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## Weight Accorded to Pre-nuptial Agreement Lessened Due to Inconsistent Behaviour

Pre-nuptial agreements that set out the division of assets in the event of a divorce are becoming less stigmatised in Singapore nowadays, growing in popularity across a diverse demographic ranging from younger millennials to high net-worth individuals. Pre-nuptial (and indeed, post-nuptial) agreements are one of the circumstances that may be considered by the court in ordering the division of matrimonial assets. However, in Singapore, it is established law that pre-nuptial agreements cannot be enforced in and of themselves and are subject to the court's scrutiny. Rather, the court retains the ultimate power to divide matrimonial assets in such proportions as the court thinks just and equitable, and will determine the weight that ought to be accorded to the pre-nuptial agreement.

In *CLB v CLC* [2021] SGHCF 17, the High Court found that the weight to be given to a pre-nuptial agreement was significantly diminished by the parties having behaved inconsistently with the pre-nuptial agreement throughout the 16-year marriage.

Below, we examine the key takeaways from the case that parties may wish to pay attention to, whether they are considering entering a pre-nuptial agreement themselves or seeking to ensure an existing pre-nuptial agreement will be upheld as far as possible.

### Background

Section 112 of the Women's Charter covers the power of the court to order the division of matrimonial assets. The definition of matrimonial assets is crucial, as non-matrimonial assets will be excluded from the pool of assets to be divided. Per the definition set out in section 112(10), matrimonial assets are:

- (a) Any assets acquired before the marriage by one or both parties:
  - (i) that is ordinarily used or enjoyed by both parties or their child/ren while the parties are residing together; or
  - (ii) which has been substantially improved during the marriage by the other party or both parties; and
- (b) Any other asset acquired during the marriage by one or both parties.

However, assets (apart from a matrimonial home) that (a) has been acquired by one party at any time by gift or inheritance ("**gifted asset**"), and (b) has not been substantially improved during the marriage

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by the other party or both parties, will not qualify as a matrimonial asset. A gifted asset may lose its character as a gift if there was a "real and unambiguous intention" on the donee's part that it should become part of the pool of matrimonial assets.

In the present case, the divorcing parties had voluntarily entered into a pre-nuptial agreement ("**Agreement**") before their marriage and with the benefit of independent legal advice. Through the Agreement, the parties sought to "protect their separate property ... from claims by each other if they separate", which included:

1. the property each owned prior to marriage, which was set out in the First Schedule of the Agreement;
2. property acquired by each party through gift or inheritance, etc; and
3. income derived from separate property (whether by sale, exchange, investment, disposition, or other dealing, or attributable to enhancement or appreciation of the property due in whole or part to market conditions or to the services, skills or effects of either party).

The dispute surrounded certain assets worth approximately S\$6 million, which the Husband asserted should be excluded from the pool of matrimonial assets either pursuant to the Agreement and/or due to their character as pre-marriage assets and/or gifts.

The Wife argued that although the Agreement was valid, it should be departed from as the parties' conduct demonstrated that they had abandoned the Agreement as a result of significant developments after the marriage. In particular, the Husband had left his job and taken up freelance work for 15 out of the 16 years of marriage, resulting in their "[pooling] their resources together in accordance with the concept of community of property".

### Decision of the Court

After considering all the relevant circumstances, the Court found that it was not just and equitable to accord full weight to the Agreement. A few overarching factors it took into account included:

1. contemporaneous communications from the Husband indicating that he considered at least some of the disputed assets to be part of the family's wealth rather than his personal wealth.
2. the Husband's inconsistency in positions, as he sought for the Agreement to be given its full weight but included two properties held in the Wife's name as part of the matrimonial property to be divided. Per the Agreement, the Wife would be entitled to both properties in their entirety.
3. the Husband's conduct in relying on certain assets to provide for the family. Such conduct had an effect on how the Wife conducted her life, such as in respect of her career choices and the utilisation of her income and assets.

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However, the Agreement was not entirely disregarded. The above conduct by the Husband did not necessarily mean that he intended for all his pre-marriage assets to constitute matrimonial assets. Rather, whether the assets listed in the First Schedule were to be included in the pool of matrimonial assets would depend on the facts surrounding each asset. In relation to the disputed pre-marriage assets and/or gifts, the Wife would need to prove that (a) a particular asset had first lost its character as a gift, and then (b) that asset also fulfilled the definition of "matrimonial assets" under section 112(10)(a) or (b).

We highlight certain key principles as illustrated by the Court's rulings regarding some of the assets below.

Asset	Basis for exclusion	Decision and reasoning
CPF monies	Pre-marriage asset	<b>Excluded.</b> The Wife's argument that the monies had been commingled with monies acquired during marriage was rejected. The Court noted that there was no use of CPF funds to purchase property. Only the CPF monies acquired after the marriage were included in the pool of matrimonial assets.
Australian property	Pre-marriage asset	<b>Excluded.</b> While the property had been used occasionally as a holiday home for the family, this did not suffice to show it was "ordinarily used or enjoyed" by the family as required by section 112(10).
DBS Account	Account was specifically excluded in the Agreement. Further, the monies in the account were derived from excluded assets.	<b>Included.</b> The funds had been commingled with funds that were matrimonial assets, and the account had been used on behalf of the family.
Shares in (H) Sdn Bhd which were later sold	Pre-marriage gift	<b>Excluded.</b> Despite the Husband's having used part of the sale proceeds for the family, there was insufficient evidence to prove that the Husband had the requisite "real and unambiguous intention" that the entire asset was to be part of their matrimonial assets.

### Concluding Remarks

*CLB v CLC* underscores the importance of behaving consistently with the pre-nuptial agreement. The Husband's conduct, both in word and in action, indicated that he considered his assets to be available for the family's benefit, resulting in the Court according significantly less weight to the Agreement. This was reflected in the Court's inclusion of certain assets in the pool of matrimonial assets despite such assets being specifically excluded in the Agreement. Parties must take care to maintain a distinction between their personal assets and assets intended for the family's benefit.

It is worth highlighting the Court's remarks that pre-nuptial agreements are tricky in any event, as "it seems unrealistic to make provisions for a future not yet learnt or experienced", particularly when there

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are children born to the parties. In the event of a major change in circumstances that may result in a change to how parties manage their finances – such as the Husband's taking up freelance work and thereafter relying on his personal assets to provide for the family – parties may wish to consider the impact such changes may have on the pre-nuptial agreement.

Parties should still consider making pre-nuptial agreements, especially when there are significant assets at stake, including inherited property. Further, some trusts dictate that in order to be beneficiaries, the beneficiaries should enter into a pre-nuptial agreement. However, parties must be aware that if the pre-nuptial agreement is not to be negated, they should conduct themselves according to the terms of the pre-nuptial agreement.

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