

Singapore Management University

Institutional Knowledge at Singapore Management University

Singapore Law Journal (Lexicon)

Yong Pung How School of Law

1-2022

Reforming Singapore's law on division of matrimonial assets

Jia En TEO

Singapore Management University

Follow this and additional works at: <https://ink.library.smu.edu.sg/sljlexicon>



Part of the [Asian Studies Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Family Law Commons](#)

Citation

TEO, Jia En. Reforming Singapore's law on division of matrimonial assets. (2022). *Singapore Law Journal (Lexicon)*. 2, 53.

Available at: <https://ink.library.smu.edu.sg/sljlexicon/16>

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Singapore Law Journal (Lexicon) by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylids@smu.edu.sg.

REFORMING SINGAPORE'S LAW ON DIVISION OF MATRIMONIAL ASSETS

Section 46(1) of the Women's Charter undergirds the sacrosanct institution that is marriage – it lays out its moral basis and expresses society's hopes and expectations of the ideal marital relationship: marriage is an equal cooperative partnership of different efforts for mutual benefit. It is thus no surprise that even when a marriage is terminated, the division of matrimonial assets is also founded upon this prevailing ideology. However, as opposed to equal division, Singapore law dictates a "just and equitable" division of matrimonial assets, where wide discretion and power is vested in the judiciary. This legal rule has been criticised to be vague and unpredictable, which in turn fuels more litigation and contradicts an equally important principle in family divorce law – harmonious termination of marriage and resolution of disputes with minimum acrimony and distress as far as possible. This article will examine the underlying rationale for the present law on division of matrimonial assets and the problems with the current approach, explore fundamental concepts such as the notion of fairness and the partnership theory of marriage, before concluding with the possible reforms which may be adopted by Singapore's law on division of matrimonial assets.

TEO Jia En*

Class of 2021 (LLB), SMU Yong Pung How School of Law

I. Introduction

1 Section 46(1) of the Women's Charter¹ is a powerful demand which conveys society's expectations of an ideal marital relationship: spouses shall cooperate with each other in safeguarding the interests of the union and in caring and providing for the children. In other words, the prevailing ideology of marriage in Singapore is the equal cooperative partnership of efforts.² At the stage of divorce, the division of matrimonial assets is likewise founded upon this ideology, where court

* This article was originally written as a directed research paper during the author's final semester at the Singapore Management University, Yong Pung How School of Law. The author would like to thank her supervisor, Professor of Law Chan Wing Cheong, for his patience, valuable feedback and cherished guidance in the writing of this article. The author is also grateful for the helpful comments from the anonymous reviewer. Any errors remain the author's own.

¹ Cap 353, 2009 Rev Ed. All provisions in this article are cited with reference to the Women's Charter unless otherwise specified.

² *NK v NL* [2007] 3 SLR(R) 743, [20].

orders made should reflect marriage as a partnership of equals.³ Section 112 is the governing provision for the division exercise and provides the court with an extremely broad discretion.⁴ However, this endeavour has not been easy; it is “all about feel and the court’s sense of justice”⁵ and is thus embroiled with much ambiguity, uncertainty and inconsistency.

2 This article will look into Singapore’s present legal formulation for the division of matrimonial assets in two aspects: the definition of “matrimonial assets” and much more significantly,⁶ the “just and equitable” directive, along with their difficulties. Thereafter, it will explore the concept of fairness in relation to the partnership theory of marriage, which in turn influences the underlying rationale and approach to be utilised for division. Lastly, it will consider some practical insights from New Zealand’s rule to equality and present a proposal for reform in Singapore law.

II. Brief History of Section 112 of Women’s Charter

3 The power to divide matrimonial assets is statutory in origin and first bestowed on the courts in 1980 under the predecessor section 106.⁷ Back then, assets which were acquired by couples during their marriage by their joint efforts were divided with the view to incline towards equality of division, while those acquired by the sole effort of one spouse were divided in proportions which the court thinks reasonable.⁸

4 The Women’s Charter was later reviewed in 1996.⁹ A new section 112 was passed to replace the predecessor section 106. It provides a statutory definition for matrimonial assets,¹⁰ and now simply gives the courts a single directive to divide such matrimonial assets,

³ *UYP v UYQ* [2020] 3 SLR 683, [45].

⁴ *NK v NL* [2007] 3 SLR(R) 743, [19].

⁵ *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157, [81].

⁶ This article will more elaborately discuss the issues revolving around the “just and equitable” directive than the definition of matrimonial assets, deliberately, as the author is of the view that the former is more problematic and in need of reform. See Part III, B where only one major criticism, coupled with some other minor ones, are distilled and written regarding the definition of matrimonial assets.

⁷ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 15.017.

⁸ *Koo Shirley v Mok Kong Chua Kenneth* [1989] 1 SLR(R) 244, [14].

⁹ See Women’s Charter (Amendment) Act 30 of 1996.

¹⁰ Women’s Charter (Cap 353, 2009 Rev Ed) s 112(10).

whether acquired by one spouse or both spouses, in just and equitable proportions.¹¹ Section 112 was said to strengthen its predecessor provision, by reflecting the enlarged and clarified circumstances the court should consider, which would include a homemaker's efforts in the home,¹² thus according equal value to both financial and non-financial contributions to the family.¹³ Overall, it widens the court's powers and gives it the flexibility to effect a more just and equitable division after taking into consideration all the circumstances of the case.¹⁴

5 Parliament chose to keep only the open-ended directive to effect a just and equitable division, and disagreed with continuing to require courts to incline towards equality of division in the new provision, for the following reasons:

- (a) First, this directive is not appropriate given the expanded circumstances that courts have to consider before coming up with a division order.¹⁵ Any law that has to be enforced effectively must be devoid of inherent inconsistency.¹⁶
- (b) Next, the law needs to provide for all cases, namely marriages of long and short durations, and marriages under unusual sets of circumstances. The law must not put judges under constraint to incline towards equality when what is equal may not be just.¹⁷ Indeed, this concern has been reiterated once again in a recent case of *USB v USA*,¹⁸ where judges expressed that the court should not incline towards equality of division in short marriages.¹⁹

¹¹ Women's Charter (Cap 353, 2009 Rev Ed) s 112(1).

¹² *Singapore Parliamentary Debates, Official Report* (27 August 1996) vol 66, col 527 (Abdullah Tarmugi, Minister for Community Development).

¹³ Leong Wai Kum, "The Just and Equitable Division of Gains Between Equal Former Partners in Marriage" [2000] *Singapore Journal of Legal Studies* 208, 237.

¹⁴ *NK v NL* [2007] 3 SLR(R) 743, [16].

¹⁵ *Singapore Parliamentary Debates, Official Report* (27 August 1996) vol 66, col 527 (Abdullah Tarmugi, Minister for Community Development).

¹⁶ *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996), para 5.5.4.

¹⁷ *Singapore Parliamentary Debates, Official Report* (27 August 1996) vol 66, col 527 (Abdullah Tarmugi, Minister for Community Development).

¹⁸ [2020] 2 SLR 588.

¹⁹ *USB v USA* [2020] 2 SLR 588, [37].

- (c) Last but not least, inclination towards equality of division would result in anomalies in marriages of convenience.²⁰

III. Present Law and its Difficulties

6 With section 112 in place, the broad framework applicable for the division exercise is clear: Courts first delineate the pool of matrimonial assets according to section 112(10) and assess its value, before considering all the circumstances of the case, including but not limited to the factors listed in section 112(2), and determine the just and equitable proportion for each of the divorcing parties.²¹ Unfortunately, the present law comes with its own problems, which will be analysed in the following three sub-sections.

A. Overarching Objective of Section 112

7 The purpose behind the division of matrimonial assets in Singapore is said to equalise the financial statuses of divorcing spouses.²² However, the exact meaning of this objective has not been elaborated upon further. Does it refer to giving spouses the proportion of assets they deserve based on what they contributed during the marriage? Or does it refer to giving each spouse “an equal start on the road to independent living”,²³ like what was pronounced in England? For the former interpretation, the division exercise will be a retrospective fact-finding process, while in the latter, the division exercise will become forward-looking and somewhat speculative in considering one’s future needs in relation to his/her earning capacity at the time of divorce. These two visions reflect the tension between two competing and incompatible contemporary images of marriage – the egalitarian partnership in the former, and the dependency model in the latter.²⁴ As

²⁰ *Report of the Select Committee on the Women’s Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996), p C4.

²¹ *ATT v ATS* [2012] 2 SLR 859, [15].

²² Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 15.009.

²³ Mark Henaghan, “Sharing Family Finances at the End of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 295.

²⁴ Martha Albertson Fineman, “Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce” in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 271.

they are of polar opposites, no single result can be fairly reconciled with the goal of doing justice to both at the same time.²⁵ Yet, in Singapore, the inherently contradictory factors of contribution and need are combined into a single division endeavour – in coming up with a just and equitable proportion, the courts are to consider parties' contributions under section 112,²⁶ and if relevant, their earning capacity and financial needs in the foreseeable future under section 114.²⁷ Therefore, Singapore needs to first, clarify the intent behind the division of matrimonial assets, and second, clearly segregate the concepts of contribution and need and specify which to consider in division, as per that intent.

B. Definition of “Matrimonial Assets”

8 In drafting section 112(10), the legislature intended to confine the court's power of division only to assets relating to marriage,²⁸ *i.e.*, having some form of nexus or link to marriage.²⁹ They were categorised by Prof Leong to refer to “quintessential matrimonial assets”, which are acquired by effort and during marriage,³⁰ and “transformed matrimonial assets”, which are acquired before marriage but substantially improved or ordinarily used or enjoyed during marriage.³¹ Gifts and inherited assets are typically excluded, unless substantially improved after their acquisition³² or used as the matrimonial home.³³

9 In the author's view, the present section 112(10) is largely rational and cogent, save for one main problem: it fails to clearly identify the subject of division, namely the material gains of the marital partnership,³⁴ which refers to the surplus property, money or other

²⁵ Martha Albertson Fineman, “Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce” in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 272.

²⁶ Women's Charter (Cap 353, 2009 Rev Ed) s 112(2)(a), (d).

²⁷ Women's Charter (Cap 353, 2009 Rev Ed) s 112(2)(h) and 114(1)(a), (b).

²⁸ *USB v USA* [2020] 2 SLR 588, [18].

²⁹ *USB v USA* [2020] 2 SLR 588, [20].

³⁰ Women's Charter (Cap 353, 2009 Rev Ed) s 112(10)(b). See *UMU v UMT* [2019] 3 SLR 504, [8].

³¹ Women's Charter (Cap 353, 2009 Rev Ed) s 112(10)(a).

³² *UEQ v UEP* [2019] 2 SLR 463, [17].

³³ Women's Charter (Cap 353, 2009 Rev Ed) s 112(10) proviso.

³⁴ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 16.034.

financial resources which are acquired by both spouses' cooperative efforts during their marriage, whatever form their respective efforts may have assumed.³⁵ While it has been recognised by local courts that only material gains of the marriage are divided during divorce,³⁶ this acknowledgement is not reflected in the provision itself. In fact, the current definition of "matrimonial assets" is both over- and under-exclusive of such gains in the marriage. On one hand, it is difficult to understand how assets acquired before the marriage but ordinarily used or enjoyed by the family during the marriage³⁷ may be considered material gains and thus divided, if the subject of division is only on the accrued *economic* gains of the marriage. These assets may be strongly connected to the marriage and family life, but cannot be said to be "acquired by both spouses' cooperative efforts during their marriage". On the other hand, in *Ong Boon Huat Samuel v Chan Mei Lan Kristine*,³⁸ the husband was the one who wanted to purchase the property in dispute³⁹ and was responsible for all liabilities arising from it,⁴⁰ while the wife completely dissociated herself from the purchase.⁴¹ Although the property was acquired during the marriage and would thus be strictly considered a matrimonial asset under the definition, the court exercised its discretionary power to exclude it from division.⁴² A reformulation of the definition to clearly emphasise that material gains of the marriage form the subject of division⁴³ is thus crucial to clarify the overall operation of the provision.⁴⁴

10 There are, additionally, other criticisms including the awkward presentation of the qualifying words or proviso of the provision,⁴⁵ the subpar treatment of the matrimonial home under the definition given the

³⁵ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 17.063.

³⁶ *UYP v UYQ* [2020] 3 SLR 683, [54], *USB v USA* [2020] 2 SLR 588, [27], *UZN v UZM* [2021] 1 SLR 426, [16], *BPC v BPB* [2019] 1 SLR 608, [51].

³⁷ Women's Charter (Cap 353, 2009 Rev Ed) s 112(10)(a)(i).

³⁸ [2007] 2 SLR(R) 729.

³⁹ *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729, [16].

⁴⁰ *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729, [18].

⁴¹ *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729, [20].

⁴² *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729, [25]–[26].

⁴³ This amendment is necessary to align the definition with the overarching unifying theory of family law: the partnership theory of marriage, which Singapore is argued to endorse in this article. See Part V, B.

⁴⁴ *Chen Siew Hwee v Low Kee Guan (Wong Yong Yee, co-respondent)* [2006] 4 SLR(R) 605, [53].

⁴⁵ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 16.238.

special place it occupies in every family,⁴⁶ as well as the insoluble conundrum present for substantial improvement on inter-spousal re-gifts.⁴⁷ However, the author believes that minor tweaks to the definition would likely suffice to resolve the confusion that has emerged from these areas.

C. “Just and Equitable” Formulation

11 To perform the “just and equitable” directive, courts have devised two structured “broad brush” approaches. In dual-income marriages, the *ANJ* approach is applicable:

- (a) First, courts ascribe a ratio that represents each party’s direct contributions relative to that of the other party, having regard to the financial contributions each party made towards the acquisition or improvement of the matrimonial assets (“**Direct Ratio**”).
- (b) Next, courts ascribe a second ratio to represent each party’s indirect contribution, including both financial and non-financial aspects, to the well-being of the family relative to that of the other (“**Indirect Ratio**”).
- (c) Then, using each party’s respective direct and indirect percentage contributions, and giving them equal weight, courts derive their respective average percentage contributions to the family which would form the basis to divide the matrimonial assets (“**Average Ratio**”).
- (d) Lastly, further adjustments may be made to the parties’ average percentage contributions before the final award is granted.⁴⁸

⁴⁶ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 16.049. It is further mentioned, to which the author agrees, in Leong Wai Kum, “Division of Matrimonial Assets: Recent Cases and Thoughts for Reform” [1993] *Singapore Journal of Legal Studies* 351, 373 that the matrimonial home is the “clearest symbol of the wealth of a family”, and thus may be regarded as “*sui generis* among matrimonial assets” to be classified on its own, and always be included for division.

⁴⁷ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 16.223. The court in *Wan Lai Cheng v Quek Seow Kee* [2012] 4 SLR 405, [55]–[59] had to exclude the application of the “substantial improvement” exception to inter-spousal “re-gifts”.

⁴⁸ *ANJ v ANK* [2015] 4 SLR 1043, [22].

12 For single-income families,⁴⁹ including those where one spouse is the sole income earner and the other plays the role of homemaker,⁵⁰ or where one spouse is primarily the breadwinner and the other primarily the homemaker,⁵¹ courts follow guidelines from case precedents which consider the length of marriages instead:

- (a) In long single-income marriages lasting 26 to 30 years,⁵² courts tend towards an equal division of matrimonial assets.⁵³
- (b) In mid-length or moderately lengthy single-income marriages lasting 15 to 18 years, courts tend towards awarding the non-income earning party 35% to 40% of matrimonial assets.⁵⁴
- (c) In shorter single-income marriages lasting 10 to 15 years, courts tend towards awarding the non-income earning party 25% to 35% of matrimonial assets.⁵⁵

13 Despite having these clear overarching frameworks, the core of the division exercise appears to be a matter of impression and judgment of the court,⁵⁶ based on what the court feels is fair and just.⁵⁷ The court in *Lock Yeng Fun v Chua Hock Chye*⁵⁸ mentioned that the difficulty in measuring the financial value of spouses' contributions has *never* been an obstacle to giving spouses their just and equitable share of matrimonial assets commensurate with their respective contributions.⁵⁹ However, it is questionable whether this can truly be executed in reality.⁶⁰

⁴⁹ *TNL v TNK* [2017] 1 SLR 609, [46].

⁵⁰ *TNL v TNK* [2017] 1 SLR 609, [43].

⁵¹ *UBM v UBN* [2017] 4 SLR 921, [50].

⁵² *BOR v BOS* [2018] SGCA 78, [111].

⁵³ *TNL v TNK* [2017] 1 SLR 609, [48]–[52].

⁵⁴ *BOR v BOS* [2018] SGCA 78, [113].

⁵⁵ *BOR v BOS* [2018] SGCA 78, [113].

⁵⁶ *ANJ v ANK* [2015] 4 SLR 1043, [24].

⁵⁷ *ANJ v ANK* [2015] 4 SLR 1043, [26], [30].

⁵⁸ [2007] 3 SLR(R) 520.

⁵⁹ *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 520, [39].

⁶⁰ See Leon Vincent Chan Chun Kit, “The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore” (2018) 30 SAclJ 797, 804–811 that presented other arguments dealing with the pitfalls of the present law, and which the author agrees with but are not elaborated upon in this article.

14 At first glance, financial contributions, being monetary in nature, seem easy to track. However, any documentary evidence would definitely be incomplete⁶¹ as parties in a marriage do not equip themselves with the mental outlook of recording their contributions towards their marriage.⁶² Indeed, their discharge of efforts over the years may be too diverse to permit any detailed assessment, thus courts may only be capable of “rough and ready approximation[s]”.⁶³

15 Next, it is acknowledged that non-financial contributions are by nature incapable of being reduced into monetary terms.⁶⁴ From the author's survey of 100 of the most recent cases in the past five years, the courts have not enunciated their reasons when ascribing numbers to the Indirect Ratio. For non-financial contributions, the courts did not resort to any economic theories nor mathematical formulae, but simply assessed them in the abstract, comparing one's upkeep of the family home with the other's help with the children's schoolwork.⁶⁵ Principles of quantification, which are necessary to avoid palm-tree justice and to ensure that any outcome reached is based on legal reasoning and not arbitrary or capricious decision-making,⁶⁶ are absent. If the quality of non-financial contributions is valued by the courts without using any objective criteria, it is difficult to see how they may avoid the appearance of arbitrary and capricious decision-making.⁶⁷ Apart from doing justice, they must also be *seen* to be doing justice.

16 It is also difficult to understand how the courts are making sense of the juxtaposition of financial and non-financial contributions within a single Indirect Ratio, much less doing it in a principled manner. In *VBR v VBS*,⁶⁸ both spouses made their fair share of indirect contributions to the marriage, both financial and non-financial.⁶⁹ The court did not accept that the wife contributed more than the husband in terms of indirect financial contributions,⁷⁰ nor that the husband was an

⁶¹ *UNE v UNF* [2018] SGHCF 12, [73].

⁶² *ANJ v ANK* [2015] 4 SLR 1043, [25].

⁶³ *ANJ v ANK* [2015] 4 SLR 1043, [23], citing *NK v NL* [2007] 3 SLR(R) 743, [17].

⁶⁴ *ANJ v ANK* [2015] 4 SLR 1043, [24].

⁶⁵ *UTN v UTO* [2019] SGHCF 18.

⁶⁶ Patrick Parkinson, “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 Federal Law Review 1, 6.

⁶⁷ Patrick Parkinson, “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 Federal Law Review 1, 42.

⁶⁸ [2019] SGFC 123.

⁶⁹ *VBR v VBS* [2019] SGFC 123, [29].

⁷⁰ *VBR v VBS* [2019] SGFC 123, [29].

uninvolved father.⁷¹ Surprisingly, however, the Indirect Ratio was 60:40 in favour of the wife,⁷² with no further elaboration on this eventual decision. Another example is seen in *VHY v VHZ*.⁷³ The wife was a homemaker responsible for household matters, cared for their children's day-to-day needs, worked part-time and odd jobs, etc.,⁷⁴ while the husband shouldered the indirect financial contributions.⁷⁵ The court then decided a ratio of 70:30 in favour of the wife,⁷⁶ without explaining why or how the wife's non-financial contributions outweighed the husband's indirect financial contributions, and why the ratio was specifically 70:30 instead of any other ratio such as 80:20 or 65:35. A similar fact pattern is found in *BUX v BUY*⁷⁷ where the court said that the husband played a greater role in the caring for the children⁷⁸ while the wife contributed the majority of household expenses,⁷⁹ yet the ratio was merely 55:45 in favour of the husband.⁸⁰ Perhaps the English courts are right: “[T]he nature of the contributions of breadwinner and homemaker [are] intrinsically different and [thus] incommensurable”.⁸¹

17 In certain instances, this juxtaposition has worked against the spouse who contributed to the marriage in intangible aspects, for such non-financial contributions have been masked by the financial contributions of the other spouse, the latter of which has *already* been factored in the Direct Ratio and is now considered a second time and thus, double-counted, in the Indirect Ratio. In other words, it is a zero-sum game.⁸² In *USP v USQ*,⁸³ in determining the Indirect Ratio, the court considered the fact that the husband was the main breadwinner of the family, and made no mention of his non-financial contributions at all. For the wife, not only did she work intermittently and contribute to household expenses, she was also the primary caregiver of their child, managed the household and thus “much credit ought to be given to [her]”

⁷¹ *VBR v VBS* [2019] SGFC 123, [30].

⁷² *VBR v VBS* [2019] SGFC 123, [31].

⁷³ [2020] SGFC 45.

⁷⁴ *VHY v VHZ* [2020] SGFC 45, [37].

⁷⁵ *VHY v VHZ* [2020] SGFC 45, [39].

⁷⁶ *VHY v VHZ* [2020] SGFC 45, [40].

⁷⁷ [2019] SGHCF 4.

⁷⁸ *BUX v BUY* [2019] SGHCF 4, [38].

⁷⁹ *BUX v BUY* [2019] SGHCF 4, [40].

⁸⁰ *BUX v BUY* [2019] SGHCF 4, [41].

⁸¹ *Lambert v Lambert* [2003] Fam 103, 120.

⁸² Leon Vincent Chan Chun Kit, “The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore” (2018) 30 SAclJ 797, 809.

⁸³ [2019] SGFC 15.

in that aspect.⁸⁴ The Indirect Ratio was, however, only 60:40 in favour of the wife.⁸⁵ Extrapolating from these facts, one may reasonably infer that the husband's indirect financial contributions were mitigated by the wife's. Yet, how is it that the wife only obtained 20% more than the husband, having invested way more than the husband non-financially? Should the Indirect Ratio only consider non-financial contributions, it could very well have been 90:10 in favour of the wife. This would significantly change the eventual Average Ratio and the wife's deserving proportion of the matrimonial assets.⁸⁶

18 Another interesting observation is that extreme ratios for indirect contributions are not usually given. Out of the 100 cases surveyed, with varying factual matrixes, all cases except six have Indirect Ratios ranging between 75:25 (and vice versa) to 50:50, as opposed to Direct Ratios which range from 100:0⁸⁷ to 50:50. In a good way, this shows that the courts are generally wary of discrediting the other spouse who appears to have contributed "less" indirectly, commenting that he/she was unlikely to have made "insignificant indirect contributions"⁸⁸ or "cannot be said to be wholly absent".⁸⁹ At the same time, however, to some extent, this ambiguity also strengthens the argument that quantification of non-financial contributions is close to impossible, and their juxtaposition with financial contributions will turn out to be inaccurate.

19 Apart from the problems in quantification, the way that the courts dealt with the "just and equitable" directive has also resulted in some unexplainable inconsistencies.⁹⁰ This is precisely what has been

⁸⁴ *USP v USQ* [2019] SGFC 15, [38].

⁸⁵ *USP v USQ* [2019] SGFC 15, [39].

⁸⁶ In the case, the Direct Ratio was 89:11 in favour of the husband, with the total matrimonial pool worth \$1,646,930.99. Even if the parties' indirect financial contributions were calculated in the Direct Ratio instead, assuming that they are about the same value as inferred from the judgment at [38], the change in Direct Ratio would not likely be too pronounced. Taking the new possible Direct Ratio to be 90:10 in favour of the husband and Indirect Ratio to be 10:90 in favour of the wife, while according each with equal weightage as the court did, the Average Ratio will be 50:50, as opposed to 64.5:35.5 in favour of the husband (before further adjustments).

⁸⁷ *UMT v UMU* [2018] SGFC 59, *TZM v TZN* [2017] SGFC 36, *TXW v TXX* [2017] 4 SLR 799.

⁸⁸ *VHY v VHZ* [2020] SGFC 45, [39].

⁸⁹ *UYV v UYQ* [2020] 3 SLR 683, [102].

⁹⁰ *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996), para 5.5.4; Leon Vincent Chan Chun Kit,

cautioned against by Parliament in 1996, and is an unfortunate and undesirable development of the law in need of change.

20 To elaborate, courts repeatedly mentioned the significance of considering all circumstances, instead of focusing merely on a direct and indirect contributions dichotomy, in arriving at a just and equitable division of matrimonial assets.⁹¹ However, the framework of the *ANJ* approach is built exactly on such a dichotomy. While further adjustments which take into account the other factors enumerated in section 112(2) can be made to the weightage of direct and indirect contributions, such adjustments are said to be done only exceptionally, at least for long marriages.⁹² How, then, are the courts truly exercising their powers according to legislative intention?

21 Next, the length of the marriage is recognised by the courts to be a highly relevant factor in the division of assets for long marriages.⁹³ Precedent cases show that courts tend towards an equal division in long single-income marriages,⁹⁴ yet it is peculiar that there is no similar inclination for long dual-income marriages. In fact, it does not seem right that the length of marriage affects the weight ascribed to indirect contributions in the first place. In *Tan Hwee Lee v Tan Cheng Guan*,⁹⁵ the court mentioned that the law acknowledges the equally important contributions of the homemaker to the partnership of marriage, but only in long marriages.⁹⁶ But why should indirect contributions feature more prominently in long marriages, and play a *de minimis* role in shorter marriages?⁹⁷

22 The principle of common but differentiated responsibilities dictates that both parents are equally responsible for providing for their children, but their precise obligations may differ depending on their means and capacities.⁹⁸ Likewise, this principle extends to the concept

“The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore” (2018) 30 SAclJ 797, 812.

⁹¹ *NK v NL* [2007] 3 SLR(R) 743, [29].

⁹² *USB v USA* [2020] 2 SLR 588, [41].

⁹³ *UYP v UYQ* [2020] 3 SLR 683, [49], *UBM v UBN* [2017] 4 SLR 921, [66].

⁹⁴ *TNL v TNK* [2017] 1 SLR 609, [48].

⁹⁵ [2012] 4 SLR 785.

⁹⁶ *Tan Hwee Lee v Tan Cheng Guan* [2012] 4 SLR 785, [85].

⁹⁷ *USB v USA* [2020] 2 SLR 588, [40], *ANJ v ANK* [2015] 4 SLR 1043, [27], *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729, [28].

⁹⁸ *AUA v ATZ* [2016] 4 SLR 674, [41], citing *TIT v TIU* [2016] 3 SLR 1137, [61].

of marriage as a whole.⁹⁹ Courts reiterate, time and again, the importance of recognising the contributions of both spouses equally, be it in the economics or homemaking arenas. The only possible explanation for this contradictory phenomenon is that subconsciously, courts deem non-financial contributions as holding less weight so long as the marriage concerned is not lengthy enough, meaning lasting shorter than 26 years. In *ANJ v ANK*, it was said that courts tend to give weighty consideration to homemakers who have painstakingly raised children to *adulthood*, especially where these efforts entailed *significant career sacrifices*.¹⁰⁰ However, just because non-financial contributions are intangible does not mean that they are instantly worth less than the financial contributions made in shorter marriages. The law, therefore, seems inherently biased against non-financial contributions which are unquantifiable to begin with, and by their very nature take a longer time to realise. Indeed, it acknowledges the outcome that results from the efforts that one has invested into the marriage, instead of the latter *simpliciter*.¹⁰¹ An example is *VDV v VDW*,¹⁰² where the husband wrestled with many different jobs which did not reap substantial income, but nevertheless “[did] his part within his abilities” throughout the marriage, including helping to raise his adopted son up till he was gainfully employed.¹⁰³ The Indirect Ratio was still 60:40 in favour of the wife.¹⁰⁴ Why is he still disadvantaged despite putting his all for the family, simply because the wife, having a higher income, shouldered more household expenses?

IV. Arguments for a Rules-Based Regime with only Minimal Discretion

23 With the above backdrop, it is paramount to consider if according the courts with such a broad discretion in the division exercise

⁹⁹ See *VGR v VGS* [2020] SGFC 27, [210] where the court found “no reason to make any meaningful distinction between the contributions made by the parties”.

¹⁰⁰ *ANJ v ANK* [2015] 4 SLR 1043, [27].

¹⁰¹ In other words, the law should reward effort and not ability. See Leon Vincent Chan Chun Kit, “The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore” (2018) 30 SAcLJ 797, 819.

¹⁰² [2019] SGFC 143.

¹⁰³ *VDV v VDW* [2019] SGFC 143, [13].

¹⁰⁴ *VDV v VDW* [2019] SGFC 143, [52]. See also *TXO v TXP* [2017] SGFC 117 where the court found that “the marriage was an equal partnership where parties played their roles to the best of their abilities and circumstances”, yet the indirect ratio was 60:40 in the husband’s favour, who made more indirect financial contributions.

is appropriate, or if it should be narrowed somewhat. The search, however, is not binary between rules and discretion, but on the right *mix* of rules and discretion.¹⁰⁵ Indeed, discretionary elements in the law provide the important means to ensure fair outcomes.¹⁰⁶ Scherpe's research into European jurisdictions regarding property division on divorce revealed that while discretionary elements are found in all jurisdictions, they are present to varying degrees.¹⁰⁷ Within Europe, few jurisdictions adopted the discretionary approach, like Singapore, in the division of matrimonial property. Instead, most prioritised certainty in that regard, and only allowed discretion for other remedies such as maintenance payments, to ensure that any potential unfair outcomes of property division can be mitigated at the same time.¹⁰⁸ Bearing in mind, as well, that the intent of reform is not to eliminate judicial discretion completely, but to have clearer statute rules and confine discretion only to exceptional cases, what should the appropriate mix of rules and discretion be for Singapore?

A. Incommensurability Principle

24 As discussed elaborately above, the incommensurability principle, which acknowledges that it is impossible to evaluate the contributions which parties make to a marriage,¹⁰⁹ accurately depicts Singapore's "just and equitable" division model. This principle is particularly applicable for non-financial contributions, where academics have questioned the ability of judges to conduct legitimate accounting and compare, for example, 10 hours of cleaning the house with 10 hours of changing diapers. This whole inquiry is said to be "ludicrous" and something that judges "cannot possibly get right".¹¹⁰ In fact, too much discretion is dangerous because research shows that humans have a

¹⁰⁵ Joanna Miles, "Should the Regime be Discretionary or Rules-based?" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 262.

¹⁰⁶ Jens M. Scherpe, "The Financial Consequences of Divorce in a European Perspective" in *European Family Law, Vol. III* (Edward Elgar Publishing, 2016), para 2.6.2.3.

¹⁰⁷ Jens M. Scherpe, "The Financial Consequences of Divorce in a European Perspective" in *European Family Law, Vol. III* (Edward Elgar Publishing, 2016), para 2.6.2.3.

¹⁰⁸ Jens M. Scherpe, "The Financial Consequences of Divorce in a European Perspective" in *European Family Law, Vol. III* (Edward Elgar Publishing, 2016), para 2.6.2.2.

¹⁰⁹ Richard Ingleby, "Introduction: Lambert and Lampposts: The End of Equality in Anglo-Australian Matrimonial Property Law?" (2005) 19 *International Journal of Law, Policy and the Family* 137, 142.

¹¹⁰ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 173.

general tendency, in or out of law, to undervalue housework and related domestic contributions.¹¹¹ Therefore, judges, consciously or not, might have unfortunately been systematically devaluing a spouse's home contributions.¹¹²

25 Economics has created different solutions to value non-financial contributions, but they are plagued with problems. One method of valuation is the replacement cost method which calculates the sum of money necessary to replace the homemaker's services.¹¹³ However, it tends to underestimate the true replacement cost, since homemakers frequently perform different tasks simultaneously. It is also challenging to choose an appropriate hourly rate of service since there are various market rates pegged to the difficulty level of tasks performed and the quality of services provided. As a whole, the replacement value of homemakers is difficult to compute because intangibles such as love, affection and companionship have no purchasable market equivalents.¹¹⁴ Another method of valuation is the lost opportunity cost method, which calculates the career earnings that the homemaker forfeited.¹¹⁵ This speculative approach is highly criticised for hypothesising the type of occupation and likely salary earned by the homemaker.¹¹⁶ It is also difficult to find a suitable comparator with similar age, educational level, employment history, and socio-economic background as the homemaker in question.¹¹⁷ Ultimately, both approaches entail controversial judgments about the correlation between work in the household and work in the market.¹¹⁸

¹¹¹ Katharine Silbaugh, "Turning Labour into Love: Housework and the Law" (1996) 91 *Northwestern University Law Review* 1, 57.

¹¹² Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 168, Shari Motro, "Labour, Luck and Love: Reconsidering the Sanctity of Separate Property" (2008) 102 *Northwestern University Law Review* 1623, 1640.

¹¹³ Mary Downey, "Note: The Need to Value Homemaker Services Upon Divorce" (1984) 87 *W Va L Rev* 115, 124.

¹¹⁴ Hauserman, Nancy R. and Carol Fethke, "Valuation of A Homemaker's Services" (1978) 22 *Trial Law Guide* 251, 253.

¹¹⁵ Mary Downey, "Note: The Need to Value Homemaker Services Upon Divorce" (1984) 87 *W Va L Rev* 115, 130.

¹¹⁶ Mary Downey, "Note: The Need to Value Homemaker Services Upon Divorce" (1984) 87 *W Va L Rev* 115, 132.

¹¹⁷ Hauserman, Nancy R. and Carol Fethke, "Valuation of A Homemaker's Services" (1978) 22 *Trial Law Guide* 251, 255.

¹¹⁸ Ann Laquer Estin, "Love and Obligation: Family Law and the Romance of Economics" (1995) 36 *Wm & Mary L Rev* 989, 1032.

26 Indeed, one might feel uncomfortable portraying marriage as an economic exchange. The author posits that economics is not perfectly applicable in the family context. New theories of family economics reconceptualise family life as a process of exchange between family members and assert that decisions made concerning the household stem from self-interest and rational choice.¹¹⁹ Yet this does not seem right. Exchange rules are hardly broad enough to embrace family behaviours,¹²⁰ especially considering many altruistic motivations such as love and affection behind the decisions made for the family union. Constructing a legal theory of marriage and divorce on economic foundations would erase important values concerning family life¹²¹ such as “love, obligation, pride, anger, jealousy, guilt, sacrifice, and faith”.¹²² Reducing marriages to business transactions undertaken at arm’s length severely demeans the grand concept of marriage, where spouses work together to advance the well-being of the family, and whose lives have become enmeshed in indistinguishable ways.¹²³ The universal extension of the market rhetoric will only result in “a world of disembodied, fungible, attribute-less entities”.¹²⁴

27 Ultimately, no single person is able to get an accurate view inside a marriage and retrospectively account for all the innumerable contributions each spouse has made to his/her marriage.¹²⁵ Judges do not personally attest to the details of the marriage for obvious reasons. Each marriage is an “idiosyncratic economy of exchange” relying on “intimate, subjective and private constructions of meaning by couples”.¹²⁶ Judges are also unlikely to find the truth from parties’ submissions. Each spouse’s account will typically be inaccurate due to the fallibility of human memory and his/her possibly skewed perspective

¹¹⁹ Ann Laquer Estin, “Love and Obligation: Family Law and the Romance of Economics” (1995) 36 *Wm & Mary L Rev* 989, 999.

¹²⁰ Ann Laquer Estin, “Love and Obligation: Family Law and the Romance of Economics” (1995) 36 *Wm & Mary L Rev* 989, 1043.

¹²¹ James B. White, “Economics and Law: Two Cultures in Tension” (1986) 54 *Tenn L Rev* 161, 174.

¹²² Ann Laquer Estin, “Love and Obligation: Family Law and the Romance of Economics” (1995) 36 *Wm & Mary L Rev* 989, 1082.

¹²³ Alicia Brokars Kelly, “Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life” (2004) 19 *Wisconsin Women’s Law Journal* 141, 179.

¹²⁴ Margaret J. Radin, “Market-Inalienability” (1987) 100 *Harv L Rev* 1849, 1884–1885.

¹²⁵ Alicia Brokars Kelly, “Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life” (2004) 19 *Wisconsin Women’s Law Journal* 141, 172.

¹²⁶ Steven L. Nock, “Time and Gender in Marriage” (2000) 86 *Va L Rev* 1971, 1981.

embittered by the fallout. The torturous process of divorce is not the best environment for a spouse to be charitable¹²⁷ and acknowledge the credit of his/her counterpart's contributions during the marriage.¹²⁸ A scrutiny of the minutiae of people's lives would not only cause difficult evidential problems¹²⁹ and prohibitive legal costs,¹³⁰ but also oversimplify a marriage of variant efforts.¹³¹ Indeed, local courts have recognised such a reality in pronouncing that spouses contribute to the marriage in good faith and selflessly,¹³² doing many things unrecorded out of love, concern and responsibility.¹³³ It will simply be antithetical to societal norms of marriage to expect spouses to have married with the expectation of divorce¹³⁴ and kept records in this regard,¹³⁵ much less require judges to identify and measure the contributions they have made.¹³⁶ It is clear, therefore, that valuation of contributions, the key feature of Singapore's discretionary model, is practically impossible in reality, making it dangerous to continue relying on it to mete out justice to divorcing spouses.

B. Singapore's Noble Vision of Harmonious Termination of Marriages

28 The argument for a rules-based system is further strengthened considering Singapore's noble vision towards harmonious termination of marriages. Since the law is a means of resolving disputes in society,

¹²⁷ *UO v UUP* [2019] SGFC 44, [19].

¹²⁸ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 173. See *UCM v UCN* [2017] SGFC 71, [18] where the court said that the parties' claims "can be less than objective and sometimes overstated. Dissatisfaction between the contestants in a marital breakdown often produced misleading, or at least an incomplete picture of each other's real contributions to the marriage".

¹²⁹ Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 *SAC LJ* 797, 808.

¹³⁰ Patrick Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1, 11.

¹³¹ *UQX v UQY* [2018] SGFC 116, [49].

¹³² *YG v YH* [2008] SGHC 166, [32].

¹³³ *ANJ v ANK* [2015] 4 *SLR* 1043, [25].

¹³⁴ *ANJ v ANK* [2015] 4 *SLR* 1043, [25], Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 *SAC LJ* 797, 806.

¹³⁵ Milton C. Regan, *Alone Together: Law and the Meanings of Marriage* (Oxford University Press, 1st Ed, 1999), p 22–23.

¹³⁶ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 201.

it must be clear in wording and ought to be accessible by lay people without requiring expensive litigation.¹³⁷ The presence of judicial discretion, however, is doing the opposite. It reduces the predictability of court judgments, thus fuelling a more litigious attitude between divorcing spouses¹³⁸ by pitting them against each other, eventually creating more grounds for grievance and propelling them into more conflict.¹³⁹ This also unfavourably causes repercussions in children, whose developmental, emotional and physical health are adversely affected.¹⁴⁰ They are more anxious, distressed, angry and lonely¹⁴¹ and exhibit more insecure and avoidant attachment styles than children with no divorce experience.¹⁴² Such impacts only dramatically worsen in high-conflict divorces. They are exposed to increased risks for psychological maladjustment, including depression and anxiety, as well as aggression.¹⁴³ Long after the dissolution of their parents' marriage, self-esteem, psychological distress, delinquency and suicidal behaviours may still colour their future.¹⁴⁴

29 These are not at all consistent with the local family justice system's aim to facilitate the transitional period of emotional upheaval for the family,¹⁴⁵ terminate marriages peacefully and provide divorcing parties with closure and a way forward in the most dignified manner possible.¹⁴⁶ The importance of this is embedded in the proposed changes to other areas of family law, such as the push for mandatory mediation

¹³⁷ Mark Henaghan, "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 294.

¹³⁸ Lorraine Read, "High Conflict Family Court Cases: Working for the Child's Best Interests" ANZJFT 2003; 24(2): 95–101, 95–96.

¹³⁹ Lorraine Read, "High Conflict Family Court Cases: Working for the Child's Best Interests" ANZJFT 2003; 24(2): 95–101, 97.

¹⁴⁰ Alexa N. Joyce, "High-Conflict Divorce: A Form of Child Neglect" Family Court Review 2016; 54(4): 642–656, 643.

¹⁴¹ Sheala C. Morrison, Stephen T. Fife and Katherine M. Hertlein, "Mechanisms behind Prolonged Effects of Parental Divorce: A Phenomenological Study" Journal of Divorce & Remarriage 2017; 58(1): 44–63, 44.

¹⁴² Sheala C. Morrison, Stephen T. Fife and Katherine M. Hertlein, "Mechanisms behind Prolonged Effects of Parental Divorce: A Phenomenological Study" Journal of Divorce & Remarriage 2017; 58(1): 44–63, 45.

¹⁴³ Catherine C. Ayoub, Robin M. Deutsch and Andronicki Maraganore, "Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence" Family and Conciliation Courts Review 1999; 37(3): 297–314, 301.

¹⁴⁴ Sheala C. Morrison, Stephen T. Fife and Katherine M. Hertlein, "Mechanisms behind Prolonged Effects of Parental Divorce: A Phenomenological Study" Journal of Divorce & Remarriage 2017; 58(1): 44–63, 45.

¹⁴⁵ *NK v NL* [2007] 3 SLR(R) 743, [12].

¹⁴⁶ *UYV v UYQ* [2020] 3 SLR 683, [61].

for most divorce applications¹⁴⁷ and the introduction of the option to divorce by mutual agreement, which is a fault-free ground.¹⁴⁸ The Committee to Review and Enhance Reforms in the Family Justice System, in presenting recommendations, continues to do so in a way which would strengthen the existing family justice system, reduce acrimonious disputes and achieve more positive family outcomes.¹⁴⁹ Yet it is ironic that the division of matrimonial assets, which is essential in giving parties a fresh start to life, continues to stir up acrimony and foster resentment. The method of division which is adopted at the end of a marriage ought not to incentivise parties to be calculative nor constrained from being generous and loving while they cultivate trust during their marriage and build their joint lives together.¹⁵⁰

30 Thus, the author posits that converting to a rules-based system with firm principles and only minimal discretion is the right balance that Singapore should adopt. This would be consistent with Singapore's overarching vision of the justice system and truly encourage parties to put down their turbulent past.¹⁵¹ Indeed, this is the pragmatic approach to utilise considering the practical impossibility of comparing the incommensurable and urgent need to reduce long-term harmful impacts on children.

V. Arguments for a Rule to Equality

31 With the rules-based regime as the foundation, the author will now proceed to present her arguments for the adoption of a rule to equality in Singapore.

A. Notion of Fairness

32 Fairness is known to undergird the division of matrimonial assets upon divorce, but what exactly does it entail?

33 According to the famous philosopher John Rawls, justice results from a fair agreement between every member of society from a

¹⁴⁷ This is for marriages with children only. See Women's Charter (Cap 353, 2009 Rev Ed) s 50(3A).

¹⁴⁸ Women's Charter (Amendment) Bill (Bill 43 of 2021), cl 29.

¹⁴⁹ Straits Times website <<https://www.straitstimes.com/singapore/more-support-for-divorcing-couples-as-govt-accepts-review-proposals>> (accessed, 18 May 2021).

¹⁵⁰ *UZN v UZM* [2021] 1 SLR 426, [21].

¹⁵¹ *NK v NL* [2007] 3 SLR(R) 743, [12].

hypothetical “original position” of fairness with a veil of ignorance that withholds all information relating to an individual’s own identity, such that no one may be arbitrarily privileged in the agreement.¹⁵² From this hypothetical social contract, Rawls argues that two principles of justice would emerge: equal basic liberties for everyone, and social and economic equality.¹⁵³ This is known as the distributive theory of justice, where a fair and just outcome is judged by the equality of the final share-out.¹⁵⁴ In the context of property distribution upon divorce, a fair division is something which everyone would agree with if they had to devise the legal rules without knowing their position in the system.¹⁵⁵ Not knowing whether one would be a financially strong or dependent divorcee,¹⁵⁶ Rawls argues that parties would deem an equal share-out to be the fairest distribution of resources.¹⁵⁷

34 However, with every philosophical theory pushing for equality, there will be others putting forth opposing propositions. The entitlement theory of justice, for example, asserts that a just outcome is one which accords with people’s legal ownership, a result of their labour, contributions, etc. Robert Nozick argues that before deciding how to allocate resources, we should first ask to whom they already belong; applying Rawls’ view would only take resources away from those who own them legitimately.¹⁵⁸ But this is unlikely applicable in the family context. The crucial feature of fairness in Nozick’s theory, which is prior entitlement, does not shine so brightly in family unions where resources are voluntarily and willingly shared for the greater good and well-being

¹⁵² Marcus Arvan, *Rightness as Fairness: A Moral and Political Theory* (Palgrave Macmillan, 2016), p 141.

¹⁵³ Michael J. Sandel, *Justice: What’s the Right Thing to Do?* (Farrar, Straus and Giroux, 2010), p 76.

¹⁵⁴ Peter Saunders, “What is a fair divorce settlement?” 1999 (53) Australian Institute of Family Studies 48, 49.

¹⁵⁵ Peter Saunders, “What is a fair divorce settlement?” 1999 (53) Australian Institute of Family Studies 48, 49.

¹⁵⁶ Antony W. Dnes, “Applications of Economic Analysis to Marital Law: Concerning a Proposal to Reform the Discretionary Approach to the Division of Marital Assets in England and Wales” (1999) 19 International Review of Law and Economics 533, 549.

¹⁵⁷ Peter Saunders, “What is a fair divorce settlement?” 1999 (53) Australian Institute of Family Studies 48, 49. See also Larry Temkin, “Equality as Comparative Fairness” (2017) 34 Journal of Applied Philosophy 43, 45 which discusses non-instrumental egalitarianism. It finds equality as valuable in itself, thus the concern for equality is not separable from the concern for fairness, as they are part and parcel of a single concern.

¹⁵⁸ Peter Saunders, “What is a fair divorce settlement?” 1999 (53) Australian Institute of Family Studies 48, 49.

of the partnership. Another example is the principle of justice grounded in “just deserts”, which judges an outcome according to the merit attached to the behaviour of the parties. Rewards are only allocated to those who are morally deserving, according to a set of approved, desired, meritorious or virtuous behaviour.¹⁵⁹ Yet this theory goes against Singapore's stance on no-fault divorces, where courts no longer dwell on marital misconduct but instead encourage spouses to put down their past and look into the future.

35 Perhaps no philosophical theory is self-evidently right or wrong, or better or worse than any other because they simply present different dimensions of fairness.¹⁶⁰ After all, the normative foundation of fairness in family law lies not in philosophical theories in the abstract, but in the community values of family life.¹⁶¹ Fairness is necessarily grounded in social and moral values¹⁶² and leverages on the interests prioritised in society and society's views on marriage, which will then form the underlying rationale and influence the approach used to redistribute assets on divorce.

36 For instance, in England and Wales, fairness may be achieved if there is no discrimination between the spouses and their respective roles in the marriage.¹⁶³ This goes towards the recognition of marriage as an equal partnership, for it asserts the equal value of different roles, even if equal value would not be accorded in the hard world of commerce.¹⁶⁴ This is later adopted as one of the country's three strands of fairness in property divisions, the other two being financial needs¹⁶⁵ and compensation for economic disparity.¹⁶⁶ For them to be met in every case, a discretionary power to divide considering all circumstances of

¹⁵⁹ Peter Saunders, “What is a fair divorce settlement?” 1999 (53) Australian Institute of Family Studies 48, 49.

¹⁶⁰ Peter Saunders, “What is a fair divorce settlement?” 1999 (53) Australian Institute of Family Studies 48, 49.

¹⁶¹ Alison Diduck, “Public norms and private lives: Rights, fairness and family law” in Julie Wallbank, *Rights, Gender and Family Law* (Taylor & Francis Group, 2010), p 201.

¹⁶² Mark Henaghan, “Sharing Family Finances at the End of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 294.

¹⁶³ *White v White* [2001] 1 AC 596, 605.

¹⁶⁴ Rebecca Bailey-Harris, “Dividing the Assets on Family Breakdown: the Content of Fairness” (2001) 54 Current Legal Problems 533, 539.

¹⁶⁵ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, [11].

¹⁶⁶ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, [13].

the case¹⁶⁷ is necessary, understandably because not all three strands may be achieved at the same time, thus some might need to be prioritised over the others in certain cases.¹⁶⁸

37 Fairness, like beauty, lies in the eye of the beholder.¹⁶⁹ How should Singapore define fairness, bearing in mind that it ought to promote the ideals of society and be consistent with existing laws at the same time? The author's stance is that because the ideal picture of marriage in Singapore is the mutual cooperative partnership of equal efforts, it will be consistent with formal equality being the definition for fairness, which will be elaborated in the next three sub-sections.

B. Partnership Theory of Marriage

38 Under the partnership theory of marriage, marriage is a place of equality.¹⁷⁰ It recognises a community of interests created by two individuals who joined their lives through marriage – they jointly and collaboratively contribute their labour, and financial and non-financial resources for the good of their marriage as a whole.¹⁷¹ A similar picture is painted by other theories of marriage, such as the merger theory which recognises marital interdependency and the equality of spouses owing to the merger of their lives in marriage,¹⁷² and the risk-and-reward paradigm where spouses share broadly and equally in the opportunities and vulnerabilities of the union.¹⁷³ Nevertheless, the partnership theory

¹⁶⁷ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, [22].

¹⁶⁸ In other jurisdictions worldwide, Miles and Scherpe have discerned four key ingredients of fairness internationally, namely: sharing based on partnership, alleviation of need based on matrimonial obligation, compensation of relationship-generated losses, and respect for couple autonomy, possibly through marital agreements. See J Miles and Jens M. Scherpe, "The Legal Consequences of Dissolution: Property and Financial Support between Spouses" in J Eekelaar and R George (eds), *Routledge Handbook of Family Law and Policy* (Routledge, Oxford, 2014), p 142.

¹⁶⁹ Carrie Paechter, "Concepts of Fairness in Marriage and Divorce" (2013) 54 *Journal of Divorce & Remarriage* 458, 464.

¹⁷⁰ Benedeta P. Mutiso, "Getting to Equal: Resolving the Judicial Impasse on the Weight of Non-Monetary Contribution in Kenya's Marital Asset Division" (2019) 26 *Michigan Journal of Gender & Law* 121, 135.

¹⁷¹ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 142.

¹⁷² Carol Rogerson, "Developing Spousal Support Guidelines in Canada: Beginning the Discussion", available at <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ss-pae/pdf/ss-pae.pdf>> (accessed, 1 April 2021), p 26.

¹⁷³ Shari Motro, "Labour, Luck and Love: Reconsidering the Sanctity of Separate Property" (2008) 102 *Northwestern University Law Review* 1623, 1650.

of marriage takes centre stage in this article for best representing legislative intent – Singapore's concept of marriage as an equal cooperative partnership of different efforts for mutual benefit¹⁷⁴ is a clear endorsement of the partnership theory of marriage.

39 At the core of marriage as a partnership is the concept of spouses making different, but equal contributions to a marriage.¹⁷⁵ Specifically, the partnership theory of marriage quantifies the value of both spouses' variant contributions by simply treating them as inherently equal;¹⁷⁶ since each spouse is assumed to play an equal part in accumulating such property, each should receive an equal share when the marriage ends.¹⁷⁷ The spouses' cooperative conduct is the basis for redistribution of property at divorce: the collective benefits they produce through mutual efforts are conceptualised as jointly acquired and owned.¹⁷⁸

40 The partnership theory of marriage puts forth such a bold proposition because it takes into account the spouses' mutual decision on role differentiation in marriage and thus the allocation of their respective contributions to the workforce and the household.¹⁷⁹ For example, the couple may decide that one of them will specialise in the workforce, while the other would specialise in household tasks and give up his/her career prospects, whether entirely or partially. In this scenario, one spouse's achievement in the workplace is said to be possible only

¹⁷⁴ Women's Charter (Cap 353, 2009 Rev Ed) s 46(1).

¹⁷⁵ Mark Henaghan, "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 298.

¹⁷⁶ Robert Fisher, "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 331.

¹⁷⁷ Robert Fisher, "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 331, Mark Henaghan, "Exceptions to 50/50 Sharing of Relationship Property", available at <<https://www.otago.ac.nz/law/conferences/otago629330.pdf>> (accessed, 26 February 2021), p 1.

¹⁷⁸ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 Wisconsin Women's Law Journal 141, 142.

¹⁷⁹ Joni Hersch, Jennifer Bennett Shinall, "When equitable is not equal: experimental evidence on the division of marital assets in divorce" *Rev Econ Household* 2020; 18: 655–682, 659.

because of the other's domestic contributions.¹⁸⁰ The same reasoning applies also to a childless marriage, should one spouse alter his/her "patterns of workforce participation in reliance upon the security of the relationship, thereby investing to a greater extent than the other in looking after the household".¹⁸¹

41 In other words, the partnership theory of marriage considers the connection between each spouse's contributions, stemming from their private agreements on how to live their married lives. This makes perfect sense – if, as part of the union, spouses agree to differentiate their roles and live in a way which will advance their interests, as individuals and as a partnership, when the marriage ends they ought not to be separated "as individuals from the people they became in the context of the marriage, and the allocation of roles, duties and responsibilities which it entailed".¹⁸² This has been recognised only in a few local cases which awarded at least an equal Indirect Ratio because of "the way [the spouses] ordered their lives",¹⁸³ such that "one did not take priority over the other as both parties played their respective roles".¹⁸⁴ Other cases, unfortunately, superficially segregated direct and indirect contributions in strict accordance with the *ANJ* approach, without recognising that they are intertwined and without giving effect to the manner the spouses chose to live.

42 In fact, the partnership theory of marriage can go further – there is no actual need for a causal link between one's domestic contributions and the other's success in the workforce, for their contributions are intrinsically equal¹⁸⁵ and "at the heart of the moral basis for allocating property equally at the end of a marriage".¹⁸⁶ This has been

¹⁸⁰ Robert Fisher, "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 331.

¹⁸¹ Patrick Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 Federal Law Review 1, 12.

¹⁸² Patrick Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 Federal Law Review 1, 18.

¹⁸³ *UPM v UPN* [2018] SGFC 95, [121].

¹⁸⁴ *URK v URL* [2018] SGFC 122, [65]. See also *UDP v UDQ* [2017] SGFC 84, [112].

¹⁸⁵ Leong Wai Kum, "The Just and Equitable Division of Gains Between Equal Former Partners in Marriage" [2000] Singapore Journal of Legal Studies 208, 218.

¹⁸⁶ Mark Henaghan, "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 298.

acknowledged by English courts which said that non-financial contributions were “in their own right of equal value” with financial contributions,¹⁸⁷ each should be recognised as no less valuable than the other,¹⁸⁸ and it was impermissible to accord the breadwinner’s contribution with greater value than the homemaker’s contribution.¹⁸⁹ This is consistent with section 25(2) of UK’s Matrimonial Causes Act 1973, which does not demand any critical evaluation of the quality of each spouse’s performance during the marriage.¹⁹⁰ In other words, courts are minded not to assess the outcome of each spouse’s contributions or invested efforts into the marriage, but only the contributions or invested efforts *simpliciter*. It is the fact of contributions in a role-divided partnership which matters, not their quality.¹⁹¹

43 Lastly, it is crucial to be mindful of the limitations of this partnership theory, that it only applies to fruits of the relationship.¹⁹² Since the theory asserts that each spouse deserves an equal share of the properties sought to be divided because they contributed equally, albeit differently, during the marriage, these properties must have been created or enhanced because of their partnership in the first place. Equal division, in accordance with the theory, will only be fair if there is a causal nexus between the parties’ efforts and the creation of such property during the marriage.¹⁹³ The adoption of this theory would necessarily inform how the definition of “matrimonial assets” ought to be drafted, to accurately delineate the pool of matrimonial assets at the first essential stage of the division exercise. It is noteworthy that once the definition is clearly centred on partnership-created capital only, the duration of the marriage

¹⁸⁷ Rebecca Bailey-Harris, “Dividing the Assets on Family Breakdown: the Content of Fairness” (2001) 54 *Current Legal Problems* 533, 540.

¹⁸⁸ R Bailey-Harris, “The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales” [2005] *International Journal of Law, Policy and the Family* 229, 233.

¹⁸⁹ *Lambert v Lambert* [2003] *Fam* 103, 117.

¹⁹⁰ Rebecca Bailey-Harris, “The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales” [2005] *International Journal of Law, Policy and the Family* 229, 233.

¹⁹¹ Patrick Parkinson, “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 *Federal Law Review* 1, 53.

¹⁹² Robert Fisher, “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 332.

¹⁹³ Robert Fisher, “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 337.

becomes redundant in invoking the equal sharing rule because however short the spouses have been together, the fruits of the relationship will always be created only because of their joint labour, albeit in different aspects.¹⁹⁴

C. *Functionalist Approach of the Law*

44 To reiterate, Singapore endorses the partnership theory of marriage, which conveys the ideal picture of marriages where spouses are seen as equal partners – being in the same boat and committing to sink or swim together, they join their hands and work together for the mutual interests of the family union, and discharge their common but differentiated responsibilities; each contributes a different, but equally valuable set of benefits for the good of the marriage.¹⁹⁵ This dominance of equality in Singapore’s concept of marriage would naturally influence her preferred method for valuing contributions,¹⁹⁶ and underscore legal regulation of the husband-wife relationship, including the court’s power to divide their matrimonial assets.¹⁹⁷ According to the functionalist approach of the law, the function of a legal rule influences its content. Functionalists are “concerned with the law’s operative role in society”, particularly the “social effect of its operations, including the fulfilment of any existing ideals of society”.¹⁹⁸ Indeed, it has already been recognised that laws concerning the division of matrimonial assets are closely related to ideological statements of marriage and the roles of the spouses.¹⁹⁹ As such, how may the recognition of marriage as an equal partnership be best reflected in Singapore law? How may the division of

¹⁹⁴ Robert Fisher, “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 333.

¹⁹⁵ Alicia Brokars Kelly, “Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life” (2004) 19 *Wisconsin Women’s Law Journal* 141, 157.

¹⁹⁶ Martha Albertson Fineman, “Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce” in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 273.

¹⁹⁷ Leong Wai Kum, “The Just and Equitable Division of Gains Between Equal Former Partners in Marriage” [2000] *Singapore Journal of Legal Studies* 208, 224.

¹⁹⁸ S Mermin, “Legal Functionalism”, available at <<https://dialnet.unirioja.es/descarga/articulo/2064852.pdf>> (accessed, 2 March 2021).

¹⁹⁹ Mary Ann Glendon, “Matrimonial Property: A Comparative Study of Law and Social Change” (1974) 49 *Tulane Law Review* 21, 23, cited in Leong Wai Kum, “Division of Matrimonial Assets: Recent Cases and Thoughts for Reform” [1993] *Singapore Journal of Legal Studies* 351, 359.

matrimonial assets be performed in a manner which is consistent with the equal partnership model under which they are acquired?

45 The ideal of equality between spouses is at the centre of Singapore's views of marriage and hence exerts a powerful, symbolic influence²⁰⁰ on how rules on division of matrimonial assets should be fashioned locally.²⁰¹ Equal division most clearly gives effect to this ideal, and truly reflects the partnership's core values of joint contributions – that each spouse's contributions to a family, which are deemed intrinsically equal, are no less valuable than their counterpart's. Saying that the spouses' efforts are "equally important is not enough"; the law ought to reflect this so that it is "not merely perfunctory".²⁰² As such, inclination to equality as a starting point for a just and equitable division²⁰³ simply falls short of such a desired outcome. After all, equal division is the "most easily understood and implemented manifestation of equality".²⁰⁴ Additionally, a purpose of family law is also to promote gender equality – Otto Kahn-Freund noted that the concept of marriage as a partnership is intricately connected to the universally recognised principle of the equality of the sexes.²⁰⁵ To promote the equal status of men and women in society and eliminate gender discrimination, the law must also provide for equal division which reduces sex role stereotypes in marriages, emphasises the equal human dignity of each person in the marriage,²⁰⁶ and promotes "broader ideals of placing equal value and

²⁰⁰ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 199.

²⁰¹ Martha Albertson Fineman, "Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce" in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 275.

²⁰² Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 *SACLJ* 797, 827.

²⁰³ Leong Wai Kum, "The Just and Equitable Division of Gains Between Equal Former Partners in Marriage" [2000] *Singapore Journal of Legal Studies* 208, 237, Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 *SACLJ* 797, 827, 829, 832.

²⁰⁴ Martha Albertson Fineman, "Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce" in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 276.

²⁰⁵ Otto Kahn-Freund, "Matrimonial Property – Some Recent Developments" (1959) 22 *Modern Law Review* 241, 248.

²⁰⁶ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 199.

promoting freedom of choice in marriage roles”.²⁰⁷ Equal division performs a desirable expressive function by standing against any investigation into the interior functioning of the marital community, and best demonstrates that no spouse is any more entitled to marital resources than his/her counterpart.²⁰⁸ Overall, equality, more than a method of division, has real and symbolic power.

46 Of course, the best reflection of the concept of marriage as an equal partnership in Singapore must also be a practical one. Symbolism and noble goals aside, even if the function of division of matrimonial assets is simply to give effect to the parties’ contributions to the marriage, the most pragmatic method will still be equal division, due to the lack of any practical method to fully reconstruct, sensibly value and accurately account for one’s contributions during the marriage.²⁰⁹ This is particularly so considering the expanded meaning of “contribution” which the underlying partnership theory of marriage utilises. Since it recognises that “both spouses furnish a range of resources for the benefit of the marital relationship as a whole and, further, that sharing conduct in marriage plays a significant role in causing the respective economic positions the parties find themselves in at the end of the relationship”,²¹⁰ it must be considering contributions to the marriage generally, instead of to particularised assets of the marriage.²¹¹ Each partner carries out the projects constitutive of his married life “in a spirit of trust and love rather than of the piecemeal calculation of individual advantage.”²¹² Indeed, as two parties join forces and work towards a shared, satisfying life together, they pervasively share the burdens and benefits of their joint life, and the partnership model promotes the kind of interdependence and altruistic behaviour in spouses critical for the preservation of

²⁰⁷ Martha Albertson Fineman, “Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce” in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 276.

²⁰⁸ Carolyn J. Frantz, Hanoch Dagan, “Properties of Marriage” (2004) 104 *Columbia Law Review* 75, 103–104.

²⁰⁹ Alicia Brokars Kelly, “Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life” (2004) 19 *Wisconsin Women’s Law Journal* 141, 173.

²¹⁰ Shari Motro, “Labour, Luck and Love: Reconsidering the Sanctity of Separate Property” (2008) 102 *Northwestern University Law Review* 1623, 1651.

²¹¹ Alicia Brokars Kelly, “Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life” (2004) 19 *Wisconsin Women’s Law Journal* 141, 174–175.

²¹² Carolyn J. Frantz, Hanoch Dagan, “Properties of Marriage” (2004) 104 *Columbia Law Review* 75, 83.

marriage.²¹³ This reinforces the concept that valuation of contributions is impossible. Any methodology utilised to identify and measure the relative quality and value of the whole range of contributions made will be unreliable. And the rule of equality necessarily avoids this impossible inquiry.²¹⁴

47 Therefore, from both the symbolic and practical points of view, property acquired by the single enterprise of the union, to which spouses are presumed to contribute equally, should be equally shared at divorce. While existing literature in Singapore has sought to retain the starting point of an inclination to equality within section 112 in determining what would be a just and equitable division,²¹⁵ as well as an explicit exception to veer away from such a starting point for short marriages,²¹⁶ the author respectfully disagrees with such a proposal. Preserving the “just and equitable” directive means that the problems present in the current law²¹⁷ will continue to surface in future cases. More importantly, considering the partnership theory of marriage with equality as the dominant concept, it does not make sense to dictate equality in the legislation only by way of a starting point, and further restrict it by additionally introducing exceptions. The moral message conveyed to society by such a law would continue to fall short of the noble notion that marriage is an *equal* cooperative partnership of different efforts. In fact, as presented earlier, so long as the definition of matrimonial assets is reformed to focus on partnership-created capital, there should be no real hindrances towards equal division between the spouses.

D. Response to Counter-Arguments

(1) Not Representative of Every Marriage

²¹³ Sally Burnett Sharp, “The Partnership Ideal: The Development of Equitable Distribution in North Carolina” (1987) 65 NC L Rev 195, 199.

²¹⁴ Alicia Brokars Kelly, “Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life” (2004) 19 Wisconsin Women’s Law Journal 141, 203.

²¹⁵ Leong Wai Kum, “The Just and Equitable Division of Gains Between Equal Former Partners in Marriage” [2000] Singapore Journal of Legal Studies 208, 237, Leon Vincent Chan Chun Kit, “The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore” (2018) 30 SAclJ 797, 827.

²¹⁶ Leon Vincent Chan Chun Kit, “The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore” (2018) 30 SAclJ 797, 829, 832.

²¹⁷ See Part III.

48 Opponents argue that the rule of equality is inflexible²¹⁸ in failing to consider the varying dynamics of marriages and simply assuming their homogeneity,²¹⁹ and thus unfair for not giving effect to such differences at divorce.²²⁰ Granted, every marriage is unique – every pair of spouses will agree to different living arrangements, play different roles in the union, have varying number of children, and remain married for a different duration. Nevertheless, looking at the image of marriage more generally, the partnership theory equally applies despite the differences. However the spouses have chosen to lead their lives together, it remains that the division of matrimonial assets is focused only on the economic fruits of the relationship. This criticism would be appropriately addressed once the present definition of matrimonial assets is reformed to focus purely on such partnership-created capital, as per the partnership theory of marriage which Singapore endorses.

49 Of course, the rule of equality is also not envisioned to be an absolute rule. Reasoning from the partnership theory, it is understandable that certain scenarios may be carved out from the rule of equality because the matrimonial asset in question is not the product of the joint endeavours of the spouses within the marriage,²²¹ such as where the contributions made are blatantly and grossly disproportionate²²² that it would be unjust to apply the partnership theory of marriage.

(2) *Equality is Not Necessarily Equity*

50 Another common criticism is that the rule of equality does not allow for substantive equality.²²³ Indeed, role differentiation as agreed between the spouses materially contributes to the economic situation

²¹⁸ Rebecca Bailey-Harris, “Dividing the Assets on Family Breakdown: the Content of Fairness” (2001) 54 *Current Legal Problems* 533, 535.

²¹⁹ *Singapore Parliamentary Debates, Official Report* (27 August 1996) vol 66, col 527 (Abdullah Tarmugi, Minister for Community Development).

²²⁰ Jens M. Scherpe, “The Financial Consequences of Divorce in a European Perspective” in *European Family Law, Vol. III* (Edward Elgar Publishing, 2016), para 2.6.2.2.

²²¹ Simon Sugar, Andrzej Bojarski, *Unlocking Matrimonial Assets on Divorce* (Jordan Publishing Limited, 3rd Ed, 2012), para 16.5.

²²² This is one of the exceptions drafted within New Zealand’s rule of equality. See Property Relationships Act 1976 (No 166 of 1976) (NZ) s 14(2)(c).

²²³ *Singapore Parliamentary Debates, Official Report* (27 August 1996) vol 66, col 527 (Abdullah Tarmugi, Minister for Community Development). See Part II, paragraph 6(b).

they each face at divorce,²²⁴ as they face different work opportunities and have different earning capacities. And the rule of equality is criticised in failing to compensate for such an economic disparity, leaving the economically disadvantaged party during the marriage economically disadvantaged at the moment of divorce and thereafter.²²⁵

51 However, this criticism is irrelevant and on a different plane altogether because stemming from the partnership theory of marriage, the division exercise is simply concerned about the distribution of economic fruits of the partnership, which is a retrospective exercise, and not to put the spouses in economic equality, which necessarily stretches into the indefinite future.²²⁶ As discussed earlier, they are mutually exclusive. The criticism is, therefore, unreasonably harsh for neglecting the other possible legal tools and remedies available upon divorce,²²⁷ which must necessarily be utilised given the impossibility of achieving both goals using one single measure.

52 The author posits that substantive equality is more appropriately tackled by post-divorce maintenance orders, which plays a complementary and supplementary role to the division of matrimonial assets²²⁸ and corrects any residual inequality between the spouses.²²⁹ In this respect, the author respectfully disagrees with local arguments in support of reform which cite the need to accord more recognition or compensate for the loss of career opportunities for the homemaker of the family.²³⁰ The law of division of matrimonial assets should not be the sole crude instrument with which Singapore attempts to implement

²²⁴ Alicia Brokars Kelly, "Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life" (2004) 19 *Wisconsin Women's Law Journal* 141, 204.

²²⁵ Rebecca Bailey-Harris, "The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales" [2005] *International Journal of Law, Policy and the Family* 229, 234.

²²⁶ John Eekelaar, "Equality and the Purpose of Maintenance" (1988) 15 *Journal of Law and Society* 188, 192.

²²⁷ Jens M. Scherpe, "The Financial Consequences of Divorce in a European Perspective" in *European Family Law, Vol. III* (Edward Elgar Publishing, 2016), para 2.6.3.

²²⁸ *ATE v ATD and another appeal* [2016] SGCA 2, [33].

²²⁹ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 18.028.

²³⁰ Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 *SaCLJ* 797, 820, Leong Wai Kum, "The Just and Equitable Division of Gains Between Equal Former Partners in Marriage" [2000] *Singapore Journal of Legal Studies* 208, 236.

equality *and* address dependency and need,²³¹ because these are intrinsically incompatible notions, and need has no role to play in a true partnership of equals.²³² According to case law, post-divorce maintenance orders are relevant only where the division of matrimonial assets falls short of providing each spouse with a fair surplus of the wealth acquired during the marriage.²³³ It would be consistent with this existing understanding for substantive equality to be the focus of post-divorce maintenance orders, which already presently looks into the spouse's future financial needs,²³⁴ and be resorted to should formal equality not result in a fair outcome at the division stage. Indeed, Atkin argues that redressing economic disparity fits more easily under the law of maintenance, as maintenance payments are usually periodic and a more precise tool than a lump sum transfer of property.²³⁵

VI. Practical Insights from New Zealand

53 New Zealand adopts the rule to equality and is chosen as the subject for analysis in this article considering that it is a common law jurisdiction and adopts the deferred community of property regime²³⁶ like Singapore, thus any lessons from its rules-based regime would likely be useful in providing some practical insights for Singapore.²³⁷

²³¹ Martha Albertson Fineman, "Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce" in Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (Taylor & Francis Group, 2012), p 267.

²³² Leong Wai Kum, "The Just and Equitable Division of Gains Between Equal Former Partners in Marriage" [2000] *Singapore Journal of Legal Studies* 208, 219.

²³³ Leong Wai Kum, *Elements of Family Law in Singapore* (3rd Ed) (LexisNexis, 2018), para 18.017.

²³⁴ Women's Charter (Cap 353, 2009 Rev Ed) s 114(1)(b).

²³⁵ Bill Atkin, *Relationship Property in New Zealand* (LexisNexis, 3rd Ed, 2018), p 129.

²³⁶ Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 3.

²³⁷ The author is aware of other jurisdictions which have similarly adopted the rule to equality in the division of matrimonial assets, such as the civil law jurisdictions of Denmark, Sweden, Germany and Québec. Nevertheless, New Zealand is chosen to be the primary focus of comparison in this article because it has the highest resemblance to Singapore in the following aspects and would, thus, bring the most meaningful analysis: (a) They are both common law jurisdictions; (b) They both adopt the deferred community property regime; (c) New Zealand began with a discretionary regime and later evolved into a rules-based regime, showing that the rules-based regime is adopted not simply due to long-running tradition and history, but clear deliberation of the cons of the discretionary regime, which similarly surfaced in Singapore.

54 Initially, New Zealand shared a strong preponderance of judicial discretion in the division of matrimonial property to achieve justice between divorcing spouses, like England.²³⁸ However, it turned out difficult to prove non-financial contributions – the courts failed to appreciate their value²³⁹ and financial contributions inevitably carried more weight in divisions.²⁴⁰ This broad and unfettered judicial discretion also resulted in unpredictable outcomes and inconsistent awards.²⁴¹ This mirrors Singapore's experiences.

55 In 1976, its Matrimonial Property Act (“MPA”)²⁴² introduced the rule of equality subject to certain exceptions, on the basis of the partnership theory of marriage – since partnership implies shared functions, mutual rights and cooperation, a just division must recognise that each spouse had contributed equally to the marriage, thus the joint products or “fruits” of the marriage are shared equally.²⁴³ Under this new rule, contributions are assessed with regard to the marital relationship as a whole, as opposed to merely specific matrimonial properties like what was done in the past.²⁴⁴

56 However, shortcomings shortly emerged. Although MPA provided for equal sharing, it failed to secure an equitable division of the fruits of the marriage.²⁴⁵ Role differentiation within the marriage could leave one spouse with a significantly higher income and living standards at the stage of divorce, yet an equal division would do nothing to

²³⁸ Peter De Cruz, *Family Law, Sex and Society: A Comparative Study of Family Law* (Taylor & Francis Group, 2006), p 137.

²³⁹ Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 3.

²⁴⁰ A M Finlay, “Matrimonial Property – Comparable Sharing: an Explanation of the Matrimonial Property Bill 1975” [1975] AJHR E6, 5.

²⁴¹ Emily McNaughtan's Dissertation, “Home is where the Half is”, available at <<https://www.otago.ac.nz/law/research/journals/otago672753.pdf>> (accessed, 21 February 2021), p 10.

²⁴² No 166 of 1976 (NZ).

²⁴³ Emily McNaughtan's Dissertation, “Home is where the Half is”, available at <<https://www.otago.ac.nz/law/research/journals/otago672753.pdf>> (accessed, 21 February 2021), p 14.

²⁴⁴ Emily McNaughtan's Dissertation, “Home is where the Half is”, available at <<https://www.otago.ac.nz/law/research/journals/otago672753.pdf>> (accessed, 21 February 2021), p 10.

²⁴⁵ Nicola Peart and Mark Henaghan, “Children's Interests in Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 80.

compensate this economic disparity. Women are usually adversely affected, because they are often the primary caregivers in the family and sacrificed the progression of their careers in so doing, but an equal division would not compensate for their drop in earning capacity incurred during the marriage and their drop in living standards after divorce.²⁴⁶

57 This spurred further changes in 2001. The legislation was renamed the Property (Relationships) Act 1976 (“**PRA**”)²⁴⁷ to include other *de facto* relationships,²⁴⁸ and amended to give the courts the power to make compensation orders to redress such economic disparities, which may eventually result in unequal sharing.²⁴⁹ This was to “protect the economic vulnerability” of the spouse who stepped aside from the paid workforce to undertake domestic duties.²⁵⁰ More than before, New Zealand’s laws enhance substantive equality, and are more balanced – the focus is no longer simply retrospectively on the spouses’ contributions during the marriage and their property entitlements, but also on future-oriented considerations like compensation and needs.²⁵¹

58 Unfortunately, many did not agree with this change. Some were not accepting of the speculation which judges had to delve into in granting compensation orders under section 15, criticising that it “legitimised fortune-telling”.²⁵² This is because the calculation of one’s future income is not an exact science, and one’s earning capacities may

²⁴⁶ Nicola Peart and Mark Henaghan, “Children’s Interests in Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 80.

²⁴⁷ Property Relationships Act 1976 (No 166 of 1976) (NZ) s 14(2)(c).

²⁴⁸ Emily McNaughtan’s Dissertation, “Home is where the Half is”, available at <<https://www.otago.ac.nz/law/research/journals/otago672753.pdf>> (accessed, 21 February 2021), p 12.

²⁴⁹ Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 4. See Property Relationships Act 1976 (No 166 of 1976) (NZ) s 15.

²⁵⁰ Mark Henaghan, “Sharing Family Finances at the End of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 315.

²⁵¹ Bill Atkin, “Reforming Property Division in New Zealand: From Marriage to Relationships” (2001) 3 ELJR 349, 358.

²⁵² Mark Henaghan, “Sharing Family Finances at the End of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 305.

fluctuate unpredictably based on unique circumstances.²⁵³ Additionally, the PRA does not provide any guidance for judges, much less a prescribed formula to decide the quantum of compensation. No rule of thumb is possible and it created a divergence of judicial decision-making.²⁵⁴ Therefore, it seems that uncertainty is merely diverted from one area of the law to another, and not entirely eradicated.²⁵⁵ Furthermore, there was much confusion stemming from the overlap with the issuance of maintenance orders, which were meant to tackle similar issues on needs and economic disparity.²⁵⁶ As much as the author disagrees with creating a new provision to deal with economic disparity between divorcing spouses in Singapore, the author does not see a huge problem in the courts attempting to predict future events for this has always been the focus of post-divorce maintenance law, and with the rule of equality, any uncertainty or unpredictability would have been greatly narrowed. It is justifiable to retain minimal discretions in the law to address any residual inequality faced by the parties.

59 Another critique concerns the definition of relationship property. New Zealand includes properties acquired by either spouse during the marriage, which are the fruits of the relationship, and properties central to family life, into the pool for division.²⁵⁷ Yet it is difficult to identify the rationale for the equal division of properties central to family life all the time, regardless of when or why they were acquired,²⁵⁸ the spouses' intentions and expectations when they were acquired,²⁵⁹ and even if they were pre-marital property or obtained as

²⁵³ Mark Henaghan, "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 313.

²⁵⁴ Mark Henaghan, "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 322.

²⁵⁵ In response to this problem, it has been suggested to include earning capacity as relationship property in its own right, which will be subject to equal division as well. However, it is unclear how earning capacity is to be valued.

²⁵⁶ Mark Henaghan, "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Ltd, 2017), p 296.

²⁵⁷ New Zealand Law Commission Issues Paper, *Review of the Property (Relationships) Act 1976: Preferred Approach* [2018] NZLCIP 44, para 2.3.

²⁵⁸ New Zealand Law Commission Issues Paper, *Review of the Property (Relationships) Act 1976: Preferred Approach* [2018] NZLCIP 44, para 2.11.

²⁵⁹ New Zealand Law Commission Issues Paper, *Review of the Property (Relationships) Act 1976: Preferred Approach* [2018] NZLCIP 44, para 2.90.

gift or inheritance.²⁶⁰ Indeed, these three factors, when considered, might suggest that the property concerned are not fruits of the relationship, and would naturally be excluded from division according to the partnership theory of marriage. The proposed solution in New Zealand, which Singapore could keep in mind, is to additionally focus on the spouses' intentions when certain properties are acquired,²⁶¹ and classify those properties acquired for the spouses' common use or benefit as matrimonial assets. The basis for classifying such acquisitions as relationship property is that they have been made with the relationship in mind to benefit the family joint venture. Thus, even if they are funded from separate property to begin with, these can still be regarded as a form of contribution to the marriage²⁶² for the greater good of the family union.

VII. Suggestions for Reform

60 It is now apt to turn to the author's suggested reforms. The proposed amendments would look like this:

112.—(1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset —

- (a) equally; or
- (b) in exceptional circumstances, in such other proportions subject to subsection (2).

²⁶⁰ New Zealand Law Commission Report, *Review of the Property (Relationships) Act 1976* [2019] NZLCR 143, para 3.22.

²⁶¹ New Zealand Law Commission Issues Paper, *Review of the Property (Relationships) Act 1976: Preferred Approach* [2018] NZLCIP 44, para 2.88. See p 58, where the proposed amendments considered properties acquired before the marriage as relationship property if they were intended for the common use or benefit of the partners *and* were indeed subsequently used during the marriage, while properties acquired during the marriage are considered relationship property so long as they were intended for the common use or benefit of the spouses.

²⁶² New Zealand Law Commission Issues Paper, *Review of the Property (Relationships) Act 1976: Preferred Approach* [2018] NZLCIP 44, para 2.93.

(2) It shall be the duty of the court in deciding the proportions of division under subsection (1)(b) to have regard to all the circumstances of the case, including the following matters:

- (a) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;
- (b) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;
- (c) the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;
- (d) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;
- (e) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party; and
- (f) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business.²⁶³

(10) In this section —

“exceptional circumstances” includes —

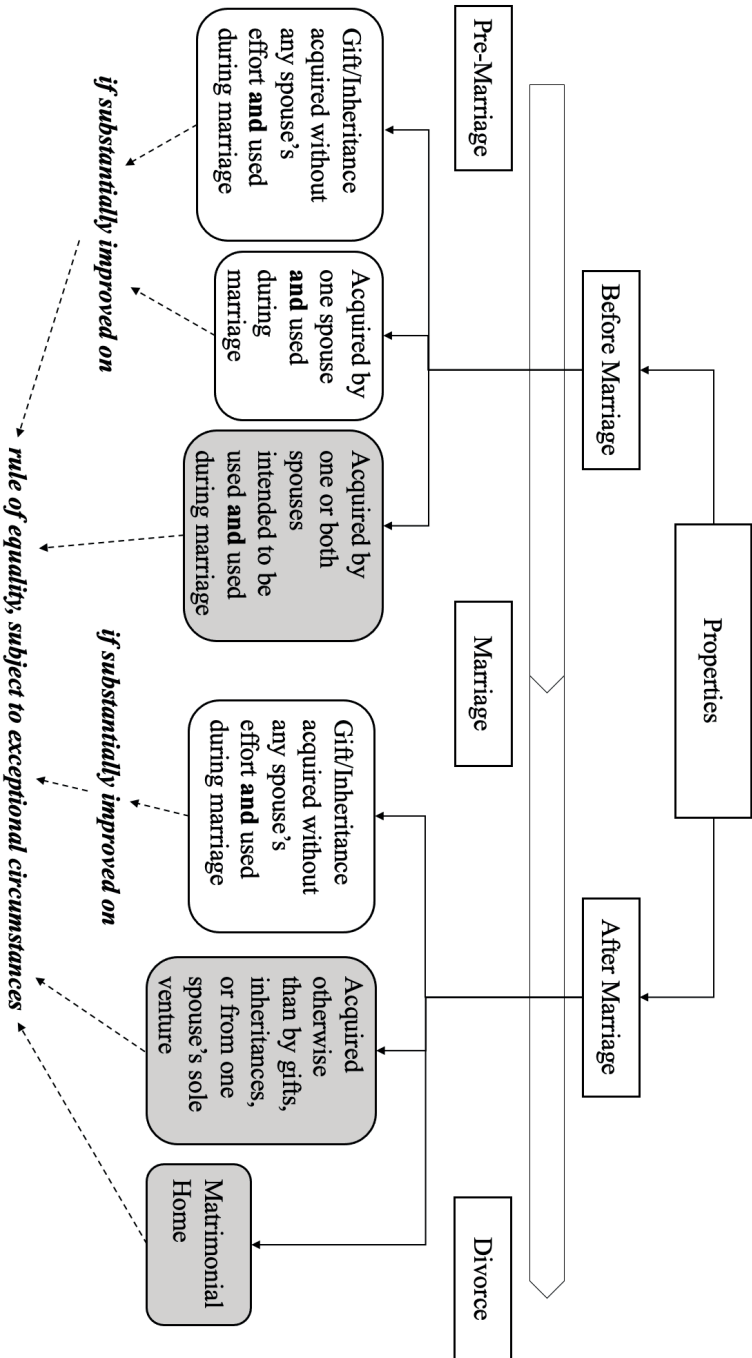
²⁶³ Forward-looking factors concerning financial needs, future earning capacity are removed, since the division exercise is concerned with contributions and it would incompatible to include forward-looking factors.

(a) extremely short marriages lasting less than 6 years; and
(b) marriages with grossly disproportionate contributions;
“matrimonial assets” refers to the material gains of the marital relationship²⁶⁴ and means —

- (a) the matrimonial home;
- (b) any other asset acquired during the marriage otherwise than by gift, inheritance or on the basis of one party’s solo venture;
- (c) any other asset acquired before the marriage by one or both parties to the marriage which is intended to be used by the family and subsequently used as such;
- (d) any other asset acquired before the marriage by one party to the marriage, otherwise than by gift or inheritance, which is subsequently used by the family and substantially improved during the marriage by both parties; and
- (e) any other asset acquired before or during the marriage by one party to the marriage, whether by gift or inheritance, but other than inter-spousal re-gifts, which is subsequently used by the family and substantially improved during the marriage by both parties.²⁶⁵

²⁶⁴ *UZN v UZM* [2021] 1 SLR 426, [72].

²⁶⁵ *UEQ v UEP* [2019] 2 SLR 463, [17].



61 In this proposal, the author seeks to make clear the objective of the division exercise, which is to redistribute the material gains of marriage between the divorcing spouses. The existing law simply grants the court the power to order the division of “any matrimonial asset”,²⁶⁶ which is then merely defined to refer to specific categories of assets²⁶⁷ without making reference to the actual subject of division, that is, the material gains of the marriage in accordance with the partnership theory.²⁶⁸ The proposed amendments, therefore, explicitly indicate “material gains of the marital partnership” within the definition.

62 The specified categories of properties under the proposed definition are also carefully drafted to represent material gains of the marriage, to be consistent with the partnership theory of marriage. First, properties in category (b) are purchased during the marriage and have the strongest connection with the family. Thus, they are reasonably considered as gains of the marriage and fruits of the relationship. The reference to who acquired the properties is dropped, in light of the partnership theory of marriage which considers the spouses’ joint lives and one’s contributions being intrinsically linked to and inseparable from another’s. Properties which are acquired on the basis of a single spouse’s solo venture are now excluded, given that they are not purchased in agreement by both spouses with a view to benefit the family joint venture and are thus not considered partnership-created capital. This is a change from the existing wording of the statute, after taking into account insights from the partnership theory of marriage. Next, properties in categories (c) and (d) are purchased before the marriage, have a weaker connection with the family and hence, are subject to more strenuous requirements. For category (c), the weaker link is compensated with the presence of an intention to benefit the family *and* a manifestation of that intention through actual utility of the property by the family. The former is an additional qualifier compared to the present law that merely requires the properties to be used by the family,²⁶⁹ which does not, alone, meet the requirements for partnership-created capital. As mentioned earlier, one’s intention to benefit the family would be a form of contribution to the marriage for the greater good of the family

²⁶⁶ Women’s Charter (Cap 353, 2009 Rev Ed) s 112(1).

²⁶⁷ Women’s Charter (Cap 353, 2009 Rev Ed) s 112(10).

²⁶⁸ See *USB v USA* [2020] 2 SLR 588, [18], where the court interpreted the division exercise to simply concern, broadly, “assets relating to marriage”.

²⁶⁹ Women’s Charter (Cap 353, 2009 Rev Ed) s 112(10)(a)(i).

union, thereby qualifying the properties as fruits of the relationship. Meanwhile, for category (d), since the properties are not purchased with any contemplation of marriage, should they be used by the family, they would only be considered as material gains of the marriage if they are substantially improved upon during the marriage.²⁷⁰ Having expended efforts into such properties to improve them during the marriage, they may then be termed as gains of the marriage. The same applies to properties in category (e) which are originally acquired without any party's efforts, but are later used by the family and substantially improved upon, thus qualifying them as material gains of the partnership. Last but not least, the matrimonial home is drafted in its own category because in the author's view, it would fit into any of the broad categories (b)-(e) in any event throughout the course of the marriage. Properties which do not fall within any of these categories would not be partnership-created capital, and thus be excluded from division altogether.

63 All in all, a huge revamp to the existing definition, which is already largely on par with the partnership theory of marriage, is unnecessary. It is believed that the minor tweaks proposed would bring the definition more neatly aligned with the partnership theory, such that the properties drafted within the definition are clearly the material gains of the marital partnership, and additionally reiterate the importance of the matrimonial home, resolve certain discrepancies concerning the existing proviso and inter-spousal re-gifts,²⁷¹ and simplify the wording of the provision for clearer understanding.

64 Next, the author proposes the rule of equality to be invoked for all property satisfying the definition of "matrimonial assets", unless special circumstances exist. As elaborated earlier, an equal division of material gains of the marriage is entirely consistent with the partnership theory of marriage, which considers financial and non-financial contributions as equally valued and intrinsically equal, and acknowledges that role differentiations are a result of the spouses' mutual agreement. No artificial distinctions need to be drawn based on

²⁷⁰ Substantial improvement of the asset either entails the investment of money or money's worth for the improvement of the asset or arises from effort which can be understood as having economic value. See *USB v USA* [2020] 2 SLR 588, [22].

²⁷¹ The proposed amendments to section 112(10) seek to codify the existing case law by removing the proviso entirely and excluding inter-spousal re-gifts from the definition of "matrimonial assets" completely.

the length of the marriage, whether the marriage was single-income or dual-income, and whether they had any children.²⁷² This addresses Parliament's fear for short, childless marriages, which made it adverse to even an inclination towards equality in 1996.²⁷³ Next, the rule to equality removes the need for courts to delve deep into the minutiae of marriage life and eliminates the practical difficulties of quantifying parties' contributions, much less juxtaposing contributions of differing nature. Being a clearer directive than the "just and equitable" formulation, it reduces the extent of unpredictability in an already stressful and taxing divorce. The divorcing parties would discover that having a litigious attitude would not benefit them and instead, learn to truly put down their past and focus on their way forward. Indeed, this is in line with the noble goal of the family justice system to terminate marriages harmoniously with the least acrimony possible.

65 The inconsistencies that are present in existing law are also removed with the new rule to equality.²⁷⁴ Courts no longer need to juggle the list of factors contained in the statute while adopting a method of division largely built on the direct and indirect contributions dichotomy. With equal division, courts need not evaluate the quality of one's efforts, and may simply acknowledge the fact that one has invested efforts into the marriage, reflecting a true parity between financial and non-financial contributions.

66 Exceptions to the rule of equality would apply where the parties' contributions were grossly disproportionate, such that the matrimonial assets are unrepresentative of a joint and cooperative effort, the picture which the partnership theory of marriage envisaged. This could include situations where there is an extraordinarily large pool of matrimonial assets available for division accrued by one party's exceptional efforts,²⁷⁵ and scenarios where parties had lived separately such that the care of the matrimonial home and/or children was the primary

²⁷² The law, therefore, will continue to provide for all cases. This is aligned with Parliament's view. See Part II, paragraph 6(b).

²⁷³ *Singapore Parliamentary Debates, Official Report* (27 August 1996) vol 66, col 527 (Abdullah Tarmugi, Minister for Community Development), Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 SAclJ 797, 814.

²⁷⁴ This tackles one of the concerns Parliament enunciated as it rejected the directive to incline towards equality, namely the need for consistency in the law. See Part II, paragraph 6(a).

²⁷⁵ *ANJ v ANK* [2015] 4 SLR 1043, [27].

responsibility of one spouse.²⁷⁶ These are the exceptional circumstances which judicial discretion is reserved for in this new rules-based system.²⁷⁷ Forward-looking factors concerning financial needs and future earning capacity are removed, thus the courts need not consider them in determining the proportions of division for these exceptional cases.

67 Extremely short marriages are also part of the exceptions to the rule of equality, but their carve-out should not be misinterpreted as a downplaying of one's indirect contributions, especially since the proposed amendments are themselves built on the general shift in focus from the outcome of contributions to contributions *simpliciter*. Rather, this exceptional circumstance is drafted to respond to Parliament's concern on marriages of convenience when they rejected the proposal for an inclination to equality.²⁷⁸ While the Women's Charter already voids marriages of convenience,²⁷⁹ and prevents parties from rushing into and out of marriage capriciously and divorcing within three years,²⁸⁰ it is still a pragmatic concern to safeguard the interests of the spouse who has entered into the marriage genuinely and not allow his/her contributions to be taken advantage of by the other party. Therefore, divorce for marriages which last less than six years, twice the length of the three-year time bar for divorce applications,²⁸¹ would constitute an exceptional circumstance and equal division will not be ordered by the courts.

68 All in all, this approach would be truly consistent with the functionalist approach of the law, which promotes the societal ideal of marriages being cooperative partnerships of equal effort and gender

²⁷⁶ See, e.g., *VIO v VIR* [2020] SGFC 49, *VAC v VAD* [2019] SGFC 95.

²⁷⁷ In these stated circumstances, an equal division would not be justified. Allowing for exceptions further enables the law to provide for all cases, which is consistent with Parliament's pronouncements on the matter. See Part II, paragraph 6(b).

²⁷⁸ *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996), p C4. See Part II, paragraph 6(c).

²⁷⁹ Women's Charter (Cap 353, 2009 Rev Ed) s 11A(1).

²⁸⁰ Women's Charter (Cap 353, 2009 Rev Ed) s 94(1).

²⁸¹ It is interesting to note that marriages lasting seven to ten years were considered to be of "normal length" in Leong Wai Kum, "Division of Matrimonial Assets: Recent Cases and Thoughts for Reform" [1993] Singapore Journal of Legal Studies 351, 387. In other jurisdictions like Ontario, Canada for example, a marriage of less than five years is considered short, as evidenced under s 5(6)(e) of its Family Law Act 1990. This is cited as a possible reform in Leon Vincent Chan Chun Kit, "The Unfounded Fears Towards Equal Division of Matrimonial Assets in Singapore" (2018) 30 SAclJ 797, 829 as well.

equality in demanding zero discrimination between the spouses. It is crucial to reiterate that an equal division is not subpar for necessarily failing to provide for all marriages because the partnership model naturally undergirds every single marriage. Last but not least, substantive equality is, more appropriately, the subject of post-divorce maintenance law instead, and thus not the focus of the division exercise.

VII. Conclusion

69 In conclusion, having considered the notion of fairness, partnership theory of marriage and the functionalist approach of the law, this article advocates a clearer definition of “matrimonial assets” focused on the material gains of the partnership and the rule to equality for such property. It is the author’s opinion that the amendments, if adopted, would truly reflect the philosophy of marriage as an equal partnership of different efforts, greatly enhance the fairness accorded to each divorcing individual and bring Singapore’s family law to greater heights.

70 Nobody ever denies that divorce is a tormenting affair. Amidst all negative emotions, parties to a marriage, once soulmates for each other, decide that parting ways is the best for both of them. They can pack up their emotions, but not necessarily the memories they have shared, the memories of the best times of their lives – “moments and feelings, captured in amber, strung on filaments of reason”²⁸² – the memories of that time they vowed to have and to hold, for better or for worse, for richer or for poorer, in sickness and in health, till “death” do them part. At the end of a new beginning, perhaps it is time for the law to help them remember their once blissful union and unconditional love, be magnanimous to each other for one last time, look ahead, and recast their future with dignity.

—

²⁸² A quote by Mark Lawrence.