

HC MC 8/2016
[2018] HKCFI 1543

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

**MATRIMONIAL CAUSES NO. 8 OF 2016
(TRANSFERRED FROM FCMC NO. 3822 of 2015)**

BETWEEN

WYSL Petitioner

and

FHCBA Respondent

and

FHTEJ (in his personal capacity) 1st Intervener

and

FHTEJ (in his capacity as the administrator of
the estate of the Respondent's father, FJA) 2nd Intervener

and

LKPR 3rd Intervener

Before: Hon Anthony Chan J in Chambers (Not Open to Public)

Dates of Hearing: 30 – 31 May, 1 June, 4 June and 7 June 2018

Date of Judgment: 19 July 2018

J U D G M E N T

1. This is the trial of ancillary relief and an application (Application) by the Petitioner (Wife) against the Respondent (Husband) and the Interveners, namely, his mother (Mother)¹, elder brother (Brother)² and the estate (Estate) of his father (Father)³ pursuant to s.17 of the Matrimonial Proceedings and Property Ordinance, Cap 192 (Ordinance) to set aside or add-back certain transfers of assets.

2. The facts of this case are unusual (but perhaps not unique in Hong Kong) in that the Husband, who is aged 49, has little earning capacity to speak of. He had been maintained by his wealthy Father throughout his marital life.

Background

3. The following background facts are largely uncontroversial. The controversial evidence will be dealt with in the analysis of the issues.

4. The Husband and Wife were born, respectively, in August 1968 and August 1971 (she is aged 46). They began their relationship in 2002 and were married in January 2005⁴. They separated in December

¹ The 3rd Intervener.

² The 1st Intervener.

³ The 2nd Intervener.

⁴ There is no suggestion that they cohabitated prior to marriage.

2014. The Wife petitioned for divorce on 31 March 2015 and the decree nisi was pronounced on 26 November 2015.

5. This was a childless marriage of about 10 years. However, the couple wanted to have children, and for that purpose the Wife had undergone extensive medical procedures including IUI, IVF and surgery⁵ over the course of 6 years involving 8 failed pregnancies.

Husband and his income

6. The Husband did not perform well in school. He completed high school education in USA, followed by a 2-year certificate course in Hotel and Restaurant Management in Canada.

7. It appears that the Husband had little ambition. His first job was that of a kitchen assistant earning HK\$3,000 per month, which lasted 3 months because he accidentally cut his hand. In about 1992 or 1993, the Husband was employed as a videotape operator, performing a mechanical task, until he was laid off in 2000. At the time, he was a senior operator earning HK\$32,000 per month.

8. After the redundancy and throughout the marriage, the Husband never resumed any gainful employment. He was involved in opening a bar in 1999 with his sister (Sister), and helped out in other catering businesses of the Sister in minor roles. Such pursuits did not result in much financial return for the Husband.

⁵ The surgery was to remove a uterine fibroid which had affected the implantation of embryos.

A 9. The Husband has a strong passion for fixed gear bicycles. A
B In about 2008 and 2010, he ran a small business selling such bicycles. B
C They were not profitable and did not last long. Recently, he has started C
D another small bicycle business as well as one trading in crystal ware. D
E Both of them are running at a loss. E

F 10. Throughout the marriage, the Husband was relying on the F
G monthly living subsidy from the Mother, initially in the sum of HK\$30,000 G
H per month and increased to HK\$50,000 per month in 2013. H

I 11. During the 3 years before the Father passed away (on 2 March I
J 2015), the Husband received lai-see money from his parents on his J
K birthday: HK\$440,000 in 2012 for his 44th birthday; HK\$450,000 in 2013; K
L and HK\$460,000 in 2014⁶. L

M 12. The monthly subsidy ceased after the Husband had received a M
N distribution of HK\$6.8 million from the Estate in January 2016. N

Matrimonial home and household expenses

O 13. The former matrimonial home occupied by the Husband and O
P Wife, situated at Kotewall Road (Home), was purchased with the Father's P
Q money and registered in the name of K C Ltd. It had a net area of 1,223 Q
R sq ft (1,532 sq ft gross), a balcony and quarters for a domestic helper. R
S The building was renovated a few years ago and had a swimming pool. S

T ⁶ Averaging these gifts means that the Husband received an additional sum of HK\$37,500 per month T
U during the last 3 years of marriage. U
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14. The shares of K C Ltd have been held by the Husband, Brother and Sister in equal shares⁷ since 2004. The Husband's shares in K C Ltd are one of the disputed assets (Disputed Assets) under the Application.

15. It is uncontroversial that during the subsistence of the marriage the Husband was paying the household expenses in addition to his own personal expenses.

Wife and her income

16. The Wife has a bachelor degree in Business and Administration obtained in 1999. She was in gainful employment throughout the subsistence of the marriage.

17. From February 2003 until April 2018, the Wife was working for a medical service provider in Hong Kong. At the time she was made redundant in April 2018, she was the Head of Marketing as well as the Head of Operation of certain clinics. In those roles, she was leading a team of 11 or 12 staff.

18. From this employment, she had an average income of HK\$60,458 per month, including double pay, bonus and commission, as of May 2015. Her fixed monthly salary was HK\$37,500. Her last salary was HK\$42,500 per month, excluding double pay. The drop in her aggregate income was a reflection of certain change applied by her employer in respect of the payment of bonus and commission.

⁷ Save that the Brother holds 1 extra share, and this applies to all the equal shareholdings by the siblings.

19. The Wife has an MBA degree which she studied for and was awarded during the marriage.

20. It is fair to say that the Wife was an independent career lady. She was considerably more ambitious than the Husband, and was free to pursue her chosen path with the benefit of a comfortable home, looked after by a domestic helper, provided by the Husband with the Father's resources.

21. The Wife was free to spend her income as she saw fit. In addition, she was given 2 supplementary credit cards by the Husband. Probably encouraged by the fact that everything was provided for her, she did not have the habit of saving.

22. After her redundancy, the Wife has actively tried to find another job. However, so far she has met with little success, save for a job as marketing manager at a training provider which pays significantly less than what she was earning (HK\$26,000 per month plus annual bonus of 1 month's salary). There is no evidence that she has taken up that position.

Father

23. He came from a rich family, but he was a successful businessman in his own right. He was active in making various investments, including shares and properties, and had a stock brokerage business (Brokerage).

24. On matters of investment, the Father trusted only himself and was fully in control. He did not rely on any of his children on such matters, despite the fact that the Brother was acting as his personal assistance from 1995 or 1996. He did not trust the investment acumen or ability of any of his children.

25. The Father suffered from a life threatening lung decease in about the end of 2003. With the help of the best medical care, he managed to recover from it. From about 2005, his condition stabilised and began to improve. However, he had to carry an oxygen tank with him all the time to assist his breathing.

26. In about February 2015, the Father was unwell and admitted to hospital. To the surprise of his family, his condition deteriorated rapidly and he passed away on 2 March 2015.

Trust and the Estate

27. The Father set up a trust (Trust) in June 2004 when he was quite ill. It was a private discretionary trust to provide for his wife and children. Each of them is entitled to $\frac{1}{4}$ of any distribution from the Trust. The Husband's entitlement under the Trust is one of the disputes in this case.

28. The Father died intestate. It is uncontroversial that the Mother is entitled to $\frac{1}{2}$ of the Estate, and the children each entitled to $\frac{1}{6}$. The Estate is administered by the Brother.

Issues

29. One may say that this trial is concerned with the ultimate question of fair division of assets between the Husband and Wife.

30. However, in order to determine that question, findings will have to be made about the assets of the Husband (the Wife's net assets, in the sum of roughly HK\$230,000 are not in dispute). Hence, the Application (the issues under which are set out in para 53 below). The Disputed Properties are said by the Husband and the Interveners to be the assets of the Father held under the Husband's name. The Wife says that they were gifts made to the Husband by the former.

31. In addition to the dispute over the Husband's entitlement under the Trust, the parties disagree on how the Husband's 1/3 interest in his parents' matrimonial home (Parents' Home) is to be valued.

32. The undisputed assets of the Husband have a net value of about HK\$48 million. The Disputed Properties are worth HK\$38,460,621.50. The value of a ¼ interest in the Trust is not in dispute: HK\$55,711,851. In respect of the Parents' Home, the rival contentions are between HK\$30 million and HK\$14,786,666.67⁸. In total, the Wife says that the Husband has assets of nearly HK\$158 million.

33. Finally, if the court should decide to accede to the Application in whole or in part, there is a question of double counting to the prejudice of the Husband, because part of the Disputed Properties had gone back to the Estate and from which the Husband had received a distribution in January 2016 which forms part of his assets. However, quite sensibly,

⁸ The lower valuation has been included in the HK\$48 million.

A the parties have agreed that a sum of HK\$2,974,309.06 should be taken
B into account to address the double counting.

C
D *Law*

E 34. The proper approach to making financial provision orders on
F and after dissolution of marriage was stated by the Court of Final Appeal
(CFA) in the case of *LKW v DD* (2010) 13 HKCFAR 537.

G 35. The question of law framed for CFA (see §6 of the judgment)
H involved a contest between the old principle of “reasonable requirements”
I and the new “equal sharing” principle, which had been adopted in a line of
J English cases starting from *White v White* [2001] 1 AC 596. The relevant
K sections of the statute in Hong Kong, in particular s.7 of the Ordinance,
L were materially identical to the equivalent provisions in England. In
following the English line, the CFA laid down ‘4 Principles’ and ‘5 Steps’
as “guidelines” (§52) which have to be borne in mind throughout.

M 36. The 4 Principles comprise of :

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- O (1) Objective of fairness – “the implicit objective of a s.7 exercise
P is to arrive at a distribution of assets which is fair as between
the parties” (§56);
- Q (2) Rejection of discrimination (§57);
- R (3) Yardstick of equal division, “which should be departed from only for good, ar
S (4) Rejection of minute retrospective investigations (§§62-69).

T 37. These 4 Principles are then applied to the 5 Steps taken in the
U s.7 exercise (§70), namely :

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- (1) Identification of the assets (§§71-73);
- (2) Assessing the parties’ financial needs (§§74-79) (which may be the end of the
- (3) Deciding to apply the sharing principle (§§80-82);
- (4) Considering whether there are good reasons for departing from equal division
- (5) Deciding the outcome (§§131-132).

38. The CFA held that “financial provision applications are highly fact-specific and judges dealing with them must ultimately be guided by s.7 and the implicit aim of arriving at a fair financial outcome as between the parties” (§52).

39. The s.7 exercise involves a consideration of “all the circumstances”, including those specifically listed in the section.

40. In this case, one of the main arguments between the Wife and the Husband is whether the court should depart from equal division in the context of a 10-year childless marriage with substantially all the available assets being non-matrimonial, in the sense that they are not the financial product of or generated by the parties’ endeavours during the marriage (see *Hart v Hart* [2018] Fam 93, at [2] (Moynan LJ)).

41. For the purpose of Step 4, the CFA had identified a number of material factors which may justify the departure from equal division – source of assets (§§87-98); conduct (§§99-105)⁹; financial needs (§§106-107)¹⁰; duration of marriage (§§108-109); contributions to the welfare of the family (§§110-118); and compensation (§§119-130).

⁹ It is common ground that this is not a conduct case.
¹⁰ It is not in dispute that non-matrimonial assets are available for satisfying a needs based award.

Amongst these factors, source of assets and duration of marriage are the important considerations in this case.

42. On behalf of the Husband, Mr Pang SC, who appeared with Mr Yim, laid emphasis on the following dicta from Lord Nicholls in *Miller v Miller* [2006] 2 AC 618 :

“The requirements of fairness

4 Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.

...

9 The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of “taking away” from one party and “giving” to the other property which “belongs” to the former. The claimant is not a supplicant. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case.

...

11 This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties’ housing and financial needs, taking into account a wide range of matters such as the

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parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

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Matrimonial property and non-matrimonial property

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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 summarized in the *White* case [2001] 1 AC 596, 610 ...

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.

27 Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.

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29 There can be no invariable rule on this. Much will depend upon the amounts involved. Generally a convenient course might be for the court to consider first the requirements of compensation and then to give effect to the sharing entitlement. If this course is followed provision for the parties' financial needs will be subsumed into the sharing entitlement. But there will be cases where this approach would not achieve a fair outcome overall. In some cases provision for the financial needs may be more fairly assessed first along with compensation and the sharing entitlement applied only to the residue of the assets. Needless to say, it all depends upon the circumstances."

43. In the same case, Baroness Hale identified 3 rationale for the redistribution of resources from one party to another upon the breakdown of marriage :

"The rationale for redistribution

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138 The most common rationale is that the relationship has generated needs which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage (note that the House did not adopt a restrictive view of needs in the *White* case [2001] 1 AC 596, 608g-609a). This is a perfectly sound rationale where the needs are the consequence of the parties' relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.

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140 A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial

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B surplus over what is required to meet both parties' needs, then a premium above needs can reflect that relationship-generated disadvantage. B
C 141 A third rationale is the sharing of the fruits of the matrimonial partnership. One reason given by the Law Commission for not adopting any one single model was that the flexibility of section 25 allowed practice to develop in response to changing perceptions of what might be fair. There is now a widespread perception that marriage is a partnership of equals ... C
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F 142 Of course, an equal partnership does not necessarily dictate an equal sharing of the assets ... F
G ... G
H 144 Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living." H
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O 44. In para 153, under the heading "*The sources of assets and the length of marriage*", Baroness Hale stated the following about non-matrimonial assets in cases where there is no relationship-generated needs or other disadvantages : O
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R "This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be R
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taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home.”

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45. Another important divide between the Husband and the Wife is the extent to which he should provide for the latter’s needs. In particular, whether he should provide for her needs for the rest of her life. In this regard, Mr Pang relies also on the following dicta from *G v G* [2012] 2 FLR 48, para 136 (per Charles J) :

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“What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):

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- (i) is not met by an approach that seeks to achieve a dependence for life (or until remarriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but:
 - (ii) is met by an approach that recognizes that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties. From that it follows that:
 - (iii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned). But, and they are important but:

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- (a) the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,
- (b) the length of the marriage is relevant to determining the period for which that level of lifestyle is to be enjoyed by the payee (so long as this is affordable by the payor), and so also, if there is to be a return to a lesser standard of living for the payee, the period over which that transition should take place,
- (c) if the marriage is short, this supports the conclusion that the award should be directed to providing a transition over an appropriate period for the payee spouse to either a lower long term standard of living than that enjoyed during the marriage, or to one that is not contributed to by the other spouse,
- (d) the marriage, and the choices made by the parties during it, may have generated needs or disadvantages in attaining and funding self-sufficient independence ...
- (e) the most common source of a continuing relationship-generated need or disadvantage is the birth of children and their care;
- ...”

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46. On accommodation need, this court was referred to the recent authority of *AVT v VNT* [2015] HKFLR 385. It was a childless marriage which lasted 3 years and 7 months. The husband appealed against the judge’s decision to award a lump sum of HK\$7.2 million to the wife to purchase a flat for her own accommodation.

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47. It was held by Cheung JA, with whom Lam VP and Poon J (as he then was) agreed, in §5.26 :

“In this case the wife is a single young woman. Whilst accepting that the Court’s priority is to ensure that the wife should have a roof over her head on divorce, in my view, in the context of this case, the Court will err on principle if it regards a lifelong provision of accommodation for the wife (in the form of a purchased flat) is the only means to meet her needs. Likewise, the amount to be awarded should be kept in proper perspective on account of the length of the marriage, the age of the wife and the need for her to establish her own life again after divorce. In this case, my view is that a sum of HK\$3.25 million is more than adequate to satisfy the accommodation needs of the wife ...”

48. In respect of the Trust, this court was referred to *Kan Lai Kwan v Poon Lok To Otto* (2014) 17 HKCFAR 414 where the CFA approved the adoption of the “*Charman* test” for the purpose of deciding whether a discretionary trust forms part of a party’s resources (see §§27-29).

49. The test was formulated by Wilson LJ in *Charman v Charman* [2006] 1 WLR 1053 as follows :

“Superficially the question is easily framed as being whether the trust is a financial ‘resource’ of the husband for the purpose of section 25(2)(a) of the Matrimonial Causes Act 1973, as substituted by the Matrimonial and Family Proceedings Act 1984, section 3. But what does the word ‘resource’ mean in this context? In my view, when properly focused, that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so.”

S.17 of the Ordinance

50. The relevant provisions are as follows :

“(1) Where proceedings for relief under any of the relevant provisions of this Ordinance (hereinafter in this section

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referred to as “financial provision”) are brought by a person (hereinafter in this section referred to as “the applicant”) against any other person (hereinafter in this section referred to as “the other party”), the court may, on an application by the applicant-

(a) if it is satisfied that the other party is, with the intention of defeating the claim for financial provision, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(b) if it is satisfied that the other party has, with the intention aforesaid, made a disposition to which this paragraph applies and that if the disposition were set aside financial provision or different financial provision would be granted to the applicant, make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property);

...

and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial provision in question.

(2) Paragraphs (b) and (c) of subsection (1) apply respectively to any disposition made by the other party (whether before or after the commencement of the proceedings for financial provision), not being a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of such intention as aforesaid on the part of the other party.

(3) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or to a disposition or other dealing with property which is about to take place and the court is satisfied-

(a) in the case falling within subsection (1)(a) or (b), that the disposition or other dealing would (apart from this section) have the consequence ...

of defeating the applicant's claim for financial provision, it shall be presumed, unless the contrary is shown, that the other party disposed of the property with the intention aforesaid or, as the case may be, is, with that intention, about to dispose of or deal with the property.

(4) In this section-

"disposition" ... does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise;

"the relevant provisions of this Ordinance" ... means any of the provisions of sections 3, 4, 5, 6, 6A, 8, 11 (except subsection (6)) and 15;

and any reference to defeating an applicant's claim for financial provision is a reference to preventing financial provision from being granted to the applicant, or to the applicant for the benefit of a child of the family, or reducing the amount of any financial provision which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of the applicant under the relevant provisions of this Ordinance."

51. By reference to s.17, 3 issues have been identified by Mr Chan SC, who appeared with Ms Cheng for the Interveners, as follows :

- (1) whether the Husband made any disposition of property within the meaning of that provision (Disposition Issue);
- (2) if so, whether any of the dispositions was made with the Husband's intention of defeating the Wife's claim for financial provision (Intention Issue);
- (3) whether, if the disposition(s) were set aside, different financial provision would be granted to the Wife (Provision Issue).

52. There is no dispute by the Wife on the following propositions advanced by Mr Chan :

(1) In respect of the Disposition Issue, “property” under s.17 is restricted to property beneficially owned by the Husband: see *Rayden and Jackson on Relationship Breakdown, Finances and Children*, Vol 1, at [22.34] in the context of the English equivalent of those provisions;

(2) The assets of a company are not assets of its shareholders, whether in the context of s.17 or under family law generally: see *Rayden and Jackson*, supra, at [22.51] and [22.52];

(3) S.17 makes it clear that the disposition must have been made by the “other party” to the proceedings, ie, the other party in the financial provision proceedings and not a third party, unless it can be shown that the third party is the other party’s servant, agent, nominee or trustee: see *Rayden and Jackson*, at [22.119] and [22.131];

(4) As regards the Intention Issue, a reviewable disposition under s.17 would be subject to the rebuttable presumption as to the Husband’s intention pursuant to s.17(3)(a), and the “intention to defeat” needs not necessarily be his sole or dominant intention. However, the court will be concerned with the Husband’s subjective intention: see *Kemmis v Kemmis* [1988] 1 WLR 1307 at 1331, 1315H, 1326E-F and 1330H;

(5) In respect of the Provision Issue, if the court determines that the Wife’s ancilla

Witnesses

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53. Both the Wife and the Husband gave evidence. On the part of the Interveners, the Brother, Mother as well as an estate agent, Mr Lam, gave evidence.

54. There is no challenge to the credibility of Mr Lam, who had assisted the Father in his property investments from about 2006 until his passed away. In respect of the rest of the witnesses, they all made a reasonable impression as witnesses. This court will have to rely primarily on inherent probabilities and sound common sense to decide matters of factual dispute. I bear in mind the dicta in *Hui Cheung Fai v Daiwa Development Ltd*, HCA 1734/2009, 8 April 2014, §§76-83 (DHCJ Fung SC).

55. My impression of the Wife is that she is a strong minded and independent career lady. She is intelligent and articulated, never shied away from any challenge in cross-examination. These characteristics are consistent with the fact that she was the leader of a sizable team of colleagues.

56. The Wife's evidence suggests that the breakdown of her marriage was a bitter experience which very much remains with her. Her evidence was liable to be tainted by such feelings.

57. Both Mr Pang and Mr Chan had urged the court to exercise "great care" in accepting any allegation of an intention to gift on the part of a now deceased person, especially where the sole person making the allegation stands to benefit from it: see *Kwan So Ling v Woo Kee Yiu Harry & Ors*, HCA 1311/2011, 30 April 2015 at §34 (per G Lam J).

A 58. The Husband was not a person with any interest in finance or
B figures. He does not appear to be a very sophisticated person.
C My impression of him is that he has a relaxed attitude and is not a focused
D person.

E 59. The Husband relied heavily on the Brother to provide the
F details of various financial matters. I mention this aspect in particular
G due to the criticisms by the Wife of the discovery made by the Husband in
H these proceedings. In particular, his case concerning a family
I arrangement by which certain assets belonging to the Father beneficially
J were distributed amongst the siblings (Family Arrangement).

K 60. In respect of the Brother and the Mother, the court must be
L alive to the fact that, coming from a small and tight family, these witnesses
M are likely to feel protective over the Husband, an instinct which may affect
N the reliability of their evidence. Also, it is unlikely that they would be
O happy to see any part of the family wealth, which had been carefully
P nurtured by the Father, going outside the family.

N *Identification of assets*

O 61. The undisputed assets have already been mentioned.

P *Disputed Properties*

Q 62. The Disputed Properties had been set out in the Wife's
R Re-Amended Summons filed on 3 November 2016 as follows :
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<u>Transferor</u>	<u>Asset</u>	<u>Date</u>	<u>Transferee</u>
Husband	33.33% of the sale proceeds of W H Ltd in the sum of HK\$15,967,225.50	Jan 2014	Brother and/or Father
Husband	Sale proceeds of Flat A in the sum of HK\$5,239,304.82	2.9.2014	Brother
Husband	Sale proceeds of Flat A in the sum of HK\$6,004,186.09	2.9.2014	Brother
Husband	Sale proceeds of Flat A in the sum of HK\$6,004,186.09	2.9.2014	Brother
Husband	HK\$912,819.22 from Hang Seng account A (Account A)	7.5.2015	Mother
K C Ltd	Sale proceeds of Flat B in the sum of HK\$3,000,000	20.4.2015	Brother
K C Ltd	Sale proceeds of Flat B in the sum of HK\$10,000,000	21.4.15	Mother

Beneficial ownership of the Disputed Properties

63. The first issue to be decided is the beneficial ownership of the Disputed Properties. It is the case of the Husband and the Interveners that they were at all material times held in the name of the Husband for the Father, whereas the Wife maintains that they were gifted to the Husband.

64. The issue turns upon the intention of the Father at the time when the properties were acquired by the Husband. That will have to be inferred from the available evidence. It is common ground that this is the preferred approach instead of relying on legal presumptions, such as the

A presumption of gift. The evaluation of the evidence is assisted with the availability of contemporaneous documents which demonstrate how the properties were dealt with over a long period of time.

65. A few words have already been said about the Father. He was very much the dominant patriarch of the family. The evidence shows that he was a careful man with his money, and he did not treat his family differently in this regard. The Husband was not given an extravagant allowance or any gift of such nature. The only exceptions were 3 sizable cash gifts on his birthdays. Although there were properties acquired by the Father in his name, there is no evidence that he ever benefited from them financially or was in control of them. He always dealt with them as instructed by his father.

66. The evidence suggests that the Father did not relinquish control of any asset to his children. However, he did not like to deal with paperworks, and he relied upon the Brother for the same.

67. There is a long history of the Father having his assets held in the names of his children, which preceded his illness in 2003 and the marriage in question :

- (1) In March 1994, when the Father (born in 1941) was in his early 50s, he asked his investment partner, Ms Wong, to transfer her 3,500 shares in K C Ltd to the Brother (then 27 years old) to hold them on his behalf. The Interveners' case that these shares were held by the Brother for the benefit of the Father is not disputed;

(2) In 1998, the Father opened a Hang Seng Bank account in the name of the Brother and one in the Husband's name (Account A). They were then aged 31 and 30. I shall have to come back to Account A below as one of the Disputed Properties;

(3) In mid-2000, the Father set up 3 HSBC Private Bank accounts under each of his children's names to hold funds for him and to build up their credit profiles for obtaining loan financing for him in the future;

(4) In 2001, the Father instructed the Brother and Husband to each hold 38% of h to facilitate the Father's securities trading.

(5) In 2002, the Parents' Home was purchased by the Father in the names of his c

Family Arrangement

68. Before the Disputed Properties are considered, I shall deal with the controversy over the Family Arrangement, which featured prominently in the Wife's final submissions.

69. It is the case of the Husband and the Interveners that after the unexpected demise of the Father in March 2015, the family had discussions on how to deal with the Estate without a will, including the assets in the children's names. It was eventually agreed that, to avoid the trouble of transferring the assets from the children back to the Estate for distribution, and with the hope that it would facilitate a settlement between the Wife and the Husband (by increasing the funds available to him), the Mother would forego her entitlement in respect of those assets in her children's names, and they would be treated as gifts to the children.

A 70. In addition, the Mother would keep the money, totalling just
B under HK\$11 million, which were transferred to her after the Father's
C death. In respect of the Parents' Home, it was agreed that the Mother
D would continue to live there for as long she wanted. The children would
E not dispose of their interest in the property without her consent and, should
F she wish to sell the property and move to another place, the children would
make the necessary arrangements for her.

G 71. On behalf of the Wife, Mr Coleman SC, appeared with
H Mr Chan, argued that, based on an analysis of some of the information
I provided by the Husband in these proceedings and the Schedule of Assets
J annexed to the Letters of Administration of the Estate, it could be seen that
K the Family Arrangement was a litigation tactic designed to, inter alia,
cover-up the inconsistencies in the Husband's case and with these
proceedings in mind.

L 72. I do not believe that such serious allegation has been made out.
M Firstly, with respect, the criticisms were based upon a forensic analysis of
N various materials. Such materials can give rise to different interpretation
O or understanding. On behalf of the Husband, Mr Pang strenuously argued
that there was no inconsistency in the Husband's case.

P 73. In my view, the evidence must be considered in the context of
Q a grieving family which was required to deal with a sizable estate without
R a will. Further, recollection is fallible, and the Husband was relying on
S the Brother practically on all the financial matters.

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A 74. It is inherently likely that the family would have had
B discussions on how to deal with the Estate. The evidence that the Mother
C was the decisive voice in the discussions is perfectly credible. She said
D that she was willing to give up her interest in the properties in the names of
E the children because she did not want to be troubled with the Estate. I
F have no reason to doubt such evidence given that she was in mourning and
she was well provided for financially.

G 75. In respect of Mr Coleman's argument that, if true, the Family
H Arrangement was a very imbalanced distribution because, eg, the property
I in the Husband's name (Flat A) had been sold and the sale proceeds
J dissipated, whereas the Brother and the Sister each had a property in
K his/her name, I do not believe that one should assume that siblings in a
close family would necessarily fight over their father's estate.

L 76. The evidence suggests that the Husband is a simple person
M with relatively modest requirements. In light of the Mother's approval, I
am not persuaded the imbalance would have spoiled a family arrangement.

N 77. Finally, Mr Coleman also argued that if the Parents' Home
O was held on trust for the Father, contrary to his intention, the arrangement
P would not avoid any estate duty. Similar argument was made in respect
Q of other transactions. I believe that the court should evaluate the
R evidence with appropriate realism. There is no good reason to believe
S that in 2002 the Father would have wanted to divest himself of the interest
T in his only matrimonial property. More likely than not, his intention was
U that his children would hold the property on trust for him, and when he
V passed away they could claim the property as theirs to "avoid" estate duty.

A This is consonant with the evidence of the Brother about what his father
B said to him in hospital, not long before he passed away. In the context of
C telling him how to deal with the family assets, the Father said that: “The
D properties are already in your names and you guys will be able to handle
E them.”

F *W H Ltd*

G 78. The shares in W H Ltd were held by the Husband, the Brother
H and the Sister in equal proportion. It was a corporate vehicle used by the
I Father to acquire a unit and a carpark at a development located at
J Wong Chuk Hang (WCH Development) in October 2011 and November
K 2012. This was confirmed by Mr Lam’s unchallenged evidence. The
L use of a corporate vehicle was to avoid the payment of special stamp duty
M in case the properties were sold within 2 years. There can be no doubt
N that the acquisitions and mortgage repayments were all funded by the
O Father.

M 79. Apparently, the Father thought that the WCH Development
N was a sound investment choice. In November 2012, he bought another
O unit at that development. Another shelf company, B Ltd, was used for
P that purchase, and the shares of B Ltd were also jointly held by his
Q children.

Q 80. Mr Chan made the point that the acquisition of properties by
R W H Ltd with a mortgage militates against the suggestion of a gift. I am
S inclined to agree.

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81. The W H Ltd properties were indeed sold within 2 years in December 2013 when a buyer was introduced to the Father by an estate agent. The shares in W H Ltd were sold to that buyer for HK\$53,673,900. The consideration consisted of two components – Debt Consideration of about HK\$47.9 million and Share Consideration of about HK\$5.8 million.

82. The entirety of the Debt Consideration, with the exception of HK\$24,481.29, was paid into various accounts of the Father. As to the Share Consideration, according to the Brother, HK\$1,924,651.78 was paid into the Hang Seng account in his name; HK\$1,924,074.5 was paid into Account A; and of the remaining HK\$1,924,074.5, the Sister had the Father's permission to keep HK\$500,000 and paid the balance of HK\$1,424,074.5 to him.

83. Save for the fact that 1/3 of the shares in W H Ltd was in the name of the Husband, there is hardly any evidence, direct or inferential, to support the Wife's contention that such shares were a gift from the Father. W H Ltd was just a vehicle used for the Father's property investment. His health was stable at the time. He was in full control of that investment. The fact that the sale proceeds of W H Ltd were mostly paid directly to Father speaks volumes as to where the beneficial ownership of the shares was vested.

84. It is common ground that the marital problems arose in 2014. The sale of W H Ltd took place in December 2013, which was unlikely to have been motivated by any desire to defeat the Wife's claim in these proceedings. Mr Lam had confirmed that the sale of W H Ltd coincided with the rise in market for the WCH Development.

85. In respect of the HK\$1,924,074.5 paid into the Account A, it is not an issue because that sum of money had been included in the Husband's assets by reason of the Family Arrangement.

86. As regards Mr Coleman's argument based on the representations in the share transaction documents that the children were the beneficial owners of the shares, I do not believe that they necessarily cast doubt on the case of the Husband and the Interveners. The fact of the matter is that it was an arrangement between the Father and his children. In such context, it is understandable that legal niceties were overlooked or ignored. Whilst such behaviour is not to be endorsed, the court does not shut its eyes to the realities in life.

87. In the premises, I hold that the sale proceeds of W H Ltd did not belong to the Husband beneficially.

K C Ltd and the acquisition of various properties

88. K C Ltd was used by the Father as a property holding vehicle over the years. It was incorporated in 1993 with 2 shareholders, the Father and his business partner, Ms Wong. They subsequently fell out and in 1994 Ms Wong's 3,500 shares (out of 10,000 issued shares) in K C Ltd were transferred to the Brother. In 1995, the Father, the Brother and the Husband were the directors of the company.

89. Since 2004, the shares in K C Ltd were held by the siblings in equal shares. This exercise involved the transfer of some of the Brother's 3,500 shares to one of his siblings. The shareholders' loans provided by

A the Father to the company were put under the names of the siblings based
B on their respective shareholdings.

C
D 90. From the available evidence¹¹, K C Ltd acquired in August
E 1995 a property in MacDonnell Road, which was used by the Brother and
F his wife as their matrimonial home. It was sold in April 1997 at a profit.
G The Brother and his wife then moved to another property held by K C Ltd
H at Pokfulam.

I 91. In June 1998, K C Ltd purchased Flat B. As indicated in the
J table above, it was sold in April 2015 (the sale and purchased agreement
K was signed in February 2015) with a small profit.

L 92. In about June 2001, K C Ltd acquired another property at
M Tai Hang Road.

N 93. Save for the purchase of the Home in 2004, there was no
O further acquisition by K C Ltd from 2004 until 2007. This period of
P non-activity coincided with the Father's illness and recovery.
Q In November 2007, K C Ltd acquired a property at Boardwood Road and
R sold the Tai Hang Road property at a profit. In the next month, the
S Boardwood Road property was also sold at a profit.

T 94. In March 2010, the Father acquired a property at Tai Hang
U Road at the price of HK\$32,510,000 in the name of the Brother. It was
V then used by the Brother as his matrimonial home. The Brother's
evidence is that the Father told him to hold the property on his behalf.

¹¹ The transactions set out below are not exhaustive of K C Ltd's property dealings.

A He also explained that there was at the time more stringent lending
B requirements for property holding companies.

C
D 95. In the same month, Flat A situated at Hollywood Road (H R
E Development) was acquired at HK\$14,680,000 by the Father in the name
F of the Husband.

G 96. Also in about March 2010, K C Ltd acquired a property at
H Babington Path.

I 97. In January 2011, another property at H R Development was
J purchased by the Father at HK\$16,590,000 in the name of the Sister.
K She was living with her parents at the time. The property was purchased
L with a tenancy which produced a particularly attractive yield. In respect
M of the purchase of both H R Development properties, the Brother said that
N the Father told him that they would be held on his behalf.

O 98. It is not in dispute that all the property acquisitions by K C
P Ltd and those in the names of the siblings were funded by the Father.

Q *Flat A*

R 99. It was purchased with a sitting tenant, and had been let out
S since. It appears that a good deal of care was taken to ensure that the
T funding for this acquisition was made in the name of the Husband,
U including the loans taken out to pay part of the purchase price.

V 100. It was the Brother who looked after all the related payments,
mortgage loans and tenancy matters. The Husband was not involved save

A for signing some documents. The contemporaneous records show that
B the Brother arranged for the payments of management fees, rates and other
C miscellaneous expenses for Flat A with the use of his Hang Seng account
D (which he said was held for the Father) although the rental payments were
E deposited into Account A. The reason was that the Husband rarely went
F to the Brother's office to sign the necessary papers. The Brother also said
G that he would not be doing all these works in relation to Flat A if it was the
H Husband's property. I find these evidence of the Brother credible and
I persuasive.

H 101. In May 2014, the tenant who was occupying Flat A vacated
I the premises. The property was sold upon Mr Lam's introduction to the
J Father of an interested buyer in June 2014 at a handsome profit.
K The evidence is that the Father did not know about the marital trouble
L between the Husband and the Wife because his wife made no mention of it
M to him. Again, the Brother was the one dealing with all the related works.
N As an indication of the beneficial ownership, there is little more reliable
O evidence than where the sale proceeds had gone to. The rather
P complicated details of the use of the proceeds had been helpfully set out
Q the tables in para 57 of the Interveners' Closing Submissions.

P 102. The evidence is that some of the proceeds went directly to the
Q Father or used to discharge the Father's liabilities and various mortgages.
R Some was held by the Brother for the Father. Only 1 of the 3 Flat A
S payments challenged in the Application (see the table at para 62 above)
T was made to the Husband, namely, a sum of HK\$6,004,186.09 paid on
U 2 September 2014 into Account A. According to the Brother, that sum
V together with other money belonging to the Father which made up a total

A of HK\$6.8 million was paid to the Mother at the Father's direction in
B November 2014.

C
D 103. Although it may be argued that the Mother and the Brother
E are in fact holding various sums from the proceeds on behalf of the
F Husband, such serious allegation cannot be accepted without sufficient
ground.

G 104. The above purchases made in the names of the siblings do
H stand out in the context of the property investments of the Father. There
I is nothing surprising for a rich man to buy a property for each his children.
J The sale of Flat A took place at a time when the marriage was breaking
K down. Although the Husband did not take any action to end the marriage,
L the prospects of a divorce was clearly on his mind.

M 105. On the other hand, it is apparent that the Father went into the
N property market with enthusiasm in March 2010. K C Ltd had been used
O to acquire Babington Path. There is no reason to doubt the Brother's
P evidence that the purchase of property in personal name would serve to
Q sidestep financing restraints.

R 106. Further, the Father's health had stabilised for a number of
S years. It is unlikely that he would have expected his life to come to an
T abrupt end. In any case, he had already put in place the Trust to secure
U the future of his family.

V 107. In the context of the Father's property investment activities,
the timing of the acquisition of Flat A, the way it was financed, the

A generation of rental income, the use of the proceeds, and the fact that the
B Husband had no say whatsoever in the transaction and no access to the
C rental income or the proceeds (even at the time when he was badly in need
D of funds (see below)) all militate against the suggestion that Flat A was a
E gift.

F 108. More likely than not, the Father's intention was to have the
G property held by the Husband on his behalf. He would want to retain full
H control over his assets, as he had done so all along. The Father might
I have in mind that, like the Parents' Home, the Husband might treat the
J property as his if he passed away. That does not mean that Flat A was
K purchased as a gift to the Husband.

L *Flat B*

M 109. This was one of the properties owned by K C Ltd. The Wife
N says that the shares transferred to the children in 2004 were gifts made to
O them at the time when the Father was quite ill. There was also an
P intention to save on estate duty with the dispositions, and such duty would
Q be payable unless the shares were given away beneficially. There is
R certainly force in the Wife's case.

S 110. Given the evidence about K C Ltd and the Father set out
T above, there can be little doubt that the shares of the company in the name
U of the Brother belonged beneficially to the Father prior to 2004. When
V the Father became ill at the end of 2003, he obtained the best medical help
available and was able to make a recovery. It is unlikely for the Father to
have given up the hope of beating the illness.

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111. However, the Father created the Trust to cater for the need of his family in the event of his demise. I have no doubt that the shares in K C Ltd were transferred to his children with the view, at least in part, to save on estate duty. On the other hand, it is difficult to believe that the Father would have given away largely all his assets when he had not given up the hope of surviving the illness. That would not be consistent with his behaviour as a dominant patriarch, and his lack of trust over his children's ability in finance.

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112. The evidence that the Father had never relinquished control over the company, and how he continued to use it as his investment vehicle, as well as the fact that the children did not derive any benefit from the company, also constitute a solid foundation from which an inference can be drawn of the Father's intention at the material time.

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113. In respect of the point that the Father did not ask his children to transfer the shares back to him despite the abolition of estate duty in about 2006, this must be viewed in the context that there was no reason for the Father not to trust his children, and that they had always acted in accordance with his instructions.

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114. On balance, I do not believe that the evidence points in favour of a gift in respect of the transfer of shares in K C Ltd in 2004. Given this finding, the challenge over the disposition of Flat B has no leg to stand on.

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115. However, for completeness, the evidence concerning the disposition of that property goes against the Wife's case also. According

A to Mr Lam, he was asked by the Father to deal with the property when the
B tenant moved out in about May 2014. Due to the condition of the
C property, it was renovated extensively under Mr Lam's supervision.
D Upon completion of the renovation in August 2014, it was put on the
E market for rent or sale. After rejecting a few rental offers, the Father
eventually decided to accept a purchase offer in about February 2015.

F 116. The transfers of HK\$3 million and HK\$10 million out of the
G sales proceeds of Flat B (challenged under the Application) from K C Ltd
H to, respectively, the Brother and the Mother were, according to the
I evidence, driven by needs after the Father's unexpected demise. The
J former was required for family expenses, such as outgoings and utilities.
K The latter was given to the Mother in accordance with her wish. I have
L no reason to doubt the Mother's evidence that after the passing of her
husband her monthly allowance had ceased, and that she needed funds also
for funeral and hospital bills.

M *Account A*

N 117. The Father had two Hang Seng accounts opened in the name
O of each of his sons (there was no such account in the Sister's name).
P The evidence is that Account A was operated by the Brother on his father's
Q instructions since it was opened in October 1998. The Husband was
R asked by his brother to sign blank withdrawal forms, and the latter's
handwritten notes can be found on the passbook. The evidence shows
that the Father was using this account freely for his own purposes.

S 118. In May 2015 after Father passed away, the Mother asked the
T Brother to close Account A and pay the money in the account
U
V

(HK\$912,819.22) to her. This transfer is challenge under the Application. There is no reason to doubt the evidence of the Mother and the Brother.

119. Although this transfer was made after the Wife's petition for divorce, it should be borne in mind that the Father had unexpectedly passed away and the family had to reorganise its finance. Most importantly, the Husband never had access to the money in this account even when he was in need.

120. I am not satisfied that this account or the money therein was at any time a gift to the Husband from the Father.

Outcome of the Application

121. In light of the above findings on beneficial ownership of the Disputed Properties, the Application must be dismissed.

The Parents' Home

122. The Wife accepts that the Parents' Home is subject to the Mother's right to continue to occupy the same as her residence during her lifetime. This property had been assessed by a Single Joint Expert to have a value of about HK\$44.36 million after taking into account the Mother's life interest. The Husband's 1/3 interest is thus worth about \$14.78 million.

123. The Wife argues that no discount should be given to the value of the property notwithstanding the Mother's life interest.

A 124. During cross-examination, it was suggested to the Husband
B that if he was to sell the Parents' Home, he would not sell it at a discounted
C price. The Husband agreed. It was then suggested to the Husband that
D if he wanted to, he could use this property as a security to borrow money.
E The Husband also agreed.

F 125. I am inclined to agree with Mr Pang that this line of
G questioning does not assist the Wife's case. The property is co-owned by
H the Husband and his siblings. They had agreed with the Mother that she
I would be allowed to reside there for the rest of her life.

J 126. The Husband will not be able to sell the Parents' Home or use
K it for borrowing money without the consent of all the owners. When the
L Brother was asked the same questions, he said that he would not use the
M property as security for borrowing money, it was the home of his mother
N and it would be her decision to sell.

O 127. In the premises, it would be wrong to value the Parents'
P Home as if it is free from encumbrance. There is nothing unfair about
Q discounting the value of the property to reflect the Mother's life interest.
R Indeed, it would be unfair not to do so.

S *Trust*

T 128. The Trust is a typical discretionary trust. It was stated in
U clause 3.3 of a Confidential Memorandum dated 12 December 2012, which
V contained the Father's wishes, that "[u]pon the death of [the Father], the
Trustee would consider holding and distributing the Trust Fund as to both

A income and capital of the Trust Fund ... for the benefit of [the Mother and
B the children] ... absolutely in equal shares”.

C
D 129. There is no dispute that the Trust Fund is worth US\$27
E million and the Husband’s ¼ interest is worth about HK\$55.7 million.
There has been no distribution from the Trust.

F
G 130. In the course of these proceedings, the Husband’s solicitors
H had written to the Trustee to make enquiries as to the Husband’s
I entitlement under the Trust and when such entitlement would become
J available for distribution. The Trustee’s position is that the Husband is
“one of the discretionary objects of the Trust” and “has no entitlement
(legal or otherwise) to any of the Trust Fund”.

K
L 131. On the basis of the evidence before the court, including the
M evidence of the Husband and the Mother of their expectation or belief that
N they are entitled each to ¼ of the Trust Fund, the Wife argues that there is
O prima facie evidence that the Husband will receive ¼ of the Trust Fund
and there is no reason why the Trustee will disagree with the wishes of the
beneficiaries or that of the Father. Further, there is no rebuttal evidence
from the Husband.

P
Q 132. I have referred to the legal test to be applied to the Trust in
R para 51 above. Mr Pang had referred the court to the following dicta of
S Charles J in *G v G*, supra, §§87 and 91, which may assist in resolving this
difficult issue :

T “So, when read in context and as a whole, the passages I have
U cited from the cases dealing with the approach to be taken to
V

interests under trusts confirm that the correct approach or rationale is focused on what the trustees would be likely to do in the future in all the relevant circumstances of the case and not on the hypothesis of what they would be likely to do if there was a disaster.

...

Further, and importantly, this approach also recognises and takes account of the significant differences between different types of trust (and companies), and thus, for example, the differences relating to control and the likelihood of receipt of assets by a spouse from:

- (i) A trust, or company structure, created by a party to the marriage into which assets earned or acquired during the marriage have been transferred and whose trustees, or directors, quite lawfully have been acting at, or can be expected to act at, the direction of, or in accordance with, the wishes of that party (a *Charman* type situation).
- (ii) A trust created by a non party under which a spouse is one of the beneficiaries and which is not a nuptial settlement (and thus this case).

Point (ii) is reflected in the common approach that the wife's trust interests were not resources that should be taken into account in applying the sharing rationale."

133. The Trust is rather different to the ones found in *Otto Poon* or *Charman*. It belongs to the second type of trust described by Charles J. It was not set up by the Husband, but by his Father before he was married to the Wife. The Father was ill at the time and he wanted to provide for the financial security of his family.

134. The Trustee is given very wide power under the terms of the Trust. For instance, it is empowered to add to the beneficiaries. The Trustee is not liable to be removed by the Husband. No Protector has been appointed for the Trust, and the power for such appointment belongs to the Trustee.

135. The Confidential Memorandum was expressly stated to be of a “non binding nature”. Pursuant to clause 1.4 of that document, the Father had confirmed his understanding that the Trustee “is not bound to follow any advice or recommendations or guidelines which [he] or any other person nominated by [him] may offer or suggest from time to time”.

136. In these circumstances, I am unable to agree with the Wife that the Husband’s interest in the Trust should be regarded as part of his assets for the present purpose.

137. The finding of this court is that the Husband’s assets are limited to those not in dispute, which have a value of about HK\$48 million¹².

Needs

138. The Husband’s needs are not really an issue given the resources available to him. The 2 main issues concerning the Wife’s needs are the duration for which she should be maintained and her accommodation needs.

139. In *LKW* (§69), the CFA cited with approval the following dicta of Thorpe LJ made in *Parra v Parra* [2003] 1 FLR 942 at §22 :

“... the outcome of ancillary relief cases depends upon the exercise of a singularly broad judgment that obviates the need for the investigation of minute detail and equally the need to make findings on minor issues in dispute. The judicial task is very different from the task of the judge in the civil justice system whose obligation is to make findings on all issues in

¹² Some of the assets had been used to pay the legal costs of the parties.

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dispute relevant to outcome. The quasi-inquisitorial role of the judge in ancillary relief litigation obliges him to investigate issues which he considers relevant to outcome even if not advanced by either party. Equally he is not bound to adopt a conclusion upon which the parties have agreed. But this independence must be matched by an obligation to eschew over-elaboration and to endeavour to paint the canvas of his judgment with a broad brush rather than with a fine sable. Judgments in this field need to be simple in structure and simply explained.”

140. In addition, Mr Pang had referred the court to another dicta of Thorpe LJ in *Purba v Purba* [2000] 1 FLR 444 at 449 :

“... In this field of litigation budgets prepared by the parties often have a high degree of unreality – usually the applicant wife’s budget is much inflated. Most unusually, in this case the wife’s budget seems to have been rather understated in many respects. It is true that one of the major items on the budget was substantial monthly expenditure for rent or mortgage. It is true that that could be said to be a superfluous item once the substantial lump sum was ordered. But the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband’s available income that should go to the support of the wife?”

141. The Wife’s relies upon the Duxbury Calculations carried out by a Single Joint Expert on the basis of monthly expenses at HK\$140,000 per month (with income of HK\$42,500, which she no longer has after having been made redundant).

142. The Duxbury Calculations were premised on 2 scenarios: with “moderate risk” and “relatively higher” risk. If this court is to rely on the Calculations, I am inclined to agree with the Wife that a moderate risk approach should be adopted when she is not an experienced investor.

A 143. The Wife's Duxbury requirements, excluding accommodation,
B had been assessed at HK\$41 million to HK\$55 million (average of HK\$48
C million).

D 144. However, I agree with Mr Pang that monthly expenses of
E HK\$140,000 are not supported by the evidence, however generously
F interpreted.

G 145. The evidence suggests that the Husband and Wife led a
H comfortable life, but they did not enjoy a high standard of living as portrait
I by the latter. For instance, the couple took a trip to Paris in June 2014.
J Contrary to the Wife's evidence, the relevant credit card statements show
K that the parties had one expensive meal during the trip, and the other
L spendings were relatively modest. Another example is that the couple
M would go to Pizza Hut, a modest place, for a meal.

N 146. There are reliable evidence on the lifestyle enjoyed during the
O marriage. Firstly, the income of the Husband, who funded the household
P expenditure, including miscellaneous outgoings like holidays. He
Q received HK\$50,000 as monthly subsidy from the Mother. In addition,
R the lai-see money averaged out at HK\$37,500 per month¹³. He had also
S received (a) HK\$900,000 as compensation for a traffic accident and (b)
T HK\$100,000 from the Sister for helping in her business. The evidence is
U not clear as to when those sums were received. Taking a reasonably
V broad brush view, the Husband had at his disposal about HK\$110,000 per
month¹⁴ at the time when the marriage came to an end. Adding the

¹³ The Husband was only given lai-see during the last 3 years of marriage.

¹⁴ Mr Pang's approach was to assume that the additional sums were received in 2011, and averaging the

Wife's monthly income of about HK\$60,000, the total income was roughly HK\$170,000 per month.

147. Secondly, the Wife had prepared a spreadsheet of the monthly household expenses in 2011 for the purpose of showing the Father that they did not spend unwisely and that the Husband needed more money. This document recorded the total monthly expenditure at HK\$58,107. The Wife said that the total figure represented 90% of the Husband's expenses and their household expenses. She was of course free to spend her own income.

148. The evidence of the spreadsheet is consistent with the Husband's case that the standard of living enjoyed by the couple was not luxurious. In this regard, it must be added that when their finance was under strain due to the expensive fertility treatments, the couple had to go to the Mother for a loan. The Wife even had to sell her engagement ring due to the shortage of funds. There can be no doubt that such a possession would not be sold unless the situation was a serious one. Such evidence speaks for both the standard of living of the couple as well as the resources available to them.

149. Thirdly, in respect of the credit card expenses, Mr Pang had helpfully provided the court with an analysis of both parties' credit card spending for the 11 months before separation in a table attached to his Closing Submissions¹⁵. On average, such expenses were about

total of HK\$1,000,000 over 4 years equalled to HK\$20,800 per month.

¹⁵ No disagreement had been expressed by Mr Coleman with the analysis.

A HK\$180,000 per month in total. The Wife paid for the expenses of the
B credit cards in her own name.

C
D 150. Taking a reasonably broad brush approach, I believe that the
E Wife's needs (generously interpreted), excluding accommodation, are in
F the region of HK\$110,000. To this sum, I would add HK\$8,000 for a
G comprehensive insurance plan sought by the Wife. This is justified by
H the fact that the miscarriages must have affected to her health, although
I there is no evidence of any specific health issue.

J
K 151. For completeness, I should make 2 points. Firstly, I do
L not believe that the miscarriages should be viewed as some kind of special
M contribution by the Wife to the marriage, as might be suggested in her
N Closing Submissions. It was a matter between the Husband and Wife.
O No doubt they both wanted to have a child. The evidence is that the
P Husband became unhappy with his continuous participation in the fertility
Q treatment and the financial drain on him.

R
S 152. Secondly, some of the Wife's "expectations" in these
T proceedings are unjustified. For example, the demand that she be
U provided with a car is unrealistic when there is no evidence that she drives.
V It would be perfectly unreasonable for her to rely on taxis service, as she
did in the course of the marriage.

153. Turing to the Wife's earning capacity, I believe that she is far
too pessimistic. I agree with Mr Pang that she is an intelligent and
capable woman who has substantial experience in a field of growing
importance in view of Hong Kong's aging population.

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154. The Wife had been out of job for about 2 months at the time of the trial. The first job offer she received did not, in my view, fairly reflect her earning capacity. With her ability, qualifications and experience in a growing field, I believe that a suitable opportunity in the job market, which is in a healthy state, will arise. The position will only be enhanced once she is unshackled from these proceedings.

155. I am inclined to agree with Mr Pang that it can be safely assumed that the Wife will be able to continue to earn at least HK\$42,500 per month. Taking into consideration the double pay, I assess her earning capacity at HK\$45,000 per month.

156. The net position on the Wife's needs, excluding accommodation, is therefore HK\$73,000 per month (HK\$118,000 – HK\$45,000).

157. Mr Pang submitted that a lump sum to capitalizing the Wife's needs (without discount) for the next 10 years should be more than sufficient to enable her to re-establish her own life after the divorce.

158. On the other hand, Mr Coleman argued that, given her age, the Wife's claims would not be adequately addressed with a 10-year calculation.

159. First of all, there is no dispute that the Wife is not entitled to a "meal ticket for life". The authorities support the proposition that the parties to a failed marriage should be encouraged to become self-sufficient. However, there is no guidance in the many authorities before the court on

A the duration for which a spouse in circumstances similar to the present
B should be provided for financially.

C
D 160. In this case, it was a 10-year marriage during which the Wife
E was free to pursue her further education and career. The bare suggestion
F that the Wife had suffered “lost opportunities” in the development of her
G career is unfair. The evidence shows that she was free to do as she
H pleased. The fact that she might have been complacent due to a
I comfortable life provided by the Husband should not be equated with lost
opportunities, which is, in any case, wisdom of hindsight. I have little
doubt that the Wife’s lifestyle during the marriage would be admired by
many.

J
K 161. The Wife is 46 years old. It has to be said that she is young
L looking and has kept herself fit. She told the Husband that she worked as
M a part-time model in her 20s, which speaks for her appearance. I cannot
therefore exclude the Wife’s remarriage prospects as submitted.

N
O 162. Bearing in mind that there is no discount for accelerated
P receipt, Mr Pang’s formula is not altogether unreasonable¹⁶. Adopting
Q the same, the Wife would be entitled to HK\$8,760,000 (HK\$73,000 x 12 x
R 10). I am minded to round that up to HK\$10 million in light of all the
S relevant circumstances.

T
U 163. As regards accommodation, the matrimonial home previously
V occupied by the couple (which is owned by K C Ltd) has an agreed value
of HK\$28 million.

¹⁶ Mr Pang assessed the Wife’s needs at HK\$85,000 before deduction of her income.

164. Mr Pang submitted that a reasonable sum which the Wife may require to either purchase or rent a property for herself upon divorce should be no more than HK\$14 million. The materials obtained by the Wife show that, with that amount of money, she will be able to purchase a flat of roughly 2/3 the size of the former matrimonial home in the Mid-level.

165. I do not believe that Mr Pang's proposal is unfair. On the other hand, the Wife's complaint that a flat of HK\$14 million would not be large enough to accommodate her belongings, including over 100 pairs of shoes, is unrealistic.

166. On the basis of the above assessment, the Wife will be provided with HK\$24 million, which is the equivalent of about half of all the assets. It is unnecessary therefore to consider Steps 3 and 4. I should add that all the circumstances identified in s.7 of the Ordinance have been considered above. HK\$24 million is not a small sum of money. The Wife will be free to deploy it as she sees fit, eg, she may decide to rent a property instead of buying one.

167. Had it been necessary to decide whether to depart from equal division, I would have held against the Wife, given the non-matrimonial nature of the assets, the duration of the marriage and the absence of any marriage generated disadvantage.

Conclusions

168. Taking a step back to review the overall picture, and with fairness being the overarching consideration, I believe that a lump sum award of HK\$24 million in favour of the Wife is appropriate.

169. The award exceeds the Open Proposal of the Husband. I make an order nisi that the costs of these proceedings be to the Wife, with a certificate for 2 counsel. Credit should be given to the total sum of HK\$3.44 million already paid by the Husband to the Wife as legal costs provision.

170. The Husband has asked for a period of 6 months to make the payment to the Wife, whereas the Wife suggests 3 months. I would allow 4 months for the payment to be made, with liberty to apply.

171. The Application is dismissed with an order nisi that the costs be to the Husband and the Interveners, with certificates for 2 counsel.

172. Last but not least, I am grateful to all counsel for their assistance.

(Anthony Chan)

Judge of the Court of First Instance
High Court

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Mr Russell Coleman SC and Mr Jeremy SK Chan, instructed by Withers,
for the Petitioner

Mr Robert Pang SC and Mr Eugene Yim, instructed by Chaine, Chow &
Barbara Hung, for the Respondent

Mr Abraham Chan SC and Ms Bonnie Y K Cheng, instructed by Sit, Fung,
Kwong & Shum, for the 1st to 3rd Intervenors

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