WHEN SPOUSES AGREE

Financial agreements made between parties who are contemplating marriage, contemplating divorce, or in the throes of divorce attract public law concerns. The law respects the private rights and interests of individuals to make agreements in matters affecting their personal lives. But society is interested in seeing that fundamental family obligations are fulfilled and that the economically weaker family members are protected when a family unit breaks down. The law attempts to strike a balance between giving autonomy to spouses and retaining judicial control over such agreements. This article surveys the approaches taken in recent cases on agreements made between spouses.

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I. Introduction

1 The title of this article may be somewhat paradoxical, particularly to divorce lawyers: Spouses embroiled in divorce proceedings constantly disagree on all sorts of issues; it is hard to conceive that they can truly agree to anything. When they can and do agree, it may be a cause for celebration.

2 Recent cases have developed a trend which gives much autonomy to spouses to make agreements to order their lives and settle their disputes. Today, are pre-nuptial agreements made between parties who are contemplating marriage and agreements made in contemplation of divorce valid and enforceable? Post-nuptial agreements made in contemplation of divorce have frequently been recognised by the courts. Pre-nuptial agreements, on the other hand, have been treated differently. The English courts were traditionally reluctant to enforce pre-nuptial agreements which sought to provide for matters upon a divorce. It was contrary to public policy to oust the jurisdiction of the court by agreement in matters over which the state was very much concerned.[1] Further, there is concern that pre-nuptial agreements which contemplate divorce undermine the institution of marriage. However, the more recent

1 *Hyman v Hyman* [1929] AC 601.

cases in England have given consideration to provisions in pre-nuptial agreements.[2]

3 The law encourages parties to resolve their own disputes within arrangements they have worked out themselves. As the character of familial relationships is intimate and unique to each family, the arrangements that emanate from the spouses themselves will be the most acceptable to them. They are also more likely to honour the terms that they have reached voluntarily. Sections 49 and 50 of the Women's Charter[3] illustrate the unique approach taken with respect to family issues. Mediation and counselling are believed to aid in the harmonious resolution of family disputes. Some of the greatest benefits of these processes are the reduction of acrimony, increased communication between the estranged spouses and the advantage of practical arrangements which are worked out by parties for themselves.

4 If settlement through mediation is widely encouraged in family proceedings, the law must correspondingly respect the parties' autonomy to make agreements dealing with the ancillary issues upon divorce. If such *post*-nuptial agreements are encouraged, are *pre*-nuptial agreements of such a different character that they should be discouraged or even held to be against public policy? The following discussion examines the modern trend in dealing with post-nuptial agreements and suggests that the same approach may also be taken with respect to pre-nuptial agreements.

II. Autonomy of spouses in the public institution of marriage

5 Prof Leong Wai Kum has characterised the husband-wife relationship in this way:[4]

> We may describe the law regulating the husband-wife relationship, including in the Women's Charter, with three characteristics, *viz.*, a spouse should conduct himself or herself *vis-à-vis* the other with reasonableness, rights and duties are mutually owed between them and spouses retain autonomy of decision-making.

2 See *M v M (Prenuptial Agreement)* [2002] 1 FLR 654 and *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120. See also Gareth Miller, "Pre-nuptial Agreements in English Law" *Private Client Business* 2003, Issue No 6, pp 415–426.

3 Cap 353, 1997 Rev Ed.

4 Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at p 364.

6 Section 46(1) of the Women's Charter exhorts that:

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

7 The law expects spouses to take their marriage seriously as a permanent union which they should safeguard together. They are expected by the law to co-operate and discharge their roles. However, the law avoids over-regulation. Respecting the rights of the spouses to order their lives as they wish is also important to the success of the marriage. In many aspects of the family relationship, such as whether to have children or how to divide the roles in the running of the household, parties have the necessary autonomy required to enjoy their family life.

8 In *Kwong Sin Hwa v Lau Lee Yen*,[5] the Court of Appeal held that:[6]

> [T]he law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, so long as such agreement does not seek to enable them to negate the marriage or resile from the marriage … In particular, the law does not forbid them to agree as to how they should live and conduct themselves as husband and wife, when and where they would commence to live as husband and wife, when they would consummate their marriage, when they would have a child or children and how many children they would have. Such agreements made between husband and wife are not illegal or immoral or against public policy.

9 What may be against public policy is a pre-nuptial agreement not to live together as husband and wife after the marriage, such as the pre-nuptial agreement in *Brodie v Brodie*[7] where the man agreed to marry the woman expecting his child on the condition that they would always live apart as if they were not married.

10 While the law respects the autonomy of spouses to make agreements to regulate their lives, it also imposes some limitation in order to ensure that certain fundamental family obligations are fulfilled. There are generally four areas in which the spouses' freedom to contract may be curtailed. The first is in the area of preserving the fundamental character of marriage. *Kwong Sin Hwa v Lau Lee Yen*[8] has held that an agreement

5 [1993] 1 SLR 457.
6 *Ibid*, at 469, [38].
7 [1917] P 271. See also *Vervaeke v Smith* [1983] 1 AC 145.
8 *Supra* n 5, at 469, [38].

must not seek to enable the spouses to "negate the marriage or resile from the marriage", such as a pre-nuptial 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.[9] The second area of restricted autonomy is expressly stated in s 116 of the Women's Charter which provides that agreements for the payment of capital sums in full settlement of future maintenance are not effective until approved by the court. The case of *Chia Hock Hua v Chong Choo Je*,[10] discussed below, dealt with such an agreement. The third is in the area of division of matrimonial assets and provision of maintenance falling outside the ambit of s 116. Section 112 confers on the court the powers to rearrange the financial resources of the parties such that the assets are justly and equitably divided between the spouses. Finally, the court retains control over agreements relating to the custody of children and has powers to vary its terms in accordance with s 129 of the Charter. Since the court has powers to make orders in respect of these issues, to what extent do spouses retain the freedom to make their own arrangements within these areas? This article focuses only on financial agreements made between spouses. The court's control over agreements on the custody, care and control, and access of children is beyond the scope of the present discussion.

III. Post-nuptial financial agreements

11 The recent trend of cases suggests that financial agreements between spouses, made validly in accordance with contract principles, is likely to be given effect as a consent order or may have its terms embodied in the court order. While some cases[11] have firmly expressed that agreements violating the principles embodied in the Women's Charter will not be given any effect, many more recent cases have in fact given effect to spouses' agreements by incorporation of the terms into the court order.

9 See also Nigel Lowe & Gillian Douglas, *Bromley's Family Law* (Butterworths, 9th Ed, 1998) at p 750.

10 [1995] 1 SLR 380 ("*Chia Hock Hua*").

11 For example, *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR 688 and *Khoo Meng Huat v Chin Seah Ha* [1996] SGHC 147. These cases are further discussed below.

12 There are a few ways of giving full or partial effect to the agreements reached by spouses. The most current approach is to convert the agreement into a consent order or incorporate some of the terms into the court order. Another way is to make an order under s 112 and have regard to the agreement as a guide on how the division of assets ought to be made. Alternatively, the court could simply enforce the agreement as a contract between the parties. These approaches are discussed more fully below.

13 In this area which is still developing, it is suggested that agreements between spouses should always be subject to the court's scrutiny. If they do not violate public policy or the scheme in the Women's Charter, they should be given effect as consent orders. Once an agreement is made into a consent order, its legal force is derived from the court order and no longer from the parties' contract.[12] This process of giving effect to the spouses' agreement by converting them into consent orders serves both private and public interests: it upholds the autonomy of the spouses and at the same time, maintains the public interest of ensuring that all such agreements come under the court's control as the ultimate adjudicator of issues in which society is interested. It also supports the Charter's policy of encouraging the harmonious resolution of disputes through mediation.[13] This approach is supported by the recent trend of cases and is one used by the English case of *Xydhias v Xydhias*.[14]

14 In England, after divorce became available based on the irretrievable breakdown of marriage, the "no-fault" divorce regime also introduced the culture of encouraging parties to settle their own affairs. But while the modern policy "favours the making of private agreements, … traditionally the law has been reluctant to view the financial consequences of marriage breakdown as a purely private concern".[15] A technique used to balance the two interests is to hold that such agreements are not effective unless they are embodied in consent orders of court. In *Xydhias v Xydhias*, Thorpe LJ held that:[16]

> [A]n agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to

12 *Lee Hong Choon v Ng Cheo Hwee* [1995] 2 SLR 663.
13 Sections 49–50, Women's Charter.
14 [1999] 1 FLR 683. See also case comment on the case in S M Cretney, "Contract Not Apt in Divorce Deal" (1999) 115 LQR 356.
15 Stephen M Cretney, Judith M Masson & Rebecca Bailey-Harris, *Principles of Family Law* (Sweet & Maxwell, 7th Ed, 2003) at para 14-003.
16 *Supra* n 14, at 691. See also case comment by Cretney, *supra* n 14.

> uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. … [T]hereafter the rights and obligations of the parties are determined by the order and not by any agreement which preceded it.

15 By requiring agreements to be embodied in consent orders, the law has to some extent reconciled the policy of upholding private agreements with the policy of placing the ultimate control over these matters in the court.[17]

16 The following discussion examines the approach taken by the Singapore court presented with financial agreements between divorcing spouses.

A. Agreements relating to maintenance

(1) Capital sum in settlement of future maintenance claims

17 Section 116 of the Women's Charter provides:

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

18 In *Chia Hock Hua*,[18] the court explained the effect of s 116:

> [T]he words 'An agreement … shall not be effective until it has been approved or approved subject to condition …' does not mean that the law denies the existence of an agreement — only that when approved it becomes effective and provides a good defence to any claim for maintenance.

19 An agreement validly entered into by both parties, even if it concerns a capital sum in settlement of all future claims to maintenance, can be effective once the court approves it. However, until the court approves it, it remains ineffective and unenforceable as s 116 imposes a specific limitation to such agreements. In *Chia Hock Hua*, the husband

17 See *supra* n 15, at para 14-004.
18 *Supra* n 10, at 385, [15].

had paid the wife $30,000. The husband alleged that it was paid by way of an agreed lump sum in full and final settlement of her claims to ancillary relief, in particular, maintenance. The wife alleged that the sum was made for her to purchase a car and that she was made to sign papers without giving further thought as to their meaning and effect. The court found that the wife was a highly educated, intelligent and enlightened person who could look after herself and was not likely to be forced to sign papers under terms she did not accept. It held that the wife had entered into the agreement voluntarily and had received the sum in full and final settlement of future claims on maintenance. The court found that there was nothing unreasonable about the capital settlement sum of $30,000 having regard to the spouses' relative financial positions and proceeded to give effect to the agreement.

20 Agreements involving capital sums to be made in full and final settlement of future maintenance are also commonly reached by parties through mediation offered in the Family Court. Such agreements are routinely converted into consent orders before they are carried out. When they are converted into consent orders, they become effective as orders of court and their legal effect is derived from the court order.[19]

(2) Monthly maintenance sums

21 Where the agreement does not involve a capital sum but sets out a monthly maintenance sum to be paid, it is not expressly subject to the limitation in s 116 of the Women's Charter. However, they will also be subject to the court's scrutiny. Section 119 of the Charter provides that the court may vary the terms of any maintenance agreement if it is satisfied that there has been a material change in circumstances. Orders of division of assets made under s 112 are closely linked to maintenance orders made under s 113 on maintenance and the court will consider the combined financial arrangements. In fact, even when a monthly maintenance agreement has been approved as a consent order, the court retains control over it under s 118 of the Charter.

22 In *Tan Sue-Ann Melissa v Lim Siang Bok Dennis*,[20] the High Court varied a consent order which required the husband to pay his wife maintenance of $2,000 per month. The amount was reduced to $1,100 on the basis that the husband had shown a material change in circumstances.

19 *Lee Hong Choon v Ng Cheo Hwee*, *supra* n 12.
20 [2004] 3 SLR 376.

The Court of Appeal accepted that the husband, who was then earning a salary of $3,000 per month, had entered into the agreement to pay maintenance of $2,000 on the expectation that his income would increase significantly. Unfortunately, this expectation, which was made known to the wife, did not materialise. The wife argued that there was no "material change in circumstances" which could justify a variation of the consent order.[21] The court held that:[22]

> [I]n the normal course of events, the subjective expectations and hopes of the [husband] could not amount to a "change" within the meaning of s 118 of the Women's Charter when they did not eventually materialise. …
>
> However, it is important to bear in mind the rationale behind the law imposing a duty on a former husband to maintain his former wife. Essentially, the aim is to even out any financial inequalities between the spouses, taking into account any economic prejudice suffered by the wife during marriage. In the present case the respondent husband agreed to pay the appellant wife $2,000 per month as maintenance in the expectation that his financial position would improve. … In such circumstances, where the expectation did not materialise (and this was not in doubt), it was our opinion that it would only be just that that fact should and could be treated as a "material change" in the context of the case. To hold otherwise would be grossly unfair.

23 The court retains a firm control even in cases where a maintenance agreement has been reached and where a consent order has already been made. In a commercial contract, if a party makes an agreement based on his expectation of more favourable circumstances which subsequently fail to materialise, he may not be able to resile from the poor bargain that he has made. In contrast, maintenance agreements remain special contracts subject to the court's control. The court interpreted the phrase "material change in circumstances" very broadly in order to do justice in this case.

21 Section 118 of the Women's Charter provides:

> The court may at any time vary or rescind any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

22 *Supra* n 20, at [26]–[27].

B. Agreements relating to the division of matrimonial assets

24 While there is no express statutory equivalent of s 116 of the Women's Charter applying to agreements in respect of the division of the parties' matrimonial assets, the courts have clearly demonstrated that it retains the power to be the final arbiter of whether such agreements should be given effect. In *Wee Ah Lian v Teo Siak Weng*,[23] the Court of Appeal held that even if parties have reached a prior agreement, the court will, in the exercise of its discretion under s 112 decide whether it ought to uphold the settlement. The court held that:[24]

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

25 On the facts of the case, the court was of the view that in upholding the settlement, there was no transgression of s 112.

26 In England, *Xydhias v Xydhias*[25] signals the modern trend that the English court would treat a validly made agreement as unenforceable until it is approved by or converted into an order of court. This approach probably also reflects the current position adopted in Singapore. In respect of capital settlement of maintenance sums, s 116 of the Women's Charter captures this character of the law. In respect of agreements on division of assets and non-capital-sum maintenance, cases show that such agreements are subject to the court's scrutiny even when they are recognised to be valid.[26]

(1) Converting the agreement or incorporating the terms into a court order

(a) Cases incorporating terms of agreement

27 Recent cases reveal that the courts frequently convert the agreement or incorporate the terms into a court order even when, on the face of the agreements, one party appears to receive an unequally large proportion of the assets.

23 *Supra* n 11 ("*Wee Ah Lian*").
24 *Ibid*, at 698, [40].
25 *Supra* n 14.
26 See *Wee Ah Lian*, *supra* n 11, and *Khoo Meng Huat v Chin Seah Ha*, *supra* n 11.

28 In *Wee Ah Lian*,[27] the Court of Appeal found that the parties' agreement, which appeared on its face to be very generous to the wife, were not inconsistent with the principles in s 112. It found that the husband had failed to make full disclosure of his assets. The terms of the agreement were incorporated into the court order.

29 In *Tan Siew Eng v Ng Meng Hin*,[28] 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 wife's lawyers suggested some new terms of settlement, without refuting the alleged repudiation. The wife changed lawyers and the new lawyers alleged that the wife never had the intention to repudiate the settlement which she now sought to be enforced.

30 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. The husband's lawyers argued that the wife would obtain 94.4% of the assets under the settlement. The court did not find this argument of significance as it found that the husband did not fully disclose all his assets. The learned judge held:[29]

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

27 *Supra* n 11.
28 [2003] 3 SLR 474 ("*Tan Siew Eng*").
29 *Ibid*, at [42]–[43].

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

31 *Tan Siew Eng* demonstrates that when a court aims to achieve a just and equitable division of matrimonial assets, it gives much weight to the agreement worked out by the parties. Although the agreement in this case had been repudiated, it still gave the best indication of what was a just and equitable division. The focus is on reaching what is a fair division rather than on applying the technical rules of contract law. Such an agreement is particularly valuable when there is a lack of full disclosure of the assets which makes the task of division tremendously difficult for the court. The court's concern is whether the parties had entered into the agreement voluntarily, with the knowledge and understanding of what they were agreeing to, without the presence of duress, undue influence or unequal bargaining positions. If they had, the agreement concluded after extensive negotiations may reflect what is closest to an acceptable, just and equitable resolution.

32 Similarly in *Lee Min Jai v Chua Cheow Koon*,[30] the wife sought to rescind part of a consent order in the decree nisi which stated that she would transfer her share to all title, rights and interest in the matrimonial flat entirely to her husband upon full payment of $50,000 by the husband. She argued that she had consented to the order without realising that she was a joint owner of the flat and therefore possibly entitled to at least half the value of the flat. The High Court dismissed her appeal and held that s 112:[31]

> ... should not be construed as an invitation to revise the terms of a settlement merely so that they appear more equitable or will be, in fact, more equitable in the objective opinion of the court. 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.

33 It has been said earlier that giving effect to the spouses' agreement as consent orders respects the private interests of the spouses

30 [2005] 1 SLR 548.
31 *Ibid*, at [5].

while maintaining the public interest of ensuring that all such agreements come under the court's scrutiny. Another purpose of this approach seems to be to reduce the length and expense of the legal process.[32] Thorpe LJ said in *Xydhias v Xhydhias*:[33]

> [T]he purpose of negotiation is not finally to determine the liability (that can only be done by the court) but to reduce the length and expense of the process by which the court carries out its function.

34 The court as the final arbiter still requires a full investigation of facts before it can reach a just and equitable division of assets. Negotiations facilitate discovery of facts and an agreement reached after extensive negotiations is likely to reflect a just and equitable resolution. The parties' negotiations are efficient processes which aid the court in reaching the just and equitable division envisaged by the Women's Charter.

(b) Cases which have not incorporated terms of agreement

35 When will the court refuse to grant a consent order based on the parties' agreement? The English case of *Pounds v Pounds*[34] advises that the law is to:[35]

> … confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties' financial circumstances as disclosed to it in summary form, without descent into the valley of detail.

36 The large number of consent orders made in the Family Court attests to the same approach taken by our courts. Many consent orders are made on agreements reached in the course of legal proceedings, usually with the assistance of mediation. Every now and then, one might imagine a draft consent order submitted to the court which gives the court cause to require further explanation as to how the arrangements are fair. In such cases, the parties are given the opportunity to make amendments to the agreement, which, if acceptable, will be converted into a consent order.

37 However, there may be agreements made prior to divorce proceedings which are out of line with the scheme of the statutory

32 See *supra* n 15, and Cretney, *supra* n 14.
33 *Supra* n 14, at 692.
34 [1994] 1 FLR 775.
35 *Ibid*, at 780.

provisions. In *Khoo Meng Huat v Chin Seah Ha*,[36] the wife sought division in the proportion stated in the separation deed, whereby she would be entitled to 75% of the proceeds of sale of their flat. The High Court did not give effect to the separation deed and made an order of equal division, which was the proportion sought by the husband. The High Court held that:[37]

> There was no doubt that the husband knew the nature and purport of the separation deed. But I accepted his evidence that when he signed it he was in an emotionally distraught state and he gave in to the demands of the wife to get out of a marriage that had failed within a year. Besides, the terms of settlement were not consistent with the provisions of [ss 112(1) and 112(2)] the Charter. … I took into consideration the short duration of the marriage, the lack of issue born of the marriage and the higher financial contribution made by the husband toward the acquisition of the flat. I also took into account the fact that the wife had sole occupation of the flat since May 1992.

38 Despite a finding that the agreement was validly made in accordance with contract principles and that the husband was aware of the nature and effect of the agreement, the court found that the terms violated the principles in s 112 of the Charter. The court's order of division prevailed and the agreement was disregarded.

39 In the more recent case of *Tham Lai Hoong v Fong Weng Sun Peter Vincent*,[38] the court also did not apply the terms of a previously executed agreement. In this case, the spouses were married for 21 years before they divorced. The wife was a homemaker, while the husband worked as a training director. Nearly six years before the hearing, the parties executed a settlement agreement whereby the husband agreed to pay the wife monthly maintenance of $1,500 for the sons and herself, and the wife agreed to receive 25% of the matrimonial assets. The High Court focused on the direct and indirect contributions of the spouses and awarded 40% of the assets to the wife and 60% to the husband. The court also affirmed the lower court's award of $2,000 per month for the wife. The court said that the agreement was "a factor to be taken into account"[39] but did not elaborate on what weight this factor was given or how it affected the final proportions. The fact that the husband had care

36 *Supra* n 11.
37 *Ibid*, at [9].
38 [2002] 4 SLR 464 ("*Tham Lai Hoong*").
39 *Ibid*, at [16].

and control of the children and was solely maintaining them may also have been factors affecting the award.

40 In both these cases, the terms of division agreed by the spouses were overridden by the court's order of division. However, in *Tham Lai Hoong*, the court stated that the agreement was a factor taken into account in reaching the final order, reflecting a little of the more modern view of giving greater regard to the spouses' autonomy.

(2) Agreement is a factor considered by the court when exercising its powers of division

41 Another possible way to deal with post-nuptial agreements is to consider them as one of the factors in s 112(2) of the Women's Charter when determining the proportions of division. Section 112(2) provides:

> It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters:
>
> …
>
> (*e*) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;
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> …

42 Using this process yields a number of possible outcomes. Having regard to the spouses' agreement does not necessarily lead to the terms of the agreement being adopted. In *Tham Lai Hoong*[40] discussed above, the court took the agreement into account but did not incorporate the terms into the final court order. On the other hand, treating an agreement as a factor could lead to the terms of the agreement being incorporated into the court order. This achieves the same effect as the technique suggested in *Xydhias v Xydhias*.[41] The court in both the cases of *Wee Ah Lian*[42] and *Tan Siew Eng*[43] had full regard to the agreement reached by spouses when it exercised the powers to divide the matrimonial assets. In both cases, the court incorporated the terms of the agreement into the court order. It is interesting that both cases involved agreements which seemed generous to the wife and involved a finding that the husband had failed to make

40 *Supra* n 38.
41 *Supra* n 14.
42 *Supra* n 11.
43 *Supra* n 28.

full disclosure of the assets. Further, in *Tan Siew Eng*, even a repudiated agreement was given effect. Thus any agreement, whether or not enforceable under normal contractual principles, could be a relevant factor in the court's exercise of powers under s 112. The weight given to such an agreement depends on, amongst other things, the circumstances surrounding the making of the agreement, whether the parties had made full disclosure of assets and how recently it was made.

(3) Court upholds agreement and declines to use section 112 powers

43 Another approach to giving effect to a spouses' post-nuptial agreement is by permitting it to be enforced as a contract and declining to make any orders under s 112 in respect of those assets contemplated in the agreement.

44 In *Wong Kam Fong Anne v Ang Ann Liang,*[44] the parties had made a settlement agreement some years before the divorce proceedings. The agreement stated that the wife was the legal and beneficial owner of the matrimonial home. The court gave effect to the agreement and declined to use its powers under s 112. The High Court held:[45]

> Spouses may … invite the court not to exercise its powers under s [112], as it is not mandatory that those powers must be exercised. The court may therefore decline to do so where a valid reason is given, and one valid reason would be that the parties have made a fair settlement in relation to the division of their respective assets.
>
> The courts have no interest in encouraging matrimonial litigation except where it is necessary to prevent oppression by one spouse against another …. Indeed, the 'clean break' principle means that the law encourages spouses to avoid bitterness after family break-down and to settle their money and property problems … A settlement agreement can of course be attacked in the same way as any other contract … However, if the agreement is valid as a contract, and if circumstances have not changed so drastically since the agreement was made that it would not be fair to give effect to that agreement, then the court may, in its discretion, respect the parties' wishes and decline to exercise its powers under s [112].

45 This approach may suggest that the private interests of the spouses to contract freely could play a more important role than the public interests of ensuring that the statutory principles in the Women's Charter are not violated. For this reason, the stance in *Wong Kam Fong*

44 [1993] 2 SLR 192 ("*Wong Kam Fong Anne*").
45 *Ibid,* at 200 and 201, [31] and [34].

Anne may no longer be indicative of the modern position. The better way of giving effect to the spouses' agreement is to make it into a consent order, as suggested earlier. In *Wong Kam Fong Anne*'s approach, the legal effect of the agreement is derived from the contract and it is enforced as an ordinary contract. Where an agreement is converted into a consent order, the legal effect is derived from the court order and a breach of the order may lead to proceedings for contempt of court.

46 An earlier English case had also used an approach which gave substantial recognition to the agreement as a contract. In *Edgar v Edgar*,[46] even though the wife might have received a much larger award than what she had agreed to accept in the settlement contract, the agreement was upheld. However, the court went further and suggested that it could intervene under special circumstances:[47]

> [F]ormal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement.

47 In that case, the wife had not established inequality of bargaining positions and even if this was present, the husband had not exploited his position, thus the court did not intervene. *Edgar* introduces some uncertainty into this area of law. An agreement which may be valid according to contract principles may still be set aside by the court after further enquiry into the justice of the case. If there are no compelling reasons to set it aside, it will be contractually binding on the parties. The decision was criticised in *Pounds v Pounds*:[48]

> The agreement may be held to be binding … only after litigation and may involve … examining the quality of the advice which was given to the party who wishes to resile.

48 It is better that the *Xydhias v Xydhias* position be taken,[49] that is, that no agreement is effective until it is embodied into a court order. The terms will then derive their legal effect from the court order and not from the agreement. This technique suggested in the English case of *Xydhias v Xydhias* and the local cases of *Wee Ah Lian*[50] and *Tan Siew Eng*[51] are

46 [1980] 1 WLR 1410 ("*Edgar*").
47 *Per* Ormrod LJ, *ibid*, at 1417.
48 *Supra* n 33, at 791.
49 See *supra* n 14 and para 13 of the main text above.
50 *Supra* n 11.
51 *Supra* n 28.

superior to that in *Edgar* and *Wong Kam Fong Anne*.[52] Section 116 of the Charter on maintenance settlement employs the same technique.

(4) Are the approaches fundamentally similar?

49 While these approaches discussed above appear to "overlap" in that the same results may be reached by the different approaches, there are subtle conceptual differences between them. In the first approach, the court focuses on the agreement and if a valid agreement has been reached in accordance with contract principles (for example, there is no duress or undue influence), the court is likely to convert it into a consent order. It need not go into details of the parties' specific circumstances or contributions nor consider all the factors in s 112(2). The agreement is not treated as merely one of the many factors in s 112(2) but takes the position of being the dominant issue. Conceptually, this approach accords more regard to the spouses' autonomy than the second approach which treats the agreement as one of the factors in s 112(2). The second approach can more easily lead to outcomes similar to *Tham Lai Hoong*[53] where the agreement is taken into account but the terms are not incorporated into the final order. It gives less regard to the importance of the spouses' autonomy over their financial arrangements. The third approach, on the other hand, gives far too much regard to the parties' autonomy. This has already been pointed out above.

50 It is noted that these approaches are more relevant to agreements made in contemplation of divorce. Where financial agreements are made in the course of divorce proceedings, the court routinely converts them into consent orders, supporting the exhortation in s 50 of the Charter which encourages harmonious resolution of family disputes without the use of court adjudication.

IV. Pre-nuptial agreements

51 Agreements providing for ancillary matters such as custody of children, maintenance and division of assets can be both pre-nuptial or post-nuptial agreements. A pre-nuptial agreement which contemplates a normal marriage but at the same time provides for the spouses' financial obligations in the unfortunate event of a divorce may not necessarily be contrary to public policy. The spouses intend to be fully married and they

52 *Supra* n 44.
53 *Supra* n 38.

have gone further to provide for a possible but not expected future event of breakdown. They make these provisions during a time when they are still rational and not clouded by the bitterness and trauma brought on by a deteriorating relationship. The older English view is that pre-nuptial agreements are of "very limited significance".[54] But the more recent view in England shows a greater willingness to consider them of relevance.[55]

52 Suppose a couple made such a pre-nuptial agreement, entered into marriage and lived together as husband wife, should their pre-nuptial agreement be disregarded if indeed they wished to divorce three years into the marriage? An agreement made a few years prior to divorce is a fairly recent agreement which could indicate the fairest way of dealing with the spouses' financial issues. The focus of the court may no longer be whether the agreement is a pre-nuptial or post-nuptial agreement, but whether the agreement is sufficiently recent to reflect the current circumstances of the parties.

53 The earlier discussion on the modern approach to the treatment of post-nuptial agreements is equally relevant here. A significant difference between a pre-nuptial and a post-nuptial agreement is that the latter is more likely to represent the current circumstances whereas the former may have been based on outdated conditions or based on expected events which did not materialise. In this sense, a pre-nuptial agreement may be given less regard or may even be totally disregarded for the reason that it may not represent what is a just and equitable arrangement under current circumstances. But it need not be held to be contrary to public policy at its inception. The court should be able to have regard to the agreement and exercise its discretion in giving it substantial or little weight. The court may also be more alert to the possibility of duress in pre-nuptial contracts, such as in cases where a spouse signs a pre-nuptial contract a few days before the wedding after being threatened with cancellation of the wedding.[56] If satisfied that there are no vitiating factors to the pre-nuptial contract, the court is likely to find the terms useful if they still reflect current circumstances.

54 *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 at 66.

55 See cases in n 2, *supra*. For the US position, see Hedieh Nasheri, "Prenuptial Agreements in the United States: A Need for Closer Control?" (1998) 12 IJLPF 307.

56 Nasheri, *ibid*, at 315.

V. Conclusion

54 The traditional Asian tradition has been said to be one that seeks to persuade and not to oblige.[57] When society is educated and each person knows the moral and social rules of conduct, there is little need to resort to formal laws to govern every issue. Social harmony comes from society itself, and the Asian legal tradition is to have informal laws or custom rather than formal laws which seek to coerce certain behaviour. Each family, if persuaded of its role in society and performs it, enables society to function in a normal way. Thus when formal laws are resorted to, the family "loses face".

55 While this may have been the case in the earlier days, it may not be accurate to say that Singaporeans are not litigious today. However, the move to encourage harmonious resolution through mediation instead of adjudication is, in a way, a return to the traditional ways in which the Asian culture is rooted.

56 The experience of the Family Court in Singapore is that parties often look to a mediator of authority to give them some guidance on what they can expect.[58] Parties feel more secure when a judge mediator has endorsed their terms as reasonable. Once a judge mediator records the simple terms of their agreement, they are fairly assured that the arrangement is a reasonable one.

57 Culture affects negotiating styles. Salacuse has found that:[59]

> Cultural factors may also influence the form of the written agreement that parties try to make. Generally, Americans prefer very detailed contracts that attempt to anticipate all possible circumstances and eventualities, no matter how unlikely. Why? Because the "deal" is the contract itself, and one must refer to the contract to handle new situations that may arise in the future. Other cultures, such as the Chinese, prefer a contract in the form of general principles rather than detailed rules. Why? Because, it is claimed, the essence of the deal is the relationship between the parties. If unexpected circumstances arise, the parties should look to their relationship, not the details of the contract, to solve the problem.

57 Patrick Glen, *Legal Traditions of the World* (Oxford University Press, 2000) at ch 9, pp 279–317.

58 DSL Ong, "The Singapore Family Court: Family Law in Practice" (1999) 13 IJLPF 328 at 346.

59 Jeswald W Salacuse, "Ten Ways That Culture Affects Negotiating Style: Some Survey Results" (1998) 14 Negotiation Journal 221 at 232.

58 Another factor that affects how some Singaporean families negotiate in family matters arises from the culture of three generations living together or having very close ties to one another. As a result, those supporting the spouses through their difficult period of marital crisis, such as the spouses' parents and relatives, may also be consulted on the terms of settlement. It is not uncommon for parties to agree to terms during mediation which are subsequently revoked after discussions with relatives. On the one hand, the support and advice offered to a spouse undergoing divorce helps ensure that the spouse is not taken advantage of and has the courage to seek a settlement that is fair to himself or herself. On the other, advice from interfering third parties can impede an efficient and fair settlement. It is sensible that agreements reached in mediation are not treated as binding until the court embodies them into court orders.

59 With the policy of encouraging the harmonious resolution of family disputes through mediation or private negotiations, the law must move towards greater recognition of agreements made by spouses. The difficulty in this area of law arises because of the tension between the need to accord spouses with autonomy and the public interest in ensuring that fundamental family obligations are fulfilled. Requiring the court to approve agreements without too much scrutiny and intervention into the terms and circumstances serves both interests.