IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 41

Civil Appeal No 136 of 2015

Between

AUA

… *Appellant*

And

ATZ

… *Respondent*

JUDGMENT

[Family law] — [Matrimonial assets] — [Division]

[Family law] — [Child] — [Maintenance of child]

[Family law] — [Custody] — [Care and control]

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v
ATZ

[2016] SGCA 41

Court of Appeal — Civil Appeal No 136 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Quentin Loh J
21 April 2016

12 July 2016 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is the husband's appeal against certain orders made in respect of ancillary matters arising out of a divorce. The marriage broke down after 19 months and the parties entered into a deed of separation ("the Deed") thereafter. The Deed made detailed provisions for the parties' uncoupling, including matters relating to the care of their daughter, the only child of the marriage ("the child"). Following the grant of an interim judgment of divorce, the wife sought to set aside the Deed on the ground of undue influence while the husband, though seeking to uphold the validity of the Deed, sought to vary the incidence of care and control of the child, which resided with the wife in accordance with the terms of the Deed. The High Court Judge ("the Judge") held that the Deed had been entered into freely and voluntarily and that there was no basis to set it aside. While not altering the care and control

arrangement, the Judge varied the terms of the Deed on the division of matrimonial assets and the amount to be paid in maintenance for the child. The husband appeals against the Judge's decision to vary the Deed on the issues of division and maintenance but not in relation to care and control.

2 This appeal requires this court to examine what weight it should ascribe to the terms of a postnuptial agreement concluded by the parties in contemplation of a divorce when it is required to decide issues relating to (a) the division of matrimonial assets, (b) child maintenance, and (c) the award of care and control of the children of the marriage. Each issue engages different legal interests and considerations and, therefore, the role played by postnuptial agreements differs in each of them. In the course of our judgment, we will reaffirm several previous pronouncements of this court on these issues and elaborate on their requirements.

Background

3 This case involves a whirlwind courtship and a short-lived marriage. In January 2007, the wife, a lady of Ukrainian descent who was living and working in Germany, made the acquaintance of the husband, a German who was living and working in Singapore, on the internet. Matters moved quickly, as things in cyberspace often do. In March 2007, the husband proposed. In April 2007, the parties wed. In July 2007, the wife moved to Singapore. She became pregnant shortly after and delivered the child on 7 March 2008.

4 Unfortunately, the marriage did not last. From 15 November 2008 (about 19 months after they married), the parties began living separately. They soon took steps to formalise their separation, eventually entering into the Deed on 21 April 2009. The wife commenced divorce proceedings on 18 August

2011 but this was withdrawn by consent on 17 January 2012 and she filed the present divorce proceedings on 3 February 2012 on the ground of three years' separation. This was uncontested and interim judgment was granted on 24 April 2012. Under the interim judgment, the husband was ordered to pay a sum of $2,950 to the wife each month (comprising $1,500 in maintenance for the child and $1,450 for the child's share of the rental expenses). It was stated that this order on rent was made without prejudice to either party's entitlement to challenge the payments during the substantive hearing. After the divorce, both parties continue to live and work in Singapore and the child presently resides with the wife, with whom care and control is reposed.

The Deed

5 Given that the Deed lies at the crux of this dispute, we will summarise its relevant terms. The Deed was negotiated over a period of five months and the parties were represented by solicitors throughout. For a start, the Deed provided that the parties had and would continue to live separate and apart from 15 November 2008 "as if each were single and unmarried and free from the marital control (if any) of the other" (cl 1.1); that neither would "require the other to cohabit with him or her and vice versa" (cl 1.2); and that either of them might commence divorce proceedings three years thereafter with the consent of the other party (cl 2.1). The Deed also made detailed provisions for all matters that a court would have to consider in ancillary proceedings arising out of a divorce: *viz*, the division of matrimonial assets, maintenance, and custody and care and control. We will discuss each in turn.

6 On the issue of division, cl 5.1 stated that each of the parties was to retain the assets in their respective names. Clause 5.2 provided that the parties' matrimonial home (a condominium), which had been purchased by the

husband before the marriage and which mortgage the husband had serviced throughout, was to remain his sole property. In return, the husband was to arrange for the wife and her child to stay in a separate apartment (cl 5.2). The Deed recorded that the husband had already paid the deposit of $5,400 for the rental of a separate apartment and that he was to pay the wife an additional sum of $2,700 per month as rent (over and above any sums he was liable to pay in maintenance) for the duration of the tenancy, which was to expire on 14 November 2011 (cll 3.2 and 3.4). It was stated that after this, "the Husband shall no longer be obliged to pay for the rent of any accommodation for the Wife and [their child] and shall only be responsible to pay maintenance as hereafter set out" (cl 3.4). Additionally, the husband was to pay a "Divorce Settlement" in the sum of $40,000 to the wife "for her contribution towards the marriage (if any and which contribution is denied by the husband)" (cl 3.1). The reason for the proviso, presumably, was to maintain the husband's claim to sole ownership of the matrimonial home. This sum of $40,000 was to comprise the sum of $10,000 which had already been paid to the wife on 19 August 2008 (cl 3.1); the deposit of $5,400 which the husband had paid for the rental of the separate apartment, which the wife was entitled to retain after moving out (cl 3.2); and a sum of $24,600, which was payable upon the grant of a final judgment of divorce (cl 3.3).

7 On the issue of maintenance, the husband was to pay a sum of $2,300 as combined maintenance for the wife and their child until 15 November 2011 (cl 3.5). Thereafter, there was only provision made for the husband to pay maintenance for their child, the sum of which varied depending on the child's age and ranged from $1,500–$2,000 per month. The husband also undertook to provide their child with medical insurance coverage (cl 3.10).

8 On the issue of custody and care and control, it was agreed that both would have joint custody of the child with care and control being vested in the wife and the husband being granted "liberal access". It was also stated that the wife was at liberty to decide where she and the child were to live, subject only to the obligation that she inform the husband immediately of the location of their new home (cll 4.1 and 4.2).

The Judge's decision

9 The Judge's decision is reported as *ATZ v AUA* [2015] SGHC 161 ("the Judgment"). This was accompanied by a short supplemental judgment (reported as *ATZ v AUA* [2015] SGHC 182 ("the Supplemental Judgment")), which made a minor correction to the order for maintenance for the child. All paragraph references in this section will, unless otherwise stated, be references to paragraphs in the Judgment and not the Supplemental Judgment. The Judge first held (and the parties do not now challenge) that the parties had entered into the Deed freely and voluntarily (at [37]) and that it was a valid agreement within the meaning of s 112(2)(*e*) of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Charter") (at [47]). She also held that the only significant matrimonial asset in contention was the matrimonial home, which had a net value of $1.6m, and so the sum of $40,000 awarded to the wife under the Deed represented 2.5% of the net value of the matrimonial home (at [56] and [57]).

10 On the issue of division, the Judge accepted that the terms of a postnuptial agreement which was negotiated with the benefit of legal advice (as the Deed was) would normally be ascribed "significant weight" in the division of matrimonial assets (at [51], citing the decision of this court in *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284 ("*Surindar Singh*")). However, the Judge held that *Surindar Singh* had to be

"applied in a nuanced manner". She explained that the Court of Appeal in *Surindar Singh* had only meant to say that the court would be slow to vary a division agreed upon by the parties in a postnuptial agreement *if* it were first satisfied that the parties had "factored all the contributions of each party" in arriving at the division (at [52]). One situation, she postulated, in which it might be said that the contributions of all parties had not been adequately accounted for was where the parties' continuing indirect contributions to the marriage "are expected to subsist by reason of obligations under the marital agreement until a final judgment of divorce" but were not taken into account in the division. In such a case, it would "generally be inequitable for one party to not sufficiently recognise these indirect contributions" (at [53]).

11 On the facts, the Judge held that the division arrived at in the Deed failed to account for the "prospective (and continuing) indirect contributions of the [wife] as a caregiver to the child… [from the date of the Deed] until the point where Final Judgment will be entered" (at [59]). She noted that under the Deed, the wife was vested with the primary responsibility of caring for the child after the date of the Deed and that she was also entitled to relocate to start a new life with the child overseas (at [60]). In the circumstances, she concluded that the division arrived at in the Deed was not fair and equitable and ordered that it be varied to provide that the wife should be given 6% of the net value of the matrimonial home, which amounted to a sum of $100,000, instead of a sum of $40,000 agreed on in the Deed (at [60] and [70]).

12 On the issue of maintenance for the child, she held that the sum of $1,500 provided for in the Deed was adequate to cover the child's living expenses (at [78]). However, she noted that no specific provision was made for the husband to pay for the child's accommodation. Given that the husband was established in Singapore and financially better off than the wife, she

agreed with the District Judge that he ought to bear half the cost of renting the apartment in which the wife and child were staying (at [83] and [85]). Thus, she varied the terms of the Deed to provide that the husband was to pay a total sum of $3,375 to the wife each month: $1,500 in maintenance for the child and $1,875 as the share of the rent attributable to the child (see the Supplemental Judgment at [4]). She declined to make provision for graduated increases in maintenance as the child grew older (as was provided for in the Deed), holding that such adjustments as might be necessary could be made by way of separate applications in the future (at [88]).

13 On the issue of care and control, the Judge favoured the preservation of the *status quo*. She noted that the child was about to enter primary education and so it would be "wholly impractical to layer the complexity of the child's life with a shared care and control arrangement" (at [109]). In the circumstances, she upheld the terms of the Deed. She awarded joint custody to both parties, but granted care and control to the wife with liberal rights of access for the husband (at [110]).

The parties' arguments on appeal

14 Mr Ranjit Singh, counsel for the husband, submits that the Judge had erred insofar as she had departed from the terms of the Deed on the issues of division and maintenance. He stresses that the parties were represented by solicitors throughout the process of negotiation and that the wife had the opportunity to and did in fact make changes to the Deed. He therefore contends that "full weight" should be given to the provisions of the Deed on the issues of division and maintenance.

15 On the issue of care and control, however, Mr Singh submits that a departure from the Deed is warranted. He accepts that the parties should continue to have joint custody but argues that the husband is a devoted father who is committed to playing an active role in the child's life and "deserves" to share in the care and control of the child. To that end, he seeks an order for shared care and control to allow the husband to "play a larger role in the child's life" and to maintain the integrity of the father-child bond which the child has enjoyed thus far. He contends this would not, contrary to what the Judge had held, lead to excessive disruption in the child's life since both parties live close to each other.

16 Ms Bernice Loo, counsel for the wife, argues to the contrary on all points. She submits that the wife has made, and continues to make, substantial non-financial contributions to the family and the welfare of the child which had not been reflected in the division in the Deed. This, she contends, suffices as a "good reason" for departing from the terms of the Deed. Further, she argues that if the structured approach towards division set out in *ANJ v ANK* [2015] 4 SLR 1043 ("*ANJ*") were applied, the wife would have been awarded a proportion of the matrimonial assets far in excess of the 6% she has been awarded by the Judge. On this basis, she argues that it cannot be said that the Judge's award is excessive.

17 On maintenance, Ms Loo submits that the provisions of the Deed, if enforced strictly, would allow the husband to avoid meeting his responsibility of providing for the child's accommodation. She therefore argues that the Deed is clearly not in the best interests of the child and that the Judge was justified in adjusting its terms. Given the significant disparity between the financial position of the husband and that of the wife's, she further contends

that the Judge was right in ordering that the husband shoulder half the cost of renting the apartment in which the wife and the child currently reside.

18 Finally, Ms Loo submits that the Judge's decision that care and control remain with the wife was entirely in keeping with the child's best interests. She argues that an order for shared care and control would be excessively disruptive for the child, particularly since the parties have markedly different parenting styles. She also points out that the access granted to the husband by the order of the Judge has already accorded him significant and substantial access to the child.

Our decision

19 Having carefully considered the arguments presented by the parties, we allow the appeal in part. We hold that the terms of the Deed should be upheld insofar as the division of assets is concerned. However, we dismiss the husband's appeal insofar as it pertains to the issues of maintenance and care and control. We now set out our detailed reasons.

Division of matrimonial assets

20 As noted at [9] above, the Judge held (a) the matrimonial home was the only asset in the matrimonial pool to be divided; (b) the Deed was freely and voluntarily entered into; and (c) the Deed was an agreement within the meaning of s 112(2)(*e*) of the Charter – that is to say, it was made in respect of the ownership and division of the parties' matrimonial assets and it was made in contemplation of divorce and is a factor to be taken into account by the court when it is deciding what an appropriate division ought to be. There is no appeal against any of these findings, and the parties do not dispute that these are the bases upon which this appeal should proceed. The substantial question

which presents itself for decision, therefore, is the weight that should be accorded to the Deed in the division exercise.

The statutory framework under s 112 of the Charter

21 Section 112(1) of the Charter empowers the court, whether in the grant of a judgment of divorce or subsequent to it, to order the division of matrimonial assets in such proportions as it thinks "just and equitable". In the exercise of this power, the court is enjoined to take into account the non-exhaustive list of factors listed in s 112(2) of the Charter, one of which is the existence of "any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce." As this court clarified in *Surindar Singh* at [43], postnuptial agreements fall within the ambit of this section. In a critical passage, Judith Prakash J, delivering the judgment of the court, explained that while the presence of an agreed distribution was only one of the many factors that the court was to take into account, in the right circumstances, the weight to be given to it may well be conclusive (at [49]):

> *Although the Judge is correct that under s 112(2) of the Charter, the presence of an agreement between the parties in regard to distribution of assets is only listed as one of the factors to be considered, with respect, this does not mean that, in all circumstances, such an agreement would have no greater weight than any other of the listed factors.* The factors are a guide to the court, not a mandatory list of items that must be ticked off and given equal weight if they exist. To follow such a course would lead to a mechanistic process of division which would not always be fair. *The discretion given to the court to achieve a just and fair distribution means that if the facts warrant it one or more factors may be given more weight than the others and even primacy over the others. In the circumstances of this case, our view is that the Settlement Agreement should have been given significant, if not conclusive, weight.* [emphasis added]

22 *Surindar Singh*, like the present case, concerned a postnuptial settlement agreement: in other words, it was an agreement concluded by the parties to govern their post-divorce affairs *after* the marriage had failed. As this court explained in *Surindar Singh* at [52], such agreements generally carry "significant weight" because, in preparing a postnuptial agreement, the parties would be addressing their minds towards the exigencies of the present moment (the impending reality of divorce), rather than some future (and perhaps even quite remote) contingency. The court held that "where parties have properly and fairly come to a formal separation agreement with the benefit of legal advice, the court will generally attach significant weight to that agreement [when deciding on the division of their matrimonial assets] unless there are *good and substantial grounds for concluding that to do so would effect injustice*" [emphasis added] (at [54]). The question, for present purposes, is whether such grounds exist. In our judgment, they do not.

No good and substantial grounds for concluding that the division in the Deed would effect injustice

23 The only injustice highlighted in the Judgment was the fact that the Deed did not appear to take into account the continuing role that the wife would play in caring for the child from the date of the Deed until the date of final judgment. The Judge held that the sum of $40,000 awarded to the wife only reflected the parties' relative contributions up till the date of the Deed (21 April 2009) and therefore did not adequately take into account the wife's continuing indirect contributions to the marriage until its final dissolution (at [59]). She therefore concluded that the Deed did not reflect a fair and equitable distribution and should be varied (at [60]). We respectfully disagree with the Judge that this constitutes a sufficient basis for varying the agreed distribution. We give three reasons for this.

24 First, we do not agree that in a case like the present the parties' post-Deed activities should be taken into account in determining what the appropriate division of their matrimonial assets ought to be. In particular, we disagree with the Judge that the cut-off point for the determination of the parties' contributions to the marriage for the purposes of the division exercise ought to be the date of the final judgment of divorce. In our opinion, this is a case in which the operative date for determining the parties' respective contributions to the marriage ought to be the date of the conclusion of the Deed (*ie*, 21 April 2009) because that was when the marriage effectively came to an end. Thereafter the parties were only waiting for time to elapse before filing for divorce.

25 In *ARY v ARX and another appeal* [2016] 2 SLR 686 ("*ARY*"), this court examined the principles to be applied in determining the "operative date" for use in ascertaining the pool of matrimonial assets. After an extensive review of the relevant authorities, the court held that the starting point should be the date of interim judgment for that was when there was "no longer any matrimonial home, no *consortium vitae* and no right on either side to conjugal rights" (see *ARY* at [32], citing the previous decision of this court in *Sivakolunthu Kumarasamy v Shanmugam Nagaiah and another* [1987] SLR(R) 702 at [25]). Where these factors are present, it may be said that the marriage has come to an end and it would be "artificial to speak of any asset acquired *after* the interim judgment has been granted as being a matrimonial asset" [emphasis in original] (*ARY* at [32]). Although the specific issue before the court in *ARY* was different (the composition of the pool of marital assets, rather than the cut-off date for determining the parties' contributions to the marriage), the crux of the inquiry is the same. The question is whether the marriage still exists in any meaningful sense such that the actions of the

parties, whether in the acquisition of assets, the care of their children, or otherwise, may properly be said to have been done during the subsistence of the marriage and should therefore be taken into account in the division exercise. We therefore apply the *ARY* principles here.

26 When one examines the Deed, it is clear that the parties' marital relationship had come to a close with the conclusion of the Deed. The three indicia of termination set out in *ARY* are all present: (a) there is no longer a matrimonial home – the wife was to move out of the matrimonial home and both would henceforth live in separate apartments; (b) there is no *consortium vitae* – the parties were to live "as if each were single" and would be "free from the marital control (if any) of the other" (see [5] above); and (c) neither party had conjugal rights – it was expressly stated that neither party could "require the other to cohabit with him or her and vice versa" (likewise at [5] above). The parties recognised it as such and it is clear that as far as they were concerned the only thing left to be done after the conclusion of the Deed was to wait for time to elapse so that either one or the other could file the papers for divorce on the ground of three years' separation.

27 In the circumstances, it is artificial to say that after the conclusion of the Deed, the wife should still be given credit for her "indirect contributions… as a caregiver to the child" (see the Judgment at [59]). We do not, for a moment, wish to undervalue the role played by the wife in caring for the child but the point is that following the conclusion of the Deed, everything the wife did for the child, she did *qua* mother, and no longer *qua* spouse. The parties, particularly the wife, would have known that she would have to bear the brunt of bringing up the child and moreover that was what she wanted to do too. That was why the Deed was structured the way it was. There is therefore no injustice in the fact that the Deed did not appear to take the wife's continuing

role as primary caregiver to the child into account in determining her share of the matrimonial assets.

28 Second, and even assuming that we could regard the wife taking care of the child post the conclusion of the Deed as contributions she made *qua* spouse (on the basis that the parties were still legally married), we do not – with respect to the Judge (see the Judgment at [59]) – agree that that was a factor which the parties had not taken into consideration when entering into the Deed. As mentioned in the preceding paragraph, the parties would have known that after the separation the wife would be the main caregiver of the child; that was what the wife desired and the parties would have addressed their minds to this factor in the agreed division of their matrimonial assets. To say that the parties had not considered that factor is to ignore the obvious, bearing particularly in mind the manner in which the Deed was drawn up.

29 It must be noted that the agreement reached in the Deed was the product of lengthy negotiations between the parties who were both legally represented throughout the five-month process. The wife was represented by M/s T L Yap & Associates while the husband was represented by M/s Bernard & Rada Law Corporation. Opportunities were given to the wife to propose alterations and she did. Some of them were accepted, *eg*, the settlement sum was increased from $30,000 to $40,000. As we noted above at [20], the Judge held that there were no vitiating factors and there is no appeal against this decision. Unless there are vitiating factors, it seems to us that the appropriate conclusion to be drawn is that the Deed reflected what both parties thought was fair and reasonable, bearing in mind the parties' agreement that the wife would be the child's primary caregiver following the date of the Deed.

30 Finally, we consider that the Judge had not given adequate consideration to the principle that agreements (even marital agreements) must be kept. In her analysis of *Surindar Singh*, the Judge said that the case stood for the narrow proposition that "a court should be slow to vary the marital agreement on the ground that it would have given a different percentage taking into account those *very same contributions* made during the marriage which are typically assessed retrospectively" [emphasis in original] (see the Judgment at [52]). Implicit in this is the assumption that a marital agreement is only useful insofar as it represents the parties' assessment of their direct and indirect contributions to the marriage. With respect, we hold that this is too narrow a reading of the *ratio* of *Surindar Singh*.

31 It is a matter of common sense and justice that the existence of an agreement for the division of matrimonial assets in contemplation of divorce should be accorded due weight when the court decides what is a just and equitable distribution. But what is perhaps less clear is that there are two distinct and separate reasons for this. The first is that the agreed division provides a useful tool for the court to determine what the proper proportions of the parties' relative direct and indirect contributions to the marriage were. The assumption is that the parties who are negotiating (particularly where they are represented by solicitors) do so rationally and with full knowledge of their respective contributions to the marriage and what they agree on must represent what in their view is a just and equitable distribution. This was what this court had in mind when it stated at [54] of *Surindar Singh* that "the parties to a marriage are in the best position to determine what is a just and equitable division of the matrimonial assets based on their own assessment of each party's direct and indirect contributions" and that, due to the "inherent

limitations of fact-finding in the litigation process", the court would readily defer to the parties' assessment on this matter.

32 The second has to do with the principle that promises are binding and agreements must be kept. This is an elementary principle of justice and fairness. Simply put, if parties have reached an agreement on division which they have *freely and advisedly entered into*, then it is surely "just and equitable" that the terms of this agreement are adhered to. We recognise that the distributions accepted in a postnuptial agreement will not necessarily reflect what the parties would have received had they gone to court for adjudication. However, this can hardly be surprising. All settlement agreements, no less marital agreements, are a product of compromise. The distributions entered into reflect the benefits, both tangible (in terms of saved legal costs) and intangible (the psychological value of repose), of dispute avoidance. Parties often accept less than what they would otherwise properly be entitled to in order to find closure. This is entirely understandable, and it is also to be expected and respected. As Choo Han Teck J aptly observed, albeit in the context of whether a consent order should be rescinded, in *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 at [5] (cited with approval in *Surindar Singh* at [55]):

> … Privately settled terms in respect of the ancillary matters in a divorce may not always appear to be fair. But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing, to any given term or condition in the ultimate settlement. …

33 When seen in this light, an agreed division which does not reflect the parties' strict legal entitlements or preferred positions can still be one that is fair and equitable, particularly if the parties have freely and voluntarily entered into the agreement with full knowledge of the relevant circumstances and the

matters to be considered. Taking these points into account, it seems to us that significant weight should be attached to the Deed, both because it is an indication of what the parties thought was just and equitable, given their respective direct and indirect contributions to the marriage (which no one knows better than themselves), and also because it represents the product of a considered compromise which was reached after a period of negotiations attended by legal advice and should be given full effect.

Conclusion on the issue of division

34 For the foregoing reasons, in our judgment, there are no "good and substantial grounds" to conclude that the present arrangement would effect injustice. On the contrary, we are of the view that this is a case in which the division agreed upon carries almost conclusive weight and should be accorded primacy. We therefore reinstate the original terms of the Deed and hold that the husband should only be liable to pay the wife $40,000 as her share of the matrimonial assets. In accordance with the Deed, the payments already made to the wife under cll 3.1 and 3.2 of the Deed (that is, the upfront payment of $10,000 made on 19 November 2008 and the deposit of $5,400 paid for the apartment which the wife and child moved into immediately after the parties' separation and which she was entitled to retain when she moved out) are to be deducted from this sum of $40,000.

35 Given our analysis on this issue, it is not necessary for us to analyse this case along the lines of the framework set out in *ANJ,* as the parties have done in their respective cases. On this point, we wish only to reiterate what we said at [28] of *ANJ*, which was that the approach we set out there is "germane to the general run of matrimonial cases where the parties' direct and indirect contributions are the only two factors engaged" and the court is asked to

determine the matter of the division of matrimonial cases *de novo*. This is not such a case. Here, there is a detailed postnuptial agreement. We therefore consider that the more appropriate methodology is to examine the division set out in the Deed before determining whether any alterations are necessary, and that is how we have approached this issue.

36 We might be prepared to agree with Ms Loo where she contends that a different result might be reached if this court were to determine the matter of division afresh without reference to the Deed. However, this is not enough. As we emphasised in *Surindar Singh* at [56], the fact that a court "might have made a different distribution than that agreed to [by the parties]" is not a sufficient basis for saying that there is injustice which warrants a departure from an agreed distribution. Instead, "[t]he grounds for disregarding such a separation agreement would have to be more substantial than a slight difference of opinion on the fairness of the distribution provided for by the agreement." No such grounds are present here.

Maintenance for the child

37 We turn now to the issue of maintenance for the child. The Judge approached this issue in two parts. She first began by considering how much the husband ought to contribute towards the child's personal and household expenses. She rejected the wife's submission of $2,790 as excessive and held that a sum of $1,500 be ordered instead. She then turned to consider the issue of the child's accommodation as a separate matter. She rejected the wife's submission that the husband ought to bear the full cost of the rental and instead held that "in principle, the [husband] has to provide accommodation for the child and bear one half of the rent of an accommodation" (see the Judgment at [81]).

38 The husband appeals only against that part of the Judge's order that provides that he is to shoulder half of the cost of renting the apartment the wife and child are currently staying in; he takes no issue with the order that he pay a sum of $1,500 for the child's living expenses. Mr Singh points out that the Deed clearly contemplates that the husband's obligation to pay for rent would cease after November 2011 and submits that it would be unfair to allow the wife to renege on the Deed since it was part of a comprehensive settlement in which the husband was obliged to and did pay for the full cost of renting an apartment for the first three years after the parties' separation. He therefore contends that the husband should only be liable to pay $1,500 for the child's maintenance each month. We reject this submission.

39 We propose to deal with this issue in steps. We will first examine the general duty of parents to maintain their children before considering what role marital agreements play in this area. Finally, we will consider whether the quantum of maintenance ordered by the Judge in this case is appropriate.

The statutory framework under the Charter

40 The central principle is that each biological parent has an independent and non-derogable duty to maintain his/her children, whether directly, through the provision of such necessities as the child may need, or indirectly, by contributing to the cost of providing such necessities. This duty is statutorily embodied in s 68 of the Charter, which provides as follows:

> Except where an agreement or order of court otherwise provides, it shall be the *duty of a parent to maintain or contribute to the maintenance of his or her children,* whether they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either *by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her*

> *means and station in life or by paying the cost thereof.* [emphasis added]

We pause to note that the duty of non-biological parents to maintain a child whom they have accepted as their own is separately enshrined in s 70 of the Charter and that its terms differ: see *TDT v TDS and another appeal and another matter* [2016] SGCA 35 at [85]. However, for present purposes, we will only focus on the duties of biological parents, for that is what the present appeal is concerned with.

41 Section 68 states that a parent's duty is to provide what is "reasonable having regard to his or her means and station in life". This is buttressed by s 69(4) of the Charter, which specifically directs the court to have regard to "all the circumstances of the case", including, among other things, the income and earning capacities of the wife and child in deciding what sum to order in maintenance. Undergirding these provisions is the principle which we would, to borrow an expression from another area of the law, call the principle of common but differentiated responsibilities: both parents are equally responsible for providing for their children, but their precise obligations may differ depending on their means and capacities (see *TIT v TIU and another appeal* [2016] SGHCF 8 at [61]). The Charter clearly contemplates that parents may contribute in different ways and to different extents in the discharge of their common duty to provide for their children.

42 So where do marital agreements which relate to the maintenance of children come in? In our view, such agreements are relevant where the court is determining what *quantum* of maintenance to order. While the existence of any marital agreement is *not* one of the statutorily prescribed factors in s 69(4) of the Charter, the expression "all the circumstances of the case" is wide enough to encompass the presence of a marital agreement which relates to the

maintenance of children. We would not place too fine a point on this save to say that the precise weight to be ascribed to the existence of such an agreement must depend on the facts of each case. However, there are two important principles which we ought to reiterate.

43 The first principle is that the welfare of the child is the overriding objective. In *TQ v TR and another appeal* [2009] 2 SLR(R) 961 ("*TQ v TR*") at [61] and [68], this court stressed that all postnuptial agreements with respect to maintenance (both those made in respect of wives and those for children) are subject to the *continuing* scrutiny of the courts and that the primary consideration was "the provision of *adequate* maintenance" [emphasis in original] (at [67]). What this means is that the court will not sanction any agreement as to maintenance if its *overall* effect would leave the child with inadequate support. In particular, it was said that the courts would be "especially vigilant and will be slow to enforce agreements that are apparently not in the best interests of the child or the children concerned" (likewise at [67]). While this statement was made with specific reference to a prenuptial agreement (which was what *TQ v TR* was concerned with), we consider that it applies with equal, if not greater, force where the court is faced with a postnuptial agreement. As pointed out in *TBC v TBD* [2015] 4 SLR 59 at [27], it is entirely proper that in some cases, one parent may contribute more than another where it is necessary to ensure that the child "will receive the full measure of maintenance".

44 The second principle is that the courts will not allow a parent to abdicate his/her responsibility of parental support. For that reason, we were careful to state that a marital agreement may be relevant to the question of the *quantum* of support, but not its *existence*. Even though s 68 of the Charter begins with the phrase "[e]xcept where an agreement… otherwise provides", a

parent cannot contract out of the obligation to provide for his/her child. As pointed out in Leong Wai Kum, *Elements of Family Law* (LexisNexis, 2nd Ed, 2013) ("*Elements of Family Law*") at p 409, this proviso must be read in conjunction with s 73 of the Charter, which empowers the courts to vary the terms of any agreement relating to the maintenance of a child if it is satisfied "that it is reasonable and for the welfare of the child to do so".

45 As this court has stressed in *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 at [26], the "idea of joint parental responsibility is deeply rooted in our family law jurisprudence." In the same paragraph, it was observed that the welfare of the child was best advanced if both parents played an active role in the upbringing of the child, even if they might not continue to live together. We affirm this principle and we hold that it applies with equal force to the area of material provision. *Even if* one parent were fully capable of providing for the child's material needs, it would still be in the best interests of the child, and consistent with the schema of the Charter as a whole, that the law recognises and enforces the joint responsibility of both parents to maintain the child. This is in keeping with the principle of common but differentiated responsibilities which we referred to at [41] above.

46 To sum up, we would put the matter in the following way. Where the parties have clearly addressed their minds to the question of the need to provide and care for the child, and the overall provision is a just and fair result that does not fall short of what is needed and expected under the general law, then there is nothing preventing the court from endorsing the substance of the terms of the agreement (see *TQ v TR* at [67]). However, if the agreement would leave the child with inadequate support, or if the burdens of parenthood are so unevenly distributed that it is inconsistent with the principle of common but differentiated responsibilities, the court will readily step in to fashion a

different set of orders to achieve a just and fair outcome that serves the child's best interests.

47 From the foregoing, it is clear that the position taken in respect of division of assets (where a marital agreement can be given almost conclusive weight in some circumstances: see [33] above) is different from that taken in the case of maintenance (where the court is comparatively more cautious about accepting the agreements made by the parties). This might appear incongruous, but it should not surprise. The reason lies in the different objectives being pursued and the different roles assumed by the courts in each area.

48 Where the court is considering the issue of division of assets, the focus is on the *proprietary entitlements* of the parties to the marriage *inter se*. No interests of third parties like children are at stake. It therefore stands to reason that any agreement which has been freely and voluntarily entered into by the parties upon legal advice should be almost determinative of the outcome and the role of the court is greatly circumscribed: it is there only to ensure that the agreement would not effect injustice. In contrast, where the court is considering the issue of maintenance for the child, the focus of the court's inquiry is the *financial needs of the child* – a *third party* who had no say in the conclusion of the agreement but whose interests are nevertheless directly implicated. In this context, the court assumes a more prominent custodial role and the overriding objective is that the welfare of the child must be safeguarded and adequate provision must be made for his/her upkeep.

49 In light of the foregoing, the question is whether the quantum of maintenance agreed in the Deed ($1,500 per month) is a reasonable sum that adequately addresses the child's need for adequate support and discharges the

husband's obligation to provide for the child's material needs (*including* the child's need for accommodation). In our judgment, it does not.

Does the Deed set out a just and fair maintenance order?

50 First, it is clear that the provision in the Deed for the child's upkeep would leave her with inadequate support. The apartment in which the wife and child reside costs $3,750 a month in rent. While there was some dispute as to the wife's income, the Notice of Assessment issued by the Inland Revenue Authority of Singapore for 2013 lists the wife's gross annual income at almost $37,000 (or approximately $3,100 per month). It is clear that without significant financial contribution from the husband, the wife and child will not be able to continue staying at the apartment. In the court below, the husband argued that the wife ought to be looking at cheaper accommodation. The Judge disagreed on the basis that the apartment in which the wife and child resided was close to her school and the husband's home (see the Judgment at [81]). There has been no appeal against this decision and we see no reason to disturb this finding. In principle, therefore, we would hold that any maintenance order that is made should – so far as it is possible, having regard to the husband's means – allow the child to continue staying at her present apartment.

51 The husband has, since the grant of interim judgment on 24 April 2012, been paying a sum of $2,950 to the wife each month (see [4] above). While he contends that he has had to dip into his savings to meet this obligation, there is no indication that this has caused him substantial hardship or that he is unable to continue making such a contribution. Of course, should the husband's financial situation continue to deteriorate, it might be open for him to apply for a variation of the order. In that event, all parties concerned

will have to adapt to the changed circumstances. But until and unless that happens, we hold that the present maintenance order of $3,375 is not unreasonable in the circumstances.

52 Second, we are of the view that the present maintenance order does not respect the principle of common but differentiated responsibilities. The husband's concession that this sum *only* reflects his obligation to provide for the child *sans* rental, in our view, settles the issue. The fact that the Deed states that the husband would not be obliged to pay the cost of accommodating the wife and the child after 14 November 2011 is of little moment. Section 68 of the Charter requires the husband to provide for "such accommodation, clothing, food and education as may be reasonable". As a matter of principle, the husband can no more contract out of his obligation to provide the child with adequate accommodation than he can contract out of his obligation to maintain the child entirely. It has long been held, since the decision of the House of Lords in *Hyman v Hyman* [1929] AC 601 ("*Hyman*"), that the jurisdiction of the court to make provisions for maintenance consequent upon a divorce cannot be abridged by the private agreement of the parties. Although *Hyman* concerned the right of a wife to maintenance, we consider that this applies, *a fortiori*, where the maintenance of children is concerned. The right of a child to adequate support is, to borrow the words of Lord Atkin, a "matter of public concern, which [the parties] cannot barter away" (see *Hyman* at 629).

53 The wife relocated to Singapore only to be with the husband and she did not work until after the parties had separated. Since then, she has taken on a variety of jobs, most recently as a real estate agent. Her monthly income, as determined by IRAS, does not exceed $3,100 a month. The assets in her sole name amount to approximately $31,500. In contrast, the husband is well-established in Singapore and has substantial savings. While he contends that

his business is not doing well, it cannot be disputed that he was, and continues to be, a man of substantial means, with assets in excess of $6.5m (see the Judgment at Annex A). In our judgment, it would not be a just and fair apportionment of financial responsibilities for the wife to shoulder the full cost of the rent for the apartment, bearing in mind particularly that she is the child's primary caregiver and is less well off than the husband.

54 The question then is what proportion of the rental of $3,750 the husband ought additionally to bear, given the need of the child for a roof over her head. The Judge first noted that the wife would have to be liable for at least a part of the rent since she would also be staying in the apartment. On that basis, the Judge concluded that the fairest order in the circumstances would be to require the husband and the wife to share the total cost of the accommodation equally. When we looked at the matter in the round, we saw no reason to disturb this ruling. It seems to us that this is a just apportionment, having regard to, among other things, the financial capacities of the parties and the present and future contributions of each to the continuing welfare of the child. In the premises, we uphold the order made by the Judge at [4] of the Supplemental Judgment, which is that the husband is to pay the wife a sum of $3,375 a month, comprising $1,500 for the child's living expenses and $1,875 being half share of the current rent of $3,750 for the apartment.

Care and control

55 The last issue concerns care and control. Ms Loo points out, as a preliminary point, that the husband, despite having hitherto been so concerned with the strict enforcement of the terms of the Deed, has quickly abandoned that position in the consideration of the question of care and control. She contends that the husband must not be allowed to "cherry pick" the parts of the

Deed he wishes to enforce while disregarding others. This is a fair point. However, the point cuts both ways. *Both* the parties had taken positions which were at variance from the Deed from day one. For instance, even before divorce proceedings had been filed, the parties had sought sole custody and care and control of the child under the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("GIA"). Even now, the wife seeks to uphold the Judge's orders, which do not exactly track the terms of the Deed.

56 The Judge took the position that once the parties were within the matrimonial jurisdiction of the court, the court was entitled to consider the matters of custody and care and control afresh (see the Judgment at [98] and [100]). While she did not explicitly say so, it was clear from the way she approached the issue that she did not think herself bound by the terms of the Deed, for she did not make reference to it in the course of her treatment of this subject. Instead, her approach was to "make an order that ensures that the child's interests are treated as and made paramount" (at [99]). In our judgment, both the Judge's approach and her eventual decision on this issue cannot be faulted.

Marital agreements and the custody of children

57 In the case of the division of matrimonial assets (and, to a lesser extent, the maintenance of the child), the substance of the question is one of finances. As the issue is merely one which relates to the ownership of property, or the distribution of the financial burdens of parents *inter se*, understandably the court would be inclined towards playing a comparatively minor role. However, where the court is concerned with questions of custody and care and control, the subject is not wholly pecuniary but the welfare of a child. A child's welfare is not something to be bartered or negotiated at the termination

of a marriage. Thus, where the court decides on questions of custody and care and control, it always acts to maximise the welfare of the child, which is the "paramount consideration" (s 125(2) of the Charter).

58 For this reason, while the court is enjoined to have regard to the wishes of the parents and of the child, it is not bound by anything that might be set out in a marital agreement. Indeed, in *TQ v TR* at [70], this court held that there ought to be a presumption that all agreements (whether prenuptial or postnuptial) relating to the custody or care and control of children are unenforceable unless it is "clearly demonstrated by the party relying on the agreement that the agreement is in the *best interests* of the child" [emphasis in original]. The reason for this, as the court explained in the same paragraph, is that in the heat of the matrimonial dispute, the interests of the child may unwittingly be relegated to second place. Thus, the court treats the terms of any such agreement with great circumspection and will not give effect to them unless it is satisfied that to do so would be in the best interests of the child. In the circumstances, we approach this matter by considering, as the Judge did, what is in the best interests of the child.

The best interests of the child

59 Mr Singh argued that an order for shared care and control would allow the husband greater say and allow him to play an "active role" in the child's life. The problem with this argument, as we pointed out during the hearing, is that the husband's access arrangements, which have been in place since January 2015, are generous and grant the husband extremely liberal access to the child. The child spends half of the school holidays in the care of the husband. During the school term, the agreed schedule is structured as follows:

Week 1

(1) Tuesday from 1.30pm to 7.30pm;

(2) Thursday from 1.30pm to 7.30pm;

(3) Friday from 1.30pm to 7.30pm;

Week 2

(1) Tuesday from 1.30pm to 7.30pm;

(2) Overnight access from Friday 1.30pm to Sunday 7.30pm

60 If we put aside the time spent in school, it would seem that the child spends almost as much of her leisure time with the husband as she does with the wife. In the circumstances, we agree with Ms Loo that the husband is afforded ample opportunity to play an active role in the child's life. This is particularly the case when one considers that the parties, as the husband himself pointed out, live very close to each other. We do not see how a shared care and control order would allow the husband to spend very much more time with the child than he currently does, particularly since the order for joint custody (which neither party has challenged) already means that the most important decisions affecting the long-term upbringing and welfare of the child can only be made with the consent of both parties.

61 Mr Singh conceded that the present arrangements afforded the husband very generous access to the child but submitted that an order for shared care and control would "recognise the role played by the father". However, we are not persuaded that this provides an adequate basis for a variation of the care and control order, particularly given the disruption it would cause to the child's life. As the Judge rightly pointed out, continuity in living arrangements is an important factor in maintaining the emotional well-being of a child (see the Judge at [107]). We agree with the Judge that an award for shared care and control would destabilise and be unnecessarily disruptive to the child's life at

this stage, considering that the child has been living with the wife for the past seven years and has just made the transition to primary school.

62 Furthermore, as we remarked during the hearing, one should not emphasise "form over substance". It is laudable that the husband wants to be a good father to the child, and we commend him for this. However, the sound and sensible way to achieving that is by continuing to take an active interest in the child's life during the periods of access, such that when the child comes of age, it will be enduring ties of love and affection rather than a court-ordered apportionment of her time, that forms the substratum of an enduring father-daughter relationship. We were informed during the hearing that the parties had cooperated in the last five years to act in the child's best interests. We are greatly heartened to hear that. It augurs well for the child's welfare.

63 In our judgment, joint custody, coupled with the vesting of care and control in the wife and liberal access to the husband, is the option which is in the best interests of the child. We therefore think it best to preserve the Judge's orders in this respect and dismiss the husband's appeal on the same.

Conclusion

64 In summary, we allow the appeal in part and order that:

(a) The husband shall pay the wife upon final judgment of divorce a sum of $40,000. The payments already made to the plaintiff under cll 3.1 and 3.2 of the Deed are to be deducted from this sum of $40,000.

(b) The husband shall continue paying the wife a monthly sum of $3,375 each month for the child's maintenance.

(c) Care and control is to remain vested with the wife, with liberal access to the husband. As directed by the Judge, parties are to work out the terms of access on their own, always bearing in mind the child's school schedule.

65 As the husband has succeeded on one issue and has failed in the other two issues, and bearing in mind the work done on each issue, we will order that each party shall bear its own costs of this appeal. There shall be the usual consequential orders.

Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal	Quentin Loh Judge

Ranjit Singh (Francis Khoo & Lim) for the appellant;
Loo Ming Nee Bernice and Khoo Seok Leng Sarah-Anne
(Allen & Gledhill LLP) for the respondent.