PRENUPTIAL AGREEMENTS

Affirming *TQ v TR* in Singapore

The question of whether prenuptial agreements over matters such as maintenance and division of assets upon divorce ought to be binding on parties is not new but continues to be of great interest. Recent publications from various jurisdictions have offered diverse models of matrimonial property regimes and rules on marital agreements. This article argues that the position on prenuptial agreements reached in the Singapore Court of Appeal decision in *TQ v TR* remains the optimal one amongst the different models. It suggests how the position may be defended, interpreted and developed.

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I. Introduction

1 The question of whether prenuptial agreements over matters such as maintenance and division of assets upon divorce ought to be valid and binding on parties is not new but continues to be of great interest across the jurisdictions. Professor Leong Wai Kum has remarked:[1]

> A plethora of interests are engaged by this question and all of them demand consideration. Should the autonomy of spouses, who are undoubtedly adult persons with the requisite capacity to regulate their own affairs, not be fully respected so that it is purely a matter of how to hold them to their agreement? On the other hand, should spouses be held to their agreement if its terms on division of matrimonial assets or maintenance fall short of what developed law would have the court order?

2 Family law the world over provides for some financial relief for family members upon the breakdown and termination of marriages. To what extent can parties opt out of default legal regimes? A very recent publication, *Marital Agreements and Private Autonomy in Comparative Perspective*,[2] has usefully presented a comparative analysis of the different matrimonial property regimes and rules on marital agreements across

1 Leong Wai Kum, "The Law in Singapore on Rights and Responsibilities in Marital Agreements" [2010] Sing JLS 10 at 108.

2 *Marital Agreements and Private Autonomy in Comparative Perspective* (Jens M Scherpe ed) (Hart Publishing, 2012).

14 jurisdictions. In countries such as France and Belgium, spouses have autonomy to select a matrimonial property regime by way of a binding marital agreement and the default matrimonial regime is only a default rule. Prenuptial and postnuptial agreements there are binding and enforceable between the spouses and cannot be set aside by the court unless they are contrary to public policy. Prenuptial agreements in the Netherlands are in principle binding on the parties like other types of agreements. Ireland treats prenuptial agreements with caution, and the courts are not obliged to enforce or recognise as valid the fact or content of a prenuptial agreement. In New Zealand, a marital agreement that complies with the statutorily prescribed procedural formalities is valid but may be set aside if the court views that enforcing it would cause serious injustice. Common law in England has only recently taken the position that prenuptial agreements are not void and can be fully effective depending on the circumstances of the case.

3 This article argues that the position reached in Singapore in the landmark Court of Appeal decision in *TQ v TR*[3] remains an optimal one amongst the models offered by the platter of regimes across jurisdictions. It suggests how the position may be defended, interpreted and developed. While the book analyses principles that regulate marital agreements in general, this article focuses on prenuptial agreements.

4 In Singapore, the matrimonial regime applicable during marriage is that of separation of property. Upon a divorce, the parties' matrimonial assets are pooled together and subjected to division by the court. This default regime has been described as the "deferred community of property".[4] Section 112 of the Women's Charter[5] provides:

> The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

5 Section 113 of the Women's Charter provides that the court "may order a man to pay maintenance to his wife or former wife" upon the termination of a marriage.[6]

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3 [2009] 2 SLR(R) 96.

4 Wai Kum Leong, "Marital Agreements and Private Autonomy in Singapore" in *Marital Agreements and Private Autonomy in Comparative Perspective* (Jens M Scherpe ed) (Hart Publishing, 2012) p 312 at p 313.

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

6 Women's Charter (Cap 353, 2009 Rev Ed) s 113.

6 To what extent can parties contract out of this statutory regime? This article supports the legal position reached in the Singapore Court of Appeal decision in *TQ v TR*,[7] which is also in line with the landmark UK Supreme Court decision in *Radmacher v Granatino*[8] ("*Radmacher*"). Whether *Radmacher* will remain the UK's position in the further future is left to be seen: the UK Law Commission has published a Consultation Paper on "Marital Property Agreements" and a report is expected later in 2012.[9]

II. Upholding autonomy and the call for certainty

7 A driving reason behind private ordering is that individuals know better than other people, including judges, what is best for themselves.[10] At a more general level, there is a value to personal liberty that should be respected. Economic analysis could offer this explanation for supporting private agreements: where people make private arrangements for themselves, there is greater efficiency and a higher chance that they are maximising the utility of their resources.[11] The economic efficiency of a family unit is affected by the roles taken by the spouses, and to achieve the maximum efficacy, a financial and property arrangement that best suits a particular family should be taken, where each spouse has the incentive to work in her or his most productive role.[12]

8 The modern movements towards mediation in divorce proceedings actively support private ordering. In Singapore, the Women's

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7 [2009] 2 SLR(R) 96. For comparative perspectives, see *Marital Agreements and Private Autonomy in Comparative Perspective* (Jens M Scherpe ed) (Hart Publishing, 2012); also see Ryznar & Stepien-Sporek, "To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context" (2009–2010) 13 Chap L Rev 27 for a comparative survey of prenuptial agreements in various jurisdictions.

8 [2010] 3 WLR 1367; [2010] UKSC 42.

9 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) available at http://www.justice.gov.uk/law commission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

10 Brian Bix, "Private Ordering and Family Law" (2010) 23 J Am Acad Matrimonial Law 249 at 251.

11 Ryan & Small, "Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining" (2008) 26 Law & Ineq 109 at 114.

12 Gillian Hamilton, "Property Rights and Transaction Costs in Marriage: Evidence from Prenuptial Contracts" (1999) *The Journal of Economic History* 68–103 at 76:

> The optimal property arrangement depended on the effort individuals allocated to tasks in which they were relatively productive. They faced a choice between leisure and income. Each spouse's input into jointly produced 'marriage' goods (children and businesses) was difficult to observe because tasks were generally unmonitored and output realized long after the inputs were provided. Hence individuals had incentive to shirk in the production of these goods.

Charter[13] was amended in 1996 with the addition of s 50 directing the court to "give consideration to the possibility of a harmonious resolution of the matter and for this purpose may, with the consent of the parties, refer the parties for mediation".[14] Private agreements are believed to reduce acrimony and protracted proceedings in court. This may be true to the extent that parties do not find a reason to litigate on the agreements themselves. Although such private ordering under s 50 occurs in the context of postnuptial agreements made in contemplation of divorce, the benefits of private settlements are not limited to postnuptial agreements.

9 Upholding a prenuptial agreement by treating it like any other contract upholds the autonomy of parties and gives certainty that all contractually valid prenuptial agreements will be binding on the parties. There are consequences to the lack of certainty. It is not unreasonable for parties to seek assurance that prenuptial agreements are effective before they would enter into a marriage. The UK Law Commission's consultation paper on "Marital Property Agreements" noted:[15]

> [W]e have heard from a number of solicitors who have been obliged to point out to their clients that the only way to achieve their objective of preserving certain assets is to cohabit rather than to marry. Some have told us of clients who, as a result, did not marry.

10 In Singapore, a lawyer specialising in family practice has said:

> In the last two years, I attended to five clients who required a prenuptial agreement. Two of these were Singaporean men who had undergone traumatic divorces and had great difficulty with the question of division of assets. They were only prepared to remarry if the spouse committed to a prenuptial agreement.

11 There is value to respecting private ordering and autonomy, but is it fair to treat marital agreements like any other commercial or non-marital contract? Are there certain social relationships or transactions which should not be "contractualised" in the same way that commercial transactions are?

III. Concerns particular to prenuptial agreements

12 Let us examine some arguments for treating prenuptial agreements differently from other contracts.

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13 Cap 353, 2009 Rev Ed.

14 Women's Charter (Cap 353, 2009 Rev Ed) s 50(1).

15 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) at para 5.20, available at http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

A. Uncertain future

13 Is the marital context a sufficient reason to justify a different treatment towards what may otherwise be a valid and binding contract? In the marital context, the parties share an intimate relationship where parties may bargain with an attitude that is altruistic and generous, particularly where the relationship is subsisting lovingly. They bargain in a manner that is sensitive to the feelings of the other partner. The joint marital life of such parties is a journey where not every event can be foreseen, making it difficult for parties to make provisions where future circumstances are inevitably unpredictable. Children born to the parties complicate the matter as the state prioritises protecting vulnerable children. If marriage is seen as a journey where both parties adjust to each other, experience life together, and grow old together, then it seems unrealistic to make provisions for a future not yet learnt or experienced. Parties are pushed to "[e]nvisioning the end of a marriage not yet begun, prospective couples must divide property not yet acquired".[16]

14 Lady Hale summed up the concerns of many in the UK Supreme Court decision of *Radmacher*:[17]

> Marriage is not only different from a commercial relationship in law, it is also different in fact. It is capable of influencing and changing every aspect of a couple's lives: … A couple may think that their futures are all mapped out ahead of them when they get married but many things may happen to push them off course – misfortunes such as redundancy, bankruptcy, illness, disability, obligations to other family members and especially to children, but also unexpected opportunities and unexplored avenues. The couple are bound together in more than a business relationship, so of course they modify their plans and often compromise their individual best interests to accommodate these new events. They may have no choice if their marriage is to survive. … there is also a public interest in encouraging the parties to make adjustments to their roles and life-styles for the sake of their relationship and the welfare of their families. All of this means that it is difficult, if not impossible, to predict at the outset what the circumstances will be when a marriage ends. It is even more difficult to predict what the fair outcome of the couple's financial relationship will be. A couple who always thought that one would be the breadwinner and one would be the homemaker may be astonished to find that the homemaker has become a successful businesswoman who is supporting her homemaker husband rather than the other way about. A couple who assumed that each would run their own independent professional life and keep their finances entirely separate

16 Ryznar & Stepien-Sporek, "To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context" (2009–2010) 13 Chap L Rev 27 at 27.

17 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [175]–[176].

> may find this quite impossible when they have children … An older couple who marry a second time round may think it fair at the time to preserve their assets for the sake of the children of their first marriages, but may find that one has to become a carer for the other and will be left homeless and in reduced circumstances if the grown-up children take priority even though they are now well-established in life and have no pressing need of their inheritance.

B. Insufficiently self-protective

15 There is a concern that parties in this relationship do not make "rational" decisions or are insufficiently self-protective.[18]

16 There is likely broad consensus for a requirement that a prenuptial agreement should be freely entered into. If a prenuptial contract would have been invalid due to contractual doctrines where vitiating factors such as duress, undue influence, mistake or misrepresentation affect its validity, there is little argument whether such contracts should be given any effect. It is simply unfair to hold parties to a contract which was not entered into willingly.

17 What is much more controversial is the argument that even if a prenuptial agreement is technically valid by contractual principles, it would still be unfair to give effect to an agreement negotiated in "the emotional moment when legal advice is easily brushed aside" and where rational judgment is clouded by "human frailty and susceptibility when love and separation are involved".[19] Thus, even if there was technically no vitiating factor invalidating the prenuptial contract, there may be good reasons why in the marital context it would still be unjust to hold the parties to their agreement.

18 There are gender concerns suggesting that women bargain in a certain way that disadvantages them.[20] It has been argued that gender differences affect how men and women bargain and as women typically hold less power in society and in marital relationships, they are prejudiced in the context of making prenuptial agreements. Studies show that, in general, women experience a decline in the standard of living after

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18 Brian Bix, "Private Ordering and Family Law" (2010) 23 J Am Acad Matrimonial Law 249 at 256.

19 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) at para 3.23, citing N Wilson, "Ancillary Relief Reform: Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor's Ancillary Relief Advisory Group)" (1999) 29 *Family Law* 159 at 162; *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam); [2009] 1 FLR 1478 at [129], *per* Baron J.

20 Ryan & Small, "Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining" (2008) 26 Law & Ineq 109.

divorce while men experience a slight increase in the standard of living as the family size decreases while personal income remains at least the same. Some suggest that "prenuptial agreements overwhelmingly hurt women by virtue of their inferior bargaining position".[21] Others argue that women tend to negotiate or ask for what they think the rules allow them to get. If this is true, the benchmark for them is set by the family regime in division of assets, and if the family law regime is unclear or they perceive the law inaccurately, the basis of their agreement is shaky. A prenuptial agreement providing for division of assets is hard to reach when the default law on the division of assets itself contains some flexibility and ambiguity. On what basis do parties premise what is fair to them if the law on division uses phrases such as "just and equitable" proportions of divisions?[22] It has been argued that situational ambiguity gives better outcomes to men.[23] Some suggest that it is not always clear whether parties have consented to a change from the default legal regime in the terms they agree to, when "it is far from clear that most people entering a marriage ever knew of those rules (in the legal regime). … [I]n terms of nondisclosure of its legal effects, marriage may be the ultimate consumer fraud on unsuspecting innocents acting in an emotional fog".[24]

19 There is also the concern that people are poor at thinking well about events in future involving contingencies contrary to their optimistic assumptions.[25] One behavioural theory posits that "parties will likely underestimate the probability that they will ever need to rely on their premarital agreement. In turn, this underestimation will often cause parties to neglect the terms of the agreement at the time of bargaining." Another observes that "their present feelings of love and trust cause them to further discount the possibility that they will ever need to rely on their agreement. In turn, parties will often underestimate the amount of attention they should devote to the contract's terms." Further, "when comparing a present cost to a future benefit, a decision-maker is likely to weigh the present cost too heavily and the future benefit too lightly". However, counter arguments to these points weaken them considerably: there are also studies suggesting that "[w]ithin the context of premarital contracts, parties entering into agreements might

21 Allison A Marston, "Planning for Love: The Politics of Prenuptial Agreements" (1997) 49 *Stanford Law Review* 887 at 894.

22 Ryan & Small, "Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining" (2008) 26 Law & Ineq 109 at 111.

23 Ryan & Small, "Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining" (2008) 26 Law & Ineq 109 at 123–124.

24 Brian Bix, "Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How we think about Marriage" (1998–1999) 40 Wm & Mary L Rev 145 at 195, citing Krause.

25 Brian Bix, "Private Ordering and Family Law" (2010) 23 J Am Acad Matrimonial Law 249 at 257, citing Daniel Gilbert, *Stumbling on Happiness* (Vintage, 2007).

consider their default rights to marital property and spousal support as endowments and therefore refuse to part with them unless afforded adequate consideration" and the theory of "fairness orientation" "demonstrates that people seek to act fairly and cooperate, and that people are averse to windfalls and undeserved penalties".[26]

C. Public interests

20 It was suggested that as some of these behavioural theories have counters to them, it is best to use the state's interest in marriage as the justification for regulating marital agreements:[27]

> [S]ociety has relied on the institution of marriage to perform three important functions:
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> (1) child rearing,
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> (2) fostering civic virtues, and
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> (3) providing welfare.
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> Because premarital agreements implicate each of those functions, the state is justified in reviewing the contracts' substantive terms.

There is a public interest in protecting transactions that work to the general benefit and placing prohibitions on those that work against the common good.[28]

21 Thus, quite apart from whether parties are able to make rational and sufficiently fair and self-protective decisions, there is an independent reason for state regulation. The state has a role in protecting weaker family members and ensuring that children are adequately cared and provided for. It has been said that "from the perspective of the public purse, it is preferable that the spousal duty of support continue after a marriage, at least to the extent that one party requires it to avoid public assistance".[29] Further, even those opposed to paternalistic interventions

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26 Karen Servidea, "Reviewing Premarital Agreements to Protect the State's Interest in Marriage" (2005) *Virginia Law Review* 535 at 549–550.

27 Public policy reasons support the view that such agreements ought to be regulated by the state as "marriage serves an important social welfare function. Through their duties to support each other and share property, parties to a marriage reduce the likelihood that either will have to rely on the state to fulfil his or her basic needs": Karen Servidea, "Reviewing Premarital Agreements to Protect the State's Interest in Marriage" (2005) *Virginia Law Review* 535 at 555.

28 Brian Bix, "Private Ordering and Family Law" (2010) 23 J Am Acad Matrimonial Law 249 at 253.

29 Karen Servidea, "Reviewing Premarital Agreements to Protect the State's Interest in Marriage" (2005) *Virginia Law Review* 535 at 557.

agree that there is room for state regulation where private agreements harm third parties such as minor children.[30]

22 If these concerns and arguments could constitute sound reasons why the law cannot simply treat marital agreements the same way it would treat any other contract, what, then, are the alternatives in approaching the issue?

IV. Use of "special form of contract"?

23 In Australia, the Family Law Amendment Act 2000[31] introduced a regime in which parties could make binding marital agreements.[32] The Family Law Act 1975[33] was amended to allow parties entering a financial agreement which complied with five conditions to avoid the default power of the court to make orders on the parties' property. The Australian experience has seen a number of cases litigated in court raising issues on the proper interpretation of the provisions.[34] A number of amendments have been made to the Australian provisions, the latest being new provisions which came into force in 2010. Professor Leong commented:[35]

> First, the formulation of the formal and substantive safeguards required of any marital agreement to supplant the default law is detailed and may not be easy to get right. It follows that the law will be argued before the courts which will ultimately cost the parties time and money. Second, such law does not necessarily avoid dispute. Indeed, whenever an agreement is disputed, the spouses proceed first through this dispute before dealing with any dispute arising from an application under the default law. The detailed formulation of the law is likely to generate dispute.

30 Brian Bix, "Private Ordering and Family Law" (2010) 23 J Am Acad Matrimonial Law 249 at 254–255.

31 Act No 143 of 2000.

32 The Family Law Act 1975 (Act No 53 of 1975) (Cth), new Pt VIIIA. See Fehlberg & Smyth, "Binding Pre-nuptial Agreements in Australia: The First Year" (2002) 16 *International Journal of Law, Policy and the Family* 127; see Owen Jessup, "Marital Agreements and Private Autonomy in Australia" in *Marital Agreements and Private Autonomy in Comparative Perspective* (Jens M Scherpe ed) (Hart Publishing, 2012) at pp 17–50.

33 Act No 53 of 1975 (Cth).

34 Leong Wai Kum, "The Law in Singapore on Rights and Responsibilities in Marital Agreements" [2010] Sing JLS 107 at 125–127.

35 Leong Wai Kum, "The Law in Singapore on Rights and Responsibilities in Marital Agreements" [2010] Sing JLS 107 at 127. See also Owen Jessup, "Marital Agreements and Private Autonomy in Australia" in *Marital Agreements and Private Autonomy in Comparative Perspective* (Jens M Scherpe ed) (Hart Publishing, 2012) at pp 17–50.

24 In England, the same issue has been examined in the UK Law Commission's Consultation Paper on "Marital Property Agreements". It sought to answer these questions: "should there be statutory reform so as to enable couples to contract out of the court's discretion in ancillary relief? If so, what form should reform take?"[36] It explored instituting "qualifying nuptial agreements" that may exclude the jurisdiction of the court if they satisfied specified requirements and tests. A specifically approved type of agreement ousts the application of the default legal regime governing the issue. The concept is somewhat similar to binding financial agreements in the Australian statute.

25 The Consultation Paper considered the possibility of requiring a qualifying nuptial agreement to comply not only with contractual principles, but to fulfil other requirements since "the relationship between the parties to a qualifying nuptial agreement is very different from the relationship between the parties to a commercial contract. It is an emotional one as well as a financial one, and that is likely to make people behave differently".[37] These additional requirements reflect some of the procedural safeguards already suggested in previous English cases as important in determining if a prenuptial agreement should be given effect. There had been earlier suggestions that some procedural safeguards should be applied, for example, that the agreement be made not less than about a month before the wedding, that parties had independent legal advice and there was full and frank disclosure of relevant information such as parties' assets.[38]

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36 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) at para 3.92, available at http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

37 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) at para 6.50, available at http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

38 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [69], referring to the 1998 Home Office Consultation Document, "Supporting Families" which suggested six safeguards. Agreements would not be legally binding:

> [W]here there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance where one or both of the couple did not receive independent legal advice before entering into the agreement where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage) where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist).

Also see Jens M Scherpe, "Fairness, Freedom and Foreign Elements – Marital Agreements in England and Wales after *Radmacher v Granatino*" (2011) 23 *Child and Family Law Quarterly* 513.

26 The UK Law Commission took the view that even if the concept of a qualifying nuptial agreement was to be available:[39]

> [T]he court's jurisdiction in ancillary relief must always remain available to supplement a qualifying nuptial agreement – whatever its scope – in two circumstances determined by broader legal and social considerations. Those considerations transcend the interests and autonomy of the parties to the agreement. They are, first, the financial responsibilities of parents towards their children and, secondly, the principle that one cannot ask the state to shoulder one's financial responsibilities for one's partner.

It follows then that there is still a necessary limitation to party autonomy despite additional requirements in place.

27 It is ironical that in its aims to achieve certainty and avoid disputes on the issues, the law should add further requirements, thereby increasing the opportunity for parties to sue on the agreement. It is submitted that it is not in the interest of the parties nor society to have parties litigate on whether their agreement satisfied the other legal hurdles to succeed as a "qualifying nuptial agreement". Even if such requirements were added, agreements fulfilling them are still not assuredly binding, since they are still subject to the court's powers. Attempting certainty by requiring a specific type of contract within a rule-laden regime shifts the dispute to a different battleground.

28 It is suggested that the optimal alternative is the regime articulated in Singapore's *TQ v TR*.

V. The Singapore Court of Appeal's approach to prenuptial agreements in *TQ v TR*

29 The Singapore Court of Appeal has given guidance on how the law will treat prenuptial agreements. A quick look at the key facts, observations and principles in *TQ v TR* on agreements governing spouses' financial arrangements is useful here.[40]

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39 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) at para 7.10, available at http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

40 Comments have been written on the case and related issues, see Leong Wai Kum, "The Law in Singapore on Rights and Responsibilities in Marital Agreements" [2010] Sing JLS 107; Leong Wai Kum, "Prenuptial Agreement in Division of Matrimonial Assets Subject to Court Scrutiny" [2009] Sing JLS 211; Debbie Ong, "Prenuptial Agreements: A Singaporean Perspective in *TQ v TR*" (2009) 21 *Child and Family Law Quarterly* 536; Debbie Ong, "Prenuptial Agreements and Foreign Matrimonial Agreements: *TQ v TR*" (2007) 19 SAcLJ 397; Debbie Ong, "When Spouses Agree" (2006) 18 SAcLJ 96.

A. Facts of TQ v TR

30 In *TQ v TR*, the wife, a Swedish national, and the husband, a Dutch national, met in London in 1988. A prenuptial agreement was executed before a notary public in the Netherlands about two weeks before the couple married in the Netherlands in 1991. The parties lived in London after the marriage until 1997, when the family moved to Singapore. A divorce decree *nisi* was granted in 2005 in Singapore. The parties had three children, whose custody, care and control was contested. The High Court ordered joint custody and awarded care and control of the children to the wife and access to the husband. The court further ordered that the husband pay $1,200 a month as maintenance to each of the children and a lump sum maintenance of $150,000 to the wife. The prenuptial agreement made no provision as to the custody of the children or maintenance but provided that there "shall be no community of matrimonial assets whatsoever between the spouses". The High Court upheld the agreement on matrimonial assets with the result that no order was made as to the division of assets. The Court of Appeal made some variations to the orders on care and control and maintenance and, like the lower court, did not make an order on the division of matrimonial assets.

31 The Court of Appeal discussed at some length the enforceability of prenuptial agreements in Singapore in general, given its "public importance". This was despite the issue being "academic for the parties concerned simply because the husband had asserted that he had no assets, and the wife had been unable to adduce any substantive proof to the contrary".[41] Thus, the court's exposition of the law on the validity and effect of a prenuptial agreement on the question of maintenance, division of matrimonial assets and custody may be said to be *obiter dicta* since there were no matrimonial assets proven to be available for division and there was no agreement on maintenance and custody issues. It may well be that the law expounded is not the last word on the subject, but it is argued here that the basic position adopted by the court is the optimal one. There are presently no other reported decisions in the Singapore courts subsequent to *TQ v TR* involving prenuptial agreements.[42]

B. Lawfulness of prenuptial agreements – Are they treated differently from postnuptial agreements?

32 Marital agreements may refer to prenuptial or postnuptial agreements. Postnuptial agreements have been upheld and incorporated

41 *TQ v TR* [2009] 2 SLR(R) 961 at [28].

42 LawNet searches did not yield such decisions at the time of writing.

into court orders in previous cases.[43] However, until *TQ v TR*, it remained less clear how the law would treat a *prenuptial* agreement which contemplated divorce and provided for matters in that event.

33 In practice, lawyers and parties are confident that the agreements reached in the course of divorce proceedings will be routinely converted into consent orders. The High Court in *Lee Min Jai v Chua Cheow Koon*[44] remarked that the court does not scrutinise the terms reached by parties:

> Privately settled terms in respect of the ancillary matters in a divorce may not always appear to be fair. But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing, to any given term or condition in the ultimate settlement. What the court should be alert to, is that one party had not taken an unfair advantage over the other in the course of negotiating and settling the terms.

34 Should prenuptial agreements be treated similarly? The Court of Appeal in *TQ v TR* cautioned:[45]

> [D]ue regard must be given to the fact that postnuptial agreements relating to the division of matrimonial assets are made in circumstances that are very different from those in relation to prenuptial agreements and may (all other things being equal) warrant the courts according postnuptial agreements more weight than prenuptial agreements in the exercise of their discretion under s 112(2)(*e*) of the Act.

35 The court should be alert to circumstances that affect the willingness of parties making the prenuptial agreement.[46] Apart from this, an important difference between a prenuptial and a postnuptial agreement is that the latter is more likely to provide for recent circumstances whereas the former may have been based on outdated conditions or based on expected events which failed to materialise. The court in *TQ v TR* considered this and noted that provisions for periodic or extraordinary renegotiation could deal with changed circumstances. A prenuptial agreement may be given less regard or disregarded for the reason that it may not represent what is a just and equitable arrangement under current circumstances.

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43 See Debbie Ong, "When Spouses Agree" (2006) 18 SAcLJ 96.

44 [2005] 1 SLR(R) 548 at [5].

45 *TQ v TR* [2009] 2 SLR(R) 961 at [75].

46 Relevant circumstances may amount to duress or may fall just short of duress, such as in cases where a spouse signs a prenuptial contract a few days before the wedding after being threatened with cancellation of the wedding; see H Nasheri, "Prenuptial Agreements in the United States: A Need for Closer Control?" (1998) 12(3) Int J Law Policy Family 307 at 315.

36 The decision in *TQ v TR* did not focus on whether an agreement was a prenuptial or postnuptial one but centred on whether the agreement was validly made in accordance with contract principles, and where valid, the weight accorded to it would depend on the precise facts and circumstances of the case. It recognised that a postnuptial agreement may be given more weight because it would have been made closer to the time of divorce thus reflecting current circumstances and "is no longer the price which one party may extract for his or her willingness to marry".[47] On the facts of *TQ v TR*, the prenuptial agreement made 16 years earlier was accorded "magnetic importance",[48] because it involved a foreign agreement made by parties who were at that time not yet connected to Singapore. It seemed fair to hold the parties to the prenuptial agreement because at the time it was made, the parties thought that it was valid and binding on them, since such agreements were valid by Dutch law.

C. Agreements on division of matrimonial assets

37 The Court of Appeal in *TQ v TR* summarised its position on prenuptial agreements on the division of assets as follows:[49]

> (c) In so far as prenuptial agreements relating to the *division of matrimonial assets* are concerned, the governing provision is s 112 of the Act. In particular, the ultimate power resides in the court to order the division of matrimonial assets 'in such proportions as the court thinks *just and equitable*' [emphasis added] (see s 112(1) of the Act). In particular:
>
> > (i) In arriving at its decision, the court will have regard to all the circumstances of the case (see s 112(2) of the Act) and this would include a prenuptial agreement.
> >
> > (ii) What *weight* the prenuptial agreement will be given will depend on *the precise facts and circumstances of the case.* In an appropriate situation, a prenuptial agreement might be accorded significant – even conclusive – weight.
> >
> > (iii) The court might be readier to place more emphasis on the fact that the prenuptial agreement in question has been entered into by foreign nationals and is governed by (as well as is valid according to) a foreign law (assuming that that foreign law is not repugnant to the public policy of Singapore). However, it is important to emphasise that everything depends, in the final analysis, on the precise facts and circumstances of the case itself (see sub-para (i) above).
>
> [emphasis in original]

47 *TQ v TR* [2009] 2 SLR(R) 961 at [75].
48 See reference to this phrase in *TQ v TR* [2009] 2 SLR(R) 961 at [108].
49 *TQ v TR* [2009] 2 SLR(R) 961 at [103].

38 The court emphasised that "the prenuptial agreement *cannot* be enforced, *in and of itself*" [emphasis in original].[50] In exercising its power under s 112 of the Women's Charter,[51] the court will have regard to the factors in s 112(2), including "(*e*) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce". It observed that the prenuptial agreement constituted one of the factors that the court should take into account in arriving at its decision.[52] Further, the reference to "any agreement" in s 112(2)(*e*) encompasses both prenuptial and postnuptial agreements. However, the court recognised that prenuptial agreements and postnuptial agreements should be given different weight as the latter relating to the division of matrimonial assets are made in circumstances different from those in relation to the former and may warrant the courts according postnuptial agreements more weight than prenuptial agreements in the exercise of their discretion under s 112(2)(*e*) of the Women's Charter.[53]

39 The court also directed that if it was minded to give effect to the terms of the agreement, it should convert the terms of the agreement into a court order pursuant to the exercise of its power of division under s 112 of the Women's Charter:[54]

> [I]t would be appropriate if the terms of a valid prenuptial agreement are converted into a court order. In particular, in so far as the division of matrimonial assets pursuant to s 112 of the Act is concerned, a valid prenuptial agreement is, as explained above, only a guide and will (to the extent that it is relevant) be reflected in the order of court itself.

40 Thus, a prenuptial agreement on the division of assets upon a divorce is not void, and if valid by contract principles, will be taken into account when the court exercises its powers under s 112 of the Women's Charter. However, it cannot be enforced in itself, but its terms can be made into a court order resulting in its enforcement by way of a s 112 order. Prenuptial agreements providing for matters upon divorce can be "binding" between the parties in this way.

D. Agreements providing for maintenance

41 Section 116 of the Women's Charter provides that an agreement for the payment of a capital sum in settlement of all future claims will

50 *TQ v TR* [2009] 2 SLR(R) 961 at [77]. Reference was made to the Privy Council decision of *MacLeod v MacLeod* [2010] 1 AC 298; [2008] UKPC 64: *TQ v TR* [2009] 2 SLR(R) 961 at [75].
51 Cap 353, 2009 Rev Ed.
52 *TQ v TR* [2009] 2 SLR(R) 961 at [77].
53 *MacLeod v MacLeod* [2010] 1 AC 298; [2008] UKPC 64; [2009] 1 FLR 641.
54 *TQ v TR* [2009] 2 SLR(R) 961 at [106].

not be effective until approved by the court. The court was of the view that s 116 applies to postnuptial maintenance agreements but is silent as to whether it applies to prenuptial agreements. It came to the conclusion that it applied equally to prenuptial agreements:[55]

> It is clear, in our view, that there is no reason in logic or principle why the aforementioned legislative policy which governs postnuptial agreements ought not to apply *equally* to prenuptial agreements. *In other words, all prenuptial agreements relating to the maintenance of the wife and/or the children will be subject to the overall scrutiny of the courts* … there is nothing preventing the court concerned from endorsing the *substance* of the terms of a prenuptial agreement with regard to maintenance if it appears to that court that those terms embody what would be a just and fair result in so far as the claim for maintenance is concerned (although, needless to say, the court always retains the right in appropriate cases to award a reasonable lump sum payment in lieu of a maintenance scheme). [emphasis in original]

42 Indeed, it could even be said that s 116 should apply with greater force to prenuptial agreements on maintenance, since these agreements would have been made much earlier and likely under circumstances significantly different from the present.

43 These expositions on the law were *obiter dicta* since there was no agreement on maintenance on the facts of *TQ v TR*. The Court of Appeal affirmed the High Court's order of a lump sum of $150,000 for the maintenance of the wife, but allowed the amount to be paid in instalments. It also ordered the husband to pay a sum amounting to $380,000 into an account in a Singapore bank which could be used by either parent for the benefit of the children.

VI. *TQ v TR* in line with landmark UK Supreme Court decision in *Radmacher*

44 *TQ v TR* is in line with the subsequent UK Supreme Court decision of *Radmacher*.[56] The former had cited the High Court decision of the latter, then known as *NG v KR*.[57] The Court of Appeal in *Granatino v Radmacher*,[58] decided soon after *TQ v TR*, gave decisive weight to the prenuptial agreement made four months before the marriage between a French man and a very wealthy German woman. On appeal, the UK Supreme Court in *Radmacher*[59] held that prenuptial agreements were valid, changing the stance long held in English

55 *TQ v TR* [2009] 2 SLR(R) 961 at [63] and [67].
56 *TQ v TR* [2009] 2 SLR(R) 961 at [80].
57 [2008] EWHC 1532 (Fam); also known as *G v R (Pre-nuptial Contract)*.
58 [2009] EWCA Civ 649.
59 [2010] 3 WLR 1367; [2010] UKSC 42.

common law that prenuptial agreements were void as against public policy. It further held that there is no material difference in policy terms between a prenuptial and postnuptial agreement and "the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements".[60] It emphasised that what is important is giving the agreement, whether made before or after marriage, appropriate weight under the circumstances. It may take into account a party's emotional state, the pressures under which he or she experienced, and the circumstances of the parties at the time of the agreement, such as their age and maturity, and whether either or both had been married or been in long-term relationships before. The fact that the agreement is a foreign one is relevant in so far as it has a bearing on whether the parties intended the agreement to be effective. The overriding criterion applicable in ancillary relief proceedings is "fairness". Baroness Hale of Richmond JSC disagreed with the majority on a few matters.[61] Of significance is her approach in emphasising "fairness in the light of the actual and foreseeable circumstances at the time when the court comes to make its order".[62] There may be greater room in her approach to incorporate the main terms of the agreement but with modifications to achieve "fairness".[63] Lady Hale astutely remarked that "there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman".[64] This said, it is noted that Lord Mance did not think that the difference in the two tests by Lady Hale and the majority was likely to be "important in practice".[65]

60 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [63].

61 The result on the facts reached by Baroness Hale was to vary the judge's order so that the husband was entitled to his English home, or any home bought to replace it, for life. The judge's order upheld by the majority was that "in order to give proper weight to the ante-nuptial contract, the sum of £2.5m for housing should not be the husband's absolutely but should be held by him only for the years of parenting": *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [112].

62 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [169].

63 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [169], *per* Baroness Hale of Richmond JSC:

> It seems to me clear that the guiding principle in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618 is indeed fairness: but it is fairness in the light of the actual and foreseeable circumstances at the time when the court comes to make its order. Those circumstances include any marital agreement made between the parties, the circumstances in which that agreement was made, and the events which have happened since then. The test to be applied to such an agreement, it seems to me, should be this: 'Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?' That is very similar to the test proposed by the majority, but it seeks to avoid the 'impermissible judicial gloss' of a presumption or starting point, while mitigating the rigours of the *MacLeod v MacLeod* test in an appropriate case.

64 [2010] 3 WLR 1367; [2010] UKSC 42 at [137].

65 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [129].

45 Thus, the majority in the UK Supreme Court in *Radmacher*[66] changed the common law view that prenuptial agreements are void as against public policy. It is noteworthy that Singapore law had, in its earlier decision of *Kwong Sin Hwa v Lau Lee Yen*[67] nearly two decades ago, already held that not every prenuptial agreement was void as against public policy but that only agreements which sought to "negate the marriage or resile from the marriage" would be void.[68] It was not surprising that in 2009, this progressive stance was affirmed by *TQ v TR*, which took the position that never accepted a sharp differentiation in the agreements just because they were made at different times relative to the life of a marriage.

46 The highest courts in both Singapore and England have decided that the court granting ancillary relief is the final arbiter of whether to give effect to marital agreements and to determine the weight to be given to marital agreements. Both courts did not make too much of the character of the agreement as a prenuptial or postnuptial one. Following the tenor of the majority judgment in *Radmacher*, it may be that there will be very few agreements entered into by willing parties (without duress, undue influence, mistake, misrepresentation or fraud) which will not be given full weight unless they are manifestly unfair. The majority had explained:[69]

> The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.

47 In *TQ v TR*, greater emphasis was placed on the court's role in protecting family obligations, and may be a little closer to the approach preferred by Baroness Hale in *Radmacher*.

VII. Approach upholds family interests and autonomy

48 Since the Court of Appeal in *TQ v TR* has held that[70] "the common tenet that runs through all the above prenuptial agreements is that they are ultimately subject to the scrutiny of the courts" and

66 [2009] EWCA Civ 649.
67 [1993] 1 SLR(R) 90.
68 For example, a prenuptial agreement which provides that they will not live together at any time. However, an agreement to live apart which is made after marriage, particularly after the spouses have experienced difficulties in their marriage, is not against public policy in the same way that divorce is not against public policy.
69 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [78].
70 *TQ v TR* [2009] 2 SLR(R) 961 at [104].

"until the Legislature decides otherwise, the courts' scrutiny remains a necessary safeguard", it is possible to criticise the position as somewhat paternalistic. There is much force in the argument that agreements made in the context of a marital relationship must be given a slightly different treatment from ordinary commercial contracts, but if in consequence the law responds to these concerns by simply overriding and disregarding validly made agreements, it may not only indicate a paternalistic and interventionist legal approach, it would also cost the law a measure of certainty that is much desired in this area. If an individual prefers companionship and marriage at poor terms to singlehood with no terms, is it fair for the law to intervene in agreements made on such understanding? If "subsequent marryers" have had negative experiences in previous divorce proceedings, should the law give them some assurance that these agreements, made with sound knowledge of the issues that lie ahead, will be effective?

49 It is argued that the law can take a calibrated approach. If lawyers give competent legal advice that facilitates the parties towards making a "fair" agreement, there can be confidence that such agreements will be upheld. Complete certainty that agreements are always binding is not necessarily the most fair in this context. Neither is it necessarily fairer to simply disallow parties the choice to make contracts; spouses' agreements are statutorily recognised as valid and relevant to a court exercising its discretion in ordering a just and equitable division of matrimonial assets.

50 The state of the law is as good as law can be by setting the standards expected and encouraging reasonable behaviour between spouses. Family law has a role in channelling good behaviour between spouses. There is a purpose to be fulfilled in withholding absolute certainty in this area and allowing judicial discretion to regulate spousal autonomy. Further, autonomy need not necessarily be perceived in "negative" terms:[71]

> We need society and its recognised social forms in order to act autonomously because they provide the stock of options for us to choose from and give meaning to our choice. We learn how to be parents, friends, spouses, and whatever we choose in our careers, personal relations, and interests through continuous observation of and participation in the social form … The state's perfectionist action to promote autonomy includes action to sustain such social forms as will promote autonomy, as well as responding, more predictably, to an individual's incapacity or reprehensible harm to another's interests.

71 Mindy Chen-Wishart, "Undue Influence: Vindicating Relationships of Influence" (2006) 59 *Current Legal Problems* 231 at 242, 248.

51 "Positive autonomy" may require the law to decline to enforce certain transactions, particularly where there is a risk of harm to social forms and legal institutions, but fair agreements will be given effect. It is important then to examine what is "fair". The following discussion suggests principles and policies applicable to a more practical construction of what is "fair" in agreements on financial provision and division of assets.

VIII. Constructing prenuptial agreements which are "fair"

52 The suggested approach is to separate the different aspects of family obligations and develop more specific guidance on how each aspect will be treated at law. It is not necessary to treat all the terms of a prenuptial contract similarly. *TQ v TR* has shown that the law treats agreements on maintenance differently from agreements on division of assets.[72] Some practical benefits can be achieved if parties can reasonably predict limitations on their autonomy in each aspect of the agreement. Agreements on maintenance are not effective until the court approves them after it is satisfied that the terms provide sufficiently for the dependent members. Parties making such agreements must understand this limit on their autonomy, but where needs have been met, agreements or terms on the division of assets are more likely to be given effect.[73]

A. Either spouse may desire upholding prenuptial agreement

53 It is easy to fall into the trap of stereotyping the parties in some preconceived gender roles. Arguments that seek to protect the homemaker, usually the wife, from the harsh consequences of prenuptial agreements usually focus on assumptions that husbands have greater assets in their own names before and during marriage, and that agreements favour such rich husbands. We must not lose focus by placing too much emphasis on such scenarios. Prenuptial agreements

72 The Court of Appeal noted in *TQ v TR* [2009] 2 SLR(R) 961 at [108]:

> [T]he courts would be more inclined to place more emphasis on prenuptial agreements that related to the division of matrimonial assets (as opposed, for example, to those agreements that related to the maintenance of the wife and/or the children as well as agreements that related to the custody (as well as the care and control) of the children).

73 In *Wong Amy v Chua Seng Chuan* [1992] 2 SLR(R) 143 at [40], the High Court said of the predecessor of s 112: "Firstly, adequate provision must be made to ensure the support and accommodation of the children of the marriage. Secondly, provision must be made to meet the needs of each spouse."

may be drafted to favour or disfavour the more vulnerable spouse and need not always favour the economically stronger spouse.[74]

54 In *Radmacher*, it was the wife, and/or her family, who desired to hold the parties to the prenuptial agreement which protected her assets from being divided upon divorce. In the Singapore High Court decision of *Wong Kam Fong Anne v Ang Ann Liang*,[75] it was the homemaker wife who sought to uphold the agreement. In this case, the parties had made a settlement agreement before the divorce proceedings which stated that the wife was the legal and beneficial owner of the matrimonial home. The husband, who had taken on the main breadwinning role, sought an order under the former s 106 of the Women's Charter (currently s 112) for a share of all matrimonial assets held by the wife. The court gave effect to the agreement, finding that the deed was intended as a comprehensive financial and property settlement between the parties made at a time when the parties had already been separated and divorce was viewed as a real possibility.

55 It is not always the case that homemaker spouses are prejudiced when parties are held to a marital agreement. Further, prenuptial agreements may include terms that are triggered by events or time, for example, an increase in a share of assets when children are born, or a term providing that the longer the marriage, the more equally the parties share in the assets.[76] Parties are also free to renegotiate terms during marriage.

56 The approach suggested does not typecast roles or circumstances by gender nor does it make assumptions that the homemaker spouse is always prejudiced by marital agreements.

B. Agreements or terms on maintenance

57 The Women's Charter expressly provides in s 116 that "[a]n agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved … by the court". This provision

74 See Ryznar & Stepien-Sporek, "To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context" (2009–2010) 13 Chap L Rev 27 at 33.

75 [1992] 3 SLR(R) 902.

76 A family lawyer in Singapore shares his experience:

> In most cases, a division scheme is time-based. For example, if the marriage breaks up in the first to third years, maintenance is fixed at a certain sum and only certain assets may be divided. If one party commits adultery at any time during the marriage, another scheme kicks in. It is not uncommon that terms are such that the longer the parties remain in the marriage, the more 'generous' the terms of division in respect of included assets.

ensures that dependent family members are financially provided for and the court must be satisfied that the dependent's needs are met by the agreed maintenance sums.

58 This approach is also reflected in England. There, the landmark decision of *White v White*[77] introduced the three strands that guided the courts in determining financial arrangements upon divorce: needs, compensation and sharing. *Radmacher* viewed "needs" and "compensation" to be factors which can most readily render it unfair to hold parties to their prenuptial agreement. The Law Commission Consultation Paper held the view that two broader legal and social considerations transcend the interest and autonomy of the parties to the agreement. These are the financial responsibilities of parents towards their children and the principle that the state cannot be asked to shoulder one's financial responsibilities for one's spouse. These considerations imply that parties cannot contract out of these maintenance obligations.

59 The state is concerned with protecting at least the following aspects of family obligations: caring for the children, maintaining dependent family members and recognising and upholding the importance of different spousal roles and dividing assets in the context of this social policy.[78] Protecting the welfare of children is a vital aspect in nurturing strong families. Section 129 of the Women's Charter ensures that any agreement relating to the custody of children will always be subject to the scrutiny of the court. Spouses cannot contract out of their responsibility to care for their child.[79] As this article focuses

77 [2001] 1 AC 596; [2000] UKHL 54.

78 See *NK v NL* [2007] 3 SLR(R) 743 at [41]:

> The social policy underscored by the division of matrimonial assets, the joint product of a marital partnership, is just as important as the final award. The language of a power to 'divide' says to the whole society that the law acknowledges the equally important contributions of the homemaker to the partnership of marriage and its acquisition of wealth. It would be unfortunate if the process of division perpetuated an impression of simply 'dividing the spoils' of the economically more advantaged party. The entire process must involve a mutual respect for spousal contributions, whether in the economic or homemaking spheres, as both roles are equally fundamental to the well-being of the marital partnership.

79 In *TQ v TR* [2009] 2 SLR(R) 961 at [70], the Court of Appeal said of agreements on custody of children:

> There ought, in our view, to be a presumption that such agreements are unenforceable unless it is clearly demonstrated by the party relying on the agreement that that agreement is in the best interests of the child or the children concerned. This is because such agreements focus on the will of the parents rather than on the welfare of the child which has (and always will be) the paramount consideration for the court in relation to such issues (see s 125(2) of the Act). It might well be the case that the contents of the prenuptial agreement concerned coincide with the welfare of the child or the children concerned. However, the court ought nevertheless to be the final

(*cont'd on the next page*)

on how the law should treat agreements on financial matters upon divorce, no more will be said of agreements on children's matters except where they relate to children's maintenance.

60 In the Singapore context, the Prime Minister has recently reiterated:[80]

> Strong families are the foundation of a cohesive, harmonious society. Our families anchor our identity and sense of belonging. They inspire us to work hard and be better people, and are our bedrock of support in good times and bad. These roles our families play are even more critical in today's environment … the Government cannot and should not do everything. *Our families remain the first line of support*. They can help where Government cannot, due to the ties of kinship and love. That is why Government will always help to nurture strong families in Singapore. [emphasis added]

61 The Acting Minister for Community Development, Youth and Sports, Mr Chan Chun Sing, recently cited Confucius: "[the] strength of a nation derives from the integrity of the home", and remarked that "[s]trong and stable families are the foundation for a thriving and successful nation. They are also the cradle that nurtures our future generation".[81] What does such a view implicate insofar as the law on prenuptial agreements is concerned? The state expects family members to provide for each other. Not characterised as a welfare state, Singapore has adopted a model of social security that values the family institution in which family members provide for their dependent kin and rely less on state welfare support. In the State of the Family Report 2011,[82] which draws data from several government agencies, survey findings and published studies, it was reported that:

> The Survey on the Social Attitudes of Singaporeans (2009)[83] showed that the majority of Singaporeans still feel that their families are close-knit, and could turn to their family members for help, both

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arbiter as to the appropriateness of the arrangements embodied within such an agreement.

The Children and Young Persons Act (Cap 38, 2001 Rev Ed) governs and care and protection of children; parents may be liable for offences under this Act for neglect and abuse of their children.

80 The Prime Minister's 2012 Chinese New Year message, 15 January 2012 (http://www.pmo.gov.sg/content/pmosite/mediacentre/speechesninterviews/primeminister/2012/January/prime_minister_2012_chinesenewyearmessage.html).

81 MG (NS) Chan Chun Sing, in the foreword of State of the Family Report 2011 (National Family Council, 2011) (available online at http://www.nfc.org.sg/pdf/Requestor_SOFR%202011%20Cicada%20v8%20Final.pdf).

82 State of the Family Report 2011 (National Family Council, 2011) (available online at http://www.nfc.org.sg/pdf/Requestor_SOFR%202011%20Cicada%20v8%20Final.pdf).

83 About 2,000 respondents participated in this survey; see State of the Family Report 2011, inside back cover.

> financially and emotionally. However, as reflected in Table 3,[84] there was a decline in the 2009 figures in two particular areas, *ie* the proportion of respondents who felt they have a close-knit family and those who will provide financial support to their family members in financial need. This could suggest that strong family ties today are eroded at the margins.

62 If strong family ties are being eroded such that there is a diminished commitment to give financial support to family members, the state will be concerned to ensure that families continue to remain "the first line of financial support".

63 This social policy prevails over agreements on maintenance. Such a limit on an individual's autonomy is not new. This same policy permeates the law contained in the Inheritance (Family Provision) Act.[85] Singapore succession laws clothe a testator with almost unlimited freedom to give his property to any beneficiary he chooses. A testator may choose not to give any property to his spouse or children upon death. The Inheritance (Family Provision) Act was enacted to prevent a testator from bequeathing his whole estate to beneficiaries other than the spouse and children, leaving them with inadequate financial provision.[86] The court is empowered under the statute to order such reasonable provision as it thinks fit to be made out of the deceased's estate for his dependants. Autonomy is not "absolute" and must give way to moral obligations and state interests.

64 Parliament has also expressed this policy when the Maintenance of Parents Bill was debated in Parliament years ago. There, the crucial issue was identified as follows: did the state wish to take on the task of supporting the elderly or should it require children to maintain their elderly parents?[87] The Maintenance of Parents Act was chosen as the structure within which dependent elderly persons would be financially provided for. Elderly dependent parents should first look to their children for financial support. Children are obligated by law to maintain their aged dependent parents. The Government invests in nurturing strong families and puts in place laws that both support and enforce fundamental family obligations. For this reason, parties have limited autonomy to contract out of such obligations.

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84 In Table 3, to the question "I will give money to my family members if they are in need of support", 99% of respondents responded "agree" in 2001 and 2006, 98% in 2003, and only 90% agreed with the statement in 2009.

85 Cap 138, 1985 Ed.

86 See Second Reading of the Inheritance (Family Provision) Bill, *Singapore Parliamentary Debates, Official Report* (24 July 1963) vol 21 at col 52.

87 See Chan Wing Cheong, "The Duty to Support an Aged Parent in Singapore" [2004] 13 *Pacific Rim Law & Policy Journal* 547.

65 These limits also address the concerns summed up by Lady Hale and the theories suggesting inequity when one bargains in the shadow of love.

C. Agreements or terms on the division of matrimonial assets

(1) Beyond needs

66 The majority in *Radmacher* observed:[88]

> [O]f the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.

67 The question of what is fair in the context of s 112 of the Women's Charter may involve at least two perspectives: the court can focus on whether agreements are substantively fair in terms of whether the spouses' needs are met and whether it is fair for each spouse to obtain or be deprived of certain assets, or, it can focus on whether it is fair to hold spouses to what they had agreed to previously, even if the resulting outcomes indicate that one party had made a poor bargain. For instance, the court in *TQ v TR* thought it fair to hold parties to the prenuptial agreement because at the time it was made, the parties thought that it was valid and binding on them, since they knew such agreements were effective by Dutch law. Parties were aware of what they could expect, having agreed to the terms; obtaining what was agreed and expected is "fair and square", even if substantively one party had a weaker bargain.

68 In respect of maintenance agreements, the court's main focus should be on whether, substantively, the needs of family members will be met by the maintenance provisions. However, in agreements relating to the division of assets, unless a dependent member's needs are required to be met out of a share of the assets, the focus will also include whether it is fair to hold parties to their earlier understanding. This approach should not fetter the court's discretion to assign appropriate weight to the prenuptial agreement depending on "the precise facts and circumstances of the case" but acts as a sensible guide to the exercise of discretion which, if followed, will establish greater certainly over time.

88 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [81].

69 In *Wong Kam Fong Anne v Ang Ann Liang*,[89] the High Court distinguished the interests involved in maintenance from the division of assets:[90]

> It is clear that a wife cannot enter into a binding agreement to waive her rights to claim maintenance unless and until that agreement is approved by an order of court under s 110 (currently s 116). That section merely confirms the position at common law as set out in *Hyman v Hyman* [1929] AC 601. It should be remembered, however, that the rationale for Hyman is based on public policy, namely, that there is a public interest in the adequate maintenance of a wife, and this public interest is supervised by the court, whose power to review any arrangements between the parties as to maintenance can never be excluded … The question then arises whether the principle in Hyman can be extended to a division of assets acquired during the marriage, because it is not necessary for the same public interest to exist in the division of the spouses' assets as in the maintenance of a wife.

In this case, the High Court declined to exercise its powers to order division and upheld the agreement.

70 The Court of Appeal in *TQ v TR* gave conclusive weight to a foreign prenuptial agreement after it was satisfied that the needs of the dependent parties have been met by the maintenance orders. It gave effect to the parties' intentions when they contracted the prenuptial agreement, aware that they should be held to its terms:[91]

> [A]t the time they entered into the Agreement, neither party anticipated that the marriage would end here in Singapore. Both parties entered into the marriage thinking that the Agreement was valid and binding. We also recognised the fact that persons may (particularly in jurisdictions where prenuptial agreements are commonplace) decide to get married only because of the assurance furnished by a binding prenuptial agreement.

D. Alert to factors particular to prenuptial agreements

71 Following from *TQ v TR*, prenuptial agreements can be "binding" if incorporated into a court order made under s 112. If prenuptial agreements are presently not treated the same way as postnuptial agreements made close to divorce, the reason must lie somewhere in the distinction between them:[92]

89 [1992] 3 SLR(R) 902.

90 [1992] 3 SLR(R) 902 at [27]–[28].

91 *TQ v TR* [2009] 2 SLR(R) 961 at [108].

92 The Court of Appeal in *TQ v TR* [2009] 2 SLR(R) 961 at [31] and [36] cited the reservations in relation to *prenuptial* agreements in *MacLeod v MacLeod* [2010] 1 AC 298; [2008] UKPC 64; [2009] 1 FLR 641.

> There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future. … Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.

72 Once it is accepted that prenuptial agreements are not void, the statutory regime requires the court to take into account such agreements when making orders of division. The statutory direction is to achieve a just and equitable division of the parties' matrimonial assets. What a challenging task this is.[93] Marital agreements can greatly assist the court in its quest for fairness. In *Tan Siew Eng @ Tan Siew Eng Irene v Ng Meng Hin*[94] ("*Tan Siew Eng*"), the husband petitioned for divorce and subsequently the spouses entered into an agreement in full and final settlement of the divorce and ancillary issues. One of clauses stated that the husband would withdraw his petition and the wife would petition for divorce instead. Later, the wife changed her mind and did not wish to petition for divorce. The husband's lawyers treated this as a repudiation of the agreement and accepted her repudiation. The High Court found that the wife had repudiated the agreement and the husband had accepted the repudiation. Despite this, the court made an order following the terms of the settlement as it found that the terms were just and equitable. *Tan Siew Eng* demonstrates that when a court searches for the just and equitable division of assets, it gives weight to the agreement worked out by the parties because a thoughtfully reached agreement gives good guidance of what is a fair result. In fact, despite the holding that the agreement in *Tan Siew Eng* had been repudiated, the court thought that it still gave the best indication of what was a just and equitable division. Agreements are particularly valuable when there is a lack of full disclosure of the assets which makes the task of division

93 In *Wong Amy v Chua Seng Chuan* [1992] 2 SLR(R) 143 at [39], the High Court remarked:

> One of the most difficult or least enviable tasks which confronts judges is how to use their discretion and extensive powers to rearrange the finances and property of the family after termination of the marriage for the rules are not very firm and uncertain. Ormrod LJ in *Martin v Martin* [1978] Fam 12, at 20B-E, had this to say: I appreciate the point he [counsel] has made, namely, that it is difficult for practitioners to advise clients in these cases because the rules are not very firm. That is inevitable when the courts are working out the exercise of the wide powers given by a statute like the Matrimonial Causes Act 1973 …

94 [2003] 3 SLR(R) 474.

tremendously difficult for the court. An agreement concluded after extensive negotiations may reflect what is closest to an acceptable, just and equitable resolution. It can be very valuable.

73 However, a *prenuptial* agreement may be given less weight than a postnuptial agreement made close to divorce proceedings because it was entered into much earlier and under pre-marriage conditions.[95] There may also be circumstances which suggest some pressure exerted on a party but which fall short of constituting any of the vitiating factors that invalidate a contract. A family lawyer heading the largest Family Practice division in a law firm in Singapore said:

> I assisted a couple who signed and executed a prenuptial agreement the day before their wedding. The husband was the son of wealthy parents. I advised him to assure his bride of his love for her. The wife was upset, felt pressurised into this agreement but knew what she was agreeing to. She wanted to proceed with the wedding and signed the agreement.

74 It is arguable whether these facts constitute duress or undue influence. Some may observe that the wife had a choice to refuse to agree to the prenuptial agreement at the cost of cancelling the wedding (and it may well be a relief to her to discover what preoccupies the heart of her groom at the start of the marriage), but others may sympathise with a woman who still cares for her fiancé and is under pressure not to embarrass herself and her family by a last-minute cancellation of the wedding. Such a circumstance may not invalidate a contract but should remain relevant when the court makes an order of division.

E. Protecting pre-marriage or matrimonial assets?

75 In England, ss 23 and 24 of the Matrimonial Causes Act 1973[96] empower the court to make financial provision and property adjustment orders but there is no definition of the assets which may be subjected to such orders. Thus the court can, when exercising the power, take into account all assets even if they are inherited, gifts or acquired before marriage. This was a concern, raised as early as in the judgment of *White v White*.[97] The UK Law Commission Consultation Paper

95 See Debbie Ong, "Prenuptial Agreements: A Singaporean Perspective in *TQ v TR*" (2009) 21 *Child and Family Law Quarterly* 536 at 545–546; Debbie Ong, "Prenuptial Agreements and Foreign Matrimonial Agreements: *TQ v TR*" (2007) 19 SAcLJ 397 at [25]–[28]; Debbie Ong, "When Spouses Agree" (2006) 18 SAcLJ 96 at [53].

96 c 18.

97 [2001] 1AC 596; [2000] UKHL 54. The courts have considered pooling all assets (matrimonial and non-matrimonial) together and then reducing shares from the position of equal division in view of factors such as a short marriage or the fact that one party had not contributed to the pre-matrimonial asset (see *Charman v*

(*cont'd on the next page*)

considered a "narrow model" of a qualifying marital agreement encompassing only "pre-acquired, inherited or gifted property"[98] and which would allow parties to contract out of the ancillary powers of the court in respect of such assets. In contrast, in Singapore, s 112(10) of the Women's Charter provides the definition of matrimonial assets liable to division, which in general, *excludes* assets acquired before marriage and gifts unless these are used by the family, is a matrimonial home, or substantially improved by the efforts of the other party or by their joint efforts.[99] Pre-acquired, inherited or gifted assets are largely, though not entirely, excluded from the power of division in Singapore.

76 Section 112(10) of the Women's Charter makes it clear that all assets acquired by either or both parties during marriage are matrimonial assets. These assets constitute the bulk of matrimonial assets in most cases. Some assets acquired before marriage or by gift may also be matrimonial assets if, for example, the other spouse or both spouses have substantially improved them during their marriage. The subsection also expressly provides that the parties' matrimonial home, whether acquired before marriage or by way of a gift is a matrimonial asset. Prenuptial agreements may provide that such pre-marriage assets, inheritance and gifts will not be divided but remain the property of the acquirer or donee, despite any substantial improvement or usage as a matrimonial home. Further, income generated from these assets during marriage may also be subjected to such terms. Although there are some pre-marriage assets and gifts which could constitute matrimonial assets under the specified conditions under the legal regime, the law intends to

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Charman [2007] All ER 425; [2007] EWCA Civ 503) or first excluding pre-marriage assets and dividing the remaining between the parties (*Jones v Jones* [2011] EWCA Civ 41; *N v F* [2011] All ER 96, [2011] EWHC 586 at [14]).

98 The UK Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) at [5.57], available at http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

99 Section 112(10) of the Women's Charter (Cap 353, 2009 Rev Ed) provides:

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

See *Chen Siew Hwee v Low Kee Guan* [2006] 4 SLR(R) 605 on the interpretation of this statutory definition.

give the court the power to divide only assets that are sufficiently related to the marriage and the joint lives of the spouses. There is less room under the Women's Charter for one spouse to obtain a large share of the other spouse's massive wealth acquired before the marriage.

77 A family lawyer in Singapore said:

> Parties want a prenuptial agreement usually because they have a lot acquired before the marriage and they want to protect the income and assets generated in the future from these pre marital assets. They do not mind sharing what is acquired during marriage. In fact, I always advise my clients that if they state that future assets are to be divided in accordance with direct financial contributions, this leaves a bad taste at the start of the marriage as their relationship, moving forward, is no longer about sharing but will be about who pays for what and how much. I do not think that a marriage should start on such an understanding. But it is easy to facilitate both parties' agreement to sign the prenuptial agreement if the whole focus in on pre-marital assets.

78 The point to be made here is that prenuptial agreements or terms that protect mainly pre-marriage assets of a wealthy party may not be all that oppressive when measured against the broad statutory scheme. For example, if pre-marriage assets and their consequential income are excluded for division but generous provisions are made from assets acquired during marriage, there may be no transgression of what is "fair". If parties need clarity and want assurance that their agreements will be upheld, they must be as fair as they can in their negotiations and the terms ultimately reached.

IX. Conclusion

79 Although prenuptial agreements are not binding until approved by the court, their value can be significant. In a legal regime that adopts judicial discretion rather than an absolute formula (for example, a prescription of equal division), one must accept that there could be a range of outcomes that fall within what is "just". The court can begin the exercise by looking at the parties' agreements, instead of starting at a position *sans* agreement, which could involve lengthy arguments and voluminous evidence on the parties' contributions and conduct during the marriage.

80 Baroness Hale called for clarity in this area:[100]

> There is not much doubt that the law of marital agreements is in a mess. It is ripe for systematic review and reform … This is just the sort of task for which the Law Commission was established by the Law Commissions Act 1965 and in which it has had such success, particularly in the field of family law. The commission can research and review the law over the whole area, not just the narrow section which is presented by the facts of an individual case.

81 It may be that the UK Supreme Court has reached a state that is as good as the law can be. Is the law weak because we abandon the attempt to form laws that are absolutely "certain"? Not necessarily. The only certainty is that the fairer parties are in negotiating their agreements, the more likely the agreement will serve them well.

82 This legal regime exhorts good behaviour between spouses and in so doing it does much more than merely decide on technical issues of upholding party autonomy and contracts. Certainty and peace of mind comes from being reasonable and fair in the making of prenuptial agreements – this seems to be a fair exchange!

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100 *Radmacher v Granatino* [2010] 3 WLR 1367; [2010] UKSC 42 at [133] and [135], *per* Baroness Hale of Richmond JSC.