately. Reducing the figure by 10% since she would obtain the cash immediately, his Honour then rounded up the sum and ordered the husband to pay $30,000 to the wife as representing her share of the matrimonial assets, besides orders as to child maintenance. The husband also owned a half-share of a home and a share of a restaurant but, as will be discussed later, these were decided to be excluded from

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[41] Div 1911 of 1989, High Court judgment dated 5 June 1991, unreported.
[42] [1992] 2 SLR 414.
[43] [1993] 1 SLR 230.

division as they had originated as gifts from his parents to him alone.

In *Ong Chin Ngoh,* the spouses had a matrimonial home worth $140,000 of which $63,640 would have to be returned to the husband's CPF account. In addition, he had a cash balance of $148,000 in his CPF account. On whether the cash balance should form part of the assets liable for division, Chan Sek Keong J said:

> The Women's Charter does not define what a matrimonial asset is .... CPF contributions are compulsory. They are part of the wages or salaries of workers and employees. They constitute a valuable source of funds upon their retirement, whether for themselves alone or for themselves and their families. They are matrimonial assets if acquired during the marriage. If the CPF contributions were not deducted from the wages or salary of a worker, they would have gone to providing for himself and the family.... The worker's rights in his CPF fund is ... [restricted. He] may not draw it out until he has reached 55 .... Notwithstanding ... I cannot see why, for the purpose of determining the corpus of the matrimonial assets in divorce proceedings, the court may not take into account the value of the CPF fund of each of the parties to the marriage. Of course, the court will have no power to order any part of the fund to be paid to the wife, where the husband has no legal capacity to withdraw the fund. But the legal capacity to use the fund has nothing to do with its legal nature as an asset of the marriage. The fact that the husband may nominate a person other than the wife to take the fund does not change its character.The husband has the same power to dispose of his other assets. It cannot be suggested that the disposing power of the husband makes such assets any less matrimonial assets if acquired during the subsistence of the marriage.[44]

His Honour thus determined that the wealth of the family was worth $140,000 (the value of the matrimonial home) and $148,000 (the CPF cash balance). Noting that the marriage had lasted about 15 years, that the CPF balance as part of the husband's salary must be seen as having been acquired by his sole effort, that the home was likely acquired by his sole effort, that under the section the wife can be awarded "up to 49% of the matrimonial assets acquired by the sole effort [of the other]", his Honour determined that "a fair division" would be to give the wife "the amount of $100,000 in the form of the matrimonial home ... That worked out to be about 35%." Since the wife and their two children wanted to continue to stay in the matrimonial home (current value $140,000) and the husband

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[44] *Ong Chin Ngoh* v *Lam Chin Kian,* note 42, *supra,* at 417.

had no objection, his Honour ordered that the home be transferred to her upon her paying him $40,000. The husband would have to deposit this and another $23,640 into his CPF account.

A contrasting position was taken by P Coomaraswamy J in *Neo Heok Kay*. The assets available were an HDB flat which served as matrimonial home worth $100,000 (of which $68,000 was from the husband's CPF account and must be returned to it), and a $9,880 credit balance in the same account which the wife did not ask a part of. Both parties had asked for a 50:50 division but where they differed was that the husband was only willing to divide the net assets after the $68,000 was returned to his CPF account while the wife asked for division before their return. By the husband's request his wife would only receive $16,000 while he would get $16,000 plus the $68,000 returned to his CPF account. By the wife's request, she would get $50,000 while the husband would have to return his $50,000 plus another $18,000 into his CPF account. His Honour decided that neither request would do.

The most interesting part of his Honour's judgment was his decision that CPF monies do not form part of the matrimonial assets liable for division. His Honour said:

> The [CPF] Act contains severe restrictions on withdrawals ... The obligation for the CPF account of the member to be refunded the withdrawals and interest that would have accrued thereto is something over which the court, let alone any member, has no control. Moneys due ... to the fund upon the sale of the flat... cannot ... be regarded as an asset acquired during marriage and ... available for division ...[45]

On this basis, his Honour decided that the assets "must mean the value of the flat less the liabilities that have to be met from the proceeds", *ie,* $100,000 less the $68,000 that must be returned to the husband's CPF account. Of the $9,880 credit balance in the account, his Honour decided that assets "do not include moneys standing to a person's credit in his CPF account."

After noting the different view taken by Chan Sek Keong J in *Ong Chin Ngoh,* P Coomaraswamy J said:

> The assets in the fund... may well be assets acquired during a marriage but they must in addition by law be available for division between the parties under the express words of s 106 ... [W]hat if the member

[45] *Neo Heok Kay* v *Seah Suan Chock,* note 43, *supra,* at 233-234.

> who is ordered to make a refund to the CPF from assets other than the net proceeds of sale of the flat has no such funds ...?[46]

On his Honour's method of calculation, then, there was only matrimonial assets valued at $32,000 for division. As they were acquired by the husband's sole effort, his Honour rightly directed himself to the limit in section 106 of 49% to the wife but the husband's solicitor had indicated that he would be willing to accept a figure higher than this as the proper share for the wife. His Honour then ordered that 62½% of this go to the wife while the husband was to get 37½%.

With respect, the ex-wife of this 18 year marriage who had borne and raised two daughters and whom nobody suggested was any other than a good wife and mother obtained only $20,000 with no career to continue while the husband obtained $12,000 and another $68,000 returned to his CPF account which also had a credit balance of $9,880 and a job to boot (with only an obligation to pay $350 a month for the maintenance of his daughters). On the totality of the family worth of $100,000 plus $9,880, the wife's share worked out to under 11% while the husband who continued to have his job obtained more than 89%! Was this fair to her?

It is possible to disagree with P Coomaraswamy J. There is no restriction within section 106 to the assets being "available" for division. His Honour had, thus, read this requirement into it and the benefit of doing so is not obvious. Reading this restriction into 'matrimonial assets' could also mean the exclusion of insurance policies (which LP Thean J included in *Cheng Kwee Eng*), or employment benefits, or the value of intangibles like club memberships (which LP Thean J included in *Shirley Koo*). It may be asked whether an undivided share of a property, especially one held on joint tenancy, would be so available for division. It must also be remembered that CPF contributions constitute a large part of an employee's earnings and to exclude the CPF monies from matrimonial assets would diminish the pool so considerably as to unduly favour the spouse who works over the one who is homemaker. At present, a sum equivalent to 40% of the employee's salary, made up of a 21.5% contribution from the employee and a 18.5% from his employer (subject to a maximum total contribution of $2585), goes into an employee's CPF account every month. The fear that there may not be the money available for the husband to return to his CPF account can be taken care of in working out how to achieve the fair division. His Honour may have overstated this fear.

It is submitted that the question of what goes into the pool of matrimonial assets liable for division can be separated from how to execute the

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[46] *Ibid,* at 236.

division once it has been decided upon. In the earlier inquiry, the court is required to calculate the family wealth. It is inconceivable that it could be right at this stage to disregard 40% of a spouse's salary. It is incumbent on the parties to make full and frank disclosure of all their assets. When a complete picture of the family wealth has thus been obtained the court works out a fair division. Only after this would the court decide on the most practicable way of executing the division. At this stage the restrictions within the holding of the various assets, like the CPF accounts and employment benefits and club memberships, have to be factored in. Acting upon these restrictions at the earlier stage with the result of excluding them from matrimonial assets diminishes the pool unnecessarily.

The debate over CPF monies has, thankfully, been settled by the Court of Appeal in *Lam Chih Kian* v *Ong Chin Ngoh.*[47] The husband in *Ong Chin Ngoh* appealed against the High Court's order on the ground that CPF funds do not form part of matrimonial assets, or alternatively, if they do, that the sum of $70,000 his wife had in her CPF account should also be liable to division. The Court of Appeal rejected the first ground of appeal and thus, endorsed the view that all CPF monies are matrimonial assets. After referring to the two opposing views Justice Goh Joon Seng, speaking for the court, said succinctly:

> In our view the fact that the fund in a member's CPF account is subject to restrictions as to its use and disposal until he reaches the age of 55 and is inviolable except to the extent set out in the CPF Act does not make it any less of an asset. If the fund is accumulated during the marriage then it constitutes an asset acquired during the marriage.[48]

This settles the issue and, it is submitted, does so correctly.

The husband was, however, successful on his second ground of appeal. Although there was no reference in the judgment of the lower court to the wife's CPF account, Goh Joon Seng J noted here that she "admitted to having [$70,000] in her CPF fund." It is not surprising, then, that the Court of Appeal decided that this CPF sum must also be included in the calculation of the wealth of the family. The lower court's calculation was varied not just by the addition of this figure but also by the court noting the detail that the cash balance in the husband's CPF account should be reduced because only 17/21th of it had been accumulated during the course of the marriage. In the end, though, the Court of Appeal decided a fair division to her was 45% of the family wealth with the result that, in return for the husband transferring his interest in the matrimonial home to her,

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[47] [1993] 2 SLR 253.

[48] *Ibid,* at 259.

she would pay him $67,040.58. In the lower court, she had been given about 35% of the family wealth with the result of having to pay her husband $40,000 in return for the whole matrimonial home. The husband, thus, got only a bit more than the lower court had ordered.

C. What Assets are Included – Gifts from Parents and Assets Acquired before Marriage

There have been recent decisions on whether gifts from parents to one of the spouses (hereafter "gifts"), or assets already acquired by one spouse before the solemnization of the marriage (hereafter "pre-marital assets"), or gifts from parents to one of the spouses before his or her marriage (hereafter "pre-marital gifts") can be matrimonial assets liable to be divided. The provision describes matrimonial assets as "assets acquired by [the spouses] during the marriage by their joint efforts ... or by the sole effort of one party." A literal reading would suggest that this description excludes gifts, inasmuch as they were not acquired by the spouses' own efforts, as well as pre-marital assets, inasmuch as they were not acquired during the course of the marriage, and, for both these reasons, that it would exclude pre-marital gifts. These decisions have provided another way of reading this description of matrimonial assets. They suggest that these assets can give rise to matrimonial assets. The more dramatic are the unreported High Court judgment in *Cheng Kwee Eng (mw)* v *Hoong Khai Soon*[49] (which we discussed earlier on the point of CPF monies), on appeal, the Court of Appeal judgment in *Hoong Khai Soon* v *Cheng Kwee Eng (mw)*[50] and the latest decision of the Court of Appeal in *Koh Kim Lan Angela* v *Choong Kian Haw* together with its cross-appeal.[51]

In *Cheng Kwee Eng* the spouses married in 1976. They began their married life living in the home which had been bought by the husband's parents before his marriage and which was registered in the names of the husband and his mother. The husband's half-share in this matrimonial home was, thus, a gift given before he married; a pre-marital gift. The spouses shared this matrimonial home with the husband's parents and his sisters and a brother. Two children were born to them. The husband continued his studies and training, here and abroad, during his marriage and, while in Singapore, the spouses lived with and on the husband's parents. The marriage broke down in 1983 and the wife left to stay with her own mother. The husband again left for studies abroad but, through his sister, a monthly sum was provided for his children which the trial judge noted was probably paid

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[49] See note 41, *supra.*
[50] [1993] 3 SLR 34.
[51] [1994] 1 SLR 22.

by his parents. The wife took care of the children since the breakdown of the marriage and, with help from her own family members, purchased a HDB flat. She was a housewife with no income although she helped out in her mother's coffee shop and she and her children were financially subsidized by her mother.

While the husband was abroad, the matrimonial home was sold by his parents acting on the authority of a power of attorney he had given his mother. His father subsequently purchased and rebuilt a property (hereafter the 'new property'). A part of the proceeds of sale of the matrimonial home had been used to purchase and rebuild this new property. The new property was registered in the names of the husband and his brother. Since his return the husband stayed at this new property while his parents, a brother and a sister lived next door. He worked as a senior engineer and had plans to remarry and use this new property as his new matrimonial home.

The wife successfully petitioned for divorce on the fact of separation and the new property was one of the assets sought to be divided. The High Court decided that this new property, although it was acquired during the course of the marriage, was not acquired by any effort of the spouses. It was acquired, partially at least, with funds from the sale of matrimonial home which was, itself, a pre-marital gift. The court decided that the new property was not a matrimonial asset and could not be divided under section 106. The husband's parents had also given him a share of the thriving family business, Soon Heng Restaurant, before he became married. The wife sought a division of his share of this as well. The court decided that this share, being also a pre-marital gift to which there had not been any contribution by the spouses in money, property, work or otherwise, was not a matrimonial asset. LP Thean J said:

> In the context of these provisions ... "assets acquired by the sole effort of one party" do not mean assets acquired by that party *simpliciter* in the sense that the assets were merely received by that party. In my opinion, they mean assets acquired by the party by reason of the contributions made by such party "in money, property or work" towards acquiring that asset.

In the result, as has earlier been mentioned, the High Court decided that it was only the husband's CPF cash balance and his insurance policies and some shares which were matrimonial assets within section 106. As they were acquired by the husband's sole effort the judge awarded the wife 45% of the matrimonial assets which he capitalised as $30,000.

On appeal, the Court of Appeal agreed with the trial judge's decision on the husband's interest in the restaurant. The Court of Appeal, however, took a diametrically different approach to determining the status of the new

property. It did not focus on whether it was acquired through the effort of either spouse but, rather, that it was bought and rebuilt with part of the proceeds of sale of the matrimonial home in which the husband had a half-share. This was enough to bring the new property within the description of matrimonial asset. Justice Lai Kew Chai, giving judgment on behalf of Karthigesu J (as he then was) and Warren LH Khoo J, said:

> The learned judge's reason for holding that the husband's undivided half share in [the new property] was not available for division was because it was a gift from his family. With respect, we are unable to agree with him on this point.... [As there was some ambiguity in how the proceeds of sale of the matrimonial home were put to use] we are left to make a rough and ready approximation that the husband paid for half of [the new property] as renovated. The money came from the proceeds of sale of [the matrimonial home.] Although the [matrimonial home] was a gift, we do not think that we should trace the source of funds for a purchase to its origin. It would be inimical to the concept of a matrimonial partnership if the source of funds for every asset acquired during marriage had to be shown to not originate from the generosity of a third party.[52]

Noting that his half-share of the new property was acquired by his sole effort, the Court of Appeal decided that a fair share to the wife would be 35% of this. There was no appeal on the $30,000 the lower court ordered the husband to pay to the wife as her share of his CPF monies, insurance policies and some stocks. The effect, thus, was she would get this sum and another representing 35% of his half-share of the new property.

This is, without doubt, a bold decision but, as will be discussed below, the Court of Appeal has affirmed this approach in the even more recent appeal in *Koh Kim Lan Angela.* It is submitted that it would be wrong to understand *Hoong Khai Soon* to have decided that gifts and, even, pre-marital gifts are included within the description of matrimonial assets. Such a sweeping statement would be somewhat inconsistent with the description as it does refer to assets "acquired ... by effort" of the spouses "during the marriage."

A literal reading of the description of matrimonial assets does lead to the view that gifts, pre-marital assets and pre-marital gifts are excluded from division. The problem with this reading was that, on the facts of *Cheng Kwee Eng,* it would exclude the two major items of wealth, *viz,* the husband's half-share of the new property acquired in place of the family's matrimonial

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[52] *Op cit,* at 39-40.

home and the husband's share of the restaurant, from division. With these excluded, the lower court was only able to award the wife of this 15-year marriage with two children a mere $30,000. One cannot help but feel that the award was a tad low given the real wealth of the husband. The husband was clearly from a wealthy family whose parents were happy to support his endeavour to improve himself in his career prospects even after he had married and become a father. The challenge presented by this uncommon set of facts, then, was whether to read the description literally to exclude gifts and pre-marital assets (even if it leads to an unfairly small proportion of the real wealth of the family available for division to the wife), or, to give her a fairer share (even if this requires a more purposive reading of the description). The lower court chose the former and the Court of Appeal chose the latter. Conservatives given to a literal reading will favour the lower court's decision while liberals who are prepared to take a more purposive reading will applaud the Court of Appeal's decision.

It is submitted that, given the challenge posed by this set of facts, the Court of Appeal made the better choice. The Court of Appeal's decision does better accord with the view that marriage is a "matrimonial partnership" so that, upon its termination, the real wealth of the spouses should be divided between them so as to equalize their economic positions. It should be remembered that the infelicities and ambiguities within the provision have been noted by judges and academic writers before. It is heartening that our highest court chose to be guided by principle to make an order that was fair.

It is possible to suggest two ways of supporting the decision. First, although the new property never served as the family's matrimonial home, there is no doubt it replaced their matrimonial home. The matrimonial home had been sold and the husband, as owner of a half-share thereof, was entitled to a half-share of these proceeds of sale. It may be easier to argue that this half-share of the proceeds of sale of the matrimonial home is a matrimonial asset. As it happened, though, the husband alleged that these proceeds had been dissipated and had not been used towards the purchase and rebuilding of the new property. The Court of Appeal was not persuaded by this claim. Lai Kew Chai J observed that the figures submitted were "rather curious" and "not supported by documents". As the Court of Appeal was not persuaded that the proceeds of sale were dissipated, it may be suggested that the court regarded the husband's half-share of these proceeds as approximately equal, in value, to his half-share of the new property. In other words, in dividing the half-share of the new property the Court of Appeal was doing no more than dividing the husband's half-share of the proceeds of sale of the matrimonial home. Such division of his half-share of the proceeds of sale of the matrimonial home may be acceptable, even, on a more conservative reading of the provision.

Second, it is possible to argue that the two features of the husband's half-share in the matrimonial home (and, thus, of the new property that took its place), *viz,* that it was a gift and that it was given before he became married should not be accorded much significance. It may be suggested that a share in the matrimonial home or the new property that took its place should always be liable to be divided under section 106 however it was acquired and whenever it was acquired. It is noteworthy that practically every reported decision before this case involved the division *inter alia* of the matrimonial home. The matrimonial home is the clearest symbol of the wealth of a family. It is possible to regard the matrimonial home as *sui generis* among matrimonial assets for the reason that, as the clearest symbol of the family wealth, it must always be included for division. In other words, the limitations within the description that a matrimonial asset is "acquired ... by ... effort" and "acquired ... during a marriage" should applied far more leniently with regard to the matrimonial home. It is noteworthy that it is increasingly common to find, in other countries, the matrimonial home treated differently from other matrimonial assets, or, at least, proposals for such different treatment. The Law Commission of England and Wales has proposed this for England[53] although this does not appear to be anywhere near implementation. New Zealand[54] and the Canadian state of Ontario[55] each have a separate regime for the matrimonial home. Under the New Zealand and Ontario statutes, the matrimonial home is always subject the court's power to divide matrimonial assets.

Taking a lenient view of the limitations, it could be argued that the husband's parents in favouring him with a gift of a half-share in the matrimonial home gave it to both him and his wife so that his half-share was owned beneficially by both of them. We said earlier that the description of matrimonial asset within section 106 appears to exclude gifts to one spouse. Property jointly owned by the spouses, even if it had been acquired as a gift, should be a matrimonial asset. After all, as jointly owned property, each spouse is already entitled to a share of this and it really makes little difference whether it is included in the division or not. Including jointly owned property within the power of division, however, has the advantage of allowing a more complete reorganisation of the economic situations of the spouses.

A more lenient view could also allow the husband's act in empowering his mother to deal with the matrimonial home during his absence from Singapore to constitute "effort" within the meaning of the section. A lenient view could further also allow the new property to be regarded as the new

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[53] See the Law Commission of England and Wales in their Report No 52 on "First Report on Family Property: A New Approach".

[54] (New Zealand) Matrimonial Property Act 1976.

[55] (Ontario) Family Law Act 1986.

matrimonial home, even though the family never did stay in it, simply because it was purchased and rebuilt with the proceeds of sale of the matrimonial home and, thus, took the place of the matrimonial home.

This suggestion that a lenient view could be taken with regard to the matrimonial home is, no doubt, bold given that there is nothing in the provision which suggests this should be done. The Court of Appeal has, however, approved of *Hoong Khai Soon* in its most recent judgment in the appeal and cross-appeal in *Koh Kim Lan Angela* v *Choong Kian Haw*. Judge of Appeal Karthigesu delivered the Court of Appeal's judgment on behalf of Chief Justice Yong Pung How and Judge of Appeal LP Thean.

The marriage between Angela Koh and Choong lasted less than four years without there having been any children. Choong was in the boutique business with his father, two sisters and a brother. The spouses lived in the husband's father's home so that Angela Koh did not have to bear the major responsibility for care of the home. She had worked as a model before her marriage but had stopped this after her marriage. Instead, she contributed to her husband's business in other ways.

At the time of the marriage, the husband owned a half-share of the partnership firm 'Glamourette' and a 20% share of the company 'Shops'. Later another company, 'Plus', was established. There was every indication the husband's business prospered during the course of the marriage. After the spouses parted and Angela Koh had begun her divorce proceedings, in 1989, the family business was reorganised to accomodate a new partner, 'Ambassador', for expansion. The business of Glamourette was injected into Plus. The capital of Plus was increased to $2 million. 49% of this was issued to the husband and his father while the balance 51% was issued to Shops. The 49% to the husband and his father were sold to Ambassador in consideration for four million ordinary shares of Ambassador of $1 each such that the husband and his father were to receive two million shares each.

As a result of this reorganisation, then, the husband's assets included 20% of Shops as well as (through Shops' acquisition of 51% of Plus) 10.2% of Plus, and 2 million Ambassador shares. His half-share of Glamourette was no longer worth anything as the firm had been made dormant by the reorganisation. In addition, the husband was owed a debt, he had a cash balance in his CPF account, two insurance policies and a car. He also had an income from his business.

In calculating the matrimonial assets the Court of Appeal faced two kinds of problems. One had to do with the lamentable lack of information about the husband's business. Karthigesu JA observed the husband "has been less than candid". His affidavit of means was modest. He said he had no bank accounts at all but "in cross-examination he admitted he possessed 'a few thousand' in his bank account." His Honour also noted that his declaration

of gross taxable income for 1990 was inconsistent with the monthly income he stated in the "modest" affidavit of means. His Honour remarked: "The court however is not powerless against a party's absence of full and frank disclosure. It is entitled to draw adverse inferences against the husband and to treat him as a man in a position to command a very substantial income ...."

Then, there were doubts over whether these assets were matrimonial assets. First, both the two million Ambassador shares (which had been in exchange for the half-share of Glamourette) and the 20% of Shops were gifts from the husband's father to the husband. Should they be excluded from division on this basis? The Court of Appeal decided against excluding them solely on this basis. It, instead, affirmed its earlier decision in *Hoong Khai Soon* to the effect that their having originated as gifts from his parent did not necessarily exclude them as matrimonial assets.

Second, the 20% of Shops was a pre-marital gift. Did the fact that it was a pre-marital asset exclude it from division? The husband argued that a pre-marital asset could only become a matrimonial asset if it had been substantially improved by the spouses' efforts during their marriage within the terms of subsection (5) of section 106, and that this had not happened. The court below had, indeed, found that there not been any substantial improvement of this asset during the marriage. In fact, the court below found that the husband had not contributed any effort whatsoever to improving any of his business assets during the course of the marriage as he was not a true business partner of his father's. The Court of Appeal overturned both these findings. It found the husband's father had admitted that the husband saw to the "day-to-day management of the business" leaving the father to concentrate on the budgetary and financial aspects and it also found that the "much higher value" of Shops due to its acquisition of 51% of Plus was due to the husband's efforts during the course of the marriage. The court further found that Angela Koh had also contributed effort to the substantial improvement of the asset by having "acted as assistant to the husband, going with him on several selling trips, helping him to entertain clients and aiding him in increasing the exposure of Glamourette." The 20% of Shops was, thus, a matrimonial asset despite having been a gift from the husband's father to him before he became married and the court valued this at $400,000.

Third, as for the two million Ambassador shares the court below had found that the husband did not own them beneficially as his father kept the shares and blank transfer forms; in other words the court below found that the husband held these shares on trust for his father. If this were so, these shares would clearly not be matrimonial assets. The Court of Appeal, again, overturned this finding for several reasons. It found, instead, that the husband was a true business partner of his father's, that the husband

had admitted owning the shares beneficially and that it was only in deference to his father that he allowed his father to hold the shares and the blank transfer forms. The Court of Appeal, thus, found that the husband owned these shares legally and beneficially. The two million shares were, no doubt, acquired while the marriage was still legally in existence even though the wife had begun divorce proceedings and, therefore, they were matrimonial assets. As for the fact that these two million shares were acquired in place of the husband's half-share of Glamourette which had been a pre-marital gift, the Court of Appeal decided that this was irrelevant for the same reason it was irrelevant with regard to the 20% of Shops. The result was that these two million shares were matrimonial assets and the court valued the shares at $1,560,000.

Added to the debt owed to the husband of $274,862, his CPF balance of $89,746.14, his two insurance policies worth $150,000 and his car worth $55,000, the Court of Appeal found the husband to have matrimonial assets valued at $2,529,608. Even though the major of these assets, *ie,* the 20% of Shops and the two million Ambassador shares and, perhaps, the debt as well, were acquired by the joint efforts of husband and wife, the court decided that it would not be reasonable to divide this equally between the spouses. There were several reasons given by the court all of which pointed to a proportion lower than 50% to the wife as being more reasonable. These included the fact that the marriage was short (less than four years and without producing any children), the matrimonial assets had been built up by the couple from gifts to the husband from his father, that no real value could be placed on the husband's interest in Shops which was not readily saleable, and that the efforts of the husband had been disproportionately larger than the wife's. On the other hand, the husband had not made full and frank disclosure of all his assets and his wife had aided him in his business if only from 1982 to 1985. For all these reasons, the court decided that a division of 15% of the known and disclosed assets of the husband to the wife would be reasonable.

This worked out to a rounded sum of $379,000 which was much larger than the sum of $100,000 the lower court had awarded her. In addition, the lower court's order of a lump sum of $54,000 in maintenance was considered "somewhat low having regard to all the considerations that should be taken into account" and was also raised to $72,000. In the event Angela Koh succeeded in her appeal while the husband failed altogether in his and the court further ordered that she was entitled to costs in both appeals.

This latest decision is noteworthy for several points. This is the first case where the bulk of the matrimonial assets comprised business assets. The Court of Appeal, just like the court below, did not regard this feature as worthy of any discussion and has, thus, decided that "any assets acquired

by [the spouses] during the marriage" does not differentiate between assets acquired for the family members' use from assets acquired for business. This decision reinforces the spirit of the provision being to equalize the net family wealth so that it does not distinguish between personal and business wealth.

Second, the decision affirms *Hoong Khai Soon* that the fact that the asset was a gift does not necessarily exclude it as matrimonial asset. In the same vein, the fact that the asset was a pre-marital asset or, even, that it was a pre-marital gift would also not necessarily exclude it as a matrimonial asset. What should we make of these decisions? How can gifts, pre-marital assets and pre-marital gifts be "assets acquired by [the spouses] during the marriage by their joint efforts or ... by the sole effort by one party to the marriage"? It is submitted that the Court of Appeal's decisions stem from the view that, while this description would necessarily include all assets acquired by the spouses' efforts during the course of the marriage, it does not necessarily exclude gifts, pre-marital assets and pre-marital gifts. With regard to these, the description allows us to inquire into what the spouses had done with them by their own efforts during the course of the marriage. Where the spouses had expended efforts on such gifts or pre-marital assets or pre-marital gifts, these assets would likely have increased in value or have generated profits. This increase in the value of the gifts or pre-marital assets or pre-martial gifts, and profits therefrom, fall within the description as being assets acquired by the efforts of the spouses during the course of the marriage. The increase in value and profits are, thus, matrimonial assets. It is the fact that such asset, or proportion thereof, was acquired by the efforts of the spouses during the course of the marriage that makes the wealth liable to be divided. The fact that the wealth was made from gifts or pre-marital assets is not significant.

It may be said, therefore, that matrimonial assets include all assets acquired during the marriage whether for the family or in the course of doing business as well as any increase in value of, or profits from, gifts and pre-marital assets. *Hoong Khai Soon* and *Koh Kim Lan Angela* support the latter part of this statement. In *Hoong Khai Soon,* Lai Kew Chai J in deciding that the husband's share of the business could not be divided said:

> The wife ... contends that she has nevertheless contributed to the substantial improvement of the business during the marriage. She claims that such contributions came in the form of her doing all the domestic chores ... [and that] she also helped out as a cashier in another coffee shop owned by the husband's father.... It is plain that the efforts which bring the asset ... within section 106 must bear a causal link

> to the substantial improvement of the asset. The question is one of fact. There has been no evidence to show that the wife's efforts at domestic chores and as cashier at an unrelated business contributed to an increase in the profits of [this business.][56]

Similarly, in *Koh Kim Lan Angela* Karthigesu JA approved of this and, in deciding that a pre-marital gift could be divided, said:

> The 20% holding in Shops has definitely been substantially improved during the course of the marriage. Owing to its acquisition of 51% of Plus the holding now has a much higher value.... The problem the wife faces is in proving a causative link between that substantial improvement and her efforts or the joint efforts of the husband and herself.... Counsel for the husband emphasised that the improvement in the assets had been contributed to by work of the husband's father and sister as well. This however does not prevent the court from taking cognizance of the fact that the couple may have contributed to the asset's substantial improvement.... We are of the view that the husband was directly, albeit not solely, responsible for the improvement in the business.[57]

In *Hoong Khal Soon* and *Koh Kim Lan Angela,* though, the Court of Appeal actually used the power to divide, not just the increase in value of the gift or pre-marital asset or profits therefrom, but the entire gift or pre-marital asset. This, it is submitted, does not detract from the validity of the statement about the way to read the description of matrimonial assets. The calculation of the increase in value of, or profits from, gifts or pre-marital assets is only possible when full facts are disclosed to the court by the owner of those assets. In these two cases, the husbands who owned these assets did not disclose all the facts necessary to allow such calculation. The court must, then, work from whatever facts are available. If necessary, the court must make rough approximations as, not to do so, will certainly be unfair to the other spouse.

The Court of Appeal in *Hoong Khai Soon,* after noting that the figures offered by the husband's claims to show that the proceeds of sale of the matrimonial home had been dissipated were "rather curious" and that it will not "fully accept the attributed uses" proceeded to adopt "a rough and ready approximation" of the matrimonial assets. In *Koh Kim Lan Angela,* too, after chastising the husband for not having made a full and frank disclosure the court "applied a 'broad brush approach' [to divide] the known

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[56] [1993] 3 SLR 34, at 38.

[57] *Koh Kim Lan Angela* v *Choong Kian Haw, note* 51, *supra,* at 27-28.

and disclosed assets of the husband." Where the spouse in possession of the facts, as the husbands in these cases, does not present these facts as honestly as is expected of him the court is forced to act upon the only disclosed assets even if such assets are, in the case of *Hoong Khai Soon,* property acquired only after the spouses had parted company and which never served as the family's matrimonial home or, in the case of *Koh Kim Lan Angela,* assets owned by the husband pursuant to a business reorganisation only after the parties had parted and the wife had started divorce proceedings. These were the best approximations the courts could make of the increase in value of these gifts or pre-marital assets due to the efforts of spouses during the marriage.

This willingness to act upon the only disclosed assets of the husbands even though they had clearly come into their ownership only after the spouses had parted and, even, in *Koh Kim Lan Angela* after the wife had started divorce proceedings may well be the strongest point to emerge from these judgments. In *Koh Kim Lan Angela,* for instance, if the husband had complied with his legal obligation to make full and frank disclosure in his affidavit of means the court would, then, have been able to calculate the increase in value of the 20% of Shops and his half-share of Glamourette due to the efforts he and his wife expended on these businesses during their marriage. The court would not have had to act upon the entirety of the value of these, as at a time two years after the wife had begun divorce proceedings. The clear message from this judgment, as well as *Hoong Khai Soon,* is that parties to matrimonial proceedings had better make full and frank disclosure in their affidavit of means. If the husband in *Koh Kim Lan Angela* had allowed a more precise calculation of the increase in value of, or the profits from, the gifts and pre-marital assets even an equal division of this could have led to a figure less than the $379,000 reached by the court.

Such approximation in the absence of full facts is not just the only practicable measure available, it may also be said to be sanctioned by the provision itself. Subsection (5) of section 106 provides, in relation to a pre-marital asset, that if such asset has been "substantially improved during the marriage" by efforts of the spouses the entire asset (not just the increase in value or profits due to these efforts during marriage) can be divided. If one were to accept the previously-held literal reading of the provision's description of "assets acquired by [the spouses] during the marriage by their joint efforts or... by the sole effort of one party to the marriage" as excluding gifts and pre-marital assets, then this subsection should be read to create an exception. The exception would be said to arise where a pre-marital asset had been substantially improved by the efforts of the spouses during their marriage; in such an event the pre-marital asset would come within the description. Given the decisions of the Court of Appeal in *Hoong Khai*

Soon and *Koh Kim Lan Angela,* this reading of the subsection would no longer be appropriate. The better reading of the subsection, it is submitted, is that it permits the entirety of the gift or pre-marital asset to constitute matrimonial asset (not just the increase in their value or profit therefrom) where such increase in value was substantial in proportion to its value before the spouses contributed their efforts. The subsection, it may be said, sanctions the approximation of the true value of the matrimonial assets. The entire provision, it should be borne in mind, operates from the standpoint of trying to arrive at some fair and reasonable division of family wealth instead of achieving any exactitude.

The same analysis as the foregoing can be applied to the facts of *Cheng Kwee Eng* where the husband's share of the business of Soon Heng Restaurant, which had also originated as a gift from his parents given before his marriage, was found not to be a matrimonial asset. The trial judge found that neither husband nor wife had by their efforts during the course of their marriage increased the value of the business in any way, and the Court of Appeal agreed with this finding. The Court of Appeal elaborated that the husband's share of the capital of the business had not been shown to have increased in value through the spouses' efforts during their marriage, and that the income from the business could only be liable to division if the business had accumulated part of the profits as capital or in reserve which it had not been shown to have done. In *Koh Kim Lan Angela* Karthigesu JA approved of this analysis thus:

> The wife in *Hoong Khai Soon* v *Cheng Kwee Eng* was unable to obtain a share in Soon Heng Restaurant because she had made no efforts at all to the improvement of the business there: her duties as cashier were at an unrelated restaurant, and as her husband had not worked at the restaurant she could not be said to have aided him in any way.[58]

His Honour so observed in order to show that *Koh Kim Lan Angela* was different in that the husband, and the wife as well, had both through their own efforts added to the value of the business assets.

A less dramatic decision which also involved a gift to one of the spouses from a parent was *Ng Kim Seng* v *Kok Mew Leng*.[59] There the marriage was dissolved after twenty-three years during which time two children were born. The matrimonial home had originally been conveyed into the sole name of the husband although a major part of its price had been paid by the wife's father as a gift to her personally. Subsequently the father gave

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[58] *Koh Kim Lan Angela,* note 51, *supra,* at 28.
[59] [1992] 2 SLR 872.

a further sum in order that the outstanding mortgage could be discharged. The nature of this sum, either another gift to the wife or a loan to the husband, was disputed. The husband later included the wife's name in the legal title. The trial judge determined that the wife, through gifts from her father, had contributed about 4/5ths to the cost of purchase and he thus divided the property in the proportion of 4/5ths to the wife and l/5th to the husband.

This could be said to be an easier case to decide because it was the homemaker wife who stood to benefit from the court taking a strict view of the proportions of her contributions albeit through gifts from her father. Also the matrimonial home had been purchased some 20 years ago and so the l/5th value returned to the husband (who had only invested less than $20,000 in it) represented a substantial gain in value. And, of course, the husband still had his career intact. The financial positions of the spouses were, thus, somewhat reversed from those in *Hoong Khai Soon* where it was the husband who had all the wealth given by generous parents, and his career. The decision of the trial judge was upheld by the Court of Appeal whose decision also did not focus on the fact of the assets having been gifts.

The decisions of the lower court and the Court of Appeal focussed, instead, on the parties' respective contributions to the acquisition of the assets. It could be that counsel did not seize on the point of their being gifts. As the decisions stand, though, they are consistent with the view that the lack of personal effort by a spouse in the acquisition of a matrimonial home (because it was a gift) does not necessarily require that the home be excluded from division. To this extent, they are consistent with the later decisions of the Court of Appeal in *Hoong Khai Soon* and *Koh Kim Lan Angela.*

On the other hand, in the earlier discussion, it was submitted that the Court of Appeal decisions in *Hoong Khai Soon* and *Koh Kim Lan Angela,* allow the argument that the provision allows the court to divide any increase in value of such gifts which was due to efforts expended by the spouses during the course of their marriage. Applying this approach to *Ng Kim Seng* it would have been possible for the husband to attempt to show that, during the course of their twenty-three year marriage, either he or his wife or both of them had by their own efforts increased the value of these gifts. Any such increases would be matrimonial assets. The decision in *Ng Kim Seng* may well have been overtaken by *Hoong Khai Soon* and *Koh Kim Lan Angela.*

D. *Spouses' Agreement*

What is the proper legal effect of agreements on division of assets made between spouses? In *Wong Kam Fong Anne* v *Ang Ann Liang*[60] the matrimonial home had been purchased with funds from both spouses and conveyed into the wife's name alone. The court found that the husband was content to allow both legal and beneficial ownership to rest in the wife. When the parties separated they entered into a deed of separation, apparently a comprehensive settlement of their property and financial situation, wherein the husband confirmed the wife's sole legal and beneficial ownership of the matrimonial home. The husband now asked for an order under section 106 while the wife alleged the agreement was binding and, thus, no order should be made.

Judicial Commissioner Michael Hwang started with the decision of the Court of Appeal in *Wee Ah Lian* v *Teo Siak Weng*[61] noting that the Court of Appeal decided that, while agreements which did not transgress section 106 will be approved, the existence of such agreements do not encumber the court and, in particular, they do not prevent its exercising its power of division. In *Wee Ah Lian* the ex-spouses had also reached an agreement on how the assets should be divided and the Court of Appeal was content to divide the assets according to the terms of this agreement. It must be noted, though, that the Court of Appeal found that nothing in the spouses' agreement trangressed the directions in section 106. It was, in a sense, easy for the court to have made the decision it did. The most the case stands for is the rather innocuous proposition that an agreement which transgresses the section will be reviewed by the court and runs the risk of being disapproved of and varied accordingly. In *Wong Kam Fong Anne,* Michael Hwang JC directed himself that despite the clauses in the settlement to the contrary he was able to exercise his powers under section 106. This, however, did not mean that he would have to exercise his power, a point which had been reaffirmed by the Court of Appeal in *Lim Tiang Hock Vincent.* His Honour said:

> It seemed to me that the correct approach was to start from the position in law as it existed immediately prior to the divorce, and then see whether any change to that position should be made by an order under s 106.... [Here] ... the deed of separation had no effect in law on the legal position, except to provide evidence of the wife's beneficial title.[62]

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[60] [1993] 2 SLR 192.
[61] [1992] 1 SLR 688.
[62] *Wong Kam Fong, Anne* v *Ang Ann Liang, op cit,* at 199.

His Honour decided not to make an order under the section. Speaking more generally of the legal nature of agreements between spouses, his Honour noted that a wife's right to maintenance cannot be waived by private agreement and this was settled by the House of Lords in *Hyman* v *Hyman,*[63] and indirectly affirmed in sections 110 and 113. These sections, however, do not apply to agreements on division of property. His Honour said, however, that "[b]oth as a matter of law as well as policy ... if the parties freely enter into an agreement in respect of the division of their assets, that agreement may be considered a valid reason for the court not to exercise its powers under s 106."

It is worth noting that the agreement here, just as the agreement in *Wee Ah Lian,* merely reaffirmed the parties' positions under the law as to the ownership of the property in question and were thus not oppressive to either spouse. In that sense, these cases were fairly straightforward. We await a case where the agreement is oppressive to either spouse to see what the court's decision would be. The decisions imply, however, that such agreement can be overridden if the court decides to use its power under section 106. The general principle is that agreements, even comprehensive final agreements, about the ownership of assets are not invalid but such agreements do not prevent the court from exercising its powers under section 106. They may, however, persuade the court to desist from making an order.

The law on the effect of agreements between spouses is still in a state of transition. It would be good, on one hand, to allow autonomy to the spouses to order their lives as they wish. Whether this requires enforcing such agreements, however, is not clear. It is suggested that a possible view to take is that agreements between spouses are valid unless they "negate" or "resile from" marriage[64] but they will not be directly enforced by the court. This position allows the maximum flexibility to the court. Where the agreement is deemed fair, the court could either make orders similar to what was agreed, or refuse to make an order leaving the parties to what they have agreed. Where it is unfair or circumstances have changed to render it unfair, the court can simply make its own order. This will make unnecessary inquiries as to whether the agreement, though valid in purpose, was made under undue pressure or duress, and, if so, whether it is severable. It is suggested that we could circumvent these by simply refusing directly to enforce any agreement. This position may also en-

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[63] [1929] AC 601.

[64] *Per* LP Thean J in *Kwong Sin Hwa* v *Lau Lee Yen* [1993] 1 SLR 457. The pre-nuptial agreement not to consummate the Registry marriage until the performance of rites of marriage according to Chinese custom was held not unlawful as it neither negated nor resiled from the marriage.

courage spouses to ensure enough fairness in their agreements so that both will spontaneously want to respect their bargain.

The settlement in *Wong Kam Fong Anne* also concerned some $55,000 in a bank account which his Honour determined to be money from housekeeping expenses saved by the wife. The settlement contained a clause that these moneys belonged to the wife exclusively. The husband also challenged this clause and asked for a division under section 106. His Honour decided that section 51 of the Act treats such money as "belonging to the husband and the wife in equal shares" but only "in the absence of any agreement between them to the contrary". His Honour applied this with the result that the agreement to the contrary was respected. One can disagree with this decision that section 51 controls the proper exercise of the power of the court in section 106. It could be argued, to the contrary, that section 51 is only controlling in an application under section 56 (in the same Part of the Act) for a determination of property interests but that under section 106 the court is not bound by it. It is somewhat anomalous to take the position that under section 106 this portion of the family wealth should be treated differently from the rest. This decision is more supportable if the court felt, apart from section 51 and the agreement between the spouses, that it was fair to give the wife the full $55,000.

E. *Guides to Division*

A frequent grouse about section 106 is that it does not give enough guidance about what the proportion of division ought to be. It merely directs the court that, where assets have been acquired by joint efforts, it should "incline towards equality of division" while if the assets were acquired by the sole effort of one spouse then that spouse "shall receive a greater proportion." Recent cases have affirmed the court's commitment to read the provision in the best possible way and to use the power to order fair divisions of matrimonial assets between the spouses. The homemaker's effort continues to be accorded particular recognition.

There are, however, still the occassional conservative statement. In *Wee Ah Lian,* Karthigesu J, speaking for the Court of Appeal, pointed out that "it is incumbent on the court to see that these provisions of the section are not violated when ordering a division of matrimonial assets." The facts there, however, may be said to make it easy for the court to so state. The spouses had reached an agreement on how the assets should be divided and the Court of Appeal found that nothing in the agreement trangressed the section. The point made about having to ensure that the provisions were not violated was, thus, not material to the court's decision. In any case, given the general nature of the directions within the section, it is possibly

only an order which gives the spouse who acquired the assets by his sole effort less than half of the value thereof which transgresses the section. Every other order may well pass muster. Here, the Court of Appeal was content to order that the operative clause in the agreement on what was due to the wife upon the failure of the reconciliation attempt should be executed so that she would receive $547,000 in lieu of two properties, retain title in the HDB flat she occupied and receive a lump sum of $100,000 as maintenance of herself and their son.

Where the financial contributions of the spouses are undisputed and an order according to these proportions would be fair enough, the courts have been mindful of the parts of the section which direct them to discover the "effort" of either spouse and to consider the "extent of the contributions made by each party in money, property or work towards the acquiring of the assets." The more usual scenario is of a dual career couple both making financial contributions towards the purchase of assets where division along the proportion of contribution may well be fair enough. There have been two recent cases but the facts of both deserve particular note.

In *Ng Kim Seng* the wife, by way of gifts from her father, had contributed 4/5ths of the purchase price of the matrimonial home while the husband contributed the other l/5th. The husband argued that the matrimonial home should be divided equally between them under section 106. He alleged that his wife held one other piece of property on trust for their children which had also been bought by her father, as well as fixed deposit accounts and a portfolio of shares which he claimed earned annual dividends of $250,000 although the court did not appear to have been satisfied with his evidence of all of this. The husband claimed he was much the poorer of the two which was undoubtedly true but, the court noted, he worked as a quantity surveyor. Neither the trial judge nor the Court of Appeal was persuaded by his request for half of the home and they divided it according to the proportions of its beneficial ownership. On its own the case only shows that a husband who continued his career and did not contribute as much as his homemaker wife to the family cannot expect, generally, to share in his wife's wealth where the wealth came from her generous parents. *Ng Kim Seng* on its own is, thus, not very interesting.

It becomes more interesting when compared with *Hoong Khai Soon.* These two cases may be said to be the mirror image of one another. In *Hoong Khai Soon* it was the husband who was the wealthier of the spouses due to the generosity of his parents and the Court of Appeal gave 35% of his half-share in the new property which replaced the matrimonial home to his wife. Compared with this decision, it does appear somewhat harsh to the husband of the wealthy wife in *Ng Kim Seng* not to give him more than the share of the matrimonial home he contributed towards. If the facts

of *Ng Kim Seng* were to arise again, the decision in *Hoong Khai Soon* is likely to be cited in argument. This decision and *Koh Kim Lan Angela,* allow increases in value of gifts, or profits therefrom, due to efforts by the spouses expended during their marriage to be divided. It would then be interesting to see if the court would draw parallels. It is submitted that the analogies are proper although it should, at the same time, be noted that there is a difference where it is the husband who claims a share of assets owned by his wife. A husband is, arguably, less affected by the marriage than a homemaker wife. He, almost always, retains his career and can continue to develop it during the course of the marriage while a homemaker not only gives it up to take care of the home but, in so doing, it is unlikely she would be able to re-enter the labour market upon the termination of the marriage. This factual reality merits consideration in deciding what is a fair division of matrimonial assets which had been gifts to the homemaker from her father.

In *Wang Shi Huah Karen* v *Wong King Cheung Kevin,*[65] the High Court also made an order which more or less followed the proportion of contribution. The facts were, however, also unusual as the marriage lasted no longer than three years without children before the spouses parted. The short marriage, therefore, had no long term effect on the wife and her career. Her counsel argued, in any case, that the court should incline towards equality of division. Michael Hwang JC decided otherwise. His Honour noted that there is a problem with the section in directing him to "have regard to the extent of contributions by each party in money, property or work towards the acquiring of the assets" and "subject to [that] consideration, [to] incline towards equality of division." He said:

> It seems to me that the reconciliation between the beginning and end of this subsection must be, taking the broad view, to find that, where the extent of the contributions made by each party can be identified with reasonable (if not exact) certainty, the court should take the proportion of contributions as the main factor determining the ratio of division, but where the extent of the contributions, although substantial in the case of each party, cannot be clearly determined, the court may incline towards equality. I would also, in appropriate cases [of property acquired by joint effort] be prepared to give some regard to the non-financial contributions of a spouse [to the welfare of the family by looking after the home or by caring for the family], because not to do so would be to inject an irrational distinction between [what

[65] [1992] 2 SLR 1025.

> should be ordered for property acquired by joint effort compared with property acquired by sole effort].[66]

His Honour then noted that he could not give significant recognition to the wife's non-financial contribution in view of "the relatively short period that the parties were effectively married." It is submitted that this fact may well be the key to understanding the decision. When the marriage is short there is less wifely or motherly contributions to consider and the actual financial contributions of the spouse to the acquisition are likely to be fairly clear. In time, however, these proportions will become blurred as there may be not only direct but also indirect financial contributions, and the non-financial contributions could be significant. It is submitted that this decision must be understood on its own facts and that it would be misleading to cite it for the broad proposition that proportion of contribution overrides the encouragement to incline towards equality. In marriages of normal length, at least seven to ten years before termination, there would naturally be greater difficulty in computing proportion of contribution and greater non-financial contribution than here. It would not then be likely for the division to be guided solely by the proportion of contribution.

The most that can be deduced from these two cases is that there may be situations where it would be considered fair enough to divide material gains according to the proportion of contribution. One such situation would be where the marriage has been short and there are no lingering effects on either spouse. Another, perhaps more controversial, would be where it is the homemaker wife who had made the larger contribution by way of gifts from her own family.

The Court of Appeal's latest decision in *Koh Kim Lan Angela* is also relevant as a guide to the proper division of matrimonial assets. It had been said earlier that, because the husband did not make full and frank disclosure, the court had no choice but to rely on the only disclosed assets which were his business assets as a result of the reorganisation of business in 1989, two years after the wife had begun divorce proceedings. Despite the fact the matrimonial assets were the result of joint efforts at acquisition by him and his wife, Karthigesu JA said:

> This is, not, however, a case where the court should apply the principle of equality of division. It would be too hazardous to enumerate the circumstances where such a division may be made. Nonetheless where, as in this case, the marriage is a short one, the assets are built up by the couple from a sizeable capital base created by others, and the efforts of the husband have been disproportionately

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[66] *Ibid,* at 1030.

> larger, it is clear that equality of division would amount to an injustice towards the husband. Accordingly, taking account of the fact that the husband has not made full and frank disclosure of all his assets, the fact that the wife has aided him only from 1982 to 1985 and that no real value can be placed on the husband's interest in Shops, which in any event is not readily saleable, and making the best judgment we can, in all the circumstances, we are of the view that a division of 15% of the known and disclosed assets of the husband to the wife would be reasonable.[67]

It is submitted that it would be wrong to read this as the Court of Appeal refusing to be directed to "incline towards equality" in dividing jointly acquired matrimonial assets. It should be borne in mind that, in not being able to calculate the true value of the matrimonial assets, *viz,* the increase in value of the gifts and pre-marital assets, the court had to divide the entire of these gifts and pre-marital assets as they were worth two years after the wife had begun divorce proceedings. The 15% of the entire value of these assets that the court ordered for the wife may well have been more than, even, an equal division of their increase in value during the short marriage. This decision, rather than being a retreat from the direction to incline towards equality, was extremely bold in that it could have been worth more than an equal division of the true value of the matrimonial assets!

From the cases discussed, the norm appears to range from 35% to 45% to the wife. The decision in *Neo Heok Kay* to award the wife 62½% was a departure and may be explained by the fact that the quantum of matrimonial assets was small due to the judge's decision to exclude CPF monies. Similarly the Court of Appeal's award of 15% to the wife in *Koh Kim Lan Angela* may be explained as the court was dividing the entire value of the business assets of the husband's rather than only the proportion of it which were matrimonial assets.

V. Towards Reform

There have been repeated calls to amend the provision to improve it. Although the provision is to be applauded as a significant part of the scheme to do justice between spouses it can, and should, be simpler and clearer than it currently is. It is hoped that the better principles which have been established by case law will be retained or incorporated and the infelicities in wording corrected. A simpler and clearer provision may be thought possible after consideration of four matters: the spirit of the provision,

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[67] *Koh Kim Lan Angela,* note 51, *supra,* at 31.

the definition of matrimonial assets, the target the court ought to aim for, and the need for flexibility in choosing the best way to achieve the division.

A. *Statement of the Spirit of the Provision*

Although there have been heartening judicial expressions of the spirit of the provision being to fairly divide the matrimonial assets between the spouses and, in so doing, to recognise the equally valuable contribution of the spouse who is the dominant homemaker, there have also been reservations over whether the actual words of the provision allow this view. It is submitted that it would help a better appreciation of the provision if its spirit were expressly spelt out.

It should be made clear that the objective behind the provision comes from the family law lest anyone should be confused that this provision stems from property law or the law of trusts. A power to divide matrimonial assets such as section 106 is moved by family law considerations to ensure fairness to the spouses while a power to adjust such as that in England is moved by a more limited objective to correct the worst effects of the general rules of property law regarding the acquisition of property. This is not to suggest that the property law is devoid of objectives but only that its objectives, as far as its rules on the acquisition of property interests are concerned, do not cater for the special needs of the husband and wife.

While expressly stating the objective of a particular provision is not normally done in countries following the common law tradition, there are enough examples of this in relation to a provision such as section 106 to support giving it serious consideration. The New Zealand Matrimonial Property Act 1976 gives as its long title: "An Act... to recognize the equal contribution of husband and wife to the marriage partnership, to provide for a just division of the matrimonial property between the spouses when the marriage ends ...." In the same vein, the Ontario Family Law Act 1986 contains the following subsection (7) within section 5 on 'Equalization of net family properties':

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses, and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of net family properties.

It is submitted that either of these expressions can be used as the model for an express statement of objective within section 106. Family law is, perhaps, one area which benefits from a less conservative approach to

legislative drafting. The Singapore Parliament may be said to have already recognised this by its inclusion of the following section 45 within the Act:

> (1) Upon 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.
>
> (4) The husband and the wife shall have equal rights in the running of the matrimonial household.

There is no doubt that these are incapable of enforcement and, thus, lack sanction; yet they unmistakably characterise the Act's perspective of the husband-wife relationship so that the Act would have been the weaker without them. By the same token an express objective within section 106 would strengthen the provision.

It would follow from this statement that, as the objective stems from family law rather than property law, section 106 should use language to reflect this. The less the provision looks like a property law provision, the easier it will be to understand and to use it well. It is submitted that words like "acquiring", "assets", "efforts", "contribution" are indelibly associated with property law and should be substituted whenever other words can be used. Perhaps we can speak in terms of the division of "net family wealth", or "net material gains" or, as the Ontario Family Law Act does, of "equalization of net family property".

It may also be worthwhile stating expressly that the power is one to divide the net family wealth between the spouses rather than to divide individual items of property as such. Karthigesu JA in *Koh Kim Lan Angela* said "we have grouped together all the husband's assets to which the wife is entitled under s 106 and have applied a 'broad brush approach'." It is of note that our courts have already used their power thus – there are numerous cases where the proportion ordered for one spouse from the other (because the major items of property have been registered only in one spouse's name, for instance) has been capitalised so that the spouse in whose name the property has been registered can retain ownership and only need pay the capitalised sum to the other; the decisions in *Cheng Kwee Eng* and *Koh Kim Lan Angela* are recent examples. To so state serves to explain the objective of the power more clearly lest anyone be confused into thinking that an application under section 106 is for individual items to be split into two.

B. *Definition of Matrimonial Assets*

The basket of matrimonial assets over which the court has the power to divide should be defined although it may be wise to make the definition less than exhaustive to cater for unexpected challenges to the definition. The definition can take the form either of a list of the assets included or, alternatively, of a broad reference to all assets owned at the time of the court proceedings together with a list of excluded property. It is also conceivable to have both – a list of matrimonial assets generally, and a list of assets which could be excluded.

1. *Assets included*

It may be provided that any property acquired by either spouse during the course of the marriage is a matrimonial asset including the following which have already been established by case law, *viz,* the matrimonial home,[68] cash balances, Central Provident Fund accounts cash balances as well as monies withdrawn for purchasing approved properties or selected investments, other properties owned by either spouse, business assets and, even, intangibles such as the benefits of club membership. *Hoong Khai Soon* has decided that even if the matrimonial home had been a gift to one of the spouses and even if it had been given before the solemnization of the marriage, it is still liable to be divided. *Koh Kim Lan Angela* has decided, similarly, that business assets which had been gifts given before the marriage are also included. Where an asset liable to division is sold or exchanged into another asset, the proceeds of sale or the new asset which took its place is equally liable to be divided. If it were not so, it would be too tempting for spouses anticipating the invocation of section 106 to transform existing property into some other kind of asset. It may be provided that all these assets are included unless a spouse satisfies the court that any of them should be excluded.

The Court of Appeal decisions in *Hoong Khai Soon* and in *Koh Kim Lan Angela* require an elaboration within the definition that, although an asset may be excluded from division, *eg,* a gift or a pre-marital asset, if the spouses have by their efforts during the course of their marriage

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[68] The matrimonial home, whenever a definition is attempted, is normally associated with residence of the family, eg, the (New Zealand) Matrimonial Property Act 1976 s 2 says "'Matrimonial home' (a) means the dwellinghouse that is used habitually or from time to time by the husband and the wife or either of them as the only or principal family residence ... and (b) includes a joint family home" while the (Ontario) Family Law Act 1986 s 18(1) says "Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home."

increased the value of such asset, or made profits therefrom, the increase in value or the profits are matrimonial assets. The definition of matrimonial asset should include the proportion of such gifts or pre-marital assets which can be traced to efforts by the spouses during the marriage. Perhaps, we should also retain subsection (5) of section 106 which, as discussed earlier, should be interpreted to provide that, where this proportion is substantial, the entire of such asset and not just the increase in value or profits may be regarded the matrimonial asset.

2. *Assets excluded*

The list of assets which a party may argue to be excluded from matrimonial assets could consist of the following which are taken from the Ontario Family Law Act 1986. Gifts from third parties to, or inheritances by, one spouse and meant only for that spouse could be excluded. This exclusion is subject to two limits in either of which the gift would not be excluded. First, the Court of Appeal decision in *Hoong Khai Soon* requires that a gift of a matrimonial home should not be excluded. This would also be the position in Ontario as, was mentioned earlier, there is a special regime for the matrimonial home under the Ontario statute in which the fact that it had originated as a gift would not necessarily exclude it from division. Second, the Court of Appeal decisions in *Hoong Khai Soon* and *Koh Kim Lan Angela* require that increases in value or profits made from gifts, where such increases in value or profits were due to the efforts of the spouses during the course of the marriage, are not excluded.

It should be noted that gifts from one spouse to the other are, in fact, a depletion of the marital partnership's assets and an argument could be made that they ought to be put back into the pool of assets to be divided. It is submitted, though, that the law could encourage spouses to desist from claiming back a portion of gifts given to the other spouse. This would be more civil and more in keeping with our Asian character. This could be achieved by adding to the exclusion gifts from one spouse to the other.

The Ontario statute also excludes three further types of property but we may well wish to think whether their exclusion is suitable for us. First, it also excludes "damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages." It is interesting that the Ontario Law Commission Report which led to these changes had actually recommended the opposite, *ie,* "both general and special damages for personal injuries to a spouse should be non-deductible."[69] The Report showed, however, that there was a divergence of views on

[69] See Report on Family Law 1974, 83-85, at 85.

this matter. Until we form a clear view on whether it is better to protect the use of these funds or to open them to division, it is suggested that no specific reference be made to them within section 106. It is, after all, not expected that such sums of damages form a significant part of most applications under section 106.

The Ontario statute also excludes "proceeds or a right to proceeds of a policy of life insurance... that are payable on the death of the life insured." Again, the Ontario Law Reform Commission Report had recommended to the contrary. It recommended that "the general rule should be that assets accumulated during marriage [including those accumulated] under an insurance programme would be, like other post-nuptial savings [liable to be divided]."[70] This would have meant that sums representing premiums paid during the marriage under insurance policies or, alternatively, the cash surrender value of these policies are subject to division. Our law may be fairly similar to that recommended by the Report as opposed to that in the Ontario statute. The High Court decided in *Cheng Kwee Eng* that the cash surrender value of term insurance policies were divisible. It may be assumed that, instead of the cash surrender value, the court could also have divided the sums paid as premiums under the policies. Sums due to be, or already, paid to a spouse as a beneficiary under an insurance policy, however, which sum is thus a gift meant only for that spouse, would be excluded as a gift meant only for that spouse. Be that as it may, it is submitted that it may be preferable not to provide specifically about insurance policies. It is not expected that sums connected with insurance policies would form a sizable part of the matrimonial assets of most families in Singapore. Where it exceptionally does, it may suffice to leave it to the court to decide if it should be excluded. In *Koh Kim Lan Angela,* for instance, the Court of Appeal included "two insurance policies to the value of $150,000." It is not entirely clear whether this was their cash surrender value. In view of the fact that this $150,000 was a small portion of the amount available for division, *viz,* $2,529,608, it is submitted that this was a minor matter over which the court was correct not to be greatly concerned about.

The Ontario statute, lastly, excludes "property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property." It was discussed earlier that the law on the proper effect of agreements between spouses remains in a state of transition. The traditional view shunned such agreements for the reason they might encourage the break-up of the marriage. Courts, today, are prepared to accept most of them as long as they do not negate or resile from the marriage.

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[70] See Report on Family Law 1974, 93-97, at 96.

It is also not expected that there will be many of such agreements to contend with in Singapore. It is submitted that, until we form a clearer view of what should be the proper legal effect of such agreements, we should not make a direct reference to them within section 106. Where the court is faced with an agreement, the best view to take may well be one where the agreement will be accorded all the consideration due to it but will not be directly enforced. This view may be the most practical as it allows a fair agreement to affect the division while an unfair one need not unduly trouble the court.

It is submitted that section 106 need only provide that gifts and inheritances meant only for one spouse should be excluded from matrimonial assets liable to division. Following the principle earlier stated, the spouse who is to benefit from the exclusion must assume the burden of proving that the property properly falls within the exclusion. To cater for other exclusions, it will suffice to add that "any other property may also be excluded upon the court being satisfied that they should be."

3. *Net matrimonial assets*

As we are aiming to divide the actual gains of the marital partnership, the 'matrimonial assets' liable to be divided should be calculated as net matrimonial assets, *ie,* after deducting two items. Under the Ontario statute the net family property "means the value of all property [except excluded property] that a spouse owns ... after deducting, (a) the spouse's debts and other liabilities, and (b) the value of property, other than a matrimonial home, that a spouse owned on the date of the marriage, after deducting the spouse's debts and liabilities, calculated as of the date of the marriage." It was earlier suggested from *Hoong Khai Soon* and *Koh Kim Lan Angela* that, with pre-marital assets, only the increase in their value or profits therefrom due to the spouses' efforts during the course of their marriage constitute matrimonial assets. It follows that our method calculation of matrimonial assets differs from that under the Ontario statute to the extent that ours is already less item (b) above. It would, thus, suffice for us to state that the matrimonial assets liable to division should be less debts and other liabilities of the spouses. This will lead to the net matrimonial assets which should be divided.

4. *Separate regime for the matrimonial home*

It is more likely to find in the Western legal systems a separate regime created to protect spouses' ownership and use of the matrimonial home. This is true of New Zealand and Ontario. Even in England and Australia,

where such separate regime does not exist, there have been calls to do so.[71] It is, thus, conceivable, for us also to have a separate regime for the matrimonial home rather than to include the home within section 106. It is submitted, however, that a separate regime is not necessary in Singapore. More than 80% of Singaporeans live in Housing and Development Board flats and, as is well known, the HDB rules require that both spouses be owners of their flats. It may be deduced that the problem of the protection of the non-owner spouse is much smaller here than in the West. It will suffice for the matrimonial home to be included within the power of division. The separate regimes in other countries do, however, emphasise the importance of including the matrimonial home within section 106 even if the home had been a gift from a third person and even if the home had been acquired before the marriage.

C. *Target*

The present section sets the target in a more complicated fashion than is necessary: it directs the court to "incline towards equality" with assets which had been jointly acquired and to "divide ... reasonably [assets which had been solely acquired while ensuring that] the party by whose effort the assets were acquired shall receive the greater proportion." It has been said that the courts have reduced this differentiation to insignificance, for good reason, by noting that for jointly acquired assets the division may be up to 50:50 while for solely acquired assets it may be up to 49:51. Our courts having noted this, it is submitted that the section need only direct the court, simply, to incline towards equality in deciding what would be a fair division of the matrimonial assets even though, exceptionally, a different proportion may be fair.

1. *Court to incline towards equality*

A direction simply to incline towards equality is, clearly, not as specific as one which directs an equal division. To choose this less specific direction requires some justification; equivalent provisions in the Swedish Marriage Code, the New Zealand Matrimonial Property Act and the Ontario Family Law Act all direct their courts to an exact equal division. In theory it may be thought that a more specific direction towards equality of division might tend to discourage litigation. It is submitted, however, that this is not necessarily so. A very specific direction could just as well invite litigation as it raises the stakes for attempting to convince the court that certain

[71] See the Law Commission of England and Wales in their Report No 52 on "First Report on Family Property. A New Approach" and the Australian Law Reform Commission Report No 39 on "Matrimonial Property".

property is or is not to be included in the division. It may be that a direction to divide equally could be too specific for its own good. A specific direction could well promise more than it can deliver. Experience in these countries has not suggested that their specific direction has helped to reduce litigation any more than a less specific one to incline towards equality. It should be recognised by all that a provision such as section 106 can only aim for rough and ready fairness instead of exactitude.

Two reasons can be given why a general direction may well best suit our needs. First, our courts have shown in their use of their power that they can work well with such a direction to incline towards equality. It is important to keep the provision in a state which allows the courts to use it comfortably. There has not been any suggestion that legal advisors here have been unable to properly advise their clients as to what to seek under such applications which is usually the main reason given for having a very specific direction. Second, perhaps even more importantly, a less specific direction may accord better with our expectations of how spouses ought to behave. We may safely assume that we would wish spouses to continue to treat each other civilly at the time of the termination of their marriage. It is submitted that a general direction could better foster such civil behaviour. It reduces the temptation to seek to include every item of wealth in the division; it makes it sensible to seek division only of the major items. It is hoped, for instance, that spouses here would not be tempted to seek division even of property to which the other has a special attachment such as gifts given between spouses at more congenial times of the marriage. When some discretion is left to the court, it is possible that in time to come all legal advisors and, perhaps, even the general public become aware that the more civilised a spouse behaves, the better the court might be disposed towards him or her. A certain amount of encouragement towards such behaviour is not beyond the objectives of a good family law as long as this does not undermine the aim of doing justice between the spouses. It is submitted that we may be better off with a general direction to incline towards equality of division.

2. *Other proportions*

It is also a common feature of equivalent provisions to provide for the exceptional situation which requires a different proportion of division, *viz,* where it might be thought 'unconscionable' to order according to the norm. A provision to this effect is less crucial if the target were set less specifically as suggested above. It may, however, still be considered worthwhile to name particular reasons to depart from the norm, or, to state that some factors should be borne in mind in working towards a fair division.

One obvious factor is where the marriage is uncommonly short such that neither spouse can claim to have been affected significantly by the marriage. The Ontario statute allows consideration where "the amount a spouse would otherwise receive ... is disproportionately large in relation to a period of cohabitation that is less than five years." Where the marriage is uncommonly short it may be thought that it would suffice for each spouse to keep whatever he or she had acquired during the period of cohabitation. While it is, generally, true that in a short marriage there would not be many matrimonial assets anyway it would still be proper to have such exception within the section to underscore the principle behind the provision, *viz,* that the prolonged performance of the homemaker role disadvantages this spouse in relation to the acquisition of assets and that fairness requires dividing up a fair proportion of the matrimonial assets to the homemaker when the marriage is terminated. Where there has not been a sufficiently long discharge of this role, the need to so recognise is less pressing.

It may be thought that we ought to consider the extent of contribution of both spouses to the marital partnership. There are two points to consider. The first is that we could spell out what constitutes contribution towards the acquisition of wealth although, it is submitted, that this may not be necessary inasmuch as this wider understanding of contribution forms the basis of the entire section. Should we like to be express, the New Zealand statute in its section 18 does a fair job:

(1) For the purposes of this Act a contribution to the marriage partnership means all or any of the following, –

(a) The care of any child of the marriage or of any aged or infirm relative or dependent of the husband or the wife:

(b) The management of the household and the performance of household duties:

(c) The provision of money, including the earning of income, for the purposes of the marriage partnership:

(d) The acquisition or creation of matrimonial property, including the payment of money for those purposes:

(e) The payment of money to maintain or increase the value of –
  (i) The matrimonial property or any part thereof; or
  (ii) The separate property of the other spouse or any part thereof:

(f) The performance of work or services in respect of –
  (i) The matrimonial property or any part thereof; or

(ii) The separate property of the other spouse or any part thereof:

(g) The forgoing of a higher standard of living than would otherwise have been available:

(h) The giving of assistance or support to the other spouse (whether or not of a material kind), including the giving of assistance or support which –

(i) Enables the other spouse to acquire qualifications; or

(ii) Aids the other spouse in the carrying on of his or her occupation or business.

(2) There shall be no presumption that a contribution of a monetary nature ... is of greater value than a contribution of a non-monetary nature.

It is more important to set out the effect of failure of contribution or misconduct upon the entitlement to property. It would be helpful to know what types of failure to contribute or misconduct are especially relevant and their effect. The New Zealand statute provides thus in its subsection (3) to section 18:

> In determining the contribution of a spouse to the marriage partnership any misconduct of that spouse shall not be taken into account to diminish or detract from the positive contribution of that spouse unless the misconduct has been gross and palpable and has significantly affected the extent or value of the matrimonial property.

In the same vein the Ontario statute in subsection (6) to its section (5) reads:

> The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family property would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

(d) a spouse's intentional or reckless depletion of his or her net family property;

It is submitted that it may be sufficient to simply allow the court to consider "any gross misconduct which would be unconscionable to ignore" in deciding what would be a fair division rather than attempt to spell out the form these may take. Divorce courts are used to working with the notion that gross misconduct may be relevant in the exercise of ancillary powers and it would suffice to leave the details to the good judgment of the court.

It may also be considered desirable for the provision to include consideration of any agreement between the spouses regarding the proportions of property holding. It had been submitted earlier that, while the law on the proper effect of agreements between spouses remains unclear, it may be worthwhile considering that agreements on property interests are lawful, as they do not negate or resile from the marriage, but they are not to be directly enforced by courts. This leaves the courts with maximum flexibility – to consider and then, either, to make an order following the terms of a fair agreement or to ignore an unfair one.

Lastly, even the Ontario statute allows the court to have consideration of "any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property" which it considers relevant to its decision on what constitutes a fair division. It will be useful to include an all-encompassing clause such as this. The Court of Appeal decision in *Koh Kim Lan Angela* illustrated just one such situation.

In summary, then, it is submitted that a practicable target would be one which directs the court to aim for a fair division of the matrimonial assets between the two spouses, that a fair order is one which inclines towards equality of division but that a division of some other proportion may be considered in view of several factors including the marriage being of less than five years, gross misconduct which would be unconscionable to ignore, an agreement on proportions made by the spouses or "any other circumstance which the court considers to be relevant."

D. *Court to have Discretion as to Actual Form of Division*

It can be seen from decided cases that the actual form of the court order to achieve the fair division of matrimonial assets is varied because the manner of property ownership within families is considerably variable. It is submitted that it would be desirable for the court, before deciding on the actual form the order should take, to consider the suggestions of the spouses as to such form but the court should have unfettered discretion

to order as it sees fit in the particular circumstances of the case. The court would conceivably take into account the particular needs of minor children as to the use of certain property, especially the matrimonial home, as well as the constraints on particular properties, like the CPF monies and pensions, and would aim to achieve a division which is as unobstrusive and convenient as may be possible.

V. THOUGHTS FOR FURTHER REFORM

Two more matters are suggested which are not as pressing but which should be considered at some point in time.

The power under section 106, like all other ancillary powers under the Act, may only be exercised upon the Singapore court granting a decree of divorce, nullity or judicial separation. First, it could be considered whether it may be desirable to widen the scope of application of these powers so that they could be invoked even after a decree has been granted by a foreign court. Since 1984[72] courts in England have been able to exercise their ancillary powers even after the parties have obtained a court decree from a foreign court. That example could persuade us to follow suit and the limitations set out there would serve as a useful model.

We should also review our laws of succession together with section 106. With the courts being as bold as they have been with their power of division, it is conceivable that a divorced spouse could well be better off in terms of his or her share of the net family wealth than a widowed spouse! This would, of course, be anomalous. We may wish to ensure that our law of succession keeps up with modern views of how a fair sharing of the net wealth of the family may be achieved.

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[72] See (English) Family and Matrimonial Proceedings Act 1984.

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This article is developed from the paper "Developments in Family Law since 1990" which the author presented at The Law Society of Singapore's Weekend of Continuing Legal Education held from 17-18 July 1993. I am grateful for the comments of my colleagues, in particular Mr Tan Cheng Han and Ms Debbie Ong, on earlier drafts. Any errors, however, remain my responsibility.