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THE JUST AND EQUITABLE DIVISION OF GAINS BETWEEN EQUAL FORMER PARTNERS IN MARRIAGE

Marriage is an equal partnership of efforts so the spouses contribute equally in acquiring property whether by making payment or by homemaking and child caring. A just and equitable division of matrimonial assets, the gains of the partnership, at its dissolution should therefore generally be an equal division. This article supports the proposition. First from discussion of a recent decision where the Family Court approved and the High Court on appeal disapproved of it. Then from a more general discussion of the current law in Singapore of the division of matrimonial assets on divorce.

THE Women's Charter,[1] the main family law statute of Singapore, provides in section 112(1):

> The court shall have power, when granting or subsequent to the grant of a decree of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

The history of this provision is clear.[2] Before 1980 the divorce court had no such broad power.[3] The power was first enacted in amending Act 26 of 1980[4] to become the famous section 106.[5] The most relevant parts of the former section 106 read:

1 Cap 353, Rev Ed 1997.

2 See, *eg, The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore, Butterworths, 1999) at P882 and C689.

3 All it had was the very restricted power to vary settlements; see the Women's Charter (Cap 47, Rev Ed 1970) s 110 "After a decree absolute of divorce ... the court may inquire into the existence of antenuptial or post-nuptial settlements ... and may make such orders ... whether for the benefit of the husband or the wife, or, of the children ... as to the court seems fit."

4 Women's Charter (Amendment) Act 26 of 1980. For a comment of the changes made by it, see Leong Wai Kum "A *Turning Point* in Singapore family law: Women's Charter (Amendment) Bill 1979" (1979) 21 Mal LR 327.

5 Of the Women's Charter, Cap 353 Rev Ed 1985.

(1) The court shall have power ... to order the division between the parties of any assets acquired by them during the marriage by their joint efforts ... .

(2) In exercising the power ... the court shall incline towards equality of division.

(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 ... .

(4) In exercising the power ... the court may divide the assets ... 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.

This section 106 was replaced *vide* amending Act 30 of 1996[6] by the current section 112.

I. From Former Section 106 to Current Section 112

The most significant change from the former section 106 to the current section 112 is that section 112 now directs the court to treat all matrimonial assets in the same way. The former section 106 separated matrimonial assets into two groups, *viz*, those acquired by the former spouses' joint effort and those acquired by one former spouse's sole effort. It directed the court to pursue different goals of each group. Of matrimonial assets acquired by the spouses' joint efforts, the court should incline towards equality of division while, of those acquired by one spouse's effort, the court should divide them in such proportions as is reasonable but in any case the acquiring spouse shall receive the larger proportion.

The current section 112 omits the separation between property acquired by the spouses' joint efforts and one spouse's sole effort. The current section 112 also provides one common goal. The court should aim to divide all the matrimonial assets between the former spouses in proportions that are just and equitable. Where before a spouse's financial contribution by paying for the property was dominant in determining proportions of division, it is now only one among factors for consideration.

This article examines whether, with this change, the just and equitable division of matrimonial assets should generally be an equal division. It is

[6] Women's Charter (Amendment) Act 30 of 1996. For a comment of the changes made by it, see Chan Wing Cheong, "Latest improvements to the Women's Charter" [1996] SJLS 553.

proposed here to expound the view that supports and another that rejects the proposition.

A. *Equal Division is "Just and Equitable" between Equal Former Partners*

The writer has suggested before that, in no longer distinguishing matrimonial assets and providing different goals depending on whether an asset was acquired by joint efforts or sole effort, the current section 112 abandons a bias contained in the former section 106.[7] As innovative as it was, the former section 106 unfortunately[8] "favoured financial contribution towards purchase over non-financial contribution to homemaking and child caring". Where one spouse (normally the homemaker) had not contributed financially to the purchase of a matrimonial asset the former section 106 directed the court to award the larger proportion of it to the spouse who did. It is fair to say that the power was still constrained by the basic principle of property law in that only financial contribution to purchase was effort that acquired the property. The non-financial contribution by the homemaker and child carer was not equal effort in the acquisition of property.

The current section 112 embraces instead the family law view of how spouses acquire property. Family law regards the spouses to have co-operated in the acquisition. This is irrespective of whether they both paid for it or only one paid while the other attended to homemaking and child caring. In no longer separating property between those acquired by sole effort from those acquired by joint efforts, section 112[9] "truly equates financial contribution with non-financial contribution". All contributions whether financial or non-financial are part of acquisition of property. In other words, family law views all property acquired during marriage as jointly acquired by the spouses. It follows that[10] "a just and equitable division [of the property] should generally be an equal division."

Section 112 is further evolution of this family law provision. It completes the severance of the power from property law and aligns it fully with the family law view of marriage as a partnership of efforts by husband and wife. At the dissolution of this partnership, the court divides the matrimonial assets between them so that neither emerges unfairly enriched or prejudiced by the particular role discharged during marriage. Where the partnership

7 See, *eg, The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C789 and B319.

8 *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at B320.

9 *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at B319.

10 *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at B322.

subsisted for a reasonable length of time so that there was substantial contribution whether financial or non-financial, the equal former partners should each receive close to an equal share of the matrimonial assets.

The district judge of the Family Court in *Lau Loon Seng* v *Sia Peck Eng*,[11] discussed below, ordered an equal division consistent with this view. It will be discussed further below that this approach was not without precedent.

B. *"Just and Equitable" Proportions Now Thrown Wide Open*

The High Court on appeal in *Lau Loon Seng* v *Sia Peck Eng*[12] propounded an alternative view. This takes the cue from the current simpler section 112 no longer distinguishing assets acquired by joint effort from those acquired by sole effort and, therefore, also omitting the former direction to the court, of jointly acquired assets, to incline towards equality of division. The view makes much of the omission of this phrase. It reasons that, because there is no longer any direction to "incline towards equality of division" of any part of the matrimonial assets, a "just and equitable" division can assume any proportion. The field of choice of what constitutes just and equitable proportions is now thrown wide open. A judge may make an order of any proportions of division he or she considers right.

This view, in making much of the omission of "incline towards equality of division" of jointly acquired assets, fails to align the power with the family law view of marriage as a partnership of efforts. If section 112 is not read in the context of marriage as a partnership of efforts, the court will fall back on the property law view that only the paying of money is effort in acquisition of property. Financial contribution will again receive undue credit over non-financial contribution. Proportions of division ordered by court will reflect approximations of the spouses' financial contributions. The homemaker will again remain prejudiced by the role he or she discharged during marriage.

II. *Lau Loon Seng* v *Sia Peck Eng*

In *Lau Loon Seng* v *Sia Peck Eng* the spouses were married for forty-one years[13] before their marriage ended in divorce. At marriage, Justice Kan

[11] Divorce Petition No 3004 of 1996 unreported.

[12] District Court Appeal No 5063 of 1998, reported in [1999] 4 SLR 408.

[13] See, however, Kan J in the report of his judgment, *ibid,* at 410 para 5 refers to the marriage having lasted "31 years after it was contracted"and the headnotes of the report adopt this calculation. That calculation is mistaken. The parties married in 1957 and were not divorced until 1998.

Ting Chiu noted,[14] "they had little means". The husband began married life as a shop assistant. The couple started a business to sell reading materials in 1972 and the wife was the South Educational Supplies Corporation's first sole proprietor. His Honour also found that the wife[15] "looked after the home, attended to three children of the marriage and managed the business while the husband continued to work as a shop assistant." The business prospered under the wife's management. It became the distributor for a Hong Kong company in 1976. The husband left his job and joined the wife in the growing business. The business developed a printing arm and became incorporated as the Southern Printing and Publishing Co Pte Ltd in 1976 and a Malaysian company was also incorporated two years later. In 1983 the husband became the sole proprietor of these businesses in place of his wife although a son had joined him in their management.

The wife's petition for divorce proceeded uneventfully. The only issues pertained to the ancillary applications for division of matrimonial assets and maintenance of the wife. At its conclusion the district judge ordered maintenance of the wife in a lump sum of $72,000. As this was not the subject of appeal and was minuscule set against the parties' wealth at divorce, exceeding $10 million, the order of maintenance will not be discussed any further.

A. *Family Court Ordered Equal Division of Matrimonial Assets*

(i) *All properties owned at divorce were matrimonial assets*

Given the parties were without much means at marriage, the district judge rightly proceeded on the basis that all the property either spouse owned at divorce were matrimonial assets. They would all have been acquired during marriage with money earned during the marriage itself. Under the definition in the current section 112(10), they neatly fit into "any other asset of any nature acquired during the marriage by one party or both parties".

It has been observed that this limb describes[16] "the bulk of matrimonial assets. An asset acquired during marriage is the quintessential matrimonial asset ... ." The property consisted, one, their former matrimonial home that the former wife was staying in at divorce, two, another residential property that the former husband had moved into when the parties separated pending

[14] *Ibid*, at 410 para 2.
[15] *Supra*, note 12, at 410 para 2.
[16] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at B341.

divorce and, three, substantial business-related properties in Singapore and Malaysia including shares in related companies.[17]

While the former spouses owned other properties like bank deposits, shares, Central Provident Fund monies and jewellery that, in theory, were also matrimonial assets since they were all likely acquired during the course of their long marriage, the district judge rightly left these small properties out of the division. A former spouse can retain small personal properties. The exercise of the power to divide does not proceed with minute precision. All that should be aimed for is rough justice. The landmark decision in *Shirley Koo* v *Kenneth Mok Kong Chua*[18] laid down as one of its[19] "defining principles [that] the power is to be exercised in broad strokes ... ." The Court of Appeal repeatedly endorsed the "broad strokes" approach including in *Koh Kim Lan Angela* v *Choong Kian Haw*[20] where business assets acquired during marriage were first included among matrimonial assets although the former section 106 lacked a definition of this term. It is a fair enough exercise of the power to concentrate on larger properties.

(ii) *Former wife entitled to "at least 50%"*

Of what would be just and equitable proportions of division, the district judge found that the wife[21] "had played a major role in the early days of the family business until the children were old enough to help their father. She was in fact instrumental in the creation of the family wealth." On this finding the district judge decided[22] "the wife through her efforts should be entitled to at least 50% of the value of all the matrimonial assets." The High Court on appeal, discussed below, disagreed with both the judge's finding and the decision.

[17] Some of the shares were held on trust for the husband. The High Court rightly approved of the inclusion of these shares as all property owned by either spouse, whether legally or beneficially, are "matrimonial assets". At the initial stage of the deliberation the court must give a value to all of them and then reach their net value. At the ultimate stage of deciding how the proportions ordered for each spouse should be achieved, however, it should be noted that some properties are held on trust so that it is more convenient for the proportions to be achieved through the transfer of more easily accessible property: see text below corresponding to note 28.

[18] [1989] 2 MLJ 264 & [1989] SLR 342, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at C697.

[19] *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at B314.

[20] [1994] 1 SLR 22, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C769.

[21] *Supra*, note 12, at 412 para 12.

[22] *Supra*, note 12 ,at 412 para 12.

The district judge then found that the former wife wanted to continue to live in the former matrimonial home that both spouses jointly held. The district judge ordered that the husband should transfer his interests to the wife although she should bear all the charges of the transfer. With this property, a bungalow in the West Coast area, given to the wife the district judge ordered that the rest of the matrimonial assets should be valued and the former wife should obtain 40% of the value. It may be that the bungalow together with 40% of the other assets would give the former wife around 50% of the value of all the matrimonial assets. The High Court on appeal also disagreed with this treatment of the former matrimonial home.

B. *High Court Ordered Former Wife Entitled only to 30%*

The High Court, on the former husband's appeal, substantially changed the Family Court order. In particular it reduced the former wife's share of the assets from 50% to 30%.[23] It is proposed to discuss first the actual points of disagreement the High Court had of the findings and order by the district judge. The High Court decision will then be discussed more generally of its interpretation of section 112.

(i) *District judge gave former wife too much credit*

Justice Kan Ting Chiu observed[24] "[t]he judge appeared to have placed a greater value on the wife's input than the latter has done herself." His Honour noted that the wife's counsel only submitted:[25]

> [S]he 'contributed significantly in money, property or more towards the growth and maintenance of the family' but did not say that she was instrumental to the creation of the family wealth. No evidence was adduced of the extent of her contribution to family businesses during her involvement up to 1982, or the size of the family businesses at that time compared to the size at the time of the divorce.

His Honour thus suggested that counsel had not even argued that the former wife's contribution was instrumental so that the district judge's finding had no basis. It is submitted that his Honour may have read counsel's argument

[23] Not surprisingly the former wife appealed from this decision. It appears that Civil Appeal No 73 of 1999 was settled on the eve of its hearing before the Court of Appeal. It may be surmised that the former husband offered terms that satisfied the former wife.

[24] *Supra*, note 12, at 412 para 13.

[25] *Supra*, note 12, at 412 para 13.

literally at the expense of its general thrust. Counsel gave evidence that the former wife initiated the family business and that, in its early years, she managed the business in between taking care of the home and bringing up the children while the husband was content to work as an assistant in someone else's shop. She was sole proprietor of the family business in its early years until the husband took over although admittedly the business was much larger under his charge. In today's economic jargon, the wife could be credited for displaying entrepreneurial spirit ahead of the husband. Her counsel did argue that the wife was equally instrumental as the husband in creating wealth during marriage.

It is further submitted that his Honour's discomfort with the lack of comparison of the value of the family business during the wife's and the husband's stewardship was misplaced. Such evidence is critical if the wife were seeking a declaration of her equitable interest in the business properties. In an application for division of matrimonial assets, however, she was not required to argue with such particularity. Section 112 was created precisely because, in the partnership of efforts that marriage is, neither husband nor wife should try to particularise their respective contribution to wealth creation. It suffices that each has contributed in some way especially when their marriage subsisted for such a length of time that it would be impracticable for either to account in any detail. Family law exhorts them in equally general terms to[26] "co-operate with each other in safeguarding the interests of the union".

There was little justification for overturning the district judge's findings of fact.

(ii) *District judge wrong with matrimonial home*

Justice Kan Ting Chiu disapproved of the district judge's treatment of the former matrimonial home. His Honour suggested that a better form of order of division would be directed at the whole of the matrimonial assets including the former matrimonial home. The detail of retaining the matrimonial home for the wife should be addressed at the later stage of deciding how exactly to achieve the proportions ordered from the former spouses' current holdings of the properties. His Honour said:[27]

> A division can be effected by the payment by one party to the other party of an amount equivalent to the receiving party's share in the

[26] See Women's Charter, *supra*, note 1, s 46(1), discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P355 and B179.

[27] *Supra*, note 12, at 415 para 23.

> asset, and one party's share in one asset may be off-set against the other party's share in another asset.

It is submitted that this disapproval is on firmer ground. It is better if the district judge had, at the stage of deciding what should be the former spouses' respective proportions, kept all the matrimonial assets in one pool. It should only be at the later stage of making incidental orders to achieve the proportions that the judge need make the specific order that the former wife should keep the matrimonial home and then make the necessary adjustments to the balance.

It has been noted before that section 112 does not specify how the judge should approach the sequence of decisions involved in an application for division of matrimonial assets. It has, however, been suggested that a practicable approach may be:[28]

> The steps required of the court are, first, to ask if each asset the applicant seeks a part of is a 'matrimonial asset', second, to assess the value of these assets and deduct debts to reach their net value, third, to consider relevant factors to reach the proportions for each spouse which is a just and equitable division thereof and, fourth, to give directions how these proportions should be satisfied from the assets.

The district judge coalesced the third and last steps in ordering that the former husband should transfer his half-share of the former matrimonial home to the wife and that the wife should receive 40% of the value of the rest of the matrimonial assets. It would have been a clearer order if the district judge had simply ordered that the wife, as an equal former partner, should get 50% of all the matrimonial assets. Then, at the ultimate stage of giving directions on how to achieve this proportion from the current ownership of the properties, the district judge could order that the former matrimonial home go the wife, deduct the value of the husband's half-share of this from the total and then what the balance of the wife's 50% proportion would amount to.

This coalescing of the steps, however, was not a gross error. As his Honour observed,[29] the district judge did adjust the wife's proportion of the balance

[28] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at B318 and C718.

[29] *Supra*, note 12, at 416 para 26. His Honour also varied one other formality in the district judge's order. She had ordered that the former husband should obtain a valuation of the assets within two months and carry out the order two months from then. His Honour gave the former husband six months to effect the order. It is submitted that this variation too was fairly insignificant.

of the matrimonial assets from 50% to 40% so that, together with her 100% of the former matrimonial home, the former wife would likely receive little more than 50% of the total. The district judge's form of order was no more wrong than a lapse in clarity.

(iii) *District judge wrong to give wife 50%*

The most significant disagreement Justice Kan Ting Chiu had was with the 50% proportion the district judge ordered for the former wife. His Honour said:[30]

> I do not find that an equal division is justified or just and equitable. I took into account the following:
>
> (a) the wife was not involved in the family business since 1982, 16 years before the divorce, whereas the husband has been actively and continuously in charge since 1983;
>
> (b) her needs and expectations are not high, as the husband had been miserly towards her during the marriage; and
>
> (c) she has no debts or financial burdens
>
> and ordered a 70:30 division in favour of the husband covering the assets including [the former matrimonial home. By counsel for the wife's estimates] a 30% share will yield about $3.3m. Adding to that the more than $200,000 of assets in her name which she is to retain without division, the wife will receive about $3.5m. Taking all the relevant factors into consideration, this is a just and equitable apportionment for a lady of 62 years for herself.

His Honour thus substituted the district judge's 50:50 division with a 70:30 division for the former husband and wife respectively. The wife of a marriage that lasted forty-one years who raised three children besides initiating and managing the family business in its early years should only receive 30% of the net gains of the matrimonial partnership. Her husband and equal partner should receive more than double her share.

[30] *Supra*, note 12, at 416 para 27.

With respect his Honour's decision may be disagreed with. Each of the reasons his Honour gave in support of the 70:30 proportions can be criticised. His Honour linked the proportions with whether the wife contributed as much to the family business as the husband. This link suggests that his Honour viewed "just and equitable" division of matrimonial assets simply as approximations of the respective spouses' contributions to the business. This should not surprise. Unless the power to divide is linked with the idea of marriage as an equal partnership of efforts, the only other possible link is the property law view by which only financial contribution to purchase of property is contribution to its acquisition.[31] It is submitted that under section 112 "just and equitable" proportions of division should not simply reflect approximations of financial contribution. They should reflect a broader more family-friendly view that all contributions of spouses to the family whether financial or non-financial are equal contributions to acquisition of property.

If we were to compare the spouses' management of the business, it is not apparent how his Honour estimated the wife's contribution at 30% and the husband's 70%. His Honour found that the former wife was[32] "engaged in the family business for more than ten years" which would leave the husband in charge only in the last sixteen years of the marriage until divorce. Of the twenty-six years of the business' subsistence during marriage, his Honour found the former wife's stewardship to have been for 38% of this period. This does not even give her additional credit for being the initiator of the business and managing it in its early years when it might be thought that a business could more easily fail. Of course the business was much larger in its later years under the husband's stewardship, although he was by then helped by a son, but a fair view might be that both the former wife and husband played equally significant roles in building up the family business.

His Honour does not appear to have made appropriate consideration of the other major contribution of spouses, *ie*, the non-financial contribution to the family and raising three children. It is in the consideration of non-financial contribution that section 112 is distinctive. The Court of Appeal has repeatedly given a wife credit for homemaking and child caring. In the noteworthy *Ng Hwee Keng* v *Chia Soon Hin William*,[33] where the wife of a nineteen-year marriage worked full-time, Judge of Appeal LP Thean insightfully decided:[34]

[31] See text corresponding with notes 7 through 10.

[32] *Supra*, note 12, at 410 para 4 although an affidavit suggested that she was managing it solely for five years only.

[33] [1995] 2 SLR 231, discussed at *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C804.

[34] *Ibid*, at 241 paras E-F.

> [T]he wife must have contributed to the welfare of the family by looking after the home and caring for the family ... notwithstanding that she was working full time. ... We now have to translate such contribution made by the wife to a sum that fairly represents her share in these assets.

The Court of Appeal, under the former section 106 that favoured financial contribution, still gave the wife[35] "at least 35% of all matrimonial assets whether jointly or solely acquired which was within the then norm". Given that section 112 abandons the bias favouring financial contribution, it is unfortunate that the High Court in *Lau Loon Seng* v *Sia Peck Eng* gave the wife a proportion lower than the former norm.

It is submitted that his Honour's observations that the wife needs and expectations were not high because the husband was miserly during marriage and that she had no debts or financial burdens were *non sequitur* the proper exercise of the power. The division of the net gains of the partnership of marriage is not to serve spouses' needs or expectations. If the total value of the matrimonial assets were abnormally small, it is conceivable for a judge to order a certain proportion that the dependent spouse needs for survival. Where there is enough wealth to give each spouse more than what a person needs for survival, however, there is no more reason to consider needs. The purpose of division is not to cater to bare needs.

It was also irrelevant whether the former wife had debts or burdens. Debts or financial burdens already incurred by the business should be discounted from their gross value to arrive at the net value of the matrimonial assets.[36] These debts and obligations should not be reconsidered in deciding the appropriate proportions. It is not appropriate to take account of financial burdens the former husband may incur in future if he were to choose to continue with the business with his half share of it. With the dissolution of their economic partnership by divorce, each former spouse assumes sole responsibility for what he or she chooses to do with his or her share of the matrimonial assets.

His Honour's final observation that receiving $3.5 million was "just and equitable apportionment for a lady of 62 years for herself" is equally unhelpful. The husband was four years older than she and would also now

[35] See Leong Wai Kum, "Trends and developments in family law" in *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995* at 632 and *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C808.

[36] See text corresponding with note 28.

only be responsible for his own needs. Their three children would be close to forty years old themselves and, it may be assumed, self-sufficient. Why was a sum less than half what the former husband would receive a just and equitable apportionment for her? Why should the equally old man receive more than $7.6 million for himself?

C. *Overall Impression of Spouses*

The Family Court order of equal division suggests an overall impression of both spouses contributing equally to their partnership of efforts during their forty-one years of marriage while the High Court order of 70:30 division suggests the husband contributed more than twice as much as his wife. Put another way, the Family Court gave equal value to both spouses' efforts while the High Court valued the husband's efforts more than twice as much as the wife's. It is submitted that the Family Court order gave off a fairer overall impression of these spouses.

This marriage was highly successful. Even though it was ended by unnatural termination through divorce, this was not until the union had lasted more than four decades and the three children produced of it became adults. There was no evidence that either the wife or the husband misbehaved grossly. The wife was granted a decree of divorce because the marriage had broken down as reflected in the fact the husband committed adultery[37] but she rightly did not make too much of this in her application for division of matrimonial assets.[38] The spouses played their roles in providing for the family as well as homemaking and child caring. Both husband and wife engaged in the co-operative partnership of marriage with admirable success. They deserved to be patted on their backs. When in their old age they chose to part ways, the order of division they deserved was one that reflected the success of their equal partnership.

A successful forty-one year marriage should set the benchmark of equal division of matrimonial assets. Having accumulated this property in their long successful partnership they each deserved to walk away with half.

It has been suggested that an order of division of matrimonial assets gives off a moral message of what marriage means and of the relative value of the roles that spouses discharged thus:[39]

[37] See *supra*, note 11.

[38] It has been suggested that only gross misconduct that affected the accumulation of wealth should be considered in determining proportions of division: see *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P964.

[39] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P894 and C713.

> [The exercise of the power to divide matrimonial assets] can teach us how to value the efforts both spouses put into their partnership whether by catering to the partnership's material needs or its, more subtle but equally crucial, non-material needs. The law can teach us how to be better husbands and wives by mutually respecting each other's contribution. At its finest, through a provision such as section 112, family law uplifts the whole of society through the cumulative good it does.

An order of equal division would have given the better message. Spouses who played the roles they accepted on marriage for forty-one years should be equally entitled to the net gains. An order of equal division does not try to weigh the respective contributions of the spouses over the forty-one years. It teaches equal co-operative partners in a long marriage that they should not engage in such accounting.

III. Towards the Family Law View that both Financial and Non-financial Contributions Acquire Property

It is now proposed to discuss the change from the former section 106 to the current section 112 more generally. It will be argued that the High Court's rather literal reading fails to take account of developments towards that event. The courts, even under the former section 106, having accepted that the purpose of the power was to achieve fairness between the former spouses were already beginning to embrace the family law view that all efforts of spouses whether financial contribution to purchase or non-financial contribution to homemaking and child caring are equal efforts that acquire property.

There are two premises to note. One, matrimonial assets are the material gains built up during marriage.[40] They consist properties acquired during marriage or, exceptionally, properties given to spouses or acquired before marriage that the spouses allowed to become inextricably connected with their marriage. Two, the proposition that just and equitable division is equal division is of marriages that lasted a reasonable length of time before

[40] The term is now defined by s 112(10): see *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P918.

[41] Where the marriage was abnormally short, the contributions of spouses would be minimal so that it may be fair enough to simply return property acquired according to the proportions of their financial contribution towards its acquisition; see *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P966. See also Warren Khoo J in *Soh Chan Soon* v *Tan Choon Yock (mw)*, text corresponding to *infra,* note 58.

divorce.[41] The bulk of divorce decrees in Singapore are given to spouses who were married for at least five years and generally between five and fourteen years.[42]

A. *Power to Divide in Fairest Way Possible*

The writer in 1989 suggested that division of matrimonial assets was aimed to give proper credit to all roles discharged in marriage because marriage is a partnership of efforts of the spouses thus:[43]

> Today, it is impossible to deny that both spouses contribute towards whatever is acquired by the family however the spouses choose to distribute the various roles that require to be performed if the family is to function as a unit. ... When, therefore, the spousal relationship ends the two spouses are each entitled to a fair share of what he or she has helped to acquire ... This is the so-called 'economic partnership view' and, it is submitted, only this can be the underlying philosophy behind the section.

(i) *Fairness is pivot*

There are memorable judicial expressions of the purpose of the power to achieve fairness in property holdings between the former spouses.

Justice LP Thean, as he then was, in *Shirley Koo* v *Kenneth Mok Kong Chua* made the first reported observation thus:[44]

> In making a division of all these assets between the petitioner and the respondent it is plainly an impossible task to quantify with any precision in monetary terms the amount of each party's contribution and I approached the problem in a broad manner, taking into account the factors prescribed in sub-ss (2) and (4) of s 106 ... . I divided the assets in the ... manner ... I considered as fair and reasonable.

[42] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P966, A323 and C802.

[43] Leong Wai Kum, "Division of matrimonial property upon termination of marriage" [1989] 1 MLJ xiii.

[44] *Supra*, note 18, at 269 para D; see discussion in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P887.

Subsequently Justice Rubin noted in *Wong Amy* v *Chua Seng Chuan*[45] that the enactment is to make "just apportionment ... for the "homemaker" (invariably the wife)". Justice Lai Kew Chai in *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal* related the power to the concept of[46] "matrimonial partnership".

The writer's analysis of reported decisions thirteen years after the former section 106 was enacted revealed that the adjective "fair" was used by almost every judge to describe the order made.[47] In elaboration it was observed:[48]

> The purpose of the provision is to allow the court to order a fair division of the material gains of the marriage when the marriage ends. ... When two people marry, they create a partnership. ... [A]ny material gain made during marriage has been acquired by both partners ... . The contribution of the homemaker to the acquisition of the assets must especially be given proper credit. At the termination of the partnership, the court aims to give each spouse a fair share of these material gains.
>
> Every judgment in the last fifteen years has emphasised that the court was aiming towards a 'fair', 'just', 'equitable' or 'reasonable' division of the matrimonial assets which is especially striking since most of these terms are not written into the section. There can be no doubt then that fairness is the pivot of section 106.

The Court of Appeal recently in *Yeong Swan Ann* v *Lim Fei Yen* reaffirmed this underlying purpose when Chief Justice Yong Pung How observed:[49]

> [W]e are of the opinion that section 106 of the Women's Charter gives the court a very wide power to order the division of matrimonial assets in the fairest way possible between the parties, taking into account the various factors listed in [the provision].

[45] [1992] 2 SLR 360, at 370 para A, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C827 & C850.

[46] [1993] 3 SLR 34, at 40 para D, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C794.

[47] Leong Wai Kum, "Division of matrimonial assets: Recent cases and thoughts for reform"[1993] SJLS 351, at 360.

[48] Leong Wai Kum, "Trends and developments in family law", *supra*, note 35, at 700.

[49] [1999] 1 SLR 651, at 658 para 23.

(ii) *Fairness in context of equal partnership*

To divide matrimonial assets in the fairest way possible requires thought of the nature of marriage to the spouses. Family law characterises marriage as an equal co-operative partnership of efforts of the spouses.[50] This has been observed thus:[51]

> [The Women's Charter section 46(1)] says that society expects they will co-operate with one another to safeguard their union and for the well being of their children, that each should respect the other and, most of all, that in the running of their family, each should have an equal right. None of these is a legally enforceable right and, yet, the exhortation is powerful in colouring the husband-wife relationship with a tone of mutual respect and reasonable consideration of one another. ... [The provision] raises the status of the wife to be the equal of her husband.

Marriage as an equal partnership of efforts underlines legal regulation of the relationship between husband and wife including the court's power to divide their matrimonial assets.

The Court of Appeal in *Central Provident Fund Board* v *Lau Eng Mui*[52] demonstrated the practical effect of fusing the power with the character of marriage as a partnership of efforts. The spouses were married many years so that at divorce the husband was only four years away from being able to withdraw his Central Provident Fund monies. The wife was home-maker and brought up three children. Their matrimonial assets consisted only the money in the husband's CPF account. Justice Chan Sek Keong, as he then was, under the former section 106 ordered that $20,000 of this when it became available should be paid to the wife as her share.[53] To assure compliance his Honour imposed a charge on the account to this amount. The Central Provident Fund Board sought to declare the charge unlawful. This was rejected by Justice Warren Khoo in the High Court[54] whereupon the Board appealed. The Court of Appeal, as befitting our highest judiciary, gave a strong judgment upholding the lawfulness of the charge

[50] *Supra*, note 26.
[51] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P356.
[52] [1995] 3 SLR 109, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C703.
[53] Divorce Petition No 272 of 1991 (unreported).
[54] *Lau Eng Mui* v *Ee Chin Kee* [1995] 1 SLR 110.

and rejecting every allegation of the Board that it was against the law, the Board would be hard put to comply with it and the objective of the power to divide matrimonial assets should accede to the more lofty objective of the compulsory savings scheme. Judge of Appeal LP Thean made an uncommon observation thus:[55]

> Before we conclude, we wish to make one observation. A court order ... dividing the CPF moneys of a member between him and his spouse under section 106 is not inconsistent with or inimical to the object or the letters and spirit of the CPF Act. Nor is it contrary to the intention of the legislature. The CPF moneys of a member are his savings under a compulsory saving scheme as provided in the CPF Act and these savings are intended for the benefit of the member himself and his family, essentially his spouse, on his retirement. In the unfortunate event that his marriage breaks down irretrievably and it is found by the court that the moneys in his CPF account have been brought about and accumulated through his effort and that of his spouse, direct or indirect, it is only just that a division of such savings between him and his spouse ought to be made on a fair and equitable basis. That is what section 106 was intended to achieve and that is also what the court seeks to achieve in exercising its power thereunder.

The Court, thus, powerfully affirmed this fusion. Property that is inextricably bound to the marriage should be divided because it was acquired by both spouses' efforts. The homemaker and child carer should not leave the marriage disadvantaged in property holding compared with the spouse who continued to work.

B. *Precedents Amplify that both Financial and Non-financial Contributions Acquire Property*

Once the underlying purpose was accepted the courts, not surprisingly, amplified on the effect of fusing the power with the idea that spouses co-operate in the acquisition of property by discharging different roles. The courts always credited the non-financial contribution of the homemaker and child carer. Indeed, the norm was for the homemaker and child carer to receive 35% to 45% of the matrimonial assets. The Court of Appeal often raised the proportion ordered for the homemaker and child carer. The last cases decided before the 1996 amendment came even closer to equal division.

[55] *Supra*, note 52, at 121 para I-122 para A through B.

Precedents cited to support these trends demonstrate the state of the law at the time of the change from the former section 106 to the current section 112.

(i) *Credit for homemaking and child caring*

If not for section 112 homemaking and child caring would be ignored in determining each spouse's interest in property acquired during marriage. By the principles of property law proprietary interest accrues almost exclusively by making financial contribution towards purchase of property. The rules of property law as they apply between spouses need not be discussed at any length here.[56] Suffice it to note that even the modern formulation of constructive trust, applied to spouses, makes it hard for the homemaker and child carer to argue that he or she is entitled to a proportion of the beneficial interest in property bought by the other spouse during marriage.[57] It is only by way of the power to divide matrimonial assets that a court can credit homemaking and child caring as contribution to acquisition of property just as financial contribution.

The writer has observed:[58]

> The judges began by singling out the contributions of the homemaker-wife for special mention. That this was so should be understood not as judicial favouring of the wife ... but simply because the 'hang-over' of the 'separation of property' required the special mention of the family law concern of giving proper credit to the homemaker's contribution. It was essential to highlight the relevance of non-financial contribution in order to emphasise the purpose of the enactment.

The power in section 112 does not favour either spouse or any role in marriage. It simply aims to give due credit to both spouses because, if not for their discharge of all the roles, the property would not have been acquired.

Justice Rubin may be the clearest when in *Wong Amy* v *Chua Seng Chuan* his Honour said:[59]

> [The provision] vest[s] the court with wide powers ... without having to embark upon a microscopic examination of the precise interest each

[56] See, *eg, The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P807.
[57] See, *eg, The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at P820.
[58] Leong Wai Kum "Trends and developments in family law", *supra*, note 35, at 703-704 and *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C826.
[59] *Supra*, note 45, at 369 para I through 370 para B.

> party has in the matrimonial assets. The said subsections also empower the court to act without strictly adhering to the traditional principles of property law. The enactments are meant, in my view, to provide for a just apportionment for the 'homemaker' (invariably the wife) even though the assets under dispute were acquired during the marriage by the sole effort of the other spouse, having regard to the contributions made by the 'homemaker' by looking after the home, caring for the family and the needs of the minor children.

Judicial Commissioner KS Rajah in *Chan Yeong Keay* v *Yeo Mei Ling*[60] accorded similar credit to the husband who served the roles of homemaker and child carer. This affirms the legal equality of the spouses[61] and that the idea is to credit effort rather than to favour either gender. Further, by reading the former section 106 purposively,[62] the Court of Appeal in *Ng Hwee Keng* v *Chia Soon Hin William*[63] credited the wife for her homemaking and child caring despite working full time.

Justice Warren Khoo in *Soh Chan Soon* v *Tan Choon Yock (mw)*, a marriage lasting more than twenty years producing three children, expressed this family law view thus:[64]

> In a relationship ruled by the heart rather than the head [a wife who is also homemaker and child carer] would not keep accounts of what she expended for the family. When it comes to dividing the family assets ... it would not be right to start from the basis that the party who is shown by documentary evidence to have made direct monetary contribution to the equity in the family home should be treated as having made a greater contribution than the other party. ... It is closer to reality to use as the starting point the assumption that both parties have contributed jointly and equally throughout the marriage to the acquisition and growth of the equity in the family home. An account can then be taken of other factors to tilt the balance one way or the other.

60 [1994] 2 SLR 541, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C827.

61 See text above corresponding with note 26.

62 See the observation of Michael Hwang JC in *Wang Shi Huah Karen* v *Wong King Cheung Kevin* [1992] 2 SLR 1025, at 1030 para G that it would be irrational to read s 106 literally to the effect that non-financial contribution can only be considered where the homemaker and child carer did not contribute to the acquisition of the matrimonial asset.

63 *Supra*, note 33.

64 District Court Appeal No 5017 of 1997 (unreported), but see *Academy of Law Digest* Issue 14/98 at 18-19.

> It is more a qualitative than a quantitative exercise. Working out the exact amounts of direct monetary contribution would be worthwhile only in a case, *eg*, of a couple who have been married for a short time, with no children, each with independent means and who have not shared a household and its myriad responsibilities.

His Honour did not think it necessary to vary the order of the district judge that the former wife who held the family together while the former husband was an "adult delinquent" for some years should receive 63% of the sole matrimonial asset even though it was the husband who contributed the larger share of its purchase price.

(ii) *Norm was 35% to 45% for homemaker*

The writer has suggested that by 1993 the courts repeatedly ordered that the homemaker should receive between 35% to 45% of the matrimonial assets.[65] A brief survey of cases suffices. In *Lam Chih Kian* v *Ong Chin Ngoh*,[66] of a marriage lasting seventeen years that produced two daughters, the wife who worked as a part-time beautician was awarded some 45% of the matrimonial assets including monies in the Central Provident Fund accounts of both spouses. In *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal*,[67] of a marriage lasting some fourteen years that produced two children, the wife who was homemaker and child carer was given 35% of the husband's half-share of a new property bought with the proceeds of sale of the former matrimonial home that had originally been a gift to the husband before marriage from his parents. In *Ong Chen Leng* v *Tan Sau Poo*,[68] of a marriage lasting more than twenty years that produced three children, the wife who was homemaker and child carer was awarded 35% of the proceeds of sale of the former matrimonial home.

Where the court strayed from the norm in *Neo Heok Kay* v *Seah Suan Chock*,[69] of a marriage lasting fifteen years that produced two children, the court sought the husband's approval to give 62H% of matrimonial assets

[65] Leong Wai Kum "Division of matrimonial assets: Recent cases and thoughts for reform", *supra*, note 47 at 388.

[66] [1993] 2 SLR 253, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C779.

[67] *Supra*, note 46.

[68] [1993] 3 SLR 137, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at C843.

[69] [1993] 1 SLR 230.

of abnormally low value to the wife who was homemaker and child carer.

Since 1993 the courts have also not given the homemaker and child carer less than this norm. The Court of Appeal in *Ng Hwee Keng* v *Chia Soon Hin William*,[70] of a marriage lasting nineteen years with one child who was adopted, approved of giving the wife who worked full-time but whom the Court thought should still be credited for her homemaking and child caring at least 35% of the matrimonial assets. In *Tan Bee Giok* v *Loh Kum Yong*,[71] of a marriage lasting twenty-five years producing two children, the Court of Appeal carefully scrutinised family transfers of property to find that a major piece was only partially a gift to the husband leaving some 22% of it matrimonial asset available for division. In the result it gave more than 35% of the total value of the matrimonial assets to the homemaker and child carer wife.

The norm of between 35% to 45% under a provision that favoured financial contribution to purchase of property is significant. It confirms that the courts were already prepared to regard between 35% to 45% as the proportion the homemaker helped acquire by his or her non-financial contribution to homemaking and child caring. Where the homemaker also made financial contribution by managing the family business the proportion should surely approach 50%. Where the current section 112 pointedly abandons favouring financial contribution, the proportion should generally approach 50%.

(iii) *Court of Appeal tended to raise homemaker's proportion*

The Court of Appeal has used its powers to give shares of the matrimonial assets that better credited the roles spouses discharged during marriage. Where it changed the order of the lower court, this consistently gave the homemaker and child carer a bigger share.

Exceptions were few. One was *Yeo Gim Tong Michael* v *Tianzon*[72] where the High Court had added a 10% premium to the share of the wife because the husband asked for and was given their former matrimonial home. The Court of Appeal decided that, while it was not wrong to add a small premium in these circumstances, 10% was too much. The Court of Appeal removed this 10% with the result the homemaker and child carer wife obtained 40% of the matrimonial assets. Thus, although the order was reduced, the homemaker

[70] *Supra*, note 33.

[71] [1997] 1 SLR 153, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C785.

[72] [1996] 2 SLR 1, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C841.

still received a proportion within the norm.

Another was *Ong Chen Leng* v *Tan Sau Poo*[73] where the Court of Appeal decided it had to vary the lower court order that was made on the finding of facts not borne out by the evidence. There was no doubt that the husband was the sole income earner of the family. The lower court found that the husband had contributed to the purchase of two other properties besides that occupied by the homemaker wife and her grown daughters. The Court of Appeal disagreed with this finding so that the lower court's order that the entire of the property the wife stayed in be transferred to her could not be sustained. It ordered instead that the property be sold and its proceeds of sale divided so that the wife should obtain 35% and the husband 65%. Justice Karthigesu was quick to note that the wife's 35%[74] "should be more than adequate to enable her to purchase a suitable Housing Board apartment and leave a tidy sum for investment."

Instances of the Court of Appeal raising the lower courts' orders in favour of the homemaker far outnumber these. In *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal*[75] the Court of Appeal reversed the decision that the court could not include for division the husband's half-share of a new property purchased partly with proceeds of sale of the former matrimonial home because the home was a gift to the husband before he married. With this major property excluded from division the homemaker and child carer wife of fourteen years and two children was given, by the lower court, only $30,000 as her share of the husband's Central Provident Fund monies, insurance policies and some shares. By its purposive interpretation of the former section 106 the Court of Appeal ordered that she would receive substantially more in getting also 35% of his half-share of the new property. Justice Lai Kew Chai propounded the principle that[76] "[i]n the absence of documentary evidence ... we ... make a rough and ready approximation [to avoid a decision which] would be inimical to the concept of matrimonial partnership ... ."

Even in a marriage that lasted only four years and produced no child in *Koh Kim Lan Angela* v *Choong Kian Haw*[77] the Court of Appeal showed its mettle. The lower court, strapped by the husband's failure to make a full and frank disclosure of the value of his family's business assets that he had substantially improved during the marriage, was only able to order

[73] *Supra*, note 68.
[74] *Supra*, note 68, at 145 para I-146 para A.
[75] *Supra*, note 46.
[76] *Supra*, note 46, at 40 paras C-D.
[77] *Supra*, note 20.

that the wife receive $100,000. The Court of Appeal varied the order to give her 15% of their value as the husband chose to disclose which came to $379,000. Judge of Appeal Karthigesu rightly exercised his prerogative to[78] "draw adverse inferences against the husband ... [and took] a "broad brush approach" so as to do justice to the parties."

The Court of Appeal in *Tan Bee Giok* v *Loh Kum Yong*[79] scrutinised the transfer of a piece of property between the husband and his mother to find that not all of it was a gift from her to him. The Court found that part of the proceeds of sale of the spouses' former matrimonial home had gone into the renovation of the derelict property. This share the Court assessed at 22% of the property. By this careful exercise the Court added substantially to the total value of the matrimonial assets available for division with the result that the homemaker and child carer wife obtained close to $1 million or some 35% of the enlarged pool of matrimonial assets.

In *Ng Hwee Keng* v *Chia Soon Hin William*[80] the Court of Appeal demonstrated insight into a wife's contribution to homemaking and child caring despite working full-time and gave her about 35% of the matrimonial assets. In *Lim Keng Hwa* v *Tan Han Chuah*[81] the lower court did not include the husband's 45% share of the family business and managed to award the wife of the fifteen-year marriage that produced two children only $70,000 as her share of the matrimonial assets. Judge of Appeal LP Thean included the 45% share observing[82] "[i]t seems to us that the share of the partnership was given to the husband in recognition of the contribution he had made and to a lesser extent his wife made to the business ... ." His Honour then noted that although the wife had a history of depression[83] "[t]he wife ... must have played her part in looking after [the two daughters] and attending to their needs." By including the husband's 45% share of the family business, the Court of Appeal was able to give the wife some 30% more and her share of the matrimonial assets became raised to $90,000.

In perhaps the most dramatic increase the Court of Appeal in *Tham Khai Meng* v *Nam Wen Jet Bernadette*[84] varied the High Court order of 50% to the wife to 80% to her. The High Court could not distinguish the contributions

78 *Supra*, note 20, at 31 para A & 32 para A.
79 *Supra*, note 71.
80 *Supra*, note 33.
81 [1996] 3 SLR 593, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C829.
82 *Ibid*, at 600 para G.
83 *Ibid*, at 601 para G.
84 [1997] 2 SLR 27, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C820.

of the wife and the husband in this eleven-year marriage and ordered a 50:50 division of the bungalow they owned and rented out, worth some $5.5 million. The Court of Appeal, however, found the wife contributed more than the husband in being the homemaker and child carer while working full-time. The Court also found the husband to have misbehaved to an extent that had to be factored in.[85] The Court further felt it necessary that the wife should own this property solely so that, at some future date, she can occupy it with the children. In the end the Court directed that the husband shall transfer his interests in the property over to her and she should pay him $1 million as his share of it. In other words the lower court's proportion of 50:50 was raised to 80:20 in favour of the wife.[86]

(iv) *Proportions rising to 50:50 especially if spouse made both non-financial and financial contribution*

Just prior to the 1996 amendment to the current section 112, the High Court began ordering equal division. Several cases deserve consideration.

In *Yeo Gim Tong Michael* v *Tianzon*[87] the marriage lasted more than ten years and produced two daughters although one was tragically killed in a road accident. The husband was the sole breadwinner while the wife was homemaker and child carer. The wife had moved out of the former matrimonial home with her daughter so there was no particular reason to maintain this property for her. Both she and the husband asked for this property to be given solely to them. The High Court decided to give it to the husband. To offset this advantage to him the judge added a 10% premium to the wife's share of the matrimonial assets so that her share became 50%. On appeal, the Court of Appeal removed the 10% premium so that the wife's share of the matrimonial assets was reduced to 40%.

In *Nam Wen Jet Bernadette* v *Tham Khai Meng*,[88] an eleven-year marriage that produced two children, both spouses worked and the wife also cared for the young children. The former wife claimed she should receive 80%

[85] It is possible to regard the Court's view of the husband's alleged misconduct to be somewhat exaggerated especially when viewed against other cases: see the writer's comparison of this decision with that in *Ong Chen Leng* v *Tan Sau Poo*, *supra*, note 68 in *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 2, at C845.

[86] It has been suggested that this order could be thought slightly over-generous to the wife; see *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at C826.

[87] Divorce Petition No 2272 (unreported) that, on appeal, was reported as in *supra*, note 72.

[88] [1996] 3 SLR 442.

while the husband claimed he should receive 82.5%. The husband had paid more towards its purchase but this was partly because they all stayed with his wife's family. Justice Rubin concluded:[89]

> In my opinion, it would be unproductive to trace the source of funds for the purchase of [the matrimonial asset] to its origin. ... Suffice it if I said that both parties in one way or other contributed in as much a substantial way as the other – directly or otherwise – to the purchase [of it] and that it would not profit either party to embark upon an exercise with a view to determine with mathematical precision the amount of their respective contributions.

On appeal, however, as said above,[90] the Court of Appeal was able to distinguish the former spouses' contributions. It found the wife contributed significantly more, the husband guilty of misconduct and that the young children required their mother to keep the matrimonial asset herself in case they decide in future to stay on their own. The order was changed so that the former wife would keep the matrimonial asset, worth some $5.5 million, while she should pay her former husband $1 million.

There is further the unreported decision of Justice Judith Prakash in *Yah Cheng Huat* v *Ong Bee Lan*[91] where the facts are somewhat similar to *Lau Loon Seng* v *Sia Peck Eng*.[92] Both former husband and wife worked in the family business although here the wife worked throughout the marriage but this marriage lasted only twenty-one years. The wife also brought up two children. Of the matrimonial assets owned by one or other spouse at divorce, her Honour said:

> I think that the correct approach is to give each party an equal share in these assets. When the marriage is good, the parties worked together and accumulated their assets jointly without drawing any distinction between them. There is no way now of determining who earned what share of the assets.

Similarly of the former matrimonial home jointly owned, her Honour said "I consider that the fairest division of the home would be to divide it equally between the parties."

Where the spouse made both non-financial and financial contribution,

89 *Ibid,* at 455 paras D-E.
90 See *supra*, note 84 and the text corresponding to it.
91 Divorce Petition No 1147 of 1995.
92 *Supra*, note 12.

an equal division was becoming common under the former section 106. Since section 112 abandons the bias that favoured financial contribution, it is reasonable to expect equal division even where the spouse only makes non-financial contribution. An equal division whether the spouse made financial or non-financial contribution to acquisition of property responds best to the reality of family dynamics where spouses discharge different roles. It should be remembered that, even under the former section 106, Justice Chan Sek Keong, as he then was, in *Ong Chin Ngoh* v *Lam Chih Kian*[93] observed that, while it did require the court to differentiate a matrimonial asset that was acquired by one spouse's sole effort from that acquired by both spouses' joint efforts, this differentiation could be reduced to insignificance. A bold court mindful of the unfairness of favouring financial contribution can award[94] "up to 49% of the matrimonial assets acquired by ... sole effort" to the homemaker and child carer.

IV. Current Section 112 Buiilds on Developments Towards Equal Division

Even under the former section 106 the courts were prepared to fuse the power to divide with the idea of marriage as an equal partnership of efforts. In the result the homemaker and child carer was consistently given no less than 35%. Where some financial contribution was also made, the proportion could reach 50%. All that remains for discussion is whether the change to the current section 112 put this proclivity towards equal division to a halt.

A. *High Court's Interpretation*

Justice Kan Ting Chiu read the change rather literally. His Honour began by observing, quite rightly, that[95] "even under the old regime the principle of equal division did not apply to all matrimonial assets." The bias that favoured financial contribution was not removed until the 1996 amendment to the current section 112.[96]

Of the 1996 amendment Justice Kan Ting Chiu observed:[97]

[93] [1992] 2 SLR 414.
[94] *Ibid,* at 418 para A.
[95] *Supra*, note 12, at 413 para F.
[96] See text corresponding with *supra*, notes 5-8 above.
[97] *Supra*, note 12, at 413 para H-414 paras A through I.

With the enactment of section 112 the reference to equality of division previously embodied in section 106(2) was omitted. ... Is there a basis for equating 'just and equitable' with equality of division? ... [W]e should refer to the parliamentary records. ... The [Select] Committee accepted that the just and equitable formulation was preferable to equal division. It stated in para 5.5.4. of its report that:

> The Committee disagrees with the proposal to restore the principle of equality. ... The law must also provide for all cases, *ie* marriages of long as well as of short duration ... . Where a marriage is of short duration with no children, the law must not put judges under constraint to incline towards equality when what is equal may not be just. Since the provisions call for judges to take into account all circumstances ... the provisions in the Bill are fair. The Bill also makes explicit the recognition of the home-making efforts of a spouse regardless of whether the spouse is working or not.

Subsequently, on the third reading of the bill, the Minister for Community Development, Mr Abdullah Tarmugi informed the members of the house that:

> ... The proposed provisions in the Bill allow the court to divide the matrimonial assets in a just and equitable manner after taking into consideration all circumstances of the case, including a homemaker's contributions. As such, it would seem inappropriate that the court would still be required to incline towards equality.
>
> The law must provide for all cases ... . For example, where a marriage is of short duration with no children, the law must not put judges under constraint to incline towards equality ... .
>
> On the concern that existing case law would be disregarded with the new provisions, the Committee is of the view that it is not the intention for the body of case law built up over the years to be cast aside, but that it should serve as a guide to judges in their decisions.

On a fair and careful consideration of section 112, it cannot be said that the principle of equal division is preserved in the just and equitable formulation.

What is just and equitable must be decided on the facts of each case.

As said above, his Honour thus saw the field of choice of just and equitable proportions of division under the current section 112 thrown wide open. Where the courts had regarded the homemaker and child carer who did not make significant financial contribution entitled to no less than 35% and, if there was also some financial contribution, the proportion could reach 50%, these must now be reconsidered. Each case must be decided on its own facts. It is submitted, with respect, that this interpretation of the amendment fails to take account of the trends tracked above.

B. *Purposive Interpretation*

The purposive interpretation of any statutory provision is preferred[98] because it almost always yields a reading that is better related to the context in which it operates. The purposive reading of the change to section 112 should take account of the character of marriage as an equal partnership of efforts, the developments achieved under the predecessor provision and the actual differences in expression between it and the predecessor provision.

(i) *Power to equalise property holdings of equal former partners*

The courts have long recognised the context in which the power to divide operates. As marriage is an equal partnership the power should be exercised to equalise the property holdings of former spouses in order to even out the discrepancies caused by years of discharge of different roles. The change to section 112 does not make it any less important to remember the realities of family dynamics. It is of note that the Minister of Community Development, during parliamentary debates, affirmed the courts' endeavour to equalise the property holdings of former spouses on divorce thus:[99]

> [T]he new provisions will in fact benefit rather than put women at a disadvantage. The proposed provisions will not put a woman, who is full-time homemaker or a working and contributing party, in a worse off position. ... In fact, a working and contributing woman will be better off ... as the courts can now also take into consideration her homemaking efforts, regardless of the extent of her contribution to the assets. This would provide for a fairer distribution of assets than the current provisions.

[98] See the Interpretation Act (Cap 1, 1999 Ed) s 9A(1) "[i]n the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law ... shall be preferred ... ."

[99] *Parliamentary Debates Singapore Official Report 1996 Vol 66 No 1* Cols 91-91.

(ii) *Developments under predecessor retained*

The developments achieved under the former section 106, as discussed above, are retained to be further built upon. It may be observed that the passages Justice Kan Ting Chiu quoted of the Minister of Community Development's speech in moving the third reading of the bill in Parliament do not support his Honour's suggestion that the field of choice is now thrown wide open. Indeed, the Minister assured the House that developments in "case law built up over the years [would not] be cast aside, but that should serve as a guide to judges in their decisions." It was never intended that developments up to 1996 should cease to be relevant. On the contrary they are retained to be further built upon. In particular the proclivity towards equal division, tracked above, deserves note.

(iii) *Abandoning bias is encouragement of equal division*

The differences in expression between section 112 and its predecessor, in particular, its abandoning the bias that favoured financial contribution over non-financial contribution, provide strong encouragement towards equal division. Parliament having chosen to express equal value of financial and non-financial contribution, dividing property in the fairest way possible between the former spouses should generally lead to an equal division. An equal division is the practical manifestation of giving equal credit for roles discharged during marriage. The writer has suggested thus:[100]

> The new section 112 avoids the infelicities of the predecessor provision and permits further development of this powerful mechanism to bring economic fairness to spouses. ... With [the abandonment of the bias favouring financial contribution] a just and equitable division should, generally, be an equal division. On an equal division, each partner leaves the partnership with half of what he or she helped to gain. An equal division best equalises the economic situations of the spouses on dissolution of their marital partnership. This is especially when the marital partnership has continued for a reasonable time so that there has been substantial non-financial contribution to homemaking and child caring. Where spouses have discharged these roles for a considerable period ... the starting point should be that each spouse is entitled to half of the net gains of their marital partnership. The

[100] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at A322.

> comparative strength of each spouse's case may then increase or reduce this proportion accordingly. Where there is no additional strength in either spouse's case, it is just and equitable to divide the gains equally.

And the passage counsel quoted before the High Court thus:[101]

> It is submitted that the new section 112 provides an opportunity to adopt a simpler approach to giving credit for the proper discharge of roles during marriage. It may, perhaps, be accepted that it is unnecessary to analyse parties' conduct and financial contributions towards the purchase or the family's needs as carefully as the Court of Appeal [previously] felt required to do. One spouse may have done more than the other but it may not be necessary to compare them this carefully in an exercise aiming, not to return to the spouse a share representing what he or she has done during marriage but simply to give each partner a just and equitable share of the net gains of the marital partnership. On the new section 112, it is hoped that the norm will be an equal division of the net gains of the marital partnership. The satisfactory discharge of either role should entitle the spouse to half of the net gains. Deviation from equal division should only be made on exceptional grounds. This simpler approach will free the courts from the need to carefully analyse parties' conduct during marriage and to ascribe proper credit for items of conduct. If marriage is an emotional and economic partnership, the two partners should generally emerge with an equal share of the net gains.

It is submitted that Justice Kan Ting Chiu may have made too much of the abandonment of the direction to incline towards equality of division. Undoubtedly it is preferred if this phrase were kept.[102] It should be noted, however, that the Minister explained the Select Committee settled for "just and equitable proportions of division" only because members did not wish

[101] *Supra*, note 12, at 412 para 14 citing *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 2, at P959.

[102] The writer in her personal representation to the Select Committee and in her oral hearing before the Select Committee argued for retention of this unique phrase that perfectly reflects marriage as a equal partnership of efforts: see *Report of the Select Committee on the Women's Charter (Amendment) Bill [Bill No 5/96]* at B27-28, C2-4 and C6-7.

[103] See "Select Committee's Views on Main Issues Raised" in *Report of the Select Committee on the Women's Charter (Amendment) Bill [Bill No 5/96]*, at viii para 5.5.4, read out at the third reading of the Women's Charter (Amendment) Bill No 5/96 *Parliamentary Debates Singapore Official Report 1996 Vol 66 No 6* Col 527.

to constrain the court's discretion where the marriage may be short.[103] The Select Committee could not be persuaded that the statutory provision should be phrased to serve the normal marriage that lasts a reasonable length of time before divorce. It settled instead for a formulation that is not as well directed to the marriage that lasted a reasonable length but eminently suited for short marriages. It may be the Select Committee did not choose well in ignoring the normal marriage of reasonable length and concentrating on the short marriage. It should be noted that this may be the only reason for omitting the direction to incline towards equality of division.

The intention was to further develop the power to give both former spouses the fairest possible share of the property that their co-operative efforts acquired. It is not unreasonable to expect that further development is to set up equal division of matrimonial assets as the new norm under the current section 112.

V. Conclusion

The 1996 change to the simpler section 112, designed to build on the developments thus far, should be read purposively. The task of the court is made simpler although the provision has grown longer. The simplicity comes from abandoning the distinction among matrimonial assets depending on whether both spouses financially contributed to their purchase or only one did. This leaves the family law view of both spouses having made equal contribution to the acquisition of property whether by financial or non-financial contribution or a combination thereof. When the marriage unfortunately ends in divorce, a just and equitable division of the gains should generally be an equal division. The suggestion of the High Court in *Lau Loon Seng* v *Sia Peck Eng* that the former wife was not entitled to half of the property despite making both non-financial and financial contributions is disturbing. It is hoped that when this decision is re-examined, the other decisions discussed above will be considered.[104]

Family law must regard the spouse who served as homemaker and child carer as having made equally valuable contribution to the acquisition of

[104] The subsequent High Court, on appeal, decision in *Louis Pius Gilbert* v *Louis Anne Lise* [2000] 1 SLR 274 should also be considered. Goh Joon Seng J approved of the suggestion of Warren Khoo J in *Soh Chan Soon* v *Tan Choon Yock*, see text corresponding to above note 64, to begin by viewing both parties' contribution as equal and refused to accede to the former husband's appeal to reduce the 35% share the Family Court gave the former wife mainly for making non-financial contributions. Goh Joon Seng J suggested that an order should only be substituted if it were "perverse" or "clearly wrong on principle".

property as the other who earned income and paid for property. *A fortiori* the spouse who makes financial contribution as well. Only then is the character of marriage as a partnership of efforts upheld. Only then does the law hold an even hand in its treatment of the different roles spouses discharge during marriage. Only then does the law treat both spouses fairly in terms of their property holdings. The proposition that the just and equitable division of matrimonial assets at the conclusion of a marriage of reasonable length is generally an equal division serves family law well.

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