

HONG KONG / JUDGMENT

RPB nee RGP v. CFB

[2024] HKFC 84**COURT**

Family Court

DECIDED

19 April 2024

CASE / FILE NUMBER

FCMC13240/2019

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bjbj FCMC 13240/2019

**[2024] HKFC 84 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 13240 OF 2019**

BETWEEN RPB nee RGP Petitioner and CFB Respondent

Coram: Her Honour Judge Thelma Kwan in Chambers (not open to public) Date of Trial: 10 - 12,
17 - 18 January 2023 Opening Submissions from Petitioner and Respondent: 3 January 2023
Closing Submission from Petitioner: 20 February 2023 Closing Submission from Respondent: 24
March 2023 Reply Submission from Petitioner: 17 April 2023 Date of Judgment: 19 April 2024

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

This is the ancillary relief trial between the Petitioner Wife () and the Respondent Husband ().
There is a child of the family () who was born on 5 February 2014, soon to be 10 years old at time
of trial. During this 5 days trial, both parties attended via VCF, W from the Philippines, and H
from the US; the two expert witnesses from the US and the Philippines also gave evidence via
VCF respectively.

Background

H is American, born in May 1974; he was 48 at the time of trial. He works as a pilot for Fx, and
was employed there since 2005, he is now living in the US. W is Filipino and was born in June
1985, she was 37 at the time of trial. She is now full-time carer for K. The parties met in the
municipality of S in the Philippines () at the end of 2006. W was working as a waitress then, and

H was just posted by Fx to S not too long before. The W s case is that they started to cohabit from June 2007, and was engaged in November 2008. H was posted to Ms, US by Fx the following month. W says it took a long time for H to obtain a spousal visa for her, she was only able to join H in the US in August 2010 and the parties got married there in October 2010. Parties lived together for a few years in the US, during which time K was born. The family then moved to Hong Kong in 2015 when H had the opportunity to be posted here. Parties separated in July 2019. W filed for divorce on 6 November 2019. Decree Nisi was pronounced on 20 July 2021. H stayed in HK until in or around November 2021; while wife worked as a part-time waitress for a short while. W then moved with K to S in July 2021, following a Relocation Consent Order made in May 2021. S is her hometown; there she looks after K, and is presently not working. H lives in the US, despite Court s enquiry at the beginning of trial to ascertain his exact residence, the response came over rather vague. It is his case that he now lives on a boat purchased by him in late 2022. To this date, he still works for Fx. Relocation Consent Order Parties says there has been a long contentious litigation, they came to some agreement with the Relocation Consent Order made on 15 May 2021. The parties have joint custody of K, W has care and control, and generous defined access to H. Following this Relocation Order, W moved to the Philippines in July 2021. H has exercised his access in 2022 for short stays and during the summer holidays in the US. H pays maintenance at US\$2,300 (HK\$17,940) for both W and K, pays for K s school fees and schools related expenses at the international school in S, and any ECA mutually agreed between the parties. There is an agreement for the parties to discuss the possibility of W moving with K to the US when he reaches age 10. At the time of trial, no mention was made on how this will unfold. H s case and his Open Proposal It is H s case, based on his calculation, that the matrimonial pot is \$3,681,483. H says there are inheritance and pre-marital assets that should be excluded from the matrimonial pot. He proposes: W to receive \$2,051,801, which is to be made up from: The property in S, Philippines, worth \$1,650,000 which needs to be transferred into the W s sole name The Hil time share worth \$140,400 W to keep the car in the Philippines, worth \$150,000; and W to retain her bank accounts and jewellery H says that as his calculation of the matrimonial pot (excluding inheritance and pre-marital assets) is \$3,681,438. The above amount proposed to be given to W represents more than 50% of the pot. Having estimated W s maintenance needs at \$5,951 a month, and calculating this for 10 years until K reaches the age of majority, H says this adds up to \$714,120, and therefore proposes to pay an additional \$1,000,000 to the W, and W to receive a share of his Defined Benefits pension sometime in future when H retires, subject to certain caveats He proposes to give K \$1,500 per month. He says W is young and has earning capacity, and as S s costs of living is not high, he says that his offer is fair. H s counsel says that H recognises the authorities that non-matrimonial assets could be relied upon for needs if and insofar as necessary, fair and reasonable, but he submits that the present case is certainly not one where non-matrimonial assets should be shared . In his closing submission, H s counsel says that W has raised points in her oral evidence not raised before. He appears to blame it on the lack of the parties agreed / disputed issues before the trial. These new issues involve W bringing up alleged intermingling of non-matrimonial assets , and the fact that H s pre-marital assets were inherited. H says as W has chosen to run a case of intermingling of assets, the burden of proof is on her. The burden does not shift onto H; it is not for H to prove non-intermingling of assets. .

Furthermore, H is also saying that W has repeatedly failed to put her case to H while in cross examination, including intermingling of assets, that the NL Farm () was not purchased with inherited funds, that H s allegation of inherited assets is in fact not inherited; and failed to challenge H s mother s letter regarding funding for the NLF property. H s counsel cites the case of SSLT v SMFC 2019 HKFLR 458, and says that while this rule is not strictly applicable to family proceedings , but parties in the SSLT case had clearly set out issues in dispute; but is not done for the present case. H s also appear to think that it was W s case that the pre-marital assets are not inherited, or that she was not concerned with the source of the assets, that she wants 50% of everything. W counsel argues that the W does not dispute that these assets are premarital / inherited but says that it should all be in the matrimonial pot for division. W s case and her Open Proposal W says they commenced cohabitation since 2007, became engaged in 2008, and the longest time they had been apart from each other was after the engagement while she was waiting for H to apply a dependent visa for her to enter US as his fianc

- e. She arrived in the US in August 2010, and they got married shortly thereafter. She says this is a lengthy marriage, and therefore says she is entitled to 50% sharing of the matrimonial assets. W says the matrimonial pot is \$23,004,266. She says H has removed \$19M worth of assets from the matrimonial pot claiming that these were inheritance and premarital. She disagrees that there should be any exclusion of these assets in the H s name. She says this is a needs case, and her needs will trump the 50% sharing of H s calculation of the matrimonial pot. W asks for 50% sharing of her calculation of the matrimonial pool, which comes to \$11,502,133; this to include the Ha property and the balance to be paid in 5 instalments. She also asks for ongoing maintenance for herself at \$20,556 and for K at \$30,941, and also for his international school fees at \$6,219. W says this is not a case for clean break as she contemplates the possibility of moving to some place pursuant to the terms of the Relocation Order. She also asks for H s undertaking to pay K s school fees, ECA, and school related expenses; her costs for flights if required to accompany K on access, her costs to deliver / collect K for H s access, and for her and K s accommodation upon future relocation. She says that she has contributed to the marriage in her own right, having followed him to where his job had taken him to enable him to build his career. Furthermore, she has contributed during the marriage as a homemaker, and throughout K s life as his major carer. W also challenges H s calculation of his pension, which amount he put into the joint schedule of assets and liabilities, as he has applied his own (i) discount for illiquidity and (ii) percentage calculation of his pension based on his assessment of the marriage duration, while these matters remain an issue for the Court to decide.

Issues

H has set out the following issues to be considered in his opening submission, these shall be analysed below. H s pension lump sum and Defined Benefits pension (income stream), and what is a fair percentage to be applied to be placed into the matrimonial pot How should the property in S (S Property) be considered H s 1/8 share of B Farm LLC (BF LLC s share in NLF Other matrimonial assets W s earning capacity Reasonable needs of the parties and K H s counsel

reminds this Court that there was no agreed issues in dispute ordered by the Judge who presided at the first PTR in April 2022; and that W never provided a list of issues themselves. On this point, at the PTR on 18 November 2022 when I made orders for Schedule of Assets, Bundles, Chronology and opening submission and proposals, neither counsels brought up the subject matter for a list of issues. The Matrimonial Pot and the Parties respective positions The following table represents the parties respective position on assets in the parties ownership Value BF LLC which holds land US\$3.5M By SJE H owns 1/8, therefore US\$437,500 / \$3.41M Ringfenced Inherited from family, and co-own with family members, 1/8 ownership of LLC Asset is not liquid NLF US\$2.2M By SJE H co-owns with brother. Therefore US\$1.1M / \$8.58M Ringfenced Confirms 50% ownership. Purchased with funds from inheritance S property \$1,650,000 Inhabited by W and K. purchased in K s name. W says it should be excluded from the matrimonial pot Part of the matrimonial pot Ha property \$2,238,600 Jointly held, Agreed value H keeps Hil Time Share, Fl \$140,000 Jointly held, Agreed value Give to W Vanguard stocks \$869,316 Should be matrimonial pot Ringfenced. Inherited / pre-marital Fidelity stocks \$391,938 Should be matrimonial pot Ringfenced. Inherited / pre-marital Merrill stocks 724-XXXXX \$683,397 Should be matrimonial pot Ringfenced Inherited / pre-marital Fx 401K lump sum US\$716,654/ \$5,859,898 Whole amount to be included into the matrimonial pot Ringfenced Based on H s calculation of 9 years of marriage, out of 17 years of service, and a 50% illiquidity discount = \$1,453,374 Fx Defined Benefit H will receive US\$130,000 per annum on his retirement Amount to be capitalized Undertaking re QDRO Merrill IRA 7YXXXXXXX US\$150,975 / \$1,177,611 Should be matrimonial pot Ringfenced for K s education Evidence before the Court The parties each filed 3 affidavits for the ancillary relief trial; including one each regarding BF LLC and NLF as late as 18 November 2022. Each party has filed two Form Es, in January 2020 and then in May 2022; there are two rounds of Questionnaires and Answers. Expert evidence The following expert evidence have been obtained: By Order of HHJ Melloy dated 18 August 2021, SJE evidence on the parties US tax liabilities and the ability to split H s pension fund. Report dated 12 April 2022 was received from Mr Robert Keys. By Order of HHJ CK Chan dated 22 April 2022, expert opinion with regard to splitting the US pension pursuant to a Qualified Domestic Relationships Order (QDRO). The question to be explored is whether the Hong Kong Court has the ability to order parties to obtain a QDRO in the US, and the process and timing required. Report dated 29 August 2022 was received from Mr Jim Mueller. By Order of HHJ Melloy in August 2021, expert opinion was ordered from the Philippines as to whether it is possible to transfer the S Property from the child to the names of the parties. Reports dated 11 March 2022 and 20 April 2022 was received from Ms Soledad Deriquito-Mawis. Ms Mawis gave evidence remotely at trial. By my Order of 18 November 2022 and 2 December 2022, an appraiser was called for valuation of the land / property held by the BF LLC and the NLF, Report dated 28 December 2022 was received from Mr Nathan Riley of National Appraisal Partners LLC. Mr Riley gave evidence remotely at trial. The Applicable Law & Legal Principles Section 7 of the Matrimonial Proceedings and Property Ordinance (MPPO), Cap 192 sets out the matters that the court must have regard to when making orders for ancillary relief:

- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say- the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage and the duration of the marriage; any physical or mental disability of either of the parties to the marriage; 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; in the case of proceedings for divorce or nullity of marriage, 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. The Court of Final Appeal in its landmark judgment of *LKW v DD* [2010] 13 HKCFAR 537 has laid down a 5-step approach in assessing the division of the parties matrimonial assets: The ascertainment of the financial resources of each of the parties calculated as at the date of the hearing (71 to 73); The assessment of the parties financial needs. If the total resources are not enough to meet the parties needs, the s.7 exercise should stop at this step and there is no room to apply any sharing principle (74 to 79); If surplus assets would remain after the parties needs have been catered for, the next step should normally be for the court to apply the sharing principle to the parties total assets, with a yardstick of equal division as part of that principle. This means that the total assets should be divided equally between the parties unless there is good reason for departing from an equal division (80 to 82); In considering whether good reasons exist for departing from equal division, the answer is to be found in the terms of s.7 and the implicit objective of a fair distribution of the assets. Factors like source of the assets, conduct, financial needs, duration of the marriage, contribution to the family and compensation are all material considerations (83 to 130); and The weight to be given to each of the factors is a matter of discretion for the court (131). Which are to be considered against 4 guiding principles, namely: objective of fairness, rejection of sex or role discrimination, yardstick of equal division, and (iv) rejection of minute retrospective investigation. A substantive part of H s case is that the assets in his name are inherited and pre-marital, the law is trite, in that he has the onus of proof on what he alleges. I shall come to some other relevant legal principles when I discuss various issues below. Duration of the Marriage Although not in the H s list of issues abovementioned, I will start with this as there is certain implication from my findings on this issue regarding the assets in the matrimonial pot. H s case H says as W declares the separation date as July 2019 in both her Form Es, and counting from the date of marriage of October 2010, this is a marriage of 8 years and 9 months, and therefore not a long one. H denies cohabitation and says W would be staying with him when he was not working, but she did not move in or live with him. He accepts that the parties started dating in December 2006, but H says the facts and evidence do not support that there was a period of cohabitation from June 2007, and most certainly not to

the extent they were essentially a married couple ; his counsel also said Most importantly, the evidence which has been put forward by W does not begin to establish her burden of proof that they both jointly intended to conduct themselves from June 2007 in a manner with the durability and permanence equating or akin to marriage, and therefore he does not taken into regard the period of W s alleged cohabitation. H s counsel then went on to challenge the choice of wording in the W s affidavits where she refers herself as staying at s, instead of moving in or living with the H. H quote GW v RW [2003] 2 FLR at paragraph 33 where DHCJ Mostyn who says that for duration of marriage, the court has always looked at the position de facto rather than de jure. And went to say, the end of the marriage is always taken as the date of separation rather than the date of decree absolute . W s case W says that the parties have cohabited since June 2007, she says it was a committed relationship which moved seamless into the marriage, and counting from then till this trial, this is a marriage of 16 years. The key time to look at is between June 2007 to the marriage in October 2010. She says: H claims to have financially assisted W from as early as 2007 in his support of her pursuit of her accounting degree (which she did not complete) After H left the Philippines and was posted to Ms in December 2008, he increased her allowance to US\$1,000 a month During the time when waiting for her visa, H has returned to Asia, stayed in S, and also went on holiday together to Thailand, Hong Kong and other part of Philippines H acknowledges there were extensive delays with her dependent visa application After the second time application for visa was approved, her medical test showed she had tuberculosis, as a result she stayed in Ma for a further duration for her treatment. W eventually joined him in the US in August 2010, H had by then relocated to Ar. H bought a house in Ph in May 2020, and the parties married in October 2010. W contests the H s stance that this is a relatively short marriage of 9 years and quotes the case of DD v LKW (2010) 13 HKCFAR 537 wherein the Hong Kong Court of Final Appeal made an Order for 50-50 sharing of matrimonial assets based on 8 years marriage. W s counsel complains of H s misrepresenting evidence in her closing submission, this was when H s counsel said in her closing submission: The parties only started living together in August 2010, when W moved to join H in the US before they married on 30 October 2010. In cross examination, W confirm that that was when the parties moved in to live together for the first time. 20) W s counsel s Reply submission on this should be quoted: Shockingly, the submission has cherry picked the parts of the question that are considered helpful to H, while omitting the complete question: you moved to Ar in 2010 before K was born to join R in US, right? And that was when you move into live together for the first time after substantial delays in processing the fianc e visa (emphasis added). Her answer was . It was the first time they had moved in together after substantial delays in processing the fianc e visa but it is a complete mischief to now exclude those words. 11) W s counsel also reminds me in her closing submission, the questions that were asked of H in this topic; when it was put to him that he and W were in a committed relationship, he said: A: But we were still not cohabiting, there are many committed relationship where you are not cohabiting. But a girlfriend. She was a girlfriend and a fianc e after I proposed, correct. Q: From November 2008 A: OK, that s not marriage, you propose to someone before marriage but that s not marriage Q: But committed to each other not only in terms of being

engaged, but in terms of financially supporting her and her family. A: I have been helping out, that's correct. Legal Principles I have been referred to a number of authorities in looking at the duration of marriage in disputed cohabitation period. The origin of the cohabitation jurisprudence as coined by Peel J in the case of *VV v VV* [2023] 1 FLR, is found in the decision of Deputy High Court Judge Nicholas Mostyn (as he then was) in the case of *GW v RW* (Financial Provision: Departure from Equality) [2003] EWHC 611 (Fam), [2003] 2 FLR 108 at 33: Thus, in my judgment, where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live it is unreal and artificial to treat the periods differently. Peel J in *VV v VV* [2023] 1 FLR 170 went on at 40 to say: Those dicta have stood the test of time. the purpose is to ensure that (i) there is no discrimination between the homemaker and the earner during that period of cohabitation, just as there is no room for discrimination between spousal roles during marriage and (ii) to avoid alighting upon an artificial short period of marriage. Peel J further said at 46, that the Court needs to inquire into the state of the relationship, intention of the parties, but at the end he said it is a fact specific inquiry. Human relationships are varied and complex; they do not easily lend themselves to pigeon holing. The essential inquiry is whether the pre-marital relationship is of such a nature as to be treated as akin to marriage. In the case of *E v L* [2021] EWFC 60, 1 FLR 952, Mostyn, J added 18 months of cohabitation to the length of the marriage saying at 75: It may not have been traditional in its functioning in that there was not conventional cohabitation; the wife did not move in lock, stock and barrel to the F House. But it was from that point a committed, sexual, emotional, physical and psychological, if somewhat itinerant, relationship. s counsel refers me to the case of *IX v IY* [2019] 2 FLR 449 at para 68 What the court must be looking to identify is a time at which the relationship had acquired sufficient mutuality of commitment to equate to marriage The mere fact that parties begin to spend time in each others home does not of itself, it seems to be, equate to marriage. In situations such as this, the court must look to an accumulation of markers of marriage which eventually will take the relationship over the threshold into a quasi-marital relationship which may either be added to the marriage to establish a longer marriage or becomes a weightier factor as one of the circumstances of the case. Discussion To begin with , I am of the view that H s counsel has downplayed the relationship of the parties when the following was said on his behalf in the closing: This was a young romance; H was a young pilot, having a good time as a young man living away from his family in Te, in a small coastal municipality in the Philippines H would often be in and out of town. There is a difference in fact (and a difference in law) where parties are in a relationship, even if they go on holidays together, and something which equates to marriage . For the relationship to be quasi-marital would require something well over and above holidays and helping [W] out with some money ; H was merely being generous. As guided by the authorities, I need to look at several markers to consider whether there is an ongoing committed relationship since the parties allegedly lived together, and the perceived intention of the parties. The following factors are taken into consideration: W says the cohabitation began in June 2007 when she moved into H s residence at S W s counsel in her closing submission refers me to exchange of messages in 2007 between the parties showing: H telling W to check that his

phone is plugged in June 2007, W letting H know in September and October 2007 about progress of the roofers of his residence which shows that she was living at his residence when he was away, and even when he was in vacation . This evidence contradicts H s case that W only stays with him when he was not working H s evidence that he had financially assisted W s family as early as 2007 The parties got engaged the month prior to the H being posted back to the US, that is to me a clear sign of commitment. H must have proposed, and if the fact was that the engagement was one month before he was due to leave S, it shows that it was their intention to take this relationship to a new level after having lived together for a period of time The longest time they were apart was when after H s posting to the US in December 2008, he applied for W s visa to join him as fianc

- e. This has to be issued in Ma. It is not disputed that the process took longer than the parties expected, and W was refused on her first application. The parties re-applied, which shows that H did fully intend and was committed and determined for W to join him, her application was granted the second time. The separation was not by design, but due to the process of delay in the visa application After H left for the US, he has paid her allowance at \$1,000 per month During the time apart, H flew back to S, spent a number of holidays with her, and stayed with her family when in S. This was not contested H purchased a property in the US in May 2010, despite his counsel arguing that W says he did so without telling her, she did say she was shown some listing. Therefore, W was aware that H was on a house hunting exercise, and she did eventually moved into the house he bought after they got married Referring to the above quotation of questions and answers from the cross examination on the H and his oral evidence, he did not dispute that there was a committed relationship when given an opportunity, but I find him to be somewhat evasive in his answers. I am of the view that this is not a case where one should look at the duration of the marriage by merely looking at the date of marriage. In considering the evidence on this issue, I am inclined to find the W to be more credible; H is discredited when he says that she only stayed with him when he was not working. There is limited information as to how the couple conducted themselves during their time together, and I have reminded myself of the above-mentioned case of E v L, where the court found a committed relationship despite the wife therein did not even move in lock stock and barrel with the husband. In consideration of the above factors, I accept W s evidence that the parties were indeed cohabiting from June 2007 until H left S in December 2008. Therefore, I will look at the duration of marriage as commencing from June 2007 until their separation in July 2019, this is 12 years 2 months. How does this compare to H s allegation that this is only a 9 year marriage? At the end of the day, this is not a numbers game, looking at the facts of this case, and all things considered, I am of the view that this is not a short marriage by any stretch of imagination. STEP 1: Identifying the Matrimonial Assets Under this heading, the Court is to consider the financial resources of the parties, with reference to s.7(1)(a) of the MPPO. H s Fx 401 Pension H s Case H s case is that his pension has two components:

- (i) Lump sum portion The value of the lump sum portion as at 28 November 2022 was \$5,589,898, he calculates that as he was married for 9 years out of 17 years of service, the percentage of the lump sum that should go towards the matrimonial pot is 52%, and therefore on this calculation, the amount should be \$2,962,646. H further says that as the lump sum portion is not realizable until May 2034 when H turns 60, and due to the illiquidity of this asset, there should be a 50% discount to be applied to the present face value of the asset, quoting *SSLT v SMFC* [2019] HKFLR 468. Therefore, on his side of the balance sheet, he puts \$1,453,374 ($5,589,898 \times 52\% \times 50\%$) into the matrimonial pot.
- (ii) Defined benefit portion (future income stream) From the H's opening submission, and with reference to Fx Pilot Benefit Book: After 25 years of service with Fx in 2030 and after H reaches retirement age of 59 (for his 401(K) pension) he would be entitled to a future income stream, through the Defined Benefits Portion of his pension, of up to US\$130,000 per year (i.e. up to HK\$1,014,000 per year, or \$84,500 per month) H quotes from the two US experts with regard to tax consequences and process for obtaining a Qualified Domestic Relations Order (QDRO), the salient points being: The splitting of H's 401(K) pension between the parties is not a taxable event, income tax arises only when funds are distributed from the split pension. It is irrelevant where W lives when the splitting of the pension occurs. Pension Splitting should be pursuant to a QDRO. Hong Kong Court has no jurisdiction to make an order for a QDRO, however, it can make a direction for parties to obtain a QDRO in the US to enable enforcement in the US. Parties need to file a Joint Petition to Recognise the Foreign Country Judgment in the proper county in the US where the QDRO will be executed. H offers an undertaking to enter into a QDRO to ensure that W has a similar income stream from her share of H's Fx Defined Benefits pension accumulated during the marriage. In the H's Open Proposal, he says: W would receive 50% of that portion that was accumulated during the marriage, which equates to around 26% of the Defined Benefit (with the specific procedure as set out by the relevant SJE). On the basis that the Defined Benefit will pay US\$130,000 per annum, this would mean that, from the date of H's retirement, W would receive her own pension of a sum of approximately US\$33,800 per year. W's case W disagrees that a percentage should be applied to the Pension (lump sum or income stream) as the H was not forthcoming as to when he acquired the Fx Pension. She refers to the Fx Pilot Handbook which states that a pilot automatically becomes a pension plan participant on the first anniversary of employment, not on the first date of starting employment, and then only if he / she was credited with at least 1,000 hours of service during the first year of employment. W says when H was asked as to when the Fx 401K was acquired, the answer provided by his legal team was: Our client commenced employment with Fx on 28 November 2005. W says he was deliberately avoiding telling the truth, and on this basis, invited me to draw adverse inference against H to bring in the whole of the Fx Pension. W also quoted various authorities to persuade me that there should not be a discount for liquidity. With regard to the Defined Benefit income stream, W queried why H applies 50% discount to W's entitlement. i.e. $130,000 \times 52\% \times 50\%$ to arrive at her annual entitlement of US\$33,800 per annum, which gives her only US\$2,816 per month. She says that as she does not have access to the income stream right away, and therefore no need to apply this discount. At trial, W

introduced a new proposition that it is possible that H maybe able to defeat W s Defined Benefit claim by transferring it to his 401K, she therefore argues that the full value of the DB pension should be included in the overall assets and be subject to equal division. It is also W s position that she does not wish to incur further costs to apply for the QDRO as proposed by the H. Legal Principles on dealing with Pension H s counsel relied on the case of *SSLT v SMFC* to argue the H s application of an illiquidity discount on the lump sum, HHJ I Wong said the following at 44-48:

44. It is not in dispute that the pensions and the retirement accounts could only be realized upon the parties retirement, probably when they reach the age of 65. Both are now 43 years old; there are still more than two decades to go before the money could actually goes into their pockets. It must be correct that a distinction must be drawn between an asset, which can be realized for cash and thus freely available and one, that is not realisable and non-transferrable. Regardless of whether it is in the form of a provident fund or a pension (ie a lump sum or an income stream), the money that the parties would receive on retirement is not an available capital asset.
45. It is thus necessary for the court to have regard to the extent to which an asset is freely available or whether it is attended by a particular handicap or risk. If the full value of these assets are taken, given that the husband has far more assets of this nature than the wife; in all likelihood he would end up of having more illiquid assets. I agree with Ms Chan that this would be unfair to the husband. A similar case can be found in *Martin-Dye v Martin-Dye* [2006] 1 WLR 3448.
46. In *DGB v SDGK*, FCMC 12078/2013 (unreported, date of judgment: 12 March 2014) where the husband in that case was 47 years old, I gave a discount of 40% on the face value of the husband s MPF.
47. In another case *S v S*, FCMC 6574/2003 (unreported, 14 March, 2005) Deputy Judge C.K. Chan (as he then was) accepted the husband s case that his pension fund is illiquid and the judge included a nominal 10% of the present value of the pension into the calculation.
48. It is of course axiomatic that the facts of every case are different and so the two cases cited in the foregoing paragraphs are for reference purpose only. It is rather unfortunate that the parties, in particular the husband, have chosen not to adduce any professional actuarial assessment. However, for the reasons that I have elaborated and bearing in mind Riberio PJ s advice that a broad-brush approach is all that is required at this stage: *LKW v DD*, at [72], I consider it is not unreasonable that a 50% liquidity discount should be applied. I would give a 50% discount across the board on assets of this nature. s counsel further quoted the case of *LOTM v CSM* [2022] HKFC 64, which she said applied *SSLT v SMFC*. On my reading, this case mentioned but did not apply *SSLT*, as the wife in *LOTM* did not commute the provident fund she received to a lump sum because she opted to receive a monthly amount, and therefore there was no lump sum to which an illiquidity discount were to be applied. W distinguishes this case from *SSLT* and quoted *HTL v K*, RE unreported FCMC 1678/2013 dated 10 November

2015, saying that HHJ Melloy did not apply an illiquidity discount on the wife's provident fund despite the fact that she would only come to her funds in 13 years time; but the Judge in that case did accept that only a portion of the provident fund accumulated during the marriage would go toward the matrimonial pot. W also quoted the case of *PLTO v KLK* [2013] HKLRD 1089 where the Court of Appeal rejected the approach taken by the trial judge of applying 30% discount to company shares. I also found the case of *LWS v WST* unreported FCMC 5380/2019 dated 20 August 2021 wherein HHJ Grace Chan applied a 30% discount to the wife's MPF where she was 11 years away from accessing her MPF.

Discussion As mentioned above, two SJE's expert have been appointed and consulted. One with regard to the US tax implication of the splitting of the pension; and another one with regard to procedure and timing of obtaining a QDRO. Neither of the experts were called nor were their evidence challenged.

Pension Lump Sum I do not accept W's argument and her basis for inviting me to take in the whole of the amount of the Pension. The law is trite in that I should consider the portion of pension that is attributable to the duration of the marriage. As to what part of the Pension lump sum to take into account, the pension in question has accumulated substantively over the period of the marriage. I accept H's argument that it should be limited to the time when the marriage subsisted. On the H's eligibility to participate in the Fx Pension plan, it is not clear to me whether the start date of his pension dates back to his date of commencement of employment. In the absence of any contradicting evidence, I will adopt H's position that the amount of \$5,589,898 applies to 17 years of service. Using H's formula, but based on my above findings on the duration of marriage, I calculate the proper proportion of the pension to be included for the purpose of the matrimonial pot is 71.6% (12 years 2 months / 17 years). Applying this percentage to the value of the pension amount will be \$4,002,367 (being \$5,589,898 x 71.6%). I also accept that there should be a discount for illiquidity of the pension, but disagree with H's contention that a 50% discount should be applied. In this case, H's accessibility to this pension is around 10 years away, guided by case law and on a broad-brush basis, I will apply a 30% discount to the value of the apportioned pension lump sum, thereby placing \$2,800,000 into the pot.

Defined Benefits Pension (Income Stream) There is no dispute on the amount that H will be receiving on his retirement, this is put forward by the H in his solicitors letter dated 6 January 2023. In the W's opening proposal she says that it will take further costs to implement a QDRO in the US and ask this Court for a balancing payment to her to be made now. I find the W's ask rather confusing. W is asking for US\$130,000 to be included in the overall assets and be subject to equal division. This makes no sense to me, as US\$130,000 is a per annum amount, which will start when H turns 59 in December 2033. This payment, if shared with W, should be payable until W's death. I have no assistance nor information on how this annual sum translates into a number I can add to the matrimonial pot. In the circumstances, and given the W's concern on costs, and uncertainty of this future payment, I will not be making a direction for parties to apply for a QDRO.

S Property The S Property is actually land in the Philippines and a house built thereon. The land was purchased in January 2017 for \$380,650, constructions began in 2017/2018, and cost the H \$1,218,090. W also says she has paid for various works on the S Property from her own savings. For the

purpose of these proceedings, the S Property has been assessed as PHP11,000,000 / \$1,650,000. According to the H evidence, it is a large 1,500 square feet 3-bedroom house, with proximity to market and mall, and short walking distance to W s maternal family, and 20 mins drive from K s international school. H s case H says that it was purchased as matrimonial property with the intention that it would be a holiday home for the family in the present time, and in the future, to be left for K (after W and H pass away). H says that the land was put in K s name to avoid any possible claims from W s family in the future. H further says that W has facilitated the transfer of the S land into K s name, and therefore she is effectively in full control of the S property while K is a minor. H s offer is for W to continue to live in the S Property for the rest of her life, it is her home with K. And for a needs case, it is not fair for W to ask for funds to cover her accommodation costs. H argues that the value of the S property should be part of the matrimonial pot, and places it on W s side of the balance sheet, he proposes in his Open Proposal that the property should be transferred to W s sole name. He contends that as she lives there mortgage free and rent free in the S Property, that this makes up the majority of her entitlement. H argues that W has completely omitted the mention of the S property in her Form E, and proffered no other way of dealing with the property other than to completely ignore it for the purpose of the assessment of the matrimonial pot in these proceedings. In H s opening submission, this was put forward: Pending and subject to further clarification from the SJE , according to Article 225 of the family Code of the Philippines, the father and the mother shall jointly exercise legal guardianship over property of the unemancipated common child without the necessity of a court appointment. In case of disagreement, the father decision shall prevail, unless there is a judicial order to the contrary . In such circumstances, it appears that H could be the guardian of K and his properties, for the purposes of a transfer of the S property to W. In H s closing, he further says: Provided that it is in K s best interest, as the father of K, H could be legal guardian of K and his property, appointed by the Philippines Court, and guardianship proceedings may be commenced in the Philippines, pursuant to Art. 222 of the Family Code of the Philippines. As such K need not be joined as a party to the Hong Kong matrimonial proceedings. s case W acknowledges that the S property was purchased with matrimonial assets; and that it was done with the intention of the parties to ensure K has a place in S. She accepts that she will be living in the S property with K, but she said it is not her asset and she cannot deal with the property, borrow against it, sell it or use it as her own in any manner. She therefore argues that the value of the S property should be excluded from the matrimonial pot. W s counsel in her closing submission quotes a salient part of the expert s evidence from cross examination: s counsel: Ms Chan asked why it was so easy to gift properties to children and so difficult to get them back. You said diminution of his estate. If you gift something to a child, he becomes the owner, it is his asset, and it is in his interest to retain that asset unless any prevailing reason to the contrary? Answer: Yes, its, his property W s counsel: To remove it, the asset, there has to be a good reason that would be in his interests Answer: Yes (and she referred to provision of Philippines law) She therefore submits H s plan to be the guardian of the child so as to enable him to transfer the property from K to W could not be in K s interest. On the contrary, it actually serves H more as it

accords with his intention to make the S property part of W's award. Expert Opinion The expert opinion was sought to provide advice in respect of the feasibility of transferring the S property from K to W. The two reports from the SJE were dated 11 March 2022 and 20 April 2022 respectively. She gave evidence remotely and were cross-examined by both counsels. Some important points from the opinion and from her cross examination are as follows: The expert opinion states that the S Property cannot be transferred to W as K cannot give consent as a minor. If property is owned by a child, the parents themselves cannot sell the property, the child and his property must be placed under legal guardianship by the Court pursuant to Article 222 of the Family Code in the Philippines. And a parent has to file a motion asking the court to allow the parent as guardian to sell the property of the child. The intention of the law is to protect the property of the minor. She also elaborates on this point by saying that getting the property out of K's name would be complicated because it would mean a diminution or a decrease in the estate of the child. A Hong Kong court order cannot be made for this purpose as it cannot be enforced in the Philippines. W can be a transferee if she still has her Filipino citizenship. However, she cannot be acquiring the property of the child while she is a legal guardian as there will be a conflict of interest (Article 14-91 of the Civil Code of Philippines). SJE also quote Philippine law AM number 03-02-05-SC on qualification of a guardian, which disqualifies someone who has conflict of interest with the child. During cross-examination, the expert explains that The guardianship process cannot be used to personally benefit the person who is applying to be the guardian. (emphasis added) This was in the context of a question from W's counsel regarding a guardian who makes an application which will result in his own financial gain. She also states that the property in the name of K is in fact in the nature of a gift; she says: For example, it's mother bought the property and instead of putting it under her name, it was placed under the name of the child. So for all intents and purposes, it was a gift coming from mother to the child. Now that the child is the owner of the property, the registered owner of the property of that, the mother cannot without prior authority from the court, just sell the property because precisely, the property is no longer owned by the mother. That the Court in considering the need to sell / transfer any property belonging to a child will consider what is in the best interest of the said child. The SJE also expressed concern that if the guardian is a foreigner, then she wonders whether the court will see the application of guardianship by such foreigner as a form of contravention to the Philippines constitution which prohibits foreign control of properties on Philippines land. Discussion It has now come to light that the transfer of the S property is not a straightforward process. It is also clear that the W cannot be a legal guardian if the intention is to transfer the S Property to her. If the H were to apply, other than the fact that he is a foreigner and the application would mean that he is applying to deal with Philippines situs property, he also has to satisfy the court that he does not have a conflict issue. It is of note that H's closing did not address the issue of self-benefit if he were to apply to be the guardian. I agree with W that H is arguably in a position of conflict should he wish to apply, not only is he depriving K of his interest, he is doing it so that the S Property will form part of the award that he should be paying W. It is clear that the parties have both agreed to purchase this property in their child's name, the purchase money came

from matrimonial assets, and both intend that it is to be for him when he is of age. It is a gift that has been given, and with the benefit of the SJE evidence before me, there is no clear prospect or certainty as to whether the interest in S Property can revert at all to the donor(s) of that gift. In the circumstances, I conclude that the S Property cannot be part of the matrimonial pot. I do acknowledge that there is value to be enjoyed by W as she is enjoying rent-free accommodation, and to that end the W should not be entitled to any accommodation or accommodation related costs if she remains in S. I shall come back to this point in my assessment of her needs. Pre-Marital Assets H claims a number of assets in his name are inherited and pre-marital and therefore non-matrimonial. These are: BF LLC NLF Fidelity Account Vanguard Account Merrill Lynch 7Z4-XXXXX The law is trite in that for this first step under LKW v DD, I do not need to make a distinction between matrimonial and non-matrimonial assets. At 71 per Mr Justice Ribeiro PJ: At this stage, the court need not attempt to distinguish between matrimonial and non-matrimonial property, that being an exercise best undertaken (if necessary) when considering distribution of the assets. It is also not in dispute between parties that for assessing needs of the parties, all the assets under the ownership of the parties need to be brought in. With regard to the approach in looking at non-matrimonial assets, the duration of the parties marriage plays a part. As discuss above, while this is not a long marriage, I do not consider this to be a short marriage. I make reference to the case of PW v PPTW (CACV 224/2013) Judgment dated 12 March 2015 where the Court referred to two approaches of the English Court concerning sharing of the non-matrimonial property. The first step involves the Court adjusting the percentage from 50% to take into account the non-matrimonial property. The second approach is a two step process requiring the Court to (i) divide matrimonial assets in accordance with sharing principle, and (ii) to identifying the non-matrimonial property, and the extent to which such pre-marital asset is to be reflected, taking into consideration such factors as duration of marriage and mingling of assets. I note here that the H s counsel requested that all the alleged inherited and pre-marital assets be excluded on that basis, together with his argument that this was a short marriage. While the W s counsel just asked for everything to be in the pot, and share 50-50. I. BF LLC H s Case H says that his interest in the BF LLC is inherited and premarital. The LLC holds two pieces of land of around 100 and 5.4 acres respectively. H says he inherited his 1/8 share of the LLC when his father died. According to H, the LLC was formed for tax reasons. Relying on a Notice of Appraisal on 29 April 2022, which he has failed to produce promptly and only did so around October 2022, he says that his 1/8 share is US\$186,032.50. H also relies on a Company Agreement dated October 2015 (Company Agreement) which determines the rights between the members of the LLC. But he did not produce this document until one day before the PTR on 18 November 2022 and only in response to W s disagreement of the H s valuation. H threatened W with costs should valuation be lower than his then proposed value of US\$1,568,606. When the valuation was finally delivered, the SJE states that the market value of the fee simple interest of the land held by Balser Farm LLC is US\$3.5M. 1/8 interest would be US\$437,500. H argues that due to the unique nature of this inherited asset and the provisions in the Company Agreement, there is no realistic third party buyer on the open market. And that There is a clear and

express restriction on H commercial freedom to sell, transfer or deal with his (minority) interest and there is no real or genuine market value beyond the paper figures . Therefore, he says, there should be discount for lack of marketability and for H s minority interest. Excerpts from the Company Agreement include the following terms: Members must be direct descendants of the H s grandfather There are restrictions on dealing with interest in and representing the LLC There is an agreed value of the assets for the Members of the LLC for all purpose There is a first right of refusal of existing members on any intended disposition by a member and limitation on right to transfer unless with unanimous consent of the members. On these bases, H says it is not fair nor reasonable to take a 1/8 share of the paper valuation and put it into the matrimonial pot. H claims discount for illiquidity, lack of marketability and minority interest in the LLC. He also says he disagrees with the SJE s valuation. In his closing, his counsel took issue with W s point on intermingling of this asset. He says that this position was never taken by the W in her affidavits, in the questionnaires, nor in her opening. He further says that the family only visited the property once in 2017, and W has never been to NLF. H s counsel also brought up a whole new argument in her closing to say that H s interest is in the private company (the LLC), and he has no beneficial interest in the property underlying. W s Case W argues that H had delayed his disclosure on BF LLC and provide information only very close to trial, and then arguing over valuation issues. W further argues that the family has visited the BF property and stayed there during the marriage making it a resource to the family, and H has made contribution from his own assets including payment of tax and that she has been told that H has paid an amount to his uncle for upkeep of the place. While accepting that the BF LLC is inherited and illiquid, she disagrees that the solution is only to give a discount; she argues that the whole of the 1/8 value should be put into the matrimonial pot. Expert Opinion re BF LLC There was a lot of drama leading to finalizing the report for the BF LLC and the NLF. This will be further elaborated below as it ties to the H s litigation conduct. The report provided by the SJE Mr Riley was dated 27 December 2022, he gave evidence in Court via VCF and was cross-examined by both parties. In the report, the SJE has assessed the value of the land held by BF LLC as US\$3.5 million; and for NLF to be US\$ 2.2M It has transpired that despite Mr Riley s attempt to request for inspection of the properties held by BF LLC and NLF, H did not respond to this request and therefore no arrangement was made for inspection. With regard to BF land, while Mr Riley confirms that it is land that has been passed down from ancestors to offspring, he was not able to confirm that it was owned as far back in the 1910s as alleged by H. On cross examination by H s counsel, SJE also says that the fact that BF land is owned by a LLC or however owned; or that there are restrictions on the sale of the interest in the LLC pursuant to the Company agreement does not affect his valuation as he is appraising the market value of the land itself as it sits on the face of the earth and in that location . And that what he has appraised is the entire holding and not one member s interest in the LLC. H s Counsel also questioned about a discussion regarding H s minority interest, but it was denied by Mr Riley who said he did not recall that there was a discussion on partial interest. When asked about liquidity discount, Mr Riley said that the valuation of the LLC interest would be that of a business valuer and he does not have the expertise to determine what sort

of discount be applicable. Discussion While H has argued that the BF LLC is inherited and pre-marital. H's counsel's argument that H has no interest in the underlying assets of the LLC is a whole new argument that appears only in the closing submission. In H's list of issues, the following question was listed: what is a fair value to be attributed to H's 1/8th interest in the LLC, but this separate legal person argument was not put forward in the opening at all. In H's closing submission, he relied on the case of *PMCL v AKK* unreported, FCMC 11521/2015 dated 13 February 2023, but did not put forward how this argument should be considered by this Court. It is not clear to me whether H is now saying that it should have been the LLC that should be valued, and not the underlying pieces of land; which cannot be the case as H, represented by Ms Chan at both the PTR hearing in November 2022 and the Direction hearing in December 2022, and where in both instances the issue of valuation was a main point of contention, participated fully in instructing the SJE on the valuation of the pieces of land in question. If they had wanted the Court to consider the value of H's 1/8th interest in the LLC, they should have raised the issue of valuation of the LLC prior to trial but they did not. With regard to H's argument that the shares of the LLC are illiquid and lacks marketability, and that a minority interest discount should be applied, W in her closing acknowledges that this asset is illiquid. It also appears that the H's 1/8 share of the LLC lacks marketability due to the restriction in the Company Agreement. But as the rest of the shareholding is held by the H's family members, there is no argument before me that the family members may or will buy him out although W's counsel attempt to argue this is a possibility. As for minority interest H's counsel quotes the case of *AVT v TNT* [2015] HKFLR 385, one of the issue in this case from the Court of Appeal involves consideration whether a discount should be given to the husband therein to his minority shareholding of a private company. This is after the company valuation expert has applied a 20% discount based on the fact that he was dealing with a private company versus a public company. H's Counsel also quoted the following from the Judgment by Cheung JA (as he then was): What the expert had said was that no further discount should be given because a minority shareholder has no power to decide how the company is to be run .. In any event the principle is that there is no rule of general applicability that the value / price of a minority shareholder in a private company should be discounted to reflect the fact that the shares are a minority shareholding. The whole of the facts surround the shareholding had to be considered in order to decide the extent to which, if at all, any discount is appropriate. In particular in a situation where the company is a quasi-partnership it is artificial to apply a discount: See *Nourse J in In re Bird Precision Bellows Ltd* [1984] 1 Ch 419. H's counsel went on to argue W never argued that the company is a quasi-partnership. I would also like to quote what appears after the above paragraph in the *AVT* case, Cheung JA went on to say: In this case, the father and the husband are the only two shareholders in the company. The analogy of a quasi-partnership is appropriate. Further, it is unlikely that the husband is forced to sell his 30% interest in the open market in circumstances in which a discount would be forced upon him. Either the husband's shareholding will be sold at the same time as the father's shareholding or it will not be sold at all, if this happens the husband would get full value of his shares A family-owned company such as BF LLC is not unlike a quasi-

partnership, and the above principles would apply. Therefore, I conclude that should there be valuation of the LLC shares before me, a minority interest discount is unlikely to be applied. The above observation on the LLC shares aside, I stress again, as the parties have jointly proceeded on the valuation of the land held by the LLC, this is the only value I have to attribute to this asset, and accordingly I will accord 1/8 of the US\$3.5M to H's side the balance sheet, which is US\$437,500 or \$3,412,500. As to the W's argument that this is a resource to the family and she has visited the property, I do not find sufficient evidence to support this contention. There were no specifics, nor were there photos from this visit. W says H has acknowledged paying tax and expenses for the property, but there is no paper trail that H has paid from matrimonial assets. I am therefore of the view that this asset has been kept segregated from the parties' assets during the course of the marriage.

II. NLF H's case This is 40 acres of land, purchased by H and his brother in 2018 using what he claims to be pre-marital assets. H says it was bought with money from his father's inheritance (who died in 1984), held by H's mother and never passed through his bank account. To support his case, he produced with his 2nd answer in October 2020, a Deed executed by his Mother dated the month before in September 2020 and signed in Te before a notary public (Mother's Deed) confirming that she has advanced H's part of his future inheritance in the sum of US\$300,000 in 2018 in order for H to pay for his half share of NLF. There was mention that the H's brother might be ready to buy out H's 50% interest, this appears in his lawyer's letter of 8 November 2022, although at that time the parties were discussing a valuation of US\$1,000,000 for NLF. W says that this is still a viable option, but H's opening submission suggests that there is no evidence to that effect. H argues in his closing that the lack of evidence to support H's contention that NLF is pre-marital was not put to H in cross examination. W's case W says that this was purchased during the marriage. She does not accept H's proposal of the value of the NLF. On her own accord, she discovered that the land to the east and west of NLF are owned by H's relatives, and an application was made for change of zoning from agricultural to residential use. This was confirmed by the SJE Mr Riley, but never revealed by H during the course of these proceedings. Referring to the Mother's Deed, W says this transaction took place in 2018. It was not a long time ago, yet H never produced any documentary evidence to prove what he said. Furthermore, this is an asset purchased during the marriage. Evidence shows that tax has been paid on NLF, but there is no evidence on how, when and by whom. Expert evidence regarding NLF Mr Riley says that this piece of land is worth US\$2.2million, given H co-owns this with his brother on a 50-50 basis, his share of this piece of property is US\$1.1million. It was revealed during Mr Riley's cross-examination that application has been made by H and his brother to rezone this land to a different purpose, the date of their application was 4 October 2021. The zoning application shows that the application is from agricultural open to residential medium density, and the rezoning was approved on 2 November 2021. Furthermore, other than the subject tract of land, rezoning applications were made by the owners of the land (who are relatives of the H) to the east and west of NLF, and were also approved respectively one month and 12 months ago prior to the current hearing. SJE also says that such a re-zoning of NLF from agriculture to residential medium density would increase the value of the land.

Discussion Like BF LLC, H has not been forthcoming at all with regard to disclosure for NLF. It is significant that the land is being rezoned into residential purpose. Common sense dictates that this will likely be followed by development of the land or else the application would not have been undertaken. Rezoning will bring about consequential increase in value, although this is a matter for the future. What concerns me more, is that H has this information more than a year ago prior to this hearing and did not reveal this information. H s closing did not address this issue of rezoning at all, except to repeat that value of NLF is to be excluded. Furthermore, all that this Court has in support of H s case that NLF is pre-marital is his mere say so and the Mother s Deed. W says that the Mother s Deed could not be relied on by this court, if he needs his mother evidence in support, it should be produced in affidavit, and have her called as his witness, so that her evidence can be properly tested in cross-examination. I must say I have to agree with this argument. Furthermore, this being a transaction that is so close in time, it is surprising that H has not adduced any evidential support of fund transfer and paper trail of any kind that proves his version of events that this was purchased with inheritance funds and never been intermingled with matrimonial assets. I am therefore unable to accept the H s contention that NLF was bought with pre-marital funds, the value of H s ownership in NLF of \$8,580,000 should therefore be included into the matrimonial pot for division purpose. III-V. Fidelity Account, Vanguard Account, and Merrill 7Z4-XXXXXX According to the schedule of assets and liability, W says these accounts have the following value; while H did not put a number on these except to say that they are not to be included into the matrimonial pot as Fidelity and Vanguard were inheritance and Merrill 7Z4-XXXXXX is pre-marital:

- i. Fidelity US\$50,248 / \$391,938 ii. Vanguard US\$111,450.8 / \$869,316 iii. Merrill - US\$87,953 / \$683,397 H s Case H says these were inherited from his grandfather who died in 2004. He produced a Deed dated 8 September 2020 from his uncle (Uncle s Deed) who is the executor to the grandfather s estate, to prove his case. The Uncle s Deed makes reference to the Vanguard and Fidelity account and reads as follows. I confirm that [H], born on xxx 1974 and holder of Hong Kong Identity Card Number xxx inherited Fidelity Account No Z27-122661 and Vanguard Account No 800-284-7245 from his grandfather upon his death. H in his 4th Affidavit at paragraph 45 makes refence to a Merrill Lynch investment which he says I also inherited before [W] and I got married . H then produced a letter via solicitor s correspondence to the W on 7 January 2023 attaching a letter from his Uncle addressed to Department of Veteran Affairs in November 2004 (Uncle s 2004 letter), on which he relied to prove:
- i. That he inherited the Merrill Lynch funds and ii. That the date of death of his Grandfather in 2004. H also argues that he has disclosed statements from Vanguard Fidelity and Merrill, and that W has never asked any questions on them; that his account has always been self-contained without inter-mingling; and that W s case otherwise was not put to the H. W s Case W s case simply says there is no evidence to link these accounts with the Grandfather s inheritance. In the same tenor as the argument for the Mother s Deed, she also contends that the Uncle s Deed has no evidentiary value. Discussion I am not able to place much

evidentiary weight on either documents produced by the H for the following reasons:

- i. In agreement with W's argument, the one-page Uncle's Deed is not properly put into evidence to allow the W to cross examine. It was an exhibit to H's Answers to questionnaire.
- ii. Even if I were to rely on the Uncle's Deed, it only makes reference to Vanguard and Fidelity but not the Merrill account.
- iii. The H's one liner in his 4th affidavit regarding the Merrill account being inherited is hardly sufficient, and is unsupported by an evidence.
- iv. H only produced Uncle's 2004 letter in January 2023 as a basis that he inherited the funds in his Merrill Lynch account. At the back of this letter is a one-page document titled L A B Assets (L A B is the name of H's deceased grandfather); this one pager contains a list of assets in L A B's name or held by him which totalled US\$1,361,326.86. While there was reference to two Merrill Lynch accounts which bear different account numbers, I cannot see how this one pager is connected to Uncle's 2004 letter, or that this could be used to prove that H inherited his Merrill Lynch account from his grandfather. H in his closing says: H has disclosed a letter dated 2 November 2004 from H's Uncle which confirms that H inherited inter alia the Merrill pre-marital funds. 1/8th of US\$1,361,326.86 is US\$179,165.86 (as of 2 November 2004). According to H's Schedule of Assets / Liabilities, the total value of H's Fidelity, Vanguard and Merrill pre-marital accounts was US\$249,314.25 a fair and plausible figure 18 years later based on passive economic growth (and losses based on market factors). (emphasis added) I find this last part of the counsel's submission totally groundless, and akin to grasping at straws. I fail to see how this reasoning could possibly support the H's case that these three accounts came from his grandfather's inheritance. H also argues that these assets are pre-marital when he points to the initial purchase dates of some of the funds held in the Merrill account to be in 2004 and 2005, she says under the glossary to the statement, this means, date of your initial investment in this fund. I am not of the view that this argument proves that the funds from this account comes from the grandfather's inheritance either. At best, this shows that the funds were purchased before the marriage. That said, I have no evidence before me that these funds or any income therefrom have been intermingled, W has not provided any evidence in this regard. In my view, H has failed to prove that these funds come from his grandfather's inheritance, as said, at best these are pre-marital investment; W has not proved co-mingling of funds with the married life although these assets have been held by the H throughout the 12 years of marriage. On the legal principles above mentioned, the total amount of these funds are to be included as part of the matrimonial pot at this stage of analysis. Merrill IRA (7YXXXXXX) The value of this account is US\$150,976.78 / \$1,177,611. H's Case H says this is ringfenced by H for K's future education, and should therefore be excluded as matrimonial assets. H says this is important as substantial part of the family assets have been spent on the parties legal costs, and therefore some assets must be set aside for K. H says even by W's evidence, she says that the money in this account was from the 401K with his previous employer M Airlines, with whom he worked before he even met W. The money then was rolled over to this account in 2012. His counsel elaborates from the statements provided by H that the initial purchase dates of the funds in this account were 2012, which is consistent with W's evidence. Therefore, these assets are premarital. He says

W did not dispute ringfencing assets for K but only that she does not want this asset excluded from the matrimonial pot. In his closing he says that s needs can be met without dipping into non-matrimonial assets, including the Merrill IRA. The fact that the Merrill IRA funds have been earmarked and ringfenced by H for K s education has been sworn on oath by H; in affidavits and oral testimony . He suggests that a mutual undertaking be provided that the funds in the Merrill IRA would not be used by either parties, other than for K s future education. W s case Under cross examination, W says that she had understood that H had set aside college funds for K, but thought it would be his Fidelity account, not the Merrill account. She argues that with the depletion of funds from the matrimonial pot, it is no longer affordable to have money set aside and she asks for this sum to be brought back into the matrimonial pot. W has also quoted the case of HTL v K, RE where HHJ Melloy ruled against a proposition by the wife therein to set aside funds for the children s tertiary education, as she found that there was simply not enough money to make that a sensible proposition. Discussion I completely fail to see how by the H s mere say so that this account is ringfenced for K s college fund that it could then simply be excluded from the matrimonial pot, whether the W is aware of or agree to this arrangement. W did not argue that the funds in this account has been intermingled with matrimonial assets. I also found the HTL case to be of relevance and assistance. Even if this is pre-marital segregated assets, this amount needs to be brought into calculation of the matrimonial pot for subsequent steps under LKW v DD to be undertaken. H s Boat H s case H says this was purchased with the funds from abovementioned Fidelity Account. This is a second-hand boat which H is using as his accommodation. He contends that this was bought with inheritance from the account and should be excluded. H argues that the value of the boat is US\$155,000. W s case W says the H has in his 4th and 5th Affidavit dated 24 October 2022 says that he wants to secure stable accommodation for himself and also large enough to cater for K when he goes to stay with him; and also that he would be permanently relocated to Oa, Ca in February 2023. Then he changed his mind to say he does not wish to reside in Oa, and now says he has not decided where he would like to purchase a home. Yet around the time of these affidavits:

- i. On 21 Oct 2022, he paid a deposit of US\$15,500 from his Bank of America Account against the purchase of his boat at US\$165,573.5
- ii. On 22 October 2022, he withdrew US\$150,000 from his Fidelity Account, which then went into another of his account on 26 October 2022
- iii. On 28 October, he closed on the boat purchase transaction
- iv. On 8 November 2022, he informed through his solicitors that he has purchased a 2-bedroom boat W argues that the value should be the one in the invoice \$165,573.50, which is inclusive of documentation, state/title registration tax and administration costs; and that should be the value to be taken into account. Discussion Based on the analysis above, the value of the boat needs also to be taken into full consideration of the matrimonial pot. The boat was purchased with funds in the Fidelity account which I have found to be pre-marital segregated assets. The value should be the cost of the boat and not to include the ancillary costs of acquisition, this will bring US\$155,000 / \$1,209,000 into the pot at this stage. Matrimonial Pot The matrimonial pot contains the following assets and based on my determination above: Joint Ha land 2,338,600

Hil Time Share 140,000 Car in Philippines 150,000 Bank account 1,491,856 45,498 Pension 401 2,800,000 BF LLC 3,412,500 Inherited, segregated 8,580,000 Vanguard, Fidelity and Merrill 7Z4XXXXX 1,944,651 Premarital, segregated Merrill IRA 7YXXXXXX 1,177,611 Premarital, segregated Boat 1,209,000 Purchased with premarital, segregated funds Valuable: Jewellery 15,000 Valuable: Rolex 29,250 Sub-total: 9,264,868 60,498 14,008,600 TOTAL: 23,333,966 Parties Earning Capacity W s Income and earning capacity W is not working at this moment, she is the primary carer for K. She says she has a negligible earning capacity. H says that W is not engaging her obviously available earning capacity. He says that at 37, she is healthy, educated, reads, speaks and write English. She has previously worked as a waitress in S when they met, as a call centre agent 4 hours a day for a short period while in the US, and briefly after they separated in Hong Kong also waitressing. H says that the W s case is zero earning capacity, not even diminished earning capacity. He says even with a brief internet searches of job opportunities in S, W has a range of options available, he estimates her earning capacity to be PHP30,000 a month (\$4,200). I agree that it is a weak argument on W s part that she has no earning capacity. Now that K is almost 10, and attending school in the morning until 2pm, there is no reason why W cannot make use of this time slot to find a part time job to contribute to her expenses. M is also surrounded by her close-knit family who are available to support her in part with K if need be. Admittedly, W s earning capacity is limited and at great disparity in comparison to that of H s. H s Income and earning capacity According to the H s Form E, he makes \$295,780 as a pilot at Fx. It appears that the job is secured and he intends to stay on in this position in the near future. There is no doubt that he has a high earning capacity and continue to be so for awhile. STEP 2: Assessing the parties needs W s case on her Needs W estimates that her expenses in the Philippines to be \$20,556 per month, and she asks for \$30,941 for K, and a further \$6,219 for K s school fees. This totals \$57,716. W says her expenses is based on their standard of living in Hong Kong. W says that her current ask is substantially less than her estimate in HK which was \$114,780. H s case on W s needs H says that as he has lived in S and is aware of the standard of living there. H says W s expenses are inflated, and she is clearly overspending. He takes issue with the reasonableness and / or the veracity of the figures put forward by W, including her documentary support. H estimated her expenses to be \$5,951 and that of K s to be \$7,456. A part of the cross examination of the W was spent on her expenses. H submits that W admitted to the mixed receipts she provided, which included expenses other than for herself and K, she admitted that some of these were duplicates, and some were merely handwritten by her brother. He submits that it is impossible for K to consume 50kg of raw rice each month, W admitted in cross-examination that this include rice for other people. Furthermore, her receipts do not support her claim that K eats organic / western food 80% of the time. H says that he will be fully responsible for K s expenses including education expenses, ECAs if appropriate and agreed, and that W will not need to make any contributions. He also maintains that he has been called to send extra money on ad hoc needs, and he always support K financially. Furthermore, with reference to the potentiality of W relocating with K to where H is based in the US or a mutually agreed location; H also contends that W had a negative experience living in the US

and therefore it is unlikely that the parties would agree for W and K to relocate to the US. H submits that W has been able to maintain herself and K with the \$17,940 that he was ordered to pay her from the time of the Relocation Order. Discussion First regarding standard of living, I take the view that the assessment of needs for W and K must be based on where they now, and in the near future, reside. In the absence of any clear consensus on whether W and K will move, I will make my determination of their needs based on their ongoing residence in S. H produced a cost-of-living comparison between S, USA and Hong Kong on which he relies to say that the standard of living in S is not comparable to that in Hong Kong. Not much analysis was put forward in the H s affidavit in this regard, but these were not challenged at cross-examination either. I do not have evidence of cost of living in S, doing the best I can, and on a broad-brush basis, the following shows the Agreed expense schedule of the parties , with the final column of my assessment on her needs generously interpreted.

Assessment of W s expenses s Per Form E 25 May 2022 s Per Form E 7 September 2022 s	estimates My estimate s
General Utilities	1,305 1,875 1,305 1,400
Food	4,002.50 4,002.50 2,000
2,000 Car Expenses	1,049 1,346 1,000
Insurance (car) Others: Laundry s Personal Meals out of home	1,367.50 1,367.50 683.75 1,000
Transport Clothing/shoes Personal grooming Entertainment / presents Holiday	6,000 1,500
Medical / dental Contribution to parents	3,000 3,000
Dependent family members	1088
Others (donations, pet, legal)	14,649 20,556 5,951
9,300 (~US\$1,192)	I note here that W has failed to explain why his expenses has increased by 40% in four months time. I also largely agree with the H s observations on the receipts produced by W and the answers she gave at cross examination. W has not come up to proof on the amount of expenses she claims. I calculate W s needs, generous assessed, to be \$9,300 per month. Against this amount, I will take into account that at her age, she has earning capacity, even in a limited way, and she can supplement her income on top of this assessment. W is now at a prime age of 37, she is in good health and expect to live a number of years ahead. On the principle of fairness, she needs to be put in funds so that her livelihood can be maintained. In consideration of her accommodation needs. I have taken into account that she is now living at the S property. I accept there is an element of uncertainty when K turns 18 as to what will happen with the S property. I will consider this again in my final decision. On my calculation of \$9,300 per month, she will need \$111,600 per annum. It is clear that there are enough assets in the matrimonial pool to provide for her needs. H s Needs From the updated Form E, he claims \$212,927 as his expenses. This includes his current maintenance of \$17,940 for W and K. W says this is incorrect. H now has accommodation in his house boat. Any short-term accommodation expenses should no longer be required or if incurred when working, is a reimbursable item from H s employer. And that H will no longer need to pay for rental in Hong Kong of \$20,000. W also challenges why he claims such an exaggerated spending of \$4,000 + \$10,000 for food and meals out of home, which in total is just \$4,000 short of the expenses he is now paying for herself and K. She also failed to understand why H cites expenditure such as school transport, clothing and shoes, lunch money as his expenses for K since K is living with her. She assessed his need to be around \$137,236 without taking into account the maintenance for herself and K. With the declared income of \$295,780 in his updated Form E, W argues that he has sufficient balance

to pay for what she asks. STEP 3: Deciding whether to apply the Sharing Principle Despite M's case being represented as a needs case, I am of the view that this is a sharing case. The sharing should be applied to the matrimonial assets as calculated above in 193 to the amount of \$14,008,600. This include assets which are agreed to be jointly owned, a recalculation of H's pension lump sum, and NLF which H has failed to prove that it was purchased with pre-marital funds. 50% of this is rounded at \$7,000,000. It is my view that there should be a clean break between the parties, which is in line with the F's proposal. STEP 4: Reasons for Departure from the Sharing Principle The sharing principle has been applied. Assets have been excluded from the sharing principle as being inherited or premarital, and absent evidence in support of intermingling. At \$7,000,000 against the total matrimonial pot of \$23,333,966, W's lump sum represents 30% of the total. Child's expenses The following is a table of K's expenses with proposals from both parties, and my assessment of his needs on a broad-brush basis. This will have taken into regard F's undertaking to pay for his schooling, which can be paid directly to the school. However, H cannot by his claim that he will pay for everything for K, and not put money in W's hands for K for his day-to-day needs. W will need funds in hand for K's food, clothing or pay for tuition / ECA on the spot. It is not fair to ask W to go to H on a monthly basis to ask for these expenses. s Per Form E 25 May 2022 s Per Form E 7 September 2022 s estimates My estimate Child's General Utilities 1,305 1,875 1,305 1,400 Food 4,002.50 4,002.50 2,000 2,000 Household expenses (including maintenance) 7,901 7,901 1,117.80 3,000 Car Expenses 1049 1346 Insurance (car) Others: Laundry Child's Personal Meals out of home 1,367.50 1,367.50 683.75 1,000 School fees* 6,219 6,219 Paid by H Tuition School books and stationery Medical / dental 1,500 1,000 Entertainment/ presents 2,250 Holidays 6,000 1500 Clothing/shoes Lunches /pocket money 2250 1,000 Other transport Uniform Total (Excluding school fees of \$6219) 18,173 30,941 7,456 13,970 (~US\$1,791) This brings my assessment of K's needs to \$13,970, having in mind that children expenses usually increase as they grow. STEP 5: Deciding on the Outcome I take into regard the W's Open proposal, and that the following are assets on her side of the balance sheet or in her possession: Valuable \$15,000 Bank assets \$45,498 Car \$150,000 \$210,498 Deducting \$210,498, the balance payment to be made by the H shall be \$6,789,502. I note here that W has asked for the Ha property in her open proposal but H has not offered to transfer. On the face of the H's financials, he has cash or liquid assets which can be converted to be paid to W; alternatively he has the asset base to take out loans if he wishes. Time will be given for H to make this payment to W, before which H is to pay for maintenance for W as assessed herein, until the full lump sum payment be made. Considering the principle of fairness, this Order will put liquidity in her hand, and should cater for W's needs very comfortably in the Philippines. This amount can be invested for return, and also be sufficient to purchase a real property for investment or her eventual use. H will have \$16,333,966 based on the percentage calculation of the matrimonial pot. His accommodation is currently provided for from his boat, he has a high earning capacity and continues to earn an attractive salary, he will have an income stream on his retirement of US\$130,000 per annum; I conclude that his needs are well covered. From his on-going income, his own expenses can be catered for. Based on the assessment above, K's needs is \$13,970, which I will round up to be US\$1,800.

This is exclusive of his school fees. I accept H's undertaking that he will continue to pay for his international school fees direct. Taking into regard the H's income and expenses above, he has more than enough to cater for K's on-going education and his expenses in the Philippines. I also accept that he has in the past, and also says he will, continue to pay for any reasonable ad hoc amounts that W requests. Litigation conduct W has taken issue with various conduct on H's part which is worth mentioning. Form E had not been accurately completed. The updated Form E simply replicates the first one except for minor obvious adjustments. The following still remain incorrect in the updated Form E:

- a. Neither income nor expenses are current
- b. Includes items of spending on K which he is no longer incurring e.g. school bus in HK, and Octopus pocket money, and ECA that K is not doing
- c. Include items in the expenses which are reimbursed by H's employer
- d. H's pay remains the same in the two Form Es over a period of two years, despite he says that his income varies month by month. He then admitted in oral evidence that he did not add up his 12 months of income
- e. He admitted to making a mistake with K's school fees which he declared to be \$11,000 per month but corrected to say it is actually US\$11,000 per year
- f. He acknowledges in cross-examination that he has omitted to add an amount into his income which was an additional sum he received for relocating out of HK.
- g. H erroneously reported his dividend income, which should be at least for Vanguard, \$6,500 (calculated from an amount he received in 2019 in his answers) and not \$1,873 for both Vanguard and Fidelity account
- h. H failed to provide support of eating out at \$12,580 per month, and furthermore did not disclose that he has a per diem reimbursement from his employer for food allowance. Disclosure and Valuation regarding the BF LLC: W says her legal team has repeatedly pursued the valuation of the US land from the H and his legal team but in vain. She also says that H has failed to produce information in his possession and then chose to do so only at the very last minute before trial. H had not made any attempt to provide answers to questions regarding BF LLC. H had never given an estimate valuation for BF land, and confirmed that he had made no attempt to obtain a valuation. Information on BF land was produced only after W refused to agree to H's valuation. His legal team took three months before responding to W's enquiry for BF land valuation. He produced in October 2022 a Notice of Appraisal dated April 2022 (obviously received prior to his updated Form E in May 2022). When challenged, he said it has been mistakenly left out. H says that the BF LLC has no bank accounts, audited accounts or management accounts in his answer to questionnaire, but then admitted that he never asked his uncle for these before answering the question. Parties came to Court twice as late as November and December 2022 with regard to valuation of the US land. This includes arguments over defining the scope of the

valuation, drafting of the joint letter to the SJE, H's refusal to pay for the expert, the revelation that H's legal team had had extensive communication with the intended SJE prior to Court's appointment. Disclosure regarding NLF Evidence on the rezoning approval of NLF was never revealed by H, but uncovered by W's own efforts. Other Non-disclosure W says that H's other non-disclosures include his evasive response as to where he is based, his refusal to disclose the commencement of his Fx pension, and he did not declare that he went off to purchase a houseboat while owing W's litigation funding. It is clear that H's abovementioned litigation conduct would have no doubt caused extra legal expenses. Given that W is reliant on H for provision of litigation funding, W must have felt strapped in her pursuit of her case. This unfairness needs to be addressed in the issue of costs. Last Minute Evidence On day 2 of the trial (11 January 2023), H's counsel sought to introduce new expert evidence on Capital Gain Tax from a lawyer in Te. H wants to add this evidence via correspondence dated 11 January 2023 to W, having only handed the same to W's counsel that morning. Letters shown that H had correspondence with this lawyer since 3 January 2023. Nothing was mentioned before evidence began, H's counsel says that she only wanted to add the additional correspondence to the back of the bundle. Not only was this done after W has started her evidence, H and his legal team had ignored all proper procedures for seeking court's leave for expert evidence or to seek leave to introduce additional evidence prior to trial. Time was spent on Day 3 morning to argue the admission of this information. Needless to say, H was unsuccessful in this attempt. W asks for costs for the time spent on this. The Family Court has at times been considered to be more lax in procedures; this may come under the scope of important and relevant information, usually regarding children, which may need to be brought to the attention of the Court for fair disposal of issues. That said, these processes still rest at the discretion of the Judge and must not be taken for granted. The way in which H sought to bring in this very delayed information after trial commenced was far from desirable, not to be encouraged, and wrong in principle. Legal Costs The amount of legal costs incurred by the parties are wholly disproportionate to the matrimonial pot. According to the Form Hs received prior to trial, W has spent \$5,933,228 and H has spent \$5,197,393. Counting from the date of the Petition in November 2019 until the trial in January 2023, parties have spent \$11.2M in just over 3 years, that comes to around \$300,000 per month. Enough judges at different levels have commented on the costs that parties incurred in divorce legal proceedings. This is yet another one of them, where a big part of the matrimonial pot has been spent on parties acrimonious and litigious proclivities. I will not labour this point, except to say that the amount spent on legal proceedings would have been much better served if spent on their child. Costs H offers \$3.05M to the W. This is a mere 13% of the total family pot. It is hard to imagine that despite H's argument of premarital assets, and acknowledging that W's needs can trump this argument, that he thinks that this is a fair distribution of matrimonial assets in his version of an almost 9 years marriage. I have ruled against him on his calculation of the duration of marriage, and his attempt to bring S property into the matrimonial pot. He has fallen short of proving his allegations with regard to inherited assets. W asks for \$11.5M and a periodical payment for herself and K. I ruled against her in her attempt to sweep everything into the matrimonial

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