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THE LAWS IN SINGAPORE AND ENGLAND AFFECTING SPOUSES' PROPERTY ON DIVORCE

White v *White*[1]
Cowan v *Cowan*[2]

> Much of the movement toward convergence of [law] is traceable not to deliberate efforts to impose unification not to transplantation but merely to the tendency of nations ... to have similar problems and to arrive at similar legal ways of ... dealing with them.[3]

TWO comparative law jurists accurately observed this character of legal development more than two decades ago. The laws of several countries of the effect of marriage on each spouse's interest in the property of the other acquired during the course of their marriage are proving this proposition. This note records developments in Singapore and England. Recent decisions in England portend to mirror earlier development in Singapore.

I. THE CONTEXT

A. *During the Subsistence of Marriage*

The laws in Singapore and England, of the Common Law tradition, respond conservatively to whether a person, by being the spouse of the owner of property, becomes entitled to an interest in it. Certainly of the laws that apply during the subsistence of marriage that conform to the concept commonly called the 'separation of property',[4] the laws in the two countries provide

1 House of Lords, unanimous decision, [2000] 2 FLR 981.

2 Court of Appeal England, unanimous decision delivered 14th May 2001, unreported, [2001] EWCA Civ 679. Leave to appeal to the House of Lords was refused.

3 JH Merryman and DS Clark, 'The Philosophies of Convergence,' *Comparative Law, Western European and Latin American Legal Systems: Cases and materials* (Charlottesville Virginia, Mitchie Co, 1978) at pp 52-63.

4 See M Rheinstein and MA Glendon, 'Persons and Family,' in *International Encyclopaedia of Comparative Law* (New York, Oceana, 1973-1985) Vol IV, at pp 40-47.

that marriage has minimal effect on a spouse's interest in property belonging to the other.[5]

Proprietary interests accrue as the principles of property law determine.[6] Family law does not provide rules in this area. By property law, legal proprietary interests are generally unassailable since legal title to property can only be transferred by documents. Equitable proprietary interests can be acquired through the mechanism of trust. While implied trusts arise without documents, the current formulation of the so-called 'common intention constructive trust'[7] renders it unlikely for a spouse to succeed in arguing such trust if he or she has not made financial contribution to the acquisition of property even if this is because it fell on him or her to discharge the roles of homemaker and child carer. The spouse who expends effort for the welfare of the family and caring for the children even diligently over many years and who thereby benefits the other spouse who can focus on developing his or her career and invest the earnings in acquiring property will not, by the expending of these efforts alone, become entitled to interests

5 See SM Cretney and JM Masson *Principles of Family Law* (6th ed) (London, Sweet & Maxwell, 1997) at pp 123-125, and *The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore, Butterworths Asia, 1999) at P795-803. There are, of course, differences in the laws of England and Singapore that are irrelevant for present purposes including that a spouse's right to occupy the property that has become the family's matrimonial home is better protected in England; for a brief comparison, see *The Family Law Library of Singapore by Leong Wai Kum, supra,* at P830-836.

6 See the classic House of Lords decisions in *Pettitt* v *Pettitt* [1970] AC 777 and *Gissing* v *Gissing* [1971] AC 886 accepted as reflecting the law in Singapore by the High Court of Singapore in *Tan Evelyn* v *Tan Lim Tai* [1973] 2 MLJ 92, [1972-1974] SLR 491 and discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at C606-610.

7 The two categories of possible arguments towards such trust as propounded by Lord Bridge in the House of Lords' unanimous decision in *Lloyds Bank plc* v *Rosset* [1991] 1 AC 107, which have been adopted by the Court of Appeal of Singapore as reflecting Singapore law in *Tan Thiam Loke* v *Woon Swee Kheng Christina* [1992] 1 SLR 232, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra* note 5, at C622-628, are too well known by now to require repeating. It has been observed that Lord Bridge's statement, particularly when applied in a dispute between married persons, 'may make more of financial contribution than one would have thought desirable. It would appear that the first category requires at least indirect financial contribution while the second may require even direct financial contribution. Before Lord Bridge's view, one would not have thought a claim to constructive trust to require evidence of direct financial contribution. Of indirect financial contribution, one would have thought it helpful but not necessary to the claim. That direct financial contribution may well be a requirement in the second category [also] blurs the distinction between resulting and constructive trusts'; see Leong Wai Kum 'Trends and Developments in Family Law' in *Review of the Judicial and Legal Reforms in Singapore Between 1990 and 1995* (Singapore, Butterworths Asia, 1996) 632 at 666.

in the properties acquired.[8] By property law, only efforts related to payment for the acquisition of property count for entitlement to proprietary interests.

Family lawyers have for a long time pointed out that this view of the acquisition of property severely prejudices the spouse who discharges the homemaking and child caring roles.[9] Even if this spouse also works, 'separation of property' will still leave a measure of prejudice as the spouse who also attends to homemaking and child caring while continuing to work is probably disadvantaged by the dissipation of efforts.

B. *On Termination of Marriage*

Should the law remain the same when the marriage ends?[10] It is in this area that the laws in England and Singapore show greater variation. They began with the same law giving the divorce courts a very limited power to vary selected properties that are 'settlements'.[11] Since 1980, however, Singapore has added another limb to its law of the effect of marriage on spouses' interests in each other's property, to apply only on the termination of the marriage. This law follows a concept different from 'separation of property'. With this addition the law in Singapore of the effect of marriage on spouses' interests in each other's property became bifocal. One limb conforming to 'separation of property' continues to apply during the subsistence of marriage while another conforming to 'community of property' applies on the termination of marriage. England has not followed suit but there is some reason to believe that two recent decisions might lead a similar way forward.

[8] It should be remembered that proprietary interests are only those that rest in the property itself and are 'definable, identifiable by third parties, capable in nature of assumption by third parties, and have some degree of permanence or stability' *per* Lord Wilberforce in *National Provincial Bank Ltd* v *Ainsworth* [1965] AC 1175, at 1248. A proprietary interest bestowed by property law is of different character from a personal right that family law may bestow on a spouse with regard to the reasonable use and occupation of property owned by the other.

[9] The seminal work in exposing the shortcomings of the concept of separation of property given the reality of the spouses having to distribute the roles of homemaking and child caring and going out to earn is generally attributed to Mary Ann Glendon; see, *eg,* 'Matrimonial Property: A Comparative Study of Law and Social Change' (1974) 49 Tulane Law Review 21.

[10] The same law applies when the marriage is terminated unnaturally by court decree whether this is by a decree of nullity or divorce. Indeed even when the marital relationship is only suspended by decree of judicial separation, the same law also applies. It is only for convenience that this law is referred to as applying on divorce although it is pertinent that decrees of divorce are more commonly granted than decrees of nullity or judicial separation.

[11] This power still subsists in England in the (English) Matrimonial Causes Act 1973 s 24 (b)-(d) although no report of its recent use is known. In Singapore, see the obsolete Women's Charter, Cap 47 1970 Rev Ed, s 110.

(i) *(English) Matrimonial Causes Act 1973*

The English Parliament in 1973 improved on the traditional power over 'settlements' by allowing the court that terminates marriage additionally to make 'an order that a party to the marriage shall transfer to the other party ... such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion.'[12] This remains the full extent of the power bestowed on the English courts today although the considerations that the court should make in its exercise of the power was somewhat rationalised in 1984.[13]

(ii) *Women's Charter 1997 Rev Ed*

The power to divide matrimonial assets was inserted into the Women's Charter[14] in 1980 to allow the court that terminates marriage to, one, 'order the division between the parties of any assets acquired by them during the marriage by their joint efforts [of which] the court shall incline towards equality of division' and, two, 'order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage [of which] 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'.[15]

In 1996 this provision was improved by being substituted with a simpler provision that provides a common objective. This provision remains current. The Women's Charter today allows the court that terminates marriage to 'order the division between the parties of any matrimonial asset ... in such proportions as the court thinks just and equitable'.[16]

II. Comparison of Singapore Power to Divide and English Power to Adjust

It is useful to compare the two powers, in particular, from the decisions of courts that define their characteristics.

[12] (English) Matrimonial Causes Act 1973, s 24.

[13] (English) Matrimonial and Family Proceedings Act 1984 substituted the previous provision with what is now the (English) Matrimonial Causes Act, s 25.

[14] This is the main marriage and family statute in Singapore; see *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at P38-61.

[15] Women's Charter (Amendment) Act 26 of 1980, s 100, that later became the famous Women's Charter, Cap 353 1985 Rev Ed, s 106. See also *infra,* note 97.

[16] Women's Charter, Cap 353 1997 Rev Ed, s 112.

A. *Singapore Power to Divide Matrimonial Assets*

(i) *Slow start*

It took some time for the predecessor to the current provision of the Singapore power to divide matrimonial assets to make the impact it should have on members of the legal profession.[17] The writer hailed the enactment as a bold innovation.[18] The predecessor provision did contain infelicities of expression[19] that are perhaps not surprising since it introduced a concept from the civil law to complement existing law of the effect of marriage on spouses' interest in each other's property.[20] This concept is commonly called[21] the 'community of property' by which marriage has a total effect on spouses' interest in each other's property. By this concept, the properties spouses acquire during marriage become pooled into a community to which both spouses are entitled and, to a greater or lesser extent, both have powers of management. In concept, then, separation of property and community of property represent the two extremes of the spectrum of responses to whether marriage has any effect on the spouses' interest in each other's property.

The concept of community of property was refined by the Scandinavian countries[22] to defer its effect on property until the marriage is terminated by court decree. This refined concept has become known as 'deferred

[17] See *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at P884 where the writer observes that eight years after its enactment, only four cases invoking the provision had been reported in the law reports and that for many years it was assumed that only the former matrimonial home stood liable to be divided.

[18] See Leong Wai Kum 'Division of Matrimonial Property upon Termination of Marriage' [1989] 1 MLJ xiii at xiv: 'the legislature ... has accepted that both spouses contribute towards the acquisition of assets whatever role they perform and that the provision (wart notwithstanding) ought to be read in order to achieve the goal of giving each a fair share of the family fortune when the marriage ends.'

[19] These have been elucidated in Barry Crown 'Property Division on Dissolution of Marriage' (1988) 30 Mal LR 34. See also *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 5, at P883-886.

[20] See 'Division of Matrimonial Property upon Termination of Marriage,' *supra,* note 18, at xiii-xiv, which refers to the 'economic partnership view' as the underlying philosophy of the power in the courts to divide property between the spouses.

[21] See 'Persons and Family,' *supra,* note 4, at 47-48. See, *eg,* the French Civil Code that contained such provision from 1804.

[22] See the Swedish Marriage Code that since the 1920s has provided that, during marriage, the spouses own and manage their individual properties while retaining some right in the other spouse's property and the primary effect of community of property comes in only at the termination of marriage by court. The laws are now (Swedish) Marriage Code 1987, SFS 1987: 230, Chapters 7-13; see D Bradley 'Marriage, Family, Property and Inheritance in Swedish Law' [1990] 39 ICLQ 370.

community of property'.[23] Singapore joined the progressive Canadian state of Ontario[24] and New Zealand[25] in changing its law at divorce to conform to the concept of 'deferred community of property'. It has been observed that the reason to have the power to divide matrimonial assets is that

> [i]f not for the [power to divide matrimonial assets,] homemaking and child caring would be ignored in determining each spouse's interest in property acquired ... . It is only by [dividing their matrimonial assets between them] that a court can credit homemaking and child caring as contribution to the acquisition of property just as financial contribution.[26]

(ii) *Courts accept purpose of power to credit non-financial contribution*

The courts in Singapore began to deliver dramatic decisions towards the end of the decade from the enactment of the power possibly because the applications became better argued in court. In the first major reported decision the High Court of Singapore[27] lay down three principles that continue to define the power. There are summarised as '[f]irst, any asset acquired during marriage is liable to division, second, the power is to be exercised in broad strokes and, third, the aim of the court is to reach a fair and reasonable division of the assets between the spouses.'[28] Chief Justice Yong Pung How in the Court of Appeal affirmed these when his Honour observed '[w]e are of the opinion that [the provision] gives the court a very wide power to order the division of matrimonial assets in the fairest way possible between the parties'.[29]

[23] See 'Persons and Family,' *supra,* note 4, at 48-49.

[24] See (Ontario) Family Law Act 1974 now Family Law Act 1986, s 5(7) which proclaims '[t]he 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'.

[25] See (New Zealand) Matrimonial Property Act 1976 which long title proclaims itself '[a]n 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.'

[26] Leong Wai Kum 'The Just and Equitable Division of Gains between Equal Former Partners in Marriage' [2000] SJLS 208 at 226.

[27] *Koo Shirley* v *Mok Kong Chua Kenneth* [1989] 2 MLJ 264, [1989] SLR 342, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at C697-700.

[28] *The Family Law Library of Singapore by Leong Wai Kum, supra*, note 5, at B314.

[29] *Yeong Swan Ann* v *Lim Fei Yen* [1999] 1 SLR 651 at 658, para 23.

There are memorable judicial expressions of the purpose of the power being to give credit for efforts in homemaking and child caring as in 'the enactments are meant ... to provide for a just apportionment for the "homemaker".'[30] These expressions are remarkable in a Common Law country that continues to operate under the concept, during the subsistence of marriage, that marriage has minimal effect on spouses' interests in each other's property. The power to divide matrimonial assets gives due credit to these non-financial contributions in order to balance the entitlement to proprietary interest that the spouse who worked and was the major breadwinner of the family would obtain for his or her financial contributions.

(iii) *Power affirms marriage as equal partnership of efforts*

The writer has suggested that, to exercise the power to divide matrimonial assets in the fairest way possible to credit non-financial efforts within the family:

> requires thought of the nature of marriage to the spouses. Family law [in Singapore] characterises marriage as an equal co-operative partnership of efforts of the spouses. ... Marriage as an equal partnership of efforts underlines legal regulation of the relationship between husband and wife including the power to divide their matrimonial assets.[31]

The characterisation of the nature of marriage to the spouses comes from a unique provision in the Women's Charter that:

> [u]pon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union ... . [They] have the right separately to engage in any trade or profession or social activities [and] ... equal rights in the running of the matrimonial household.[32]

[30] *Per* Rubin J in the High Court in *Wong Amy* v *Chua Seng Chuan* [1992] 2 SLR 360, 370. See also Lai Kew Chai J in the Court of Appeal in *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal* [1993] 3 SLR 34, 40, discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C827-829, include a property for division where to exclude it because it was acquired to replace another that had been acquired as gift 'would be inimical to the concept of matrimonial partnership' and the Court of Appeal in *Ng Hwee Keng* v *Chia Soon Hin William* [1995] 2 SLR 231, also discussed in *The Family Law Library in Singapore by Leong Wai Kum* at C804-813, give credit to the wife for homemaking despite her working throughout marriage and having the help of her mother-in-law at home.

[31] 'The Just and Equitable Division of Gains between Equal Former Partners in Marriage,' *supra,* note 26, at 224.

[32] Women's Charter, *supra,* note 16, s 46(1).

This provision in effect defines marriage from the status of the spouses by describing what their mutual commitment to each other means to each of them. It is exceptional for a Common Law country like Singapore to boldly provide such when none of the exhortations in the provision is directly enforceable. The provision is what a common law jurist[33] would disparagingly describe as of imperfect obligation. The writer has, however, championed the provision as 'powerful in colouring the husband-wife relationship with a tone of mutual respect and consideration of one another'[34] and that to denigrate such exhortation is to regard law as if it had only to design and enforce legal rights. A provision that characterises marriage as the spouses' equal partnership of efforts 'teaches [proper behaviour of spouses] as well, if not better, as the provision of legally enforceable rights'.[35]

The effect of providing that marriage is the equal partnership of efforts on the power to divide matrimonial assets is dramatic.[36] The writer has observed:

> [t]he current [provision of the power to divide matrimonial assets] ... regards the spouses to have co-operated in the acquisition [of property]. This is irrespective of whether they both paid for it or only one paid while the other attended to homemaking and child caring. All contributions whether financial or non-financial are part of the acquisition of property. In other words, family law views all property acquired during marriage as jointly acquired by the spouses.[37]

(iv) *Remarkable orders of division*

The decisions that have been handed down by the courts in Singapore of the division of matrimonial assets have been nothing less than remarkable. Several propositions bear this out. Although there are decisions that have

[33] The jurist would have been influenced by the positivist view that nothing should be regarded as law unless it contains a command backed by sanction.

[34] See *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at B179.

[35] *Ibid*, P356-357.

[36] The provision is not only useful in this area of law. It was useful in helping the High Court of Singapore decide that the intentional tort of enticement should no longer be allowed to be pursued in Singapore and it also conveys the morality of parental responsibility as the right way to appreciate legal regulation of parenthood; see *The Family Law Library in Singapore by Leong Wai Kum* at B181-182 and Leong Wai Kum 'Restatement of the Law of Guardianship and Custody in Singapore' [1999] SJLS 432, at 481-483.

[37] 'The Just and Equitable Division of Gains between Equal Former Partners in Marriage,' *supra*, note 26, at 210.

gone against the grain, the vast majority are consistent with these propositions.

Even under the predecessor provision that did not contain a definition of 'matrimonial asset' such as the current provision does,[38] the courts cast a very wide net over what properties were liable to the power to divide. The High Court of Singapore set the tone that any 'assets acquired during the marriage',[39] including the spouses' former matrimonial home, another residential property, money in the husband's bank account and membership in a country club, are liable to the power despite all of them having been paid for by the husband while the wife was fulltime homemaker and carer to their two children. Of the matrimonial home, the Court of Appeal has even included the property acquired to replace the former matrimonial home although the family never stayed in the new property, at least where not including this would leave the homemaker with a paltry amount where the husband was fairly well off.[40] No distinction was ever drawn between personal assets and business assets,[41] both are liable to the power if acquired or improved in value by the spouses' efforts during marriage. The courts had no difficulty even with money that accumulates in the spouse's compulsory savings account that an employee in Singapore is required to maintain to provide for his or her old age, as the local equivalent of a pension fund.[42] In a dramatic decision when the board that administers the accounts challenged the legality of an order of division that was made against money in the account given that even the account-holder is denied free access to it until he or she reaches a certain age, the Court of Appeal protected the power[43] thus:

[38] Women's Charter, *supra,* note 16, s 112(10).

[39] *Koo Shirley* v *Mok Kong Chua Kenneth, supra,* note 27.

[40] *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal* [1993] 3 SLR 34, discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C794-798.

[41] *Koh Kim Lan Angela* v *Choong Kian Haw* [1994] 1 SLR 22, discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C769-775.

[42] *Lam Chih Kian* v *Ong Chin Ngoh* [1993] 2 SLR 253 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C779-783.

[43] Although the Court of Appeal did observe that an order should only be made against money in this account, given the many constraints on its accessibility, where there is no other matrimonial asset against which the proportions of division can more conveniently be sought from. Where the money is the only major matrimonial asset, the account can rightly be charged so that when the account-holder is able to access the money he or she must pay over the proportion decided to be his or her spouse's share accordingly.

> [t]he moneys [in the account] are intended for the benefit of the member himself and his family, essentially his spouse, on his retirement. ... [I]t is only just that a division of such savings between him and his spouse ought to be made on a fair and equitable basis.[44]

Even of property acquired as windfall by gift, the Court of Appeal was prepared to scrutinise the family transactions carefully to discover that not all of it was gift but that some 22% was acquired using the proceeds of sale of the spouses' former matrimonial home and this proportion of the current value of the property was available for division.[45]

The power is exercised in broad strokes.[46] The writer has observed that this has meant that '[t]he courts have, generally, divided the wealth of the family as a whole instead of individual pieces of property item by item'[47] so that all property that are matrimonial assets are aggregated, current values are ascribed to each to arrive at a gross value, debts and liabilities are accounted for to arrive at the net current value of matrimonial assets and it is this figure of which proportions of division are decided.[48] Once the spouses' respective proportions are decided, the court may then make consequential orders as to how to achieve these proportions conveniently from the spouses' current pattern of holding the properties.[49] By the broad stroke approach as well the courts have decided that where the spouses, in contemplation of divorce, have made comprehensive agreement to divide the matrimonial assets in which the homemaker will receive a reasonable proportion thereof, the court may well dismiss the application one of the spouses makes for an order of division so that they are left to their agreement.[50]

[44] *Per* LP Thean JA in *Central Provident Fund Board* v *Lau Eng Mui* [1995] 3 SLR 109, 122 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C703-711.

[45] *Tan Bee Giok* v *Loh Kum Yong* [1997] 1 SLR 153 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C785-789.

[46] *Koo Shirley* v *Mok Kong Chua Kenneth, supra*, note 27.

[47] Leong Wai Kum 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform' [1993] SJLS 351, at 360-361.

[48] See the writer's suggestion in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at B318 that, although the provision does not make it clear, a practicable resolution of an application for an order of division proceeds along several steps.

[49] *Ibid.*

[50] The High Court in Singapore thus dismissed an application without going into its merits; see *Wong Kam Fong Anne* v *Ang Ann Liang* [1993] 2 SLR 192 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C714-718.

The writer observed '[e]very decision [up to 1993] had been based upon what was "fair" or "equitable" or "reasonable"' [despite the fact that most of these terms] are not even in the section itself.'[51] On surveying reported decisions, it was further observed that 'the norm appears to range from 35% to 45% to the wife [who contributed towards homemaking and child caring[52]].'[53] The Court of Appeal has been observed, more often than not, to increase the proportion for the homemaker in order to fulfil the objective.[54] 'Where some financial contribution was also made [by the homemaker and child carer] the proportion could reach 50%'.[55]

(v) *Current provision supports new norm of equal division*

The substitution of the predecessor provision by the current one has further developed the law. The writer observed that, where the courts were able to achieve as much fairness as decided cases show under the predecessor provision that was flawed for retaining a preference for financial contribution over non-financial contribution,[56] the abandonment of the bias in the current provision suggests that the way forward is towards a new norm. The writer suggests '[i]t is not unreasonable to expect that further development is to set up equal division of matrimonial assets as the new norm under the current [provision]'[57] for all except the most short marriage.[58] The writer continues:

51 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform,' *supra,* note 47, at 360.

52 Note, however, that it is the effort that is credited and not a particular gender. The High Court of Singapore in *Chan Yeong Keay* v *Yeo Mei Ling* [1994] 2 SLR 541 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C827-829 gave the husband who exceptionally looked after the home and children who contributed only 4.6% towards the price of the spouses' former matrimonial home half of it as his rightful share.

53 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform,' *supra,* note 47, at 388.

54 See decisions discussed in 'The Just and Equitable Division of Gains between Equal Former Partners in Marriage,' *supra,* note 26, at 229-232.

55 See decisions discussed *ibid,* at 232-234.

56 See *supra,* text at note 15.

57 See decisions under the current provision discussed in 'The Just and Equitable Division of Gains between Equal Former Partners in Marriage,' *supra,* note 26, at 239.

58 For what should be considered a short marriage in Singapore, see *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at P966. The High Court of Singapore in *Wang Shi Huah* v *Wong King Cheung Kevin* [1992] 2 SLR 1025 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C813-815 where the marital cohabitation barely lasted one year although the marriage formally ended after 5 years with no child naturally, did not do anything more than estimate the spouses' respective financial contribution to the acquisition of their former matrimonial home and ordered proportions of division accordingly.

> Family law must regard the spouse who served as homemaker and child carer as having made equally valuable contribution to the acquisition of property as the other who earned money and paid for property. *A fortiori* the [homemaker and child carer] who made 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 equally 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.[59]

(vi) *Courts partially accept equal division*

While it is still early days as the current provision has been in force for less than five years, the High Court of Singapore, on appeal,[60] has both accepted and rejected equal division. Two judges have embraced the proposition but decided not to change the order of the Family Court that was higher than equal division, in one,[61] and lower, in the other.[62] Another judge has disavowed equal division as the new norm but raised the Family Court order to equal division, in one,[63] and accepted the order of equal division in the other.[64]

Warren Khoo J in the High Court of Singapore, on appeal, observed that:

[59] 'The Just and Equitable Division of Gains between Equal Former Partners in Marriage,' *supra,* note 26, 239.

[60] The matrimonial and ancillary jurisdiction is, since 1996, with the Family Court in Singapore that is a District Court; see Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order S110/1996. The High Court of Singapore is the first level of appeal from the Family Court.

[61] *Soh Chan Soon* v *Tan Choon Yock* DCA 5017/97, unreported, in a marriage of 18 years with 3 children, where the Family Court awarded the homemaker who maintained the family but whose husband paid 66% of the price of the matrimonial home, 63% of its equity.

[62] *Louis Pius Gilbert* v *Louis Anne Lise* [2000] 1 SLR 274 in a marriage of 18 years with 2 children where the Family Court awarded 35% of the matrimonial assets comprising the former matrimonial home and the husband's compulsory savings.

[63] *Yow Mee Lan* v *Chen Kai Buan* RA 5070&5073/1999, unreported, in a marriage of 26 years with 3 children where the Family Court ordered for the homemaker who also helped out in the family business that she should receive 50% of the matrimonial home, 40% of the husband's assets in Singapore and 30% of this assets abroad, and the High Court, on appeal, substituted it with the simpler 50% of all the matrimonial assets.

[64] *Ryan* v *Berge*r [2001] 1 SLR 419 in a marriage of 15 years with 1 child where the homemaker and child carer who was equal partner in the family business was awarded 50% of the matrimonial assets.

> [t]here is a touch of artificiality in such cases to use as the starting point ... the amount of money each party has contributed directly towards the acquisition of the home. This ignores the indirect contributions, monetary and otherwise, most of which are incapable of any meaningful ascertainment either because no record was kept or because the nature of the contribution is irreducible into monetary terms. [Division of matrimonial assets] is more a qualitative than quantitative exercise.[65]

Even Judith Prakash J in the High Court of Singapore, on appeal, who rejected the idea that just and equitable proportions of division should be equated with equal division, was prepared to observe that:

> the legislation ... recognises that a marriage is not a business where, generally, parties receive an economic reward commensurate with their economic output. It is a union in which the husband and the wife work together for their common good and the good of their children. Each of them uses (or should use) his or her abilities and efforts for the welfare of the family and contributes whatever he or she is able to. The partners often have unequal abilities whether as parents or as income earners but, as between them, this disparity or roles and talents should not result in unequal rewards where the contributions are made consistently and over a long period of time.[66]

The Court of Appeal has recently endorsed the approach of Judith Prakash J.[67] While the highest court's first word strikes a blow at the suggested new norm of equal division, LP Thean JA did observe that the court must take a broader view than engage in meticulous calculations of financial contributions and further that non-financial contributions may sometimes be just as important.[68]

B. *English Power to Adjust Property Interests*

The difference between the Singapore power to divide matrimonial assets and the English power to adjust property interests is greater than the differences

65 *Soh Chan Soon* v *Tan Choon Yock, supra,* note 61.

66 *Yow Mee Lan* v *Chen Kai Buan, supra,* note 63.

67 *Lim Choon Lai (mw)* v *Chew Kim Heng* Civ App No 141/2000, judgment 22 June 2001. In a marriage of 30 years with 2 children, the Court of Appeal varied the Family Court order of equal division of the proceeds of sale of the former matrimonial home, upheld by the High Court on appeal, to 60:40 in favour of the former wife.

68 *Ibid,* para 14.

in the language of their respective statutory provisions.[69] Differences in language should not be overplayed although language does matter. From the language employed in the two statutory provisions of the different powers, the writer observed:

> [A]n 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 ... 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 recognized whatever roles they play within 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.[70]

Several other shortcomings may be observed of the power bestowed by legislation in England to the court that terminates marriage.

There has not been clear judicial articulation of the purpose of exercise of the power. Hence, the exercise of the power has not been related with the view of spouses as discharging different but equally valuable roles during marriage. When the (English) Matrimonial and Family Proceedings Act 1984 supposedly rationalised the provision on the considerations the court should make before making its ancillary orders *inter alia* to adjust property interests by removing the general goal to put the parties in the position they would have been in had their marriage not broken down and both spouses discharged their responsibilities to each other,[71] the goal was not replaced.[72] The courts were left floundering for a goal.

In time, there developed a preference of exercising the ancillary powers to provide the homemaker and child carer with enough to meet his or her

69 See *supra,* text at notes 12 and 16.

70 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform,' *supra,* note 47, at 355.

71 This became known as the 'minimum loss' principle; see SM Cretney and JM Masson *Principles of Family Law, supra,* note 5, at 425-426.

72 Instead the court was directed, one, to give 'first consideration ... to the welfare while a minor of any child of the family who has not attained the age of eighteen' and, two, to make orders in such form as to encourage the spouses towards self-sufficiency; see now (English) Matrimonial Causes Act 1973 ss 25(1) & 25A.

'reasonable requirements'.[73] This meant, in a situation where the spouses left substantial wealth and property, that the spouse who was homemaker and child carer would receive a much smaller share of the property than the spouse whose earnings purchased it. In the case cited to illustrate this 'discrimination' between the kinds of contribution to the family,[74] a wife and good mother for fourteen years was awarded £9 million to meet her reasonable requirements where the husband was worth £400 million. The position was becoming untenable and the High Court in England had, in a subsequent case,[75] added an element additional to reasonable requirements to credit the wife's contributions. The stage was set for the two recent decisions that bring remarkable developments to the law in England.

III. Two Recent Remarkable Decisions in England

A. *White* v *White*

(i) *Facts and course of applications*

The Whites' marriage lasted more than thirty years producing three children. The spouses co-operated in running a farming business while the wife additionally took care of the home and cared for the children. It was a successful equal partnership of marriage and business.

At the start of their marriage, both spouses contributed an equal amount for the business. A year into marriage, the husband's father provided an interest-free loan that paid for some 34% of a farm the spouses bought and owned jointly. The father also provided some working capital. The spouses lived and worked on the farm. Over time the spouses bought more land and the farm grew in size. At divorce this farm was worth £3.5 million. The husband's father also bought another estate at an advantageous price that he transferred to himself and his three sons. The husband's share of the cost was met from the profits of the farming business he owned with his wife. He and his wife also farmed the farm within this estate. The husband later bought over the farm and had it conveyed into his name alone. The

[73] The (English) Court of Appeal decisions in *O'D* v *O'D* [1976] Fam 83, *Page* v *Page* (1981) 2 FLR 198 and *Preston* v *Preston* [1982] Fam 17 have been identified by the House of Lords in *White* v *White, supra,* note 1, at 991 paras A-D as the genesis of this development. It was observed that at that time 'reasonable requirements' was regarded as an improvement on bare 'needs'.

[74] The (English) Court of Appeal in *Dart* v *Dart* [1996] 2 FLR 286 was troubled by the award being this low but did not regard the lower court's exercise of discretion as wrong enough to merit changing the award.

[75] High Court in England in *Conran* v *Conran* [1997] 2 FLR 615.

farm was worth £1.25 million at divorce. Mr and Mrs White also had pension provisions so that their combined worth at divorce was £4.6 million.

Upon divorce, the spouses requested a 'clean break' in their financial affairs. The High Court in England awarded the wife, as meeting her reasonable requirements, the sum of £980,000. This would be met by her keeping her own assets and the husband transferring some of his to her. On doing so she would receive 20% of the spouses' combined wealth. On appeal, the Court of Appeal in England almost doubled her award to recognize her contribution to the family as wife and mother over and above her partnership role. This increased award would give her some 40% of the spouses' combined wealth.

Both parties appealed to the House of Lords. In the result, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Cooke of Thorndon, Lord Hope of Craighead and Lord Hutton dismissed both appeals so that the wife in this long successful partnership of marriage and business was ordered to be entitled to 40% of the wealth, that was twice as much as her reasonable requirements. While this result in itself is fairly dramatic of its effect on whether the homemaker and child carer in England is limited to an amount assessed to meet his or her reasonable requirements, it is the observations their Lordships made towards this result, mainly by Lord Nicholls, that are even more remarkable. The discussion below will reveal how close some of the observations come to principles established to define the power to divide matrimonial assets in Singapore.

(ii) *Features of case*

It is useful to note the features Lord Nicholls observed of this marriage. The spouses sought a clean break from each other and the ultimate order on how to achieve the amount the wife was assessed as entitled to, reflected this.[76] The surplus wealth of the family[77] substantially exceeded the amounts

[76] The writer has observed of the Singapore power to divide matrimonial assets that an application for an order involves several steps '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 proportions for each spouse which is just and equitable division thereof and, fourth, to give directions how these proportions should be satisfied from the assets'; see *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at B318. Similarly, of the English power to adjust property, once the court has decided how much of the total wealth of the family each spouse is entitled to, it needs to help the spouses arrive at the most convenient way to achieve them given the current pattern of holding property by the spouses. In *White* v *White, supra*, note 1, it would be necessary to see if the farming business could be minimally affected even after the spouses' respective awards have been achieved.

[77] The writer has observed of the Singapore power that it is to be exercised against the net current value of property that are matrimonial assets and, thus, liable to be divided; see

the spouses required for their needs. Lord Nicholls pointed out two further features that his Lordship used to support his views. One, throughout marriage both spouses contributed equally although, of the home and family, Mrs White was the homemaker and child carer.[78] Two, the spouses' bounty came partially from the generosity of the husband's father.[79]

(iii) *Rejects ceiling of 'reasonable requirements'*

Lord Nicholls traced the path of development in the Court of Appeal in England[80] when, on the English Parliament abandoning the 'minimum loss' goal without replacing it,[81] it became common to focus on the factor of 'financial needs, obligations and responsibilities'[82] of each of the parties. His Lordship observed that this 'seems to have become largely subsumed into a wider, judicially developed concept of 'reasonable requirement'.[83] While this in itself would not necessarily have hindered the proper exercise of judicial discretion, Lord Nicholls observed that it assumed more sinister authority when the practice developed 'whereby the court's appraisal of a claimant wife's reasonable requirements has been treated as a determinative, and limiting, factor on the amount of the award which should be made in her favour.'[84]

His Lordship criticised this development:

> I venture to think ... the courts have departed from the statutory provisions. The statutory provisions lend no support to the idea that a claimant's financial needs, even interpreted generously and called reasonable requirements, are to be regarded as determinative.[85]

The Family Law Library in Singapore by Leong Wai Kum, supra, note 5, at P895. Similarly, the English power to adjust property should be exercised against the net current value of all the property of the spouses that are liable to the power. Only then is the court deciding their respective entitlements to the net gains of their marital partnership.

78 It may be surmised that, in this regard, the spouses were not too different from the normal couple. When the minutiae of differences in marital relationships are ignored what we usually observe is the general similarity where married couples co-operate in the best way each knows how to improve their lives and enrich their partnership at least until their relationship deteriorates beyond repair. Indeed Lord Nicholls later suggested that the Whites' co-operation was fairly typical of modern families; see *infra,* text at note 93.

79 While this feature is exceptional, Lord Nicholls later reduced it to insignificance; see *infra,* text at notes 104 and 105.

80 See *supra,* text at notes 73 and 74.

81 See *supra,* text at note 71.

82 (English) Matrimonial Causes Act 1973, s 25(b) directs the court considering ancillary orders to consider several factors including the parties' needs.

83 *Supra,* note 1, at 990 para H.

84 *Ibid,* at 991 para E.

85 *Ibid,* at 992 para D.

In place of focussing on one factor his Lordship reminded that, even in a 'big money' case, another crucial factor is the available resources of each party. The effect this additional consideration brings out was observed thus:

> If a husband and a wife by their joint efforts over many years ... have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? ... [W]here the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband?[86]

The House of Lords has, thus, brought back to the fore the court's interpretation of all the factors for consideration listed in the statutory provision. The practice of ordering to meet the claimant's reasonable requirements will no longer do especially where the wealth of the family at divorce exceeds the spouses' reasonable requirements.

(iv) *Defining principle is fairness*

Having rejected 'reasonable requirements' the question is: What did the House of Lords offer in its place? Lord Nicholls began with what may be regarded as the defining principle in the making of financial ancillary orders between former spouses. His Lordship opined '[e]veryone would accept that the outcome ... should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances.'[87]

The word 'fair' does not appear in the English statutory provision. Introducing this adjective to underline the making of financial ancillary orders between former spouses recalls similar development in Singapore.[88] While it is true that the adjective in itself does not provide a clear enough guideline for predictability of results, it is submitted that, just like in Singapore, it will be helpful in conveying a salutory tone to the exercise of the power.[89]

[86] *Ibid,* at 992 paras E-G.

[87] *Ibid,* at 983 para H.

[88] See *supra,* text at notes 27 to 29.

[89] In Singapore this defining principle has engendered more specific judicial expressions of the purpose of the power to divide matrimonial assets to give proper credit for homemaking and child caring to balance the proprietary interests of the breadwinner and this has further led to suggestions of norms of division that are practicable; see 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform' *supra,* note 47 at 360-361.

Setting the right tone is especially useful since the court retains substantial discretion in the exercise.[90]

(v) *Fairness within context of marriage*

Lord Nicholls' reference to fairness to define the proper exercise of the power to make financial ancillary orders between former spouses would have been even more effective if his Lordship had more clearly related it with the context of marriage. Fairness must be thought of within the context of what it means to the parties to have been married to one another, generally for a reasonable length of time. It is in this respect that English marriage law may be less developed than Singapore law.

While English law provides a definition of marriage from the perspective of its formation as 'the voluntary union for life of one man and one woman to the exclusion of all others',[91] it does not offer another definition from the perspective of marriage, once formed, as providing the spouses with a unique status. The law in Singapore benefits immensely from having a statutory description of the status of marriage. The provision describes marriage as the spouses' equal co-operative partnership of efforts.[92] That spouses should regard themselves as being in an equal partnership of efforts gives powerful support for the exercise of the power to make fair financial ancillary orders between them at their divorce. Equal partners should expect that, on the dissolution of their partnership of efforts, the surplus wealth will be fairly divided between them.

Lord Nicholls, in a later part of his Lordship's judgment, does make observations of the nature of marriage to the spouses and even relates it with the objective to achieve a fair division of property. His Lordship noted the changes in modern patterns of life and their effect on the ideal of fairness thus:

> Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and

[90] The writer has observed the significance of the Singapore courts' also describing the exercise of the Singapore power to divide matrimonial assets with the aim of achieving fair results despite this adjective not being express in the provision; see 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform' *ibid,* at 360-361.

[91] *Hyde* v *Hyde* (1866) LR 1 P & D, 130 at 133.

[92] Women's Charter, *supra,* note 16, s 46 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra*, note 5, at P364-367 and see *supra*, text at notes 31 to 37.

> children. This traditional division of labour is no longer the order of the day. ... But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering ... parties' contributions. ... If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.[93]

It is submitted that the more closely courts in England relate the exercise of the power to adjust property interests with this view of how married people co-operate during marriage so that any wealth they build up is achieved co-operatively, the better reasoned the decisions become. Further, this process may be aided by a definition of the status of marriage, such as the marriage law in Singapore provides.

(vi) *Fairness means equality of division as yardstick*

To achieve fair ancillary financial orders between former spouses, Lord Nicholls suggested there should be a yardstick of equality of division. His Lordship was quick to point out that a yardstick of equality of division that will act as a check so that orders do not deviate too much from it, is not to be equated with a presumption of equal division or even equal division as the starting point.[94] The yardstick of equal division was supported thus:

> A practical consideration follows from [the view of spouses as having co-operated during marriage]. ... Before reaching a firm conclusion and making an order along these lines, a judge would always be well

[93] *White* v *White, supra,* note 1, at 989 paras C-F. It is interesting that the writer made a similar appeal in 1989; see 'Division of Matrimonial Property upon Termination of Marriage,' *supra,* note 18, at pp xiii-xiv: '[t]oday 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. Thus whether both spouses work ... or one spouse works while the other takes care of the home on a fulltime basis ... both are contributing to the well-being of the unit including its wealth and property holdings.'

[94] His Lordship even suggested that equal division may be the exception rather than the rule, see *White* v *White, supra,* note 1, at 989 para F, although this must be understood against his Lordship's advice that equality should only be departed from for good articulated reasons, see text corresponding to note immediately below.

> advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.[95]

Only time will reveal if his Lordship's disavowal of equality as presumption or starting point is mere semantics[96] when his advice is that any departure from the yardstick requires to be justified by sound reasons that are articulated. For the moment, it is remarkable that his Lordship used the noun 'division' to refer to the court's task when the English power has traditionally been referred to merely as 'adjustment' of property interests. The noun 'division' that is expressly used in the Singapore provision of the power to divide matrimonial assets[97] is inherently bound with the concept of 'community of property'.[98] Lord Nicholls' use of this term is a remarkable development of the law in England. It suggests that there may be reason, due to the way married people now order their lives, for the law in England to incorporate aspects of community of property. While adding another limb to the law of the effect of marriage on each spouse's interest in the property of the other is no doubt best achieved by the legislature after public debate, the way forward appears to have been set. Treating both spouses fairly demands acceptance of the family law view that spouses co-operate during marriage so that all accumulated wealth including property was acquired by both of them. Singapore has chosen to incorporate this view 'deferred' until the marriage is terminated. It is interesting to see if England will do the same.

It is too early to suggest what exactly a 'yardstick of equality of division' really means, in particular, how it differs from a presumption or starting point of equal division.[99] Clearer explanation will be welcome. In particular, there should be clearer explanation of how a judge should assess and compare

[95] *Ibid,* at 989 paras F-H.

[96] Even Lord Cooke while not disagreeing with any part of Lord Nicholls' judgment suggested that there may not be any difference between equal division as yardstick from equal division as presumption or starting point thus 'I doubt whether the labels 'yardstick' or 'check' will produce any result different from 'guidelines' or 'starting-point'; *ibid,* at 999 para C.

[97] See Women's Charter (Amendment) Act 26 of 1980, s 100, *supra,* note 15, now Women's Charter, *supra,* note 16, s 112.

[98] See *supra,* text at note 21.

[99] See comments by John Eekelaar 'Back to Basics and Forward into the Unknown' [2001] Fam Law 30, Joanna Miles 'Equality on Divorce?' [2001] CLJ 46 and Rebecca Bailey-Harris 'Fairness in Financial Settlements on Divorce' [April 2001] LQR 199.

the spouses' respective contributions to the family. Should he or she take a more general survey or attempt a rather more detailed analysis?

One does expect, however, that in time a norm of division will become accepted in England, at least for marriages that have lasted a reasonable length so that both spouses will have made significant contributions whether financial or non-financial. The more significant these contributions have been over a period of time the harder it will be for the judge to attempt to be rather more specific in assessment. It is on such recognition that the writer has recently suggested that the law of division of matrimonial assets in Singapore has developed to the point where there may be a new norm of equal division.[100] Equal division is both realistic of the degree of particularity that a judge can possibly assume in making fair orders of division of property between former spouses who were married for a reasonable number of years and is the epitome of fairness that equally values financial and non-financial contributions to the family.

(vii) *Will England accept 'deferred community of property'?*

When Lord Nicholls' observations are aggregated, they add up to a view of the effect of marriage on spouses' interest in each other's property acquired during marriage that is not really consistent with 'separation of property'. If the spouses should be regarded as having made equal contribution either by paying for property or by homemaking and child caring and if a court should not deviate from ordering that each spouse obtain an equal share of the surplus wealth at the dissolution of their marital partnership of marriage, then marriage can no longer be thought to have minimal effect on the spouses' entitlement to each other's property. Indeed marriage has significant effect! This view is that, in contrast to 'separation of property', of 'community of property' although deferred until the partnership of marriage is terminated by court decree.

The logical progression from Lord Nicholls' observations, then, is to embrace the concept of 'deferred community of property'. By acknowledging this concept the decision in this case becomes better reasoned. It remains to be seen if the next step taken in England is to review the decision the English Parliament made in 1970 to reject community of property. Until some accommodation with community of property is made, this decision and the developments it may engender will not gel well with the concept that underlies English law on the effect of marriage on spouses' interests in each other's property.

[100] See *supra,* text at notes 57 to 68.

(viii) *Effect of property acquired as gift*

Neither the husband nor the wife made any concrete argument based on the facts that the husband's father helped them to acquire their first farm by providing an interest-free loan and some working capital and he later helped the husband acquire their second farm by buying the estate at an advantageous price and having it registered in the husband's name along with his own and that of his other sons. The strongest argument that the husband could have made from these facts would have been that a certain proportion of the current value of the two farms should continue to be regarded as having been acquired by the husband as a gift to him alone from his father. If he had succeeded and the court had assessed this proportion, then this part would be property beyond the power to adjust so that the husband could not be ordered to share it with his former wife. Lord Nicholls observed that by the laws of Scotland[101] and New Zealand[102] that have adopted the deferred community of property concept:

> property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from ... matrimonial property. ... In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.[103]

Lord Nicholls, however, went on to suggest that, had the husband tried to make capital of this, he might not have succeeded to any appreciable extent. His Lordship suggested that the character of property as acquired by gift can be ignored in two circumstances. One, over time the origin can be overlooked thus '[t]he initial cash contribution made by Mr White's father

[101] See (Scotland) Family Law Act 1985.

[102] See (New Zealand) Matrimonial Property Act 1976, ss 8-10.

[103] *White* v *White, supra,* note 1, at 994 paras C-H. Property acquired before marriage and by windfall including by gift are also treated differently by the law in Singapore from property acquired by the personal efforts of the spouses during marriage. Even under the predecessor provision, the courts excluded such property unless they had been converted into matrimonial property by the spouses' expending personal effort in substantially improving the property during the marriage; see, *eg,* the Court of Appeal in *Ng Kim Seng* v *Kok Mew Leng* [1992] 2 SLR 872 discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C783-785 and *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal, supra,* note 30, discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C794-798.

in the early days cannot carry much weight 33 years later.'[104] Two, the origin as gift can also be ignored where not including the property could leave the spouses grievously imbalanced in property holding thus 'this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.'[105]

These two reasons provide sound justification for according less significance to the origin of property as gift. What this meant for Mrs White, then, was that the judge did not set aside any particular proportion of the current value of the farms as belonging solely to the husband. It did, however, leave Mrs White, despite being an equal marital and business partner with her husband, with only 40% of their combined wealth.

Spouses who engage in an equal co-operative partnership of efforts should be discouraged, after a number of years has passed, from continuing to distinguish property acquired by windfall. It would be undesirable for property to become fossilised by one detail of its acquisition.[106] Further, since the exercise of the power is driven by a measure of discretion in the court, it is legitimate for a court to include the property acquired by gift where not to do so might leave one spouse with a paltry share of the surplus wealth of the marital partnership. Lord Cooke observed 'the significance ... is diminished because over a long marriage the parties jointly made the most of the [husband's father's] help and because it was apparently intended at least partly for the both of them.'[107] In Singapore, a decision by the Court of Appeal to include a property acquired to replace the spouse's former matrimonial home which the husband's half-share thereof was given to him by his parents before he married was supported by reference to similar considerations.[108]

[104] *White* v *White, supra,* note 1, at 995 para B.

[105] *Ibid,* at 994 para G.

[106] The Singapore statutory definition of what constitutes 'matrimonial asset' threatens to so fossilise property acquired originally by gift; see Women's Charter, *supra,* note 16, s 112(10)(b) and the Court of Appeal decision in *Lee Yong Chuan Edwin* v *Tan Soan Lian* [2001] 1 SLR 377.

[107] *Supra,* note 1, at 999 para E.

[108] See *Hoong Khai Soon* v *Cheng Kwee Eng and anor appeal, supra,* note 30, discussed in *The Family Law Library in Singapore by Leong Wai Kum, supra,* note 5, at C794-798 where in a marriage lasting 13 years with 2 children and the husband was generously given a half-share of a landed property and a share in his family's restaurant business, excluding the half-share of the landed property because it originated as gift to the husband would have left the homemaker and child carer with a miniscule portion of the family property. See also 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform,' *supra,* note 47, at 369-374.

B. *Cowan* v *Cowan*

White v *White* was embraced and somewhat amplified by the Court of Appeal in England in *Cowan* v *Cowan.*[109]

(i) *Facts and course of applications*

The Cowans' marriage lasted thirty-five years producing two children. The couple started a business but the wife left to attend to homemaking and child caring after some years. The husband's younger brother joined him but was never as enterprising as the husband. Under the husband's management the business became remarkably successful. At divorce the spouses' combined net worth was more than £11 million.

The High Court in England initially assessed the wife's reasonable requirements to the tune of £3.2 million, consisting of her home, a holiday flat in Florida, a lump sum payment of £1.7 million from the husband and her pension fund. The wife appealed citing the House of Lords decision in *White* v *White*[110] arguing, quite expectedly, that it encouraged equal division where the spouses made significant financial and non-financial contribution during marriage, as she claimed was true of them. The husband appealed arguing *inter alia* that he was trustee for his brother so that the net wealth of the business available for division with his former wife was less than the lower court had worked from.

In the result, the wife succeeded partially. Thorpe, Walker and Mance LJJ gave unanimous decision that consideration according to the House of Lords decision required that the wife should receive more. She should, however, not receive half because it was the business acumen of the husband that contributed most to the accumulation of wealth. The husband's argument that his brother was entitled to a significant part of the business assets was rejected for the reason his brother's role was insignificant.

The wife's award was raised by the lump sum payment being increased from £1.7 million to £3 million. This raised her total entitlement to £4.4 million, which amounted to 38% of the spouses' combined surplus wealth. The husband would receive £7.1 million or some 62%. In proportion, then, this decision of awarding the wife 38% of the combined wealth is fairly similar to the House of Lords' decision in *White* v *White*[111] that approved the Court of Appeal in England award of 40% of the combined surplus wealth despite the wife here not being the equal business partner as was the case there.

[109] *Supra,* note 2.
[110] *Supra,* note 1.
[111] *Ibid.*

(ii) *Bound by White* v *White*

The Court of Appeal embraced the House of Lords decision in *White* v *White* that it was in any case bound to follow. The so-called 'reasonable requirements' ceiling on the order of adjustment of property interests in 'big money' cases, that was developed mainly by the Court of Appeal, is no longer good law. Thorpe LJ who delivered the main judgment declared:

> [w]e discard the application of the concept of reasonable requirements to establish a ceiling to the wife's award. We discard the discriminatory bias introduced by this court ... . We recognise the wife as well as the husband has a legitimate aspiration to devise a substantial estate at the end of her life. None of these judicially created factors may be used to depress the wife's award.[112]

(iii) *All contributions considered*

Having discarded the ceiling, it follows that the Court of Appeal reiterated that a court should consider all the relevant factors in assessing the appropriate order of adjustment of property. In particular, the spouses' financial and non-financial contributions towards the acquisition of property must be evaluated. That this should be done, especially in view of the discretion the court possesses in the exercise, could, however, introduce substantial variation in courts' assessments with the possibility of producing uncertain results. The decision a court could reach threatens to be highly unpredictable. The Court of Appeal may, however, be regarded to suggest the way to avoid such undesirable development.

(iv) *Realistic assessment of contributions*

It has rightly been observed that if the courts were seriously to consider the spouses' respective contributions this could encourage spouses to argue that their respective contributions have been unequal and that the spouse who contributed more ought to receive more property.[113] It would be lamentable if legal practitioners in England began devising arguments that their client's contribution outweighs his or her spouse's.

[112] *Supra,* note 2, at para 64.

[113] Rebecca Bailey-Harris 'Fairness in Financial Settlements on Divorce' *supra,* note 99, at 201 predicted there is 'scope for legal argument on inequality of contribution' that she lamented is 'scarcely conducive to the non-conflictual resolution of disputes.'

The writer has suggested that this unpalatable scenario can be avoided were courts to adopt a more realistic approach to assessing spouses' contributions during marriage, especially where it has lasted for a reasonable length, so that argument in court would follow accordingly. Of the current Singapore provision of the power to divide matrimonial assets that abandoned the bias favouring financial contribution over non-financial contribution, she suggested:

> It may, perhaps, be unnecessary to analyse the parties' conduct and financial contributions towards the purchase or the family's needs as carefully as the [courts in Singapore] felt required to do in the past. 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.[114]

It was thus suggested that it would suffice if the courts operated on the basis that, within a marriage of reasonable length, there would generally be significant contributions by both spouses so that the norm should be an equal division. In other words, unless a convincing case is made out that one spouse has not made contribution of any nature, and in a marriage of reasonable length it would be exceptional if this were so proven, there should be no need to inquire further into details.

It has been demonstrated that the Court of Appeal of Singapore, which attempted a more detailed assessment under the predecessor provision, arrived at a result that did not vary significantly from the then norm. In a marriage that lasted some nineteen years with one child where the wife worked continuously although she did attend to homemaking and child caring with the assistance of her mother-in-law,[115] the Court of Appeal of Singapore painstakingly reviewed the processes of acquisition to sort out the property that was jointly acquired by the spouses (their former matrimonial home), the properties acquired by the husband's own efforts (an apartment, money in his compulsory savings account and his bank account, his shares and his car) and properties acquired by the wife's own efforts (money in her compulsory savings account, her shares and some jewellery). From this the Court of Appeal decided that the former matrimonial

[114] *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at P959.
[115] *Ng Hwee Keng* v *Chia Soon Hin William* [1995] 2 SLR 231, discussed in *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at C804-812.

home should be divided in proportions of 60:40 in favour of the husband, the husband's assets should be divided in proportions of 80:20 in favour of the husband (the wife becoming entitled to 20% of them through her non-financial contribution to their acquisition) and the wife's assets need not be divided with him (the husband not having become entitled to any proportion thereof for failing to contribute to their acquisition). Working from the values given of the major properties, the writer calculated that this complicated process and series of orders produced the final result where the wife obtained some 35% of the combined wealth of the spouses at divorce,[116] *ie,* within the then norm of 35-45% for the homemaker.[117] The Court of Appeal of Singapore could have done almost as well by directly ordering that the wife of the marriage of such length who also made non-financial contribution by caring for the spouses' child and running their home (although she did had the help of her mother-in-law) should receive no less than the lower end of the norm of 35% of the combined wealth of the marital partners at divorce. In this exercise it may not necessarily be worth the court's while to attempt any particularity in its considerations unless it were something quite out of the ordinary.

Thorpe LJ in the Court of Appeal in England seems to favour the view that consideration of the factors should be more general than particular especially in a marriage of some length. Of the need for realism his Lordship observed:

> It is not even clear who had the idea of embarking upon this trade [that led to the successful business]. It is not surprising that recollections now differ, 35 years or so after the event, and I for my part find it quite impossible upon the evidence to reach any firm conclusion whether the wife's activity ran from 1965 or from a year or so later, and whether it endured until and possibly beyond 1973, or ended effectively in about 1968.[118]

Given that dose of realism it was to be expected that his Lordship opined:

> The decision in *White* v *White*[119] introduced ... [f]airness ... and in its pursuit the reasons for departure from equality will inevitably prove to be too legion and too varied to permit of listing or classification.

[116] See 'Trends and Developments in Singapore Family Law,' *supra*, note 7, at 707-708.
[117] See *supra,* text at note 53.
[118] *Supra,* note 2, at para 11.
[119] *Supra,* note 1.

> They will range from the substantial to the faint but that range can be reflected in the percentage of departure. However it would seem to me undesirable for judges to be drawn into too much specificity, ascribing precise percentage points to the various and often counter-balancing reasons which the facts of the individual cases render relevant.[120]

This penchant for general assessment and avoiding detailed comparison of the spouses' efforts recalls a defining principle in the proper exercise of the power to divide matrimonial assets that the High Court of Singapore set very early on,[121] *viz,* that the power should be exercised in broad strokes by the court assuming a 'broad brush' method to assessing all the factors on the palette. A broad brush achieves as much fairness as may be possible when a marriage fails to live up to the spouses' hopes of it continuing for their entire lives.

Thorpe LJ's view also seems in line with the opinion of Warren Khoo J in a later High Court of Singapore, on appeal,:

> [D]ivision of matrimonial assets is not a science. It is a judicial attempt to divide what was never intended to be divided. There is a touch of artificiality in such cases to use as the starting point ... the amount of money each party has contributed directly towards the acquisition of the home. ... [Division of matrimonial assets] is more a qualitative than quantitative exercise.[122]

Over time, memory fails and evidence may no longer be forthcoming. More importantly, spouses should be discouraged from blowing up their own contribution and downsizing the other's. The way to discourage such dishonourable conduct during the hearing of the application and thus aid its non-confrontational resolution is for the court to desist from attempting specific assessment. The exercise of the power in England will gain from further development of this opinion of Thorpe LJ. If a norm could be developed of the proper division in a marriage of reasonable length, this would be welcome. It is submitted that a norm of 35-40%, such as would explain both *White* v *White* and *Cowan* v *Cowan,* is not the worst to start with.

[120] *Supra,* note 2, at para 53.
[121] *Koo Shirley* v *Mok Kong Chua Kenneth, supra,* note 27.
[122] *Soh Chan Soon* v *Tan Choon Yock* DCA 5017/97, unreported, *supra,* note 61.*Cf Lim Choon Lai (mw)* v *Chew Kim Heng*, *supra*, text at notes 67 and 68.

(v) *Whither equality of division?*

The judgment of Thorpe LJ may be thought weakest in whether the fair order of division in a marriage of reasonable length is equal division. Given that the law in England is in transition between two different concepts on the effect of marriage on spouses' interest in each other's property, it may be too much to expect clearer views at this stage.

His Lordship has clearly embraced the House of Lords' 'yardstick' of equal division with its corollary that any departure from equal division should be for good reasons that are articulated. His Lordship even traces proposals to change the law to follow that in other countries that, to greater or lesser extent, encourage equality of division. These culminated in the Government White Paper *Supporting Families* published in October 1998 of which the most relevant paragraph proposes:

> having dealt with the needs of children and the housing needs of the couple, and having taken account a nuptial agreement, the court would then divide any surplus so as to achieve a fair result, recognising that fairness will generally require the value of the assets to be divided equally between the parties.[123]

This yardstick would unequivocally argue for the wife's award to be raised since the lower court had ordered far short of equal division from the basis of 'reasonable requirements' that is no longer justifiable. Thorpe LJ, however, then somewhat backtracked when his Lordship observed:

> I accept [counsel for the husband's] submission that the ratio of the judgments in *White* is that the judge's objective is not equality but fairness. ... But as Lord Nicholls emphasised fairness is a subjective standard. Individual judges are likely to have widely accepted differing responses to the appeal. ... The decision in *White* v *White* clearly does not introduce a rule of equality. The yardstick of equality is a cross check against discrimination. Fairness is the rule ... .[124]

It is possible to disagree with Thorpe LJ. Lord Nicholls set fairness as the defining principle that underlies the proper exercise of the power. His Lordship can be thought to have gone further in accepting that, generally, the fair decision in a marriage where both spouses expended their best efforts over a reasonable period of years is an equal division. That Lord Nicholls

[123] *Supra,* note 2, at para 28.
[124] *Ibid,* at paras 43, 52 and 53.

did not change the lower court's order giving the wife 40% of the combined wealth may be attributed, one, to an appeal court's traditional hesitation to vary an order arrived at with a dose of discretion unless the order were grossly deviant, two, a proportion of the combined wealth could be unavailable for division for having been given to the husband as a gift from his father and, three, the proportion of 40% of the combined wealth for the wife was already considerable development in such a 'big money' case. Thorpe LJ may be reading too little into the House of Lords' yardstick of equality of division.

His Lordship then discussed what he regarded as 'counter-balancing factors' in *Cowan* v *Cowan* that persuaded him against ordering an equal division for the wife. While it is not in principle wrong to isolate factors that argue against equal division, it is submitted that each of those his Lordship identified can be disagreed with.

His Lordship identified that the wife's 'housing arrangements were seen by the judge to be complete and likely to continue unchanged for the foreseeable future, if not for her life'.[125] The wife did have the good fortune of being allowed to keep the former matrimonial home and a holiday flat in Florida. These properties, however, were retained within the value of the spouses' combined wealth so that her award of 38% includes them. In that regard, they are not a counter-balancing factor as they do not argue that she should receive less. This fact does not reflect on whether it is fair to deviate from the yardstick of equal division. Rather it reflects only on how the wife's entitlement should be achieved from the properties available.

His Lordship then referred to recent business dealings and suggested that the husband should be left with more in order to be able to achieve what he hoped to thus 'it seems to me fair to recognise the husband's continuing need to exercise his business talents [and] give some priority to a choice for the husband either to finance a future business venture alternatively to invest in the development or extension of the two trading companies that he presently owns or controls'.[126] The husband had not argued clearly what his immediate plans were and how much he would require to achieve them. It is submitted that his Lordship may be thought to be bending backwards in making the supposition that the husband will require more of the combined wealth to achieve his immediate business goals. It is a fundamental principle that, on divorce, each spouse picks up his or her own life. Unless the husband made compelling argument for what it takes to finance his immediate business goals, it disadvantages the wife to suppose that she would not need more to pursue her goals.

[125] *Ibid,* at para 65.
[126] *Ibid,* at para 66.

His Lordship then compared the spouses' contributions thus 'fairness certainly permits and in some cases requires recognition of the product of the genius with which one only of the spouses may be endowed'.[127] Even if one accepts his Lordship's finding that the success of the business was due to the husband's creative talents,[128] there are two objections to giving the husband extra credit. One, it distracts from marriage as a partnership of efforts. Lord Nicholls in *White* v *White,* it is submitted, discouraged such discrimination when his Lordship cautioned 'whatever the division of labour ... fairness requires that this should not prejudice or advantage either party when considering ... the parties' contributions.'[129] The Cowans did their personal best in his and her assigned role. When they ended their marital partnership, the fact the Mr Cowan was a brilliant businessman in itself did not justify giving him an extra 24% of their surplus wealth. The objective is not to return to each spouse the proportion he or she helped earn. The second objection is that any distraction from marriage as an equal partnership of efforts will encourage spouses to dishonourably claim to have been the major contributor. Thorpe LJ has set in motion arguments that contributions to business should be seen as genius and greater than contribution to the welfare of the family. This is lamentable. It fails to encourage spouses towards appreciating the equal worth of their separate efforts. The writer has observed of the morality that can be coaxed from this area of law thus:

> [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 [the proper exercise of the power] family law uplifts the whole of society through the cumulative good [that a series of decisions] does. A moral lesson can be learnt from a dissolved marital partnership.[130]

His Lordship then suggested that, although the husband may not have proven that his brother was entitled to a part of the business assets, his suggestion of it should still be considered thus '[t]he judge found the husband

[127] *Ibid,* at para 67
[128] Counsel for the wife argued to the contrary.
[129] *Supra,* note 1, at 989 para D.
[130] *The Family Law Library of Singapore by Leong Wai Kum, supra,* note 5, at P894.

to be not a trustee for this brothers in the legal sense but more as a protector. ... if some misfortune overtook [his brothers] ... the husband would alleviate the crisis as far as money allowed.'[131] This point appears the most curious. Thorpe LJ did not disagree with the lower court's finding. There was no evidence to support that anyone else was entitled to the surplus wealth of the business. There was not even any suggestion of the husband's brothers' imminent financial needs. Yet, his Lordship suggested that there was something worth considering in this speculation that the husband would be a good provider to his brothers. Even if he were minded to behave with such honour, it is hard to appreciate why this should be at some cost to his former wife.

Thorpe LJ then also took account of 'the special characteristics of the pension funds held by the husband and the wife respectively'.[132] It is submitted this consideration is irrelevant for the same reason as the wife's share being partially accounted by two homes is an irrelevant consideration in assessing if the award should deviate from the yardstick of equality of division.[133]

It is submitted that his Lordship had not offered any convincing reason for deviating from the yardstick of equal division. The Cowans had a long successful marital partnership where the wife additionally helped in the early years of the family business. Now that the marital partners are going separate ways, each deserved closer to an equal share of the surplus.

IV. View From Singapore

It is appropriate to end with some observations from Singapore given that the law here had a two-decade head start with regard to what should happen to spouses' property on divorce.

The decisions in *White* v *White* and *Cowan* v *Cowan* are nothing short of remarkable not least for the size of the awards for the claimant wives and in setting, if not a norm, at least a working benchmark of some 38%-40% of combined wealth where the marriage has been successful in continuing for a reasonable number of years producing children. They give further impetus to proposals to change English law to become closer to that of countries that encourage equal division of the surplus wealth at divorce.

To proceed from this transitional stage, it would help if the context in which fairness is to be pursued were made express. The law in Singapore has benefited from the description of marriage as the spouses' equal co-operative partnership of efforts. The law in England, not only of this area

[131] *Supra,* note 2, at para 68.
[132] *Ibid,* at para 69.
[133] See *supra,* text at note 126.

but also in regulating all aspects of the relationship between spouses, will benefit from crystallising erstwhile developments. The law in Singapore has also been rationalised as having incorporated the deferred community of property view so that, on divorce, marriage is rightly accepted to have significant effect on the spouses' interests in each other's property. England may have to engage in similar analysis especially as awards that fulfil the yardstick of equality of division become more common. Orders of division of matrimonial assets in Singapore benefit from the suggestion that there are norms of division. There is a norm in Singapore where the marriage has been of reasonable length especially with children. This would also serve England well. These developments in England are awaited.

For now, it is heartening to note that the bastion of the concept of separation of property has joined other countries in acting to correct the disadvantages this concept works on the spouse who discharges the roles of homemaking and child caring. As the comparative jurists astutely observed, it is to be expected that reasonable people looking at the same problem they face in their own societies will come to roughly the same solution.

LEONG WAI KUM*

* LLB (Hons) Malaya; LLM (Harvard); Associate Professor, Faculty of Law, National University of Singapore.