Ryan v Berger
[2000] SGHC 236

Case Number : Div P 2854/1997

Decision Date : 17 November 2000

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Luna Yap (Luna Yap & Co) for the petitioner/husband; Ann Tan and Lim Choi Ming (Ann Tan & Associates) for the respondent/wife

Parties : Ryan — Berger

Family Law – Matrimonial assets – Division – Just and equitable division – Whether equal division just and equitable – Whether certain assets belonged to pool of matrimonial assets to be divided

Family Law – Maintenance – Whether wife entitled to maintenance – Award of lump sum maintenance

Family Law – Custody – Security for return of child from outside of jurisdiction

: This appeal covered the whole range of the ancillary orders made by the district judge in the Family Court. In this judgment, I deal only with the appeals against the orders on the division of the matrimonial assets and maintenance. In this regard, the petitioner-husband lodged an appeal against almost all the orders made by the judge whilst the respondent-wife lodged a cross-appeal in respect of two of the findings below.

Orders below

The judge found that the pool of matrimonial assets comprised the following:

1	4 Keng Chin Road [num]07-01 Centuryville	$2,450,000
2	Centrepoint [num]05-61	$600,000
3	Tanglin Park [num]06-04	$2,100,000 (subject to mortgage of $882,000, net value is $1,120,200)
4	410 South Barrington Ave [num]205 Brentwood LA California (in respondent`s sole name)	$510,000 (US$300,000)
5	Maserati car (in respondent`s name)	$55,000
6	Exploration PNG (S) Pte Ltd	500,000 shares (value not ascertained)
7	Exploration PNG Pty Ltd	Value unknown
8	Pratt Ryan Oilfields	Value unknown
9	Heli-Hovell Pte	Value unknown
10	Petitioner`s CPF moneys	$38,000
11	OCBC Joint Bank account	$1,287.85

***Description* Value** The judge awarded each of the parties 50% of the value of each of the above assets. She further ordered that the wife would be entitled to reside in the Centuryville flat with the child subject to her paying all its outgoings and that she would be given the first option to purchase the husband`s 50% share in this asset on the basis of its then current valuation of $2,450,000 subject to her paying the husband his 50% share and bearing the cost of the transfer. This option was to be exercised within three months and if it lapsed the husband would have a similar option for a similar period.

In regard to the other two immovable properties located in Singapore, the parties were to agree on the sale or disposal of their respective equal interests in the properties either to one another or to third parties failing which there would be liberty to apply for consequential orders.

The wife was to pay the husband the sum of US$150,000 being his share in the property at Brentwood, California and a further sum of $27,500 being his half share in the Maserati car.

The husband had to pay the wife US$32,000 being her half share of certain damages recovered in legal proceedings and further a sum of $8,504 being his contribution towards the renovation of Centuryville for the child`s benefit. He had also to pay her the sum of $19,000 being half the amount outstanding in his CPF ordinary account.

As maintenance, the husband was to pay the wife the sum of $120,000 as lump sum maintenance calculated on the basis of $2,000 per month for five years.

The appeals

The husband was dissatisfied with the division of the assets on an equal basis between himself and the wife. He also contested the first option given to her to purchase his title and interest in the Centuryville apartment, the former matrimonial home. Further, he was not happy with the lump sum maintenance award nor with the holding that the matrimonial assets excluded the shareholders` loans made by himself and the wife to the family company, Exploration PNG (S) Pte Ltd (`the company`), and the Hawaiian property purchased by the wife in October 1999.

There was one other order he appealed against that did not relate directly to division of assets but that must be dealt with here. When awarding custody to the wife, the judge had given liberty to both parties to take the child out of the jurisdiction of the court during the school holidays subject to compliance with certain security conditions. This was a consent order. The husband was unhappy that the court had ordered the matrimonial assets to be sold as such sale would impinge upon the security provisions that would ensure the child`s return to Singapore. He therefore appealed against the order for sale of the assets.

The wife`s appeal is in respect of the judge`s finding that the property at Brentwood, California, which is held by the wife in her sole name, forms part of the matrimonial assets and is available for division and also in respect of the further finding, that a property known as 14/165 Avenue Road, Mossman, Sydney, Australia, which is held in the sole name of the husband, does not form part of the matrimonial assets.

Background

The parties met in the early 1980s in Papua New Guinea. The husband, an Australian national, had been working there from 1969 as a KIAP (a New Guinea patrol officer) and a magistrate. The wife, on the other hand, went to Papua New Guinea from the United States as an Ethnographic researcher. After the parties` marriage, which took place in Los Angeles, California, in May 1984, they set up home in Papua New Guinea. The next year, the wife joined the husband in the company, Exploration PNG Pty Ltd (`PNG Pty`), which the parties had set up in 1983 together with one Mr Konefabu. At that stage, the parties held 50% of the shares in PNG Pty and Mr Konefabu owned the other 50%. From 1985, both parties were involved in PNG Pty. The husband ran the operations while the wife was the office/administration manager. It was a successful business that laid the foundation of the parties` present wealth.

In about 1990, the parties decided to move their home to Singapore due to the deteriorating law and order situation in Papua New Guinea. In 1991, they set up the company here with joint funds and became the sole and equal shareholders of the company. In 1993 or 1994, the company became the holding company for the parties` shares in PNG Pty and another corporate entity called Pratt Ryan Oilfield Services Pte Ltd. There are three directors in the company, namely, the parties and a Singaporean individual appointed for the purpose of complying with statutory requirements. The main activity of the company is to provide support facilities and consulting services to oil companies and other types of resource development companies in Papua New Guinea and South East Asia.

The parties` only child was born at the end of 1990. From about 1991 onwards, the wife ceased to work in PNG Pty though the husband continued to manage that company. The wife remained in Singapore with their son whilst the husband travelled regularly on the company`s business and spent a great deal of time in Papua New Guinea. From 1996, the wife was employed in the company as a human relations and cross-cultural consultant. As managing director, the husband was paid $4,800 a month while the wife received a salary of $4,000 per month.

In November 1991, the wife and a friend set up a company called Designer Properties Pte Ltd. The wife also pursued a training programme on real property law in 1993. This company purchased and sold one or two properties before it was wound up, voluntarily, in 1996.

The parties acquired several immovable properties in Singapore over the years. Some were purchased in joint names and others in the name of the company. They also sold properties often at a profit.

These proceedings were triggered when the wife discovered in 1997 that the husband was having an affair with the maid. He left the matrimonial home and shortly thereafter, in September 1997, filed a petition for divorce based on the unreasonable behaviour of the wife. The wife filed an answer and cross-petition based on the husband`s adultery and the husband subsequently withdrew his divorce petition. The divorce proceeded on the wife`s amended cross-petition. The decree nisi was granted in August 1998 on the basis of the husband`s adultery.

Issues : (1) ***Was it correct to divide the assets on a 50-50 basis?***

(i) The judge`s reasoning

In her grounds, the judge noted that it was common ground that the parties were not just marriage partners but were partners in business as well. Their partnership in PNG Pty had generated considerable wealth for both of them such that when they decided to set up business in Singapore, they were able to contribute jointly a sum of $3.6m to the company. The judge noted also that the husband`s counsel had conceded that the wife was significantly involved in the business of PNG Pty up to 1990 but had argued that her contribution thereafter was minimal whereas it was the

husband`s continued involvement in the PNG Pty business that generated the revenue for the purchase of the properties in Singapore. The judge also noted the submission by counsel for the wife that she had actively participated in the buying and selling of properties in Singapore and had taken a course to improve her knowledge of real estate in Singapore. She had made lucrative property investments, the company`s real estate acquisitions being largely due to her efforts though she had consulted the husband. The wife had also had the care of the child and all domestic matters while the husband was away from Singapore for long periods of time.

In coming to her conclusion, the judge cited the dictum of the Court of Appeal of **Ng Hwee Keng v Chia Soon Hin William** [1995] 2 SLR 231 that the Court had to adopt a broad brush approach after giving serious consideration to the factors laid down in s 106(4) of the Women`s Charter (Cap 353) (`the Charter`) and consider what would be a just and equitable division between the parties. She then observed that this dictum was equally applicable to the present s 112 of the Charter and paraphrased the judgment of Warren Khoo J in **Soh Chan Soon v Tan Choon Yock** (Unreported) to the effect that in dividing matrimonial assets, it is not particularly helpful to try and ascertain the exact amount of money each party contributed but would be closer to reality to use as a starting point the assumption that both parties have contributed jointly and equally throughout the marriage to the acquisition and growth in the family home.

The judge concluded as follows:

> *Taking into account the length of the marriage which was 15 years up to the decree nisi, the fact that parties were equally involved in the family business until the child was born, the different role played by each when the Singapore company was set up and the services provided by them to the company, it cannot be disputed that the building up of the family assets in this case was a joint enterprise. The parties had contributed jointly and equally from the start of the marriage and although the wife might have played a reduced role in the business of [PNG Pty] after the child was born, she was instrumental in the property investments in Singapore which had reaped them joint benefits. Credit should also be given to her contribution as mother in taking care of the child with the husband being away on field work for substantial periods of time.*

(ii) The husband`s submissions

When it came to the point, the husband did not contest the equal division of all of the matrimonial assets. He concentrated on the equal division of the net tangible value of the shares in the company, the division of his CPF moneys and the division of the Tanglin Park property.

Dealing first with the company, counsel for the husband submitted that the judge had not taken into account the following facts:

(a) the sole efforts of the husband in managing the entire business operations of the company from 1991 to 1999;

(b) the minimal contributions by the wife to the company demonstrated by:

(i) the failure of the wife to assist in the company which meant that an office manager had to be employed until 1995 and thereafter a secretary until 1997;

(ii) the wife`s involvement in Designer Properties Pte Ltd between November 1991 and July 1996;

(iii) the wife`s actual employment in the company only beginning in 1996 after Design Properties Pte Ltd was wound up and her ceasing to work for it a year later, in September 1997, when the marriage broke up; and

(iv) the occasions when the wife travelled socially, in particular, the two-month long trip to China from July to 1 September 1997.

Secondly, it was submitted that in ordering an equal division of the company, the judge erred in law by equating the principle of `just and equitable` division in s 112 to equality of division which was contained in the previous s 106(2). Also the judge had erred by giving the wife more credit for the property investments than the facts showed. There was no evidence that these investments had profited the company as the purchase prices of the properties were not compared with their valuations.

As regards Tanglin Park property, the submission was that the judge had, in dividing this equally, not taken into account the fact that it had been acquired in August 1994 as an investment property for $1,730,000. The husband had repaid the mortgage loan of $1m from his CPF account and from the property`s rental proceeds. The wife had not made any financial or non-financial contribution to this property. The judge had erred in not giving the husband credit for his sole financing of the property without the assistance of the wife, and in this respect, counsel relied on the case of **Wang Shi Huah Karen v Wong King Cheung Kevin** [1992] 2 SLR 1025 where Michael Hwang JC opined that where the extent of the contributions made by the parties can be identified with reasonable certainty, the court should take the proportions of such contributions as the primary factor determining the division of the assets. Counsel submitted that these principles also applied to the division of the husband`s CPF moneys.

(iii) Discussion and conclusion

The judge took a holistic view of the matrimonial assets. She applied the same rule of division to all of them without distinction. The husband, however, now wishes the court to distinguish between assets. Whilst he is willing to accept the 50-50 division of the properties at Centuryville, Centrepoint and Brentwood, and the Maserati car, he wishes to be awarded a bigger share of the company, of the Tanglin Park property and of his CPF funds. In the court below, counsel for the husband conceded that the wife should get at least 30% though she argued that the wife`s share should not be much more than that. Here, there was no attempt to state exactly how such a quantification could be justified. The husband`s thrust was simply that since he had been the main person involved in the operations of the company, its growth was due to his efforts and he should be awarded a majority share of it and of the other assets of which he acquired through his own efforts, namely his CPF funds and the Tanglin Park Property.

It appears to me that in the circumstances of this case, the judge was correct in her approach to the division. It was not disputed that the husband and wife were full business partners from the start of their marriage or shortly thereafter. The husband even stated that although the marriage became unhappy very early on, from about 1985, he remained in the marriage because he did not want to jeopardise the business. Whilst this assertion of unhappiness may have been exaggerated (it is difficult to believe that a deeply unhappy man who has been married for only a short time and who has no children will not end a marriage because of his business interests), the statement was telling in relation to the vital role that the wife played in PNG Pty.

Further, the extent of the parties` partnership was shown by the fact that they shared everything: all moneys were put into joint accounts and they allocated equal shares to each of them in the

businesses which they set up together. All the properties (with the exception of the Brentwood property) were either purchased in joint names or in the name of the company which itself was jointly owned. At the time the company was set up, it`s shareholders lent it $3.6m. These moneys came from the joint accounts of the parties and the parties were credited as equal providers of this loan. Whilst the husband contended that the larger share of moneys in the joint account belonged to him, no real proof of this assertion was furnished.

It was apparent that the parties had treated their relationship as both a domestic and a business partnership until the circumstances changed and the wife had to take on a more domestic role when she became a mother. Even then, however, she continued her efforts to contribute towards the maintenance and growth of the family assets by identifying and working on property investments for the benefit of the family. Some of these investments were undertaken by the company (at the date of the hearing below, the company owned some five real properties) while others were purchased in the names of the parties or by the wife`s property investment company. The wife`s position was that all profits as well as losses of her property investments were credited or debited as the case may be to the parties` joint accounts and used to make further investments. It should be noted that up to the time of separation, the wife did not have her own bank account.

The wife gave a very clear account of how she was instrumental in the property investments in Singapore whilst the husband was away managing the PNG Pty business. She gave details of 13 properties that were bought at her behest. Some of these were subsequently sold at her behest and some of these sales were profitable like those involving an apartment in Leonie Hill and a penthouse in Waterside. She also gave details of two other sales where profits had been made and used to purchase a unit in Elizabeth Heights in the name of the company. Whilst the wife claimed to be single-handedly responsible for researching the market and liasing with the housing agents for the purchase of the properties, she also admitted that she had discussed potential purchases with the husband if he was available.

The husband`s stand was that property purchases made by the parties, either in a personal capacity or on behalf of the company, were always joint decisions because they involved large sums of money and he had to ensure that they and the company were able to finance such purchases. He did not want to give the wife much credit for the investments even though he admitted the parties had made a profit of over $100,000 from the purchase and resale of the Waterside penthouse. He ignored the wife`s assertions of the profits made in other transactions.

I concur in the judge`s finding that the property investments were mainly the contribution of the wife to the family`s assets. The husband can only have been involved in a peripheral way given his responsibility for conducting the operations of the company and its subsidiaries and the travel that this involved. The husband was frequently away from Singapore and would not have been in touch with the local property market in the same way as the wife. Nor would he have had the time to conduct all the nitty-gritty investigations and negotiations that are involved in the sale or purchase of a property though I accept that he would have had a part in the financial arrangements.

In relation to the Tanglin Park property, the purchase price was $1,730,000 and $1m of this price was obtained by way of a mortgage loan. Part of the balance, some $40,000, came from the husband`s CPF account and the rest of the downpayment (some $690,000) was from the parties` joint account, as conceded by the husband`s counsel. The mortgage instalments of $8,500 per month were paid partly from the rental of the property and the rental of another property at Centrepoint and partly, to the extent of $1,700 a month, from the husband`s CPF funds. In so far as the sources of the funds for the purchase and the mortgage repayment were the joint account and the rentals of jointly owned properties, the husband and the wife must be treated as contributing equally to such funds since

there is no evidence to support a different apportionment of those sources between the two. When the husband`s contribution from his CPF account is added to the other sources of funds, the husband`s contribution would, no doubt, be greater than that of the wife. However, no one made an exact calculation of how much the difference was. In my view that difference cannot be very great since the husband was only paying about 20% of the mortgage loan from his sole funds.

Having considered the submissions and the facts, I concur with the judge`s conclusion that in this case the just and equitable division of the matrimonial assets was an equal one. I do not think that the judge did equate a just and equitable division with an equal division. I agree with the submission that the two are not the same because just and equitable has to be determined on the basis of the facts before the Court in any proceeding and whilst in one situation it might be just and equitable to divide assets equally between the parties, in another situation such a decision might very well wreak injustice.

As counsel for the wife submitted, the husband had acknowledged that during the years of the marriage he had trusted the wife totally and allowed her free use of the joint account without any need to account to him for her spending. He had also accepted her non-financial contribution as wife and mother and primary caregiver. In submissions made on his behalf, the husband had acknowledged that the wife was highly qualified and had been a working wife and mother throughout the marriage.

In this particular case, therefore, on the basis of the factors cited by the judge, viz the length of the marriage, the parties` joint involvement in the family business up to 1990, the wife`s contributions in the domestic sphere and as a mother thereafter and the wife`s efforts to maintain or improve the value of the family`s assets by property investment vis-Ã -vis the husband`s role in running the main income producing asset ie the company after 1990, it was just and it was equitable to order an equal division of all matrimonial assets. I therefore dismiss the husband`s appeal in relation to the equal division of the company, Tanglin Park and his CPF funds.

Should the wife have been given the first option to purchase the Centuryville apartment?

The Centuryville apartment had been occupied by the parties as their matrimonial home for most of their years in Singapore. It was the home from which the husband moved after the wife found out about his affair in September 1997. The wife and the child continued to reside there. The judge decided that as the wife had been awarded custody, care and control of the child, she should be given the option to purchase the husband`s half share in this property at the current market valuation. The husband did not contest the equal division of this property. He was not happy, however, that the wife was given the first option to buy it on the basis of paying him his 50% share as he considered she should pay a premium for the property.

On appeal, the husband submitted that the judge did not take or fail to give adequate consideration to the following facts:

(a) that the wife had represented to the court on 15 December 1999 that she intended to leave Singapore upon the expiry of her social visit pass;

(b) that the apartment had redevelopment potential and that both the husband and wife had expressed an interest in buying out the other`s share;

(c) that the valuer appointed by the parties jointly had valued the apartment as being worth $3.03m if it was sold on an en-bloc basis although the desktop valuation was $2.45m;

(d) that the owners of the apartments at the Centuryville Condominium had rejected an indicative collective sale price of $39.39m because they wanted more;

(e) if the value of the apartment was taken at $2.45m, the wife could be unjustly enriched by being placed in a position to reap potential gains from any redevelopment which gains the husband would be excluded from.

Counsel for the husband cited **Yeo Gim Tong Michael v Tianzon** [1996] 2 SLR 1 where the Court of Appeal opined that in a dispute between two co-owners of land, where both parties want the land, there should be a premium attached to the property and whoever gets the property should pay a premium for it. The court went on to state that the position should be no different in a dispute over a matrimonial home between the husband and wife where both of them wanted the property for his or her own occupation subject to the overriding considerations laid down in the Charter in relation to the division of matrimonial assets. Building on this, the husband submitted that the basis for giving the wife the first option here was not valid since she had indicated her intention of leaving Singapore and that the correct order to make would be to let either party buy the other out at a premium fixed by the court or to let them each bid the other out.

The wife argued that the husband had ignored the reality of the situation which was that there was little chance that there would be an en-bloc sale of Centuryville since residents holding 58% of the total share value of the condominium (including the parties) had voted against the proposed sale. The wife also submitted that she now had an employment pass as an employee of the company and that her situation was fluid. She did not know what would happen in the future and where she would be. Further, the court below had been concerned with the needs of the minor child and these were better dealt with by providing him with his familiar home surroundings rather than forcing him to adjust to new circumstances.

It appears to me that this is a case in which the principle relating to payment of premium should be adopted. Counsel for the wife attempted to distinguish the ***Tianzon*** case by pointing out that the matrimonial property there had been acquired by the sole financial efforts of the husband whereas here the property had been acquired by joint efforts. I do not regard that as a distinguishing factor. The Court of Appeal did not advert to the manner of acquisition of the property in ***Tianzon*** when it expressed its view that the advantage which the court gives to a spouse who is awarded the right to stay in a matrimonial home may be taken into consideration in the division of that asset. Neither is it relevant that the wife in ***Tianzon*** had found alternative accommodation and did not require the matrimonial property to provide a roof over her head. In this case, whilst the wife is using the Centuryville apartment as her shelter, she will have enough money from the division of the other assets to buy or rent alternative accommodation and matters can be arranged so that she has sufficient time to do this before having to move out of Centuryville.

What is significant here is that there is a probability that the wife will not stay in Singapore after the ancillary matters are finalised. She expressed an intention of leaving Singapore at an earlier stage and although she might change her mind, it is difficult to see how she would stay here bearing in mind her allegations that she has found it hard to obtain employment due to bad-mouthing by the husband. Further, the wife has already bought property in Hawaii and she does not have very strong ties with this country. She came here to set up a home and business because of her domestic circumstances. The business is now to be wound up and the marriage has been dissolved. There is little reason for her to remain here. In those circumstances, it appears to me to be incorrect to allow her to buy a property which both parties want without reflecting, in some way, the advantage that she would gain from doing so. The advantage in this case is all the more clear in view of the possibility of an increased value from an en-bloc sale. That might not take place this year or next but the residents

have already considered a proposal and may very well vote in favour of another one if it is made at a higher price.

During the course of argument, I informed counsel that parties were agreeable, I might order the wife to sell her share in the matrimonial home to the husband at a 10% premium ie that he would have to pay 10% above the price he would otherwise pay on a 50-50 division (based on a value of $2.45m). Otherwise I indicated that my inclination was to order a sale of the property with the proceeds of sale to be divided between the parties and with the wife having the option to postpone taking steps to sell the property of up a year so that she has time to determine her future course. At the adjourned hearing, counsel for the wife informed me that the wife was not prepared to sell her share to the husband for 10% more but she was still willing to buy it at the original price. The husband, on the other hand, was willing to pay a 10% premium and was agreeable to the flat being kept for another year while they sorted out their affairs.

In the ***Tianzon*** case itself, the trial judge had fixed a premium of 10% to be paid by the spouse purchasing the matrimonial home. The Court of Appeal considered that quantum to be excessive in the circumstances of the case because by adding the 10% to the 40% awarded to the wife, the trial judge had effectively awarded her 50% of the entire value of the assets. As the assets in that case had been acquired by the sole effort of the husband, under the provisions of s 106(4) then in force, the husband had to receive a greater proportion of them and the premium could not be sustained. In the present case, the Centuryville property is only one of the assets and making either party pay an extra 10% for it would not effect a substantial change to the otherwise equal division of the assets.

In the circumstances, I allow the husband`s appeal on this point. I order that either party may purchase the other party`s share in the Centuryville property by paying the other party his or her 50% share in the property plus a 10% premium. The wife shall have the first option of purchasing the property since she has custody and her retaining it would help to maintain the child in his accustomed home. The wife shall notify the husband within six weeks whether she wishes to purchase the property on this basis. If she does not indicate her intention to buy it within the specified period, the husband shall have the option to purchase it, such option to be exercised within six weeks thereafter but the actual transfer shall take place at the wife`s convenience but no later than nine months from the date of the exercise of the option. If neither party wishes to buy the property, it shall be sold in the open market and the proceeds of sale shall be divided equally between them. The property shall be offered for sale in the open market no later than six months after the date when the husband indicates he does not wish to exercise his option.

Were the directors` loans to the company and the Hawaiian property matrimonial assets?

The judge considered the issue of the loans made by the parties to the company as directors of the company in connection with the issue of the division of the wife`s property in Hawaii. The husband had argued that this property should be in the pool for division. The wife`s stand was that this property had been bought in October 1999 with part of the money that she had received as repayment of her loans to the company.

The judge reasoned that as equal directors and shareholders, the parties had agreed on the return of the loans, and that the loans should be repaid to them in equal shares. The judge recognised that whatever property each party acquired with the loan moneys would become a matrimonial asset as long as the acquisition was made before the grant of the decree absolute. Such matrimonial asset would be divisible and the court would have to determine with regard to the factors listed in s 112(2) the proportionate entitlement of the parties to such asset. In the judge`s view, such an exercise would be tantamount to the parties` agreement as between themselves and the company and in the

circumstances before her, she did not think it served any useful purpose to readjust what the husband and wife as equal business partners had already decided vis-Ã -vis the company: namely to be paid equally the capital they had jointly invested. Hence she did not include these loans nor the assets acquired with their proceeds in the pool of matrimonial assets.

Counsel for the husband made copious submissions as to why the judge had come to the wrong conclusion. Among these was a contention that the judge had disregarded the parties` agreement that these loans should be divided as a matrimonial asset. Also she had failed to take into account the fact that since the parties had equal voting power in the company, there was no other agreement that could have been reached between them except for payment to them in equal shares. They had agreed on the repayment because they needed money to fund their legal fees incurred in the divorce.

Whilst the above criticisms have theoretical force, in practice, once the judge had decided that all matrimonial assets should be divided equally between the parties it made no difference whether she included the company loans as matrimonial assets or not. I agree with counsel for the husband that these loans should be regarded as matrimonial assets. That does not take the matter further, however, since I have also agreed with the judge`s assessment that the correct and equitable division in this case is an equal one. In any case therefore, the loans would be divided between the parties in equal shares. Once division took place, neither party would have an interest in the other party`s share of the divided assets. On this basis, if the wife had waited until after the hearing of the ancillary matters to buy the Hawaiian property, the husband would not have been able to claim a share in it. The fact that she was a little precipitate in her acquisition does not change the position since there has been no change in the proportion of assets awarded to her. I concur with the judge`s finding that the Hawaiian property was funded from the proceeds of the loan and from a mortgage taken by the wife. It was not acquired with other funds that would be considered matrimonial assets.

I therefore dismiss the husband`s appeal on these issues.

Is the Brentwood property a matrimonial asset?

The Brentwood property is registered in the wife`s name alone. It was purchased with joint funds. The wife, however, asserted that it belonged to her alone as the husband had purchased it as a gift for her to atone for an extramarital affair which she had discovered in December 1990. The judge made the following finding in regard to the Brentwood property:

> *The evidence adduced did not convince me that the [Brentwood] property was a gift to the wife. The date of the acquisition of this property was too long after the discovery of the husband`s affair to support her claim that it was to hers solely as an incentive to remain in the marriage. The rental income from the property was deposited in the parties` joint account at all material times although she alone was liable for taxes. This fact was inconsistent with her position that the husband was not to have any interest in the property. She could very easily have arranged at the point when the property was conveyed to her, to have the rental proceeds deposited in her own bank account. In fact she had very quickly after the husband`s departure in September 1997 instructed her agent to deposit the rental payments to another account held with her sister. It seemed to me more probable that the reason for the wife`s sole ownership of this property was for the husband to be free from a tax obligation in the USA. The [Brentwood] property must therefore be included in the pool of matrimonial assets.*

The wife appealed against this finding.

The wife submitted that there were undisputed facts that showed that the property was hers alone. First, the husband had signed a document entitled `Escrow instructions` whereby he had instructed an escrow holder to prepare a grant deed in favour of the wife in respect of the property in which deed was to recite that the husband`s express intent, as spouse of the wife, was to convey all right, title and interest that he had in the Brentwood property to the wife as her sole and separate property. Secondly, the grant deed was in fact executed and stated that the property was the sole and separate property of the wife. Thirdly, the husband never visited the property and it was the wife who dealt with all matters relating to it, and received all correspondence in respect of it. Fourthly, although the rental proceeds were put into a joint account, that was because the wife did not have any sole account and the proceeds themselves were utilised solely by the wife for maintaining the property, to pay expenses relating to her mother and for her spending money in the United States.

Counsel further submitted that the grant deed and the escrow instructions were clear evidence that the husband at the time of the purchase of the property intended it to be the wife`s wholly and without reservation. She submitted that an express written document voluntarily entered into by the husband without qualification had to constitute, at the least, prima facie evidence of the parties` intention at the time of the acquisition of the property.

Counsel noted that the judge had considered the time lapse between the wife`s discovery of the husband`s affair in December 1990 and the purchase of the property in October 1993 was too long to support the wife`s submission of the property being bought to persuade her to remain in the marriage. Counsel pointed out that the time gap could be explained by the fact that the wife had given birth to the son in December 1990 and had to look after a new born child. Further, in 1991, she was rushing a large and important project for the company. Then in 1992 she had intended to buy an apartment in New York and it was because this purchase fell through that the wife had to restart her search for a property so that the transaction was not completed until 1993.

The husband`s case was that the property had been put into the sole name of the wife so that he would not become liable for income tax in the United States. He asserted that the property had been bought as an investment and it made sense from a tax planning point of view for only one party to be liable to US tax. The wife submitted that parties were paying world-wide taxes on all their properties and the husband`s contention of a tax advantage being gained by him from the Brentwood property being in the wife`s name would be a drop in the ocean of their consolidated assets and could not have been the reason for the property being granted to the wife. Whilst the wife admitted that the parties had sought advice on tax planning in the US, she said that this advice had been sought in relation to their proposed investment in a US company and the tax implications on PNG Pty if they went into business with that US company.

I do not find any flaw in the judge`s reasoning on this point. It was based on the undisputed fact that the funds financing the purchase were joint moneys arising from the parties` business operations in Papua New Guinea and the fact that from inception the parties had dealt jointly with all assets acquired during the course of the marriage. They had not drawn any distinction between his property and her property or his earnings and her earnings. All funds were put into joint accounts and all assets were put in joint names. This pattern continued with the rental of the Brentwood property which was deposited into a joint account when the wife could have, had she chosen to do so, established a sole account in her own name at the time of purchase. The wife`s free use of the funds in this account was not something extraordinary either. Throughout the marriage she had full and free access to moneys in the parties` various joint accounts.

There was also evidence that both parties looked for the property and that both flew to the US to

transact the purchase. If it had been a property intended for the wife alone as an appeasement, it would have made more sense for the husband to tell her how much he was willing to pay and leave it to her to deal completely with the purchase. Instead the husband took an active interest in the acquisition. Further, the parties consulted two US attorneys with respect to tax planning and family trusts, in relation to both business and non-business matters. The husband produced a copy of a fax which he had sent to one of these attorneys at the time of the purchase. In it he gave the attorney details of the many investments which the parties had outside the US and also asked for urgent advice as to in which name the property in Los Angeles which was then being purchased should be registered. That indicated that the name chosen for registration would be chosen on the basis of convenience and benefit to both parties.

The husband`s explanation for the property being put in the wife`s name instead of both names was a reasonable one: as a citizen of the United States she was in any case required to file world-wide tax returns irrespective of where she actually resided whereas he as an Australian had no such liability unless he owned assets in or received income from the United States. The tax explanation also accounts for the format of the grant deed and escrow instructions. It would not have helped the husband`s tax position had he stated that the property was not for the wife solely but for his benefit as well.

I also agree with the judge`s finding that the timing of the purchase of the Brentwood property makes it improbable that this property was intended as an inducement to the wife to stay in the marriage. More than two years had passed since the wife`s discovery of the affair and she had remained in the marriage all that time. Her reasons for not purchasing a property earlier being lack of time and involvement in family and business matters are flimsy given that she would have the court believe that this promise of her own home was the essential condition which brought her back to the marriage. In the event, I dismiss the wife`s appeal on this finding.

(5) Is the Sydney property a matrimonial asset?

The Sydney property was a flat purchased by the husband prior to the marriage in his own name and using his personal funds. The flat was bought in 1980 and during most of the marriage, it was rented out. Even after the tenancy ceased in 1996, the parties did not spend much time in it. The wife stayed in the flat with the husband for a short time on three occasions and only spent one night there by herself. The judge found that the Sydney property was not a matrimonial asset. The wife contests this finding.

The statutory position is clear. By s 112(10) of the Charter, an asset acquired by one party before the marriage is not a matrimonial asset unless it is ordinarily used or enjoyed by both parties or their children for shelter or transportation or for household, educational, recreational, social or aesthetic purposes or has been substantially improved during the marriage by the other party. The wife was not able to satisfy the judge that the Sydney apartment had been ordinarily used or enjoyed by both parties for shelter or for recreational purposes or that she had substantially improved it during the marriage. The evidence that she put forward to try and support these assertions on her part was insubstantial.

The trial judge stated:

> *32 The husband adduced evidence to show that out of their 14 years of marriage, the wife had stayed in the Sydney property no more than 21 days during the period from August 1996 to August 1997, ie when the property*

became vacant up to the time the marriage broke down in September 1997. There had not been substantial improvements to the property during the marriage. After the last tenant left, some painting works were carried out and furniture replaced. The wife was unable to produce any evidence to challenge the husband`s assertions other than some correspondence to show that the estate agent had communicated with both of them concerning the Sydney property and an insurance policy for certain items in the property taken out in the wife`s name.

33 I was unable to accept the wife`s contention that the Sydney property was the family`s holiday home. Her stay there, whether alone or with the husband and child for such a short time in comparison with the length of the marriage could not qualify the property as an asset ordinarily used by the parties for recreational purposes. The wife`s bare assertion that the property had been renovated with her supervision was insufficient to satisfy the second limb of section 112(10) that it had been substantially improved during the marriage. These contributions during her short stay on the property could not be regarded as anything more than de minimis. I therefore ruled that the Sydney property be excluded from the pool of the matrimonial assets.

The wife has not been able to convince me that the above findings were wrong. They appear to me to have been fully justified by the evidence that was before the judge. Accordingly, I dismiss the wife`s appeal on this issue.

Maintenance

The judge decided that the wife should receive maintenance in a lump sum of $120,000 computed at $2,000 per month for five years. This figure was arrived after the judge had taken into account what the wife would receive from her share in the matrimonial assets, the parties` respective earning capacities, their financial needs and the standard of living (high) which they had enjoyed during the marriage.

The husband has challenged this award. He does not think that the wife is entitled to any maintenance at all. His grounds are:

(a) the husband`s only source of income is his salary from the company and this would cease when the company is wound up;

(b) although the husband had established a new company this might not be able to repeat the success of the company since he did not have the support and set up of the Papua New Guinea business and staff;

(c) the wife`s earning capacity as a counsellor is more secure as there was less risk and no requirement for capital investment;

(d) the wife had rental income from the Brentwood property and from her Hawaiian property;

(e) the wife must have been earning an income as a counsellor as letters written by her solicitors said she was busy with counselling work and she had not been frank on such earnings as she had not paid

these into the company;

(f) the wife`s claims that she could not work because the husband had damaged her reputation had not been substantiated and her lifestyle between September 1997 when the parties separated and the hearing in December 1999 had not been affected by the lack of maintenance from the husband thus showing that the wife had other means of support;

(g) the judge had erred in that while she provided for the future continuance of the wife`s lifestyle by making the lump sum award, the husband would be prejudiced by such an order as his future earnings are unknown and she had further failed to consider the possibility of the early re-marriage of the wife in which case any lump sum maintenance would unnecessarily enrich the wife.

A legal submission made on behalf of the husband was that the judge had erred in law in that there was no subsisting order for maintenance included as part of the interim order of court dated 23 September 1998 on the basis of which the judge could have founded her lump sum maintenance order. There is no merit in this point. The wife had previously applied for interim maintenance and although no order was made on this application, the court below had expressly reserved the issue of maintenance for the wife for decision at the hearing of the ancillary matters.

The husband had relied on the case of **Tan Bee Giok v Loh Kum Yong** [1997] 1 SLR 153 to justify the argument that the wife had no legal basis to apply for maintenance. In ***Tan Bee Giok*** `s case, the Court of Appeal observed that when a wife`s application for maintenance made at the time of the divorce proceedings is dismissed by the trial court, the wife cannot subsequently apply under s 118 (previously s 112) of the Charter for a variation order since there would be no subsisting order to vary. That was not the situation in ***Tan Bee Giok*** `s case itself where the Court of Appeal allowed the wife`s appeal against the trial judge`s dismissal of her application for maintenance and awarded the wife maintenance. The principle enunciated in ***Tan Bee Giok*** cannot apply here since the first application was for interim maintenance whereas the order appealed against was made at the end of the divorce proceedings and on the hearing of ancillaries. At that stage the wife would have been entitled to renew her claim for maintenance even if the judge hearing the application for interim maintenance had not expressly noted that the issue of maintenance was to be resolved later.

The factors cited by the judge in awarding maintenance to the wife are relevant ones. The wife, although enjoying an independent income, was supported by the husband in that she had full access to the funds in the joint account for the needs of herself and the household. The wife is now in her forties and, at the time of the divorce, her main income was the salary of $4,000 per month which she received from the company and the $10,000 a month that she received in loan repayments. It was clear to the judge that once the company was wound up, the wife would have no further regular income. Although the husband alleged that the wife was earning money from counselling he was not able to prove that allegation.

The wife`s prospects of earning a high income hereafter are not great. Quite apart from any problems she might have in the job market here arising out of the divorce, her profession as a human relations cross-cultural consultant or counsellor is not one that is well known or highly likely to bring in a high income. The husband, on the other hand, has managed a business in Papua New Guinea for over 15 years and has earned a good income from doing so. Although the company is to be wound up, there is no reason to believe that he will not be able to form another corporate entity and build on his previous contacts and experience to build up an equally successful business. In the foreseeable future therefore, the husband`s prospects of earning a comfortable income are much better than the wife`s. The husband also has assets from which he will be able to pay the lump sum maintenance without suffering adverse financial consequences.

There can be no doubt of the husband`s liability to maintain the wife. The main question is that of quantum bearing in mind that the wife is quite comfortably circumstanced in that she is receiving half of the matrimonial assets. Further, there is a possibility of remarriage. I think, however, that all these factors have already been taken into account by the judge.

Usually with spouses who are in their late forties and where the wife`s life expectancy is used as the main basis for assessing the multiplier, a longer multiplier is used. For example in **Ong Chen Leng v Tan Sau Poo** [1993] 3 SLR 137 , the Court of Appeal found no difficulty with an award to a wife aged 50 calculated over a period of 17 years. In **Yow Mee Lan v Chen Kai Buan** [2000] 4 SLR 466 , I awarded the wife who was then aged 51 a lump sum based on full maintenance for eight years (ie up to the husband reaching the age of 60) and on half maintenance for a further eight years (ie on the basis that his income might be reduced because his activity might lessen after that age). In this case, I think that an assessment of lump sum maintenance on the basis of only five years at a time when the wife was 46 years old and the husband 49, was generous to the husband and must have been influenced by the trial judge`s assessment of the possibility of a remarriage and her consideration of the wife`s own assets.

Secondly, the quantum awarded was on the low side bearing in mind the parties` living expenses and style of living while they were married. Here again, I think that the judge must have had regard to the wife`s own resources and considered that it was not correct for the husband to bear the full burden of maintaining her in that standard of living when she herself had capital and income from property to help defray her expenses.

I therefore dismiss the husband`s appeal on the question of maintenance.

Security for child`s return to Singapore

One of the ancillary orders made by the judge in relation to the issue of custody was as follows:

> *There shall be liberty to both parties to bring the child out of the jurisdiction of the court during the school holidays subject to the travelling parent informing the other parent two weeks in advance of the intended trip with details of the itinerary, flight arrangements and accommodation arranged for the trip. By consent, as security to ensure the child`s return to the jurisdiction, the other party`s share in the matrimonial assets, namely, the property at Centuryville, Tanglin Park and Centrepoint shall be forfeited to the other party in the event of failure to bring the child back to Singapore. A penal notice shall be attached to the order of court.*

As part of the division of the matrimonial assets the court had ordered that the Tanglin Park and Centrepoint apartments be sold. The husband was unhappy with this order as he considered that by doing so the judge had in effect removed the security contained in the order recited in [para] 71 which would ensure that the wife would not leave the jurisdiction with the child without the consent and knowledge of the husband.

Whilst s 126(3) of the Charter provides that when an order for custody is in force, no person shall take the child who is the subject of the custody order out of Singapore, except with the written consent of both parents or with the leave of court, it is all too easy for a parent who has both the child and the child`s passport, to flout that provision. As foreigners, the parties obviously had concerns about the removal of the child from this jurisdiction. That is why they agreed to the order

on the forfeiture of assets if the child were kept out of the jurisdiction.

With the winding up of the company and the sale of the other matrimonial assets there would be really very little to keep either party in Singapore. Whilst the assets must be sold since that is the best way of dividing them and procuring a clean break between the parties, that does not mean that there should be no security given for the return of the child here until such time as both parties are able to agree otherwise or the court otherwise orders having heard arguments as to what would be in the child`s best interests.

I will not set aside the order for the sale of the assets per se. However, I will make an additional order that the sales of the apartments at Tanglin Park and Centrepoint shall not be effected until each of the parties has put up a bond for $150,000 in favour of the other to secure the child`s return to the jurisdiction when either parent takes him abroad. This order may, however, be varied if on application the court subsequently adjudges that it is in the child`s best interests to remain out of the jurisdiction for a longer period.

Conclusion

The wife has failed on both her points of appeal. She must pay the husband`s costs of this appeal. The husband has been successful in two points of his appeal, those mentioned in [para ] 43 and 75. He has, however, failed on his other, more substantial, points. I therefore award the wife 80% of her costs of the husband`s appeal.

Outcome:

Order accordingly.