

HONG KONG / JUDGMENT

CSH v. LS or LS formerly known as CY Y

[2020] HKFC 143**COURT**

Family Court

DECIDED

6 August 2020

CASE / FILE NUMBER

FCMC12435/2016

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bjbj FCMC 12435/2016

**[2020] HKFC 143 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 12435 OF 2016**

BETWEEN CSH Petitioner and LS or LS formerly known as CY Y Respondent

Coram : District Judge A. Tse in Chambers (Not Open to Public) Dates of Hearing: 9 January 2018 to 12 January 2018, 16 January 2018, 14 May 2018 and 17 May 2018 (7 Days) Date of Judgment : 6 August 2020

J U D G M E N T (Ancillary Relief: Long Separation)

This is the trial of the Wife s application for ancillary relief.

Background

The Early Years The Petitioner (Wife) is aged 77 and the Respondent (Husband) is 86. Their fathers were businessmen in the Mainland. In particular, the Husband s father was a successful businessman trading in jadeite and jewelry. Both parties are university graduates. The parties met in about 1960 and were married in China on 1 February 1962. They had two children, a daughter, LYY (hereinafter referred to as A) who was born in 1962 and a son, C (hereinafter referred to as C), who was born in 1967. Both parties worked as teachers after their marriage. The Cultural Revolution started in the Mainland in about 1967. There was no dispute that it was a very difficult time for the family. They were branded as one of the 5 black groups because of their family and education background and were persecuted. In October 1967, the Husband smuggled

into Hong Kong. At that time, the Wife was heavily pregnant with C and A was only 5 years old. The Wife was persecuted after the Husband's departure. There is a dispute of fact as to whether the parties were living together at the time, whether the Husband told the Wife about his plans to leave the Mainland, whether the Husband intended to abandon the Wife and the children to start a new life in Hong Kong and the extent of the Wife's persecution. There is no dispute that the Husband had changed both his name and his surname several times. His original name was CYK. Upon his arrival in Hong Kong, he reported to the Hong Kong authorities that his name was NC and that he was married to CKL (In fact, this was not the Wife's name. Her name is CSH). Although the Husband alleged that he intended to abandon his family in China, there is no dispute that they maintained communication by letter and very occasionally by telephone. Shortly after his arrival in Hong Kong, the Husband found employment as an apprentice in a jewelry company. He resigned a few months later to become a jewelry salesman. There is a dispute as to whether he had learnt the trade from his father or whether he learnt as he worked in Hong Kong. The Husband says that he heard from some townsmen in about 1969 or 1970 that the Wife was having an affair with his younger sister's boyfriend. This is denied by the Wife. At about the same time, the Husband started courtship with a lady in Hong Kong (W2) who he subsequently married on 22 September 1970. In order to marry W2, the Husband made a false declaration to the Hong Kong Government that he had not previously been married. He has been living with W2 as man and wife since then. They have a daughter, LMK (hereinafter referred to as X) who was born in 1972. X is divorced and is a single mother to a daughter (Y). The parties agreed that the Husband's second marriage was bigamous. Although there appears to be no dispute that the Wife subsequently heard that the Husband had another relationship, there is a dispute as to how she became aware of it. The Wife says that she heard rumors that the Husband had a girlfriend in Hong Kong. She did not know that he had remarried until she arrived in Hong Kong many years later. On the other hand, the Husband says that his father told the Wife that he has remarried. It appears that the Wife confronted him at some stage. During the trial, much was made of a letter from the Husband to the Wife produced as exhibited as CSH-2. It was during cross-examination about this letter that the Husband suddenly collapsed in Court. He has been medically unfit to attend Court to give evidence since then. In that letter, the Husband made reference to a business in Singapore. There is no dispute that the Husband does not and never had any business in Singapore. The Wife alleges that what the Husband was referring to in that letter, was her assistance in smuggling jadeite to him. The Wife says that after the Husband came to Hong Kong, she continued to look after the children, whilst the Husband sent her money which was used to support the family. In those early years, she also helped the Husband with his jewelry business. The Husband's father and sometimes other relatives would supply the Husband with jadeite. The jadeite was passed to her and she would hide them in hollowed out tree roots. She would then send them to the Husband as Chinese medicine. On one occasion, she even bought some high quality jadeite herself from a dealer at RMB 8,000 and as a result became heavily in debt. She sent it to the Husband but the Husband told her that there was no jadeite in the package. She believed that her packages of jadeite assisted the Husband to establish his jewelry business. This is denied by the Husband. He says that in about 1971, the owner of a gold and jewelry company invited him and W2 to purchase the jewelry arm of the company at a

consideration of HK\$25,000. However, he only had HK\$5,000. He was only able to purchase the business because W2 contributed HK\$20,000 towards the purchase. Although W2 was only a primary school teacher at the time, she had some money which was given to her as gifts for their wedding. She also sold the gold ornaments she received for the wedding. After the Husband purchased the jewelry business, W2 resigned from her job as a teacher and helped with the accounting and stock of the business. The Husband admits that some of his relatives and townsmen (including his father and maternal aunt) had sold him some jadeites which he then sold in Hong Kong. The Wife also sent him packages on 2 to 3 occasions alleging that there was jadeite in the packages when there was none. Everyone (including the Wife) who sent him packages asked for repayment. Although he knew that they were demanding payment far in excess of the real value of the jadeite and although he never received any jadeite from the Wife, he paid as requested. The Wife agreed that the Husband told her that there was no jadeite in her packages, but he still repaid her. However, his repayment was insufficient to cover the cost of the jadeite. Apart from that, the Husband's other assertions are challenged by the Wife. In 1973, the Husband also took over the gold ornament arm of the company and began to trade under the name of NWJG. In about 1978, the Husband was sentenced to 100 days imprisonment in Taiwan for smuggling some dangerous medicine for his relative. On 16 March 1978, the Husband changed his name and surname again (to his present name). On 26 April 1978, the Husband informed the Hong Kong Government that he was separated from CKL (the same name that he reported to the Hong Kong authorities as his wife upon his arrival). On the same day, he also reported that he was married to W2. According to the same document, the Husband again reported that W2 was his spouse on 6 February 2007. Despite what was stated in the Certificate of Registered Particulars produced as LS-2 (B6/1206), this is denied by the Wife. She relied on the same document which stated that upon arrival in 1967, the Husband reported that CKL was his wife. In about 1979, the Wife, A and C applied for a one-way permit to come to Hong Kong. The Husband says that he objected to that application. He says he wrote to the Ministry of Public Security in their hometown, asking them to reject the application. On the other hand, the Wife says that this application was supported by the Husband. She relied on a letter dated 10 May 1979 written by the Husband to the Ministry of Public Security Bureau in support of her application (CSH-22, B6/1362). In about 1980, the Wife, A and C came to Hong Kong. The Wife says that it was only upon her arrival that she discovered that the Husband had gone through a bigamous marriage with W2. At that time, A was 17. There is a dispute as to whether the Husband provided sufficient maintenance to the Wife and the two children. The Husband says that he did whilst the Wife stated that the Husband's maintenance was irregular and inadequate, as a result of which A was forced to cease her education. The Wife also stated that she was forced to work full time in a clinic from 1981 until her retirement in 1990. Although the parties never lived together or were in any way intimate, they met every two to three weeks for lunch or dinner. The Husband attended dinner at the Wife's home at Chinese New Year and went to the Mainland to pay their respects to ancestors at Ching Ming. The Husband's Jewellery Business The Husband's gold and jewellery business (NWJG) prospered. In 1994, a limited company called NWJGCL was incorporated. At the time, there were 7 shareholders. Two companies known as BP Ltd (BPL) and GI Ltd are together the majority shareholders in NWJGCL. The remaining shareholders are employees of the

business. BPL was incorporated on 22 November 1994. The Husband and W2 were directors of this company. There were only two corporate shareholders, each holding one share in BPL. On 15 December 1994, the two corporate shareholders each transferred its share in BPL to the Husband and W2 respectively. On the same day, the Husband subscribed to 8 additional shares in BPL. In other words, there were a total of 10 shares, 9 of which were held by the Husband and 1 share held by W2. There is no dispute that there is a Declaration of Trust that W2 was holding that share on trust for GI Ltd. There is also no dispute that GI Ltd is wholly owned by the Husband. On 23 November 2010, GI Ltd ceased to be a director of NWJGCL. On the following day, GI Ltd transferred its share to BP Ltd. In 1999, further shares were issued by NWJGCL which were purchased by the some of the employees who were shareholders. In the initial stages of the proceedings, there was a suggestion that these other shareholders were holding their shares on trust for the Husband. Subsequently, the Wife clarified in her 3rd Affirmation that the beneficial ownership of the shares held by the employees were not in issue. She was only referring to W2 who held the one share in BP Ltd on trust for the Husband. There is no dispute that prior to the distribution referred to below, the Husband held 37 percent shares in NWJGCL. Properties The Husband rented a property for the Wife and her children for a short period of time after their arrival in Hong Kong. He later purchased a property in Sham Shui Po for them. This was later sold and in 1987 a property in Mei Foo was purchased in the joint names of the Wife and A. The deposit was paid with the proceeds of sale from the Sham Shui Po property together with a contribution from the Husband. This property was subsequently sold and a second flat in Mei Foo was purchased. The Husband says that all along he was responsible for the mortgage repayments of these properties. This was never challenged by the Wife. The second Mei Foo property was sold in 2000 and the Wife moved to live with C in rented premises. C subsequently purchased a property in the Mid-levels where the Wife now lives. There is a dispute as to whether the purchase of this property was funded by the Husband. The Wife and A are also the registered owners of a flat and car park in Ma On Shan. However, the Wife says that she has no beneficial interest in these properties. This property was acquired by ballot and A submitted both her name and the Wife s name to increase her chances of success. The ballot in A s name failed whilst the ballot in the Wife s name was successful. A purchased the flat in the Wife s name whilst the Wife nominated A as a co-owner and joint tenant. The Wife says that A paid for these premises and it was used as A s home. From the Husband s statement of issues, this does not appear to be challenged by the Husband. The Husband and W2 live together in a flat in Jardine s Lookout (the Jardine s Lookout property). This property, together with two car parking spaces were purchased in the Husband s sole name in 1985. He was the sole registered owner of this property until the disputed distributions mentioned below. On 4 November 2003, a property in Braemar Hill together with a car parking space was purchased in the name of W2 and her daughter for a consideration of HK\$4.5 million with the assistance of a mortgage. The mortgage was discharged on 1 February 2007. In around 2009, a property in Shanghai was purchased in the joint names of the Husband and W2. This property was held in joint names until the disputed distributions mentioned below. On 21 January 2011, a property in Taikoo Shing was purchased in W2 s name for a consideration of HK\$9,230,000. The Husband was never the registered owner of the properties in Braemar Hill or Taikoo Shing. However, he confirmed that he had contributed to

part of the purchase price of the property in Braemar Hill. He alleges that the property in Taikoo Shing was funded by W2. This is not accepted by the Wife. She says that the above mentioned properties held in the names of W2 and her daughter were wanton disposals on the part of the Husband and should be added back in the calculation of the matrimonial pot. In addition or in the alternative, she says that these properties are parked with W2 and X for the Husband (suggesting some sort of trust, the exact nature of which was not specified) or are resources that are still available to the Husband when the Court is considering his needs Distributions The Husband has given significant sums to both the Wife, W2 and their children: HK\$3 million to the Wife in about 2003; HK\$3 million to C in about 2003; HK\$3 million to X in about 2003 for her to purchase a property with W2; HK\$2 million to A in about 2009; CNY 2 million to the Wife in 2011; CNY 2 million to W2 in 2011; CNY 3 million to A in 2011; RMB 1 million to A in 2012; RMB 3.1 million to the Wife on 9 November 2014; RMB 1.5 million to A in 2014; HK\$1.3 million to X on 4 August 2015; HK\$3 million to W2 on 4 August 2015; GBP 300,032.79 to W2 on 16 February 2016 to pay for tuition and maintenance of Y; HK\$ 2 million to the Wife on 7 June 2016; HK\$2.3 million to X on 24 October 2016; and RMB 800,000 (HK\$956,000) to Y on 21 June 2017 and 24 July 2019 Some of the funds given to W2 and X were used to purchase property. The Wife says that the properties so purchased in W2 and her daughter s name should be taken into account when computing the matrimonial assets (totalling HK\$95,154,106). These include: A flat called C Heights and 2 car parking spaces, valued at HK\$22,490,000; A flat in Braemar Hill (the Braemar Hill flat), valued at HK\$18,949,401; A flat in Tai Koo Shing (the Tai Koo Shing flat), valued at HK\$15,850,000 ; Proceeds of sale of a flat in Shanghai (the Shanghai flat) of HK\$19,764,705; and Cash given to W2 and her daughter in the sum of HK\$18,100,000. The property in C Heights together with two carparks were purchased in 1985 in the Husband s sole name. By a Deed of Gift dated 26 April 2011, the Husband named W2 as a joint tenant of these properties. This was and still is his home with W2. The Braemar Hill flat together with a car parking space were purchased on 4 November 2003 at a consideration of HK\$4.5 million under the joint names of W2 and X. This property was mortgaged but that mortgage was fully discharged on 1 February 2007. The Taikoo Shing flat was purchased in W2 s sole name on 21 January 2011 for a consideration of HK\$9,230,000. The Shanghai flat was purchased in about 2009 in the joint names of the Husband and W2. It was sold for over HK\$20 million on 21 March 2016 and the proceeds of sale were kept by W2. Background to distributions in 2011 The Husband s health began to deteriorate in 2011 and he decided to retire. Although the date of the diagnosis is unclear, there is no dispute that he suffered from throat cancer. Apart from retiring, the Husband began to make a number of distributions of his assets.: In 2011, he caused BP Ltd to transfer his entire shareholding in NWGJCL (3,700 shares) to SGD Ltd, a company owned by C. He says that the shares were transferred to SGD Ltd with C s agreement to hold the same on trust for the Wife. Although the transfer is not disputed, the Wife and C deny that the shares are held on trust. There is also a dispute as to whether the monthly sums paid by NWGJCL into the Wife s bank account were monthly dividends as a result of her beneficial ownership of those shares; By a Deed of Gift dated 26 April 2011, W2 became a joint tenant of C Heights (i.e. her home with the Husband); In about early 2011, the Husband also transferred all his interest in the Shanghai property to W2, whereupon W2 became the sole owner of the property. That property was subsequently sold and the proceeds of sale were kept

by W2. In the same year, the Husband gave significant sums of money to the Wife, A and W2. Whilst there is a dispute as to whether C holds the 37 percent shares in NWJGCL on trust for the Wife, there is no dispute that for a time after the transfer of shares, the Wife received monthly payments of HK\$18,500 from NWJGCL; The Wife says, in 2016, the Husband transferred sums amounting to over HK\$11 million to W2 and X. Apart from the properties in the name of W2 and X, the Wife is asking for HK\$6,703,608 transferred to W2 and X to be added back in the computation of matrimonial assets (i.e. a total of HK\$85,864,812 to be added back) [A/144]. This is opposed by the Husband. He says that his assets were the fruits of his joint efforts with W2 over the last 5 decades. The Wife never made any contribution towards his assets and that he has been more than generous to the Wife and her children. Events Leading to the Present Proceedings There is no dispute that these proceedings were at least partly initiated as a result of a dispute involving a jadeite boat . There are many factual disputes as to what was said or done in relation to this dispute. However, not all of the factual disputes are relevant to the Court s decision on ancillary relief and it is not necessary to resolve them. In essence, the Wife, the Husband and their children were present during a lunch in Central on about 17 May 2016. On that occasion, the Wife asked the Husband about a jadeite boat which was regarded as a family heirloom. The Wife suggested that the jadeite boat should be passed down to C, who was the only son. In answer, the Husband stated that the jadeite boat had been handed to W2. There was a second lunch with the Wife and her children in Central on 21 May 2016 when the Husband reiterated his refusal to hand over the jadeite boat to C. The Husband says that from June 2016 onwards, C repeatedly asked him for the jadeite boat and asked to look at the Husband s will. He alleged that C threatened to make him suffer and expose his bigamous marriage to W2 if the Husband did not comply with his requests. This was denied by C. In any event, the Husband was so angry with C that he published a notice in the Economic Daily News and the Hong Kong Economic Journal on 15 March 2017, announcing that he was disowning C as his son [B6/1209-1210]. The Petition in the present proceedings was filed on 28 September 2016. Issues in Dispute The Wife Petitioned for divorce on the basis of 2 years of separation. In the Petition, she stated that the date of separation was some time prior to January 1984. The Decree for divorce was granted on that basis. She now appears to argue that they were not so separated, but failed to give a new date of separation. In fact, she appeared to be suggesting that there was in fact no separation until the commencement of these proceedings. The first question is whether the Wife is now entitled to renege on the alleged separation date. The size of the matrimonial pot and the Wife s contribution towards the same are also in dispute. The Wife is asking the Court to add back almost all of the assets given to W2 and X over decades in the computation of matrimonial assets. The Wife argues that this is a sharing case, and she the Court should depart from equal division in her favour, whereas the Husband says that the Wife s claims should only be restricted to her needs . In the event that the Court finds that this is a needs case, there is a dispute as to the Wife s needs and the form of payment. The Wife wants a clean break, whereas the Husband is offering periodical payments. Legal Principles Applicable to Ancillary Relief claims In ancillary relief proceedings, the court is required to undertake an inquiry into all the circumstances of the case, having regard to the factors set out in s.7 of the Matrimonial Proceedings and Property Ordinance, Cap.192 (MPPO). The Court of Final Appeal in LKW v DD [2010] 6 HKC 528, has established that that inquiry is

undertaken having regard to the underpinning principles in *White v White* [2001] 1 AC 596, namely: The objective of fairness; The rejection of discrimination; The yardstick of equal division; The rejection of minute retrospective investigation. Applying those principles as the foundation, the inquiry is a five step process. In the first step, the court must ascertain the financial resources of each of the parties. These are calculated at the date of the hearing. At this stage the court does not attempt to distinguish between matrimonial and non-matrimonial property, that part of the exercise being undertaken, if necessary, when considering the distribution of the assets (See *LKW v DD* (supra) at 71-73). In the second step, the court will assess the parties financial needs. This is an assessment which is made flexibly, having regard to the needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future. Their needs should be generously interpreted (See *LKW v DD* (supra) at 77-79). Those needs should be set at a level that equates, in so far as the resources allow, to the standard of living that the parties enjoyed during the marriage (See *LKW v DD* (supra) at 79). The third step is the application of the sharing principle. If there are surplus assets after the parties financial needs have been catered for, these must be shared amongst the parties. That sharing is undertaken on the basis that the total assets should be divided equally between the parties, unless there is a good reason, capable of articulation, for departing from an equal division (See *LKW v DD* (supra) at 79-82). The fourth step requires the court to consider whether there are good reasons for departing from equal sharing. In *LKW v DD* (supra) at 83 and 85, Ribeiro PJ said that this step is: necessarily a complex question which raises a range of separate issues It cannot be over-emphasized that the matter is fact-specific and discretionary. The sharing principle must not be mechanistically applied. In the same case, Ribeiro PJ identified six particular factors that might be relevant to the issue of departing from equal sharing. The source of the assets was identified as one of the factors. However, effort and expense should not be wasted in trying to establish a sharp dividing line between what is and what is not matrimonial property (See *LKW v DD* (supra) at 87-88). He stated that the existing case-law identified two classes of assets as possible candidates for exclusion on the basis of source (See *LKW v DD* (supra) at 89): The first involves property acquired during the marriage by one of the parties from a source wholly external to the marriage, such as by gift or inheritance. The second involves assets derived from a business or an investment conducted solely by one party (sometimes called unilateral assets). Conduct was also identified as one of the factors. The court is required by s.7 (1) of the MPPO to have regard to the conduct of the parties in exercising its discretionary jurisdiction. However, this does not permit the parties to indulge in a post-mortem of their marriage in order to find fault with each other, or to air their mutual recriminations. Conduct would only be regarded as a material factor if it is gross and obvious (See *LKW v DD* (supra) at 99 and 104). The third factor identified was financial needs. Such needs may arise from the care of children, an inability to re-enter a job market, or some other particular responsibility. The fourth factor is the duration of the marriage. Where the marriage was short, there is likely to be less call upon each other by the parties. In addition, in short marriages, the court may well be inclined to regard as excludable non-matrimonial property, assets acquired by one of the parties before the marriage or acquired in the course of the marriage from some wholly external source. However, after a long marriage, those factors are likely to have much less weight (See *LKW v DD* (supra) at 93). The fifth factor is

the contribution made by each of the parties to the welfare of the family, including the contribution made by looking after the home or caring for the family. Where the parties to the marriage occupy the traditional roles of breadwinner on the one hand and homemaker or child-carer on the other, their contributions are of a quite different character and are very difficult to assess, particularly in money terms. The argument that a financial contribution was special was dealt with by the judge at 118 in these terms: In my view, our courts ought to proceed on the footing that the parties respective contributions to the welfare of the marriage are implicitly recognized within the sharing principle itself and that there will, if at all, only be rare and exceptional cases where an issue can properly be raised in favour of departing from equality on the basis of special or stellar contribution . The final factor is that of compensation. This factor will take into account issues such as the loss of a benefit, e.g. a pension, which a party to the marriage will lose as a result of the dissolution of the marriage. But it also recognizes, and deals with, disadvantages incurred as a result of the way in which the parties arrange their affairs during the marriage. Thus, the inherent disadvantage in the traditional roles of a husband and wife in the marriage, to the wife, in being able to identify the production of income or assets, may be the subject of compensation. Ribeiro J recognized the risk of double-counting in the application of this factor and gave this guidance at 130: Our courts ought to proceed on the footing that compensation for relationship-generated disadvantage is generally already factored in upon any application of the sharing principle. The extent of the compensation allowed for in applying that principle and deciding the extent of any possible departure from an equal division is, in any particular case, a fact specific question which will depend upon the nature, certainty, permanence and other qualities of the disadvantage incurred, viewed in a broad brush way. It will only be in exceptional cases that a separate element of the award over and above the amount already factored in should be dedicated to such compensation on the special facts of the particular case. In such exceptional cases, the court should not attempt to try the issue evidentially or conceptually as if it were a damages claim. A broad brush attribution of some percentage of the award to the element of compensation would generally be sufficient.

Identification of Assets This is the most difficult of all the issues in this case. Firstly, although the Court is not obliged to resolve each and every factual dispute, the disputes of facts in this case span the last 5 decades. The issue also covers assets dealt with by the Husband over a decade ago and the Wife is basically relying on almost every argument that can possibly be put forward in the Family Court. There are third party issues but the appropriate procedure had not been adopted. The Husband suddenly collapsed shortly after he started his evidence and has not been fit to attend Court ever since. There is no dispute that throughout the years, the Husband has given substantial sums not only to the Wife and her children, but also to W2 and their daughter, X and granddaughter Y. Some of the sums given to W2 and X were used by them to purchase properties. The Wife asks the Court to add back the assets held by W2 and her daughter in its computation of assets on the following grounds: The assets given to W2 and her daughter were wanton, reckless or extravagant in nature; The assets were all paid for by the Husband which gives rise to a resulting trust; The assets were parked with W2 and her daughter (suggesting that there is some other form of trust, which is not specified); The dispositions were made by the Husband with an intention to defeat the Wife's claims; and The assets in the hands of W2 and her

daughter are resources available for the Husband under the principles enunciated in *KEWS v NCHC* [2013] HKCFA 1. The disputed disposition which the Wife now seeks to have added back fall into three categories: The value of real property registered (wholly or in part) in the name of W2 and/or her daughter, X; The sale proceeds of real property of the Shanghai property; Payments made by the Husband to W2 and/or X and/or various bank withdrawals. Wanton, Reckless or Extravagant Spending. The Wife argues that W2 was merely the Husband's mistress and that the assets acquired by W2 and X with financial assistance were all wanton spending on the part of the Husband. Where one party has deliberately or recklessly wasted, lost or given away assets in anticipation of trial, then it might be appropriate to add back the lost value of such assets into the balance sheet of that party's assets: *Cowan v Cowan* [2001] 3 WLR 684; *Norris v Norris* [2003] 1 FLR 1142. In *Norris v Norris* (supra), the husband spent 30,000 on jewellery for his girlfriend and recklessly spent 250,000. Both sums were added back into the balance sheet of his assets. In order to persuade the Court to add-back, there must be a wanton element to the alleged dissipation. This is a very high threshold because circumstances justifying an add-back are actually a species of misconduct. It is settled law that the Court should only take into account conduct that is obvious and gross. In *Vaughan v Vaughan* [2008] 1 FLR 1108 at 13-14, Wilson LJ (as he then was), and with whom the remainder of the Court agreed, held that a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of the sums attributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation. In *A v B* (Ancillary Relief: earning capacity, addbacks) [2016] 1 HKFLR 332 at 57, citing *MKKWH v RKSJ* (unrep) CACV 197/2012 dated 24/9/2013, which in turn refers to *Mostyn J* in *N v F* at 11: In this country we have separate property. If a party disposes of assets with the intention of defeating the other party's claim then such a transaction can be reversed under s. 37 of the MCA 1973. Similarly, where there is clear evidence of dissipation in which there is a wanton element then the dissipated sums can be added back or re-attributed. But short of this a party can do what he wants with his money. In *MAP v MFP* (Financial Remedies: Add back) [2016] 1 FLR 70, Moor J found the husband's overspending, particularly in relation to drugs and prostitution to be irresponsible and opined that it may have been morally culpable, but held that the requisite threshold was not crossed and therefore there should be no add-back:

63. I now turn to the law as to add-back. It does seem to me that arguments in this area essentially come down to an issue of conduct as defined in s.25(2)(g) of the MCA 1973, namely conduct that it would in the opinion of the court to be inequitable to disregard. As Baroness Hale of Richmond makes clear in *Miller/McFarlane*, for such conduct to bite it has to be gross and obvious.
64. The add-back authorities essentially say the same. For the court to add-back assets that have been spent, the court has to be satisfied that there has been wanton dissipation of assets.
65. Bennett J considered the same issue in *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142 where he said, at para [77]: the overspend at a time when he was about to and then did enter into protracted litigation with the wife, can only be classified as reckless. Although it is

normally wrong in principle to allow the husband additional capital because of his obligations to children from a former relationship, where he has expended funds honestly and reasonably in their support, the funds so expended should not (save in exceptional cases) be added back to his assets: *H-J v H-J* (financial provision: equality) [2002] 1 FLR 415. Many marriages break down because one of the parties has formed a relationship with a third party. Very often, a new household is set up and the third party is supported financially by the spouse. This kind of expenditure is not considered as wanton or reckless. In the present case, the Husband left the Mainland to escape persecution. He was clearly already branded as an anti-revolutionary before his departure and could not return to the Mainland during the Cultural Revolution. The Wife and two children remained in the Mainland. When the Husband left, there was little, if any prospect of him ever seeing the Wife and his children again. There appears to be no dispute that the family had little or no assets at the time. The Husband says that he could not even afford the cost of the journey to Hong Kong and had to borrow money from his father. He only had a few hundred Reminbi to pay for his journey. He arrived in Hong Kong with no family and no money. Life for him must have been harsh and lonely. He then met W2 and married her. The Court is not condoning the Husband's behavior, but in the light of all the circumstances of this case, his marriage to W2 could not be regarded as wanton or obvious and gross. Until the Court urged her to adopt more neutral wording, the Wife has been calling W2 the Husband's mistress. In fact, she was much more than a girlfriend or mistress. The MPPO provides as follows:

3. Maintenance pending suit in case of divorce etc. On a Petition or joint application for divorce; or Petition for nullity of marriage or judicial separation The court may order either party to the marriage to make to the other such periodical payments for his or her maintenance
4. Financial provision for party to a marriage in cases of divorce etc.
 - (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage; before or after the decree is made absolute), the court may, subject to the provisions of section 25(1), make any one or more of the following orders, that is to say---
 - (a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;
 - (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;
 - (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified
6. Orders for transfer and settlement of property and for variation of settlements in cases of divorce, etc.

- (1) on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of sections 10 and 25(1), make any one or more of the following orders, that is to say
 - (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first mentioned party is entitled wither in possession or reversion;
 - (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
 - (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
 - (d) an order extinguishing or reducing the interests of either of the parties to the marriage under any such settlement;
 - (e) an order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion, and for the use of the proceeds of such sale, and the court may make an order under paragraph (c) notwithstanding that there are no children of the family
8. Neglect by party to marriage to maintain other party or child of the family
 - (1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent) has failed
 - (a) to provide reasonable maintenance for the applicant
 - (6) Where on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) then, subject to the provisions of section 10, the court may make such one or more of the following orders as it thinks just, that is to say
 - (a) an order that the respondent shall make to the applicant such periodical payments and for such term as may be specified in the order;
 - (b) an order that the respondent shall secure to the applicant, to the satisfaction of the court, such periodical payments and for such terms as may be so specified;

- (c) An order that the respondent shall pay to the applicant such lump sum as may be so specified Although their marriage was void ab initio, W2 has very substantial rights under the Matrimonial Proceedings and Property Ordinance, Cap.192 (the MPPO). In fact, she has the same rights as the Wife in the event of a Petition for nullity. If the Husband failed to maintain her during their marriage, W2 has the right to claim for relief under s.6 of the MPPO. X is the Husband's daughter with W2. The law does not differentiate between legitimate and illegitimate children. It is clear from the background above that the Husband gave substantial sums of money to the Wife, W2 and all his children and has assisted some of them in the purchase of property at about the same time. The Wife appears to think that her adult and financially independent children have a right to the Husband's assets while any gift to X (a single mother who, even according to the Wife's case has always been financially dependent on the Husband) or Y (who is a minor and also financially dependent on the Husband) is wanton. Her rationale is that all of the Husband's assets are matrimonial or joint assets, in which she has a share. It was hence wanton or reckless for him to give those assets to W2, X or Y without her consent. In *A v A* [2007] EWHC 99 (Fam); [2007] 2 FLR 467, Munby J (as he then was) exhorted:
- [17] I wish also to make the point that, even in the Family Division, a spouse who seeks to extend her claim for ancillary relief to assets which appear to be in the hands of someone other than her husband must identify, and by reference to established principle, some proper basis for doing so. The court cannot grant relief merely because the husband's arrangements appear to be artificial or even dodgy. In *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415, Lord Sumption JSC made the following observations: [37] Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere. The Wife's stance flies in the face of *A v B* (Ancillary Relief: earning Capacity, add-backs) (supra), *MKKWH v RKSH* (unrep) (supra) and *N v F* (supra). The Husband was free to do what he wants with his money unless there is clear evidence of dissipation with a wanton element, for example, in anticipation of trial or intention to defeat and extravagant spending. Intention to defeat The Wife argued that the distributions were made by the Husband with an intention to defeat her claims. I will now deal with each of the assets that the Wife seeks to add-back to the matrimonial pot in turn. In 2003, the Husband gave HK\$3 million to X for her to purchase the Braemar Hill property with W2. That property together with a car parking space were purchased on 4 November 2003 at a consideration of HK\$4.5 million under the joint names of W2 and X. This property was mortgaged but that mortgage was fully discharged on 1 February 2007. This transaction took place 13 years before the Petition was filed. There is no suggestion that there was any claim or potential claim between the parties or that there was any anticipation of divorce proceedings at that time. To the contrary, according to the Wife, although they were separated, the relationship between her and the Husband was respectful and harmonious. Further, there is no dispute that the Husband also gave HK\$3 million to the Wife and HK\$3

million to C in the same year. If the Husband had wanted to dissipate his assets to defeat the Wife's claim, there would be no reason for him to give her and C a total of HK\$ 6 million. There is not a shred of evidence to support the allegation that this distribution was a dissipation with intention to defeat the Wife's claims. In 2011, the Husband gave CNY 2 million to W2. In early 2011, the Husband transferred all his interest in the Shanghai property to W2, whereupon W2 became the sole owner of the property. The Shanghai property was subsequently sold and the proceeds of sale were kept by W2. By a Deed of Gift dated 26 April 2011, W2 became a joint tenant of C Heights (i.e. her home with the Husband). On 21 January 2011, the Taikoo Shing flat was purchased in W2's sole name for a consideration of HK\$9,230,000. Again, this happened years before the Petition or any potential claim from the Wife. Further, in the same year, the Husband caused BP Ltd to transfer his entire shareholding in NWGJCL (3,700 shares) to SGD Ltd, a company owned by C. From then on, monthly sums were transferred to the Wife by NWGJCL. In 2012, the Husband also transferred RMB 1 million to A. In fact, there is no dispute that the Husband's health began to deteriorate in 2011. He was subsequently diagnosed with cancer. There is no evidence to suggest that there was any intention to defeat the Wife's claims. To the contrary, there was no reason for the Husband to effect the transfer of shares to C's company and RMB 1 million to A if he had such an intention. The distributions are entirely consistent with estate planning. There was another tranche of distributions between 2014 and 2016. These distributions have to be considered differently by reason of s.17 of the MPPO, which provides as follows:

17. Avoidance of transactions intended to defeat certain claims Where proceedings for relief under any of the relevant provisions of this Ordinance (hereafter in this section referred to as financial provision) are brought by a person (hereafter in this section referred to as the applicant) against any other person (hereafter in this section referred to as the other party), the court may, on an application by the applicant- If it is satisfied that the other party is, with the intention of defeating the claim for financial provision, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim; If it is satisfied that the other party has, with the intention aforesaid, made a disposition to which this paragraph applies and that if the disposition were set aside financial provision or different financial provision would be granted to the applicant, make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property); if it is satisfied, in a case where an order under the relevant provisions of this Ordinance has been obtained by the applicant against the other party, that the other party has, with the intention aforesaid, made a disposition to which this paragraph applies, make such an order and give such directions as are mentioned in paragraph (b); and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial provision in question. Paragraphs (b) and (c) of subsection (1) apply respectively to any disposition made by the other party (whether before or after the commencement of the

proceedings for financial provision), not being a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any such intention as aforesaid on the part of the other party. Where an application is made under this section with respect to a disposition which took place less than 3 years before the date of the application or to a disposition or other dealing with property which is about to take place and the court is satisfied- In a case falling within subsection (1)(a) or (b), that the disposition or other dealing would (apart from this section) have the consequence, or In a case falling within subsection (1)(c), that the disposition has had the consequence of defeating the applicant's claim for financial provision, it shall be presumed, unless the contrary is shown, that the other party disposed of the property with the intention aforesaid or, as the case may be, is with that intention, about to dispose of or deal with the property. In this section- Disposition does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise; The relevant provisions of this Ordinance means any of the provisions of sections 3,4,5,6,6A,8,11 (except subsection (6)) and 15; and any reference to defeating an applicant's claim for financial provision is a reference to preventing financial provision from being granted to the applicant, or to the applicant for the benefit of a child of the family, or reducing the amount of any financial provision which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of the applicant under the relevant provisions of this Ordinance On 4 August 2015, the Husband gave HK\$1.3 million to X and HK\$3 million to W2. On 16 February 2016, the Husband gave GBP 300,032.79 to W2. He explained that this was to pay for Y's tuition, rental and living expenses in the UK. These transactions fall within 3 years prior to the prior to the Wife's application for financial provision. However, the Wife has not made any application under s. 17 of the MPPO. She explained that this was for the sake of saving time. However, under s.17(3), the presumption of intention to defeat only comes into operation if an application is made under section 17 of the MPPO. Since no such application has been made, the Wife is not entitled to the benefit of those presumptions. At the time of the distributions in 2015, there were no arguments between the Husband and Wife. The parties were amicable despite their separation and the Husband's marriage to W2 and there was no suggestion of any divorce proceedings being contemplated. Further, the Husband had given RMB 1.5 million to X in 2014 and RMB 3.1 million to the Wife on 9 November 2014. There was no reason for him to give such substantial sums to the Wife and A in 2014 if he had any such intention. As for the payment of GBP 300,032.79 even according to the Wife's case, the Husband explained that this was to pay for the tuition, rental and living expenses of Y, who was starting university in the UK. Even according to the Wife, Y is and has always been financially dependent on the Husband. The husband explained that he had paid for C's university education in the US and he wanted to give the same assistance to his granddaughter. There is no suggestion from the Wife or C that the amount given for Y is not in line with that provided to C. Although there was an argument about the jadeite boat in May 2016, there was no suggestion that the Wife would be petitioning for divorce. In fact, on 7 June

2016, the Husband gave a further HK\$2 million to the Wife. If he had intended to defeat the Wife's claims, he would not have given her this amount. The Court is not satisfied that these distributions were made with an intention to defeat the Wife's claims. On 24 October 2016, the Husband gave HK\$2.3 million to X. This was the one of the three distributions that was made after the presentation of the Petition on 28 September 2016. The Husband explained that this sum was given to X for the payment of his legal costs in these proceedings [A241/ 6]. The Wife simply says that this payment was made within 3 years prior to the Petition. Because the Wife has not taken out an application under s.17 of the MPPO, she is not entitled to the presumption. The Wife bears the burden to prove that this is wanton spending, the threshold of which is very high. If the HK\$2.3 million had been used by X to pay for the Husband's legal costs, then it is difficult to see how that could be regarded as wanton or reckless. The Husband has also given RMB 800,000 to Y in July 2017 as a gift. This sum is a mere fraction of the available assets. For the reasons set out below, this distribution will not affect the amount of the Wife's claims. The Husband has a pattern of giving HK\$2 to 3 million to family members throughout the years. There is no dispute that Y grew up in a single family. She has lived with the Husband, W2 and X all her life and was brought up with the assistance of the Husband and W2. Y is reading music at university, a career in which it is very difficult to succeed. The Husband's gift to Y was consistent with his previous practice. In all the circumstances of this case, there is insufficient evidence to cross the threshold of wanton or reckless spending.

Scale of the Distributions The Wife argued that the distributions to W2, X and Y were wanton by reason of its scale. As explained above, although their marriage was a nullity, W2 has the same rights as the Wife under the MPPO. Contrary to the Wife's belief, none of the Husband's children (who have all reached majority) have any right to his assets. It is illogical to argue that the distributions to A and C were legitimate, whilst the distributions to X and Y were wanton. In fact, the cash distributions to the Wife and her children were much greater than those to W2, X and Y. The Wife chose to liquidate her investments more than a decade ago whilst W2 and X used the money to purchase properties and held on to them. As a result, the properties purchased by W2 and X have grown substantially in value. C Heights was purchased by the Husband in the 1980s whilst the Shanghai property was purchased in the joint names of the Husband and W2 in 2009. The Husband's interest in the Shanghai property and C Heights were transferred to W2 in 2011. W2 sold the Shanghai property in 2016. The Wife is now trying to paint a picture of wanton spending by using the current market value of all the above properties. She argued that the Husband was only able to transfer the title of the Shanghai property to W2 by making a false declaration that she was his wife and that under Chinese law, the Husband would have been prevented from effecting the transfer without her consent. No expert evidence in Chinese law has been adduced to assist the Court. There is no dispute that the Husband's health began to deteriorate in 2010. Even according to the Wife's case, W2, X and Y are and have always been financially dependent on the Husband. If he were to pass away without making reasonable financial provision to them, W2, X and Y are entitled to make a claim under the Inheritance (Provision for Family and Dependents) Ordinance, Cap.481 (whether W2 was married to the Husband or not). The Wife argued that a second

family always takes subject to the first. She says that in view of its scale, the dispositions were wanton or reckless. She relies on the case of *Vaughan v Vaughan* [2010] EWCA Civ 349 (following the well known 1970 decision of *Robert v Roberts* [2970] P.1. In that case: the wife was 66. She has not remarried. She lives alone in a four bedroom house in Hammersmith which is in her sole name, free of mortgage and worth 1,091,000 net of costs of sale. She is a renowned expert on Islamic and Indian art but she now has no earned income. Her health appears good and she claims genetic longevity. The husband was aged 71. He has remarried the second wife in 1985. She was aged 56. They live together in a large house in North Kensington which is in their joint names and is worth 4,365,000 net of costs of sale. However, it was subject to a mortgage of 737,000. They have two children, namely a son aged 22 and a daughter aged 19, both at university. The husband still heavily subsidizes the children; but the subsidy will not endure in the long term and, in the case of the son, should end after about two years. The husband has been in practice as a barrister since the age of 24 and he took silk in 1981. He was a distinguished member of the bar and one of the leading exponents of E.U. law in England and Wales. Unfortunately, the husband's health has been in serious decline during the last three years. For the time being he continues to do limited work at the bar; but the wife accepts that it is inappropriate to ascribe to him any future earning capacity for the purpose of these applications. The husband and wife were married in 1967 and separated in 1981. There was no child of the marriage. At the time of the separation the husband was 42 and the wife was 37. In 1975 she had begun to work full-time at Christie's in her specialist field but from 1979 to 1981, she was working there only as a part time consultant. A separation deed (the Deed) was executed in September 1981. It provided that out of the proceeds of sale of the parties home, the wife should receive 105,000 together with chattels, including an already valuable Indian desk which the parties had bought together; and that the husband should make periodical payments to her at the rate of 12,000 per annum for two years and, thereafter, at a rate which would bring her income up to one third of their joint incomes. In 1984, the wife petitioned for divorce; and in August 1985 the decree absolute was pronounced which enabled the husband to marry the second wife. At the time, the wife did not activate her claims for ancillary relief. Instead there was a consensual variation of the Deed, whereby the wife's periodical payments reverted to the fixed rate of 12,000 per annum and, perhaps as a quid pro quo for her relinquishment of the right to have her income brought up to one third of their joint incomes, the husband paid her a further capital sum of 40,000. In 1989 the wife for the first time applied to the court for financial provision. In form, it was an application under s.35 of the Act for an order for upwards variation of the provision in the Deed for periodical payments at the rate of 12,000 per annum; but the wife seemed to have been treated as having also activated the claims for ancillary relief made in her petition. In that application, the wife accepted that, in the light of the payments of capital made to her in 1981 and 1985, there was no case for the husband to make further capital provision for her; and her capital claims were duly dismissed. In response to her application for increased periodical payments, the husband seemed to have proposed a package of provision amounting nearly to a clean break following two further years of substantially increased support for her. The husband's proposal was rejected by the

court which held that the husband should be required to make periodical payments to the wife on a long term basis. The court further held that the history of the case did not warrant an award in excess of the wife's needs, albeit reasonably to be estimated. The husband was ordered to continue making periodical payments of 12,000 per annum under the Deed but that he should additionally make periodical payments under an order at the rate of 15,175 per annum. Since then, the husband had been making payments at the rate of 27,175 per annum. Before the deputy judge was an application by the husband to terminate both parts of his obligation to make periodical payments to the wife. Also before him, however, was a cross-application by the wife for an order that its termination should be in consideration of his payment to her of a substantial lump sum by way of capitalization, under s.31(7B) of the Matrimonial Causes Act 1973 of what she contended would otherwise be his obligation to continue to make periodical payments to her. She contended that the lump sum should be in the sum of 560,000. By way of reply, the husband conceded that, were he to be held to be under any obligation to continue to make periodical payments to her, his obligation should indeed be capitalized; but he contended, as before, that in the circumstances he was under no such obligation. During the trial, the deputy judge notionally allocated assets and income to the second wife. The appeal raised a question about the proper treatment of the hypothetical claims of a second wife against the husband in the assessment of any obligation on his part to continue to make periodical payments to a first wife. It was held on appeal that:

- [37] In *Roberts v Roberts* [2970] P.1, the Divisional Court of the Probate Divorce and Admiralty Division allowed an appeal by a wife against an order of the justices that, out of a net income of 22 per week, her husband should pay only 2.50 per week for the maintenance of herself and their son. The reasoning of the justices was that the husband needed to apply the balance of his income to the support of himself and, in particular, of his cohabitant and two of her children. The court (Sir Jocelyn Simon P and Rees J) decided, at 3E, to survey the relevance not only of a husband's moral obligation to support a cohabitant but also of an ex-husband's legal obligation to support a second wife (on the basis that the claim of the former could not rank higher than that of the latter); held, at 6E to 8B, that not only an ex-husband's legal obligation to a second wife but also a moral obligation of a husband or ex-husband to a cohabitant had to be brought into account in assessing the level of his obligation to maintain the first wife; but held, at 8G, that on general principle, a spouse must on marriage be presumed to take the other subject to all existing encumbrances, whether known or not - for example an obligation to support the wife or child of a dissolved marriage; but considered, at 8H to 9F, that English law did not, as did some Commonwealth courts, take the principle to its logical conclusion by affording primacy or priority to the claims of the first wife; yet nevertheless concluded, at 5D and 10D, that a decision, such as that of the justices, to give such priority to the claims of the cohabitant (or second wife) as virtually to ignore the claims of the first wife was plainly wrong.

[39] In my view the judge in the present case wrongly gave priority to the claims of the second wife. He lost sight of the principle in the case of Roberts. His fourth attribution to her was unprincipled. Whatever the length of the second marriage in relation to the first; however substantial the non-financial contribution made by the second wife to it; and whatever the extent to which the pension fund was built up out of the husband's earnings during its subsistence; it remained as illogical for the judge to attribute one half of the husband's pension income to the second wife as it would have been for the judge to attribute one half of the husband's substantial earnings to her while he had remained in receipt of them. All the judge should have done was to take into account the husband's obligation to maintain the second wife to the extent to which she could not maintain herself out of the income already judicially attributed to her. Contrary to what is being alleged by the Wife, the Court in *Vaughan v Vaughan* (supra) ruled expressly that English law did not, as some Commonwealth courts, give priority to the first wife. Further, the case of *Vaughan v Vaughan* (supra) is not authority on the principles of reckless or wanton spending or add-back. In that case, the husband was applying to terminate his periodical payments to the first wife. The deputy judge erred in making a notional attribution of assets to the second wife. This is not the Husband's position in the present case. He is not trying to shirk from his legal obligation to provide reasonable maintenance to the Wife; nor is it a contest between the actual claims and notional claims of the Wife and W2 respectively. In the present case, it is the Wife's refusal to acknowledge that W2 had made any contribution to the Husband's assets over the last five decades. There is a dispute as to W2's contribution. The Husband alleged that W2 worked on the accounting side of his business. This is denied by the Wife and C. The Wife and her children only arrived in Hong Kong 7 years after the Husband bought the business. It is impossible for the Wife or her children to say whether W2 did work in the business during the time that they were in China. Even on the assumption that W2 never worked in the business, she was acting as the Husband's spouse in Hong Kong, has been by his side for over 50 years, providing him with companionship and moral support, running his household, bearing and bringing up his child. It was clear that W2 had contributed to the welfare of the Husband which enabled him to build up his business. Most of the assets in dispute were given to W2 and X many years prior to these proceedings. There is no question of any notional attribution. The issue before this court is whether these distributions amounted to misconduct and whether such assets should be added back to the Husband's resources for distribution. The Wife also relied on the case of *A v B* [2016] 1 HKFLR 332. In that case the husband and wife were married for 20 years and had two daughters aged 17 and 14 at the date of hearing. The husband was a practicing barrister while the wife worked as a Contract and Risk Manager. They were separated in June 2011 after the wife discovered that the husband had gifted HK\$1 million to his girlfriend C. The husband then left the matrimonial home which consisted of two adjoining flats, Flat C and D. Flat C was registered in the wife's name and Flat D was registered in the name of the husband where he cohabited with C. They led a lavish lifestyle in contrast to the lifestyle during the marriage. The husband further gifted HK\$200,000 to C just before he left the matrimonial home and gave her a monthly allowance of HK\$20,000 to HK\$30,000 from

November 2011. The husband initiated divorce proceedings in 2013 on the basis of 2 years separation and a decree nisi was granted in late 2013. The husband proposed that he continue to pay the mortgage on the former matrimonial home, but that each party keep their own flat and when the younger of the children should reach 21, the wall between the properties be restored and he could then sell Flat D. He suggested nominal maintenance for the wife and child maintenance and a lump sum in respect of arrears of child maintenance. At the heart of the dispute was whether the husband's prospects of advancement in his professional career as a practicing barrister in the foreseeable future should be taken into account. If they could be quantified as part of the assets for consideration, should the entire former matrimonial home be given to the wife so as to achieve a clean break. In addition, should the payment and spending on C be added back to the marital pot or be regarded as such a conduct which the court could disregard. The court ordered the husband to transfer Flat D to the wife by way of a clean break, child maintenance and the lump sum in respect of arrears in maintenance. It held: In relation to the husband's enhanced future earnings and earning capacity although they could not be quantified, nor could there be any direct contribution by the wife after the divorce, the court applied the sharing principle since the wife was not looking for any on-going periodical payments and it was common ground that there be a clean break between the parties. There was no doubt that the husband had an enhanced earning capacity due to his own talents and energy, but the marital pot was also the product of the contributions, lifestyle and spadework of both parties during the marital partnership. In addition, the relatively frugal lifestyle of the parties during the marriage had led the wife to believe that she would be able to reap the rewards in the future, but instead she faced a time when her home would be reduced by half while the husband would be able to live a much more luxurious lifestyle as the product of his enhanced earning capacity; In applying the principles of non-discrimination and equality in the assessment of the fruits of the marital partnership, fairness required the court to address such disproportionate financial loss to the wife who earned, and would continue to earn, a much lower income than the husband. Such disparity of financial position after the end of the marriage by reason of the much larger earning capacity of one party was recognized as a good reason to depart from equality; There would be no difficulty for the Court to characterize the first two payments of a total of HK\$1.2 million to C in 2011 as wanton or reckless or extravagant in terms of their amount relative to the parties standard of living during the marriage and the overall size of their matrimonial pot, or the reasonableness of their payments in the circumstances. It would amount to wanton or reckless when the husband had later let C keep the money and gave her a further HK\$200,000 without any good reason other than the fact that they had by then started dating. As for C's monthly pocket money, although it could be said that such expense was a depletion of the husband's resources and may thus reduce his ability to meet the wife's needs or those of the daughters, they had not benefitted from such expenditure, there was simply a lack of evidence or information to enable the court to safely conclude that these payments amounted to financial irresponsibility and dissipation of assets that was wanton, reckless or extravagant, or to such conduct which was so obvious and gross that it would be inequitable to disregard and justify their adding back through the

Norris route but rather as part of her arguments for departing from equal division of the matrimonial property. The facts in *A v B* (supra) are very different from the present case. The husband and wife in that case had lived a relatively frugal life style. It was a long marriage and the husband built up his practice as a barrister during the marriage. The husband had just started dating his girlfriend when he gave substantial sums to her. In the present case, the Husband and Wife were only together for a few years. There was no marital acquest when the Husband left the Mainland. The Husband was a teacher in the Mainland. He changed his career after he arrived in Hong Kong and W2 has lived with him and contributed to his welfare for decades. In all the circumstances of this case, the Wife has not been able to satisfy the threshold that Husband's distributions to W2, X and Y were wanton or reckless. Those distributions will not be added-back. Even if the Wife had been able to establish wanton spending, only the amounts allegedly dissipated would be added back. The Wife is not only claiming an add-back, she is laying a proprietary claim over the assets purchased by W2 and X with the funds. Her claim is conceptually wrong. The Trust argument. The Wife argues that since the assets registered under W2 and X's names were paid for by the Husband, those assets are held on resulting trust for him. Further or in the alternative, she argued that those assets were merely parked with W2 and X. In *TL v ML* (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam) [2006] 1 FLR 1263 at 34-37, pointing out that the task of the Judge determining a dispute as to ownership between a spouse and a third party is completely different in nature to the familiar discretionary exercise between spouses; a dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division. See also *LWYA v KYW* [2015] 2 HKLRD 1029 at 31; *A v A* (supra) at 21-24; *Goldstone v Goldstone* [2011] EWCA Civ 39; [2011] 1 FLR 1926 at

35. The procedure to decide on the beneficial ownership of assets involving a third party suggested by Mostyn J has come to be known as the *TL v ML* procedure. In *A v A* (supra), Munby J (as he then was) stated at 23, when speaking of *TL v ML*:

[23] The deputy judge recorded, at para.[35], the complaint of counsel in that case that the issues had never been properly defined, pleaded or particularized and went on to suggest at para. [36], how such issues should in future be handled by way of appropriate case management. I am sympathetic to the approach being suggested by the deputy judge, though I would not wish to be quite so prescriptive as he appears to be. Vigorous judicial case management in such cases is vital, but the appropriate directions to be given in any particular case must reflect the case managing judge's appraisal of how, given the forensic realities of the particular case, the issues best be resolved in the most just, effective and expeditious manner. Munby J's view was echoed by Hughes LJ in the English Court of Appeal case of *Gourisaria v Gourisaria* [2010] EWCA Civ 1019:

[22] It is plain to my mind, that Mostyn J in the passage which I have cited in his reference to the only appropriate procedure was not to be taken as having meant any universal proposition for every case. In *Fischer Meredith v JH & PH* (Financial Remedy: Appeal: Wasted Costs)

[2012] EWHC 408 (Fam); [2012] 2 FLR 536 at 42-44, Mostyn J held that there may be some flexibility in the approach to be adopted if the legal title to the disputed asset is vested in one of the spouses and that spouse is asserting that a third party is the beneficial owner. Mostyn J was, however, of the clear view that the practice he articulated in *TL v ML* (supra) should be adhered to when the legal title to the asset was vested in the name of a third party. He identified the clear obligation on the claimant to apply to joining the third party at an early stage and to seek to invoke the discipline in *TL v ML* as that was the only way the pool of assets over which the dispositive powers of the court ranges can be established. This Court agrees that the *TL v ML* procedure may not be appropriate in every case, for example, where the value of the total assets is very small. However, any such issue should be raised as soon as possible, so that the Court can give appropriate directions. The trust issue in this case was only raised by the Wife at trial. It is wholly unfair that the Wife is seeking to mount a resulting trust claim at such a late stage. At no stage prior to her opening submission had the Wife suggested that the Husband is the beneficial owner of the assets held by W2 and X on the basis of a resulting trust. The Wife is seeking in excess of HK\$66 million for the Husband. If the Wife were to succeed, the award could only be satisfied from assets held by third parties. If the third parties are not joined, they will not be bound by any of the court's orders. If the Wife had raised the issue of a resulting trust, pleadings would have been directed and third parties joined to these proceedings. The burden of proving the existence of a trust rests on the Wife. The existence of a resulting trust depends on the intention of the settlor. The Husband says that the assets were given to W2 and, X and Y as outright gifts or financial support. He regards W2 as his wife and X is his daughter. There is nothing to contradict the Husband's evidence and no third party proceedings have been issued. To the contrary, it is clear that the Husband made financial provision not only for W2 and X, he also gifted substantial assets to the Wife and her children. It is difficult to understand why the distributions to the Wife and her children are to be regarded as out-right gifts but not those to W2, X and Y. Most of those assets were given to W2 and X years before the commencement of these proceedings. There is simply no reason why the assets should be parked with the Wife and X. Even if there were a presumption of a resulting trust, that presumption can easily be rebutted by the facts in this case. In her Opening Submissions, the Wife also argued that it is more likely that this was a conditional gift and as such (a) it remains a resource of the Husband's and (b) is beneficially still owned by him on resulting trust. There is absolutely no evidential basis for this assertion. Further, at no stage does the Wife identify what the alleged condition was. The Wife's trust arguments are wholly untenable. The KEWS Argument In her Opening Submissions, the Wife sought to raise a new argument to add back the assets under the names of W2 and X as resources available to him on the basis of *KEWS v NCHC* [2013] HKCFA

1. In that case, the husband and wife were married in 2000 when they were in their twenties. They had no children. The husband had impressive financial qualifications, including an Executive MBA degree from a prestigious business school, financed by his parents. In 2002, the wife developed a serious medical condition and was unable to work. The husband did

not work for most of the marriage in order to care for her. The husband's parents were from a well-known Hong Kong family, and while not in the extremely rich category, they provided the couple with generous financial support enabling them to enjoy a reasonably high standard of living. In 2006, the parties separated and in 2008, the husband petitioned for divorce. In 2009, the husband began employment earning \$14,000 per month, which would increase significantly. He lived with his parents who continued to support him financially. Between 2005 and 2010, the husband had a total of over \$7 million deposited into his bank account. His parents also paid for his credit card bills, club memberships and medical expenses. It was unlikely that the wife would be able to lead a normal life due to her condition and after the separation, she was completely dependent on her parents with whom she lived and who had been paying all of her expenses which, by mid-2010, amounted to over \$2.4 million. The Court of Appeal, taking into account the significant financial support given by the husband's parents, which the lower court found would continue, ordered the husband to make to the wife (a) periodical payments of \$42,500 per month until the death of either party or the remarriage of the wife, whichever was earlier, or until further order; and (b) a lump sum payment of \$1.5 million. On appeal to the Court of Final appeal, the question was the Court's approach when assessing the financial resources of the parties for the purpose of determining the appropriate ancillary relief to be granted in divorce proceedings where third party assistance to the parties was involved. In dismissing the husband's appeal, the Court held: For the purposes of considering an application for ancillary relief under s.4 of the Matrimonial Proceedings and Property Ordinance, the Court was guided only by s.7(1), in particular s.7(1)(a). The width and wording of s.7(1)(a) included financial assistance made by third parties to the parties of a marriage and accordingly this could be taken into account in the computation of that party's overall financial resources. In every case where this was involved, the two critical evidential questions for the court were: (a) the extent of the financial assistance provided by the third party to the husband and wife; and (b) the likelihood of such assistance continuing in the foreseeable future; The court had to look at the reality of the situation and have regard to matters of substance and not just form. In looking at reality, it could take into account not only what a party actually had, but what might reasonably be made available to him or her if a request for assistance were to be made. As to what might occur in the foreseeable future, past conduct was often a useful guide; Having ascertained the extent of the third party financial assistance and then finding on the evidence of probabilities that there was a likelihood of the continuation of such assistance in the foreseeable future, the court was then in a position in law first, to take this into account in the identification of the financial resources of the parties and second, in determining the appropriate ancillary relief to be granted. This approach was entirely consistent with the court's duty under s.7(1); Concept of judicious encouragement The concept of judicious encouragement, which might be taken to mean that the court could encourage third parties to provide financial assistance, had led to confusion among judges and practitioners. If its true ambit was really no more than a restatement of the proper approach as set out above, there was no difficulty. However, if it meant a form of pressure on non-parties to add to the relevant spouse's resources which, on the evidence they would not

do or were unlikely to do, the concept should be rejected. Such approach was consistent neither with principle nor with the authorities. It was better of the term judicious encouragement were no longer to be used. In the present case, there is no dispute that X is a single mother and has always been financially dependent on the Husband. There is no evidence that she has ever given the Husband any financial assistance. In those circumstances, the Wife has no prospect in satisfying the criteria propounded in KEWS. Similarly, there is no evidence of any past financial support to the Husband by W2. In fact, it is the Wife's case that the Husband has been financially supporting the W2 throughout the years. The situation with W2 is very different from X. She is still living with the Husband as man and wife and at least some of her resources would be available to meet the Husband's needs. However, if it is the Wife's case that the assets held by W2 or X should be made available for distribution, her case would be wholly untenable. What the Wife is trying to do is to exert the kind of pressure that the Court of Final Appeal has deprecated in KEWS. On the other hand, it is clear that the Wife has resources available to her in the form of: The provision of housing by C; The provision of a monthly allowance of HK\$10,000 by C; The payment by C of the common general household expenses in the sum of about HK\$21,500; The monthly receipt of payments from NWJGL in the sum of HK\$18,500. These financial resources (which amount to HK\$50,000, exclusive of free accommodation) have been paid regularly over the years. There is no evidence whatsoever that they will cease. Shares in NWJGL The Husband's 37 percent shares in NWJGL were transferred to SGDL, C's solely owned company in 2011. The Husband says those shares are held by C on trust for the Wife. This is denied by the Wife and C. No *TL v ML* proceedings in respect of the beneficial ownership of these. The Husband's evidence in respect of this alleged trust is also very vague. The Husband's evidence is as follows:-

41. Since the said sale and purchase of shares in NWJGL in or around 1999, NWJGL has begun to issue monthly dividends. The said monthly dividends have all along been made in case. Out of generosity, I have given my portion of dividends to the Petitioner in the past before the transfer of shares in NWJGL from BPI to [SGDL], a corporate vehicle of [C] in 2011. I have never intended to give such sums to her as maintenance. Whenever NWJGL provided my share of monthly dividends to me, I would instruct the staffs of NWJGL to deposit the said monthly dividends into the Petitioner's bank account numbered xxx-x-xxx793 held with the Hang Seng Bank. In view of the Petitioner's age, I have always intended [C] to hold the shares in NWJGL on trust for the Petitioner, in order to provide some financial comfort to the Petitioner. Even with the transfer of shares in 2011, I have not named [C] or SGDL, as a director of NWJGL because I had never wanted [C] to participate in the running of NWJGL
47. In 2011, I realized I was very old and my health condition became poor. That is the reason why I thought that I had to retire and distribute my assets.

48. In relation to the shares in NWJGCL held by my corporate vehicle, I have first considered giving them to the Petitioner for her to obtain the monthly dividends from NWJGCL. However, I thought that the Petitioner was also old enough, I then decided to give the said shares to [C] to hold the same on trust for the Petitioner. Upon the agreement for the said trust arrangement with [C], 3,700 shares in NWJGCL (being 37% of shareholding in NWJGCL) were transferred from BPL to SGDL in 2011. I have never asserted to anyone, including [C], that the said 3,700 share transfer was a result of a trimmed down exercise. At the time the agreement was reached, [C] knew very well that the said 3,700 share was my total shareholding in NWJGCL, and he was and is simply holding the same on trust for the Petitioner.
49. After the said transfer of 3,700 shares in NWJGCL, [WHS], a managing director and shareholder of NWJGCL informed me that [C] has never gone to the shop of NWJGCL to collect the monthly dividends issued by NWJGCL on behalf of SGDL, nor given any instructions to NWJGCL concerning the monthly dividends, and asked me as to how to deal with the monthly dividends. I told him that because the said 3,700 shares were intended to be given to the Petitioner, NWJGCL could continue to deposit the monthly dividends to the Petitioner's said account held with the Hang Seng Bank. The Husband bears the burden to prove that the NWJGCL shares are held by C on trust for the Wife. His evidence amounts to a bare allegation, completely devoid of details. The monthly payments into the Wife's bank account is neither here nor there. They were paid into her account even before the share transfer. Moreover, the alleged reason for the transfer of shares to SGDL is illogical. According to the Husband, the beneficiary of the shares was never expected to participate in the management of NWJGCL. The intended beneficiary was to only receive the dividends. In those circumstances, it is difficult to see how the Wife's age would have prompted the establishment of the alleged trust. Further, the Husband's witness, WHS stated that he thought it was a family arrangement. At no time did he mention that the shares were held by SGDL on trust for the Wife. The Wife has always lived with C. The Husband may have given the shares to SGDL in the hopes that C would use the resources therefrom to provide financial support to the Wife. However, this does not make C a trustee of those shares. By reason of the above mentioned matters, the Court is not satisfied that the shares are held by SGDL on trust for the Wife, and hence the value of those shares will not be considered in the identification of assets. C's Property There is no dispute that C purchased his current property in 2003 and that the Wife has been residing with C and his family in this property. It is also agreed that the Husband gave the Wife and C each HK\$3 million in 2003 or 2004. The Husband says that the Wife has a beneficial interest in this property. This is denied by the Wife and C. Even though the Husband has given the Wife HK\$3 million and even on the assumption that he had suggested the purchase of a property, it does not mean that the Wife had contributed towards its purchase or has a beneficial interest therein. Even assuming that the HK\$3 million was given to C prior to the purchase of the property and C had used the whole or part thereof to pay the purchase price, it would only be financial assistance provided by the Husband to C for the purchase. In the light of the above, the Court is not

satisfied that the Wife has any interest in this property. Disclosure The Wife alleges that the Husband has failed to make full and frank disclosure of his assets. She argued that the Husband has failed to disclose the Shanghai Property in his Form E [A30]. Form E only requires a party to disclose the assets that they have at the time of filing, together with any important changes to his financial circumstances within 3 years of the Petition. The Husband's interest in the Shanghai Property was transferred to W2 in 2011, i.e. 5 years prior to the Petition. The disclosure of the Shanghai property was not required by Form E. The Wife asserted that the Husband had attempted to mislead the Court by saying that W2 had broadly the same assets as him when he knew that he had gifted her much more than he had disclosed. She relied on his Form E [A29/point 22 and A30]. This assertion is not accurate. In his Form E [A29], the Husband merely stated: In conclusion, all my present assets are established through the joint effort of My Present Wife and me and the same are shared between My Present Wife and me equally, and can never be construed as the matrimonial assets of the Petitioner and me. The Husband never merely stated that all his assets are the fruits of the marriage between him and W2. It does not support the Wife's allegation. In Form E [A30], the Husband was asked to state briefly the assets and income of his present spouse of cohabitee. He has disclosed the properties held by W2 and his joint accounts with her. At no time did the Husband allege the W2 had broadly the same assets as him. The Wife alleged that the Husband lied about the ownership of the Taikoo Shing property. She relied on the Husband's affirmation [A177]. This was clearly a careless mistake. In fact, he had disclosed that the Wife was the owner of the Taikoo Shing property in his Form E [A30]. The Wife stated that the Husband lied about the ownership of BPL. Both the Husband and Wife were originally shareholders of BPL. However, on 15 December 1994 (a few weeks after the incorporation of BPL), W2 made a declaration of trust of the shares and in fact the Husband is the sole owner of BPL. The Husband was talking about events that happened over 2 decades ago. There is no dispute that the Husband is of ill health, both mentally and physically. This may be a genuine mistake. There is no dispute that the Husband had failed to disclose 2 bank accounts. These were subsequently disclosed. There is no allegation that he has any other hidden assets and the Wife has not asked the Court to draw any adverse inferences against the Husband. This would only be relevant to the Court's assessment of credibility. Conclusion on Assets and Resources In my judgment, the assets of both parties amount to around HK\$53 million, of which the Husband has HK\$41.8 million and the Wife has HK\$11.2 million (as set out in the Wife's schedule as undisputed assets). The bulk of the Husband's asset comprises of the Husband's half share in C Heights, which has been his home with W2 for nearly 30 years. The Husband was 84 at the time of trial. He is retired and is of very ill health. He no longer has any income. The Wife was 77 years old. She is also retired. However, she had resources totaling HK\$50,000 per month (HK\$31,500 from C) and (HK\$18,500 from NWGJCL). Needs The Wife's Needs The Wife's open offer is a sum of HK\$66 million equalization money to be paid in her favor. In other words, her case is that she should have HK\$77 million. She says her needs come to HK\$45.2 million. The bulk of her claim, in the sum of K\$35 million, is for her accommodation needs. The remainder (HK\$10.2 million) are her living expenses (at HK\$62,200 per month). Accommodation Needs

There is no dispute that the Wife is living and has always lived with C. After she sold her property in Mei Foo in about 2000, she moved to live in rented premises with C. In 2003, C purchased his property. The Wife has lived there ever since. She now says that she wants to move out because the grandchildren are growing up and need more space. The Wife says that she needs HK\$35 million to purchase a property near C. The sole basis of this figure is that the Husband lives in a HK\$40 million apartment. The Wife has ignored the fact that this is the Husband's home with W2, where they live with X and Y (i.e. a family of 4). The Wife has failed to inform the Court the size of the proposed property. No evidence has been produced in respect of the cost of such property. The Wife's claim is clearly excessive and lacks evidential basis. Further, there is no dispute that these proceedings were triggered by the dispute over the jadeite boat. By that time, the Wife had been living with C for close to 20 years. In the past, the Husband had provided the funds whenever the Wife wanted to purchase a property as her residence. There was not even a suggestion that she had ever asked for the provision of a property since she sold her home in Mei Foo or that she had any intention to move out of C's home prior to the dispute about the jadeite boat. In other words, she would have continued to live with C if the Husband had handed over the jadeite boat pursuant to her demand. The Wife has more than sufficient resources to move out and she did not. In all those circumstances, the Court does not accept that the Wife has any accommodation needs.

Living Expenses The Wife says that on the basis of HK\$62,200 per month, she would require a Duxbury sum of HK\$10.2 million to cover a recurring sum of HK\$720,000 per annum. On the basis of HK\$720,000 per annum, the Wife was adopting a multiplier of 14.17 years. No Duxbury table or calculation has been produced by the Wife. In her Form E dated 11 January 2017, the Wife deposed that her current household expenses are HK\$43,162.50 [A52]. In her Affirmation dated 9 June 2017, she stated that her monthly expenses will be HK\$62,200 [A145-146]. This is because of the following increases:

Expense	Form E	Affirmation
Utilities	\$3,000	\$8,000
Management fees	\$962	\$3,000
Food	\$3,750	\$8,000
Household expenses	\$2,500	\$5,000
Transport	\$2,000	\$3,000
Clothing & shoes	\$3,000	\$3,500
Entertainment	\$2,000	\$2,500
Medical & Dental	\$5,000	\$8,500
Total	\$22,212	\$41,500

Whilst the increase in management fees is reasonable in the event that the Wife moves out from C's residence, the other increases are wholly exaggerated. For example, there is no reason for the utilities to increase by \$5,000 per month, the food to increase by over \$4,000 per month. Her explanation of household expenses is also illogical. C would have to pay for the maintenance of the property and appliances. Her share of the household expenses would be inclusive of such maintenance expenses. It is difficult to see how those expenses would increase by \$2,500 per month. The Wife's reasonable monthly expenses are at most HK\$45,000. In her calculation, the Wife has not taken into account the contribution to her expenses from C. According to her Form E, C pays for about HK\$21,500 of her current expenses. He also pays her an allowance of HK\$10,000. There is no suggestion that these subsidies would cease. Her monthly expenses are hence reduced to HK\$13,500. The Husband asked the Court to also take into account the HK\$18,500 paid to the Wife by NWJGCL. There is no dispute that the Wife has been receiving such monthly payments since January 2016, although there is disagreement as to whether these are dividends. The Wife

argued that there is no guarantee that she would receive these payments. She pointed out that, the Husband's witness, WHS stated that he was not optimistic about the business of NWJGCL. Secondly, she submitted that she was not entitled to those payments as they belonged to C legally. Firstly, there is no suggestion that these payments would stop. Although C stated that no special dividends have been made available to him in 2016-2017, the payments of HK\$18,500 to the Wife have continued. Secondly, according to the evidence, since the transfer of shares, C has been provided with the monthly operational reports of NWJGCL which showed the fixed dividend was treated by the company as monthly costs. C has never objected to those payments and there is no suggestion that he would object. In fact, according to C's Affirmation, he does not care about the payment of dividends. In those circumstances, the Wife's monthly expenses are well catered for. Even if the payments from NWJGCL were to stop, the shortfall would only be HK\$13,500. Adopting the Wife's alleged Duxbury calculation, the amount required for living expenses would be HK\$2,295,540 (i.e. HK\$13,500 x 12 x 14.17 years). Legacy The Wife says that she wishes to leave a legacy to her children. She relies on *White v White* [2001] 1 AC 596. This subject was mentioned in the course of the discussion of the relationship between financial resources and financial needs and the uxbury Paradox. Lord Nicholls stated as follows at pp.606 - 610:- Financial resources and financial needs I turn next to a point where the current state of the law is not altogether satisfactory. That this is so emerges clearly from the decision of the Court of Appeal in *Dart v Dart* [1996] 2 FLR 286. The point concerns the relationship of paragraph (a) and paragraph (b) in big money cases. Paragraph (a) concerns the available financial resources of each of the parties. Paragraph (b) is concerned with the financial needs, obligations and responsibilities of each of the parties. In practice, paragraph (b) seems to have become largely subsumed into a wider, judicially-developed concept of reasonable requirements. This wider concept appears, in turn, to have displaced consideration of the parties available resources as a factor in its own right. The development had its origins in a decision of the Court of Appeal in *O D v O D* [1976] Fam 83 where the alluring phrase reasonable requirements was coined. In that case Ormrod LJ, at p.91, considered the wife's position, not from the narrow point of need, but to ascertain her reasonable requirements. A similar approach was adopted a few years later, in *Page v Page* 2 FLR 198, 201. This was a case where there was enough capital to provide adequately for both husband and wife. Not surprisingly, the court held that when considering the needs and obligations of the parties, a broad view could be taken. Ormrod LJ, whose judgment are a valuable source of much of the jurisprudence in this area of the law said: In a case as this needs can be regarded as equivalent to reasonable requirements, taking into account the other factors such as age, health, length of marriage and standard of living. The third case in this trilogy of cases where resources exceeded financial needs is *Preston v Preston* [1982] Fam 17. Ormrod LJ, at p.25, set out a list of general propositions. His second proposition was: the word needs in section 25(1)(b) in relation to the other provisions in the subsection is equivalent to reasonable requirements, having regard to the other factors and the objective set by the concluding words of the subsection. Rightly or wrongly, these passages have been understood as saying that reasonable requirements is a more extensive concept than

financial needs. This seems then to have led to a practice whereby the court's appraisal of a claimant wife's reasonable requirements has been treated as a determinative and limiting, factor on the amount of the award which should be made in her favour. The soundness of this approach was considered by the Court of Appeal in *Dart v Dart* [1996] 2 FLR 286. Thorpe LJ, who has much experience in this field, gave the leading judgment. He sought to reconcile the existing practice with the statutory provisions: see o 296F-H. Reasonable requirements are more extensive than needs. What a person requires is likely to be greater than what that person needs. The objective appraisal of what the applicant requires must have regard to the other criteria of the section, including what is available, the parties accustomed standard of living, their age and state of health and perhaps less obviously the duration of the marriage, contributions and pension rights. Thorpe LJ said, at p296: Used thus the consideration of needs ceases to be paramount or determinative but an elastic consideration that does not exclude the influence of any of the others in a big money case where the wife has played an equal part in creating the family fortune it would not be unreasonable for her to require what might be even an equal share. This conclusion, I have to say, seems to me worlds away from any ordinary meaning of financial needs. Moreover, this conclusion gives an artificially strained meaning to reasonable requirements, the more especially as this phrase was adopted originally as a synonym for financial needs. The other two members of the Court of Appeal were more doubtful. Peter Gibson LJ, at p302, questioned the correctness of an approach which determines the quantum of an award by reference only to the reasonable requirements of the applicant. Butler-Sloss LJ, with her immense experience of family work, shared Peter Gibson LJ's doubts: see p 305. She wondered whether the courts may not have imposed too restrictive an interpretation upon the words of section 25 and given too great weight to reasonable requirements over other criteria set out in the section. She considered that if spouses are in business together, the traditional reasonable requirements approach method to arrive at the post-divorce adjustment of family finances. Subsequently this question arose again, in *Conran v Conran* [1997] 2 FLR 615. Wilson J was of the view that, notwithstanding the observations of Thorpe LJ in the *Dart* case, one could not sensibly fit an allowance for contribution into an analysis of a wife's needs. That would do violence to language and to section 25(3), where contribution and needs are set out as different matters to which the court is required to have regard: see pp 623-624. Thus, as matters stand, there is a degree of confusion. I venture to think this has arisen because the courts have departed from the statutory provisions. The statutory provisions lend no support to the idea that a claimant's financial needs, even interpreted generously and called reasonable requirements, are to be regarded as determinative. Another factor to which the court is bidden to have particular regard is the available resources of which party. As my noble and learned friend, Lord Hoffman, observed in *Pigslowska v Pigslowski* [1999] 1 WLR 1360, 1379, section 25(2) does not rank the matters listed in that subsection in any kind of hierarchy. The weight, or importance, to be attached to these matters depends upon the facts of the particular case. But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why

ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division. There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression reasonable requirements in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognized, there is some overlap between the factors listed in section 25(2). In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is: only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties' contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme. The Duxbury paradox This approach also furnishes a solution to the so-called Duxbury in this type of case. In the present case Holman J referred to the well known paradox that the longer the marriage and hence the older the wife, the less the capital sum required for a Duxbury type fund. A Duxbury calculation is, no doubt, useful as a guide in assessing the amount of money required to provide for a person's financial needs. It is a means of capitalizing an income requirement. But this is all. As I have been at pains to emphasise, financial needs may well be less than the amount required to provide for a younger wife's financial needs. It by no means follows that, in a case where resources exceed the parties' financial needs, the older wife's award will be less than the younger wife

- s. Indeed, the older wife's award may be substantially larger. The next generation I must mention a further matter on which, through her counsel, Mrs. White advanced submissions. It arises out of observations made in *Page v Page* 2 FLR 198. Ormrod LJ, at p.201, expressed the view that when assessing the amount of a lump sum provision under section 25 it is not legitimate to take into account the wife's wish to be in a position to make provision by will for her adult children. Dunn LJ, at p.203, made a similar statement. Ormrod LJ repeated this in his third general proposition in *Preston v Preston* [1982] Fam 17,25. Brandon LJ was of the

same view: see p.36. I agree with this proposition to a strictly limited extent. I agree that a parent's wish to be in a position to leave money to his or her children would not normally fall within paragraph (b) as a financial need, either of the husband or of the wife. But this does not mean that this natural parental wish is wholly irrelevant to the section 25 exercise in a case where resources exceed the parties' financial needs. In principle, a wife's wish to have money so that she can pass some on to her children at her discretion is every bit as weighty as a similar wish by a husband. A Duxbury type fund is intended to provide money for living expenses but not more. The amount of the Duxbury fund is calculated on the basis that the capital as well as the income will be used. The calculation assumes that nothing will be left when the wife dies. This was put graphically by Peter Singer QC in a challenging paper presented to the Family Law Bar Association in May 1992. The Duxbury fund calculation involves using income and ultimately exhausting the capital at the theoretical point when the wife would down her last glass of champagne and expire as predicted by the life tables. In my view, in a case where the resources exceed needs, the correct approach is as follows. The Judge has regard to all the facts of the case and to the overall requirements of fairness. When doing so, the judge is entitled to have in mind the wish of a claimant wife that her award should not be confined to living accommodation and a vanishing fund of capital earmarked for living expenses which would leave nothing for her to pass on. The judge will give to that factor whatever weight, be it much or little or none at all, he considers appropriate in the circumstances of the particular case. As explained by Lord Nicholls, the Courts appeared to think that the claim of an applicant for ancillary relief was restricted to his or her needs. In an attempt to achieve a fair result where the assets are in excess of needs, the Courts coined the concept of reasonable requirements. What Lord Nicholls said in *White v White* is that there was no legal presumption of equal division when awarding ancillary relief, but a judge exercising his statutory discretion pursuant to section 25 of the Act should, before making his final decision, check his tentative views against the yardstick of equality of division and depart from equality only if, and to the extent that, there was good reason for doing so. A claimant's financial needs or reasonable requirements should not be regarded as determinative in arriving at the amount of an award, and the assessment of financial needs should be treated only as one of several factors to be taken into account, particularly when the financial resources of the parties exceeded their financial need. Although a claimant parent's wish to be in a financial position to make provision by will for adult children could be regarded as a financial need, to give such weight as was appropriate to that parental wish. The Wife also relies on the case of *L v T* (unrep) FCMC 2250/2000 dated 2 September 2002, which predates *LKW v DD* (supra). The learned Judge in that case did refer to Lord Nicholls' observations in *White v White* (supra) and ruled:

- [133] Having considered all the facts and circumstances of the case, and in reference to what was being said in *White* that a Duxbury calculation is just a guide in assessing the amount of money required to provide for a person's financial needs, a means of capitalizing an income arriving at the amount of an award, I am satisfied that in this unusual case where resources clearly exceed needs, I should take into account the wish of the Wife that her

award, in Lord Nicholls words, should not be confined to living accommodation and a vanishing fund of capital earmarked for living for living expenses which would leave nothing for her to pass on. If it is the Wife s case that her wish to leave a legacy for her children amounts to a financial need, then both *White v White* (supra) and *L v T* (supra) are clearly against that position. That wish is only one of the many factors which the Court should consider in assessing the Wife s award. In fact, the Court questions whether it is necessary to consider the Wife s wish to leave a legacy after the decision in *LKW v DD* (supra). If this were a case where the assets are only sufficient to cover the needs of both parties, the Wife s wish (which is not a financial need) would not even be considered at all. In a case where assets exceed the needs of the parties, the Court would be going onto steps 3 and 4 set out in *LKW v DD* (supra) to consider applying the sharing principle and whether there are good reasons for departing therefrom. The Wife s wish will be considered further below. The Husband s Needs As explained above, there is no evidence that W2 or X have ever provided any resources to the Husband throughout the years. It was in fact the Wife s case that both W2 and X have always been financially dependent on the Husband. However, there is no dispute that the Husband is still living with W2 as man and wife. She has been supportive of him throughout these proceedings. The Husband admits that his wealth and the gifts to W2 were all fruits of their marriage. W2 clearly has sufficient assets to cater to the Husband s needs. In other words, this is a case where surplus assets would remain after the parties needs have been catered for. Sharing Principle and Good Reasons to Depart from Equal Division Both parties assert that there should be a departure from equal division, whereas the Husband argued that the Wife should be restricted to her needs . In *LKW v DD* (supra), the Court ruled at 80- E.4 Step 3: deciding to apply the sharing principle

80. If surplus assets would remain after the parties needs have been catered for, the next step in the exercise should generally be for the court to apply the sharing principle to the parties total assets, leaving the needs question previously considered to be dealt with under that principle (as pointed out by Sir Mark Potter P in *Charman v Charman* (No 4) cited above). In other words, the court should not make an immediate allocation but should return to needs for them to be dealt with alongside all other material factors in the processes described below as Steps 4 and 5.
81. In *B v B* (Ancillary Relief), Hughes LJ summarises the purpose of the sharing principle, with the yardstick of equal division seen as part of such principle: The sharing principle gives rise to the general proposition that no distinction is to be made, when considering the contributions of the spouses to the marriage (section 25(2)(f), between monetary and non-monetary contributions. Thus there also follows the requirement to test the outcome of the exercise against the yardstick of equality, and to depart from it only if and to the extent that there is a good reason for doing so: see Lord Nicholls in *White* at 605f. Lord Nicholls there expressly adverted to the fact that, more often than not, it is necessary to depart from it The importance of the yardstick of equality is twofold. First it underlines the necessity not to treat financial contributions differently from those in non-monetary form. Second, it underlines the essential fairness of equal division in a large number of cases of shared

matrimonial life.

82. The point reached at this third stage of the section 7 exercise therefore involves the court deciding that the sharing principle applies and taking the view that the total assets should be divided equally between the parties unless there is good reason, capable of articulation, for departing from an equal division. It is worth emphasizing, however, that as pointed out by Lord Nicholls, the court will often ultimately not arrive at an equal division E.5 Step 4: considering whether there are good reasons for departing from equal division
83. The fourth step therefore involves considering whether good reasons exist for departing from the principle of equal division. Any such departure means increasing or reducing one party's share and correspondingly reducing or increasing the share of the other. The question for the court is whether the balance ought to be shifted from a point of equality to some other point in the circumstances of the case. This is necessarily a complex question which raises a range of separate issues.
84. What then are potentially good reasons for such a departure? The answer is to be found in the terms of section 7 and the implicit objective of a fair distribution of the assets. Any of the matters listed in paragraphs (a) to (g) of section 7(1) may provide an appropriate reason, as may the conduct of the parties and all the circumstances referred to in section 7(1). The catch-all category of all the circumstances makes relevant any matter which bears on the fairness of the financial outcome in a matrimonial context.
85. It is important to stress that while such factors, individually or cumulatively, are potentially capable of resulting in a departure from an equal division, a finding that one or more of those factors are engaged does not necessarily mean that a departure must occur. The weight to be given to such factors is in the court's discretion to be exercised in Step 5 as described in Section E.6 below. It cannot be over-emphasised that the matter is fact-specific and discretionary. The sharing principle must not be mechanistically applied.
86. I turn next to consider, as part of the fourth stage of the exercise, a variety of matters which may be material to the sharing principle's operation. E.5.a Source of assets as a material factor
87. The source of an asset may provide a reason for excluding it from the sharing principle on the basis that it is not an item of matrimonial property. Of course, in many cases, no question of any distinction between matrimonial and non-matrimonial property will arise. But where there are assets which may be capable of being so differentiated, section 7(1)(a) implicitly requires the court to consider whether any part of such assets ought in fairness to be excluded from the sharing principle. Differentiation might also be seen as a requirement of section 7(1)(f) if the source of a particular asset suggests that it is an independent and unmatched contribution by one of the parties.

88. However, the warning issued by Lord Nicholls must be kept in mind. Effort and expense should not be wasted in trying to establish a sharp dividing line between what is and what is not matrimonial property: This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties wedding day. Similarly, the equal sharing principle might suggest that each of the party s assets should be separately and exactly valued. A thorough investigation into these differences can be extremely expensive and of doubtful utility. The costs involved can quickly become disproportionate.
89. The existing case-law identifies two classes of assets as possible candidates for exclusion on the basis of source. The first involves property acquired during the marriage by one of the parties from a source wholly external to the marriage, such as by gift or inheritance. The second involves assets derived from a business or an investment conducted solely by one party (sometimes called unilateral assets). E.5.a.i Assets independently acquired
90. In *White v White*, Lord Nicholls gave as examples of assets within this class, property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust and property acquired before the marriage .
91. He made it clear, however, that there is no hard and fast rule as to whether such property should be excluded. It is very much a matter within the judge s discretion to be exercised taking account of all the circumstances of the particular case: when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered.
92. However, an important factor which comes into play is the duration of the marriage, the factor mentioned in section 7(1)(d). As Baroness Hale pointed out, the importance of the source of the assets will diminish over time . Her Ladyship explained: As the family s personal and financial interdependence grows, it becomes harder and harder to disentangle what came from where.
93. So where it is a short marriage, the court may well be inclined to regard as excludable non-matrimonial property, assets acquired by one of the parties before the marriage or acquired in the course of the marriage from some wholly external source. But after a long marriage, those factors are likely to have much less weight. Thus, in *White v White* itself, Mr. White had benefitted from an initial cash contribution made by his father but, as Lord Nicholls commented, that could not carry much weight 33 years later.

94. Where one of the parties acquires certain assets after separation without any help or contribution from the other, the court may well exercise its discretion to exclude such property from an equal division. However, if at Step 2, an endeavor to meet the parties financial needs is the sole or paramount concern, its acquisition after the separation may not prevent such property from being included in the award. E.5.a.ii Unilateral assets
95. There has been a measure of disagreement in relation to unilateral assets. Baroness Hale was inclined to regard assets sourced from the business or investment activities solely of one of the parties, i.e. unilateral assets, as property potentially to be excluded from an equal division. She qualified this by saying: The source of the assets may be taken into account but its importance will diminish over time . By way of elaboration, her Ladyship stated: the court is expressly required to take into account the duration of the marriage: section 25(2) (d). If the assets are not family assets , or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division This is simply to recognize that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared.
96. Lord Hoffman and Lord Mance agreed with Baroness Hale while Lord Hope of Craighead agreed with both her Ladyship and Lord Nicholls. Lord Nicholls, however, did not agree with Baroness Hale on this point. He stated: the courts should be exceedingly slow to introduce, or reintroduce, a distinction between family assets and business or investment assets. In all cases the nature and source of the parties property are matter to be taken into account when determining the requirements of fairness. The decision of Munby J in *P v P* (Inherited property) [2005] 1 FLR 576 regarding a family farm is an instance. But business and investment assets can be the financial fruits of a marriage partnership as much as family assets. The equal sharing principle applies to the former as well as the latter. The rationale underlying the sharing principle is as much applicable to business and investment assets as to family assets.
97. The difference of opinion is relatively narrow as it only relates to cases where the marriage is of short duration. The merits of the competing views are open to debate and it is not necessary to reach a firm conclusion in this judgment. I will content myself with saying that I am tentatively inclined to prefer Lord Nicholls s approach as being simpler to operate and as avoiding the possible re-introduction of a discriminatory element into the exercise.
98. It should be noted that these refinements are not generally applicable to the matrimonial home and other assets which have been intended for and devoted to family use. Lord Nicholls pointed out in *Miller/McFarlane* as follows: The parties matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose .in principle the entitlement of each party to a share of the matrimonial property is

the same however long or short the marriage may have been. Baroness Hale agreed, describing the matrimonial home as a prime example of a capital assets. E.5.b Conduct as a material factor

99. Section 7(1) makes it the court's duty to have regard to the conduct of the parties in exercising its discretionary jurisdiction. It is therefore in principle a factor which may, alone or in combination with others, result in a departure from an equal division.
100. However, the courts have recoiled from permitting the parties to indulge in a post mortem of their marriage in order to find fault with each other or to air their mutual recriminations and go into their petty squabbles for days on end. As Sir George Baker P stated in *Campbell v Campbell*, everything should be done by the court to avoid costly, indecent and time-wasting investigations regarding conduct in relation to ancillary relief proceedings. Otherwise the court will be faced with a lengthy, costly and, most likely, profitless investigation stretching over days, when allegations and counter-allegations are made by the ex-spouses or spouses, one against the other. These sentiments are just as pertinent today and are reflected in the fourth underpinning principle referred to above.
101. In *Wachtel v Wachtel*, Ormrod J devised a means to counteract such objectionable practices which was endorsed by Lord Denning MR in the Court of Appeal. It was made clear that conduct was only relevant to financial provision if it was: both obvious and gross so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. His Lordship added: In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehavior in the course of an unhappy married life.
102. As Sir Mark Potter P stated in *Charman v Charman* (No 4): the case of *Wachtel* was seen at the time, and is still seen to be fundamentally important. It established, amongst other things, that the acrimonious disputes as to the causes of the breakdown of marriage, which had characterized the law of divorce prior to the 1969 Act, were not to be born again in the arena of financial disputes.
103. In England and Wales, section 25 was amended in 1984 so that section 25(2)(g) now states that conduct is to be taken into account only if that conduct is such that it would in the opinion of the court be inequitable to disregard it. It therefore differs from section 7 which does not contain that express qualification. However, in my view, that amendment makes no material difference. Section 25(2)(g) puts into statutory language what is essentially the obvious and gross test used before 1984. This is indicated in the passage from the learned President's judgment cited in the preceding paragraph and made clear by Baroness Hale: once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other:

in the famous words of Ormrod J in *Wachtel v Wachtel* [1973] Fam 72, 80, the conduct had been both obvious and gross . This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases.

104. Conduct, or more accurately, negative conduct, is therefore only to be regarded as a material factor of it is obvious and gross in the sense explained in *Wachtel v Wachtel* or, which comes to the same thing, if it is such that it would in the opinion of the court be inequitable to disregard it.
105. The conduct heading is sometimes used in the case-law to refer to positive conduct which I prefer to discuss under the heading of contribution . It has been suggested that prenuptial and post-nuptial agreements might be classified as instances of conduct . I would be more inclined to regard them as relevant matters brought in under the general rubric of all the circumstances . They do not in any event call for any detailed discussion in the present case.
E.5.c Financial needs as a material factor
106. Assessment of the parties financial needs has been examined in describing the second stage of the exercise under discussion. It was noted that paragraphs (b) to (e) of section 7(1) have a bearing on such financial needs. In the present context, one or more of those matters may also be relevant to deciding whether an equal division should be departed from.
107. This, as envisaged by section 7(1)(b), one of the parties may be left with significantly more onerous obligations or responsibilities (most commonly involving care of the children) than the other. Baroness Hale gave as examples of needs , cases where one of the parties is unable or has a diminished ability to re-enter the job market; or has responsibility for the care of elderly relatives. Another example involves cases where one of the parties has special needs arising out of a physical or mental disability 9as section 7(1)(e) recognizes). Circumstances like these are clearly capable of leading to a departure from equality of division.
E.5.d Duration of the marriage as a material factor
108. Section 7(1)(d) specifies duration of the marriage as a factor which the court must consider when exercising its discretionary powers. This is potentially of great importance to the question whether the court should depart from an equal division. While the sharing principle applies to both long and short marriages, it is clear that when a short marriage comes to an end, fairness may dictate that one party should exit the relationship with less than half of the total assets.
109. In Lord Nicholls s words, this reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage . Viewing marriage as a partnership of equals, the fruits of the partnership are likely to be less substantial after a short marriage. Mutual commitment being shorter-lived, the extent of any disadvantage brought about by separation may well be less profound. Moreover, as we have seen after a short marriage, the court may well treat property acquired by one of the parties before the

marriage or during the marriage by way of inheritance or gift or from some other wholly external source as excludable non-matrimonial property. We have also noted that Baroness Hale held that following a short marriage, unilateral assets in the sense explained above might be excluded. Accordingly, the duration of the marriage is highly relevant and an equal division is more likely to be sustained after a long, rather than a short, marriage. E.5.e Contributions to the welfare of the family as a material factor

110. The court is duty-bound by section 7(1)(f) to have regard to the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family. This is at the heart of the approach to financial provision in *White v White* and *Miller/McFarlane*. In identifying the overall objective as fairness between the parties and in rejecting gender or role discrimination when assessing the parties respective contributions, those authorities are in harmony with section 7(1)(f).
111. The parties contributions are generally factored in as an intrinsic part of the sharing principle. The yardstick which favours equal division unless some good reason exists to the contrary implicitly gives equal recognition to the parties respective contributions, though different in kind. This was put graphically by Coleridge J in *RP v RP*: the parties made a life-choice early on in their marriage; that they would have children and so the wife would cease to work. That was a life-choice made by them both with all its pros and cons. From then on her contribution has been just as full as the husband's but different. At the end both are entitled to a full share of the fruits of their combined and equal contribution; she to ensure that she has a secure future both with and later without the children and the husband so that he can re-establish himself. She has earned it (as Lord Nicholls of Birkenhead stressed in *Miller*), and so has he. This is not largesse by the husband, it is her entitlement deriving from her valuable contribution.
112. A number of problems may arise however, if an attempt is made by one of the parties to persuade the court that his or her contribution to the family's welfare is so significantly greater than the other party's (sometimes called a special or stellar contribution as to justify departure from an equal division).
113. Assuming that during the marriage the parties occupied the traditional roles of breadwinner on the one hand and homemaker or child-carer on the other, there is, as Thorpe LJ said in *Cowan v Cowan*, the obvious difficulty of assessing contributions which are largely of a different character and are therefore inherently incommensurable. Any attempted assessment would necessarily be highly subjective and unsatisfactory.
114. Secondly, an attempt to decide whether the contributions of one of the parties during the marriage were or were not stellar, is likely to require highly objectionable retrospective investigations of the kind discussed above in connection with the fourth underpinning principle.

115. While recognizing that the court must assess each and every one of the section 25(2) criteria that may affect the outcome, Thorpe LJ stated: I do not accept that the duty requires a detailed critical appraisal of the performance of each of the parties during the marriage. Couples who cannot agree division are entitled to seek a judicial decision without exposing themselves to the intrusion, indignity and possible embarrassment of such an appraisal. I fully agree with Coleridge J that any other approach encourages a vain endeavor to recreate historic situations, choices and failings which in the context of a long marriage can never be recaptured fully or accurately.
116. Thirdly, since, as noted above, the parties respective contributions are already factored in as an intrinsic part of applying the sharing principle, a real risk of double-counting exists if one of the parties is to be awarded some additional sum in recognition of some allegedly special contribution.
117. Given such difficulties, it is unsurprising that the English courts have shown a marked and growing reluctance to accept special contribution as a basis for departing from equal division. The bar for raising the issue has been set very high. As noted above, Lord Nicholls and Baroness Hale adopted a standard equivalent to the obvious and gross standard in connexion with conduct and held that a premium for special contribution would only be considered where the circumstances are of such an exceptional nature that it would very obviously be inconsistent with the objective of achieving fairness for them to be ignored. Expressing his wariness of the issue of special contribution, Thorpe LJ in *Lambert v Lambert*, stated: for the present, given the infinite variety of fact and circumstance, I propose to mark time on a cautious acknowledgement that special contribution remains a legitimate possibility but only in exceptional circumstances.
118. In my view, our courts ought to proceed on the footing that the parties respective contributions to the welfare of the marriage are implicitly recognized within the sharing principle itself and that there will, if at all, only be rare and exceptional cases where an issue can properly be raised in favour of departing from equality on the basis of special or stellar contribution. E.5.f Compensation as a material factor
119. Compensation has been canvassed as a factor material to the ultimate outcome in two different ways. The first, deriving from section 7(1)(9g), is relatively uncontroversial. The Ordinance requires the court to have regard to the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. Whether such a loss arises in any particular case is essentially a question of fact.
120. More difficult issues present themselves in relation to the second type of compensation which addresses, not a loss arising as a consequence of dissolution of the marriage, but a disadvantage incurred as a result of the way the parties arranged their affairs during the marriage. Lord Nicholls explained that such compensation: is aimed at redressing any significant prospective economic disparity between the parties arising from the way they

conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case.

121. Baroness Hale called this compensation for relationship-generated disadvantage, explaining it as follows: the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties' needs, then a premium above needs can reflect that relationship-generated disadvantage.
122. Treating this kind of compensation as a factor material to the distributive outcome has caused difficulties, many of which have been identified by Coleridge J in *RP v RP*.
123. The first problem relates to the claim implicit in an invocation of this type of compensation. The party seeking to rely on it is in effect saying that but for taking up the role he or she in fact assumed during the marriage, he or she would have enjoyed a lucrative career of some description. This sounds very much like a free-standing civil claim for loss of a chance. But, as Coleridge J points out: it is simply not possible (and highly undesirable and costly) to conduct a speculative what if exercise to reconstruct the parties' marriage on a different basis.
124. Moreover, ancillary relief proceedings are quasi-inquisitorial and quite unsuited to entertaining claims in the nature of an action for damages. Coleridge J explains this as follows: it is neither possible nor desirable to break up, artificially, these ancillary relief claims into separate heads of claim as if they were actions for damages for personal injury. In this jurisdiction there is only one finite pot of resources which has to be divided between the two parties fairly by balancing their competing claims by reference to s.25. That is a world away from a civil claim where the resources of the defendant are irrelevant to the calculation of the claim and which is made up by aggregating separate heads of damage. In this jurisdiction every pound or percentage point added to one side subtracts in equal measure from the other.
125. It is perhaps significant that Lord Nicholls expressed a concern that allowing such compensation might lead to double counting: Compensation and financial needs often overlap in practice, so double counting has to be avoided. But they are distinct concepts, and they are far from coterminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.

126. In my view, the risk of double-counting in clean break cases arises not merely because of a potential overlap with financial needs but because compensation for relationship-generated disadvantage is, like contribution, already intrinsically factored in as part of the sharing principle. By recognizing that a spouse who has given up a potentially lucrative career to take up a traditional role within the family should enjoy equal status with the breadwinner and should receive an equal share of the assets unless there is good reason to the contrary, the sharing principle gives effect in principle to this form of compensation.
127. I therefore find it difficult to see how double-counting can be avoided if some additional premium is to be attributed to the lost opportunity of an independent lucrative career. It seems unfortunate that in *Miller/McFarlane*, compensation was treated as an independent strand of fairness apparently standing apart from the strand represented by the sharing principle. That may well have contributed to the tendency detected by Coleridge J of some parties attempting to treat compensation as if it was a free-standing damages claim rather than an aspect of the sharing principle.
128. The view that compensation should be viewed as an intrinsic part of the sharing principle finds echoes in a question posed by Coleridge J (although he spoke of the overlap primarily in terms of need). The word compensation, which has been used frequently during this hearing, does not appear in the statute. Does it, I wonder, in the end, add anything to the concept of financial obligations and responsibilities which each of the parties has, deriving from s25(b)? Obligations arise, surely, because of the parties' contributions, equal but different, (including career sacrifice) at the beginning, during the marriage and beyond its end.
129. There may of course be cases where on the particular facts, allowing for this second type of compensation is fully justified and involves no risk of double-counting. *McFarlane v McFarlane* is a case with such special facts. The wife had given up a professional career as successful and highly paid as the husband's and Lord Nicholls considered it a paradigm case for an award of such compensation. However, a central feature of that case was that the parties' capital was insufficient to permit an immediate clean break and the only way the compensation element could be addressed was in the form of periodical payments by the husband. There was accordingly no risk of double-counting since there was no question of applying the sharing principle to any capital assets.
130. In my view, the approach to compensation should be similar to the approach to contribution previously discussed. Our courts ought to proceed on the footing that compensation for relationship-generated disadvantage is generally already factored in upon any application of the sharing principle. The extent of the compensation allowed for in applying that principle and deciding the extent of any possible departure from an equal division is, in any particular case, a fact-specific question which will depend on the nature, certainty, permanence and other qualities of this disadvantage incurred, viewed in a road brush way. It will only be in exceptional cases that a separate element of the award over and above the amount already factored in should be dedicated to such compensation on the special facts of the particular

case. In such exceptional cases, the court should not attempt to try the issue evidentially or conceptually as if it were a damages claim. A broad brush attribution of some percentage of the award to the element of compensation would generally be sufficient. E.6 Step 5:

Deciding the outcome

131. It is worth reiterating that, having gone through the processes I have compendiously called Step 4, the court is not bound to depart from equality in the division of the parties assets even if one or more of the factors considered are engaged on the facts. The weight to be given to such considerations is a matter of discretion for the court. Stepping back and looking at the overall impact of the factors found to be relevant, the court may decide that certain factors carry such weight that a departure from equality is called for. The decision is fact-specific and discretionary. But where there is a departure, the court should explain its basis since the articulation of reasons provides a useful check on the fairness of the outcome. Consideration of Factors I will now consider the factors set out in Step 4 of LKW v DD (supra). It would be more convenient to first deal with the length of the marriage. Length of Marriage The Wife is asking for asking for a departure from equal division. One of the factors she relied on is the length of the marriage. She says that this was a marriage of over 55 years. The Wife presented a Petition for divorce on 28 September 2016. The Petition was based on 2 years separation. She alleged in the Petition that the parties had been separated since some time prior to January 1984 [A/2/ 10]. The Petition was uncontested and the Wife affirmed the truth of the contents of the Petition when she applied for directions for trial by filing a Form 21(4). A Decree Nisi was pronounced on the basis of her Petition on 11 May 2017. In her 1st Form E filed on 11 January 2017, she stated that the separation dated was 1981 [A/39]. However, by the time she filed her 1st Affirmation on 9 June 2017, she suggested that they were not so separated. There was no suggestion as to when she says was the proper separation date. In her Statement of Issues, the separation date was not listed as one of the disputed issues. However, the Wife alleged that this was a marriage of over 55 years. By the time of the trial, it became apparent that the Wife was running a case that the marriage continued until the commencement of the proceedings. Firstly, the sole reason put forward by the Wife in the Petition for the irretrievable breakdown was that the parties have been separated for 2 years as at the date of the Petition. If she says that there was no separation until the Petition, she was not even entitled to a decree. In other words, if what she now says were true, she had obtained the decree by misleading the Court. The Wife did not raise this allegation until after the Decree Absolute was granted. Her conduct in this respect is thoroughly dishonest. Section 11 of the Matrimonial Causes Ordinance, Cap.179 [MCO] provides that the sole ground for presenting or making a petition or application for divorce shall be that the marriage has broken down irretrievably. Section 11A(2)(d) of the MCO provides that irretrievable breakdown may be proved by satisfying the court that the parties have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition. Under section 11C of the MCO, a husband and wife shall be treated as living apart unless they are living with each other in the same household. However, living apart does not exist so long as both parties bona fide recognize the marriage

relationship as continuing even though the husband and wife are separated. The relationship does not end by reason of a separation brought about by the pressure of external circumstances such as absence on professional or business pursuits, or in search of health, or, it may be, even of pleasure. Sexual intercourse, dwelling under the same roof, society and protection, recognition in public and in private, correspondence during separation may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the marriage relationship does or does not exist, the weight of each of these elements varying with health, position in life, and all the circumstances of the parties [Jackson & Rayden on Divorce and Family Matters 18th Edition/ 9.57]. In the Court of Final Appeal case of *WLK v TMC* (2010) 13 HKCFAR 6018 at 105, Ribeiro PJ (with whom the Court agreed) held that there may be highly exceptional cases (such as where parties are unable to cohabit because, for instance, they have high-powered jobs in different countries but have children and otherwise generally conduct themselves as if they are married) where the absence of physical cohabitation may not stand in the way of treating them as in a de facto marital state. Plenty of other examples abound those deprived of the company of their spouses by war, famine, even imprisonment are not thereby rendered unmarried. Such a proposition is as false as it is unedifying. In *Z v X* (C Intervening) (Disclosure: Company Valuation) (2012) HKFLR 436, the husband and wife were married in Harbin in 1982, after which they spent very little time physically together. In 1984, the husband worked in Beijing. In 1988, he was assigned to work in Hong Kong. In 1990, the wife went to Australia on a student visa. The parties emigrated to New Zealand in 1993 and bought a property there, although the Husband continued to live and work in Hong Kong most of the time. In early 2000, the parties emigrated to the United States where their son was to attend school. The wife only discovered that the husband had a secret second family in November 2003. The husband then made proposals to the wife for financial arrangements in December 2004. Both the Court of First Instance and the Court of Appeal found that the marriage had continued until 2003. In particular, the Judge relied on a letter written by the husband to the wife in July 1989 in which the husband stated that he believed that he and the wife can walk happily throughout our life. Further, by the husband's email dated 17 December 2003 he had admitted that the marriage had been in existence until that time. The court held that the husband might well have cohabited with a third party for a long period during the marriage but the husband had never indicated that the marriage was long dead. The questions of separation and post separation accrual was also considered in the case of *Kan Lai Kwan v Poon Lok To Otto* (2014) 17 HKCFAR 414. The parties were married on 6 January 1968 in England where they were each working and pursuing further qualifications, the wife as a nurse and the husband as an engineer. After returning to Hong Kong in 1969, they found employment and had three children. In 1997, the husband started his own engineering business while the wife continued to work as a nurse. After a slow start, the husband's business enjoyed some success but then had a major setback in the mid-1980s when it almost failed. It was a very difficult time for them since most of their savings were lost in a stock market crash. They decided to emigrate to Canada in 1988. The wife remained in Canada with the children for several years while the husband returned to Hong Kong and

started rebuilding the business. They became Canadian citizens in 1992. Unfortunately, two tragedies befell the family. On 7 October 1995, the younger daughter was killed in a road accident in the United States, after which the parties found it impossible to talk to each other. Five years later, their son took his own life by leaping from the balcony of the family home. The rift between the parties widened even further. In 2001, the parties moved into a new home. It was the husband's case that while he and the wife lived there under the same roof, their marriage was a bare shell and nothing more. Matters came to a head in 2008 when the wife discovered and confronted the husband about a long term relationship he had maintained with a younger woman. The Husband then wrote a note upon the wife's insistence affirming the marriage. They then went to France together. Upon their premature return from the trip, the wife had an emotional confrontation with the husband's girlfriend. On 3 July 2008, the husband moved out of the former matrimonial home but the parties later went to Singapore together only to have another row there. A final attempt at reconciliation was made in October 2008 when the husband asked the wife to book a cruise holiday. That holiday did not materialize. On 6 November 2008, the wife petitioned for divorce on the basis of one-year separation and consent. She did not proceed with that Petition, which was eventually dismissed by consent. On 6 February 2009, the husband issued his petition based on two years separation. He affirmed that the parties had lived apart since February 2001. The wife did not defend the proceedings and on 26 May 2009 and 1 September 2010 respectively, the decree nisi and the decree absolute were pronounced by the Court on the basis of the husband's petition on 26 May 2009 and 1 September 2010 respectively. The February 2001 separation date was also deposed to by both parties in their Form Es. However, shortly before the start of the hearing, the wife made an Affirmation stating that the February 2001 date was incorrect and that separation had in fact occurred sometime in 2008. The date of separation and the extent to which the wife should be awarded a share in the husband's business after 2001 therefore became contentious issues. The trial Judge held that the wife was estopped from denying that separation had occurred in 2001. The Court of Final Appeal however, held that there was a considerable body of evidence before the Court regarding the parties' relationship between 2001 and 2008. They accepted that the tragic death of the two children had had a devastating effect on the parties' relationship, leaving them emotionally numb and mutually unable to communicate. There was no more warmth or connection between the parties. However, the Court pointed out that for the period between 2001 and 2008, the trial Judge found that: What is agreed is that they had separate bedrooms. The wife says that whilst this may well have by then become an unhappy and unfulfilling marriage, it remained a marriage. She would polish his shoes, see to it that his laundry was done and if she did not always prepare his meals herself, they had a maid, she saw to it that his meals were prepared and kept warm for him if he returned home late. They would sometimes have meals at home together and she continued to be a corporate wife, attending functions and entertaining, as his wife, clients from overseas as well as Hong Kong government officials and mainland officials. They travelled together to the Mainland on company business where she was seen to be his wife. They even went on a cruise together to Greece and shared the same cabin. For the first time in court she said that on one

occasion they even had sexual intercourse which he has denied. On one or perhaps two occasions she performed the wifely task of driving him to the airport when he had to travel on business. Usually he employed a driver to do this sort of thing, who I presume on this occasion, was not available. They even entertained together at home. He would have barbeques for friends and for young engineers who the husband wished to encourage in their careers. This *modus vivendi* continued until the husband finally left the home and went to live elsewhere in 2008. The Court of Final Appeal held that the parties were bound by the estoppel but, where the circumstances demanded the Court's intervention, it was free to override those estoppels. This accorded with the quasi-inquisitorial role of the judge in a matrimonial case. It was further held that the lack of sexual intimacy, separate bedrooms, very limited communication and occasional meals together appeared insignificant when contrasted with the many facets of their ongoing relationship. The Court pointed out that the evidence tended to show that while the marriage was unhappy, with no tenderness or feeling, the parties continued their habitual relationship founded on their very long marriage, with the wife continuing to do domestic chores for the husband, entertaining at home and accompanying the husband to business events to keep up appearances as a corporate wife to save the husband's face in front of his associates and friends; going on trips together; and having together and having a row on the wife discovering the husband's continued relationship with his mistress the wife reacting very much as a jealous wife and the husband acting like a husband seeking to placate her with a note which acknowledges her as his wife and records a desire for a harmonious and complete family life in May 2008. The Court found that the evidence unmistakably points to the marriage (unhappy though it was) having continued until the parties finally separated when the husband moved out of the house in mid-2008. The Wife relied on the case of *L v T FCMC 2250/2000*. In that case, the husband's grandfather TCF was a wealthy man and one of the biggest land owners in the New Territories. He had 3 sons, namely TPK, TKW and TKC, the husband's natural father. In 1931, the husband's grandfather distributed part of his assets to his 3 sons. However, as TKW had already died at that time, his share was held by the TKW Tso. As TKW was without any issue, under the direction of the grandfather, the husband who was then only a small child of 2 years of age, was adopted by TKW's widow WS in order that the male lineage of TKW could be assured. The husband therefore became the sole heir to the TKW Tso but while he was a minor, his natural father TKC was appointed the manager of the Tso until he died in 1953. In the late 1940s or early 1950s, when the grandfather was in his 90s and not in good health, he was keen that the male line of the TKW Tso descendants should be assured before his death by arranging for the husband and wife to marry each other. The wedding took place on 17 January 1951 in accordance with the Chinese customary rites and ceremonies arranged by the heads of the respective families some 2 years earlier, when the husband was 19 and the wife was only 15. As with most customary marriages, the consent of the husband and wife was not sought. About a year prior to the marriage, the husband formed a relationship with a girl called SF and started living with her. It was common ground that the husband and wife had only met on 3 occasions before the wedding. On the first 2 occasions, the husband had tea with the wife's father and barely spoke to her. On the last occasion, the

husband brought along his girlfriend to meet the wife in a hotel and disclosed to her of their relationship. The wife told her father about this but the marriage nevertheless went ahead. After the marriage, the parties lived with WS. However, the husband was seldom at home, staying most of the time instead with SF. Three months later, the husband brought SF to see WS and later took her as his concubine. The husband and SF lived with his biological mother, whilst the wife lived with WS. Despite this, the husband and wife had two children, a son in 1952 and a daughter in 1954 to whom the husband never assumed any parental role. The wife and the children were all along supported by WS with income from the TKW Tso. After the death of the grandfather in 1952, the remainder of his estate took the form of the Six Entities which distributed income and capital to his male descendants including the TKW Tso. One year later, the husband's biological father also died, leaving his estate to his 4 male sons, including the husband. In 1955, the husband separated from SF and started living with a Madam Y by whom he has 4 children. Upon the death of the biological father, WS was appointed the manager of TKW Tso and she continued to distribute the Tso's income to the husband until 1955 when she decided to retain the whole of the income generated by the Tso as well as its share of the income generated by the Six Entities, which upset the husband and caused a rift between them. The husband alleged that it was the result of the wife having spoken against him and SF in the past. Their relationship deteriorated further when WS allowed the wife to be appointed as an additional manager of the Tso in 1968. The conflict came to a head in 1977 when the parties son TTC was also appointed a manager. In 1978, the husband instituted legal proceedings in the High Court against WS, the wife and their son TTC for a declaration that he was the sole legal successor to the Tso and that their respective appointments as managers were null and void. The case was eventually settled in 1983 with 40% of the Tso's assets given to the husband and the remaining 60% to TTC. It was also part of the settlement that both WS and the wife were to cease being the Tso's managers. They were since maintained by TTC. WS later died in 1996. In January 2000, the wife with the assistance of legal aid applied to the family court for a declaration that her marriage to the husband on 17 January 1951 was a subsisting customary or validated modern marriage under the provisions of the Marriage Reform Ordinance, Cap. 178. On 6 March 2000, in the absence of the husband who was served by substituted service, care of his brother's address, the Wife was granted the declaration. On 14 March in the same year, the wife commenced divorce proceedings on the ground of desertion since 1956 and for general ancillary relief and costs. On 20 March 2000, the Wife on an ex parte basis applied and obtained an injunction restraining the husband from disposing of any of his assets once he found out about her ancillary relief claims. At the return inter-partes hearing, the husband denied that he had any intention of disposing of his assets which included over \$30 million in cash, together with stocks and shares and interests in numerous lots of land in the New Territories. He was prepared to give an undertaking not to dispose pending the determination of the wife's claims. The wife's case was that she saw very little of the husband after their marriage as he rarely returned home and later in 1956 deserted her and their children altogether. She says that he has never fulfilled his duties whether as a husband or a father throughout their marriage, financially or otherwise. On the other hand,

she has always fulfilled her duties as a wife, a daughter-in-law to the husband's two fathers and WS and as a mother to the two children. She asserted that she had practically brought up the children on her own whilst the husband would indulge in gambling and womanizing. When the husband lost all his money, he commenced the High Court proceedings for the Tso's assets although he had already succeeded to his biological father's estate. She and the children were all along supported by WS with income from the Tso until 1983 when her entitlement ceased with the settlement of the High Court action. She had asked the husband for maintenance but was refused. From then on, she was supported by TTC with income from his business and the sale proceeds of his share of the Tso's assets. Unfortunately, in about 1999, she was told by TTC that he could no longer support her as a result of the failure of his business. The Tso has also dried up as it no longer held any land. The Husband says that he did tell the wife at their meeting prior to the marriage that he would continue to live with his girlfriend. The wife must either accept this or else he would call off the wedding. The wife had accepted this arrangement prior to the marriage and the wedding thus went ahead. However, when he later married SF as a concubine, the wife broke her promise and started to speak ill of SF. That was why he decided to stay away from their matrimonial home. The husband says that in about 1954, he and the wife formed the opinion that their marriage was at an end and agreed to separate. He agreed that he had never paid any maintenance for the wife or their children during the marriage and that they had been maintained by the income of the Tso. After the settlement of the High Court action, their son TTC became the beneficial owner of 60% of the assets of the Tso. The husband believed that the wife has continued as the manager of the Tso with the son after the death of WS and has been able to enjoy the income from the Tso. He also suspected that the Tso still has two properties and that the sale proceeds of some of the Tso's properties and income have been invested in other forms by the Tso to which the wife had access. The Court found that the husband had met the wife to tell her about his relationship with SF. However, neither of them had the power to call off the wedding. It was a typical customary marriage which was decided by the husband's grandfather and arranged by the respective heads of family and elders. The consent of either party was never sought or required. However, the Court found that the wife never accepted an arrangement that would condemn her to a life synonymous with widowhood and it was the husband who had deserted her. Although the wife accepted that she hardly ever saw the husband during the marriage, she argued that their separate lives was not indicative of the length or existence of their marriage. She asked the Court to take into account the time and society in which they lived, where arranged marriages and concubinage existed. She says that the weight to be placed on their separation in those circumstances was nil. This is to be contrasted to a modern marriage, where parties marry out of their own free will and separation normally signifies the end of the marriage. The Court agreed that in determining the duration of the marriage, it should take into account the time and society which the parties lived in which led to their separate living arrangement. One standout feature of this marriage was that it was a customary one. Unlike a modern marriage, a customary marriage was a union between two families as opposed to a union of two individuals. Such a marriage was not the pursuit of individual happiness,

rather it was the procreation of male descendants. The consent of the bride and groom was not necessary. By the nature of customary marriage, the separation of the parties, or their separate living arrangements do not necessarily mean the end of the marriage. The separation was the direct result of the husband taking a concubine, which he was then permitted to do and which was in fact part of the institution of a customary marriage. The Court found that the taking of SF as a concubine was formally accepted by WS and, reluctantly by the wife as well. The consequential separate arrangement with the husband living with SF in one household and the wife with WS in another cannot therefore be said to have brought the marriage to an end. The Court found that that marriage should be viewed in the context of the wife's subjugation to her husband and the standard of behavior expected of her when considering the duration of the marriage. It is clear that findings in respect of a dispute as to the separation date are very fact specific. Each case depends on its own facts. No single factor is conclusive. The Court is required to look at all the circumstances in the context of that particular marriage. The parties are in agreement that the Husband left the Mainland to escape persecution in October 1967 and that they have never lived together or resumed any intimacy since then. Even the circumstances in which the Husband left were in dispute. The Wife says that the plan for the Husband to smuggle to Hong Kong was a joint decision. He had dinner with her before he left. On the other hand, the Husband says that it was a unilateral decision. He says that at that time, he and the Wife were already living in different cities. The Wife was living in quarters provided by a school where she was a teacher, whilst he was in his home town. He says that when he left, he intended to abandon the family to start a new life in Hong Kong. The Wife's evidence in this respect is somewhat inconsistent and self-contradictory. Despite the allegations in her Affirmations, when it was put to her that she and the Husband never lived together since 1967, she stated that she was unable to live with him again after he stormed away. By September 1970, the Husband had remarried. The Wife admitted that she had heard a rumour that the Husband had a girlfriend in Hong Kong but this was denied by the Husband. She alleges that she was unaware of the Husband's infidelity until after her arrival in Hong Kong. She relies on a letter from the Husband in support of a subsisting relationship (the Letter). She says that in the Letter, the Husband assured her that there was no third party; she was unaware of W2 until her arrival in Hong Kong. She further suggested in her 1st Affirmation that she and her children were treated as the first family and the relationship subsisted until the commencement of these proceedings. The Letter stated as follows: (Wife's name), (Your) letters all received. (Wife's name), scold me with all you might, curse me. I am not a despicable and heartless person. I know I have done you wrong, done wrong to little daughter and little son. I only hope that you would calm down and take care of yourself. (Wife's name), although presently I am so, but our sentiment as husband and wife through difficult times I will never forget and I will definitely not forget our flesh and blood, little daughter and little son. I swear that I will never have another child. I am fully satisfied with having little (the daughter) and little (the son). You may not believe me but the fact will speak for itself. Who said that I had sworn in front of the Hong Kong Government that I have abandoned my wife and children? I hope that you would calmly

think about this, and do not fall into other people's trap. In front of (the Wife's name), I admit my millions and millions wrongdoings and ask for your millions and millions forgiveness. But for others, I would basically ignore. Brother Mao's thinking that I would agree would be too optimistic. I would retaliate what he dares to do to me, tit for tat. (Wife's name), what you mentioned in your letter to me have moved my heart and soul. You have always loved your husband, your daughter and son as your own life. You fully understand righteousness. You sacrificed yourself taking care of your husband, daughter and son to minute details. You are smart and a woman of virtue. All these will forever live in my mind. I now swear to you once again, I will never forget you, will never forget our flesh and blood, little daughter and little son. What I have presently are held in a passive position. I have to rely on other people's finance, my own hard work and wisdom, making more money. These money, (Wife's name) you have a share, our little daughter and little son also have their shares. For all these, I will in future make arrangements. Please (Wife's name), be rest assured. With regard to (my) business in Singapore, I have formally asked Brother Mao to manage it for me. I am fully aware of it in Hong Kong. He now wants me to settle the remaining balance as a prerequisite for sending a letter. Since he makes it so explicit, I will not oblige, unless the business is completely closed down. Otherwise he wishes Brother Mao to replace Brother Wing, this surely cannot be done. Miss you and miss little daughter and little son. Wishing you safe and sound Sd.Kwing 23/12 I paid a visit to the son of Aunt Chiu amidst my busy schedules but did not meet him, subsequently he also did not contact me. (my emphasis) The Wife says that the Letter (especially the parts in bold) shows the Husband's assurance to her that there was no third party to the relationship. The Wife is evidently cherry picking from the Letter. Contrary to what is alleged by the Wife, it was clear that she had written to the Husband a number of times, to which he had initially failed to respond. It was also clear that she was confronting him about his relationship in Hong Kong. That was why the Husband admitted in the letter that he had done the Wife and their children wrong. He then referred to their sentiments as husband and wife during difficult times (i.e. in the past) and assured her that he would take care of her and their family financially. The Wife had clearly heard about the Husband's marriage, as she confronted him about his declaration to the Government [A165]. In other words, not only was there no denial of a third party, the Husband was in fact admitting in the Letter that he had a new relationship. I am further reinforced in my view by the Husband's reference to not having another child. The Wife was in China and it would not be possible for them to have a child together. At that time, they did not even know whether they would ever see each other again. If the Husband did not have another relationship in Hong Kong, there was no reason for him to promise not to have another child. The only possible interpretation is that he was admitting that he had a relationship in Hong Kong but was promising not to have a child with W2. He was assuring the Wife of his intention to continue making financial provision for her and the children despite his change of circumstances. The Wife also confirmed under cross-examination that the Husband was telling her that he had remarried in Hong Kong but had promised to continue supporting her. When the Wife arrived in Hong Kong, the Husband never lived with her and continued to live with W2. There was no evidence of

any emotion confrontations, pleas or attempts at reconciliation when this happened. It is consistent with the Wife already having knowledge of the Husband's relationship with W2. The Wife also argued that the marriage was clearly still subsisting because the Husband applied for her and her children to emigrate to Hong Kong. This is denied by the Husband. He asserted that not only had he done nothing to promote the move, he in fact wrote a letter to object to the Wife's application. The Wife produced a letter dated 1979 [B6/1361-1362], written by the Husband, which says: My original name was (original name). After coming to Hong Kong, for various reasons and convenience, [I] changed my name to (present name). I opened and now operate the NWJGC at (address). My wife (name); my daughter (name and date of birth); my son (name and date of birth). Hope [you will] please give them the Notarization documents. In the letter, the Husband did not mention any application for a single entry permit for the Wife and their children. In fact, on 26 April 1978 (i.e. over a year before that letter), the Husband had written to the Hong Kong Immigration Department to inform them of his present name and that he had separated from the Wife. He also told the Immigration that he was remarried to W2 [B6/1206]. It therefore appears that despite asking for notarization of documents, the Husband was trying to stop the move by informing the Hong Kong Immigration Department. Even if the Husband had assisted in the move, it was never intended to be a reunion with the Wife. There is no dispute that they never lived together after the Wife arrived in Hong Kong. The Husband continued to live with W2 and their daughter. The Wife also argued that even the Husband's witness, Mr. Wong viewed the parties and their children as a family. Separation does not mean that they stop being family. The Wife was and will always be the mother of the Husband's children. It was also clear from the Wife's evidence that she knew very little about the Husband's life even after she came to Hong Kong. She did not know that the business was unincorporated, that it was only incorporated in 1994. The only business card of the Husband in her possession was prior to the incorporation of the business. She had no idea who were the shareholders in the business (although it was initially suggested that these other shareholders were the Husband's nominees). She admitted that she was unaware of the Husband's assets. In all the circumstances, it was clear that the Wife knew of the Husband's new relationship long before her arrival in Hong Kong. The nature of her relationship with the Husband upon her arrival was very different from the relationship between the parties in *Otto Poon* (supra). The Husband and Wife never lived under the same roof or resumed any intimacy. Since 1967, the Wife never looked after his household or act as the corporate wife. She in fact knew very little about the Husband's life even after her arrival in Hong Kong. Even the Wife admitted in her Affirmation that she was devastated that the Husband had married W2. In my judgment, even if she had hoped that things may be different, she was certain, at the very latest, by her arrival in Hong Kong that her marriage was over. Although they met for meals and festivities, the Wife admitted under cross-examination that their relationship was that of separated husband and wife. She also admitted in Court that she could never live with the Husband again. The Court in *L v T* (supra) has made it very clear that the facts in that case are highly unusual and each case must be decided on its own facts. In that case, it was a customary marriage where consent and individual happiness were not factors. They are

very different from the present case. The marriage in this case was a union of love, entered into by the parties by their own free will, where marriage to a third party would undoubtedly signify the irretrievable breakdown of the first marriage. In her first Affirmation, the Wife alleged that despite his marriage to W2, the Husband always treated her as the First Family [A/126/ 30] suggesting that he paid deference to them and recognized her as his principal wife and W2 as a concubine akin to the situation in L T (supra). However, her evidence in this respect is wholly self-contradictory. She then contradicted herself in the very next paragraph [A/126/ 31] and stated that the Husband provided for her and their children irregularly and insufficiently. Contrary to the assertion of being treated as the First Family, the Wife alleged in her 3rd Affirmation that their daughter A had to work in a stationery store for \$400 because the Husband failed to provide enough for the Wife and her children [A220/ 17]. She then contradicted herself again in oral evidence by admitting that there has not been a day when the Husband had failed to maintain her and their children. This was again contradicted by the undisputed evidence that the Husband paid for C's education in the United States, gifted very substantial sums to the Wife and their children throughout the years and paid for the purchase of the Wife's residences in Mei Foo. A marriage does not continue to subsist simply because a husband responsibly continues to maintain a separated spouse and their children. Many ex-spouses meet up for meals and during festivities for the sake of the children and grandchildren. Looking at all the circumstances of this case, neither of the parties could have bona fide regarded the marriage as subsisting once the Wife knew about the Husband's relation with W2. Under cross-examination, it was suggested to the Wife that the Letter was written to say that although he had remarried and the Wife knew it, the Husband will continue to make financial provision for her and the children. The Wife's answer was That's what he always said. By reason of the matters mentioned above, the Wife knew that the Husband was married long before she came to Hong Kong. She could not have bona fide believed that her marriage to him was subsisting after the Letter. She is now estopped from changing the separation date, i.e. sometime before January 1984. There is no reason for the Court to override that estoppel. It was in fact a short marriage with a very long separation. Source of Assets The Wife argued that she had provided the Husband with the seed money for his business by sending jadeite to him in parcels of tree roots. However, the evidence from both the Wife and C was again inconsistent and self-contradictory. There is no dispute that there was no marital acquiescence at the time the Husband left the Mainland. Although the Husband's father was a jadeite merchant, the Husband chose to become a teacher. When he left the Mainland, he did not even have the money to pay for the journey and had had to borrow several hundred dollars from his father. The Wife alleged that she sent the Husband jadeite disguised in tree roots, the sale proceeds of which formed the seed money for his jewelry business. This is denied by the Husband. The Wife admitted both in her Affirmations and under cross-examination that she only funded the jadeite in one of the packages. However, even at the time, the Husband told her that there was no jadeite in her package. This was clearly not something he made up for the purposes of these proceedings. Initially, the Wife painted a picture that she had funded the jadeite. Subsequently, she admitted that the

Husband sent her reimbursement for the jadeite that he never received. She only argued that she those payments were insufficient. The Husband admitted that he received some jadeite. However, he said that they were sent by his relatives and townsmen (including his father and aunt), and not by the Wife. The price of these jadeite was named by the relatives and stated in a letter inside the packages. The price the relatives demanded were far beyond the actual value of the items and amounted to extortion. Despite that, there is no dispute that the Husband paid in full for this jadeite. The Letter on which the Wife so heavily relied also suggested that the jadeite was sent by someone else. With regard to (my) business in Singapore, I have formally asked Brother Mao to manage it for me. I am fully aware of it in Hong Kong. He now wants me to settle the remaining balance as a prerequisite for sending a letter The Wife says that the business in Singapore referred to the smuggling of jadeite. According to the Letter, the Husband had asked Brother Mao . The Wife put it to the Husband during his cross-examination that Brother Mao who was his sister s husband). If the Wife s case were true, then the Husband had entrusted Brother Mao to manage his jadeite business for him and it was this Brother Mao (and not the Wife) who was sending the letters . The Letter was in fact consistent with the Husband s case and inconsistent with the Wife s case. Further, the version of events from the Wife and C in respect of the jadeite packages is extremely doubtful. The Husband took over the jewelry arm of a goldsmith shop in 1971. The Husband stated that he took over the jewelry arm of a goldsmith business with funding from W2 (who used the cash and gold jewelry she received for their wedding). This is disputed by the Wife. She pointed out that W2 came from a very ordinary family and was only earning HK\$350 per month as a primary teacher. She asserted that the Husband was only able to take over the jewelry business with the profits he made from the sale of jadeite she sent between 1967 and 1971. However, according to her 1st Affirmation [A123/ 13-14], this was what happened after the Husband s departure from the Mainland:

13. After the Respondent escaped from the Cultural Revolution, we were left to cope with the fall out from his illicit departure. We were persecuted and punished for his actions. Because I was the wife of someone who had smuggled out and therefore was regarded as an anti-revolutionary, I could not return to our home commune. I was caught and imprisoned. I could no longer work. I lost my ration card. Unable to attend to my newborn son, [C], I had to put him in the care of others while I was on the run.
14. I was detained by the authorities and had to spend time in a jail cell on a number of occasions. My children were at times denied education opportunities. It was a very difficult period of my life, having to face such harshness without my husband by my side and to take care of the children the best I could in such turbulent times. There is no dispute that the Husband had left the Mainland to escape persecution. In other words, the family would have been persecuted even if the Husband had stayed in China. The Wife did not become an anti-revolutionary because the Husband had left. According to her 1st Affirmation, the Wife was unable to stay in our home commune (i.e. Shantou) after the Husband s departure. If that were the case, it would be impossible for the Husband s father and relatives to hand her the jadeite. She then gave a completely opposite version of her whereabouts in her 3rd

Affirmation. In her 3rd Affirmation, she appeared to suggest that she was able to and did stay in Shantou: In order not to get my family in Dongguan into trouble because of the Respondent's disappearance, I then went back to Shantou. The Respondent thereafter sent his first of many sums of money to me after he arrived in Hong Kong According to her 1st Affirmation, the Wife was caught and imprisoned after the Husband's departure. Thereafter, she was on the run. Obviously, she would not be able to send any jadeite if she were imprisoned. If she had been on the run, then it is difficult to see why and how the Husband's relatives would entrust her with the jadeite. She then changed her evidence in her 3rd Affirmation. In this Affirmation, she seems to be alleging that the assistance was given after the Husband had taken over the jewelry business. I believe he is trying to distance himself from his father in order to avoid having to admit that he was dependent on the gems sent from the PRC to him when he started up The Wife also conveniently ignored the fact that the Husband had taken over the jewelry arm of an existing business. In other words, he took over a business with existing stock. In any event, it was inherently improbable that she would send any jadeite after she knew of his relationship in Hong Kong. The Wife never stated how long she was on the run. However, C suggested that it was in terms of years in his Affirmation [A153/ 3]: After my father, the Respondent (Father) smuggled into Hong Kong, my Mother had a hard time. She had to leave me in the care of others in a number of locations in my infant years since she was persecuted and was not able to take care of me. I still recall instances where my Mother would come to visit me and bring me food, and then left without telling me so that I did not have to see her leave. It was a very sad time for both her and me. However, in his Affirmation, C also alleged that he had witnessed the Wife hiding jadeite in tree roots [A153/ 6]. According to the Wife, the jadeite was sent to the Husband in the early years which enabled him to take over the jewelry business. According to both the Wife and C, the Wife did not live with C during those early years. C's version of witnessing the packaging of the jadeite is extremely questionable in those circumstances. In any event, during the years prior to the Husband's takeover of the jewelry business, C would have been a toddler of at most 4 years. It is extraordinary that he would have a memory of this and that he understood what the Wife was doing at that age. In my judgment, the evidence from the Wife and C in respect of the Wife's role in sending the jadeite is highly unreliable. In my judgment, the Husband's assets are unilateral assets accumulated by him post separation with the Wife and after his marriage to W2. Conduct The Wife alleged that the Husband is guilty of misconduct by reason of his alleged dissipation of matrimonial assets. As explained above, the Court finds no misconduct on the part of the Husband. The Wife also alleged that the Husband failed to give her sufficient and regular maintenance after her arrival in Hong Kong. Her evidence in this regards was again extremely inconsistent and self-contradictory. In her Affirmation [A/126], she stated:

27. The children and I were faced with having to settle in Hong Kong on our own, with financial payments from the Respondent, which were irregular and inadequate. Our 17 year old daughter was forced to stop her education.

28. I therefore had to and did make, full contribution, both as a mother by continuing to take care of the children and working full time in a clinic around 1981, until I retired in 1990. In that part of her 1st Affirmation, the Wife made it sound as if she was left to her own devices after her arrival in Hong Kong and that she and A were forced to work to maintain the family. In fact, that is absolutely untrue. There is no dispute that after their arrival, the Husband rented a property for the Wife and the children. Subsequently, he purchased a flat in Sham Shui Po for them. Later, the Sham Shui Po property was sold and a property in Mei Foo was purchased as the Wife's residence. This was later sold and another property in Mei Foo was purchased. The Wife also admitted that the Husband provided her with maintenance, although she said it was insufficient and irregular. In her next Affirmation [A220], she made it sound as if she had had to pay for the mortgages of the properties that were purchased as her residence:
31. During all these years, the Respondent continued to provide for his First Family, albeit irregularly and insufficiently. He rented a place for us initially, and then purchased on mortgage a property in Sham Shui Po, in around 1982 for the children and me to live in. In 1987, I used the proceeds of sale from the Sham Shui Po property and he contributed to the balance of the down payment for the premises at [address in Mei Foo] as a home for the children and me. I later sold that Mei Foo premises and bought a second flat in Mei Foo. I later sold the second Mei Foo flat in around 2000. By that stage I had been retired for 10 years. There were still mortgage payments to be covered and I had no capital. Her written evidence further contradicted by her oral evidence, where she said under cross-examination that all along he gave me money. She said that the Husband gave her cash every month and that there was never a day when the Respondent had failed to maintain her. She also admitted in her oral evidence that the mortgage payments were funded by the Husband. When the Wife was asked about the HK\$18,500 from NWJGCL, she mentioned (for the first time) that the Husband had only asked for her Hang Seng Bank account on the street in 2015. This was simply untrue. She only admitted sums were deposited into her bank account after she was confronted with the deposit slips in her Hang Seng Bank account [B6/1291], the first of which was dated 4 June 2007. The allegations in her Affirmations are clearly inconsistent with the undisputed financial support that was given by the Husband, including the purchase of various properties, the maintenance, the support for C to attend University in the US and very substantial sums of money given to the Wife and her two children over the years. During her testimony in Court, the Wife admitted proudly that there has not been a day when the Respondent has failed to give me financial support. She further admitted that the Husband had kept his promise to support her and the children. In her first Affirmation, the Wife alleged that she still had no capital after the sale of her home in Mei Foo. She contradicted herself in her oral evidence, where she admitted that she kept the proceeds of sale but alleged that she no longer recalls their whereabouts. The Husband points out that the Wife's claim is exaggerated because these proceedings are not at all about their broken marriage or the Wife's needs. This is an attempt to obtain a legacy for C. There is no dispute that these proceedings were triggered by the dispute over the jadeite boat.

There is no evidence that the Wife was unhappy with any of the financial arrangements or the Husband's conduct prior to that dispute. The Wife admitted that she considered the jadeite boat a family heirloom which was to be passed to C [A/133]. C was of the same view [A/158]. When it was suggested to the Wife in cross-examination that these proceedings were all about C's inheritance, she said That is not the main issue. In other words, she at least regarded it as one of the issues. The Husband says that after the two lunches when the Wife demanded the jadeite boat, C continued in his quest for inheritance, demanded to see his Will and threatened to expose his bigamous marriage. This is denied by C. He said he did not take part in the dispute. C said that the Wife only began to worry that the Husband would give his assets to W2 after the dispute about the jadeite boat. The Wife and C's evidence are highly improbable. Firstly, the Husband has been living with W2 as man and wife for 46 years by that stage. Even according to the Wife, W2, X and Y are wholly financially dependent on the Husband. This was known to the Wife and C all along. It was a person called (and not the Wife's solicitors) who conducted the land search of the Husband's home prior to the commencement of these proceedings. The Husband paid HK\$ 2 million to C in June 2016, the sum said to be the value of the jadeite boat. The Wife's legal fees were paid through Curt [A95]. HK\$300,000 was paid to C on 1 September 2016 and the Petition was issued on 28 September 2016. Another HK\$1,500,000 was paid by the Wife to C on 14 November 2016. When the Wife was asked about this, she said she had no recollection. She also appeared to have no idea about the nature of her claims (e.g. the request for add-back). In fact, according to the Wife's opening submission, she is asking the Court to consider her wish to leave a legacy to her children. This is in complete disregard of the Husband's distribution of very substantial sums to her two children over the years together with the transfer to C of the Husband's shares in NWJGCL (which was his goose that laid the golden egg). In the light of those distributions, the Wife's wish to leave a legacy for her children carries little, (if any) weight. In my judgment, the Husband is not guilty of any misconduct of any sort. In fact, he has been very generous to the Wife and her children all these years. Nothing had changed over the last 50 years. These proceedings are to secure C's inheritance, which both the Wife and C know are not forthcoming. Contribution The Wife appears to be arguing that she is entitled to a departure in equal division in her favour because of her stellar contribution. As pointed out above, she has tried to make out that she brought up the two children single handedly. It is clear that her assertions are untrue. She admitted that the Husband sent her many sums of money prior to her arrival in Hong Kong. She used this to take care of the children. Initially, she tried to paint a picture that she was left to her own devices after her arrival in Hong Kong. She subsequently admitted in oral evidence that not only did the Husband pay for her residences, he gave her a regular monthly allowance, supported C's university education and gave her very substantial sums over the years. The Wife alleged that because she took care of the two children, she freed up the Husband's capital and income to reinvest into his business. This is obviously untrue. The Wife now admits that the Husband has maintained her and the two children throughout. The Wife only worked in a clinic. There is no question of her freeing the Husband's capital or income to reinvest in his business. The Wife said that she contributed to the Husband's business but

her evidence was self-contradictory and incredible. There is simply no basis for an assertion of stellar contribution. Compensation The Wife has repeatedly submitted that this is a classic case of relationship-generated disadvantage. Firstly, the Court of Final Appeal has already pointed out that save in very exceptional circumstances, the element of compensation is intrinsically included in the principle of equal sharing. Secondly, this claim is wholly groundless. There is no dispute that both parties were teachers in the Mainland. During the Cultural Revolution, the elite were persecuted. Schools were closed. The Wife never had a lucrative career ahead of her, either in the Mainland or in Hong Kong. In any event, she worked in Hong Kong until her retirement. In the past 50 years, she has received more than ample financial support from the Husband. She and her children have been given more funds than W2, X and Y. The Wife decided to realize her investment and is now jealous of W2 and X, who had kept their investments. There is no question of compensation in this case. In my judgment, there are simply no grounds for a departure of the sharing principle in the Wife's favour in this case. Delay The Husband says that the Wife's claim should be restricted to her needs because of the long period of separation. The Husband relies on *Wyatt v Vince* [2015] UKSC 14; [2015] 1 WLR 1228 at 31-21. In that case, Lord Wilson JSC (with whom the remainder of the Court agreed) held that there is a prominent strain of public policy hostile to forensic delay, so that the court will look critically at explanations for it and, even irrespective of its effect on the respondent, will be likely, by reason of it and subject to the potency of other factors, to reduce or even to eliminate its provision for the applicant. The Husband emphasized that nevertheless it remains important to address the effect of delay on the respondent. Examples given include: obligations or otherwise arranged his financial affairs in the belief that the applicant would make no claim against him and that he has done so in a way which, even if it were possible, it would not be reasonable for him to put into reverse; where a respondent can point to factual issue of which the dimming of memories or the disappearance of witnesses over the period of the delay no longer permits accurate determination. The Husband submitted that the delay in the present case is at least 37 years. Moreover, there is no satisfactory explanation for the delay. The Wife may say that she had hoped that the Husband would return to her. However, even if that might have been true at one stage, it could not have been thought at all realistically possible after 1980. The Wife has admitted as much in her oral evidence. It became even less likely as the years went by. The marriage had irretrievably broken down decades ago and if the Wife had wished to make an ancillary relief application, she should have brought one many years earlier. Although *Wyatt v Vince* was a case where the delay occurred between petition and the prosecution of the ancillary relief claim, the Husband argued that the principle equally applies to a delay between the breakdown of the marriage and the issuing of the petition or commencement of the ancillary relief claim. He referred to *Foster v Foster* (1977) Fam Law 112. In *Foster v Foster* (supra), the parties separated after 12 years of marriage. The husband gave the wife a lump sum and made voluntary periodical payments. The husband went to live with another woman (whom by the time of the hearing he had married). The husband had made various gifts of money and other assets to his cohabitee and he also transferred their joint family home into his cohabitee's sole name. Twenty three years after separating

from the wife, the husband filed for divorce. Just over a year after decree absolute was granted, the wife applied for ancillary relief. The wife obtained a lump sum which was subsequently set aside by the Court of Appeal, essentially because of the length of separation and the fact that the husband's assets were the result of joint efforts by him and his second wife. In *Rossi v Rossi* [2007] 1 FLR 790, which was decided post *White* (supra), the parties were Italian and married in Italy in 1964. By 1978, cohabitation between them had ceased. The wife had a son from a former marriage. The spouses ran an antiques business in Italy which fell on hard times. In 1985 the business was moved to London it being a matter of dispute between the parties whether this was a joint venture of one undertaken on the wife's initiative alone. At all events, the business came to be run by the wife and the son. The wife and her son held legal title to two properties in London and to the business partnership. The wife divorced the husband in 1992, at which time he did not defend and signified he would not claim ancillary relief. The husband was arrested in India in 1993 and was unable to leave permanently until 2001. In 2005, however, he began to pursue claims (based, *inter alia* on the contention that the partnership was a *troika* between himself, his wife and her son) against the wife and the son for ancillary relief and orders under the Partnership Act 1890 and the trusts of Land and Appointment of Trustees Act 1996. The Court held [24.7-, dismissing the husband's claims that: 24.7 In deciding whether a non-matrimonial post separation accrual should be shared and, if so, in what proportion, the court will consider, among other things, whether the applicant has proceeded diligently with his or her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and, if so, in what proportions, for what period and by what means. Delay

25. In some cases delay will receive at least some reflection by the characteristics of assets acquired after separation as non-matrimonial. But as I have tried to explain above, this is by no means an invariable consequence. The question is whether delay *per se* should be reflected in the exercise of the discretion.
26. In *Jackson's Matrimonial Finance and Taxation* (Butterworths, 7th edn, 2002), at para 5.7, it is stated: Whatever the length of the marriage, a claim may fail if it is left dormant for too long, in which case one factor may be that the husband's assets have been built up with another woman. It has been said that after a long lapse of time a party to a marriage should be entitled to take the view that there would be no revival of initiation of financial claims against him; the longer the lapse of time the more secure he should feel in the rearrangement of his financial affairs and the less should any claim be encouraged or entertained.
27. The authorities for these propositions are all very old: *Foster v Foster* [1977] Fam Law 112; *Chamber v Chambers* (1980) 1 FLR 10 and *Fraser v Fraser* (1982) 3 FLR 98. I consider them to have equal validity in the post-*White* era.

28. These propositions were foreshadowed in the even earlier case of *Chaterjee v Chaterjee* [1976] Fam 199, (1975) FLR Rep 134 where Ormrod LJ stated, at 208 and 139 respectively: Delay, if it really is delay in the sense of prejudicing the other party may have an important influence on the justice of the case. So may conduct which can be described as lulling the other party into the belief that all claims have already been dealt with. Similarly it may be unjust to interfere with property rights after a lapse of a reasonable and proper manner in the belief that the financial consequences of the divorce have been settled.
29. A vivid example of the vice of delay is the decision of Booth J in *D v W* (Application for Financial Provision: Effect of Delay) [1984] Fam Law 152. There the delay was 6 years and the parties were found equally responsible for it. That aside, the applicant wife had a meritorious claim. She was seeking to recover the value of her half-share of the former matrimonial home. That half-share was worth 14,000. On that basis she would waive the 2,000 unpaid periodical payments that H owed her. Booth J stated: There are certain detrimental consequences of delay. The first is that delay engenders bitterness and hostility between the parties which is detrimental to the whole family and, in particular, to any children of the family. The husband in this case is aggrieved at the attack that is now made upon the home in which he has been living for the past 10 years. The wife, on the other hand, feels deprived of her money and the right to live there. The delay inevitably increases costs. It leads to a multiplicity of affidavits which are filed in order to deal with the ever-changing position of each of the parties. Inevitably, it leads to an exchange of correspondence over a protracted period between solicitors and, no doubt, also leads to attendance of the parties upon the solicitors. And all those matters add up in costs. Further, with the change in property values and with inflation as it is in our present economic situation, as well as with the changes in the parties' own situation and the commitments they take upon themselves, the whole case can be materially altered, and the ability of the parties to cope with the merits of a case may be put in jeopardy. Indeed, delay can put the court in the simple position of not being able to do justice between the parties according to the merits of each case. Unless it can be clearly shown that one party bears the greater responsibility for the delay than the other, the court may be left with no alternative but to make an order which does not reflect the merits of the case. In the result, Booth J felt that all she could do was to award the wife a mere 2,500 (inclusive of the arrears of maintenance). I would emphasise the risk of injustice that is caused by delay. The longer the time that passes the more likely it is that documents will disappear and memories cloud with the result that there is a greatly enhanced risk of the court rendering imperfect justice.
30. Almost every other field of civil litigation has statutory anti-delay measures in the form of limitation period. Even where limitation periods do not exist the equitable doctrine of laches may apply to debar a delayed claim. Limitation periods and the doctrine of laches embody the public policy consideration expressed by Wood J in *Chambers*, namely that the longer the lapse of time the more confident a party should be that no claim will be initiated against him, and the more secure he should feel that his financial structures will not be disturbed. As pointed out by the Husband, the Wife has put forward no explanation for the

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