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THE UNFOUNDED FEARS TOWARDS EQUAL DIVISION OF MATRIMONIAL ASSETS IN SINGAPORE

In 2017, the Singapore Court of Appeal moved away from using the broad-brush approach for single-income marriages. While the court has definitively laid out that long single-income marriages will tend towards an equal division of matrimonial assets from past precedents, there is currently no guidance for short single-income marriages. What results is that the law on the division of matrimonial assets will require different approaches for different types of families. This article firstly seeks to alleviate and rationalise the fear towards short marriages, and secondly, proposes that the law should be streamlined into a single approach for this area of law by requiring the division of matrimonial assets to incline towards equality while providing a discretion for judges where the outcome is inequitable.

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I. Introduction

1 Since moving away from fault-based divorce, the focus of all contentious divorces has shifted towards the division of matrimonial assets. Ex-spouses attempt to claw back what they believe they deserve after being in the marriage. No couple enters a marriage with divorce in mind. When the marriage is smooth-sailing, spouses tend not to draw lines between themselves to determine their efforts to the marriage. While some couples may provide safeguards in the form of prenuptial agreements, they merely remain as a last resort. Often, it is only when the marriage is heading south that these efforts are calculated. Therefore, virtually all cases of divorce involve the couples "looking at hindsight", as in referring to their memories and available evidence, when dividing matrimonial assets.

2 The law on the division of matrimonial assets makes the situation murkier because of the immense discretionary power given to

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the courts to determine what is "just and equitable" under s 112 of Singapore's Women's Charter.[1] When the division of matrimonial assets produces large disparities between parties, it reinforces the tensions between parties. In such situations, the adult spouses are not the only ones to suffer. The ones who suffer most from such high-tension relationships are the children of the marriage. Therefore, it is crucial to ensure that this area of family law is improved to alleviate the pains of all parties involved.

3 It is crucial to act prudently to achieve a just and equitable outcome for parties seeking a divorce. As such, in the aftermath of the 1996 reform to the Women's Charter, the Singapore courts have been cautious in finding the best way to exercise judiciously this extremely broad power entrusted to them by the Legislature.[2] This can be seen from the changes made to the approaches being adopted by the courts until the seminal case of *ANJ v ANK*[3] ("*ANJ*") where the Court of Appeal laid out the structured, broad-brush approach.[4]

4 This article will first lay out the evolution and prevailing principles of family law in Singapore,[5] and discuss the issues present in the current *ANJ* approach and exception for single-income marriages.[6] In the next part,[7] the article will seek to address the fears associated with short, single-income marriages before arguing for the shift back towards the inclination to equality in the division of matrimonial assets.[8] The last part will then conclude the article.[9]

1 Cap 353, 2009 Rev Ed.

2 The Select Committee's views on the amendments can be attributed to Parliament because the Minister for Community Development and several Members of Parliament ("MPs") formed the committee in the first place. Further, as Leong Wai Kum noted, "there was no disagreement by any [MPs]" on the Select Committee's views. See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2013) at p 617; *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996); *Parliamentary Debates, Official Report* (27 August 1996) vol 66 at col 534; *Parliamentary Debates, Official Report* (2 May 1996) vol 66 at col 68 (Abdullah Tarmugi, Minister for Community Development).

3 [2015] 4 SLR 1043.

4 This structured broad-brush approach may be interchangeably known as the "broad-brush approach" or "*ANJ* approach".

5 See paras 5–16 below.

6 See paras 17–33 below.

7 See paras 34–66 below.

8 See paras 67–79 below.

9 See paras 80–82 below.

II. Background

5 The current state of Singapore's family law is commendable with the moral exhortation of s 46(1) of the Women's Charter as a starting point which provides that:

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

6 This moral exhortation permeates all areas of family law involving marriage. More specifically, in the realm of division of matrimonial assets, it provides that marriage is an equal co-operative partnership of different efforts for mutual benefit.[10] From this, the power to divide matrimonial assets flows from the principle of "deferred community of property" where parties are taken to have contributed to the acquisition of the matrimonial assets during the subsistence of marriage, which are up for division when the marriage breaks down.[11] This concept of "deferred community of property" only takes place when the marriage is terminated legally.[12]

7 While the Court of Appeal has adopted the principle that marriage is an *equal co-operative* partnership of *different efforts* for mutual benefit, case law has shown that the just and equitable outcomes determined by the courts do not reflect this principle. Instead, the courts continue to show that in short marriages and marriages lasting up to 15 years, the division is far from equal.

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10 The Court of Appeal has endorsed this principle consistently since *NK v NL* [2007] 3 SLR(R) 743 in 2007 to *ANJ v ANK* [2015] 4 SLR 1043 in 2015 and *TNL v TNK* [2017] 1 SLR 609 in 2017. See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2013) at p 500; *NK v NL* at [28] and [41]; *ANJ v ANK* at [17]; and *TNL v TNK* at [45].

11 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2013) at p 497.

12 See *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [40], affirming Leong Wai Kum's concept of "deferred community of property" in Leong Wai Kum, *Halsbury's Laws of Singapore: Family Law* vol 11 (Singapore: LexisNexis, 2006) at para 130.751. Subsequently, the Court of Appeal affirmed it in *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [80]:

> Sections 51 and 52 of the Women's Charter, taken with s 112 of the same legislation, have resulted in a 'deferred community of property' approach in the determination of the property rights of spouses. The former two sections have the effect of rendering the fact, that a woman is married, irrelevant to her proprietary interests … The latter section, on the other hand, has empowered the courts with a broad discretion to divide 'matrimonial assets' between spouses during or after matrimonial proceedings to terminate their marriage; it is based on the principle of 'community of property', under which both spouses have a joint interest in certain property, regardless of which spouse purchased or otherwise acquired it.

8 It is timely to reconsider how this discretionary power under s 112 should be exercised or how the provision should be amended in light of the Family Justice Court's recent announcement to "review" this area of law.[13] Before considering the approach, it is important to examine ss 112(1) and 112(2) of the Women's Charter which provide that:

> (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 in such proportions as the court thinks just and equitable.
>
> (2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, 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 needs of the children (if any) of the marriage;
> >
> > (*d*) 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;
> >
> > (*e*) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;
> >
> > (*f*) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;
> >
> > (*g*) 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; and
> >
> > (*h*) the matters referred to in section 114(1) so far as they are relevant.

9 Section 112 provides for a highly discretionary power that is without much legislative guidance. Instead, it vests in the courts the

13 See Kelly Ng, "Laws on Division of Matrimonial Assets May Be Reviewed" *Today* (28 February 2018).

power to decide how it should be exercised. As a result, since its amendment in 1996, this highly discretionary power has led to the Court of Appeal amending its approach constantly. Therefore, the author will endeavour to provide a brief history showing the evolution of the discretion exercised by the Court of Appeal at various stages of the two decades.

10 Within the span of three years, the Court of Appeal produced the two seminal cases of *ANJ v ANK* (in 2015) and *TNL v TNK*[14] (in 2017). In *ANJ v ANK*, the apex court established a framework for the structured broad-brush approach where the courts will not engage in a mathematical calculation of each spouse's contribution to the marriage.[15] Under the *ANJ* approach, the courts will:[16]

> (a) "delineate the matrimonial pool, making clear the date or dates to be used for such assessment";
>
> (b) "ascribe a ratio that represents each party's direct financial contributions relative to the other party";
>
> (c) "decide a ratio that represents each party's indirect contributions";
>
> (d) "[use] these two ratios to derive each party's average percentage contributions"; and
>
> (e) "make further adjustment as may be necessary, either to the weightage of the direct and indirect components, or to shift the average ratio".

11 Under the third limb, it should not be split into two separate smaller ratios of non-financial contributions and indirect financial contributions.[17] The Court of Appeal further held that adverse inferences (by either adjusting the proportion or adding a specific sum into the pool for division) may still be drawn against the party who fails to make full and frank disclosure of his matrimonial assets.[18] This approach sets the preliminary proportion that a spouse is to receive; the court may also consider the other factors under s 112(2) and "adjustments as it deems necessary to … [achieve] a just and equitable result on the facts".[19]

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14 [2017] 1 SLR 609.

15 See *ANJ v ANK* [2015] 4 SLR 1043 at [23]–[25]; *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 at [23]; *NK v NL* [2007] 3 SLR(R) 743 at [28]; *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [33]; and *Lim Choon Lai v Chew Kim Heng* [2001] 2 SLR(R) 260 at [14].

16 See *TEG v TEH* [2015] SGHCF 8 at [16].

17 See *TNL v TNK* [2017] 1 SLR 609 at [47].

18 See *ANJ v ANK* [2015] 4 SLR 1043 at [29].

19 See *ANJ v ANK* [2015] 4 SLR 1043 at [27]–[28].

12 Shortly after, the Court of Appeal in *TNL v TNK* acknowledged the unfairness within the *ANJ* approach for single-income marriages. It backtracked on its previous approach and held that the *ANJ* approach should not be applied to single-income marriages.[20] Instead, the Court of Appeal held that in single-income marriages, the division will follow precedents that have equalised division, unless there are exceptional facts. This will be discussed below.[21] However, while this change is welcome, it shows the inherent difficulty in finding an ideal approach that would suit all situations. The article will now review the evolution of the law of division of matrimonial assets to trace approaches that have been accepted, rejected or improved on.

A. Rejection of "uplift method"

13 In *NK v NL*,[22] the Court of Appeal has rejected the previous "uplift method" where the division of matrimonial assets "entail[ed] a mathematical process of returning to the parties their respective financial contributions plus a percentage of indirect contributions".[23] In a bid to ensure the recognition of both the financial and non-financial contributions, the courts held that "*direct* financial contributions are *not* to be considered as a *prima facie* starting point although they nevertheless constitute a factor [to] be considered" [emphasis in original].[24] The court concluded from this that the powers under s 112 should be "exercised in broad strokes" and not based on a "precise mathematical exercise".[25]

B. Rejection of eight-step methodology

14 Subsequently, in *Koh Bee Choo v Choo Chai Huah*,[26] the Court of Appeal rejected the creative eight-step methodology from *AJR v AJS*.[27] This methodology:[28]

20 See *TNL v TNK* [2017] 1 SLR 609 at [41]–[46].
21 See paras 17–33 below.
22 [2007] 3 SLR(R) 743.
23 See *NK v NL* [2007] 3 SLR(R) 743 at [47].
24 See *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 at [23].
25 See *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [33] and *NK v NL* [2007] 3 SLR(R) 743 at [28].
26 [2007] SGCA 21.
27 [2010] 4 SLR 617. See *Koh Bee Choo v Choo Chai Huah* [2007] SGCA 21 at [46].
28 See Lim Hui Min, "Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result – A Review of High Court and Court of Appeal Cases from 2005–2010" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Singapore: Academy Publishing, 2011) at para 63(i).

> … incorporate[s] the fact-finding and assessment stage (including dealing with dissipated assets and investments made for one party's sole benefit), and prescribes the calculations to be done to work out each party's share of the matrimonial assets, based on the court's findings of each party's direct financial and indirect contributions.

The approach was intended to be a guide for the courts to cross-reference against while using the conventional broad-brush approach. Despite its well-meaning intentions, this methodology was rejected to be too rigid and mathematical in its application even as a guide because of the rigorous precision required in its calculation.

C. Broad-brush approach

15 The rejection of both the "uplift method" and eight-step methodology show that the Court of Appeal's aversion towards rigidity and precise calculation was because it would unnecessarily confine or bind the judges in their discretion. This was explicitly reflected in the current approach expounded in *ANJ v ANK* where the Court of Appeal introduced the broad-brush approach in 2015.[29] Prior to *ANJ v ANK*, the courts struggled to find a systematic approach in arriving at a just and equitable division of assets. Chao Hick Tin JA established a simpler and clearer framework which specifically provides for the consideration of direct and indirect contributions of ex-spouses. This came to be known as the *ANJ* approach. This method was expedient because it does not fixate itself on calculation; instead, it is based on the court's "feel of what is just and equitable on the facts of the case".[30] However, the *ANJ* approach proved to be expedient at the expense of artificiality and speculation.

16 The constant evolution of the approaches used demonstrates the inherent difficulty in trying to ascertain the best way to achieve what is just and equitable under s 112. Regardless of the past denouncing of equal division of matrimonial assets in *Lock Yeng Fun v Chua Hock Chye*[31] ("*Lock Yeng Fun*"), the Court of Appeal's latest decision in *TNL v TNK*, a decade after *Lock Yeng Fun*, has rightly demonstrated the willingness of the Judiciary to part from its previous approaches to

29 While the broad-brush approach first appeared in *Koo Shirley v Mok Kong Chua Kenneth* [1989] 1 SLR(R) 244 at [25] where L P Thean J (as he then was) "approached the problem in a broad manner", the Court of Appeal in *ANJ v ANK* [2015] 4 SLR 1043 finally propounded an approach that solidified the broad-brush approach.

30 See *ANJ v ANK* [2015] 4 SLR 1043 at [30].

31 [2007] 3 SLR(R) 529.

reconsider the principles under s 112 to achieve fairness and a just and equitable outcome.[32]

III. Expediency at the expense of consistency

17 Under the current *ANJ* approach, the courts have emphasised the importance of considering *all circumstances* of the case in coming to their decision.[33] Apart from those listed under the non-exhaustive s 112(2) of the Women's Charter, the courts have considered a number of factors such as the size of assets, the presence of domestic helpers, the number of children, the successes of the children from the marriage, the length of marriage and the number of working spouses. It is undoubtedly the case that one or more of these factors have led the courts to decide the cases in one way or another. The *ANJ* approach was crafted to take into account many of these factors, whether as direct contributions or (mostly) as indirect contributions to the marriage. While the *ANJ* approach allows for a more holistic consideration of the situation as required under s 112, it results in the courts speculating the amount of contributions made by each spouse since it is based on the judge's "feel".[34]

A. Artificial adjustable weight to direct and indirect contributions

18 By providing for the discretion to adjust the weight given to the spouses' direct and indirect contributions, it creates a more artificial situation because of the added layer of speculation. The *ANJ* approach is already artificial by having to ascribe figures to reflect parties' direct and indirect contributions to the marriage. By having to adjust the weight to either contributions based on the judge's "feel", it allows for greater speculation of the happenings during the marriage.[35] It is difficult to determine whether to adjust the weightage, or by how much. Therefore, what results is speculation on top of more speculation. Further, despite the constant exhortation that financial and non-financial contributions to the marriage are equally important, the Court of Appeal was willing to carve out the exception that in short marriages, especially those not involving children, the weight given to direct contributions may be more than the weight given to indirect contributions.

32 See *TNL v TNK* [2017] 1 SLR 609 at [42]–[47].
33 See *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [80].
34 See *ANJ v ANK* [2015] 4 SLR 1043 at [30].
35 See *ANJ v ANK* [2015] 4 SLR 1043 at [30].

19 In *ATE v ATD*,[36] the Court of Appeal demonstrated that it would not avoid adjusting the weight given to the ratios of the direct and indirect contributions.[37] It reasoned that during the short five-year marriage, both parties worked and kept their finances separate, and they had a "not inconsiderable amount of assistance on the domestic scene".[38] The court held that the ratio for direct to indirect contributions should therefore be 75:25. The apex court eventually concluded, cognisant that there was a child from the marriage, that the division of matrimonial assets will be 54.25% to 45.75%, in favour of the husband. Although the Court of Appeal has noted that the indirect contributions should not be split into subcategories of indirect financial contributions and non-financial contributions, accordingly, this logically means that the non-financial contribution was less than 25% of the total consideration in the division exercise. This is hardly a reflection of the principle that marriage is an equal co-operative partnership of different efforts, which it has previously endorsed.

20 While the varying of weight still allowed for an outcome which is close to the equalisation of matrimonial assets, the logic and principle behind it are missing. In *ATE v ATD*, the Court of Appeal acknowledged that there was a "not inconsiderable amount of assistance on the domestic front". Given that both parties had agreed that the respective contributions of the husband and wife were 40% and 60% for indirect contributions, the courts need not have adjusted the weightage given to this since they were almost equal. Using an equal weight given to both direct and indirect contributions, the court would have come to a similar conclusion of an equal division of matrimonial assets.[39] This outcome would have been more principled in logic because it lives up to s 46(1), albeit the outcome being very similar.

21 Undeniably, the *ANJ* approach has attempted to bring in "some system into the question of determining how the matrimonial assets of a marriage are to be divided".[40] However, ultimately, since it is "all about feel and the court's sense of justice", the approach is layered with speculations.[41] From deciding what ratio to ascribe to the spouses' direct contributions to the indirect contributions, the courts are giving a

36 [2016] SGCA 2.
37 See *ATE v ATD* [2016] SGCA 2 at [21].
38 See *ATE v ATD* [2016] SGCA 2 at [21].
39 The Court of Appeal in *ATE v ATD* [2016] SGCA 2 had determined (at [23]) that the direct contribution of the husband was 59% while the wife's was 41%. Applying the *ANJ* approach, the shares would be 49.5:50.5 in favour of the wife. The court can subsequently round it up to be an equal division of assets.
40 See *ANJ v ANK* [2015] 4 SLR 1043 at [25].
41 See *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [81].

"rough and ready approximation" of the figures.[42] While this is understandable since it is difficult to ascribe a value to non-financial contributions and "documentary evidence [can fall] short",[43] it does not detract from the speculative nature of the approach.[44] On top of these already highly speculative steps, a final speculative step is added where the weight can be adjusted based on the court's "feel" of the circumstances, which includes the length of the marriage and the presence of children.

B. Failure to consider realities of marriage

22 No one enters into a marriage with the expectation of divorce. During the marriage, when it is smooth-sailing, there is usually a co-mingling of finances during a marriage.[45] Co-mingling of finances in a dual-income marriage may happen in many ways but this article will focus on two forms: firstly, the crediting of both incomes into a single joint bank account; and, secondly, depositing a portion of their incomes into a single joint account which is subsequently used to pay for their household expenses.[46] In some cases, the *ANJ* approach would presume that there is equal direct contribution to the acquisition of matrimonial assets.[47] In others, the direct contributions would be based on the proportion of the income or amount from the income that was transferred by the spouses into the joint account.[48] Both methods are practical but, with respect, highly artificial.

23 Even in a dual-income marriage where spouses separate their incomes into separate bank accounts, there is a high level of artificiality and speculation. It may well be that where one spouse contributes to the mortgage payment and the initial purchase price of the matrimonial home while the other pays for the daily expenses of the family, evidence remains a problem.[49] The spouse who pays for daily expenses is not credited for any direct contributions because his or her income was not

42 See *ANJ v ANK* [2015] 4 SLR 1043at [23].
43 See *ANJ v ANK* [2015] 4 SLR 1043 at [23].
44 See *ANJ v ANK* [2015] 4 SLR 1043 at [23]–[26].
45 See Lim Hui Min, "Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result – A Review of High Court and Court of Appeal Cases from 2005–2010" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Singapore: Academy Publishing, 2011) at para 30(ii).
46 See *APE v APF* [2015] SGHC 17 at [51].
47 See *APE v APF* [2015] SGHC 17 at [54]; *Li Kong v Cheng Lai Nar* [2005] SGHC 164; and *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935.
48 See *UGO v UGP* [2017] SGFC 124 at [42].
49 "Parties in a functioning marriage do not keep records of their transactions with a view to building a case should divorce occur, so gaps in the evidence, especially in long marriages, can be expected": see *UBM v UBN* [2017] 4 SLR 921 at [59].

used in the acquisition of matrimonial assets, *per* the *ANJ* approach's first limb. Instead, his or her contribution to the daily necessities will only be considered as indirect contribution. Building on the Court of Appeal's decision in *TNL v TNK* and the High Court's decision in *UBM v UBN*,[50] the *ANJ* approach not only "unduly favour[s] the working spouse" but also unduly favours the working spouse who solely contributed to the acquisition of assets.[51] Therefore, this artificial demarcation of financial contributions into two different types – direct financial contribution and indirect financial contribution – unduly penalises the spouse not applying his or her income to the acquisition of assets.

24 This was the case in *AKF v AKG*[52] where the High Court was faced with the situation where the wife had contributed primarily to the indirect financial contributions – the family's welfare, the children's education, and healthcare – and indirect non-financial contributions.[53] The court acknowledged her role as the primary caregiver, notwithstanding her career, and awarded her 40% of the pool of matrimonial assets. It should be noted that *AKF v AKG* predates *ANJ v ANK*; therefore, the case is not illustrative in showing how the courts came to the eventual ratio. However, if the *ANJ* approach is applied here, it may be the case that the wife was not credited for any direct contributions to the marriage. Instead, she would be heavily credited for both of her indirect financial and non-financial contributions. If this were the case, her application of her finances for the household is given less weight as compared to the husband's application of his finances on the acquisition of property. Logically, if equal weight were given to direct and indirect contributions, and indirect contributions contain the consideration of both indirect financial and non-financial contributions, it must be that indirect financial is of less weight in the division of matrimonial assets.[54] While the outcome is aligned with precedent cases, as surveyed by the Court of Appeal in *BCB v BCC*,[55] the author believes that this reinforces the fact that greater recognition was given to direct

50 [2017] 4 SLR 921.
51 See *UBM v UBN* [2017] 4 SLR 921 at [38] and *TNL v TNK* [2017] 1 SLR 609 at [44].
52 [2010] SGHC 225.
53 See *AKF v AKG* [2010] SGHC 225 at [25].
54 It is difficult to determine how much weight indirect financial and non-financial contributions are given under indirect contributions because, as the Court of Appeal in *TNL v TNK* [2017] 1 SLR 609 has noted (at [47]), indirect contributions "should not be further broken down into two sub-steps such that separate ratios are assigned to indirect financial contributions, on the one hand, and non-financial contributions, on the other".
55 [2013] 2 SLR 324.

contributions instead of equal recognition.[56] But for her contribution and her role as primary caretaker, she would not have been sufficiently credited as much for her efforts.

25 A further problem is also seen in the recent case of *UNE v UNF*[57] where Debbie Ong J was tasked to apply the *ANJ* approach in a marriage that was both single-income and dual-income over the course of almost three decades. The long marriage created additional evidentiary problems because the parties had purchased and sold multiple real estate properties and investments during the marriage without keeping detailed records.[58] Ong J eventually concluded that a just and equitable division of matrimonial assets in this long non-single-income marriage was an equal division. However, more strikingly, the case showed that even the more predictable limb of direct contributions in the *ANJ* approach required some arbitrariness through the broad-brush approach because of the lack of evidence.[59]

26 As Woo Bih Li J points out in *YG v YH*,[60] parties contribute to the marriage:[61]

> … in good faith without regard to the question of division or each party's share in each asset acquired … it would usually be the case that both parties would not have considered whether she should then have a smaller share in [one property].

Arguably, the courts may pragmatically then accord more weight to the indirect contribution ratio to benefit the spouse who used his or her income on the daily expenses of the family. However, as discussed

56 In *BCB v BCC* [2013] 2 SLR 324, the Court of Appeal embarked on an "exhaustive inquiry into cases where the marriages were ten years or longer, the couple had children, both parties were working and where the husband had greater direct financial contributions than the wife": *BMJ v BMK* [2014] SGHC 14 at [47]. The court further endorsed Lim Hui Min's article (Lim Hui Min, "Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result – A Review of High Court and Court of Appeal Cases from 2005–2010" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Singapore: Academy Publishing, 2011)) where she traced the trends of divisions between 2005 and 2010. *BCB v BCC* similarly illustrates the greater recognition for direct contributions where the wife was awarded 60% of the pool of matrimonial assets instead. One difference, however, was that in that case, the wife took over the primary breadwinner role when the husband's business was not doing so well. Prior to that, the family had relied primarily on the husband's income. See *BCB v BCC* [2013] 2 SLR 324 at [35]–[40].

57 [2018] SGHCF 12.

58 See *UNE v UNF* [2018] SGHCF 12 at [89].

59 See *UNE v UNF* [2018] SGHCF 12 at [72]–[73] and [90].

60 [2007] 3 SLR(R) 233.

61 See *YG v YH* [2007] 3 SLR(R) 233 at [32].

earlier, the shifting of this weight is highly arbitrary and not principled. This only shows that the *ANJ* approach fails to consider the circumstances when the marriage is smooth-sailing and neither party in a marriage considers the implications of their financial arrangements.[62]

C. Unsuitability of ANJ *approach for single-income marriages*

27 While the *ANJ* approach proves to be an expedient way of computing contributions, it unfairly penalises the homemaker in a single-income marriage. In *TNL v TNK*, the Court of Appeal, rightly, replaced the *ANJ* approach for single-income marriages.[63] The wife was a full-time homemaker in a marriage of 35 years while the husband was a director of a listed company and the sole breadwinner. The wife had singlehandedly raised three grown children from the marriage. The High Court held that the wife had a direct contribution of 14% and an indirect contribution of 75%.[64] The judge then adjusted the weight given to the direct and indirect contributions to be 40% and 60% respectively because of the length of the marriage.[65] This resulted in an almost equal division of matrimonial assets of 49.4:50.6 in favour of the wife, which the High Court then rounded to equalisation on the basis that it was a "*very long*" [emphasis in original] marriage.[66] This equalised outcome was affirmed by the Court of Appeal but for different reasons.

28 Judith Prakash JA noted the difficulty of the *ANJ* approach because under the first limb, the homemaker spouse would be accorded close to zero or zero. Under the second limb, the homemaker would never be accorded 100% even if the homemaker was exceptional because the sole breadwinner would have contributed to the indirect *financial* contributions; it is a zero-sum game. Accordingly, the homemaker spouse is "doubly (and severely)" penalised.[67] Prakash JA held that this was not "consistent with the courts' philosophy of marriage being an equal partnership"[68] and conceded the High Court's artificiality in massaging the numbers and weight to reach a just and equitable outcome.[69] Short of articulating an approach for divisions involving long, single-income marriages, the Court of Appeal was satisfied with a sort of trends approach that involved a comparison with precedent cases.

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62 The High Court in *UJP v UJQ* [2018] SGHCF 9 recently repeated this similar refrain that "[i]n happy times, blissful couples do not keep accounts" (at [22]).
63 See *TNL v TNK* [2017] 1 SLR 609 at [46].
64 See *TNK v TNL* [2016] SGHCF 7 at [52].
65 See *TNK v TNL* [2016] SGHCF 7 at [54].
66 See *TNK v TNL* [2016] SGHCF 7 at [55].
67 See *TNL v TNK* [2017] 1 SLR 609 at [44].
68 See *TNL v TNK* [2017] 1 SLR 609 at [45].
69 See *TNL v TNK* [2017] 1 SLR 609 at [44] and [56].

29 Subsequently, in *UBM v UBN*, Debbie Ong JC (as she then was) came to an outcome that was in line with *TNL v TNK* of 60:40 in favour of the husband despite awarding the wife zero for direct contribution.[70] Ong JC declined to award more weight to the indirect contributions because of "artificiality" and the need to be consistent with the principle that "marriage is an equal partnership of different efforts",[71] especially in long marriages.[72] The learned judicial commissioner went on to expound on the Court of Appeal's decision in *TNL v TNK* in "using trends in past cases [with similar facts] to guide its assessment of a just and equitable division".[73]

30 In the subsequent cases following *TNL v TNK* involving long single-income marriages, the Family Justice Courts attempted to follow the trends from precedents raised in both *TNL v TNK* and *UBM v UBN* and held that the matrimonial assets were to be divided equally or close to equally between the two ex-spouses given the absence of exceptional facts.[74] However, even with good intentions, the lower courts have resorted to interpret *TNL v TNK* differently by distinguishing cases which are of moderate and short length from long marriages, despite the caution from the learned Ong JC in the High Court in *UBM v UBN*:[75]

> I would caution parties embroiled in matrimonial disputes against extending their battlefield in litigation by *nit-picking on whether their case should be classified as a Dual-Income Marriage*, to which the structured approach in *ANJ v ANK* applies, or a Single-Income Marriage, to which it does not. *One should not split hairs in this way, for it would undermine the aspirations of the WC and the family justice system* if the exercise of dividing the matrimonial assets gives incentive to the parties to argue over fine brush financial contributions. *Neither should parties be inflexible by arguing where a bright blue line should separate a short marriage from one of moderate length and a long one*. [emphasis added]

31 In applying *TNL v TNK*'s trend approach, the lower courts have done exactly what Ong JC had cautioned against. In *UDL v UDM*,[76] the Family Court mistakenly concluded that the marriage was a short one, albeit lasting for 12 years.[77] The court then went on to apply the

70 See *UBM v UBN* [2017] 4 SLR 921 at [27]–[35].
71 See *UBM v UBN* [2017] 4 SLR 921 at [28].
72 See *UBM v UBN* [2017] 4 SLR 921 at [27]–[35].
73 See *UBM v UBN* [2017] 4 SLR 921 at [41].
74 See *UGM v UGN* [2017] SGFC 123; *TYU v TYV* [2017] SGHCF 8; *UFU (MW) v UFV* [2017] SGHCF 23; *UFE v UFF* [2017] SGHCF 28; *UEY v UEZ* [2017] SGFC 108; *UII v UIJ* [2018] SGFC 1; and *UIV v UIW* [2018] SGFC 8.
75 See *UBM v UBN* [2017] 4 SLR 921 at [54].
76 [2017] SGFC 77.
77 *UDL v UDM* [2017] SGFC 77 was after the decision of *TNL v TNK* [2017] 1 SLR 609. See *UDL v UDM* at [25].

ANJ approach even though the Court of Appeal in *TNL v TNK* had explicitly stated that it did not apply to single-income marriages.[78] It was unfortunate that the Family Court concluded, after considering only considering one other case – *TYS v TYT*[79] – that the wife ought to receive only 5% of the pool of matrimonial assets even though she had sacrificed her career to be a homemaker and attempted to have a child through in vitro fertilisation ("IVF").[80]

32 This raises another question of the usage of trends in the application of *TNL v TNK*: whether the precedents can be relied on in the first place. The Court of Appeal in *Lock Yeng Fun* had stated that:[81]

> Our examination of the case law shows that the courts might not have given sufficient recognition to the value of factors like homemaking, parenting and husbandry when attributing to them a financial value in the division of matrimonial assets. This ought *not* to be the case. [emphasis in original]

33 While the using of precedents as suggested in *TNL v TNK* allows for consistency, the author cautions that the courts should be careful with selecting precedents. As conceded by the Court of Appeal above, some of these precedents have yielded unfair results. Relying on precedents which have yielded unfair results would seek to perpetuate the injustice and inequity in them. Therefore, this article proposes a different methodology which will be discussed below.[82]

IV. Reconsidering fears

34 The current regime therefore distinguishes between two types of marriages – long and short marriages, and single-income and dual-income marriages. In *TNL v TNK*, while the Court of Appeal held that the *ANJ* approach does not apply to all single-income marriages, the case was dealing with a *long* single-income marriage and not a short single-income marriage. In future, it is possible that there will be at

78 The Family Court in *UDL v UDM* [2017] SGFC 77 was cognisant of the Court of Appeal's decision in *TNL v TNK* [2017] 1 SLR 609. See *UDL v UDM* at [26].

79 [2017] 5 SLR 244.

80 The Family Court in *UDL v UDM* [2017] SGFC 77 had downplayed the wife's contributions to the marriage by being fixated on the lack of sacrifice of career. The wife in this case had given up her career opportunities by being a full-time homemaker, similar to the wife in *TYS v TYT* [2017] 5 SLR 244, albeit not in the same way. See *UDL v UDM* at [24] and [26].

81 See *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [39].

82 See paras 67–79 below.

least three different approaches depending on the length and income generation of the marriage.[83]

35 To truly live up to the demands of s 46(1) of the Women's Charter, there is a need to ensure that s 112 is utilised to achieve this objective and/or Parliament should reconsider it altogether. It bears repeating at this juncture the vital sanctioned concept that marriage is an equal co-operative partnership of different efforts for mutual benefit. As noted by the Court of Appeal in *TNL v TNK*, this is the "philosophy of marriage".[84] While succinct in its phraseology, it is layered with many expectations. Firstly, it recognises that parties in a marriage have different abilities and accordingly both parties exert different efforts for mutual benefit. Secondly, it recognises that spouses co-operate in this partnership, using their different efforts. And lastly, it demands no distinguishing between the efforts exerted by parties because it has recognised that efforts may be different. The courts, Parliament or both may work towards this exposition by inclining all division of matrimonial assets towards equality. The author will discuss (a) what Parliament fears; (b) how Parliament's fear of short marriages is baseless; (c) how the courts can achieve the demands of s 46(1) through the consideration of guides based on past precedents; and (d) how Parliament may include this demand in s 112.

A. Fear of inconsistency by Parliament

36 In 1996, Leong Wai Kum argued for the retention of the "inclination towards equality" from the predecessor s 106 of the Women's Charter to be present in the current s 112.[85] This was rejected by the Select Committee who felt that it would lead to an "inherent inconsistency" in the law.[86] This article would like to make two points about this: firstly, the current state of law for the division of matrimonial assets is, regrettably, inherently inconsistent; and secondly, the Select Committee had not completely dismissed the proposition of inclination towards equality. The Select Committee argued that:[87]

83 Judith Prakash JA stated in *TNL v TNK* [2017] 1 SLR 609 at [48] that short single-income marriages would be considered in future when the situation arises. As such, there is a possibility that there will be a third different approach for short single-income marriages in the future.

84 See *TNL v TNK* [2017] 1 SLR 609 at [45].

85 See *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996) at pp B27–B28 and C2–C4.

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

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

> The Committee is of the view that any law that has to be enforced effectively must be devoid of inherent inconsistency. *The law must also provide for all cases,* ie *marriages of long as well as of short duration with their own set of circumstances*. ***Where a marriage is of short duration with no children, the law must not put judges under constraint to incline towards equality when what is equal may not be just***. Since the provisions call for judges to take into account all circumstances and to order the division according to what is just and equitable and that the circumstances for consideration have also been enlarged and clarified, the provisions in the Bill are fair. [emphasis added in italics and bold italics]

37 The then Minister for Community Development, Abdullah Tarmugi, subsequently said in Parliament that:[88]

> The Committee is of the view that any law that has to be enforced effectively must be *devoid of inherent inconsistency*. The proposed provisions in the Bill allow the court to divide the matrimonial assets in a just and equitable manner after taking into consideration all circumstances of the case, including a homemaker's contributions. *The Bill has also enlarged and clarified the circumstances which the court should take into consideration*. As such, it would seem inappropriate that the court would still be required to incline towards equality.
>
> *Sir, the law must provide for all cases,* ie*, marriages of long as well as of short duration, and marriages under unusual sets of circumstances. For example, where a marriage is of short duration with no children, the law must not put judges under constraint to incline towards equality when what is equal may not be just*. The Committee is of the view that the provisions of the Bill are fair. Indeed, it is a better formulation than the current one.
>
> [emphasis added]

38 From the Minister's speech and the Select Committee's report, Parliament had clearly intended for the law for the division of matrimonial assets to be consistent. The presence of two *separate* approaches – the *ANJ* approach and trends approach from *TNL v TNK* for dual-income marriages and single-income marriages respectively – results in inconsistency because there are now two different approaches for different types of marriages. This goes against the very fear of inconsistency by Parliament. Applying the same literal reading by the Court of Appeal in *Lock Yeng Fun*, Parliament had intended for there to be a *consistent* law and in turn, a consistent approach for the division of matrimonial assets. Although the *TNL v TNK* approach is highly commendable, the outcome of having two different approaches for

88 See *Parliamentary Debates, Official Report* (27 August 1996) vol 66 at cols 526–527 (Abdullah Tarmugi, Minister for Community Development).

two different types of marriages is unfortunate because it is contrary to Parliament's intention.

39 Secondly, with respect, Andrew Phang Boon Leong JA in *Lock Yeng Fun* had wrongly concluded that there should be no starting point of equal division of assets by reading the Select Committee's report too narrowly.[89] While Leong argues that s 112 should be purposively interpreted to "take account of the character of marriage as an equal partnership of efforts, the developments achieved under the predecessor provision and the actual differences in expression between it and the predecessor provision".[90] The author goes one step further to suggest that a *holistic* reading of Abdullah Tarmugi's and the Select Committee's statements should be adopted instead. Taking note of the emphases added, Parliament was concerned with cases involving short marriages with no children.[91] Parliament did not want to "put judges under constraint to incline towards equality when what is equal may not be just". As Leong rightly noted, the Select Committee was silent about the just and equitable division for long marriages where, with children, "[t]here is no reason not to incline towards equality of division in these marriages".[92]

40 Further, even though the Select Committee had stated once in their report about the concern regarding short, childless marriages, Abdullah Tarmugi intentionally highlighted the same point in Parliament again to emphasise this fear.[93] Looking at the entirety of the situation, it would be fair to conclude that so long as the fear for short, childless marriages is addressed, Parliament will not be averse to an inclination towards equality. The courts should not feel constrained by this fear of short, childless marriages. This article argues that this thus does not preclude the court's ability to be inclined towards equality as bravely demonstrated by the Court of Appeal in *TNL v TNK*. The Court

89 Although the reasoning was merely *dicta* in *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 ("*Lock Yeng Fun*"), it has been adopted by the Court of Appeal subsequently in *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 and *NK v NL* [2007] 3 SLR(R) 743. See *Lock Yeng Fun* at [53]–[57].

90 See Leong Wai Kum, "The Just and Equitable Division of Gains between Equal Former Partners in Marriage" [2000] SingJLS 208 at 236.

91 See n 2 above.

92 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2013) at p 619.

93 It bears noting that during the consultation process, Aline Wong (a member of the Select Committee) had pressed on with the issue of short marriages with no children. Leong Wai Kum argued that this would not be too much of a concern because firstly, the asset pool will be small, and secondly, the law on gifts and premarital property will guard against the over-inclusion of assets into the pool to be divided. See *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996) at p C4.

of Appeal had acknowledged that at least in long single-income marriages, "precedent cases show that [the] courts tend towards an equal division" of matrimonial assets.[94]

B. Unfounded fear of short, childless marriages

41 During the consultation phase and debates of 1996, Members of Parliament had a deep fear about short, childless marriages. Aline Wong, a member of the Select Committee, singled out this particular fear to be about "marriages of convenience".[95] This fear is real and should not be downplayed.[96] However, this article believes that there are mechanisms in place to protect the richer spouse from having an unjust and inequitable outcome through an inclination towards equality. Firstly, s 112(10) of the Women's Charter defines what matrimonial asset may be divided:

> (10) In this section, 'matrimonial asset' means —
>
> (*a*) any asset acquired before the marriage by one party or both parties to the marriage —
>
> (i) ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter or transportation or for household, education, recreational, social or aesthetic purposes; or
>
> (ii) which has been substantially improved during the marriage by the other party or by both parties to the marriage; and
>
> (*b*) any other asset of any nature acquired during the marriage by one party or both parties to the marriage,
>
> but does not include any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during the marriage by the other party or by both parties to the marriage.

42 Looking at the provision, only property "closely connected with the spouse's exertion of personal efforts *during* the subsistence of the

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

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

96 There has been a growing number of people engaged in such relationships of convenience, termed as "sugar daddy and sugar baby" relationships, which society and Parliament express concern for. There is a possibility that they transform into a marriage of convenience. This article takes no position on this. See Wong Pei Ting, "Dating Platform for Sugar Daddies Draws over 20,000 Users Here" *Today* (10 January 2018).

marriage" [emphasis added] – quintessential matrimonial assets – may be divided.[97] Using the typical facts of a marriage of convenience where one spouse (usually significantly younger) marries a rich spouse, there might be a fear that the rich spouse who has amassed an enormous pool of assets would subsequently have to divide it equally with his spouse of convenience if the marriage ends. These marriages are usually short and childless; therefore, the amount of quintessential assets amassed during the marriage would be small. Premarital assets will not be included into the pool for division under s 112(10) unless they have been "transformed" *per* s 112(10)(*a*). The spouse who came in with nothing would not suddenly obtain an "unwarranted windfall" because of the marriage.[98] Therefore, with respect, the presence of these mechanisms renders the fear of short, childless marriages baseless. Understandably, there may be still lingering discomfort, but that should not render the law of division of assets to be unprincipled.[99] Alternatively, an additional safeguard could be put in place where the law is amended to include a special exception within s 112(2) for the length of the marriage. This will be discussed below.[100]

43 Further, the courts are given discretion to elect between the use of a global assessment methodology or the classification methodology in the division of matrimonial assets.[101] In the global assessment methodology, the court identifies a collective pool of matrimonial assets pursuant to s 112(10) and subsequently divides them collectively as a single pool in a just and equitable fashion.[102] On the other hand, the classification methodology allows the court to separate matrimonial assets into different classes and divide each class of matrimonial assets differently in a just and equitable manner.[103] The courts can employ the classification methodology in short, childless marriages and separate

97 The Court of Appeal has adopted the concept that assets acquired during the marriage by one or either spouse. See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2013) at p 613 and *TND v TNC* [2017] SGCA 34 at [35].

98 See *Wan Lai Cheng v Quek Seow Kee* [2012] 4 SLR 405 at [42] and *Chen Siew Hwee v Low Kee Guan* [2006] 4 SLR(R) 605 at [27].

99 It is important for family law to respect both parties' decisions and mistakes. In such relationships, parties are both adults who are capable of independent decision-making. In a generation which is frowning less on such relationships, the law should avoid being too paternalistic. Usually, it would likely only be the matrimonial home, cars and jewellery that are subjected to division in such cases since moneys in the richer spouse's bank accounts were not acquired during the marriage.

100 See paras 67–79 below.

101 The Court of Appeal has endorsed both methodologies and held that they are both consistent with s 112(1) of the Women's Charter (Cap 353, 2009 Rev Ed). See *NK v NL* [2007] 3 SLR(R) 743 and *ANJ v ANK* [2015] 4 SLR 1043.

102 See *NK v NL* [2007] 3 SLR(R) 743 at [31].

103 See *NI v NJ* [2007] 1 SLR(R) 75.

quintessential matrimonial assets from matrimonial assets that were transformed from premarital assets. The division of quintessential matrimonial assets should thus be an inclination towards equality to achieve an outcome that is just and equitable while living up to the spirit of s 46(1). The courts may exercise its discretion to divide premarital assets that have been transformed into matrimonial assets in a fashion that they deem just and equitable. The creative use of the classification methodology will act as a second layer of safeguards for this area of law because of the wide discretion given to the courts under s 112(2) to "have regard to all the circumstances of the case".

C. Collateral fear of inclining towards equality as starting point does not follow

44 The sole concern which prevented the Select Committee from adopting an inclination towards equality back into s 112 was the fear of short, childless marriages. Having addressed the baseless fear of short, childless marriages, the author submits that an inclination towards equality would be reasonable as a starting point. This inclination towards equality is crucial in setting the right tone for marriages that all efforts exerted during the marriage are equal, regardless of their form – financial or non-financial. If the Women's Charter was truly intended to "define the equal status and obligations of the husband and wife", the division of matrimonial assets must reflect this definition, or it will merely be patronising.[104]

(1) Long marriages

45 In long marriages, the courts are in consensus that the division of matrimonial assets is to incline towards equality. Both the Court of Appeal and High Court have acknowledged the trends that in long single-income and long dual-income marriages, precedents show that division tends towards equality.[105] This consensus is because of the sacrifice the primarily homemaker spouse has made for the marriage in the form of loss of job opportunities and career developments over a long period of time.[106] As noted by Debbie Ong J in *UNE v UNF*, "there is little reason why a full-time homemaker spouse should generally be in

104 See *NK v NL* [2007] 3 SLR(R) 743 at [15].

105 See *UBM v UBN* [2017] 4 SLR 921 at [66].

106 Similar trends were noticed by Lim Hui Min between 2005 and 2010: see generally Lim Hui Min, "Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result – A Review of High Court and Court of Appeal Cases from 2005–2010" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Singapore: Academy Publishing, 2011).

a better position than a spouse who worked but brought far less income into the marriage than the other spouse".[107]

(2) Size of pool of matrimonial assets should not be given much weight

46 This consensus for an inclination towards division of matrimonial assets for long marriages ceases when the pool of matrimonial assets is large.[108] In *Yeo Chong Lin v Tay Ang Choo Nancy*,[109] the Court of Appeal upheld the High Court's decision to give the solely homemaker wife 35% of the pool of matrimonial assets of $69m.[110] The court held that the husband had "special skills in the marine industry" and an "unusual drive and ability" which led to the accumulation of such a large pool of assets "literally from scratch".[111] While this may have well been the case, it is equally important to note that:[112]

> … in most cases where one party experiences great financial success, the other often bears a heavy burden in respect of the children and home; in some cases this entails the sacrifice of any potential for career development.

Therefore, the homemaker wife should have been credited more for her efforts in supporting the breadwinner husband's work indirectly. As a result of her exceptional homemaking, the husband was able to focus on accumulating wealth for the family. It is precisely because she had shouldered the entire burden on herself that reduced the worries of the husband of the family. As noted by the High Court, the family was "poor in the early years and therefore the [w]ife's role must have been 'more arduous'" then.[113] This should have also been put in the spotlight instead of only focusing on the husband's exceptional "drive and ability". But for the wife's bearing of this burden, the husband would not have been able to successfully utilise his exceptional "drive and ability". Therefore, the author submits that the size of the pool of matrimonial assets should play a *de minimis* consideration.[114]

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107 See *UNE v UNF* [2018] SGHCF 12 at [94].

108 See *TNL v TNK* [2017] 1 SLR 609 at [52].

109 [2011] 2 SLR 1157.

110 See *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [82].

111 The Court of Appeal did not question the High Court's assessment of this. See *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [75].

112 See Debbie Ong & Valerie Thean, "Family Law" (2005) SAL Ann Rev 239 at 271, para 13.31, affirmed by the Court of Appeal in *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [39] and *Pang Rosaline v Chan Kong Chin* [2009] 4 SLR(R) 935 at [21].

113 See *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [2] and [73].

114 Debbie Ong J's recent judgment of *UNE v UNF* [2018] SGHCF 12 had effectively applied the author's suggestion. Even though the case concerned a pool of matrimonial assets of more than $21m, the size of the pool was not a factor in

(*cont'd on the next page*)

(3) Short marriages

46 Even in short marriages, the division of matrimonial assets should tend towards equality. This article will discuss two main arguments: firstly, the focus should be on the efforts of spouses and not ability; and secondly, more recognition should be given for the loss of career opportunities.

47 Firstly, effort should be rewarded instead of ability because it encapsulates what marriage is – an equal co-operative partnership of different *efforts* for mutual benefit. "Effort" by its plain definition means "a vigorous or determined attempt"[115] while "ability" means the "possession of the means or skill to do something".[116] Lim Hui Min makes this distinction that while a party may work very hard, he or she might not produce substantive results in terms of contributions because of the "lack of intelligence and/or ability".[117] Similarly, the High Court in *Lee Nyuk Lian v Lim Nia Yong*[118] has recognised that spouses with unequal abilities should not be given unequal rewards from the marriage. The author believes that recognising efforts will be most in line with the "philosophy of marriage being an equal partnership".[119]

48 Using the recent case of *UDL v UDM* as an illustrative, the Family Court attempted to utilise the new trends approach from *TNL v TNK* because it was a primarily single-income marriage.[120] The case involved a moderate marriage of 13 years where the wife had not contributed at all to the acquisition of matrimonial assets.[121] The court had misunderstood and misapplied the trends approach from *TNL v TNK*. In *TNL v TNK*, the court had explicitly stated that the *ANJ* approach should not be applied for all single-income marriages.[122] Yet,

deciding the division of matrimonial assets. The author recognises that this could be because *UNE v UNF* was not a single-income marriage, unlike *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157.

115 Oxford Living Dictionaries, "Effort" https://en.oxforddictionaries.com/definition/effort (accessed June 2018).

116 Oxford Living Dictionaries, "Ability" https://en.oxforddictionaries.com/definition/ability (accessed June 2018).

117 See Lim Hui Min, "Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result – A Review of High Court and Court of Appeal Cases from 2005–2010" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Singapore: Academy Publishing, 2011) at para 70.

118 [2007] 2 SLR(R) 905.

119 See *TNL v TNK* [2017] 1 SLR 609 at [45].

120 See *UDL v UDM* [2017] SGFC 77 at [1]–[2].

121 The Family Court in *UDL v UDM* [2017] SGFC 77 had also wrongly concluded (at [25]) that the 13-year marriage was a short marriage. However, this author will take the court's point as it is.

122 See *TNL v TNK* [2017] 1 SLR 609 at [46].

the lower court applied the *ANJ* approach and awarded the wife nothing for direct contributions and a mere 10% for indirect contributions. This 10% was derived from misapplying *TNL v TNK* and comparing the precedent of *TYS v TYT* for indirect contributions because both cases involved IVF.[123] The Family Court then held that the sacrifices in *TYS v TYT* were greater than the wife's in *UDL v UDM* because in *TYS v TYT*, it was a slightly longer marriage of 17 years; the wife in *TYS v TYT* succeeded in bearing a child with special needs from IVF; and the wife in *UDL v UDM* had exclusive occupation of the matrimonial home.[124]

49 Firstly, with respect, the comparison against the precedent of *TYS v TYT* made by the Family Court in *UDL v UDM* was incorrect. The cases were starkly different in their facts despite both involving attempts at IVF. The considerations in both cases were different because of the length and the presence of a special needs child from the marriage. If *TYS v TYT* was used as the benchmark and the contributions were purely considered, the wife's contributions in *UDL v UDM* would certainly be significantly lesser as compared to the wife in *TYS v TYT* because there was no child to apply her ability to. This was the major factor which the Family Court relied on to award the wife with 10% for indirect contributions in addition to the wife's exclusive occupation of the matrimonial home.[125] Secondly, if the wife's efforts at attempting to conceive and the loss of career opportunities were given more consideration, it is clear that the outcome of 5% of the pool of matrimonial assets is unsatisfactory.

D. Focus on loss of career opportunities

50 More generally, the courts should accord more recognition for the loss of career opportunities because they have significant impacts on the lives of the homemaker post-divorce. In this sense, the homemaker should be compensated for the loss of labour participation. In *ANJ v ANK*, the Court of Appeal reiterated its previous decision in *Ong Boon Huat Samuel v Chan Mei Lan Kristine*[126] that "indirect contributions

123 This is based on deduction because the Family Court had given the wife in *UDL v UDM* [2017] SGFC 77 a mere 5% as the final proportion of the pool of matrimonial assets while awarding her nothing for direct contributions. Working backwards allowed this author to deduce that the court had awarded her 10% for indirect contributions because the weight given to the various contributions was not adjusted (at [24]–[31]).

124 In *TYS v TYT* [2017] SGHCF 7, the High Court had awarded the husband and wife 85:15 and 25:75 for direct and indirect contributions respectively. The final ratio was 55:45, in favour of the husband.

125 This is a factor under s 112(2)(*f*) of the Women's Charter (Cap 353, 2009 Rev Ed).

126 [2007] 2 SLR(R) 729.

usually play a *de minimis* role in short, childless marriages".[127] With respect, contrary to the Court of Appeal's decisions, the time away from the workforce is still significant for the homemaker spouse. This article will draw on the Canadian family law for (a) the recognition of loss of career advancement; and (b) the differing treatment for the loss of time from mandatory conscription that is present in Singapore.

(1) Inspiration from Canadian family law on recognition of loss of career advancement

51 Canadian family law in this respect is particularly useful to draw lessons from in the area of unjust enrichment for non-married couples. While the mechanics of the law of unjust enrichment differ from the division of matrimonial assets under the Women's Charter, the principles and considerations from the focus on the contribution of parties are similar to determine whether a party was unduly enriched by the efforts of the other party. In this regard, unjust enrichment can be considered relevant in this article's discussion.

52 The Canadian courts were not afraid to accord due recognition of the wife's efforts in maintaining the household such that the husband was able to focus on his business. In *Ker v Baranow*,[128] the Supreme Court of Canada held that:[129]

> There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 *Ms. Vanasse gave up a lucrative and exciting career* with CSIS, where she was training to be an intelligence officer, to move to Halifax with Mr. Seguin. *In many ways this was a sacrifice on her part; she left her career, gave up her own income, and moved away from her family and friends.* [emphasis added]

53 In that particular case, the couple was in a common law relationship and unmarried; therefore, they could not rely on the Ontario Family Law Act[130] ("Ontario FLA") for equal division of net family property.[131] The court held that the wife had relied on her husband to her detriment and this constituted her contribution to the acquisition of the properties to claim a share.

127 See *ANJ v ANK* [2015] 4 SLR 1043 at [27(a)] and *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729 at [28].

128 [2011] 1 SCR 269.

129 See *Kerr v Baranow* [2011] 1 SCR 269 at [152].

130 RSO 1990, c F-3.

131 See s 4 of the Ontario Family Law Act (RSO 1990, c F-3).

54 Where there are children of the marriage, the sacrifice of career opportunities and efforts are very clear and always readily recognised. However, the author argues that even without children, the homemaker's efforts on the homemaking front should be given equal weight with financial contributions regardless of the length of the marriage. Time is priceless; time lost can never be returned. While the Singapore Court of Appeal has rightly noted that the power to divide matrimonial assets is not punitive, it should also recognise the zero-sum game that is present in this power.[132] When the homemaker is not credited or compensated for the efforts and sacrifice, the other gets doubly credited at his/her expense. The breadwinner gains from recognition of his breadwinning and the lack of credit for the homemaker's sacrifice.[133]

55 Canadian family law has also accepted this recognition of loss of career opportunities in spousal support since they have equality in the division of matrimonial assets. Similarly, like unjust enrichment, spousal support is different from the division of matrimonial assets. However, spousal support in Singapore is a consideration within the division of matrimonial assets as seen in s 112(2)(*h*) read with ss 114(1)(*a*) and 114(1)(*b*) of the Women's Charter. Section 114(1) provides that:

> (1) In determining the amount of any maintenance to be paid by a man to his wife or former wife, or by a woman to her incapacitated husband or incapacitated former husband, the court shall have regard to all the circumstances of the case including the following matters:
>
> (*a*) the income, earning capacity, property and *other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future*;
>
> (*b*) the *financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future*.
>
> [emphasis added]

56 Spousal support is part of the consideration of *all the circumstances of the case* found within s 112(2). Therefore, the principles behind spousal support are not too distant from the overall division, making it relevant and applicable for the discussion of the division of matrimonial assets. This is because both sets of principles are related in so far as both areas analyse the contributions to the marriage, and in turn the compensation for their efforts.

132 See *Chan Tin Sun v Fong Quay Sim* [2015] 2 SLR 195 at [28].

133 *Ie*, When the homemaker's share gets reduced by 10% to 40%, the breadwinner's share is increased by 10% to 60%. The difference between their respective shares is 20%. This is a very significant amount.

57 Looking back at Canadian family law, the Supreme Court of Canada has endorsed the compensatory principle in spousal support to recognise the sacrifices by the homemaker spouse:[134]

> The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. *This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being*. In such situations, spousal support may be a way to compensate such economic disadvantage. [emphasis added]

58 Carol Rogerson and Rollie Thompson further elaborate in the Spousal Support Advisory Guidelines:[135]

> Compensatory claims are *based either on the recipient's economic loss or disadvantage because of the marriage (typically a loss of earning capacity) because of the roles assumed during the marriage* or on the recipient's conferral of an economic benefit on the payor without adequate compensation. [emphasis added]

59 In a marriage, spouses are required to "sacrifice [their] personal priorities … in the interests of shared goals".[136] Therefore, looking specifically at the division of matrimonial assets, cutting back on labour participation inevitably hinders her ability to contribute financially to the marriage. This sacrifice should not be downplayed even if consensual because both spouses had reached this consensus together. Further, since this "economic disadvantage arising from the marriage" continues well after the divorce, the breadwinning husband should not then be allowed to rescind on this consensus that they contribute differently to the marriage.[137] Therefore, there is a need to compensate the homemaker in this respect even if one does not count homemaking as a form of contribution to the marriage.

134 See *Moge v Moge* [1992] 3 SCR 813 at 867–868.

135 The principle from *Moge v Moge* [1992] 3 SCR 813 was subsequently adopted by Carol Rogerson and Rollie Thompson in the creation of the Spousal Support Advisory Guidelines ("SSAG"). While it is not codified in legislation, the SSAG is extensively used by judges as a guideline for awarding spousal support in Canada. See Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines: The Revised User's Guide* (presented to the Department of Justice Canada) (April 2016) at p 5 <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/pdf/ug_a1-gu_a1.pdf> (accessed June 2018).

136 See *Moge v Moge* [1992] 3 SCR 813 at 848.

137 See *Chutter v Chutter* (2008) BCCA 507 at [50].

(2) Mandatory conscription is compensated

60 All males in Singapore are required to serve in either the military, civil defence force or police force for their national service. Parliament has long recognised the unreturnable sacrifice of time that all males have contributed to the nation. As such, national service was reduced in length from two and a half years to the current two years.[138] In recognition of the possible career advancements and opportunities in this span of about two years, the Government has declared that:[139]

> *Male employees who join the Civil Service on completion of fulltime NS are given 2 salary increments in recognition of their contributions to national defence and to ensure that they do not lose out in terms of salary to their contemporaries who do not have to serve NS.*
>
> Many employers in the private sector have also given similar tangible recognition for NS to their male employees.
>
> [emphasis added]

61 Similarly, and more recently, the Ministry of Social and Family Development and the National Council of Social Service jointly issued a salary guideline in 2016, echoing the Ministry of Defence's position:[140]

> *Male employees who join the Civil Service on completion of full-time NS are given two-year salary increments in recognition of their contributions to national defence and to ensure that they do not lose out their contemporaries who did not serve NS*. Social service organisations should also take this into account in computing appropriate starting salary for the staff. [emphasis added]

62 This clearly espouses the Government's intention that the loss of two years of time – be it in terms of experience or opportunities – can be very significant. This loss of experience is a sacrifice that forms part of the immeasurable non-financial contributions. While the courts have been largely sympathetic to this reality in the case involving moderate to long marriages, they have downplayed the significance of it in short

138 There is a further reduction of two months of service for those who have obtained at least a Silver award in their National Physical Fitness Assessment test.

139 See Ministry of Defence, *Supporting Our NSmen: An Employer's Guide* (2002) <https://www.mindef.gov.sg/oms/dam/publications/eBooks/More_eBooks/employer_guide.pdf> (accessed June 2018); Toh Wen Li, "Mindsets Need to Change to Bridge Gender Pay Gap: Ong Ye Kung" *The Straits Times* (22 September 2017).

140 See Ministry of Social and Family Development & National Council of Social Service, *Notes on Application of the Social Service Sector Salary Guidelines 2016* (2016) <https://www.ncss.gov.sg/NCSS/media/NCSS_SMD/People%20Solutions/Notes-on-Application-of-the-Social-Service-Salary-Guidelines-2016.pdf> (accessed June 2018).

marriages.[141] This article believes that in a short marriage of five years, double that of national service, the homemaker spouse loses not just double the years of experience but more. This is a result of the reality that employers would preferably not want to hire someone older.

63 Since the Government compensates males for their loss of time in the military, similarly, it is reasonable and not a stretch to compensate homemakers for their even larger loss of time. It should not be forgotten that the other spouse had either explicitly or implicitly allowed for it by agreeing with the homemaker's decision during the subsistence of marriage. By only crediting the breadwinner, the homemaker is effectively penalised for taking on the role. This thus illustrates how the application of the *ANJ* approach to short single-income marriages would also perpetuate the same problems as long single-income marriages because of the double credit given to financial contributions. Ong JC stated in *UBM v UBN*:[142]

> … *Parties in a functioning marriage do not keep records of their transactions with a view to building a case should divorce occur, so gaps in the evidence, especially in long marriages, can be expected*. In some cases, the court is able to reach fairly accurate figures in respect of the parties' direct contributions due to the availability of cogent evidence. In other cases, gaps in evidence can affect the court's ability to determine a precise ratio for direct contributions. The court will consider all available relevant evidence to reach a just determination at each stage of the exercise of discretion afforded by s 112 of the WC.
>
> … *Who is to say that had one spouse not been present in the life of the other, the latter would have been as financially successful and thus able to contribute a greater share to the pool of matrimonial assets? Conversely, one cannot, on hindsight, tell with certainty whether the presence of the other spouse in one's life had any negative effect on one's career*. …
>
> [emphasis added]

64 As rightly noted by Ong JC, the courts are forced to speculate because of the lack of evidence.[143] Therefore, while the courts try to best ascertain a fair amount from this lack of evidence, speculation should be limited as much as possible. Where there is a need for speculation, the benefit of the doubt should be given the homemaker spouse because it is more difficult to ascertain his or her contribution because of its very nature. In this sense, it will live up to the exhortation of s 46(1) to not

141 The courts have alluded that it is Parliament's intention to not view direct contributions and indirect contributions on the same plane in short marriages. See *UBM v UBN* [2017] 4 SLR 921 at [63]–[65].

142 See *UBM v UBN* [2017] 4 SLR 921 at [59]–[60].

143 See *UNE v UNF* [2018] SGHCF 12 at [72]–[72] and [90].

seek to over-credit financial contributions and accord the recognition non-financial contributions deserve. Accordingly, the courts should not increase the weight given to direct contributions in short, childless marriages.[144]

65 The author recognises that there is a distinction between conscription and marriage because the former is mandatory while the latter is voluntary. However, there should not be differing treatment of both areas solely on this basis. Both sacrifices of time are essential in their respective areas for them to work well. During the marriage, the time lost is crucial for the household and/or children to flourish. Not every family is privileged to have a domestic helper or family members to help in their caring for the family. The Court of Appeal has recognised that the presence of a domestic helper eases the homemaker's work and has even gone to the extent of reducing recognition of the homemaker's contributions to the marriage.[145] On the other hand, time lost for conscription is crucial for national security. These sacrifices enable the success of the family and nation. The fact that the marriage has failed and divorce is occurring does not diminish the sacrifices made at that point in time. Further, as mentioned previously, no couple goes into a marriage with the expectation of divorce. Therefore, voluntariness *per se* is not persuasive against the recognition of loss of time and career opportunities.

66 Taking both arguments together, if the focus of non-financial contributions is on efforts and the fact that time has been lost, the argument to incline the division of matrimonial assets towards equality is highly justifiable. This is not without safeguards. However, the safeguards will depend on whether this is the way forward with the courts interpreting s 112 to allow for an inclination towards equality or an amendment of legislation.

V. Reinterpretation or reformation?

67 The discussion above brings this article to challenge the status quo. However, the issue remains – who should initiate change – the courts or Parliament? This part will look at the legislative changes which Parliament can effect to reconsider the inclination towards equality and then complementarily or in the alternative, how the courts can achieve this.

144 *Cf* the Court of Appeal in *ATE v ATD* [2016] SGCA 2, which accorded a 75% weightage to direct contributions in the short marriage.

145 See *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906.

A. Reform by Parliament

68 Parliament can consider amending s 112 to include the inclination towards equality into the provision again. As shown above, the norm to this day – at least for long marriages – inclines towards equality.[146] The author submits that marriages of short and moderate lengths should also incline towards equality to fully recognise the efforts of the parties in the marriage, regardless of the presence of a child of marriage. To say that the efforts are equally important is not enough; the outcome needs to reflect this so that it is not merely perfunctory. In the same vein, credit should be given to the exceptional spouse who is not only the primary breadwinner but also the primary homemaker; the courts should be allowed to deviate from the inclination in such events.

69 To incline towards equality as the starting point would be different from what Judith Prakash J (as she then was) in *Yow Mee Lan v Chen Kai Buan*[147] was rejecting. In that case, she stated that:[148]

> Given that the court's prime function is to make an equitable distribution of matrimonial assets in the light of all the circumstances, it cannot carry out this function properly if it operates on assumptions. In my view, the correct approach would be to first determine the facts of any particular case, consider which of the factors set out in s 112(2) are applicable on those facts and thereafter decide what on that basis would amount to an equitable division. In this regard, *I must respectfully disagree with the approach postulated in* Soh Chan Soon*'s case that the starting point is the assumption that both parties have contributed jointly and equally* throughout the marriage to the acquisition and growth of the equity in the family home [emphasis added].

70 The court was not rejecting that the division of matrimonial should incline towards equality. It was rejecting the *assumption* that parties had "contributed jointly and equally" [emphasis added].[149] This is different from what the author is proposing in substance and not just in semantics. The author is proposing that the spouses' respective contributions should not be questioned because efforts and the sacrifice of career opportunities cannot be quantified. In this regard, the author is not assuming that contributions were equal but proposes that they should not be questioned. This proposition will premise the inclination

146 See *UBM v UBN* [2017] 4 SLR 921 at [66].

147 [2000] 2 SLR(R) 659.

148 See *Yow Mee Lan v Chen Kai Buan* [2000] SGHC 152 ("*Yow Mee Lan*") at [33]. *Yow Mee Lan* remains good law because the Court of Appeal has continuously endorsed it since *Lim Choon Lai v Chew Kim Heng* [2001] 2 SLR(R) 260 at [12]–[14] and in *TNL v TNK* [2017] 1 SLR 609.

149 See *Yow Mee Lan v Chen Kai Buan* [2000] SGHC 152 at [33].

towards equality unlike what *Soh Chan Soon v Tan Choon Yock*[150] did – to assume that parties have jointly and equally contributed. Further, with Parliament taking the lead in this regard instead of the courts reading this into s 112, it would alleviate the discomfort by the many judges who have concluded that s 112 bars the inclination towards equality.[151]

(1) Lessons from the Ontario Family Law Act

71 While s 112(2) is currently drafted extremely broadly as a non-exhaustive list of factors for the courts to consider, the courts may consider adopting something similar to s 5(6) of the Ontario FLA:[152]

> **Variation of share**
>
> (6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
>
> (d) a spouse's intentional or reckless depletion of his or her net family property;
>
> (e) *the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is* ***disproportionately large in relation to a period of cohabitation that is less than five years****;*
>
> (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
>
> (g) a written agreement between the spouses that is not a domestic contract; or
>
> (h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.
>
> [emphasis added in italics and bold italics]

150 [1998] SGHC 204.

151 See *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [57].

152 See ss 5(1)–5(6) of the Ontario Family Law Act (RSO 1990, c F-3).

72 In Ontario, s 5 of the Ontario FLA provides for the equalisation of net family profits between the spouses. While this regime is slightly different from the regime proposed by the author, the principles remain useful to learn from. As noted above, s 5(6) of the Ontario FLA explicitly provides an exception for the variation from equality if the marriage is less than five years. In a similar vein, the amended s 112 should include a similar exception which would allow for courts to consider in determining what is just and equitable with the starting position as an inclination towards equality. Parliament could amend s 112 to require the division of matrimonial assets to incline towards equality while providing for the exception that this inclination can be varied if the marriage is less than five years. This will explicitly guide the courts and espouse Parliament's intent within the legislation to possibly deviate from the inclination towards equality in short, childless marriages where the pool of matrimonial assets is exceptionally large.

73 Further, the median duration of marriage before divorce has always been above ten years.[153] Therefore, the law should cater towards providing guidance for the majority of cases, which are moderate to long marriages, and an exception for short marriages. In this regard, it would alleviate the Select Committee's fear of unjustly enriching the pure homemaker in such situations and the Court of Appeal's fear that it would "induce" the judge to seek equality as the end point. Further, courts are not pressured to deviate from the inclination towards equality all the time for short marriages because the provision is merely permissive and not mandatory.

B. Implementation by the courts

74 Should s 112 not be amended, there are two ways in which the courts can apply a similar system, either (a) moving on from the spectre of *Lock Yeng Fun* and recognising that Parliament had not completely objected to the inclination towards equality; or (b) adopting the trends approach for all types of lengths and income-generating families.

75 Firstly, the courts can adopt what the author has argued, that Parliament had not completely objected the inclination towards equality. As discussed above,[154] Parliament's only rejection for the inclination towards equality was because of short, childless marriages. The author has provided an explanation that this fear is baseless because of the

153 See Department of Statistics, Ministry of Trade & Industry, *Statistics on Marriages and Divorces, 2016* (July 2017) at p 16 <http://www.singstat.gov.sg/docs/default-source/default-document-library/publications/publications_and_papers/marriages_and_divorces/smd2016.pdf> (accessed September 2018).

154 See paras 17–33 above.

safeguards from s 112(10) in place and the discretion accorded to the courts to adopt the categorical approach in these situations. Further, the efforts of the homemaker in a childless marriage should not be discounted because the time spent away from the workforce is very significant. With the concern of short, childless marriages addressed, the courts may then adopt the inclination towards equality in deciding the division of matrimonial assets because it is in line with Parliament's intent for a consistent law.

76 On this same note, the author cautions against the use of fault in this area of family law, especially since Family Law has moved away from the use of fault in divorce unless it is gross misconduct.[155] Where one spouse deliberately and systematically harms the other, the courts might need to exercise their discretion to shift away from equality after considering all circumstances under s 112.[156] Even in cases where one parent has neglected the children because of gambling habits, she should not be penalised; instead, the other parent should be credited for shouldering the additional burden.[157] What remains is that conduct would only be scrutinised when it has met the high threshold of gross misconduct.

77 Alternatively, the courts may adopt the trends approach that was first used by the Court of Appeal in *BCB v BCC* and subsequently propounded by the same court in *TNL v TNK*. This trends approach, as noted by Ong JC in *UDM v UDN*, "guide[s]" the courts towards a just and equitable division of assets that is consistent. The possible concern about using a trends approach, as highlighted above,[158] is the fear that it would be building on unprincipled precedents.[159] Therefore, the courts could build on Lim's work, and Ong JC's work in *UDM v UDN*, to come

155 It is not within the scope of this article to explore whether this position is correct. It is fair to note that Singapore adopts a "no fault" basis in family law. See *NK v NL* [2007] 3 SLR(R) 743 at [12].

156 See *Chan Tin Sun v Fong Quay Sim* [2015] 2 SLR 195. The wife in this case had systematically poisoned her husband by putting arsenic into his food.

157 Even though *Tan Siew Kee v Chua Ah Boey* [1987] SLR(R) 725 was about the custody of the child. The High Court was cognisant of the neglect by the mother because of her addiction to gambling and being in the company of undesirable people. She, therefore, had reduced capacity, ability and desire to even look after the child.

158 See paras 17–33 above.

159 These unprincipled precedents include those that focused too much on the financial contributions of parties and were noted by the Court of Appeal in *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [39]:

> Our examination of the case law shows that the courts might not have given sufficient recognition to the value of factors like homemaking, parenting and husbandry when attributing to them a financial value in the division of matrimonial assets. This ought *not* to be the case. [emphasis in original]

up with an accessible guide for judges, lawyers and litigants-in-person.[160] Alternatively, a commission can be set up to study precedents.

78 In this trends guide, the courts would need to set clear boundaries for the varying lengths of marriages. The author suggests that marriages that are five years and below are to be considered short marriages; six to 15 years are to be considered moderate-length marriages and 16 years and above long marriages. This delineation is not arbitrary but based on the study of the judgment calls made by the Court of Appeal and High Court.

79 Both solutions suggested keep in line with Parliament's intention for there to be inherent consistency within the law of division of matrimonial assets because the same principle applies – that marriage is an equal co-operative partnership of different efforts for mutual benefit. This does not tie the hands of the judges as feared by the Court of Appeal in *Lock Yeng Fun* because judges are astute and competent to not blindly fit their cases into the mould created.[161] Instead, the discretion still remains with the courts to decide to shift away from this inclination towards equality where the facts demand it under s 112.

VI. Conclusion

80 The return to an inclination towards equality as a starting point remains controversial and can be scary because of the fear of overcompensating the financial contributions as in *Yow Mee Lan* and *TNL v TNK*.[162] Other courts fear that it contravenes parliamentary intention while Parliament fears that there is possibly injustice and inequity in short, childless marriages should there be an inclination towards equality. These are real and legitimate fears because on first glance, it can come across as unjust to award the pure homemaker spouse in a childless marriage an equal division of matrimonial assets. However, the author believes that the fear of injustice and inequity should not be the driving force of law, more specifically, the division of matrimonial assets.

160 Lim Hui Min has done extensive work in this field, tracing the cases between 2005 and 2010. It is not the aim of this article to endeavour to do something similar. See Lim Hui Min, "Matrimonial Asset Division: The Art of Achieving a Just and Equitable Result – A Review of High Court and Court of Appeal Cases from 2005–2010" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Singapore: Academy Publishing, 2011).

161 See *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 529 at [57].

162 See the discussion at paras 17–33 above.

81 The author has proposed how these fears can be alleviated on three bases. Firstly, short, childless marriages are unlikely to accumulate a large pool of matrimonial assets. Secondly, the courts can apply the categorical approach to award the pure homemaker a lower share for premarital property that has been transformed. Lastly, Parliament can include an explicit exception to veer away from the inclination towards equality that the reformed provision will contain for short marriages below five years. These are sufficient safeguards that can be put in place. By having the law provide for the majority of cases and an exception for short marriages, the Select Committee's want for consistency in law is achieved. Most importantly, by inclining towards equality, it accords respect to s 46(1) of the Women's Charter and does not serve to inhibit itself because of the fear of short marriages.

82 The inclination towards equality will allow for a more equitable outcome because the loss of years as a homemaker, even in a short marriage, is vital. If the government recognises the loss of two years for males because of national service, what more is five years in a short marriage? The inclination towards equality will also allow for more consistency and predictability in outcomes by future potential divorcees. As Canada moved towards an equalisation of net family profits, there was a tremendous fall in the number of cases litigating for the division of assets. Even with the high rate of successful mediation already present, an inclination towards equality as a bottom line would encourage parties to settle.[163] Through the reduction in animosity that is usually generated from this thorny issue of division of matrimonial assets, the ones that stand to benefit most would be the children of the marriage from less conflict.

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163 Seven in ten divorce mediations were successful in resolving all issues of conflict. Rahimah Rashith, "'Encouraging' Results from Divorce Mediation: Family Justice Courts" *The Straits Times* (28 February 2018).