

HONG KONG / JUDGMENT

SDY v. KSLS

COURT

Family Court

DECIDED

20 May 2008

CASE / FILE NUMBER

FCMC11958/2006

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bjbj FCMC 11958 / 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 11958 OF 2006

BETWEEN SDY Petitioner and KSLS Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing:
21, 22 and 23 April 2008 Written closing arguments submitted: 30 April and 7 May 2008 Date of
Judgment: 20 May 2008

J U D G M E N T

Introduction

AUTONUMOUT This is an application by a Petitioner husband for ancillary relief. AUTONUMOUT The parties have one child, a little girl, M, who was born on the 30 January 2004 and is now therefore 4 years of age. They have joint custody of M. M lives with the wife, who has care and control, but there are generous access arrangements in place so that M can see the husband and/or his parents almost on a daily basis. (See Court order dated 25 May 2007). AUTONUMOUT There was a separate matter, which was brought to my attention at the beginning of the trial, concerning M s passport. I will deal with the wife s application in this respect at the end of this judgment. AUTONUMOUT The husband is originally from Northern England and the wife is from Hong Kong. They met in the SAR. Both are well educated, professionally qualified and in their late 30 s/early 40

- s. They cohabited for a short period and married in February 2002. They separated in an acrimonious fashion in 2006. It is common ground that this is therefore a relationship of approximately 5 years duration. AUTONUMOUT At its heart this is a dispute concerning the husband's entitlement to a share of the family assets, where it is accepted that the majority of those assets were either brought into the marriage by the wife (by loan and/or gift), or they were accumulated and/or maintained largely as a result of the wife's earnings and other financial resources. AUTONUMOUT It is common ground that there should be a clean break between the parties. M will need to be provided for. The issues AUTONUMOUT
- (a) Should the money advanced to the wife by her father be treated as a loan or a gift?
 - (b) Should the money advanced to the husband by his parents be treated as a loan or a gift? (c) Is the wife's contribution to the family's finances to be treated as a special contribution?
 - (d) Are any of the assets to be regarded as non-matrimonial property?
 - (e) If so how should such assets be treated?
 - (f) What is the computation of available assets?
 - (g) How should those assets be divided bearing in mind the principles of need, compensation and sharing and the s.7 factors?
 - (h) To what extent can and should the court depart from the yardstick of equality bearing in mind all of the factors set out above and the overriding concept of fairness?
 - (i) How much maintenance should the husband now pay for M? The law AUTONUMOUT The law in Hong Kong has been clarified since the recent decision in *DD v DKW* (CACV no 91 of 2007). The Hon Mr. Justice Cheung JA set out in clear terms the applicable principles to be generally applied in ancillary relief cases. They are at paras 69 and 70 of the judgment. For ease of reference I will repeat them here: The applicable principles
69. I am aware that Family Court judges are concerned with the practical application of the principles established in *White and Miller*. I will set out what I consider to be the relevant principles when the Court considers ancillary relief applications:
- (1) In the majority of the cases where the parties only have limited financial resources, the focus of the inquiry on fairness is to divide the assets of the parties so as to make provision for their housing and financial needs. It may be necessary to augment the available assets by making orders for periodical payments (*Miller* [11][12]).
 - (2) Where there are assets which are available beyond satisfying the immediate housing and financial needs, equality in division of the assets should be made unless there is a good reason to the contrary (*Miller* [16], *Charman* [65]). This approach is not confined to big money cases but to cases where the assets are available beyond satisfying the needs of the parties. (*Rayden and Jackson on Divorce and Family Matters Vol 1*(1), para 16.26)

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- (3) The inquiry should be conducted in two stages:
- 1) First, computation of the available assets of the parties such as property, income (including earning capacity) and other financial resources which the parties have and the parties have and are likely to have in the foreseeable future (Charman [67]).
 - 2) Second, distribution of the assets by reference to the three principles of need (generously interpreted), compensation and sharing. These principles can be gleaned from section 7(1) and each of the matters set out in section 7(1)(a)-(g) can be assigned to one or another of the three principles (Charman [68]).
- (4) The principle of need requires consideration of
- 1) the financial needs, obligations and responsibilities of the parties (section 7(1)(b));
 - 2) the standard of living enjoyed by the family before the breakdown of the marriage (section 7(1)(c));
 - 3) the age of the parties (section 7(1)(d)); and
 - 4) any physical or mental disability (section 7(1)(e)) (Charman [70]).
- (5) The principle of compensation relates to, among others,
- 1) the prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for the benefit of family during marriage.
 - 2) in short marriage the financial disadvantage a party suffered, if any, on entering into the marriage.
 - 3) any loss of possible pension rights : section 7(1)(g) (Charman [71]).
- (6) The relevant factors for the principle of sharing are,
- 1) the contributions of each of the party to the welfare of the family (section 7(1)(f)).
 - 2) the duration of the marriage (section 7(1)(e)). (but see below)
 - 3) conduct of the parties which it would be inequitable to disregard (Miller [65]; Charman [72]).
- (7) As to any conflict between these three principles,
- 1) the criterion of fairness is to apply in irreconcilable conflicts between the three principles [Charman 73].
 - 2) when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail (Miller [28], [29], [139]; Charman [73]).

- 3) when the result suggested by the needs principle is greater than the result suggested by the sharing principle, the former result should in principle prevail (Miller [142], [144]; Charman [73]).
- (8) The principle of fairness is to apply to all properties of the parties both matrimonial (i.e. the product of both parties which also include the matrimonial home, even if this was brought into the marriage by one of parties) and non-matrimonial (i.e. by inheritance and gift) (Miller [22]).
- (9) The equal sharing principle applies to both long and short marriages but in case of short marriage, the non-matrimonial property may be a good reason for departing from equality (Miller [24]; Charman [66]).
- (10) The concept of special contribution i.e. exceptional income generated by only one party, may be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise (Miller [68]).
- (11) Where a spouse has given up a lucrative career for the benefit of the family, this may justify an award for compensation (Miller [90-93]). The principles are not exhaustive
70. It would not be practicable to list each and every principle that one may extract from White and Miller. As Charman observed, the House of Lords after laying down the guidelines has left much to be developed by courts. What I have done here is to set out those principles which I believe would be most frequently encountered in ancillary relief applications. AUTONUMOUT Reference must also be made to the Matrimonial and Proceedings Ordinance, Cap 192 under which applications for ancillary relief are made. The court has wide powers, including the power to order a lump sum payment (see section 4), to transfer property (see section 6) and to make orders for sale (and consequential directions upon any such sale, as required (see section 6A)). AUTONUMOUT As referred to above, the Hon Mr Justice Cheung JA identifies the relevant section 7 factors under the headings of need, compensation and sharing. The court shall take into account the s.7 factors when determining an application for ancillary relief. For ease of reference I have set them out again here. (7)(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-
 - (a) 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;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;

- (e) any physical or mental disability of either of the parties to the marriage;
- (f) 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;
- (g) 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 Evidence
AUTONUMOUT I must now turn to consider the issues, the law and the parties evidence as set out in the parties affirmations and as given orally by them during the hearing. For the avoidance of doubt, in so far as the matters set out in this judgment differ from the evidence of the husband or wife, that is because I have preferred the evidence of the other party or because I do not find the evidence given credible, or because I consider that the documents produced confirmed my findings of fact. The issues Should the money advanced to the wife by her father be treated as a loan or a gift? AUTONUMOUT It is not disputed that the wife s father has advanced her (and/or the husband) the following sums of money: January 1993 HK\$1.6 million, August 2003 HK\$1 million, End 2005/beginning 2006 HK\$200,000 and March 2006 HK\$2 million It is the wife s case that these monies were loans to be repaid by her as and when she was able. AUTONUMOUT The difficulty with the wife s case is that it does not really stand up to detailed investigation. AUTONUMOUT The wife s father has filed two documents, the first an affirmation dated the 14 February 2007. This was filed in relation to the custody dispute. In it the father deals with some of the financial issues. The second document was a statement dated the 5 July 2007, in which the father acknowledged that this statement would be used in court during any legal processes in connection with the Matrimonial Causes. AUTONUMOUT In these documents the father sets out the details surrounding the alleged loans. He says that he lent the wife the first sum of HK\$1.6 million in 1993 to start her off in life . This was allegedly a non-interest bearing loan. The wife used it to help to buy the TKS property (see below). He says that it was understood that she would repay him as and when she was able. I have noted that the wife made no repayments at all to her father in the nine years prior to her marriage and that none were made during the marriage, until the father allegedly demanded repayment. I find the wife s evidence in this respect tenuous to say the least. It seems that there was no serious intent, and never had been, to repay the father this sum. Had that not been the case repayments would have been made previously. I have also noted that as with the other monies there is no documentary evidence to support what the wife says including any proposed repayment schedule. AUTONUMOUT The father said that he lent the parties a further sum of HK\$1 million to help them purchase a flat in SWH. The wife was pregnant at the time and they wished to buy a new property in which they could live with their new child. This was to be their matrimonial home. The husband gave evidence that he understood that the HK\$1 million was a gift. The father says in the statement that this loan was interest bearing and that it was agreed that the parties would pay him interest of HK\$2,000 per month. The father has received the sum of HK\$2,000 on a monthly basis since. The husband says the HK\$2,000 per month was tea money i.e. a mark of respect and not interest on a loan. But the husband also acknowledges

that most of the conversation at the time was in Cantonese and that therefore he may have missed some of the meaning. However he is clear about what he understood the position to be and says that if the HK\$1 million had been a loan he would not have accepted it. I found the husband's evidence more credible than the wife's in this respect. AUTONUMOUT Later the father gave the wife a further sum of HK\$200,000 in four instalments of HK\$50,000 each. This was at a time when the husband was unemployed and cash flow was tight. The father says that the reason he did this was two fold a) to help the couple financially and b) to help save their marriage. Again he claims that this was a non interest-bearing loan, although he also acknowledges that I did this in order to help her out of her hardship (whilst the Petitioner could not support her) but since I love my other two daughters equally I also gave them \$200,000 for fairness. AUTONUMOUT If this was a loan as opposed to a gift I can see no reason why the father should lend his other two daughters \$200,000 for fairness sake. With respect this does not make sense. Again I prefer the husband's evidence namely that this was a gift as opposed to a loan. AUTONUMOUT Finally in March 2006, the father gave the daughter a further sum of HK\$2 million. He says that he did this in order to prevent foreclosure on the matrimonial home and again to assist the parties marriage. The husband has pointed out that the wife had significant assets in her own name at the time and that there was no imminent danger of the matrimonial home being repossessed in any event. AUTONUMOUT Generally I am also aware of the timing of the father's statement namely that it was signed the day before the Financial Dispute Resolution, which took place on the 6 July 2007. It seems to me that the father must have been aware at that time that he would be expected to give evidence at the trial, if the parties were unable to reach any settlement. I had expected the father to be called as a witness. I was led to believe at the pre trial review that he would give evidence. However he has not been called. The wife has given reasons for not doing so, including the fact that her father is 84 years of age. She also claims that her father has a congenital heart condition and cataracts and that he is not enjoying very good health. This is notwithstanding the fact that in his affirmation of the 14 February 2007 the father says: Despite my age I do not have any major health issues. I only visit the doctor once every few months to do check-ups. I live a healthy and disciplined lifestyle. I get up everyday at 6am to go jogging and exercise. I then have lunch at 11:30am (usually with M), tea at 3pm and have dinner at around 6:30pm. I would then sleep at 8:30pm in the evening. AUTONUMOUT The two different versions do not sit happily together. It is impossible for me to determine whether what the wife says in this regard is true. In any event, given the circumstances, I do not intend to attach any weight to what the father says in these documents, as his evidence has not been tested. AUTONUMOUT Further I am mindful of the fact, as I have said above, that there is no documentary evidence to support the existence of the so-called loans. In addition I have noted that although the father says that he wishes to recall the money, he then goes on to say that he intends to use those funds to set up a trust fund for M. There is no suggestion that he simply requires the funds to be returned to him to be used for his own living during retirement. This also does not accord with his statement at paragraph 9 of his affirmation: I gave S the above sums of money on the understanding that she did not have to make prompt or regular payment. She could repay me when she would

be able to do so. Since I retired at the age of 58, such sums were a substantial part of my savings. S was well aware of my financial status. She was appreciative that I helped her out of her bad times and she promised to repay later. I was not eager to press for repayment, as I believed her well being is more important than money. Consequently, bearing in mind all of the above, it seems to me that the sums advanced by the father should more properly be described as gifts as opposed to loans. AUTONUMOUT The wife's counsel argues in the alternative that I should view these monies as sums advanced to the wife only as opposed to the parties jointly. AUTONUMOUT Certainly I would accept that argument in so far as tranches a), c) and d) are concerned. Tranche a) i.e. the first sum of HK\$1.6 million was clearly given to the wife before she had even met the husband. Likewise, in so far as tranches c) and d) are concerned namely the sums of HK\$200,000 and HK\$2 million, the husband was frank when he said that he had not been aware that the father had forwarded those sums to his wife until after the event. I believe him. The husband also accepts that other than the HK\$1 million (tranche b), all other monies were gifts to the wife and not to him and the wife jointly. I accept that the father gave those sums to his daughter in an attempt to help her financially and in order to do what he could to try to help save the parties marriage. AUTONUMOUT However in so far as the sum of HK\$1 million is concerned, it seems to me, that this money was given to both of the parties to assist them in the purchase of their new family home. AUTONUMOUT There is one other matter. The wife repaid the sum of HK\$550,000 to her father on the 17 August 2007. This raises the question which amount has the wife allegedly repaid, albeit in part? In the absence of any evidence to the contrary I will assume that the wife has repaid part of the first amount of HK\$1.6 million. I take the view that this is a matter to be resolved ultimately between the wife and her father. Mr Egerton has referred to this as litigation window dressing. I would agree. In so far as the total sum of HK\$4.25 million is concerned, it seems to me that prima facie that sum forms part of the monies available for distribution and should not be deducted at source and returned to the father. The original source of those funds is though something that I will consider further when determining how the assets should be distributed. I accept prima facie the argument advanced by Mr Egerton, namely that these monies should be viewed as a contribution made by the wife to the parties asset base. Should the money advanced to the husband by his parents be treated as a loan or a gift? AUTONUMOUT Reference was also made to a sum of HK\$150,000 advanced to the husband by his parents. The husband accepts that this money was a gift although he gave evidence that he felt honour bound to return it to his parents. Again, in so far as this sum still form part of the parties asset base, I also accept that it may form part of the assets presently available for distribution. As it is a gift it should not be deducted at source and returned to the husband's parents. Is the wife's contribution to the family's finances to be treated as a special contribution? AUTONUMOUT The wife argues that she has made a special contribution to the welfare of the family. Although it is not disputed that the wife was the sole income provider for prolonged periods during the marriage, I do not accept that that, of itself, entitles the wife to claim that she has made a special contribution. In a legal sense special contribution has come to mean a contribution that is so marked that to disregard it would be

inequitable and that exceptional earnings are to be regarded as a factor pointing away from equality of division when, but only when it would be inequitable to proceed otherwise (para s 60 and 61 DD v DKW (CACV no 91 of 2007) AUTONUMOUT Thus in Charman v Charman [2007] 2FCR 217 it is clear that Mr. Charman, and Mr. Charman alone, had made a special contribution in that he had been responsible for amassing the parties incredible wealth. This had been generated as a direct result of his formidable foresight, business acumen and talent. AUTONUMOUT I accept that the wife was solely responsible for supporting the family whilst the husband was unemployed i.e. from November 2001 May 2002 and again from May 2005 May/June 2006. The first period began prior to the parties marriage in February 2002. The wife did not call off the wedding. She supported the husband during this period. Again she did likewise from May 2005. The wife s counsel has suggested in her closing that She has behaved as if she were the husband of the family, working hard for the family, shouldering the entire financial burden on top of her role as a dedicated and hands-on mother to M AUTONUMOUT I have noted that the wife is a well-educated commercial lawyer. She has the ability to support her family and when times were tough both she and the husband were lucky in that they were able to rely on her ability to earn a good salary. The husband I am sure, would have contributed more if he had been able to do so. I accept that the he wife has made a significant contribution. I do not accept that it was a special contribution . Are any of the assets to be regarded as non-matrimonial property? And if so how should such assets be treated? AUTONUMOUT This is a more difficult question. The wife submits that the TKS property and other shares and liquid assets held in her sole name prior to the marriage, should be regarded as non-matrimonial property. The husband for his part says that prima facie the TKS property and other assets must be included in the computation of available assets, prior to the distribution of those assets. AUTONUMOUT It is not disputed that the wife purchased the TKS property with the assistance of her father, long before the parties met. She has been responsible for the property all along. She currently resides there with M. When the husband moved in with her she was living in that property and he paid her HK\$7,500 per month by way of a housing contribution. There was never any question of the husband contributing towards the mortgage repayment itself or of the parties selling this property and using the net equity to partly fund the purchase of the matrimonial home. This property has along been regarded as belonging to the wife. AUTONUMOUT But, the difficulty with the wife s position is that the TKS property was refinanced to provide funds to trade in securities. In her 10th affirmation of the 25 September 2007 she says In about the end of 2004, the Petitioner insisted that I should refinance the TKS to give him more funds to trade in securities. As a result, I raised a fresh mortgage loan of HK\$2,000,000.00 from XX Bank. The loan was drawn down on the 17 January 2005. After deducting the outstanding old loan balance of HK\$954,185.37, the refinancing balance available was about HK\$1,045,841.63, from which HK\$693,165.79 was deposited into the 450 Joint account. Both parties provided funds for trading securities. That money was then used to help finance other things. Those funds can then be said to form part of the marital acquest. AUTONUMOUT I am also mindful of the helpful guidance provided by the House of Lords in this respect. In Miller v Miller, McFarlane v McFarlane [2006] UKHL, 24, Lord Nicholls of

Birkenhead said, when discussing the concepts of matrimonial and non-matrimonial property A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the "matrimonial property" equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired *634 during the marriage otherwise than by gift or inheritance: [HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111156696&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split"](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111156696&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split) \t "_top" Family Law (Scotland) Act 1985, sections 9 and 10 . In England and Wales the [HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0292575419&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split"](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0292575419&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split) \t "_top" Matrimonial Causes Act 1973 draws no such distinction. By [HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111178322&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split"](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111178322&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split) \t "_top" section 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. 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. As already noted, 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.
23. The matter stands differently regarding property ("non-matrimonial property") the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the White case [2001] 1 AC 596 , 610: "Plainly, 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. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.
25. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the White case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs. AUTONUMOUT In Hong Kong, as in England and Wales there is no statutory distinction between matrimonial and non-matrimonial property. The distinction becomes important when considering all the circumstances of the case and the s.7 factors. AUTONUMOUT In this case I accept that the TKS property should be regarded as non-matrimonial property notwithstanding the fact that it has been borrowed against. This is how the parties viewed the property. It is how they arranged their finances. The same argument has been raised in relation to the wife's other liquid assets that she brought into the marriage, such as her share portfolio. This is less easy to determine as the wife's share portfolio and other liquid assets have changed over time. I am also mindful of the guidance provided by the 18th edition of Rayden, at paragraph 16.74 in this respect, which states: Pre-marriage assets, inherited wealth or gifts received, during the marriage represent assets that derive from sources external to the marriage; however they are not to be quarantined and set apart from the other assets in the case. It has been suggested that pre marriage assets could include, not only cash and property, but also a developed career, existing high earnings and an established earning capacity. There are no hard and fast rules: it is for the judge to decide how important assets that were owned by a spouse before the marriage, or acquired later by inheritance or gift are in the particular case. AUTONUMOUT Thus although I accept that the TKS property may properly be regarded as a non matrimonial asset and to a lesser extent the wife's other assets, that does not mean necessarily that they should be deducted from the asset base at source. Fairness may dictate that recourse will need to be made to these assets, or some of these assets, in any event, when assessing how to distribute the parties assets. What is the computation of available assets? AUTONUMOUT There was an issue at the beginning of the trial concerning the valuation of some of the real property. I gave clear directions at the pre trial review on the 16 October concerning valuations namely that Valuation of the following properties to be agreed between the parties, failing which a valuer shall be jointly appointed by the parties and a valuation report shall be filed no more than 28 days before the hearing of the trial AUTONUMOUT I was referred to subsequent correspondence between the parties respective solicitors in which valuations were agreed as follows: 10D HK\$9,500,000 (former

matrimonial home held in joint names) 31B HK\$5,800,000 (31B held in the name of GPP Limited. The wife is a shareholder and director of GPP) Car park space HK\$600,000 (held in joint names) TKS, Hong Kong HK\$5,600,000 (TKS property held in the name of the wife).

AUTONUMOUT At the beginning of the trial the husband tried to introduce new evidence relating to the valuations of the former matrimonial home and 31B. He first raised the issue in a letter of the 14 April, just one week before the trial, This was at the 11th hour.

Understandably the wife did not agree. I concurred. In line with my direction at the pre trial review, the original agreed valuations were ordered to stand. I also noted the fact that I asked the parties if valuations had been agreed at the second pre trial review on the 18 March 2008. I was informed by both sides that they had. The matter proceeded on the basis of the original agreement. Mortgage redemption statements were produced as follows: HK\$362,915.39 HK\$3,267,236.53 None HK\$1,751,671.96 Thus the net values of the properties are as follows:

- a) Matrimonial home 9,137,084.61
- b) 31B 2,532,763.47
- c) Car park 600,000.00
- d) TKS 3,848,328.04 TOTAL 16,118,176.12 AUTONUMOUT In addition the parties hold a Zurich policy, no XXXXXXXX. The surrender value as at the 24 April 2008 was US\$98,378.18. It is agreed that this policy, which was taken out for the benefit of M, should be kept for that purpose. AUTONUMOUT The parties also each hold a small mandatory provident fund (mpf). These are of similar value and as they roughly balance out I do not intend to include them in the computation of available assets. Each side will continue to hold their own mpf fund. AUTONUMOUT The wife has also taken out a life insurance policy for M. The present surrender value is approximately HK\$180,000. M is the beneficiary. I do not intend to interfere with this arrangement or to include it in the computation of available assets. AUTONUMOUT In addition the wife holds cash and other investments in the sum of HK\$1,330,857.53. She owes only HK\$305 on her credit cards. The current accounts clearly fluctuate. She holds approximately HK\$1,240,000 in investments. I will include that sum in the computation of available assets. The husband holds in total approximately HK\$130,000 in his bank accounts, most of which appears to be in operational accounts, including current accounts. These accounts fluctuate. He has credit card debts of approximately HK\$155,000. As his debts cancel out his available funds I do not intend to include either in the computation of available assets. I have dealt with the alleged loans from the wife's father and the husband's parents above. Both parties have outstanding legal fees to pay. As costs may be an issue at the end of the day, I do not intend to deduct either side's costs from the monies available for distribution. Thus the following is available for distribution: Properties HK\$16,118,176.12 Other investments - HK\$ 1,240,000.00 TOTAL HK\$17,358,175.00 AUTONUMOUT In addition both parties have a good income and earning capacity. The husband is presently earning US\$10,000 per month (HK\$78,000) and the wife is earning HK\$83,000 per month. She also has the ability to supplement her income by virtue of a

consultancy agreement with a solicitor's firm. It has been suggested that the wife's family is very wealthy. That suggestion is unproven. I accept that the wife may inherit from her family and that the husband may do likewise. I do not intend to include that as a financial resource that the parties are likely to avail themselves of in the immediately foreseeable future. How should those assets be divided bearing in mind the principles of need, compensation and sharing and the s.7 factors? Need

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; AUTONUMOUT Both need somewhere to live. The wife is presently living in the TKS property with M and the Maid. It is a two bed-roomed property. She says, and I accept this, that the TKS property is too small for them longer term. She would like to return to the former matrimonial home, which is a larger three bed roomed property. AUTONUMOUT The husband is presently living in the matrimonial home. He too needs somewhere to live, which is suitable for M when she visits. He would like to retain the smaller 31B property for this purpose.
- (c) the standard of living enjoyed by the family before the breakdown of the marriage; AUTONUMOUT Both parties have enjoyed a reasonable standard of living during the marriage. Both have a good and continuing earning capacity.
- (d) the age of each party to the marriage; AUTONUMOUT Both parties are relatively young.
- (e) any physical or mental disability of either of the parties to the marriage; AUTONUMOUT This is not relevant to the present application. Compensation the prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for the benefit of family during marriage. in short marriage the financial disadvantage a party suffered, if any, on entering into the marriage.
- (g) 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. AUTONUMOUT The issue of compensation was not argued and on the facts of the case does not appear to be relevant. Sharing
- (f) 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; AUTONUMOUT The wife's puts her case largely on the basis of contribution. She says that she has contributed more than the husband financially and now that the marriage is at an end she should receive more of the available assets because of that. Mr. Egerton for the husband says that she has approached the case on the basis of an audit and that the court is not required under the s.7 factors to approach the division of the parties assets on that basis. Although I agree, it is nevertheless true that the parties respective contribution to the marriage, both financial and otherwise, is something that I must take into account under this heading. AUTONUMOUT It is common ground that initially the parties set up a joint bank account (account 623) into which they both deposited HK\$10,000 per month to cover household expenditure. In

addition the husband originally gave the wife a further HK\$7,500 to cover the cost of housing. Later this amount was increased to HK\$30,000 and then to HK\$38,000. It was the husband's evidence that during his first period of unemployment i.e. from September 2001 May/June 2002, he continued to contribute, even though he was not earning a salary, by drawing on his own savings. AUTONUMOUT In the second period of unemployment i.e. from April 2005 May 2006, the husband accepts that he stopped making a financial contribution because he had no money with which to pay. His parents sent him some funds and he also tutored English and that provided him with some pocket money. He said I continued to pay as much as I could when I could. I always contributed to the maximum of my ability. AUTONUMOUT In terms of contribution generally he said My contribution to the family and marriage every penny that I had has gone into the marriage. All my time and effort and emotion. AUTONUMOUT The wife has also claimed that the husband misappropriated funds, by transferring money from her account or the parties joint account into his own account and that he passed these funds off as his own. AUTONUMOUT Having heard the husband give evidence I am satisfied that it was never his intent to give this impression and that he accepts that the source of a lot of the family funds was either from the wife herself or from her father. AUTONUMOUT In this case it is clear that the wife's financial contribution has been very significant, both in terms of her own earning capacity, the gifts received from her father (either solely or jointly with the husband) and the other assets that she brought into the marriage. In comparison the husband's financial contribution has been limited. He came to the marriage with limited savings. AUTONUMOUT The wife has also contributed fully in her role as mother. Likewise I accept that the husband made an equally important contribution as M's father.

- (d) the duration of the marriage; AUTONUMOUT It has been suggested that this is not an unduly short marriage. I do not agree. It seems to me that a relationship of approximately 5 years is relatively speaking, a short one. However the existence of M means that it is not a short marriage in the classic definition of the phrase i.e. short in length and childless. Conduct of the parties, which it would be inequitable to disregard AUTONUMOUT Both parties accept that this is not a relevant factor in this case. To what extent can and should the court depart from the yardstick of equality bearing in mind all of the factors set out above and the overriding concept of fairness? Case law AUTONUMOUT Ms. Tsui for the wife has helpfully provided me with some additional English cases, which support her client's case for a departure from the yardstick of equality. Mr. Egerton for his part points out that they are all decisions at first instance and therefore their assistance is limited to the interpretation of principle as applied to particular facts of the particular case. AUTONUMOUT Although I do of course accept that, I have nevertheless found three of them in particular to be useful, because although they all involve longer marriages, they nevertheless deal with similar issues - namely to what extent one can and should depart from the yardstick of equality where one party's financial contribution far exceeds that of the other and there are issues relating to what one might term non-matrimonial property. (See *B v B*, *L v L* and *NA v MA* below) AUTONUMOUT In *B v B* (ancillary relief) [2008] 1 FCR 613, the husband received 29%

of the assets where all of the assets had been brought to the marriage by the wife, who had inherited them prior to meeting the husband. Further for periods of time neither of the parties worked, each relying on the wife's inherited wealth for support. The parties had been married for 12 years and had cohabited for a further 3. It was therefore a relationship of some 15 years duration. There was one son. AUTONUMOUT In *L v L* [2008] 1 FLR 142, the court also found that there was a good reason to depart from equality where the husband had acquired substantial assets including inherited property prior to the commencement of the relationship. The parties had been married for 10 years and there were two small children. In that case the wife received 42% of the assets and in the words of Ms Tsui This sum happened to be equal to that required to meet the wife's needs, so there was no tension between the application of the sharing and needs principle in this case AUTONUMOUT In *NA v MA* [2006] EWHC 2900 (Fam), the husband had significant inherited wealth. The main issue related to the enforceability or otherwise of a post-nuptial agreement. The relationship lasted for 12 1/2 years and there were 2 young children. The wife received 23% of the assets (GBP9.176 million). This was based on an estimate of her reasonable needs (generously interpreted). AUTONUMOUT In *RP v RP* [2006] EWHC 3409 (Fam), the wife received 60% of the assets because needs dictated a greater share than 50%. AUTONUMOUT The overall criteria is one of fairness. In departing from the yardstick of equality I have taken into account the shortness of the marriage, the significant contribution made by the wife to the assets available for distribution, the existence of non-matrimonial property, the contribution made to the assets by the wife's father, the parties' relative young age and their continuing earning capacity. I have also taken into account each party's need to be housed appropriately. AUTONUMOUT In view of this it seems to me that fairness dictates that the wife should retain the TKS property. This is notwithstanding the fact that there was some muddling of the assets by virtue of the fact that this property was borrowed against. AUTONUMOUT In addition I accept that both parties should have somewhere suitable in which to live. The mother wishes that the former matrimonial home should be transferred to her. The husband would like 31B to be transferred to him unencumbered. There are not the financial resources available to do this, other than by reference to the TKS property and/or the wife's other liquid assets. Although I will not upset the ownership of the TKS property, recourse will be made to the wife's other liquid assets. I am satisfied that in doing so, both parties will be appropriately housed with affordable mortgages. The wife shall also retain the most significant asset that she brought into the marriage. Division of Assets AUTONUMOUT Thus I will make an order in the following terms:

- a) The matrimonial home worth HK\$9,137,084, to be transferred from the joint names of the parties into the sole name of the wife, subject to the existing mortgage. Such transfer to take place within the next 60 days.
- b) 31B held in the name of GPP Limited and worth HK\$2,532,763 to be transferred into the sole name of the husband, subject to the existing mortgage within the next 60 days.

- c) The car park held in the parties joint names and worth HK\$600,000.00 to be transferred into the sole name of the husband within the next 60 days.
- d) The TKS property worth HK\$3,848,328 to be retained by the wife. In addition the wife is to pay the husband a lump sum of HK\$1,240,000, also within the next 60 days. A clean break is to be effected between the parties upon compliance with a) e). AUTONUMOUT Thus the husband will receive assets worth in total HK\$4,372,763 as follows: 31B 2,532,763.47 Car park 600,000.00 Lump sum 1,240,000.00 TOTAL 4,372,763.00 AUTONUMOUT This represents just over 25% of the total assets and just under 33% if the TKS property has been removed from the computation as a non-matrimonial property. The husband may, if he wish use the lump sum to reduce his mortgage liability. I am satisfied that he has the means to pay for the mortgage, reduced or otherwise. The wife for her part will be able to return to live in the former matrimonial home, with M. She will also retain an asset brought into the marriage and maintained solely by her throughout. How much maintenance should the husband now pay for M? AUTONUMOUT Although maintenance for M has not been agreed I was not addressed on this during the hearing. The husband says in his opening that he is prepared to pay HK\$8,000 per month. At present he is paying HK\$12,000, although HK\$4,000 of that appears to relate to a contribution towards his housing. In his closing the husband reiterates that he is prepared to pay HK\$8,000 per month. The wife in her closing proposes that The husband is to keep paying for M s reasonable expenses and his contribution towards the Zurich fund for M AUTONUMOUT Therefore I will order that the husband do pay periodical payments for M in the sum of HK\$8,000 per month the first payment to be made on the 1 August 2008 (by which time the other orders should have been put into effect). The parties should contribute equally to the Zurich fund for M, also as from the 1 August 2008. Costs AUTONUMOUT I will reserve costs for argument. Section 18 declaration to issue. Passport AUTONUMOUT The wife issued a summons asking the husband to return M s passport forthwith. This followed difficulties over holiday access, which resulted in the husband retaining M s passport. At present the court holds M s passport. It will now be returned to the wife. Although the parties have joint custody of M and notwithstanding the husband s active involvement in M s life, it seems to me that the parent with care and control should more properly hold the passport. This is the wife. I very much hope that there will be no further need for the court to become involved in issues such as this going forward. I will make no order as to costs in relation to this particular application. (Sharon D. MELLOY) District Judge Mr Robin Egerton instructed by Messrs Boase Cohen & Collins for the Petitioner Ms Jennifer Tsui instructed by Messrs Chaine, Chow & Barbara Hung for the Respondent PAGE - PAGE - PAGE %0J& &`#\$ &`#\$ &`#\$ ~!P] `Ar< j% Td ,f@- sy \$ he~"Td c(#\$ 0kJ\$ \$ @P\$ \$ 1 # ' :L- E{k' XW(\$ s ` ()H/0 -3*\$ 43*\$ c7*+ :p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p eB9|q M|; \$ jo>tm wzO?p= H#@\$ 3i@\$ wd%A nSDH lEFE 5)GTd kxL\$ /eNH S\$O\$ vuWOTd J R0 c;R\$ Y CR D)U"lv G%9UT nm{V RW!W C:~W x% X\$ (OX: x8Y\$ L}YH (Yq[*nT]fM|; #b2^ \$ Q^f Y6xc\$ e>tD ?Dep= \ft~ ZJg\$ hx;r N)/h EUhp}6c vCip= T{sk lmZ"D |ml+ TCn\ y|p0 o8'q "hsTd gsTu\$ tV0vx 4xv\$ Epxfa`+ xDs\ *y\$ Yay~_ __z4w | >\$> C? } R\$ ~\$ r%<~ f!\$- o8'q nm{V wd%A jo}> r%<~ tV0v C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$

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