

FROM ASSET PROTECTION TO ASSET DIVISION: SUGGESTED TREATMENT OF DISCRETIONARY TRUSTS IN SINGAPORE DIVORCE

Discretionary trusts present significant challenges for the division of matrimonial assets during divorce. On the one hand, dividing a discretionary trust potentially conflicts with traditional trust law principles and also affects non-spouse third parties. On the other hand, not dividing a discretionary trust undermines the policy of family law to fairly divide the fruits of the marriage between divorcing spouses. This article suggests six ways in which the Singapore courts can take a discretionary trust into account during division, namely, by: (a) treating the discretionary trust interest as an “asset” under s 112(1) of the Women’s Charter 1961 (“WC”), complemented by a holistic valuation of that interest; (b) ordering the division of the trust assets “if as and when” the respondent-spouse receives a trust distribution; (c) setting aside dispositions of property into the trust using s 139M of the WC; (d) challenging the trust as a sham; (e) challenging the trust as an illusory trust; and (f) regarding the trust as a financial resource.

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I. Introduction

1 Singapore is one of the world's leading wealth management centres² and cities with the most high-net-worth individuals (“HNWIs”).³ Although the precise numbers are unknown, it is surmised that there are a respectable number of HNWIs in Singapore who have set up domestic or overseas trusts.

2 Trusts have long been used by HNWIs and businessmen for asset protection and succession planning. Amongst various trust structures, the discretionary trust is particularly popular because of its flexibility and ability to adapt to changing circumstances.⁴ Another key advantage of the discretionary trust is its asset protection feature. Trust assets are *prima facie* protected from the settlor's and discretionary beneficiaries' creditors: Even if a discretionary trust is structured in a way that allows the settlor to retain influence or control, the settlor is no longer the beneficial owner of the trust assets. The discretionary beneficiaries also do not have a proprietary interest in the trust assets until the trustee exercises his or her discretion in a beneficiary's favour.⁵ However, the discretionary trust's very asset protection features present challenges for asset division during divorce. Family courts have to balance between family law's goal of fair redistribution between divorcing spouses, and upholding general trust and property law principles.⁶

3 This article considers how the Singapore courts should treat a discretionary trust when dividing matrimonial assets during divorce proceedings. The Singapore courts have yet to provide a detailed analysis on this matter. This article will refer to the spouse attempting to obtain

2 “The Deloitte International Wealth Management Centre Ranking 2024”, *Deloitte* (23 October 2024) <<https://www.deloitte.com/ch/en/Industries/financial-services/perspectives/international-wealth-management.html>> (accessed 30 June 2026). As at end-2024, Singapore held assets under management exceeding S\$6tn: see “Singapore Asset Management Survey 2024”, *Monetary Authority of Singapore* (15 July 2025) <<https://www.mas.gov.sg/-/media/mas-media-library/publications/singapore-asset-management-survey/asset-management-survey-report-2024.pdf>> (accessed 30 June 2026).

3 Singapore ranked as the fourth city with the most millionaires, centi-millionaires and billionaires as at end-2024: see “Top 50 Cities for Millionaires”, *Henley & Partners* <<https://www.henleyglobal.com/publications/wealthiest-cities-2025/top-50-cities-millionaires>> (accessed 30 June 2026).

4 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [34]–[35]; Tang Hang Wu, “An Impregnable Fortress? Possible Attacks On the Singapore Trust” (2011) 25(2) *Trust Law International* 66 at 68.

5 *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 574 and 617–618; *Lakshmi Prataprai Bhojwani v Moti Harkishindas Bhojwani* [2019] 3 SLR 356 at [32].

6 Diana Bryant, “Heterodox Is the New Orthodox – Discretionary Trusts and Family Law: A General Law Comparison” (2014) 20(7) *Trusts & Trustees* 654.

a share of the trust assets as the “claimant-spouse” and the spouse resisting it as the “respondent-spouse”. For the purposes of this article, it will be assumed that the respondent-spouse is a discretionary beneficiary.

4 This article argues that the Singapore courts should adopt a wide interpretation of the term “asset” under Singapore’s Women’s Charter 1961⁷ (“WC”). The respondent-spouse’s interest in the trust (*ie*, “discretionary trust interest”), as a chose in action, should be considered an “asset” that can be added to the pool of matrimonial assets for division, even though the respondent-spouse, strictly speaking, has no proprietary interest in the trust assets. This should be complemented with a holistic valuation of the discretionary trust interest, which takes into account the likelihood of the respondent-spouse receiving the trust assets. The alternative approach is for control to be required for a discretionary trust interest to qualify as the respondent-spouse’s “asset”, and for its value to equate to the trust’s total assets. However, that all-or-nothing approach is often hard to satisfy. Compared to the first approach, it is a blunt tool for achieving justice between the divorcing spouses *inter se* and with the non-spouse beneficiaries.

5 The abovementioned two approaches draw from jurisprudence in New Zealand,⁸ Australia⁹ and Ontario¹⁰ whose legislation, like Singapore’s, requires the court to assess if a discretionary trust is a “property” or “asset” of either or both of the spouses before it can be divided. As that is not a legislative requirement in England,¹¹ English cases are less instructive for Singapore. Nonetheless, given the extensive experience of the English family courts in dealing with discretionary trusts, reference will be made to the English experience where relevant.¹²

6 Other than regarding a discretionary trust interest as an asset, this article will also consider five supplementary techniques to take the trust into account during asset division, namely: (a) for division of the trust assets to be ordered “if as and when” the respondent-spouse

7 2020 Rev Ed.

8 Property (Relationships) Act 1976 (NZ) ss 2, 8 and 11.

9 Family Law Act 1975 (Cth) ss 4(1) and 79.

10 Family Law Act, RSO 1990, c F.3 (Can) ss 4(1) and 5(1).

11 Matrimonial Causes Act 1973 (c 18) (UK) s 25(2)(a); *Whaley v Whaley* [2012] 1 FLR 735; [2011] EWCA Civ 617 at [113].

12 For a comparison of the matrimonial property redistribution regimes as applicable to discretionary trusts in Australia, England and Wales, New Zealand and selected Canadian and US jurisdictions, see Adam Hofri-Winogradow & Mark Bennett, “Looking Through’ Trusts in Relationship Property Redistribution Regimes: A Comparative Perspective” (2024) 35(1) *King’s Law Journal* 25, and Adam Hofri-Winogradow & Mark Bennett, “Looking Through Trusts” (2026) 62(2) *Osgoode Hall Law Journal* 485 at 496–497 and 511–517.

receives a trust distribution; (b) setting aside dispositions of property into a trust using s 139M of the WC; (c) challenging the trust as a sham; (d) challenging the trust as an illusory trust; and (e) regarding the trust as a financial resource.

7 Part II¹³ provides an overview of Singapore’s approach to division of matrimonial assets and the potential tools to address discretionary trusts. Part III¹⁴ summarises the treatment of discretionary trusts in Singapore divorce proceedings thus far, and explains the obstacles in dividing a discretionary trust. Part IV¹⁵ explains why a discretionary trust interest should be considered a matrimonial “asset”, and how it should be valued. Part V¹⁶ looks at the other techniques.

II. Singapore’s approach to division of matrimonial assets and potential tools to address discretionary trusts

8 The division of matrimonial assets is one of the three financial matters that the Singapore courts decide on during the divorce process, the other two being spousal and child maintenance. Section 112(1) of the WC imbues the court with a wide discretion to divide “matrimonial asset[s]” “between the parties” in a “just and equitable” manner. Section 112(2) provides a non-exhaustive list of factors that the court should consider when exercising its discretion.

9 The Singapore courts employ a structured approach towards division.¹⁷ First, the matrimonial pool is delineated. This involves determining which assets are “matrimonial assets” and valuing them. Only assets acquired by either or both of the spouses during the marriage, and the matrimonial home, are matrimonial assets. Premarital assets, gifts and inheritances are not included in the matrimonial pool unless they were substantially improved during the marriage, or, in the case of premarital assets, ordinarily used or enjoyed by the family during the marriage.¹⁸ Second, the court will use the direct financial and indirect contributions of each spouse to form a preliminary basis for asset division.¹⁹ Lastly, the court will make adjustments as necessary to arrive at

13 See paras 8–14 below.

14 See paras 15–43 below.

15 See paras 44–88 below.

16 See paras 89–103 below.

17 *ANJ v ANK* [2015] 4 SLR 1043 at [21]–[30]. Note, however, that the structured approach does not apply to long single-income marriages. The court will tend towards equal division instead: see *TNL v TNK* [2017] 1 SLR 609 at [41]–[46].

18 Women’s Charter 1961 (2020 Rev Ed) s 112(10); see also *USB v USA* [2020] 2 SLR 588 at [18]–[20].

19 *ANJ v ANK* [2015] 4 SLR 1043 at [22].

a just and equitable outcome. At this stage, the court can, amongst other things, take into account the factors in s 112(2) of the WC, including the “financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future”.²⁰

10 If a non-spouse claims an interest in an alleged matrimonial asset, separate civil proceedings may be necessary to determine the extent of that third party’s interest and ensure that the eventual division order is binding on the third party.²¹

11 Using the structured approach, the Singapore courts can take a discretionary trust into account in two ways. First, the court can divide it as a “matrimonial asset”.²² This article suggests five possibilities to bring a discretionary trust within the scope of division, namely by regarding the discretionary trust interest as an “asset” under s 112(1) of the WC, ordering division of the trust assets “if as and when” the respondent-spouse receives a trust distribution, setting aside a disposition of property into the trust using s 139M of the WC, and attacking the validity of the trust by arguing that it is a sham or an illusory trust.

12 Second, the court can consider a discretionary trust a “financial resource”.²³ Unlike in England, where financial resources can be used to *fund* the redistribution,²⁴ in Singapore (as it is in Australia), parties’ financial resources are only a factor to be considered when deciding *how* to divide the matrimonial assets, but they themselves cannot be divided. From the claimant-spouse’s perspective, it is undesirable for a trust not to be considered a matrimonial asset but only a financial resource, especially when the trust is the main or only substantial asset for division.²⁵

13 The courts in New Zealand,²⁶ Australia²⁷ and England²⁸ have another tool to address discretionary trusts during division, namely

20 *ANJ v ANK* [2015] 4 SLR 1043 at [28]. While “financial resources” is listed in s 114(1)(a) of the Women’s Charter 1961 (2020 Rev Ed) as a factor relevant to the assessment of maintenance, it can also be considered for the purposes of division because s 112(2)(h) provides that the courts can consider “the matters referred to in s 114(1) so far as they are relevant”.

21 *UDA v UDB* [2018] 1 SLR 1015 at [50]–[59], discussed further in paras 35–37 below.

22 Women’s Charter 1961 (2020 Rev Ed) s 112(1).

23 Women’s Charter 1961 (2020 Rev Ed) ss 112(2)(h) and 114(1)(a).

24 *Whaley v Whaley* [2012] 1 FLR 735; [2011] EWCA Civ 617 at [113].

25 Patrick Parkinson, “Family Trusts and Third Parties Under the Family Law Act 1975” (2012) 26(1) *Australian Journal of Family Law* 5 at 6.

26 Family Proceedings Act 1980 (NZ) s 182(1).

27 Family Law Act 1975 (Cth) s 85A.

28 Matrimonial Causes Act 1973 (c 18) (UK) s 24(1)(c).

the power to vary nuptial settlements, including trusts. However, this power was repealed in Singapore in 1980²⁹ and is no longer available in Singapore today.

14 Separately, while not the focus of this article, it is highlighted that instead of division, the claimant-spouse can also ask the Singapore court to take the discretionary trust into account when assessing the respondent-spouse's financial ability to pay maintenance. The court can do so if the trust is assessed to be the respondent-spouse's "financial resource".³⁰

III. Challenges when dividing discretionary trusts during divorce

15 Both substantive and procedural complications may arise when dividing discretionary trusts during divorce. Dividing discretionary trusts is substantively complicated because it potentially subverts traditional trust law principles, and may affect non-spouse third parties such as trustees and other discretionary beneficiaries.

16 Procedural hurdles include the Singapore Family Justice Courts' lack of jurisdiction to adjudicate on proprietary claims made by non-spouses, potential difficulties in obtaining disclosure of trust documents, and cross-border challenges when the trust has foreign elements.

17 Although there have been a handful of divorce cases involving discretionary trusts, the Singapore courts have yet to address in detail the substantive trust law complications or procedural hurdles that may arise.

A. *Treatment of discretionary trusts in Singapore divorce proceedings thus far*

18 Singapore divorce cases on discretionary trusts fall within three categories.³¹

19 In the first category of cases, the courts suggested that a trust which the respondent-spouse had control over could be taken into account when ordering spousal maintenance. However, while control

29 Women's Charter (Amendment) Act 1980 (Act 26 of 1980) s 28, repealing Women's Charter (Cap 47, 1970 Rev Ed) ss 111–112.

30 Women's Charter 1961 (2020 Rev Ed) s 114(1)(a).

31 It is caveated that it is not always clear from the judgments as to whether the trusts were discretionary trusts.

may translate to a trust being the respondent-spouse's "financial resource" for the purpose of maintenance,³² the courts have not explained if or why control should translate to a trust becoming an "asset" for the purpose of division, when the respondent-spouse has no proprietary interest in the trust assets.

20 In *Gaye Williams Nee Marks v Cary Donald Williams*³³ ("Williams"), Mr Williams settled his business in two trusts. Corporate trustees were appointed. The beneficiaries were Mr Williams's sons. One of the companies in the trust paid for a significant proportion of the family's expenses during the marriage. The trust deeds gave Mr Williams wide powers as settlor to change the beneficiaries (including making himself the sole beneficiary) and replace the trustees. The trustees also took instructions from Mr Williams. Because of his significant control over the trust, the court treated Mr Williams as the owner of the trust assets for the purpose of determining his financial ability to pay spousal maintenance. The court ordered Mr Williams to pay spousal maintenance of either S\$7,350 *per* month or a lump sum of S\$1m (of Mrs Williams's choosing). This far exceeded the S\$3,300 monthly salary that Mr Williams was formally earning as the managing director of his business, or the approximately S\$200,000 non-trust assets in his possession. The trust was not subject to division because it was already taken into account when deciding maintenance.

21 In *Marie Eileen Guin nee Fernandez v Arun Guin*³⁴ ("Guin"), the couple set up a Hong Kong trust. They separated and Mrs Guin applied for interim spousal and child maintenance. The judge was not satisfied that Mr Guin had lost interest in or control of the trust as alleged, and treated the trust as Mr Guin's "financial resource" when ordering interim maintenance.³⁵ During the subsequent divorce proceedings, the judge awarded Mrs Guin a share of the trust assets pursuant to division, on the basis that Mr Guin had not lost control of the trust. However, the judge did not explain how or why Mr Guin's control over the trust caused it to be his "asset", despite his lack of proprietary interest.

22 In the second category of cases, the courts implied that they were prepared to include trust assets in the matrimonial pool for division.

32 Women's Charter 1961 (2020 Rev Ed) s 114(1)(a).

33 [1993] SGHC 190. The terms of the trust as described in the judgment suggest that the two trusts were discretionary trusts.

34 [1994] SGHC 157. The judgment did not specify if the trust was a discretionary trust.

35 The decision on interim maintenance was not reported but was summarised in the divorce decision: see *Marie Eileen Guin nee Fernandez v Arun Guin* [1994] SGHC 157.

However, because of how the cases were conducted, the courts did not have the opportunity to fully engage with the trust issues.

23 In *WZF v WZG*,³⁶ the husband set up an Australian trust. The trust deed named him as the sole beneficiary.³⁷ The husband refused to disclose the trust assets or value³⁸ and also withheld information regarding companies that he had an interest in,³⁹ bank accounts in his name,⁴⁰ the surrender proceeds of an endowment fund,⁴¹ and insurance policies.⁴² Consequently, the court drew an adverse inference against the husband for his non-disclosure.⁴³ The court gave effect to the adverse inference in two ways. First, it applied the “quantification approach” to ascribe a value exceeding S\$10m to one of the companies and added that value to the matrimonial pool.⁴⁴ Second, as there was no evidence from which the court could approximate the value of the other undisclosed assets (including the trust), the court used the “uplift approach” to give the wife an additional 10% of the known assets to compensate her for the husband’s non-disclosure.⁴⁵ It is noted that although the court did not have an opportunity to engage with the trust issues, it did not immediately exclude the Australian trust from the matrimonial pool. This case implies that the courts may be prepared to treat a respondent-spouse’s interest in a trust as an “asset” capable of division, at least when the respondent-spouse is the sole beneficiary. The position is, however, uncertain if there are multiple discretionary beneficiaries.

24 In *XIK v XIL*,⁴⁶ the husband declared that he owned shares in two companies. It was subsequently discovered that a family trust owned the shares instead. At the ancillary matters hearing, the wife contended that there were undisclosed matrimonial assets held by the family trust. However, the wife adduced no evidence for that allegation and also had not pursued further information about the family trust during discovery. Other than the value of the shares in the two companies (which the husband had admitted ownership of), the court assigned a *nil* value to

36 *WZF v WZG* [2024] SGFC 46; *WZF v WZG* [2025] 3 SLR 1219. The judgments did not specify if the trust was a discretionary trust.

37 *WZF v WZG* [2024] SGFC 46 at [23].

38 *WZF v WZG* [2025] 3 SLR 1219 at [46]–[47].

39 *WZF v WZG* [2025] 3 SLR 1219 at [50]–[57].

40 *WZF v WZG* [2025] 3 SLR 1219 at [42]–[44].

41 *WZF v WZG* [2025] 3 SLR 1219 at [45].

42 *WZF v WZG* [2025] 3 SLR 1219 at [49].

43 *WZF v WZG* [2025] 3 SLR 1219 at [58]–[71] and [91]–[92].

44 *WZF v WZG* [2025] 3 SLR 1219 at [59] and [64]–[71].

45 *WZF v WZG* [2025] 3 SLR 1219 at [59], [63]–[64] and [91]–[92].

46 [2025] SGHCF 16. The judgment did not specify if the trust was a discretionary trust.

the family trust.⁴⁷ Due to the way the case was conducted, the issue of whether assets held by the family trust (which the husband may not have a proprietary interest in) should be included in the matrimonial pool for division was not fully explored by the court.

25 In the third category of cases, one of the spouses withdrew and settled funds into a trust either shortly before or in the middle of divorce proceedings and named their children as beneficiaries. The courts have had two responses to this. In *NI v NJ*,⁴⁸ *TQ v TR*,⁴⁹ *AQT v AQU*⁵⁰ and *Kwee Lee Fung Ivon v Lim Gordon*,⁵¹ the sum withdrawn was excluded from the matrimonial pool because it was intended for the children's benefit. The children's needs are a factor that can be taken into account when dividing (or in these cases, declining to divide) the matrimonial assets.⁵² On the other hand, the sum withdrawn in *THD v THE*⁵³ was notionally returned to the matrimonial pool for division.⁵⁴

26 This third category shows that it is legitimate for funds from the matrimonial pool to be set aside for the children and excluded from division. However, it is respectfully submitted that closer attention should be paid to the terms of the trust. For example, if the beneficiaries can be changed⁵⁵ or the settlor-spouse can revoke the trust,⁵⁶ the excluded trust funds may not actually benefit the children. It may be more equitable for the trust to be considered during division instead.

47 *XIK v XIL* [2025] SGHCF 16 at [21].

48 [2007] 1 SLR(R) 75. The judgment did not specify if the trust was a discretionary trust.

49 [2009] 2 SLR(R) 961. The judgment did not specify if the trust was a discretionary trust.

50 [2011] SGHC 138. The judgment did not specify if the trust was a discretionary trust.

51 [2013] SGHC 228. The judgment did not specify if the trust was a discretionary trust.

52 Women's Charter 1961 (2020 Rev Ed) s 112(2)(c).

53 [2015] SGFC 136. The judgment did not specify if the trust was a discretionary trust.

54 In *TNL v TNK* [2017] 1 SLR 609 at [24] and *UZN v UZM* [2021] 1 SLR 426 at [62]–[65], the Court of Appeal explained that when divorce is imminent and one spouse spends a substantial sum without the other spouse's consent, that sum can be added back to the matrimonial pool, even if the expenditure is for the benefit of the children. The spouse who made the payment must be prepared to personally bear the expenditure and cannot expect the other spouse to share in it in the absence of the latter's consent.

55 Tang Hang Wu, "Let's Call the Whole Thing Off: Divorce and Trusts in Singapore" (2011) 17(9) *Trusts & Trustees* 855 at 863.

56 Tang Hang Wu, "Equity and Trusts" (2013) 14 SAL Ann Rev 339 at para 15.6.

B. Substantive complications – tensions between trust and family law

27 There are at least three ways in which trust or property law principles may be an obstacle in dividing a discretionary trust, all of which have not been considered by the Singapore courts thus far.

28 First, a discretionary beneficiary does not have a proprietary interest in the trust assets. In a discretionary trust, the trustees have the discretion to determine which beneficiary within a class to distribute trust assets to, and the extent of distribution. The discretionary beneficiary has a right to due consideration. However, until the discretion is exercised, the discretionary beneficiary has no proprietary interest, but only a mere hope that the discretion will be exercised in his or her favour.⁵⁷ This lack of proprietary interest is a challenge for the Singapore, New Zealand, Australia and Ontario courts, whose laws provide that only “assets” or “property” belonging to either or both of the spouses can be divided.⁵⁸

29 The challenge is particularly acute when the discretionary trust is structured in a way that gives the respondent-spouse significant control or influence over the trust, even if he or she does not formally have any proprietary interest in it. This may include a settlor respondent-spouse issuing a letter of wishes indicating how he or she would like the trustees to distribute the trust assets.⁵⁹ The respondent-spouse can also be granted powers over the trust as a protector,⁶⁰ or reserve powers to himself or herself if he or she is a settlor. These powers may include the ability to add or remove beneficiaries, replace trustees, confirm distributions or vary the terms of the trust. Alternatively, the respondent-spouse can also be a trustee or sit on the board of the corporate trustee.⁶¹ The courts

57 *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 574 and 617–618; *Lakshmi Prataprai Bhojwani v Moti Harkishindas Bhojwani* [2019] 3 SLR 356 at [32].

58 Women’s Charter 1961 (2020 Rev Ed) ss 112(1) and 112(10); Property (Relationships) Act 1976 (NZ) ss 2, 8 and 11; Family Law Act 1975 (Cth) ss 4(1) and 79(1)(a); Family Law Act, RSO 1990, c F.3 (Can) ss 4(1) and 5(1).

59 *Breakspear v Ackland* [2009] Ch 32; [2008] EWHC 220 (Ch) at [5]–[6].

60 A protector is a non-trustee who has powers to affect the operation of the trust: Matthew Conaglen & Elizabeth Weaver, “Protectors As Fiduciaries: Theory and Practice” (2012) 18(1) *Trusts & Trustees* 17 at 19.

61 One popular way of structuring a family trust is to incorporate a private trust company to act as the trustee. The settlor, his or her family members, and/or trusted advisors often sit on the board of the private trust company and thus control the administration of the trust. See Ashley Crossley, “Offshore Planning: Trends and Developments” (2006) 13 *Journal of International Tax, Trust and Corporate Planning* 123 at 128; Jek Aun Long & Danny Tan, “The Growth of the Private Wealth Management Industry in Singapore and Hong Kong” (2011) 6(1) *Capital Markets Law Journal* 104 at 107–108 and 111; and Vincent Ooi & Chan Ee Lin, “Family Offices, Private Trust Companies and Trust Integrity Issues: Problems and
(cont’d on the next page)

face tension between upholding strict trust law principles and adopting a substance-over-form approach.⁶²

30 Second, dividing a discretionary trust may involve disregarding fiduciary powers. Depending on the terms in the trust deed, powers can be fiduciary or personal. Fiduciary powers require the power-holder (such as the trustee or protector) to exercise the power in the interest of the beneficiaries as a class. On the other hand, a power-holder with personal powers can exercise the power in any way he or she wishes, even for his or her own benefit, without considering the beneficiaries' interest.⁶³

31 Most trustees' power to distribute trust assets is fiduciary. They have a fiduciary duty to take the interest of all beneficiaries into account and hold an even hand between them,⁶⁴ to take all and only relevant matters into account,⁶⁵ and exercise independent judgment.⁶⁶ Even if a respondent-spouse is the trustee, he or she is constrained by fiduciary duties, and cannot make distributions to himself or herself without first considering the interest of the beneficiaries as a class. As the respondent-spouse is not able to freely dispose of the trust assets, the analysis of whether such a trust is the respondent-spouse's "asset" or "property" can be affected.⁶⁷

32 Further, when the court issues a division order, even if it is an *in personam* order against the respondent-spouse rather than against the trustee, the respondent-spouse will likely turn to the trust for assistance if the sum ordered to be paid exceeds his or her non-trust assets. The

Solutions" in *Trusts and Private Wealth Management: Developments and Directions* (Richard Nolan, Tang Hang Wu & Yip Man eds) (Cambridge University Press, 2022) at pp 131–133.

62 *Charman v Charman (No 4)* [2007] 1 FLR 1246; [2007] EWCA Civ 503 at [57]; *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [75]–[79].

63 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [186]–[187]; Matthew Conaglen & Elizabeth Weaver, "Protectors As Fiduciaries: Theory and Practice" (2012) 18(1) *Trusts & Trustees* 17.

64 Lynton Tucker, Nicholas Le Poidevin KC & James Brightwell, *Lewin On Trusts* (Sweet & Maxwell, 20th Ed, 2020) at paras 29-062–29-064.

65 Lynton Tucker, Nicholas Le Poidevin KC & James Brightwell, *Lewin On Trusts* (Sweet & Maxwell, 20th Ed, 2020) at paras 29-041–29-044; John Glover, "Discretionary Trusts, Fiduciary Duties and the Family Law Act: Has the Family Court Acted Beyond Power?" (2000) 14(3) *Australian Journal of Family Law* 184.

66 *Re Beloved Wilkes's Charity* (1851) 42 ER 330 (Ch) 333; Charles Mitchell, "Judicious Encouragement or Judicial Bullying?" (2017) 4 *Conveyancer and Property Lawyer* 287 at 288.

67 The New Zealand, Australia and Ontario courts' analysis of how fiduciary powers affect the finding that a discretionary trust is the respondent-spouse's "property" is discussed below at paras 54–58 (New Zealand), 59–67 (Australia) and 68–71 (Ontario).

court is hence assuming or indirectly encouraging the trustee (be it a respondent-spouse trustee or a third-party trustee) to prioritise the respondent-spouse's compliance with the division order over the trustee's fiduciary duties owed to the beneficiaries. A trustee who accedes to such a request by the respondent-spouse may be exposed to claims that he or she did not consider the other beneficiaries' interest, or that he or she had acted on the dictation of the respondent-spouse without exercising independent judgment. The trustee may also be accused of breaching the proper purpose rule⁶⁸ because distribution of trust assets to satisfy a division order that ultimately benefits a non-beneficiary (*ie*, the claimant-spouse) very likely falls outside the settlor's intention when setting up the trust.⁶⁹ Although the English courts view their orders as providing "judicious encouragement" to third-party trustees rather than exerting "improper pressure",⁷⁰ the line is a fine one especially when the respondent-spouse faces bankruptcy if the trustee does not accede to the request for funds.⁷¹

33 The above controversies do not arise if a power-holder has personal power(s) to distribute trust property to himself or herself, unconstrained by the other beneficiaries' interest.

34 Third, the courts face the challenge of balancing the interests of the divorcing spouses and other third-party discretionary beneficiaries.⁷² Although these beneficiaries likewise have no proprietary interest in the trust assets, they will suffer from a diminished trust fund if trust assets are paid out pursuant to the divorce proceedings.

C. Procedural hurdles

35 A claimant-spouse faces several procedural hurdles when seeking division of the respondent-spouse's discretionary trust interest.

36 First, trust assets involve third-party interests, specifically those of the trustee (who is the legal owner) and other discretionary beneficiaries (who do not have proprietary interest but have a right to

68 *Grand View Private Trust Co Ltd v Wen-Young Wong* [2022] UKPC 47 at [55]–[63].

69 John Glover, "Discretionary Trusts, Fiduciary Duties and the Family Law Act: Has the Family Court Acted Beyond Power?" (2000) 14(3) *Australian Journal of Family Law* 184.

70 *Thomas v Thomas* [1995] 2 FLR 668 at [3].

71 Charles Mitchell, "Judicious Encouragement or Judicial Bullying?" (2017) 4 *Conveyancer and Property Lawyer* 287 at 290.

72 Patrick Parkinson, "Family Trusts and Third Parties Under the Family Law Act 1975" (2012) 26(1) *Australian Journal of Family Law* 5 at 5–8 and 14–19.

due consideration). The Singapore Family Justice Courts⁷³ do not have jurisdiction under s 112 of the WC to adjudicate on a non-spouse's proprietary claim in alleged matrimonial assets or to make orders against non-spouses who are the legal owners of alleged matrimonial assets.⁷⁴ Instead, the options are:

(a) The claimant-spouse obtains legally binding confirmation and an undertaking from the third parties that the trust assets are matrimonial assets and that the third parties would abide by a division order by the Family Justice Court.⁷⁵

(b) The Family Justice Court determines whether the discretionary trust interest or trust assets are matrimonial assets without the third parties' participation. If they are found to be matrimonial assets, the court may include the assets in the matrimonial pool but cannot make an order directly affecting those assets.⁷⁶ This option is only viable if both spouses agree to it and if the trust assets are not the main or only substantial asset available for division.⁷⁷

(c) Separate legal proceedings are commenced in the civil courts, where the civil court would determine the respondent-spouse's and third parties' interests in the trust assets. The division proceedings in the Family Justice Court would be stayed pending the decision of the civil court.⁷⁸

(d) The claimant-spouse can drop his or her claim that the discretionary trust interest or trust asset is a matrimonial asset.⁷⁹

37 Option (a) above is rarely feasible. Trustees are unlikely to consent to such a request given their fiduciary duties,⁸⁰ and non-spouse discretionary beneficiaries are unlikely to agree to a division order that would deplete the trust fund and diminish potential trust distributions to them. Option (b) is unfeasible if the respondent-spouse resists inclusion of the discretionary trust interest or trust assets in the matrimonial pool. Option (c), which relates to commencing separate civil proceedings, is

73 The Family Justice Courts consist of the Family Division of the High Court, the Family Courts, and the Youth Courts. The Family Division of the High Court and the Family Courts have jurisdiction relating to divorce and matrimonial causes: Family Justice Act 2014 (2020 Rev Ed) ss 3, 22 and 26; Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 17(1)(a).

74 *UDA v UDB* [2018] 1 SLR 1015 at [24]–[48].

75 *UDA v UDB* [2018] 1 SLR 1015 at [56(a)].

76 *UDA v UDB* [2018] 1 SLR 1015 at [8(a)] and [56(d)].

77 *UDA v UDB* [2018] 1 SLR 1015 at [57].

78 *UDA v UDB* [2018] 1 SLR 1015 at [8(b)] and [56(b)].

79 *UDA v UDB* [2018] 1 SLR 1015 at [56(c)].

80 See paras 30–32 above.

the only feasible option if the spouses are contesting the inclusion of the discretionary trust interest or trust assets in the matrimonial pool.⁸¹ Option (d) is a potential course of action if the claimant-spouse is content to relinquish his or her claim to a share of the trust assets. In that scenario, the claimant-spouse can still request the Family Justice Court to treat the trust as the respondent-spouse's "financial resource" that is not itself divided, but is taken into consideration when deciding how the pool of matrimonial assets should be divided.⁸²

38 A second procedural hurdle relates to obtaining information about the trust. If trust documents are not voluntarily disclosed by the respondent-spouse, the claimant-spouse may have to consider applying for a disclosure order against the respondent-spouse or trustee.

39 One criterion for disclosure, whether in divorce or civil proceedings, is that the documents must be in the disclosing party's "possession or control".⁸³ "Possession" refers to physical possession, while "control" refers to a legal right or practical ability to obtain the documents.⁸⁴

40 Beneficiaries of a trust are not entitled as of right to trust documents; disclosure is instead part of the court's inherent jurisdiction to supervise, and if necessary intervene in, the administration of the trust.⁸⁵ A respondent-spouse who does not physically possess the trust documents may use this as a shield to argue that he or she does not

81 The failure to commence separate civil proceedings to determine the respondent-spouse's interest in the trust assets does not prevent a family justice court from drawing an adverse inference for the respondent-spouse's failure to make full and frank disclosure of the trust assets. The court can still employ the "uplift approach" to give the claimant-spouse a higher share of the known pool of matrimonial assets, to account for the respondent-spouse's non-disclosure: see *XKT v XKU* [2025] SGHCF 27 at [54]–[60] and [67]–[70], approved on appeal in *XKU v XKT* [2026] 1 SLR 187 at [79]–[82].

82 Women's Charter 1961 (2020 Rev Ed) s 112(2)(h), read with s 114(1)(a). This is discussed further at paras 101–103 below.

83 Family Justice (General) Rules 2024 P 9 r 4; Rules of Court 2021 O 11 r 3.

84 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2025] 4 SLR 1262 at [123]–[130].

85 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [66]–[67], followed in Singapore in *Mustaq Ahmad v Providentia Wealth Management Ltd* [2023] SGHCF 52. For factors which the courts in different jurisdictions take into consideration when ordering disclosure of trust documents to a discretionary beneficiary or object of a power, see *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [54] and [67]; *Mustaq Ahmad v Providentia Wealth Management Ltd* [2023] SGHCF 52 at [39]–[47]; and *Erceg v Erceg* [2017] 1 NZLR 320; [2017] NZSC 28 at [56]. In New Zealand, the common law position in *Erceg v Erceg* [2017] 1 NZLR 320; [2017] NZSC 28 has been superseded by the disclosure framework in ss 45–55 of the Trusts Act 2019 (NZ).

have “control” over the trust documents and should not be compelled to disclose them. However, trustees have a fiduciary duty to account for the trust.⁸⁶ In practice, trustees may disclose documents to a discretionary beneficiary on request, depending on factors such as the nature and extent of the requestor’s interest in the trust,⁸⁷ and the documents that are being requested.⁸⁸ In order to prove that he or she does not have “control” over the trust documents, the respondent-spouse should show evidence of his or her attempts to obtain trust documents from the trustee. Ultimately, however, if the trustee is of the view that the respondent-spouse is not entitled to the trust documents, the claimant-spouse may have no choice but to attempt to obtain disclosure from the trustee.

41 The claimant-spouse can obtain disclosure against the trustee in the latter’s capacity as a non-party in the divorce proceedings,⁸⁹ or as a party in the civil proceedings⁹⁰ (if commenced). While the confidentiality of trust documents used to be a hurdle,⁹¹ the Family Justice (General) Rules 2024 and Rules of Court 2021 explicitly provide that a party is not entitled to withhold or object to the disclosure of documents just because they are confidential.⁹² Further, although Singapore-licensed trust companies⁹³ have statutory confidentiality obligations under the Trust Companies Act 2005,⁹⁴ disclosure is permitted for the purposes of legal proceedings relating to a trust administered by a licensed trust company.⁹⁵ Confidentiality *per se* is hence not an obstacle to obtaining disclosure from the trustees.

86 *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339 at [84]–[88].

87 *Erceg v Erceg* [2017] 1 NZLR 320; [2017] NZSC 28 at [56(c)]; *Lakshmi Prataprai Bhojwani v Moti Harkishindas Bhojwani* [2019] 3 SLR 356 at [30]–[33].

88 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [67]; *Erceg v Erceg* [2017] 1 NZLR 320; [2017] NZSC 28 at [56(d)]–[56(f)]; *Mustaq Ahmad v Providentia Wealth Management Ltd* [2023] SGHCF 52 at [39].

89 Family Justice (General) Rules 2024 P 9 r 10.

90 Rules of Court 2021 O 11 r 1–O 11 r 3.

91 Tang Hang Wu, “An Impregnable Fortress? Possible Attacks On the Singapore Trust” (2011) 25(2) *Trust Law International* 66 at 70–72; Tang Hang Wu, “Let’s Call the Whole Thing Off: Divorce and Trusts in Singapore” (2011) 17(9) *Trusts & Trustees* 855 at 857–858.

92 Family Justice (General) Rules 2024 P 9, r 9(1); Rules of Court 2021 O 11 r 9(1). It bears noting, however, that a confidential document does not lose its confidentiality even if it is disclosed: see P 9 r 9(1) of the Family Justice (General) Rules 2024 and O 11 r 9(2) of the Rules of Court 2021.

93 Singapore has a licensing regime for persons carrying out trust business. Trust business includes acting as a trustee: see ss 2 and 3 read with the First Schedule of the Trust Companies Act 2005 (2020 Rev Ed).

94 Trust Companies Act 2005 (2020 Rev Ed) s 49(1).

95 Trust Companies Act 2005 (2020 Rev Ed) s 49(2) read with Third Schedule, Pt 1, para 4.

42 Third, the claimant-spouse may encounter a number of procedural hurdles when the trust has foreign elements. These include the service of court documents out of Singapore on foreign trustees, challenges that the Singapore court does not have the jurisdiction to make decisions relating to a foreign law trust that is administered by foreign trustees, and difficulties in enforcing a Singapore division order overseas, especially in offshore jurisdictions with “firewall” legislation that prohibits the recognition of foreign judgments that are inconsistent with local trust laws.⁹⁶ While significant, a full analysis of these cross-border challenges is beyond the scope of this article.

43 Having looked at the challenges of dividing discretionary trusts, the remainder of this article⁹⁷ will suggest how the Singapore courts should approach the issue, drawing from the experience of courts in other jurisdictions.

IV. Treating discretionary trust interest as an “asset” under section 112(1) of Women’s Charter 1961

44 This part sets out the first proposed technique for taking a discretionary trust into account during division, namely, to treat the discretionary trust interest as an “asset”, value it, and subject it to division.

A. *Should a discretionary trust interest be an “asset”?*

45 Must a spouse have a proprietary interest in an asset for it to be capable of division? There is no definition of “asset” in the WC, though the definition of “matrimonial asset” in s 112(10) includes an “asset of any nature acquired during the marriage” [emphasis added].⁹⁸ The term “asset” has been treated differently in two Singapore Court of Appeal cases. In *Chan Teck Hock David v Leong Mei Chuan*⁹⁹ (“*David Chan*”), the court held that “the term ‘matrimonial asset’ has been given a very wide meaning by the legislature”.¹⁰⁰ It went on to hold that unvested stock options that were contingent on the husband’s continued employment,

96 Mark Harper & Dawn Goodman, *International Trust and Divorce Litigation* (Jordan Publishing, 3rd Ed, 2019) chs 7 and 9.

97 See paras 44–103 below.

98 Research into the history of the Women’s Charter 1961 (2020 Rev Ed) sheds no light on why the word “asset” (*ie*, matrimonial asset) rather than “property” is used in s 112(1), although the word “property” is found in other parts of the statute. It is assumed that “asset” and “property” are synonymous in the Women’s Charter 1961 (2020 Rev Ed).

99 [2002] 1 SLR(R) 76.

100 *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR(R) 76 at [17].

although only a chose in action, were “assets” that could be subject to division.¹⁰¹ Conversely, *UDA v UDB*¹⁰² held that the asset must have been beneficially owned by either or both spouses.¹⁰³ In doing so, the court seemed to be suggesting a narrower definition of “asset”.

46 It is submitted that the courts should not limit “asset” in the WC to beneficial interest in a property. First, the court’s remarks in *UDA v UDB*¹⁰⁴ should be understood in the context of that case, where it was alleged that the wife’s mother held an immovable property on fixed trust for the wife. The focus was on determining who the beneficial owner was. The court did not consider the full range of interests that could potentially be considered an “asset”.

47 Second, a wide definition of “asset” is in line with the policy underlying the division of matrimonial assets in Singapore. Matrimonial assets are “the joint product of a marital partnership”¹⁰⁵ which the courts are empowered to divide in a “just and equitable”¹⁰⁶ manner upon divorce. The fair sharing of the fruits of marriage would be undermined if one party is allowed to “remove significant assets that have accumulated over the life of a marriage from the reach of one party ... simply because of the purported sanctity of trusts law and purity of principle”¹⁰⁷

48 Third, Singapore would be in good company if it adopts a wide interpretation of “asset” in s 112(1) of the WC. The New Zealand,¹⁰⁸ Australia¹⁰⁹ and Ontario¹¹⁰ courts have all adopted a wide interpretation of “property” in their family law legislation,¹¹¹ so as to give effect to the legislative intent of taking into account all of the spouses’ relevant assets to effect fair redistribution on divorce. This is discussed further below. While not confined to redistributing the spouses’ “property”,¹¹² the

101 *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR(R) 76 at [27]–[29].

102 [2018] 1 SLR 1015.

103 *UDA v UDB* [2018] 1 SLR 1015 at [31].

104 [2018] 1 SLR 1015.

105 *NK v NL* [2007] 3 SLR(R) 743 at [41].

106 Women’s Charter 1961 (2020 Rev Ed) s 112(1).

107 Diana Bryant, “Heterodox Is the New Orthodox – Discretionary Trusts and Family Law: A General Law Comparison” (2014) 20(7) *Trusts & Trustees* 654 at 669.

108 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [29] and [38].

109 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [54] and [89]–[91]; Philip Hallen & Hayley P Bennett, “*Kennon v Spry* and the Elephant in the Room: Women, Divorce, and Discretionary Trusts in the 21st Century” (2011) 17(9) *Trusts & Trustees* 829.

110 *Mudronja v Mudronja* [2014] ONSC 6217 at [97]–[98].

111 Although the Property (Relationships) Act 1976 (NZ) s 2, the Family Law Act 1975 (Cth) s 4(1) and the Family Law Act, RSO 1990, c F.3 (Can) s 4(1) define “property”, it is not made explicit if a discretionary trust interest is included.

112 *Whaley v Whaley* [2012] 1 FLR 735; [2011] EWCA Civ 617 at [113].

English courts also adopt a substance-over-form approach.¹¹³ In all these jurisdictions, division is not confined to assets in which either or both spouses have beneficial ownership. A discretionary trust can be subject to division in certain circumstances, even though the respondent-spouse does not have any proprietary interest in the trust assets.

49 However, even with a wide definition of “asset” or “property”, a key issue is how far that definition should be stretched. If a respondent-spouse is only a discretionary beneficiary, all he or she has is a mere expectancy. The trustees may never exercise their discretion in the respondent-spouse’s favour. The discretionary beneficiary’s right to due consideration cannot be assigned. On one view, a discretionary trust interest is no different from hoping to receive a birthday gift or an inheritance. It is also difficult to value.¹¹⁴ Unlike unvested stock options, which crystallise upon events largely within the employee-spouse’s control, a discretionary trust interest depends on the trustee’s exercise of discretion in the respondent-spouse’s favour, and may never materialise into actual proprietary interest.

50 The New Zealand, Australia and Ontario courts have grappled with this issue. Two approaches seem to have emerged.

51 One approach is to consider a discretionary trust interest as the respondent-spouse’s “asset” or “property” if the respondent-spouse had control over the distribution of the trust assets, such that he or she is able to distribute the assets to himself or herself. Even so, the courts have differing views on the *degree* of control required in order for the spouse’s rights and entitlements to qualify as an “asset” or “property”. New Zealand requires the highest degree of control, followed by Australia, then Ontario. If control is found, the value of the respondent-spouse’s interest is taken to be the value of the trust’s total assets.

52 The second approach is found in one line of cases in Ontario, and is also emerging in Australia. In this approach, the respondent-spouse’s discretionary trust interest, as a chose in action, is in itself regarded as the respondent-spouse’s “asset” or “property”. The valuation process of the respondent-spouse’s discretionary trust interest is a nuanced one, and takes into account the respondent-spouse’s likelihood of receiving the trust assets. Control is not necessary to qualify a discretionary trust interest as an “asset” or “property”, but it is relevant for valuation.

113 *Charman v Charman (No 4)* [2007] 1 FLR 1246; [2007] EWCA Civ 503 at [54].

114 Margaret R O’Sullivan, “Valuation Issues and Discretionary Trusts” (2008) 28 *Estates, Trusts and Pensions Journal* 75 at 76–77.

53 The two approaches are considered below. This article argues that Singapore should adopt the second approach.

(1) *New Zealand*

54 The New Zealand courts have thus far only permitted the respondent-spouse's powers and entitlements to be treated as "property" for the purpose of New Zealand's Property (Relationships) Act 1976 ("NZPRA") when the respondent-spouse has what amounts to a general power of appointment. A general power of appointment is when a power-holder is "free to appoint [the trust assets] to himself without considering the interests of anyone else"¹¹⁵ – in other words, a personal rather than a fiduciary power to distribute trust assets.¹¹⁶ Outside divorce, a general power of appointment, such as a settlor's power of revocation, has been treated as tantamount to ownership.¹¹⁷

55 In *Clayton v Clayton*,¹¹⁸ ("*Clayton*") Mr Clayton set up the Vaughan Road Property Trust ("VRPT") during the marriage to facilitate his business. Mr Clayton was the settlor and sole trustee of the VRPT and also the "Principal Family Member". The discretionary beneficiaries included Mr Clayton, Mrs Clayton and their two daughters. The daughters were also the "Final Beneficiaries", who would take any remaining trust assets on the vesting day.¹¹⁹

56 In the trust deed, Mr Clayton had powers, in his capacities as "Principal Family Member" and trustee, to appoint all of the trust assets to himself.¹²⁰ Moreover, Mr Clayton was not constrained by any fiduciary obligations to the discretionary beneficiaries (whom he had the power to remove)¹²¹ and Final Beneficiaries because the trust deed provided that the trustee need not consider the interests of all beneficiaries and could act contrary to their interests.¹²² The New Zealand Supreme Court concluded that the combination of Mr Clayton's powers and entitlements as Principal Family Member, trustee and discretionary beneficiary

115 Lynton Tucker, Nicholas Le Poidevin KC & James Brightwell, *Lewin On Trusts* (Sweet & Maxwell, 20th Ed, 2020) at para 33-033.

116 See paras 30–33 above.

117 *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721; [2011] UKPC 17.

118 [2016] 1 NZLR 551; [2016] NZSC 29.

119 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [10].

120 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [51]–[55].

121 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [22] and [62].

122 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [56]–[58]; Patrick G O'Hagan, "Reserved Powers and Illusions: *Clayton v Clayton*" [2017] *Conveyancer and Property Lawyer* 380 at 385–387.

amounted to a general power of appointment,¹²³ which was “property” for the purposes of the NZPRA.¹²⁴ The powers were valued as the total value of the trust assets.¹²⁵

57 In contrast, Mr Pinney’s less extensive powers in *Cooper v Pinney*¹²⁶ (“*Cooper*”) were found not to amount to “property” under the NZPRA. In that case, the trust held a company that owned a farm where Mr Pinney conducted business.¹²⁷ The discretionary beneficiaries were Mr Pinney, his children and grandchildren.¹²⁸ Mr Pinney and his sister were among the initial trustees.¹²⁹ Mr Pinney had the power to change trustees, but there had to be minimally two trustees.¹³⁰ The trustees had to make decisions unanimously.¹³¹ On the facts, the trust had been administered for Mr Pinney’s benefit: He did not pay rent and kept the income generated by the farm. No distributions had been made to other beneficiaries.¹³² Mr Pinney’s ex-partner, Ms Cooper, argued that Mr Pinney’s trustee appointment power enabled him to appoint trustees whom he could influence or control, thereby enabling him to control the trust.¹³³

58 The New Zealand Supreme Court rejected that argument. The requirement for minimally two trustees and unanimity evidenced that the trust was not intended to be controlled by any one individual. Mr Pinney could not exercise his trustee appointment power contrary to that intention, as doing so would be contrary to the proper purpose rule.¹³⁴ Further, Mr Pinney’s trustee appointment power, as well as the trustees’ powers of distribution, were fiduciary and had to be exercised in the best interest of the beneficiaries as a class.¹³⁵ The proper purpose rule and fiduciary constraints limited Mr Pinney’s ability to appoint the trust assets to himself. His powers, hence, did not amount to “property” under the NZPRA.

123 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [68].

124 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [69]–[84].

125 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [104]–[107].

126 [2024] 1 NZLR 935; [2024] NZSC 181.

127 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [14]–[19].

128 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [21].

129 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [21]–[22]; During the proceedings, Mr Pinney was replaced with a third-party trustee.

130 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [25].

131 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [24].

132 *Cooper v Pinney* [2023] 2 NZLR 455; [2023] NZCA 62 at [89].

133 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [104].

134 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [106]–[110].

135 *Cooper v Pinney* [2024] 1 NZLR 935; [2024] NZSC 181 at [111]–[124].

(2) *Australia*

59 The Australian courts have gone further than the New Zealand courts. They have: (a) allowed for the powers and entitlements of *both spouses in combination* to be considered when deciding if they amount to “property” under Australia’s Family Law Act 1975 (“AFLA”); and (b) found that the powers and entitlements qualify as “property” even when the power to distribute trust assets is a fiduciary rather than personal power.

60 In *Kennon v Spry*¹³⁶ (“*Kennon*”), Dr Spry was the settlor and sole trustee of the ICF Spry Trust. Dr Spry, Mrs Spry and their four daughters were amongst the discretionary beneficiaries.¹³⁷ The trust held the matrimonial home and other investments. Dr Spry, as settlor, had power to vary the trust.¹³⁸ He did so twice, first in 1983 to exclude himself as a beneficiary,¹³⁹ and then in 1998, when the marriage was in difficulty, to exclude himself and Mrs Spry as capital beneficiaries.¹⁴⁰ Further, in 2022, after Mrs Spry applied for divorce, Dr Spry established a trust in favour of each of the four daughters and applied to each of the trusts one quarter of all the capital and income of the ICF Spry Trust¹⁴¹ (“2002 Dispositions”).

61 The trial judge used s 106B of the AFLA¹⁴² to set aside the 2002 Dispositions and the 1998 variation instrument. One issue on appeal before the High Court of Australia was whether the ICF Spry Trust, as it was before the 2002 Dispositions and 1998 variation, constituted “property” of both or either Dr Spry and Mrs Spry, especially since Dr Spry had been excluded as a beneficiary in the 1983 variation.

62 Three out of five judges in the High Court of Australia¹⁴³ held that Dr Spry’s power to distribute trust assets (albeit subject to a fiduciary duty to consider all beneficiaries), combined with Mrs Spry’s right to due consideration as a discretionary beneficiary, meant that all of the trust assets could have been distributed to Mrs Spry. Dr Spry and Mrs Spry’s power and entitlement in combination constituted “property” for the

136 (2008) 238 CLR 366; [2008] HCA 56.

137 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [11].

138 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [10].

139 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [16].

140 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [19].

141 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [20]–[25].

142 This is the Australian equivalent of s 139M of the Women’s Charter 1961 (2020 Rev Ed), though there are differences in the scope and requirements.

143 For a summary of the different judgments, see Justin Gleeson SC, “Spry’s Case: Exploring the Limits of Discretionary Trusts” (2010) 84 *Australian Law Journal* 177.

purposes of s 79 of the AFLA.¹⁴⁴ The power and entitlement were valued as the total value of the trust assets,¹⁴⁵ though the court ordered Dr Spry to pay Mrs Spry a sum of money without specifying that it had to be paid out of the trust.¹⁴⁶

63 Other than being the trustee as in *Kennon*, the Australian courts have also accepted that a respondent-spouse's *de facto* control over the trust can amount to "property" under the AFLA. However, the threshold is a high one: The person controlling the distribution of the trust assets (*ie*, the "puppet") must do nothing without the respondent-spouse's control or direction (*ie*, the "puppet master").¹⁴⁷ Further, general control is insufficient. There must be control, specifically over the distribution of trust assets such that the respondent-spouse can procure its distribution to himself¹⁴⁸ or the spouse.¹⁴⁹ Hence, in *Harris & Dewell*,¹⁵⁰ although the husband used the trust assets as his own,¹⁵¹ his 99-year-old father was the one with ultimate control over the distribution of the trust assets.¹⁵² As the husband did not have control over the father,¹⁵³ and the husband was not a beneficiary,¹⁵⁴ the trust was found not to be the husband's "property".

64 In line with that, the Australian courts have held, on many occasions, that the respondent-spouse's interest as a discretionary beneficiary is not "property" if he or she does not control the distribution or if he or she shares control over distribution of trust assets with others. This includes situations where the respondent-spouse is not a director¹⁵⁵ or is only one of the directors of a corporate trustee.¹⁵⁶ In those situations, the respondent-spouse's interest may be considered a "financial resource"

144 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [62], [65]–[66], [78]–[80] and [125]–[126].

145 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [137].

146 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [99]–[100], [111] and [136]–[138].

147 *Harris & Dewell* (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [67].

148 *Harris & Dewell* (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [68].

149 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [54] and [89]–[91]; Philip Hallen & Hayley P Bennett, "Kennon v Spry and the Elephant in the Room: Women, Divorce, and Discretionary Trusts in the 21st Century" (2011) 17(9) *Trusts & Trustees* 829.

150 (2018) 58 Fam LR 313; [2018] FamCAFC 94.

151 *Harris & Dewell* (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [31]–[36].

152 *Harris & Dewell* (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [71]–[72].

153 *Harris & Dewell* (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [69]–[70].

154 *Harris & Dewell* (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [72].

155 *Harris & Harris* [2011] FamCAFC 245; *Wei & Xia (No 5)* (2023) 67 Fam LR 421; [2023] FedCFamC1F 679.

156 *Morton & Morton* [2012] FamCA 30; *Dovgan & Dovgan* [2021] FamCA 306; *Rigby & Kingston (No 4)* [2021] FamCA 501; *Barrett & Winnie* (2022) FLC 94-093; [2022] FedCFamC1A 99.

instead, which is taken into consideration when deciding *how* to divide the matrimonial pool, though it *cannot itself be divided*.¹⁵⁷

65 However, there is an emerging approach which does not require control over distribution in order to qualify a discretionary trust interest as “property”. The Australian courts had previously acknowledged in *obiter* that a discretionary beneficiary’s right to due consideration is an equitable chose in action, which could constitute “property” for the purposes of the AFLA.¹⁵⁸ However, the courts have never acted on this as “it is difficult to value those rights when the beneficiary has no present entitlement and may never have any entitlement to ... the trust [assets]”.¹⁵⁹

66 The recent “test case” of *Woodcock & Woodcock (No 2)*¹⁶⁰ (“*Woodcock*”) suggests that a discretionary trust interest is capable of being valued. This preliminary trial application involved four trusts established by Mr Woodcock’s grandparents, of which Mr Woodcock was one of the discretionary beneficiaries.¹⁶¹ The trustees were corporations where Mr Woodcock sat as the sole director or one of several directors.¹⁶² By virtue of the voting structure, Mr Woodcock had significant influence over the distributions¹⁶³ and received more than A\$15m over a five-year period.¹⁶⁴ Mrs Woodcock’s expert valuer represented that the future distributions to Mr Woodcock could be estimated based on the latter’s influence over the distributions and the distribution history.¹⁶⁵ The expert proposed to carry out a valuation. Wilson J held that the issues of whether Mr Woodcock’s rights are property, and the value of those rights, warranted determination at trial.¹⁶⁶

67 While *Woodcock* was only an interlocutory application, it suggests that future Australian courts are prepared to find that a discretionary trust interest is itself, as a chose in action, sufficient to be considered “property” without also requiring control. The extent of control over the

157 See paras 101–103 below.

158 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [75]–[78]; *Dovgan & Dovgan* [2021] FamCA 306 at [299]–[301]; *Barrett & Winnie* (2022) FLC 94-093; [2022] FedCFamC1A 99 at [154]–[155].

159 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [77].

160 [2022] FedCFamC1F 173 at [28].

161 *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173 at [16(b)]–[16(d)].

162 *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173 at [15] and [16(a)].

163 *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173 at [76]–[81].

164 *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173 at [26].

165 *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173 at [83]–[84].

166 As at 2 May 2025, the case was fixed for trial on 20 October 2025: see *Woodcock & Woodcock (No 2)* [2025] FedCFamC1F 282. There is no published judgment as at the date of this article.

distributions will be a factor relevant to valuation instead. This was the approach taken by one line of cases in Ontario.

(3) *Ontario*

68 There are two lines of cases in Ontario,¹⁶⁷ one of which requires the respondent-spouse to control the distribution of the trust assets in order for a discretionary trust interest to be regarded as “property” under Ontario’s Family Law Act 1990¹⁶⁸ (“OFLA”).¹⁶⁹ In this line of cases, the degree of control required is lower than that in New Zealand and Australia: the fiduciary nature of the power to distribute trust assets, and the fact that the respondent-spouse is just one of multiple trustees, are not obstacles to finding control.¹⁷⁰ In the other line of cases, a discretionary trust interest is itself sufficient to constitute “property” under the OFLA.¹⁷¹

69 Both lines of cases were considered in the decision of *Lang-Newlands v Newlands*¹⁷² (“*Lang-Newlands*”). In that case, Mrs Lang-Newlands’s father established trusts which held the family business. The Newlands Family Trust (“NFT”) was scrutinised during the divorce proceedings. The trustees were Mrs Lang-Newlands and her two brothers, with decisions to be made by majority. The discretionary beneficiaries were Mrs Lang-Newlands and the four children of the marriage.¹⁷³ As the court was bound by *Shinder v Shinder*¹⁷⁴ (“*Shinder*”), an Ontario Court of Appeal case with similar facts, Sharma J in the Ontario Superior Court of Justice eventually excluded Mrs Lang-Newlands’s discretionary trust interest from division as being a gift from her father.¹⁷⁵ Mr Lang-Newlands has appealed against this finding.¹⁷⁶

167 Sarah Boulby, “Financial Literacy for Family Lawyers: Trusts in Family Law” (2018) 33 *Money & Family Law* 51 at 51–53.

168 RSO 1990, c F.3 (Can).

169 *Durakovic v Durakovic* [2008] CarswellOnt 5329 at [162]; *Kochar v Kochar* [2015] ONSC 6650 at [20]; *Tremblay v Tremblay* [2016] ONSC 588 at [26]–[38]; *Borges v Santos* [2017] ONCJ 651 at [35]–[45].

170 *Tremblay v Tremblay* [2016] ONSC 588 at [36].

171 *Brinkos v Brinkos* 69 OR (2d) 225; [1989] CanLII 4266; *Sagl v Sagl* 31 RFL (4th) 405; [1997] CanLII 12248 at [31]–[37]; *Kushmir v Lowry* [2004] CarswellOnt 530 at [21]; *LeVan v LeVan* 82 OR (3d) 1; [2006] CanLII 31020; *Mudronja v Mudronja* [2014] ONSC 6217 at [97]–[99].

172 [2024] ONSC 6285.

173 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [67(a)].

174 142 OR (3d) 321; 2018 ONCA 717.

175 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [222]–[243].

176 As at 25 April 2025, the decision was pending appeal. In *Lang-Newlands v Newlands* [2025] ONCA 328, the Ontario Court of Appeal held interlocutory proceedings regarding a stay pending appeal. There is no published judgment on the substantive appeal as at the date of this article.

70 Although the court was bound by *Shinder*, Sharma J had concerns about that decision and welcomed appellate guidance.¹⁷⁷ Sharma J also provided an alternative analysis on the basis that *Shinder* was not binding where Mrs Lang-Newlands's discretionary trust interest was not considered a gift. He opined that Mrs Lang-Newlands's interest as a discretionary beneficiary was capable of being "property" under the OFLA¹⁷⁸ and that control was unnecessary.¹⁷⁹ Control was instead relevant to valuation.¹⁸⁰ However, in what respectfully appears to be a contradiction, Sharma J sought to distinguish *Lang-Newlands* from the cases which held that control was necessary to constitute "property", by saying that Mrs Lang-Newlands had control as one of the three trustees.¹⁸¹ Yet, when considering the issue of valuation, Sharma J found that Mrs Lang-Newlands, in her role as trustee, did not control NFT's distributions. One of her brothers was the "directing mind" instead.¹⁸²

71 Reading *Lang-Newlands* as a whole, for a discretionary trust interest to constitute "property" under the OFLA, the respondent-spouse has to be a discretionary beneficiary and formally possess some power to distribute trust assets to himself or herself, even if he or she is, in reality, unable to do so. It is submitted that this requirement of formal control without substantive control adds little to the concept of "property" or "asset". The power of such a respondent-spouse to distribute trust assets to himself or herself is an illusory one.

(4) *Singapore: a suggested approach*

72 Having considered the positions in New Zealand, Australia and Ontario, it is suggested that Singapore should recognise a discretionary beneficiary's interest as sufficient to constitute "asset" under s 112(1) of the WC, without requiring control, for three reasons.

73 First, on an interpretation level, the Singapore courts have not found any obstacle in regarding choses in action as an "asset". The Court of Appeal in *David Chan* held that unvested stock options should be treated as an "asset", and that difficulties in valuation or division should not render a chose in action any less of an asset.¹⁸³ The term "asset" should hence be wide enough to cover a discretionary beneficiary's right to due

177 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [238] and [244].

178 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [206].

179 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [213].

180 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [210] and [214].

181 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [216]–[219].

182 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [353]–[355] and [373].

183 *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR(R) 76 at [29] and [36].

consideration, which is an equitable chose in action.¹⁸⁴ The difference between unvested stock options and a discretionary trust interest is that the former crystallises upon events largely within the employee-spouse's control, while the latter depends on the trustee's exercise of discretion in the respondent-spouse's favour and may never materialise into actual proprietary interest. However, it is submitted that this element of uncertainty of a discretionary trust interest can be accounted for during valuation, which is discussed below.¹⁸⁵ Classification of an interest as an "asset" and its valuation are separate exercises. Denying that a discretionary trust interest is an "asset" at all risks foreclosing division and prejudicing the claimant-spouse before the more nuanced question of valuation can be addressed.

74 Second, while the position is not yet settled, Australia¹⁸⁶ and Ontario¹⁸⁷ appear to be leaning towards not requiring substantive control for a discretionary trust interest to be considered "property". Control is instead relevant to valuation.

75 Third, for policy reasons, control should not be a qualifying criterion for a discretionary trust interest to be an "asset". Requiring the respondent-spouse to control the distribution of trust assets unconstrained by fiduciary duties (as in New Zealand)¹⁸⁸ or have substantive control (as in Australia prior to *Woodcock*)¹⁸⁹ is too high a bar. That requirement will probably be met only when the respondent-spouse is the sole trustee, which is the minority of cases. On the other hand, requiring formal control (as in Ontario in *Lang-Newlands*)¹⁹⁰ is unnecessary and adds little to the concept of "asset".

76 Any form of a control requirement risks depriving the claimant-spouse of a share of the assets accumulated during marriage, hence undermining the policy underlying the division of matrimonial assets. This is especially so in Singapore where, unlike the aforementioned jurisdictions, there appears to be a sizable number of settlors who appoint a professional trust company to act as trustee.¹⁹¹ In those situations, the

184 *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [75]; *Tremblay v Tremblay* [2016] ONSC 588 at [27].

185 See paras 77–85 below.

186 *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173.

187 *Lang-Newlands v Newlands* [2024] ONSC 6285.

188 See paras 54–58 above.

189 See paras 63–64 above.

190 See paras 70–71 above.

191 Professional trust companies are licensed to carry out trust businesses in Singapore (see n 93 above). As at 30 June 2026, there are 67 licensed trust companies in Singapore: see "Financial Institutions Directory", *Monetary Authority of Singapore* <<https://eservices.mas.gov.sg/fid/>> (accessed 30 June 2026).

settlor's main way of influencing distribution decisions is by issuing letters of wishes. Trustees may consider them but must still make an independent judgment regarding distribution.¹⁹² The respondent-spouse may have powers to influence the operation of the trust but will not be a trustee. Such a set-up will not satisfy the control requirement in any of the three jurisdictions. It is submitted that the better approach is for control to be accounted for in valuation, to which this article now turns.

B. Valuation

77 When a respondent-spouse has substantive control over the trust such that he or she is able to distribute *all* the trust assets to himself or herself (or the other spouse), it is justifiable to place the entire value of the trust assets in the matrimonial pool.¹⁹³ However, a more nuanced approach must be taken when the respondent-spouse does not have substantive control. What is to be valued is not the underlying trust assets but the *discretionary trust interest*. It is submitted that this is a function of the value of the trust assets (entailing an objective analysis), and the respondent-spouse's likelihood of receiving the trust assets (entailing a more subjective analysis).¹⁹⁴ A professional valuation, based on an understanding of trust law and how the particular trust in question operates, is likely necessary.¹⁹⁵ A suggested framework, as drawn from Ontario jurisprudence, is set out below.

78 First, since a discretionary trust interest is non-transferrable, its fair market value would be zero. A "value-to-owner" valuation can be used instead: This is what the respondent-spouse would pay to avoid losing his or her discretionary trust interest.¹⁹⁶

79 Second, a holistic approach should be taken when considering the respondent-spouse's likelihood of receiving the trust assets. Amongst other things, it is suggested that the following factors be taken into account:

192 *Pitt v Holt; Futter v Futter* [2013] 2 AC 108 at [66].

193 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [104]–[107]; *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at [137].

194 Morgan McIntyre, "Trust Me, It's Property, but What's It Worth?" (2019) 34 *Money & Family Law* 74 at 75.

195 Margaret R O'Sullivan, "Valuation Issues and Discretionary Trusts" (2008) 28 *Estates, Trusts and Pensions Journal* 75 at 94.

196 *Tremblay v Tremblay* [2016] ONSC 588 at [39]; Margaret R O'Sullivan, "Valuation Issues and Discretionary Trusts" (2008) 28 *Estates, Trusts and Pensions Journal* 75 at 83–84; Morgan McIntyre, "Trust Me, It's Property, but What's It Worth?" (2019) 34 *Money & Family Law* 74 at 75.

(a) Degree of control by the respondent-spouse over distribution of the trust assets.¹⁹⁷ Factors that may be taken into consideration include:

(i) The composition of the trustees, including whether the respondent-spouse is a trustee and if decisions are to be made by a majority;

(ii) The relationship between the respondent-spouse and trustees, including whether the trustee is a professional trustee, a family member or someone who may be influenced by the respondent-spouse;

(iii) Whether the respondent-spouse has powers to revoke or vary the trust, veto the trustees' decisions, replace the trustees, or add or remove beneficiaries, and whether those powers are personal or fiduciary; and

(iv) The history of trustee decisions which may demonstrate influence by the respondent-spouse, such as the trustee acceding to a respondent-spouse's letter of wishes or request for distributions.

(b) The manner in which the trustee is likely to exercise its dispositive discretion.¹⁹⁸ Factors that may be taken into consideration include:

(i) The settlor's intentions, including his or her objectives in establishing the trust, the criteria for distribution of trust assets, or the settlor's wishes as set out in letters of wishes;

(ii) The number of beneficiaries (including the potential for this to increase or decrease), their life expectancy and needs;

(iii) The relationship between the respondent-spouse and settlor, and whether the respondent-spouse is a primary beneficiary or a more remote one as set out in the trust deed;

(iv) Limits placed on the trustee with respect to the distribution of capital or income; and

197 *Tremblay v Tremblay* [2016] ONSC 588 at [32]; Margaret R O'Sullivan, "Valuation Issues and Discretionary Trusts" (2008) 28 *Estates, Trusts and Pensions Journal* 75 at 94–95.

198 Margaret R O'Sullivan, "Valuation Issues and Discretionary Trusts" (2008) 28 *Estates, Trusts and Pensions Journal* 75 at 95–98; Morgan McIntyre, "Trust Me, It's Property, but What's It Worth?" (2019) 34 *Money & Family Law* 74 at 76.

(v) The history of the trust distributions.

80 Third, valuation techniques such as applying a discount can be used to take into account a respondent-spouse's lack of control and the illiquidity of the discretionary trust interest.¹⁹⁹ These techniques are similar to the discount for lack of control and discount for lack of marketability that are applied when valuing minority shareholdings in private companies in a voluntary commercial sale.²⁰⁰

81 To illustrate the above framework, in *Lang-Newlands*,²⁰¹ the trust deed contemplated equality between the five beneficiaries (ie, Mrs Lang-Newlands and her four children), and the trustees operated on that principle.²⁰² Although Mrs Lang-Newlands historically received more distributions, it was because the children were minors. She used the distributions received for the benefit of the family, including the children.²⁰³ Mrs Lang-Newlands was also found to have no substantive control over the trust distributions despite being one of three trustees,²⁰⁴ and had no substantive control over the payouts made by the underlying companies to the trust.²⁰⁵ Because of these factors, the value of the trust assets was prorated amongst the five beneficiaries, with Mrs Lang-Newlands' share being 20%.²⁰⁶ A 50% minority and illiquidity discount was then applied²⁰⁷ because Mrs Lang-Newlands only had minority control over the trust and underlying companies,²⁰⁸ and the trust assets were illiquid.²⁰⁹

82 It is observed that this proposed approach is similar to the expert valuer's proposed valuation approach in the Australian case of *Woodcock*, as discussed above.²¹⁰

199 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [409]–[412].

200 A discount for lack of control reflects a minority shareholder's inability to exert control over management decisions of the company, while a discount for lack of marketability reflects the difficulties in selling shares of a private company due to share transfer restrictions and narrowness of the market: see *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [43]–[48] and [58]–[59].

201 The discussion about valuation of Mrs Lang-Newlands's interest in the trust is *obiter*. The decision is pending appeal as at 25 April 2025 (see n 176 above).

202 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [346], [371(d)]–[371(h)], [383] and [389].

203 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [347]–[352] and [371(i)]–[371(o)].

204 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [353]–[374].

205 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [375]–[378].

206 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [396].

207 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [397] and [481]–[528].

208 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [409]–[412] and [414]–[480].

209 *Lang-Newlands v Newlands* [2024] ONSC 6285 at [413] and [423]–[426].

210 See paras 66–67 above.

83 When applying this framework to Singapore, one additional consideration is that only *matrimonial assets* should be placed in the matrimonial pool.²¹¹ Hence, *eg*, if the settlor was the respondent-spouse's parent and the trust assets (*eg*, properties not being the matrimonial home) were not substantially improved by the claimant-spouse or both spouses during the marriage, the respondent-spouse's discretionary trust interest is likely to be a gift and hence excluded from the matrimonial pool. Another scenario relates to premarital assets: If the respondent-spouse was the settlor, but he or she established the trust before marriage, any trust assets that were transferred into the trust before marriage that were not enjoyed by the family, or substantially improved by the claimant-spouse or both spouses during the marriage, are not matrimonial assets. Such trust assets should be excluded from the valuation of the respondent-spouse's discretionary trust interest.

84 The strength of the valuation framework described above lies in its ability to calibrate the value of the discretionary trust interest to the respondent-spouse's degree of control over the trust and likelihood of receiving future distributions. Where the respondent-spouse exerts significant control in the trust distributions, as in *Williams, Clayton and Kennon*, the interest may be valued at 100% of the trust assets. Where the respondent-spouse has partial but not absolute control and/or the evidence establishes a likelihood of receiving some future distributions, as in *Cooper, Woodcock and Lang-Newlands*, the interest may be valued as a proportion of the trust assets. At the other end of the spectrum, the interest may be valued at *nil* in an appropriate case, such as where the respondent-spouse has no control, is only remotely connected to the settlor, is one of many discretionary beneficiaries, and has no history of receiving trust distributions.

85 That said, the inherent uncertainty in predicting the likelihood of a respondent-spouse receiving future trust distributions means that valuing a discretionary trust interest will involve some degree of imprecision. This need not, however, be an obstacle to the court. The Singapore courts have recognised that the just and equitable outcome contemplated by s 112(1) of the WC does not demand mathematical precision. Instead, the courts have adopted a "broad brush" approach in the division of matrimonial assets,²¹² which can equally be applied when valuing a discretionary trust interest.

211 Women's Charter 1961 (2020 Rev Ed) s 112(10); *USB v USA* [2020] 2 SLR 588 at [17]–[35].

212 *NK v NL* [2007] 3 SLR(R) 743 at [28]; *ANJ v ANK* [2015] 4 SLR 1043 at [17]; *TME v TMF* [2016] SGHCF 6 at [24]; *UBM v UBN* [2017] 4 SLR 921 at [58]–[60].

C. *Suggested approach addresses tension between trust and family law*

86 In summary, it is suggested that Singapore adopt a wide definition of “asset” under s 112(1) of the WC. A discretionary trust interest should, without more, fall within that definition. This should be complemented with a holistic valuation which takes into account the likelihood of the respondent-spouse receiving the trust assets.

87 The suggested approach addresses the tensions between trust and family law highlighted above.²¹³ First, the discretionary beneficiary’s lack of proprietary interest in the trust asset is not an obstacle to division because the wide definition of “asset” includes a chose in action. Second, adopting a holistic valuation respects the trustee’s fiduciary obligations to take into account the interest of all beneficiaries while, at the same time, acknowledges that a respondent-trustee may be able to control or influence distributions to be made in his or her favour. Third, the holistic valuation also allows the interest of other third party beneficiaries to be considered, thereby balancing their interest with that of the divorcing spouses.

88 At the same time, the holistic valuation is fair to both spouses because it takes into account the respondent-spouse’s likelihood (or unlikelihood) of receiving the trust assets. The suggested approach furthers the family law policy of fair sharing of the fruits of the marriage.

V. *Other techniques to take discretionary trust into account during asset division*

89 This part considers other techniques for taking a discretionary trust into account during division of assets, namely to:

- (a) order division of the trust assets on an “if as and when” basis, when the respondent-spouse receives a trust distribution;
- (b) set aside the disposition of property into a trust using s 139M of the WC;
- (c) challenge the trust on the basis that it is a sham;
- (d) challenge the trust on the basis that it is an illusory trust; and
- (e) consider the trust a financial resource which could be taken into consideration when deciding how to divide the matrimonial pool.

213 See paras 27–34 above.

90 Technique (a) above postpones the division of trust assets. Techniques (b) to (d) “invalidate” the transfer of property into the trust, or the trust itself, so that the purported trust assets can be placed directly in the pool for division. Technique (e), by contrast, does not bring the trust assets into the matrimonial pool.

A. *The “if as and when” approach*

91 One alternative approach to finalising division at the end of the divorce proceedings (as described above)²¹⁴ is for the division to be postponed until trust distributions are made to the respondent-spouse. The court can, pursuant to s 112(5)(e) of the WC, order the respondent-spouse to pay the claimant-spouse a portion of the trust assets “if as and when” the former receives a trust distribution.²¹⁵ This approach is fairer to the respondent-spouse because division takes place, not based on the respondent-spouse’s likelihood of receiving the trust assets, but on his or her actual receipt of the same.

92 However, the “if as and when” approach may burden the claimant-spouse with lifelong uncertainty. It prevents parties from having a clean break and moving on with their lives. This approach may also be impractical: It relies on the respondent-spouse to inform the claimant-spouse that he or she received trust distributions, which can be an unrealistic expectation given the breakdown of the parties’ relationship.²¹⁶ Further, a respondent-spouse who is able to exert control over the trust may arrange his or her affairs such that he or she never receives a trust distribution but benefits from the trust in indirect ways. This approach may hence result in further acrimony and litigation.

93 Notwithstanding the disadvantages, the “if as and when” approach may be preferable in certain situations. These include where parties remain sufficiently amicable to make ongoing disclosure realistic, or if valuation would be highly speculative due to insufficient information to assess the respondent-spouse’s likelihood of receiving trust distributions.

214 See paras 45–88 above.

215 *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR(R) 76 at [39].

216 *TME v TMF* [2016] SGHCF 6 at [23].

B. Setting aside dispositions of property using section 139M of Women's Charter 1961

94 Section 139M of the WC can be used to set aside the respondent-spouse's dispositions of property into a trust in a number of matrimonial proceedings, including division.²¹⁷ It provides that the court can, on application, set aside a disposition of property made within three years immediately before the date of the application if the disposition was made with the object on the part of the disposing party to deprive the other spouse of any rights in relation to the property.²¹⁸

95 One limitation of s 139M is that the deprived spouse must be a wife or incapacitated husband.²¹⁹ A non-incapacitated husband cannot invoke s 139M to set aside a disposition of property into a trust made by the wife. Section 139M was likely drafted with maintenance in mind, as only wives and incapacitated husbands are entitled to spousal maintenance in Singapore.²²⁰ However, this distinction is unwarranted in the context of division of matrimonial assets and is a lacuna in the law. It is submitted that s 139M ought to be amended to permit either spouse to invoke the provision in the context of division, irrespective of gender or incapacity.

C. Sham

96 A sham document is one that gives the appearance of creating legal rights and obligations different from the actual legal rights and obligations (if any) that parties intended to create. To establish a sham, the settlor and trustee must share a common intention to mislead.²²¹ In other words, the settlor and trustee must have intended to give a false impression that a trust was created, when in reality they did not intend to create a trust.²²² If a sham is found, the trust is void.²²³

217 Women's Charter 1961 (2020 Rev Ed) s 139L(a).

218 Women's Charter 1961 (2020 Rev Ed) ss 139M(1)(a) and 139(M)(5); see *NI v NJ* [2007] 1 SLR(R) 75 at [23]–[24] where the claimant-spouse was unsuccessful in setting aside the respondent-spouse's transfer of assets into a trust because: (a) it was not done with the object of depriving the claimant-spouse of her rights to the property; and (b) the claimant-spouse had not complied with the procedural requirements for a setting-aside application.

219 Women's Charter 1961 (2020 Rev Ed) s 139M(5).

220 Women's Charter 1961 (2020 Rev Ed) ss 69(1), 69(1A) and 113.

221 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802; *A v A* [2007] 2 FLR 467; [2007] EWHC 99 at [32]–[40].

222 *Lau Seng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 at [23]–[25].

223 *A v A* [2007] 2 FLR 467; [2007] EWHC 99 at [55].

97 The claimant-spouse has the burden of proving the sham.²²⁴ There is a high threshold to cross because a sham finding implies dishonesty, and there is a “very strong presumption” that parties intended a formal document such as a trust deed to reflect their genuine intentions.²²⁵ A sham argument will likely only succeed in an exceptional case.

D. *Illusory trust*

98 Consistent with the trend of settlors reserving powers to retain control over a trust, the illusory trust argument has seen a resurgence in recent years.²²⁶ An illusory trust²²⁷ is a trust that never came into existence, either because the settlor retained such extensive control that he or she failed to dispose of beneficial ownership of the trust property or because the trust fell below the “irreducible core”²²⁸ of a trust.²²⁹

99 An illusory trust is distinct from a sham.²³⁰ A sham requires a common subjective intention by the settlor and trustee to mislead. On the other hand, an illusory trust arises when the settlor, regardless of his or her subjective intention, objectively failed to create a valid trust. It is determined based on the construction of the trust deed.

100 The law is still evolving,²³¹ but it is submitted that the crux of an illusory trust is that the settlor has powers enabling him or her to secure

224 *Lau Seng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 at [27].

225 *Lau Seng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 at [27].

226 Lucas Clover Alcolea, “Nothing New Under the Sun: The Case of the Illusory Trust” (2022) 30(2) *New Zealand Universities Law Review* 225. The illusory trust argument was raised and successfully argued in the Bermuda case of *BQ v DQ* [2010] SC (Bda) 40 Civ, the English case of *JSC Mezhdunarodny Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), and the Privy Council case (on appeal from Cook Islands) of *Webb v Webb* [2020] UKPC 22. The New Zealand Supreme Court in *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 also discussed the illusory trust argument in *obiter*.

227 The courts in *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [123] and [129], and *JSC Mezhdunarodny Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [169] have found the term “illusory trust” unhelpful because it is not a distinct doctrine; the courts were merely ascertaining if a valid trust had been created. Nonetheless, that convenient shorthand is used in this article.

228 *Armitage v Nurse* [1998] Ch 241.

229 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [124]; *Webb v Webb* [2020] UKPC 22 at [89].

230 *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29 at [128]–[129]; *Webb v Webb* [2020] UKPC 22 at [87].

231 For further reading about the issues surrounding illusory trusts, see Mark Bennett, “Competing Views On Illusory Trusts: The *Clayton v Clayton* Litigation in Its Wider Context” (2017) 11(1) *Journal of Equity* 48; Joel Nitikman, “More About Illusory Trusts: Is ‘Tantamount’ to Ownership the Same As ‘Ownership’? The Privy Council (cont’d on the next page)

all the trust assets to himself or herself, to the exclusion of the other beneficiaries.²³² This reflects the same issues discussed above²³³ regarding the extent of control needed in order to establish a discretionary trust interest as the respondent-spouse’s “property” or “asset” under the family law legislation. One key difference is that an illusory trust analysis extends beyond the matrimonial regime. A finding by the court that a trust is illusory may result in tax consequences for the trust.

E. Financial resource

101 Even if the discretionary trust interest or trust assets are not matrimonial assets, the Singapore courts can still take the trust into consideration when deciding *how* to divide the matrimonial pool if it is a “financial resource”.²³⁴ Availability of a financial resource may justify the respondent-spouse receiving a smaller share of the matrimonial assets available for division. The issue is: When should a trust be considered the respondent-spouse’s “financial resource”, given that he or she may never receive any trust distribution?

102 “Financial resource” is not defined in the WC, though it must mean something other than “income”, “earning capacity” or “property”.²³⁵ The Singapore courts have yet to provide detailed guidance on what is a “financial resource”. In the context of a trust, the courts in *Williams* and *Guin* appear to require the respondent-spouse to have control over the trust for it to be his or her “financial resource”. However, it is submitted that that requirement is too onerous. A trust which the respondent-spouse does not control but, *eg*, makes periodic payments to him or her, should be considered a financial resource.

103 It is suggested that Singapore adopts the test in Australia, where the courts are likewise empowered to consider “financial resources” when deciding how to divide the matrimonial assets.²³⁶ Although control is not necessary in Australia, a financial resource must “involve something more

Takes a Step Too Far” (2021) 27(1–2) *Trusts & Trustees* 69; and Jessica Palmer, “A Lament for Trust Principles in New Zealand” in *Asia-Pacific Trusts Law* vol 1 (Ying Khai Liew & Matthew Harding eds), (Hart Publishing 4th Ed, 2021).

232 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [222]–[278]; *Webb v Webb* [2020] UKPC 22 at [80]–[89].

233 See paras 45–76 above.

234 Women’s Charter 1961 (2020 Rev Ed) s 112(2)(h), read with s 114(1)(a). In *Wan Lai Cheng v Quek Seow Kee* [2012] 4 SLR 405 at [57]–[58], the court held that a non-matrimonial asset (a gift, in that case) could be taken into consideration when deciding how to divide the matrimonial pool, pursuant to those statutory provisions.

235 Women’s Charter 1961 (2020 Rev Ed) ss 112(2)(h) and 114(1)(a).

236 Family Law Act 1975 (Cth) ss 79(4)(e) and 75(2)(b).

than an expectation of benevolence on the part of another”.²³⁷ It turns on “a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the [respondent-spouse] to call on it”.²³⁸ The factors discussed above²³⁹ can be taken into account when applying this test.

VI. Conclusion

104 The discretionary trust presents complex challenges in matrimonial asset division. On one hand, dividing a discretionary trust potentially conflicts with traditional trust law principles and also affects non-spouse third parties. On the other hand, not dividing a discretionary trust undermines the policy of family law to fairly redistribute assets between divorcing spouses. However, this tension is not insurmountable. This article proposes six techniques for taking a discretionary trust into account during division.

105 The most significant of these techniques is for a discretionary trust interest to be recognised as an “asset” under s 112(1) of the WC, without control being required as a threshold condition. A discretionary beneficiary’s right to due consideration is a chose in action, and it should be treated similarly to other choses in action such as unvested stock options, which the Singapore courts have already accepted as assets capable of division. The respondent-spouse’s control over the trust is not irrelevant but is more appropriately accounted for during valuation. The valuation of a discretionary trust interest is a function of two variables, namely the value of the trust assets and the respondent-spouse’s likelihood of receiving the trust assets. A holistic approach that takes into account factors such as the respondent-spouse’s degree of control over the trust distributions, and the manner in which the trustee is likely to exercise its dispositive discretion enables the court to arrive at a calibrated valuation of a discretionary trust interest. The broad-brush approach that the Singapore courts have applied to the division of matrimonial assets is able to absorb any inherent imprecision in that valuation exercise.

106 The five supplementary techniques may be useful in different fact scenarios. The “if as and when” approach affords an alternative where upfront valuation would be too speculative, though at the expense of a clean break between the parties. Section 139M of the WC, the sham doctrine and the illusory trust argument provide avenues to challenge the

237 *Hall v Hall* (2016) 257 CLR 490; [2016] HCA 23 at [54].

238 *Hall v Hall* (2016) 257 CLR 490; [2016] HCA 23 at [55].

239 See para 79 above.

disposition of property into a trust or the validity of the trust structure itself, where warranted by the facts. The financial resource argument will ensure that even if a discretionary trust falls outside the matrimonial pool entirely, it is still taken into account by the court when determining a just and equitable division of the matrimonial assets. This article makes proposals in relation to two of these techniques, namely for s 139M of the WC to be amended to permit either spouse to invoke that provision, irrespective of gender or incapacity, and for “financial resource” to move away from a control requirement and towards an inquiry as to whether financial support can reasonably be expected to be forthcoming.

107 Singapore’s position as an attractive destination for HNWIs means that it is only a matter of time before the Singapore courts encounter the division of a discretionary trust during divorce proceedings. The techniques proposed in this article strike a balance between asset protection and asset division – one which respects the trust structure while ensuring that the fruits of the marriage are divided fairly between the divorcing spouses.
