

The Law in Singapore on Rights and Responsibilities in Marital Agreements

Ms Leong Wai Kum*

Abstract

People, including the soon-to-be married and the already married, have the right to enter agreements with each other. Where spouses are content with the terms they negotiated there is no reason for family law to intervene. At the same time spouses owe one another responsibilities, some of which crystallise only upon their divorce. The law in Singapore balances the interests that arise from both facets of the marital relationship. The law upholds the legality of marital agreements unless they make a mockery of the marital relationship but subjects all of them to the scrutiny of the court, which retains power to make fair financial orders between spouses upon divorce and protect their children. This paper traces current law in Singapore and compares it with law that allows an agreement to displace the court's power.

I Law Clarified

The Court of Appeal, the highest court in Singapore, in *TQ v TR and another appeal*¹ affirmed the legality of a prenuptial agreement on division of matrimonial assets upon divorce. The agreement was executed in the Netherlands between two persons who at that time had no connection with Singapore. Under Singaporean law, a prenuptial agreement is regulated in the same way as any marital agreement formed during the subsistence of marriage.² This marital agreement, relating to the division of matrimonial assets, is subject to the broad discretionary power of the court bestowed by the *Women's Charter* (Singapore, cap 353, 1997 rev ed) ('*Women's Charter*')³ s 112 to order the 'just and equitable' division of matrimonial assets that remain available at the spouses' divorce. By this decision, the

* Professor, Faculty of Law, National University of Singapore. I am grateful for the helpful comments of the anonymous reviewer.

¹ [2009] 2 SLR(R) 961. See Leong Wai Kum, 'Prenuptial Agreement on Division of Matrimonial Assets Subject to Court Scrutiny: *TQ v TR and Another Appeal*' [2009] *Singapore Journal of Legal Studies* 211.

² Family lawyers include prenuptial agreements, formed between spouses-to-be, within the general category of marital agreements despite the marriage not being in existence yet in the former group of agreements. In this paper 'marital agreements' is used as a general inclusive term to refer to prenuptial as well as postnuptial agreements and of the latter, whether formed when the marriage was functioning, divorce was contemplated or during divorce proceedings, unless specified accordingly.

³ As amended, in aspects that are largely irrelevant to the discussion below, by the *Statutes (Miscellaneous Amendments) (No 2) Act 2005* (Singapore). The *Women's Charter* is the main family statute in Singapore. Its somewhat unusual title traces to its enactment as part of the strategy of national reconstruction that the leading political party knew to require the full participation of women in the economy which the abolition of the existing polygamous marriage laws would help encourage. See generally Leong Wai Kum, 'Fifty Years and More of the *Women's Charter* of Singapore' [2008] *Singapore Journal of Legal Studies* 1.

rights and responsibilities of spouses with regard to marital agreements have become more settled.

A Need to Balance Interests

The law regulating marital agreements raises difficult issues. It comprises principles from the common law and statutory provisions: both gathered from at least the law of contract and family law, if not more areas of law. The question: 'what is the effect of a marital agreement on an application for an order of division of matrimonial assets' is thus deceptively simple and needs to be broken up into more easily handled questions. A plethora of interests are engaged by this question and all of them demand consideration. Should the autonomy of spouses, who are undoubtedly adult persons with the requisite capacity to regulate their own affairs, not be fully respected so that it is purely a matter of how to hold them to their agreement? On the other hand, should spouses be held to their agreement if its terms on division of matrimonial assets or maintenance fall short of what developed law would have the court order? Should spouses be allowed to isolate themselves from public regulation of their relationship? These interests can possibly pull in opposite directions.

Even if a court is prepared to enforce the marital agreement this raises contractual law issues involving notoriously complex principles. Is the agreement inherently one that runs against public policy which encourages the continuity of marital relationships for the benefit of spouses and their children and ultimately of general society? How much consideration should be given to whether there was pressure placed on one spouse by the other to accept the terms? Should independent legal advice have been given to each spouse before they concluded their agreement? What is the significance of an attempt by spouses to keep their agreement out of the control of the courts?

This paper attempts to organise the answers to these legal questions by looking at the rights spouses or would-be spouses possess and the responsibilities each owes the other, the sum of which forms the law regulating marital agreements in Singapore.

II General Legal Regulation of the Relationship Between Husband and Wife

The legal regulation in Singapore of spouses, at the general level, sets the context for the following discussion. The regulation of marital agreements is but one specific aspect of this area of the law. Section 46(1) of the *Women's Charter*, 'Rights and duties of husband and wife' provides:

Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.

The provision lays down what it should mean to be married. Despite the provision not providing a sanction for its breach,⁴ it is powerful in conveying the legal view of the marital relationship. The provision exhorts husband and wife to cooperate both for their

⁴ The provision is thus, in the language favoured by classicists, of imperfect obligation.

mutual benefit and in caring and providing for their children. The law encourages the ideal and cajoles spouses towards it to the extent that is practicable. The law, however, cannot possibly demand the ideal of the spouses all of the time. Where the law desists from enforcement, therefore, this is because enforcement is impossible or because any attempt at enforcement might do more harm than good. The practical limits of enforceability do not detract from the value of espousing the ideal and cajoling spouses towards it.⁵ The ideal is for a person to treat his or her spouse with all reasonable consideration since doing so is for their mutual benefit.

Regulation of the marital relationship by judicious expression of expectations may well be the ideal form of law.⁶ Family law, which regulates family members' behaviour towards each other, is more amenable to 'soft regulation' than other areas of law. This is because familial relationships are intricate, deep and may be of long duration. The classicist, who believes that a legal rule should be an enforceable command backed by sanction for breach and who therefore frowns upon a statutory provision of unenforceable expectations, may be viewing the law using too narrow a lens. It is appropriate for family law to regulate spouses by espousing the moral behaviour of each to the other.

The starting point is that there is every reason for the law to respect the spouses' continued autonomy as adults to design their life together in a way that suits them. In this author's view, there ought to be few rules that render marital agreements unlawful. We begin with the purely contractual law perspectives.

III No Intention between Spouses to Create Legal Relations

The English decision of *Balfour v Balfour*⁷ decided that, with 'domestic' agreements between spouses and family members, the common law does not presume that the parties intended, by the agreement, to create legal relations with one another. This continues to represent Singaporean law. Singapore received the common law as its basic law in 1826 and, until a particular rule is abolished or substituted by statutory provision to the contrary, it remains in force. The courts in Singapore have not decided that this presumption of lack of intent to create legal relations is obsolete.

It is not particularly difficult, however, to find evidence from which the court may infer that the spouses or would-be spouses or family members intended to create legal relations. For example, it may be that the spouses had seriously directed their minds to their agreement or that the spouses formalised their agreement in writing or that the spouses engaged a lawyer to help them reach agreement. Any one of these could form the basis for a finding by the court of the spouses' intention to create legal relations. Thus although the intention is not presumed it can readily be found where the tenor of the marital agreement is sufficiently serious.

⁵ Few other legal systems within the common law tradition have an equivalent of such a statutory provision that pronounces the expectations that the law makes of spouses with regard to their proper behaviour towards each other. Classical common law deems the role of law within the regulation of relationships as only to resolve disputes. A provision such as the *Women's Charter* s 46(1) reflects the belief that family law should play a wider role including guiding spouses towards proper behaviour between themselves.

⁶ See Leong Wai Kum, 'Supporting Marriage through Description as an Equal Partnership of Efforts' in Andrew Bainham (ed), *International Survey of Family Law 2002* (Jordan Publishing Ltd, 2002) 379.

⁷ [1919] 2 KB 571.

IV Lawfulness of Marital Agreement

To have any effect a marital agreement must not be regarded as unlawful. The English view in this regard is less clear than the view in Singapore. It treats prenuptial agreements more warily than postnuptial agreements.

In *MacLeod v MacLeod*⁸ the Privy Council on appeal from the Isle of Man upheld the common law principle which regards prenuptial agreements except those classified as ‘settlements’ (that is, that provide for property or financial provision during the subsistence of marriage rather than upon the spouses’ divorce) as against public policy. Baroness Hale, delivering judgment for the Privy Council in *MacLeod v MacLeod* acknowledged that the legal view was formed for a different era but nevertheless decided: ‘it is not open to [us] to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense.’⁹ Postnuptial marital agreements do not carry the same stigma of unlawfulness. This represents the law in England as well.

The current state of the law in England has become even less clear since the decision of the Court of Appeal in *Radmacher v Granatino*¹⁰ where the three members of the court were, with varying degrees, less insistent on prenuptial agreements being against public policy.¹¹ Whatever the legal view may be, the judges were prepared to consider the terms of the prenuptial agreement in making their financial orders. Although an appeal from the Court of Appeal’s decision to the Supreme Court is planned,¹² the law in England may only become settled after the Law Commission of England and Wales completes its review of the law relating to marital property agreements within the next couple of years¹³ when it may well recommend change from the unsettled view of prenuptial agreements.

A *Lawful Unless Mock Marital Relationship*

In 1993, the Court of Appeal in Singapore settled that marital agreements are not, whether postnuptial or prenuptial, against public policy. *Kwong Sin Hwa v Lau Lee Yen*¹⁴ decided that marital agreements are not ‘inherently wrong’ and that only very few will fall foul of the law.

The spouses had made a prenuptial agreement not to consummate their Registry solemnisation of marriage until they had performed Chinese rites of marriage. Despite the Registry of Marriages’ solemnisation being the legal ceremony of marriage under the *Women’s Charter*,¹⁵ there is widespread belief among persons intending marriage that they are not ‘properly’ married until they perform the Chinese rites, including holding the traditional wedding dinner. In this case, the Chinese rites were never held. The husband applied for a judgment of nullity alleging that the wife’s refusal to perform these rites

⁸ [2010] AC 298.

⁹ *Ibid* [31].

¹⁰ [2009] 2 FLR 1181.

¹¹ See Joanna Miles, ‘*Radmacher v Granatino* [2009] EWCA Civ 649: Upping the Ante-nuptial Agreement’ (2009) 21 *Child and Family Law Quarterly* 513, 519–24.

¹² At the time of writing, the appeal has yet to be heard.

¹³ See Law Commission, *Tenth Programme of Law Reform*, House of Commons Paper No 605, Session 2007–08 (2008) 8 [1.17]. The review began in September 2009 and is expected to be completed by late 2012.

¹⁴ [1993] 1 SLR(R) 90.

¹⁵ See the *Women’s Charter* ss 22, 23.

amounted to willful refusal to consummate their marriage. As his evidence of her willful refusal he relied on their prenuptial agreement.

To be entitled to use the agreement to found his case, the Court of Appeal had to find the agreement lawful. LP Thean J, delivering the judgment of the Court, stated:

There is nothing inherently wrong in the parties, who are about to be married or are seriously contemplating marriage, agreeing, if they so wish, on various matters which are to take place after their marriage, eg where and when they would live as man and wife, when they would have sexual relations and when, if at all, they would have a child or children and how many children they would have. By parity of reasoning, it is equally unobjectionable if the parties agree that they would cohabit as man and wife and have sexual relations only after certain customary rites are performed, provided always such customary rites are not illegal, obscene, immoral or contrary to public policy. Again, there is nothing inherently wrong for such parties to come to an agreement or understanding pertaining to their marital relations with a view to their complying with the law and also with the requirement of their church or temple or their custom. We do not see how such agreement would detract from any of their obligations under s [46(1) of the *Women's Charter*]. ... [T]he law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, so long as such agreement does not seek to enable them to negate the marriage or resile from the marriage ...¹⁶

A very high threshold is set by the test of 'negate the marriage or resile from the marriage' before a prenuptial agreement is held unlawful. It would be a rare exception for an agreement to fall foul of this threshold. The Court of Appeal in *Kwong Sin Hwa v Lau Lee Yen*¹⁷ cited the English High Court's decision in *Brodie v Brodie*¹⁸ as an illustration of a prenuptial agreement falling foul of this high threshold. In that case, the spouses entered an agreement that they would never commence marital cohabitation as man and wife but would instead continue to live separately as unmarried persons. This kind of agreement must surely be most exceptional. LP Thean J observed of this decision:

The *Brodie* prenuptial agreement was intended to enable the husband to resile from the marriage and evade his marital obligations altogether. That agreement if implemented and enforced, would make a mockery of the law regulating marriages. Obviously such an agreement is unquestionably against public policy and void.¹⁹

Most marital agreements including prenuptial agreements do not mock the law or the marriage and thereby do not fall foul of the test. By the decision in *Kwong Sin Hwa v Lau Lee Yen* the highest court in Singapore put to rest the suggestion that a prenuptial agreement, short of denying the marital relationship altogether, is unlawful.²⁰ There is no reason why the same is not true of all marital agreements.

The Court of Appeal in *TQ v TR and another appeal*,²¹ also faced with a prenuptial agreement, affirmed this principle. The Dutch man and Swedish woman, upon their decision

¹⁶ [1993] 1 SLR(R) 90 [30] and [38].

¹⁷ *Ibid.*

¹⁸ [1917] P 271.

¹⁹ [1993] 1 SLR(R) 90 [22] (citations omitted).

²⁰ *Ibid.*

²¹ [2009] 2 SLR(R) 961.

to get married, formed a prenuptial agreement some 16 years before it came before the courts in Singapore. It was prepared by a Dutch civil law notary in the Netherlands and executed following the requirements of the law in the Netherlands. The agreement was interpreted by the Court of Appeal to provide *inter alia* that there was to be no division of matrimonial assets.²² The couple married in the Netherlands in 1991 and lived in London until 1997 during which time they had three children. From late 1997 the family moved to Singapore when the husband obtained a job there. Unfortunately the marriage deteriorated. The wife applied for divorce in Singapore in 2004. They had been married for some 14 years before their divorce was granted in 2005.

Upon ordering an interim judgment of divorce, the judge decided the ancillary matters as follows:

- (a) Custody of the children (who were aged 7, 9 and 12 years at the time of the Court of Appeal's judgment)²³ to be jointly held. The wife was to have care and control of the children but the husband was to have liberal access to the children.
- (b) Husband to pay S\$1200 a month for the maintenance of each child.
- (c) Husband to pay a lump sum of S\$150 000 for the wife's maintenance.
- (d) There would be no order as to the division of the matrimonial assets.²⁴

Both parties appealed. The Court of Appeal varied the orders to some extent²⁵ but approved the lower court's decision not to make an order for the division of matrimonial assets. Of the legality of the prenuptial agreement, the Court was content to follow its earlier decision in *Kwong Sin Hwa v Lau Lee Yen*.²⁶ The agreement not to divide matrimonial assets could not be regarded as an attempt by the parties to negate the marriage or to resile from the marriage and, therefore, was lawful.²⁷

B Law Unitary in Treating All Marital Agreements Alike

Indeed the Court of Appeal in *TQ v TR and another appeal* repeated at various junctures that the law in Singapore treats all marital agreements, whether prenuptial or postnuptial and, if the latter, whether formed during the subsistence of marriage, in contemplation of divorce or even during the course of matrimonial proceedings for termination of marriage, alike.²⁸ In contrast, as has been discussed earlier, the law in England remains somewhat unsettled. It remains wary of prenuptial agreements and yet the courts can give some effect to them when

²² It is not impossible to disagree with the interpretation of the agreement. See generally Leong Wai Kum, above n 1, 213–14. For the purposes of this paper, the court's interpretation is accepted without challenge.

²³ *TQ v TR and another appeal* [2009] 2 SLR(R) 961 [16]–[19].

²⁴ *Ibid* [5].

²⁵ The court issued a further order directing the husband to open a bank account in Singapore in the name of the wife's solicitors and transfer into it S\$380 000. It was found that he had sent this money out of Singapore while the matrimonial proceedings were pending. He claimed to have put the money into a trust in Mauritius for maintenance of the children. The court also directed that both parties shall be at liberty to draw on the account for all reasonable expenses necessary for the welfare and education of the children. *Ibid* [7].

²⁶ *Ibid* [53]–[54].

²⁷ *Ibid* [54].

²⁸ *Ibid* [63], [68], [70], [73].

making orders in regards to property or financial provision upon divorce.²⁹ To the extent that the law in Singapore is unitary in its approach to marital agreements, whether prenuptial or postnuptial, the law is clearer than that in England and this is welcomed.

V Fulfil All Contractual Requirements

For a marital agreement to have effect, the courts in Singapore have fairly consistently required that it should meet with all the requirements of the law of contract. It must be valid and subsisting at the time it comes before the court.

The High Court's decision in *Chia Hock Hua v Chong Choo Je*³⁰ may represent the most detailed discussion of the contractual perspective of a marital agreement. The husband had paid the wife S\$30 000 which the wife admitted she received. Their disagreement was as to the effect of this payment. The husband claimed that the payment was made in full and final settlement of their financial responsibilities. The wife disputed this. She claimed she was tricked into signing the agreement. She therefore made an application to the court for an order that her husband continue to provide reasonable maintenance to her. She asked the court to view their agreement as unenforceable for a number of reasons.³¹ The wife's claim was dismissed by the High Court. It had no difficulty finding that the well-educated wife was not tricked into entering the agreement.³² The High Court approved of the marital agreement and dismissed the wife's application for an order of maintenance.³³

Chia Hock Hua v Chong Choo Je decided that a marital agreement, if it is to have any effect, must satisfy the requirements of contract law.³⁴ An agreement that fails to do so has no place in a court of law. Amarjeet Singh JC summarised some of the issues that could undermine any agreement as follows:

The court must be satisfied that the parties were ad idem and whether the question of the benefit of legal advice was necessary if the case was a complicated one: *Peacock v Peacock* [[1991] 1 FLR 324]; whether there was extreme pressure applied by the husband resulting in the wife accepting an unsatisfactory financing agreement: *Camm v Camm* [(1983) 4 FLR 577] whether unforeseen circumstances had arisen which made it impossible for the wife to work or otherwise maintain herself: *Wright v Wright* [1970] 3 All ER 209; whether the agreement had been reached at arm's length and the parties had been separately advised which facts if found would constitute prima facie evidence of the reasonableness of the terms: *Dean v Dean* [1978] 3 All ER 758; whether poverty and ignorance (20th century euphemism for 'a member of the lower

²⁹ See *Crossley v Crossley* [2008] 1 FLR 1467, where the English Court of Appeal accorded a prenuptial agreement 'magnetic importance' in an extremely short marriage between two persons who were independently wealthy. Their agreement was that each would walk from the marriage only with what he or she brought into it. See also *Radmacher v Granatino* [2009] 2 FLR 1181, involving an 8-year marriage between a German heiress and French financial analyst who chose to become a bioscience researcher. In that case, the English Court of Appeal varied the order of the lower court on the grounds that it had given insufficient consideration to the spouses' prenuptial agreement. The effect of the variation was that the financial relief to the husband was to be limited to improving his capacity as a carer of their two daughters. See also *MacLeod v MacLeod* [2010] 1 AC 298, in which the Privy Council accorded significance to a postnuptial marital agreement that was a variation of the spouses' prenuptial agreement.

³⁰ [1994] 3 SLR(R) 159.

³¹ *Ibid* [10].

³² *Ibid* [12].

³³ *Ibid* [22] and [23].

³⁴ *Ibid*.

income group' and 'less highly educated') produced an unfair and unacceptable arrangement for one side: *Fry v Lane* (1888) 40 Ch D 312 applied in *Backhouse v Backhouse* [1978] 1 WLR 243; whether on the construction of the agreement there was a good and effective consent: *Carter v Carter* [[1981] Fam 31], applied in *Cook v Cook* (1984) FLR 446; whether there was mistake, duress or undue influence such as the husband being in a superior bargaining position and he took an unfair advantage by exploiting his position and the agreement was entered into without the wife having full knowledge of all of the relevant facts and or legal advice; the weight to be given to the conduct of the parties and circumstances of the case was considered by Ormrod LJ who summed up the above stated considerations in *Edgar v Edgar* [1980] 1 WLR 1410 (Court of Appeal) and added that it may well be that there may be other considerations which affect the justice of the case.³⁵

In principle, then, anything that affects the validity of an agreement under the law of contract is relevant whenever a marital agreement is put in evidence in court. It is submitted, however, that such an approach requires the court to consider the copious arguments on both sides. Even where the agreement is contractually sound it remains subject to the court's scrutiny (as will be discussed below).³⁶ As there is this degree of court control over the agreement, it will be suggested below that it may be unnecessary to run through all the issues within contract law before the court gives consideration to the marital agreement.³⁷

The Court of Appeal in *TQ v TR and another appeal* affirmed this somewhat conservative approach.³⁸ The prenuptial agreement was executed in the Netherlands between a Dutch man and his Swedish fiancé who intended to set up matrimonial home after marriage in England. These connections with foreign legal systems raised issues relating to choice of law. It suffices for present purposes to note that the Court of Appeal found Dutch law to be the proper law of the contract³⁹ and that, by the substantive requirements of Dutch law, the agreement was validly formed and remained subsisting at the time it came before the courts in Singapore.⁴⁰ The Court of Appeal observed that, had there not been foreign elements so that the agreement was completely local, the question would have been whether there was full compliance with the requirements of valid formation of contract under the law in Singapore.⁴¹

A *Less Conservative Approach*

There has, however, been a decision of the High Court in Singapore that is slightly more bold in its approach. In *Tan Siew Eng (alias Tan Siew Eng Irene) v Ng Meng Hin*⁴² the spouses had made an agreement that was expressed as full and final settlement of their financial responsibilities. The husband claimed that they had mutually repudiated the agreement. The High Court agreed. Despite so finding, Woo Bih Li J decided that the substantive terms in the marital agreement provided for a 'just and equitable' division of the

³⁵ Ibid [17].

³⁶ See below under 'VII: Agreement Subject to Scrutiny'.

³⁷ See below under 'B: Suggestion of Simpler Approach Acknowledged but not Accepted by Court'. [2009] 2 SLR(R) 961 [31]–[37], [94]–[97].

³⁸ Ibid [32]–[34], [41].

³⁹ Ibid [37].

⁴⁰ Ibid [42].

⁴¹ [2003] 3 SLR(R) 474.

⁴² [2003] 3 SLR(R) 474.

spouses' matrimonial assets.⁴³ This being so, the judge was content to make an order concerning the division of the spouses' matrimonial assets by following the substantive terms in their agreement. His Honour made clear, however, that if the substantive terms were not 'just and equitable' he would have had no qualms ignoring the repudiated agreement altogether. Woo Bih Li J stated:

In the circumstances, although I had concluded that the Settlement Agreement was no longer contractually binding on the parties, I was of the view that I could and should still take it into account. After all, the general guiding principle is a division that would be just and equitable in all the circumstances. Both parties had stressed that the Settlement Agreement had been reached after extensive negotiations. This was not a case where either party had claimed to be misled into entering into the Settlement Agreement, although the husband stressed that he had entered into it to escape from the mental distress caused by the wife and despite advice from his own solicitors. However, I was of the view that while the husband may have genuinely wanted to escape from the mental distress caused by the wife, he was and is a tough and shrewd businessman who would not have put himself in such a disadvantageous position of keeping only 5.6% of the matrimonial assets for himself and his other family in Indonesia. Furthermore, the advice of his solicitors then would have probably been on the assumption that he had disclosed all his assets.

In the circumstances, I was of the view that the terms in the Settlement Agreement were just and equitable and I made an order following the terms of the Settlement Agreement, where they were still applicable, and taking into account any payment which the husband had already made thereunder before he terminated it.⁴⁴

It is submitted that since every marital agreement remains subject to the scrutiny of the court, the approach of the judge was not only justifiable but may be more practical.⁴⁵ There is no reason why a court cannot work from credible evidence of some agreement between the spouses. The more important consideration surely is whether such agreement conforms to developed law of what is the just and equitable division of matrimonial assets.

The Court of Appeal in *TQ v TR and another appeal* did not disapprove of *Tan Siew Eng (alias Tan Siew Eng Irene) v Ng Meng Hin* but observed that it will not be the normal approach.⁴⁶ Andrew Phang Boon Leong JA, delivering the judgment of the court, left some room for variation from the norm. He stated:

[H]aving regard to the fact that the court is not dealing with commercial contracts as such, we are of the view that the court does retain a residuary discretion, even in a situation where the prenuptial agreement concerned does not comply with one or more of the legal doctrines and requirements under the common law of contract, to give some weight to that agreement ... However, we envisage that the exercise of such residuary discretion will, by its very nature, occur only in very limited circumstances. ... Looked at in this light ... the decision in *Tan Siew Eng* can be viewed as a specific

⁴³ Ibid [43].

⁴⁴ Ibid [42]–[43].

⁴⁵ For further discussion on this point, see part immediately below.

⁴⁶ [2009] 2 SLR 961(R) [99].

application of this residuary discretion in what was ... a much less egregious situation.⁴⁷

The norm, however, is that the agreement must meet with the requirements of the law of contract and remain subsisting. Failing that, the agreement will not receive any consideration by the court.⁴⁸

Spouses thus have a right to enter agreements. They are adults of full legal capacity upon marriage⁴⁹ and there is no reason why the law should not accord them the same right available to any person of full legal capacity to make binding agreements between themselves to regulate one or more aspects of their lives together.

B *Suggestion of Simpler Approach Acknowledged but not Accepted by Court*

The writer has previously suggested a simpler approach to the contractual issues within marital agreements.⁵⁰ Under this approach, no marital agreement should ever be directly enforced by a court. Respect for the spouses' autonomy only requires that they be permitted to make agreements that satisfy both parties so that each fulfils his or her obligations under the agreement. Where either party becomes dissatisfied with the agreement it no longer serves the purpose of harmoniously regulating their relationship. A court should not proceed to consider whether to enforce its terms. The spouses should instead turn to the default law and apply for an order of division of matrimonial assets or maintenance, as the case may be. In making such an order the court may consider the marital agreement but is not bound by it. This approach would save the court from the considerable effort of addressing all the contractual issues either party chooses to raise. The court could be spared this effort since, whether or not it finds a contractual flaw, it may still take the substance of the terms of the marital agreement into consideration when making its financial order. The approach may be thought to be the most efficient compromise that respects the spouse's autonomy to make agreements but at the same time upholds principles of family law regarding what are fair financial orders between them.

As long as some aspects of the legal regulation of marital agreements remain in transition,⁵¹ the best approach may well turn out to be to allow family law to play the guiding role. As the Court of Appeal in *TQ v TR and another appeal* affirmed that every marital agreement is ultimately subject to the scrutiny of the court⁵² (and this is discussed in detail below) having less concern for contractual flaws may be even more attractive now. The court in *TQ v TR and another appeal* acknowledged that the writer's suggestion has much force but that, for the moment, it preferred the more conservative approach where all contractual requirements must fully be complied with.⁵³

⁴⁷ Ibid [100] (emphasis altered) (citations omitted).

⁴⁸ Ibid [105].

⁴⁹ For the requirements of the law in Singapore on capacity to marry, see generally the *Women's Charter* pts II, III, especially ss 5, 9, 10, 12.

⁵⁰ See Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) 755–6.

⁵¹ For a general discussion of the issues, see Debbie Siew Ling Ong, 'When spouses agree' (2006) 18 *Singapore Academy of Law Journal* 96.

⁵² [2009] 2 SLR(R) 961 [104].

⁵³ Ibid [99]–[100].

C All Options Open to Court

In preserving the full contractual analysis of marital agreements, the Court of Appeal in *TQ v TR and another appeal* has, thereby, preserved the whole gamut of options available in resolving the spouses' dispute over their agreement. A court may choose to enforce an agreement sought by one spouse. The Court of Appeal in Singapore in 1992 in *Wee Ah Lian v Teo Siak Weng*,⁵⁴ faced with a marital agreement made in contemplation of divorce that the court found to be comprehensive, enforced the relevant clause. A court may also dismiss the application for a property or maintenance order so that effectively the parties are left to their marital agreement. The High Court in Singapore in 1993 in *Wong Kam Fong Anne v Ang Ann Liang*,⁵⁵ faced with a comprehensive marital agreement made in contemplation of divorce that it found to be fair in the circumstances, chose this route. A third option is to record the terms of the marital agreement as a consent order. In so doing the agreement is morphed into a court order. The advantage of turning the marital agreement into a consent order is that the court's considerable powers of enforcement thereby become available to the spouse who needs to access them.

The writer regards the final fourth option, viz the court exercises the power bestowed upon it and makes the order applied for while taking consideration of the substantive terms of the marital agreement, as ideal. The High Court in Singapore in 2003 in *Tan Siew Eng (alias Tan Siew Eng Irene) v Ng Meng Hin*⁵⁶ held that, where a court approves of the substantive terms in the marital agreement concerning the division of property, it may choose to make an order concerning the division of matrimonial assets that follows the terms in the marital agreement. In that case, the lower court had found the marital agreement was not mutually repudiated. Woo Bih Li J disagreed and yet the judge ultimately decided 'the terms in the Settlement Agreement were just and equitable and I [make my court] order [of division of matrimonial assets] following the terms of the Settlement Agreement'.⁵⁷ It is true, of course, that there being no longer an agreement in existence, the High Court could technically no longer incorporate it into a consent order. It is, however, submitted that the significance of Woo Bih Li J's decision transcends this technicality. Making a court order following the terms of a 'just and equitable' marital agreement may, generally, be the best response by a court.

VI Attempt to Oust the Jurisdiction of the Court

It is clear that spouses do not have the right to exclude the court's powers. The House of Lords in *Hyman v Hyman*⁵⁸ held that no one, including spouses, may by private agreement oust the jurisdiction of the courts. In that case a husband agreed in a Deed of Separation to give his wife a fairly large capital sum as well as a weekly payment. In return he was to be left to continue in adultery and she was not to go to the courts and obtain an order of maintenance against him. He kept up his weekly payments to her. A couple of years later the law of divorce in England changed so that the wife could apply for a judgment of divorce based simply on the husband having committed adultery. When the wife applied for divorce

⁵⁴ [1992] 1 SLR(R) 347.

⁵⁵ [1992] 3 SLR(R) 902.

⁵⁶ [2003] 3 SLR(R) 474.

⁵⁷ *Ibid* [43].

⁵⁸ [1929] AC 601.

she became entitled to apply for an order of maintenance. The wife did so apply and obtained a judgment for divorce. Then, despite agreeing never to do so, she applied for an order of maintenance. The House of Lords was unanimous in deciding that the clause in which she agreed never to apply to the courts for maintenance could not be upheld.

The High Court in Singapore in *Wong Kam Fong Anne v Ang Ann Liang*⁵⁹ adopted this view. In this case, the marital agreement was clearly negotiated through solicitors and contained two clauses that spelt out in some detail that the clauses would survive any court judgment.⁶⁰ Of whether the clauses bound the court's powers, Michael Hwang JC stated:

It was therefore clear that, notwithstanding the terms of cll 12 and 13 of the deed of separation, I was able to exercise the powers of the court under [the *Women's Charter* s 112 to make an order for the division of matrimonial assets between them]. The question was whether I should do so in the circumstances of this case, since s [112] is not an imperative section.⁶¹

VII Agreement Subject to Scrutiny

The Court of Appeal in *TQ v TR and another appeal*⁶² decided that a core principle of the law in Singapore is that a marital agreement, whether prenuptial or postnuptial and whether providing for the division of matrimonial assets or maintenance for the former wife or any other matter, is always subject to the scrutiny of the court. The agreement before the court was that there shall be no division of matrimonial assets. The court decided that an agreement is only one of the factors it should consider when making an order for the 'just and equitable' division of the spouses' matrimonial assets upon their divorce.⁶³ With regard to this degree of control by the court over the terms of a marital agreement, Andrew Phang Boon Leong JA observed that the law in England is in tandem with the law in Singapore. He stated:

The English position also allows the court to consider a prenuptial agreement as a factor in arriving at its decision with respect to the division of matrimonial assets pursuant to [*Matrimonial Causes Act 1973* (UK) c 18, s 25] which requires, *inter alia* (and like [the *Women's Charter* s 112(2)]), the court 'to have regard to all the circumstances of the case'.⁶⁴

It is within this core principle that the spouses' mutual responsibilities are upheld. The core principle applies whether the marital agreement, prenuptial or postnuptial, relates to the division of matrimonial assets, the maintenance of the former wife or the custody (or care and control) of children.

⁵⁹ [1992] 3 SLR(R) 902.

⁶⁰ *Ibid* [20].

⁶¹ *Ibid* [24].

⁶² [2009] 2 SLR(R) 961 [61], [63], [67], [70], [73]–[74], [75], [103]–[104].

⁶³ *Ibid* [103].

⁶⁴ *Ibid* [79]. See also *Crossley v Crossley* [2008] 1 FLR 1467; *Radmacher v Granatino* [2009] 2 FLR 1181; *MacLeod v MacLeod* [2010] 1 AC 298.

A Agreement Relating to the Division of Matrimonial Assets

Section 112(1) of the *Women's Charter* provides that upon awarding a judgment of divorce the court 'shall have power ... to order the division between the parties of any matrimonial asset ... in such proportions as the court thinks just and equitable.' Section 112(2) sets out that:

In deciding whether to exercise its powers under subsection (1) and, if so, in what manner [the court shall] have regard to all the circumstances of the case, including ... (e) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce.

The power of the court to order the division of matrimonial assets remaining at the time of divorce in proportions between the spouses that are 'just and equitable' was bestowed upon the courts in 1980.⁶⁵ A huge body of law has developed in respect of this power over the past 30 years.⁶⁶ The courts have consistently noted the breadth of their discretion to achieve fairness between the spouses and have striven to give due credit to all contributions, financial as well as non-financial, that the spouses made for their mutual benefit whether they increased the family's wealth and property holding or improved the welfare of the marital union and provided care for the children.⁶⁷ In the light of that body of law, it makes not one iota of difference that the *Women's Charter* s 112(2)(e) refers to agreements made in contemplation of divorce. The court, being required to give due consideration to all the circumstances of the case, must consider any relevant marital agreement, prenuptial or postnuptial.

The Court of Appeal in *TQ v TR and another appeal* affirmed that courts should uphold the responsibility of spouses to achieve a fair division of matrimonial assets upon divorce.⁶⁸ Spouses discharge their mutual responsibilities when they enter a marital agreement that is fair in giving due credit to all kinds of contributions each spouse has made during the course of their marital relationship. The fairest agreements may not even come before the courts as the spouses voluntarily perform their bargain. Of those that do come before the court, where the agreement is fair enough it will receive due consideration by court.⁶⁹ Indeed the court may simply make an order regarding the division of matrimonial assets following the terms of a fair marital agreement.⁷⁰ Of the wife's appeal against the decision not to order the division of their matrimonial assets, Andrew Phang Boon Leong JA said:

In agreement with the Judge [of the lower court], we made no order as to the division of matrimonial assets. For the reasons set out below ... we decided that, given the pivotal importance of the Agreement as a factor to be taken into account in the context

⁶⁵ By the *Women's Charter (Amendment) Act 1980* (Singapore).

⁶⁶ See, eg, Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2007) 529–795.

⁶⁷ See, eg, *Koo Shirley v Mok Kong Chua Kenneth* [1989] 1 SLR(R) 244; *Central Provident Fund Board v Lau Eng Mui* [1995] 2 SLR(R) 826; *Yeong Swan Ann v Lim Fei Yen* [1999] 1 SLR(R) 49; *Lim Choon Lai v Chew Kim Heng* [2001] 2 SLR(R) 260; *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 520.

⁶⁸ [2009] 2 SLR(R) 961 [28], [73], [109].

⁶⁹ *Ibid* [88], [91], [100], [102].

⁷⁰ *Ibid* [106].

of the division of matrimonial assets, each party could keep whatever assets he or she had brought into the marriage.⁷¹

Every decision on what order should be made regarding the division of matrimonial assets is, however, somewhat unique so that its result may be less useful in precedential value than the principles laid down. Of the result reached in *TQ v TR and another appeal*, Andrew Phang Boon Leong JA stated:

In the circumstances, it would, in our view, be neither just nor equitable for the Wife to now ask the court to allow her to evade her responsibilities under the Agreement. ... [T]o hold otherwise may encourage forum shopping by those who wish to avoid the enforceability of their respective prenuptial agreements in their home countries. Further, the Wife's argument centring on the length of time since the making of the Agreement cannot be, in and of itself, a reason for disregarding it ... As (if not more) importantly ... the Husband asserted that he had no assets, and the Wife was unable to adduce any substantive proof to the contrary.

[E]ach case will obviously depend on its own facts and it would therefore be inappropriate to draw any general principles from the actual decision in the present appeal ...⁷²

TQ v TR and another appeal, the first decision on a prenuptial agreement relating to division of matrimonial assets, shows the law in Singapore to respect the autonomy of spouses where they mutually agree while, where they are no longer in mutual agreement, to hold them to their financial responsibilities to each other. There have been decisions on postnuptial agreements where the courts have decided to similar effect.

In *Wee Ah Lian v Teo Siak Weng*⁷³ the Court of Appeal faced a postnuptial marital agreement that had, indeed, been made in contemplation of divorce. The court also made reference to its power of control. M Karthigesu J, delivering the judgment of the court, opined:

We must still decide whether in the exercise of our discretion under [the *Women's Charter* s 112] we ought to uphold the settlement ...

In our view, it is incumbent on the court to see that these provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce, and the same would apply where the court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the court's intervention.⁷⁴

⁷¹ Ibid [28].

⁷² Ibid [109]–[110]. It should be noted that in the passage extracted above, Andrew Phang Boon Leong JA referred to his earlier comments that the wife in *TQ v TR and another appeal* had been unable to adduce credible evidence to support her claim that the couple had matrimonial assets at the time of divorce. His Honour had earlier observed that '[in] any event, we noted that the issue might be academic for the parties concerned simply because the Husband asserted that he had no assets, and the Wife was unable to adduce any substantive proof to the contrary': at [28]. The observations of the court of the law regulating marital agreements may technically be obiter dicta as, on the basis that there were no proven matrimonial assets, the only possible court order was that there would be no division of matrimonial assets.

⁷³ [1992] 1 SLR(R) 347.

⁷⁴ Ibid [51]–[52].

Upon finding that the postnuptial marital agreement made provision for a fair division of the spouses' matrimonial assets, the court approved of the agreement and in consequence dismissed the husband's application for a court order. Upon such dismissal, these parties were left to the agreement they had earlier entered.

In *Wong Kam Fong Anne v Ang Ann Liang*⁷⁵ the High Court in Singapore also considered a postnuptial marital agreement made in contemplation of divorce. The court also found this agreement to make fair provision for the division of the spouses' sole matrimonial asset. Of what to do about the husband's application for an order for the division of matrimonial assets, Michael Hwang JC decided:

I found the husband's grounds for invoking s [112] somewhat weak. ... Put in a nutshell, the position was that, eight years ago, the parties agreed on a division of assets and to go their own financial ways. The court was now being asked to reopen the issue on the ground that one of the parties had not honoured the terms of the settlement. There was some evidence that the wife had not adhered strictly to the terms of the deed. If that were true, the remedy should have been for the parties affected by the breach (whether the husband or the children) to take appropriate legal action in respect of their rights under the deed, and not for the husband to disclaim the settlement so many years after it had been entered into and acted upon. Whatever the husband's complaints in the past, he did not appear to have taken the position that the terms of the deed were no longer applicable until these proceedings began, and I felt that this was far too late.

Accordingly, I declined to exercise my powers under s [112] in respect of the matrimonial home.⁷⁶

In *Tan Siew Eng (alias Tan Siew Eng Irene) v Ng Meng Hin*, discussed earlier, the High Court was impressed enough with the fairness of the postnuptial marital agreement that, despite it having been mutually repudiated, the court made an order for the division of matrimonial assets following the terms of the agreement.⁷⁷

B Agreement Relating to Maintenance of Wife upon Divorce

Upon divorce the *Women's Charter* s 113 empowers the court to order a husband to continue to provide maintenance to his former wife.⁷⁸ Section 114(1) continues '[i]n determining the amount of any maintenance ... the court shall have regard to all the circumstances of the case.' The High Court in Singapore in *Quek Lee Tiam v Ho Kim Swee*⁷⁹ decided that the objective the court should aim for is the 'financial preservation' of

⁷⁵ [1992] 3 SLR(R) 902.

⁷⁶ Ibid [37], [38], [41]–[42].

⁷⁷ [2003] 3 SLR(R) 474 [42]–[43].

⁷⁸ This obligation, unfortunately, remains unilateral despite the *Women's Charter* s 46(1) exhorting both spouses to cooperate in safeguarding the interests of their union. This inconsistency in the law is not for lack of the writer's repeated calls for the equalisation of this obligation. See Leong Wai Kum, 'The duty to maintain spouse and children during marriage' (1987) 29 *Malaya Law Review* 56, 78. See also Leong Wai Kum, Submission to Select Committee on the Women's Charter (Amendment) Bill [Bill No 5/96]; *Report of the Select Committee on the Women's Charter (Amendment) Bill [Bill No 5/96]* (Parl 3 of 1996, 15 August 1996) at B37.

⁷⁹ [1995] SGHC 23 (26 January 1995).

the former wife ‘where this is practicable and, in all the circumstances, fair to do’. As with a marital agreement on the division of matrimonial assets, an agreement on maintenance only provides one fact for the court to consider, ‘namely what would be a fair order, if any, of maintenance?’

There are additional statutory controls in the *Women’s Charter* that were first enacted in 1980.⁸⁰ It is not clear which countries’ laws they were modelled upon.⁸¹ Section 116 provides that:

[a]n agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.

Furthermore s 119 provides:

Subject to s 116, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after 1 June 1981, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

The Court of Appeal in *TQ v TR and another appeal*⁸² read the provisions as referring to ‘postnuptial agreements’ but, given that the law treats prenuptial and postnuptial agreements alike, nothing turns on this interpretation. The provisions are easily read to extend similar requirements to prenuptial agreements. The effect, then, is that a marital agreement on maintenance is treated just like one on division of matrimonial assets. The case of *TQ v TR and another appeal*⁸³ establishes that in relation to an agreement relating to the maintenance of a wife, the approach of the law in Singapore is to respect the autonomy of spouses where they mutually agree while, where they no longer agree, to hold the husband to his financial obligation to his wife.

An illustrative decision is that of the High Court in Singapore in *Chia Hock Hua v Chong Choo Je*.⁸⁴ In that case, a postnuptial agreement regarding the maintenance to be paid to the wife was made in contemplation of divorce. The court found the provision to be

⁸⁰ By the *Women’s Charter (Amendment) Act 1980* (Singapore). This was substantially the Women’s Charter (Amendment) Bill 1979 (No 23 of 1979) (‘the Bill’) that had been presented for its first reading before Parliament in Singapore on 15 May 1979 (*Singapore Parliamentary Debates, Official Record* (15 May 1979), [vol 39] at col 366). Its second reading was on 7 September 1979 when it was referred to a Select Committee of Parliament (*Singapore Parliamentary Debates, Official Record* (7 September 1979)). The *Report of the Select Committee on the Women’s Charter (Amendment) Bill [Bill No 23/79]* (Parl 1 of 1980, 25 February 1980) was accepted in full and the Bill passed its third reading on 25 June 1980 (*Singapore Parliamentary Debates, Official Record* (7 September 1979)). These provisions have appeared in the *Women’s Charter* (Singapore, cap 47, 1981 rev ed) and the *Women’s Charter* (Singapore, cap 353, 1985 rev ed). They now appear in the *Women’s Charter* (Singapore, cap 353, 1997 rev ed).

⁸¹ The debates in Parliament during the three readings of the Bill that led to the *Women’s Charter (Amendment) Act 1980* (Singapore) and the *Report of the Select Committee on the Women’s Charter (Amendment) Bill [Bill No. 23/79]* (Parl 1 of 1980, 25 February 1980) do not reveal the source of inspiration.

⁸² [2009] 2 SLR(R) 961 [57]–[68].

⁸³ *Ibid.*

⁸⁴ [1994] 3 SLR(R) 159.

reasonable⁸⁵ and, on that basis, dismissed the wife's application for maintenance and left the spouses to their agreement.

C Agreement Relating to Custody (or Care and Control) of Children

Of a marital agreement relating to the upbringing of a child, the Court of Appeal in *TQ v TR and another appeal*⁸⁶ observed that the *Women's Charter* s 129 is pivotal. The provision reads:

The court may, at any time and from time to time, vary the terms of any agreement relating to the custody of a child, whether made before or after 1 June 1981, notwithstanding any provision to the contrary in that agreement, where it is satisfied that it is reasonable and for the welfare of the child to do so.

Reading simply off the provision and then reasoning apart from it, Andrew Phang Boon Leong JA observed:

The word 'any' in s 129 suggests that that provision is applicable to both prenuptial as well as postnuptial agreements. However, even if this particular provision is not applicable to prenuptial agreements, we are of the view that the same principle would apply at common law simply because ... the common law ought to be consistent with the legislative policy embodied within s 129. Indeed, as a matter of general logic as well as principle, we are of the view that the courts must always have the power (whether at common law or under statute) to scrutinise both prenuptial as well as postnuptial agreements relating to custody (as well as the care and control) of children. There ought, in our view, to be a presumption that such agreements are unenforceable unless it is clearly demonstrated by the party relying on the agreement that that agreement is in the best interests of the child or the children concerned. This is because such agreements focus on the will of the parents rather than on the welfare of the child which has (and always will be) the paramount consideration for the court in relation to such issues [see the *Women's Charter* s 125(2)]. It might well be that the contents of the prenuptial agreement concerned coincide with the welfare of the child or the children concerned. However, the court ought nevertheless to be the final arbiter as to the appropriateness of the arrangements embodied within such an agreement.⁸⁷

It is clear that courts are prepared to scrutinise marital agreements relating to the division of matrimonial assets and maintenance in order to uphold the spouses' responsibilities. This author submits that there is even greater reason to do the same of a couple's marital agreement relating to their children. The law in Singapore mandates that parents' discharge their responsibilities towards their children in the strongest terms⁸⁸ and directs courts that, in any litigation, any issue that relates to the upbringing of a child should be resolved by considering the welfare of the child as the first and paramount consideration.⁸⁹ The law respects the rights of the spouses, as parents, to agree on how to discharge their parental responsibilities but it also holds them firmly to the discharge of

⁸⁵ Ibid [22]–[23].

⁸⁶ [2009] 2 SLR(R) 961.

⁸⁷ Ibid [70] (emphasis altered).

⁸⁸ The *Women's Charter* s 46(1) and Leong Wai Kum, above n 66, 246–59.

⁸⁹ The *Guardianship of Infants Act* (Singapore, cap 122, 1985 rev ed) s 3.

these responsibilities. Where the parents' agreement falls short in any way, it is liable to be overruled by court.

VIII Comparison with Law that Allows Agreement to Supplant Default Power in Court

It is sometimes suggested that a law, such as Singaporean law, that does not bind spouses to a valid marital agreement they earlier made and, instead, provides a court with the discretion to determine the significance to accord their agreement, is less robust in allowing a spouse to 'escape' from a valid agreement. The suggestion is that the law is more robust where it binds the spouses to their marital agreement. It is further suggested that holding the spouses to their marital agreement (for example, on property), avoids a dispute arising from an application for an order for the division of matrimonial assets under the *Women's Charter* s 112.

The writer disagrees with such a suggestion. Allowing a valid marital agreement to supplant the power bestowed on the court by the *Women's Charter* s 112 is not necessarily better law. Several criticisms may be made of such law. First, attempting to enact law to avoid dispute altogether is futile. There is no law that can stop any party, including an unhappy spouse in this scenario, from disputing with the other. Whatever the shape of the law, a spouse intending to create dispute with the other and who can afford a lawyer will find some success doing so. Second, the dispute is worse in that the rule that a valid marital agreement supplants the power of the court will first have to be successfully challenged before the spouse can access the default power of the court. The dispute between them requires two steps instead of one. Third, requiring two steps instead of just one may penalise a spouse who is unable to afford the time, effort or money to do so. Such a law adds a preliminary dispute over the marital agreement which must be settled by holding that the marital agreement is not binding upon the spouses before the application can be addressed. It is not necessarily more robust.

A Australian Law

A brief introduction to the Australian law may be instructive. The default law under the *Family Law Act 1975* (Cth) is somewhat similar to Singapore's law regarding the division of matrimonial assets. Section 79(1) reads:

In property settlement proceedings, the court may make such order as it considers appropriate: (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them — altering the interests of the parties to the marriage in the property; ... including (c) an order for the settlement of property in substitution for any interest in the property.

Section 79(2) provides '[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.'

Since the amendment of *Family Law Act 1975* (Cth) in 2000,⁹⁰ however, the power of the court can be avoided by the spouses entering a ‘financial agreement’ that is, by formed ‘before marriage’,⁹¹ formed ‘during marriage’⁹² or formed ‘after divorce order is made’.⁹³ Such a financial agreement is binding on the spouses where five conditions are fulfilled.⁹⁴ Where so binding, the *Family Law Act 1975* (Cth) s 90G(2) provides that ‘[a] court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary’. The enforcement, where necessary, of a binding agreement as the only option open to the court means that Australian law is now theoretically opposite to the law in Singapore as affirmed in *TQ v TR and another appeal*.⁹⁵ This is because a binding financial agreement, whether prenuptial, postnuptial or made after a judgment of divorce in Australia, supplants the default power of the court to make financial and property adjustment orders.

No doubt the Australian law is relatively new and it may be too early to form a definitive opinion of it. It does, however, appear to have some problems.

There have already been several amendments to the *Family Law Act 1975* (Cth) since 2000 including amendments in 2003,⁹⁶ 2005⁹⁷ and 2009.⁹⁸ There have been several decisions already on the proper interpretation of the statutory requirements before a financial agreement is held to bind the parties including *J v J*,⁹⁹ *B v B*,¹⁰⁰ *Australian Securities and Investments Commission v Rich*,¹⁰¹ and *Blackmore v Webber*.¹⁰² The formulation of the safeguards before the financial agreement is allowed to supplant the default law appears by no means easy.

The Full Court of the Family Court of Australia in *Kostres v Kostres*¹⁰³ decided inter alia that the prenuptial agreement, formed 2 days before marriage by the couple who remained married for 4 years without children, was void for uncertainty. The Full Court found that the Federal Magistrate at first instance had incorrectly interpreted and applied the terms of the agreement to supplant the default law. In the result, the Full Court held that the husband’s application under the default law should be remitted back to the Federal Magistrates Court. The following statement of the court is informative of the challenges of a law that allows the court’s default power to be supplanted:

This case throws into sharp focus the particular care needed to be exercised by parties entering into a financial agreement under [pt] VIIIA (and the significant responsibilities on the legal practitioners drafting and advising on the agreement) if the agreement is to be binding and enforceable ...

⁹⁰ As amended by the *Family Law Amendment Act 2000* (Cth), which introduced pt VIIIA ‘Financial Agreements’. The amendments came into force on 27 December 2000.

⁹¹ *Family Law Act 1975* (Cth) s 90B.

⁹² *Family Law Act 1975* (Cth) s 90C.

⁹³ *Family Law Act 1975* (Cth) s 90D.

⁹⁴ *Family Law Act 1975* (Cth) s 90G.

⁹⁵ [2009] 2 SLR(R) 961.

⁹⁶ The *Family Law Amendment Act 2003* (Cth) schs 4A, 5, 6.

⁹⁷ The *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) sch 5.

⁹⁸ The *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).

⁹⁹ [2006] FamCA 442 (28 September 2006).

¹⁰⁰ (2008) 216 FLR 422.

¹⁰¹ (2003) 181 FLR 181.

¹⁰² [2009] FMCAfam 154 (6 April 2009).

¹⁰³ (2009) 42 Fam LR 336.

The principles applicable to the adjustment of property rights under s 79 [the default law] have been carefully developed over many years. The section contemplates contributions, both financial and non financial, not only to acquisition of property but to its improvement and conservation (as well as contributions to the welfare of the family) and other matters. ... A court's power to adjust property under s 79 is exercised using well defined guidelines to ensure the resulting order is just and equitable, and any order made may be subject of the safeguard of appellate review. That is not the case with property dealt with under a financial agreement. Thus care in establishing the mutual intention of the parties, and drafting the terms of the financial agreement with precision assume the utmost importance.

As this case unfortunately demonstrates agreements designed to avoid costly litigation can have expensive consequence if the intention of the parties is not readily discernable from the drafting of the agreement.¹⁰⁴

It may be that this particular financial agreement was poorly drafted¹⁰⁵ while most agreements will be well drafted. The learned judges' remarks, at the very least, affirm that the objectives of respecting the spouses' autonomy, giving certainty to financial arrangements and avoiding the time and cost of applications for court orders are by no means easy to achieve. With the Kostreses, their autonomy was not possible to respect. There was anything but certainty in their agreement. The amount of time and costs they spent were particularly high since they litigated their agreement to the Full Court of the Family Court of Australia, only to pave the way for the husband to be able to make an application under the *Family Law Act 1975* (Cth) s 79.¹⁰⁶

There has been negative academic commentary of the change in the law. The first analysis of the Australian innovation was not optimistic.¹⁰⁷ In a more recent book¹⁰⁸ the authors lament the 'uneasy fit that exists between the law of contract ... and intimate personal relationships'¹⁰⁹ and continue:

It is hard to say at this stage how the balance will be struck when the [Family Court of Australia] is faced with applicants seeking to set aside binding financial agreements. However, the case law on the operation of s 79A in the context of consent orders ... along with overseas developments indicating the increased willingness of courts to enforce private agreements, suggest that parties to binding financial agreements are likely to be held to their bargain, even if the outcome is patently unfair.¹¹⁰

There may later be more supportive commentary so that it may be too early to make any firm comments on the law. The writer submits two points may be fair to make for now. First, the formulation of the formal and substantive safeguards required of any marital agreement to supplant the default law is detailed and may not be easy to get right. It follows

¹⁰⁴ Ibid [163]–[165].

¹⁰⁵ Although there was nothing to suggest this that can be gleaned from the judgment and it may be noted that the parties were mature and experienced, being at the termination of their 4-year marriage, 55 and 63 years old.

¹⁰⁶ *Kostres v Kostres* (2009) 42 Fam LR 336 [1]–[22].

¹⁰⁷ Belinda Fehlberg and Bruce Smyth, 'Binding pre-nuptial agreements in the First Year' (2002) 16 *International Journal of Law, Policy and the Family* 127.

¹⁰⁸ Belinda Fehlberg and Juliet Behrens with Rae Kaspiew, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008).

¹⁰⁹ Ibid [9.3.7.3].

¹¹⁰ Ibid (citations omitted).

that the law will be argued before the courts which will ultimately cost the parties in time and money. Second, such law does not necessarily avoid dispute. Indeed, whenever an agreement is disputed, the spouses proceed first through this dispute before dealing with any dispute arising from an application under the default law. The detailed formulation of the law is likely to generate dispute.

IX Conclusion

The law in Singapore, as affirmed in *TQ v TR and another appeal*¹¹¹ may well be as good as it can practicably be. The law seeks to balance the right of spouses to form agreements between themselves with their responsibility to share equitably their accumulated wealth upon divorce. Where spouses are responsible and have formed an agreement that remains acceptable to them at their divorce, they will readily perform their agreement. If either is no longer content with the agreement and invokes the power of the court, there is no reason why the court should not focus on how it should exercise its power so that the terms of their subsisting agreement should only form one consideration. This somewhat ‘softer’ form of the law may be as practicable as any law regulating spouses within their long marital relationship can possibly be. It could be the optimal balance of the rights and responsibilities of spouses with regard to marital agreements.

¹¹¹ [2009] 2 SLR(R) 961.