
SPOUSAL RIGHTS ON THE CLAIM OF FUTURE ASSETS AND FINANCIAL RESOURCES AS MATRIMONIAL ASSETS: A COMPARATIVE STUDY ON MALAYSIA'S LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976, AUSTRALIA'S FAMILY LAW ACT 1975 AND NEW ZEALAND'S PROPERTY RELATIONSHIP ACT 1976.

ⁱRavindran Nadarajan & ⁱⁱSaslina Kamaruddin

ⁱLecturer at Faculty of Business and Finance, Universiti Tunku Abdul Rahman (UTAR), Kampar; Postgraduate students at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM)

ⁱⁱSenior Lecturer at Fakulti Pengurusan dan Ekonomi, Universiti Pendidikan Sultan Idris (UPSI),

*(Corresponding author) email: ravindrann@utar.edu.my

ABSTRACT

Under section 76 of the Law Reform (Marriage and Divorce) Act 1976, the courts have limited classification of the matrimonial assets distributed upon divorce on the claim related to the existing assets acquired during the course of marriage such as matrimonial home, buildings, land, and etc. Nevertheless, with the economic status of the spouse, this traditional claim should be expanded to included claims on future assets such as EPF, Insurance, capital investments, and etc as distribution for matrimonial assets as some countries recognised on it. On this basis, most of the spouse has contributed either directly or indirect towards raising up the welfare of the family, thus upon divorce mostly non-acquired spouse left behind with nothing. Therefore, it is fair to include these future assets in distribution for matrimonial assets after a divorce. This paper intends to look into judicial decision approaches applied in the foreign countries such as New Zealand and Australia in determining financial resource other than the existing assets to overcome the economic disparity between spouse in matrimonial assets claim cases. This also discusses the legal principle which the Malaysian civil court could apply when it comes to claims on economic disparity to consider the future assets to be distributed as matrimonial assets. Research methodology adopted in this paper are judicial and doctrinal analysis. Undoubtedly, this would prevent the disadvantages economic disparity between spouse upon divorce by taking into consideration other elements such as future assets to be distributed as matrimonial assets.

Keywords: *Matrimonial Property, Economic disparity, Financial resource, Future assets, Spousal rights.*

1.0 Introduction

Section 76 of the Law Reform (Marriage and Divorce) Act 1976 (therein referred as “LRDMA”) is defined on the property which was acquired by either spouse during the course of marriage would be distributed as matrimonial property. A common question would arise is that who will receive what property would be analysed by the court, based on the acquisition and contribution of the property which was subject for distribution as matrimonial property. However, when the terms of “matrimonial property” is identified, it generally refers to the assets which was acquired by either spouse during the marriage and mostly claimed property was on the existing assets such as house, land, car, and etc. Thus, this paper will analyse and discuss on terms of “future assets” whether it comes under the definition for the property which subject for distribution for matrimonial property under Section 76 of LRDMA. The future assets which is identified as assets that have enhanced earning value such as Employees Provident Funds (EPF), Insurance, Employment benefit, pension, and mutual trust would be transformed as a property which subject for distribution as matrimonial property. The rationale of this studies is that, there are many journals have been analyzed on the applicability of Section 76 of LRDMA which habitually referred to the existing property, thus our analyses would further investigate the approaches adopted by other countries on future assets as matrimonial property which they defined it as “financial resources” distributed as matrimonial property. That means that, any property which create a financial value led to have definition as property which subject for matrimonial property.

2.0 Judiciary approaches on the spousal rights on the claim of future assets and financial resources as matrimonial assets

The courts always emphasised its objective towards identifying the purpose of the provision with good command of judgment. The broader conception of the terms in the view of judiciary approaches holds that the judges should look primarily consensus on the objective of the overall purpose of matrimonial property to give equal distribution unless it is proven vice versa on the elements of contribution made by another spouse on the acquisition of the property then the court will consider other than equal distribution. Thus, the court should construe its meaning by interpreted the definition for betterment in the future.

2.1 New Zealand’s Property Relationship Act 1976

The definition on the terms of property stated in New Zealand’s Property Relationship Act 1976 (hereinafter referred as “PRA”) is broad and inclusive which has be defined in the case of *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, the Supreme Court have stated that each case reported has to identify the types of the property that subject for distribution as matrimonial property therefore it is suggested to construe the meaning of property as prescribed in PRA’s framework. Further, the Court concluded PRA includes broader interpretation than traditional concepts to define the terms of property to include the acquisition of spouse and also contribution elements towards the acquisition of the property by another spouse. Thus, the Supreme court to further clarify and identify the meaning on the property under PRA. This case give direction for the definition of the property which should be expand from the norm of the claim on the matrimonial property. The reason behind of it, that, that spouse who suffered economic disadvantage due to divorce would be compensated even the provision is silent on this matter. Nevertheless, the court’s interpreted the statutory provision under PRA as highlighted in the case *Z v Z (No 2)* [1997] NZFLR 241, it was held the definition of relationship property under section 8 of PRA was not amended within the 2001 law reform to include the disparity economic exist between spouse in the elements of the property which later considered for distribution as relationship property which the Court of Appeal concluded the higher income earning spouse should share property rather than compensation to the lower or non-earning spouse.

The reforms of 2001 on the Property Relationship Act have given new equality of result with regard to the financial advantages and disadvantages of the spouses rather than just formal equality such as 50/50 distribution of existing property (Chamberlain, 2018) This designated so that the distribution on enhanced earning capacity would consider on its substantially equal in terms of the overall contribution

and sacrifices of the parties and may not be formally equal in monetary terms. (Frantz, Carolyn J., and Hanoch Dagan, 2008) The section 15 of PRA itself drafted for the purpose to compensate another spouse those who indirectly or directly affected due to divorce and suffered financially due to lower income and living standards. (Atkin, Bill, 2008) There is question arise whether section 15 is need to be considered regarding for maintenance. For the court to make an order under section 15, the court should analyse on the disparity income and living standard exist between the spouse caused due to divorce which allows the court to make an award to compensate the weaker spouse suffered due to disparity income. (Parkinson, Patrick, 2008) *M v B* — BC200660794, New Zealand Court of Appeal, CA13/05, At para 127 stated that the analysis on the earning capacity on the income is not subject for distribution under maintenance, however it is limited to be distribute as a relationship property. Therefore, the court recognise the earning capacity as matrimonial property.

In additional to the view above, the court in *De Malmanche v De Malmanche* [2002] NZFLR 579, stressed the jurisdictional limits of section 15 of PRA must obviously be observed on the redress economic disparity by Courts at all levels, thus the section 1N(c) principle stipulates that there has to be financially advantage or disadvantage between spouse upon divorce where the court should follow whatever stated in the section stipulated. The case of *P v P* [2005] NZFLR 689 at p 693 held concerned on the interpretation and application of ss 15 of the Property (Relationships) Act 1976 and concluded that economic disparity exist between spouse upon divorce should be compensated. Further, the details of apportionment to be distributed under section 15(2) of PRA required analysis on the earning abilities of spouse and their duty towards taking care of their children.

Additional, *McGregor v McGregor* [2003] NZFLR 596, Clarkson J quoted favourably on the above cases, held that section 15 doesn't mentioned anything on halving as a distribution upon divorce to compensate the financial disadvantage spouse. The overall result was an award to Mrs X of \$240,000. This changed the parties' proportions of relationship property to 53.5 per cent to Mrs X and 46.5 per cent to Mr X. Given the cost to Mrs X and Mr X of their legal fees, and the expert valuer fees, there has to be a simpler, more transparent way of calculating disparity.¹ The Court of Appeal considered the purpose of section 15 of PRA in the case of *M v B* [2006] 3 NZLR 660, where there was a valuation on the husband's interest as partner in law firm whether there is super profit income derived by the husband from the date of separation which amount to relationship property subject for distribution under section 15 of the Property (Relationship) Act 1976 on economic disparity between spouse.² The Judge ordered five-year gap a payment of \$75,000 under section 15 of the Property (Relationships) Act 1976 (which provides for lump sum payments to redress economic disparity in certain circumstances), as well as spousal maintenance for the wife until 31 March 2006. Further William Young P highlighted the notion of a just division of the property and expressed that "a broad-brush assessment" to order compensation from the higher earner's share of the relationship property was necessary to achieve a just outcome in terms of the economic advantages and disadvantages of the parties.

The view above was supported in the case of *Jack v Jack* [2014] NZHC 1495, upholding *Carpenter v Carpenter* [2013] NZFC 8396, [2014] NZFLR 9, the High Court heralds a significant and welcome change in the application of section 15 of the Property (Relationships) Act 1976. The decision in this case upheld the Family Court's verdict awarding 70% of the relationship property to the wife for her contribution in 24 years marriage on helping her husband and taking care the children and home by sacrificed her own potential earning. In year 2017, the Supreme Court at his first time had considered section 15 in its decision in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507, Mr Williams has partnership in a legal firm and Ms Scott become professional accountant and lawyer. From the beginning of the couple's first child Ms Scott had reduced her work hours. She had completed stopped work after second child's born, later who required significant medical care for the first eight years of his life. Meanwhile, Ms Scott helped do the accounts for Mr Williams' firm on a part-time basis. The

Supreme Court of New Zealand held Mrs Scott was granted \$520,000 under section 15 of the Property (Relationships) Act 1976 as followed on the disparity between the spouses.

Thus, in New Zealand under the section 15 of the Property (Relationships) Act 1976, the court will make an order for fair and equitable distribution on the economic disparity suffered by spouse upon divorce or separation in the names of matrimonial property so that no one is left behind when the matrimonial property is distributed. (Henaghan & Ballantyne, 2015).

2.2 The Australia's Family Law Act 1975

The Australia's Family Court judge, has defined the terms on property in many cases as for now, this case of *Kennon v Spry* (2008) 238 CLR 366; [2008] FLC 93-388; [2008] HCA 56 the High Court highlights the better scope on definition of property should be examined under section 79 of the Family Law Act 1975 (thereinafter referred as "FLA") as it is the provision for the distribution of matrimonial property. Additional to that opined, the court also emphasised an order for distribution of matrimonial property should also consider on the duration of marriage as pursuant to section 79 of FLA. The property which acquired by either spouse should be identified in order to decide whether this property is subject for distribution as matrimonial property or not. In the case of *Barker v Barker* (2007) 36 FamLR 650; [2007] Fam CA 13, the court has identified some steps need to be adhered in order to distribute matrimonial property such as the valuing the property acquired, assessing on the contribution or section 75(2) made by the parties, or any orders, enforcement and associated with the property. Each party's enhanced earning interest is to be identified at this stage which also said the spouse's economic status upon divorce should be analyses.

Further In *Blake v Blake* [2007] FamCA 10 the Full Court cited with approval the decision of Guest J in *Weatherall v Weatherall* (2006) 35 Fam LR 149; (2006) FLC 93-261 ; [2006] FamCA 269 where Guest J provided a comprehensive analysis of evidence relied in valuing the property acquired by either spouse. The valuing of the property is clearly will calculate the enhanced value of the property at the time the spouse bought compare to the market value at now. In the *Marriage of Hickey* (2003) 30 Fam LR 355, held in order to define, what property falls within the definition of property either acquired by either of them, the court will proceed directly to the application of the guidelines in listed under Part VIII of Property and distribution under matrimonial property.

In the *Marriage of Coghlan* (2005) 33 Fam LR 414, Bryant CJ, Finn and Coleman JJ, held that section 90MS(1) of FLA stated that property may include superannuation interests which differ from the meaning as required by section 4(1) of the FLA on the matrimonial property settlement under section 79 or section 90MS(1). In the case of *Stephens v Stephens* [2009] FamCAFC 240, May, Boland and O'Ryan JJ held that the access to confines on the enhanced earning has be defined to considered as a "financial resource" as stated under section 75(2)(b) of the FLA which allows for a claim for distribution as matrimonial property. In the earlier case reported, in the case of *Barker v Barker* (2007) 36 Fam LR 650; [2007] FamCA 13, held any property that subject for distribution for the financial resources should be considered by virtue of sections 79(4)(e) and 75(2) factors. In the case of *Spoke v Spoke* (No 2) [2009] FamCA 40 was the first case detail out the requirement stated under section 79 on the definition of the property acquired by either spouse during the course of marriage. In *Galvan v Galvan* [2015] FamCA 1092, the trust property held subject for distribution as matrimonial property if it accorded procedural fairness in accordance with section 90MZD of FLA.

In order to identify on the enhanced earning of the value under section 75(2), the court at first will look at the assets and considering the contribution to them. Thus, there are several growths on the court's discretion in order to provide just and equitable order before considering others factors as been set up by the court. (Lifshitz, 2012). In earlier years, the case of *Seiling & Seiling* stated that the provisions have to regulate the contribution made by the spouse on its acquisition of property and the needs of each spouse and of the children in term of financially. Later, Gibbs CJ in *Mallet v Mallet*, further commented on the approaches on the section 79 said the court will considered on the past contribution

made during the course of marriage and then all the requirement related to the spouse economic status would be examined on the financial resource of spouse.

The High Court highlighted on the correct interpretation of the FLA, in the case *Stanford v Stanford* (2012) 247 CLR 108, stated the intention of the court to granted for an order for just and equitable distribution but before doing so, the court would analysing further detail in 4 steps which are, first evolution of the property, second assessing the contribution made by the spouse, third economic status of the spouse based on the financial resource. When all these elements are satisfied then at fourth step the court would grant ‘just and equitable’ in all of the circumstances. In the case above, there was uncertain in the determining the property that subject for distribution as matrimonial property because the court didn’t follow the requirement of four steps. Some trial judges have expressed doubt as to whether the four-step process is valid. In the recent year, in order to give just and equitable consideration on the distribution on matrimonial property. In *Sheridan & Sheridan* [2015] FamCA 468 (19 June 2015), [266] with followed the section 79 and 75(2) of the FLA make an award to the wife 75 % of the remaining net assets.

In the case *Anson & Meek* [2017] FamCAFC 257, the marriage was last long for 5 years with no children. The property in disputed is the farming property which was purchased before marriage and the value increased to over \$1.7 million at the time of divorce.³ The trial court make an award as 80:20 for the husband and wife, without considering the contribution elements by the wife. Further, the case was appeal and the court ordered and award for 60% for the husband and 40% for the wife. This is followed by the majority judgment of Aldridge and Cleary JJ agreed with Murphy J taking into consideration on spouse post separation contribution and the husband enhanced earning on the value of farm which subject for matrimonial settlement. The financial resource is a tool that should be taken into consideration for fair and equitable distribution when parties upon divorce suffered economic disparities.

Thus, in Australia, the “financial resource” as stated under section 75(2)(b) of the Family Law Act 1975 which allows for a claim for distribution as matrimonial property to compensated the income disparity or economic disparity occurred between spouse upon divorce so that non-acquired spouse is not left behind when the matrimonial property is distributed.

2.3 The Malaysian’s Law Reform (Marriage and Divorce) Act 1976

In Malaysia, the courts have recognized the future assets or increase in value of land or property that acquired by either spouse during the duration of a marriage as an asset transformed into matrimonial property. This view was supported that the increase in a value on matrimonial home or an investment property could be transformed as matrimonial property. (Ibrahim, Norlia, and Zuhairah Ariff Abd Ghadas, 2014). Even though it is acceptable as property for distribution as matrimonial property, but the court doesn’t used any term specifically to identify or addresses on the increase in value or “enhanced earning capacity” of the property at the time deciding judgment on the property that should be distributed as matrimonial property. Nevertheless, the court is only considering the elements of acquisition and contribution of the spouse on the property acquired by either of them during the course of marriage. However, there are proof that those categories of property are defined as property subject for distribution as matrimonial property.

Thus there are different approaches with similar terms has been identified, and it was first supported by the Court of Appeal in *Ching Seng Woah v Lim Shook Lin* [1997] 1 CLJ 375, [1997] 1 MLJ 109 At P 119, CA. which recognised the element of earning capital of the

matrimonial home by opted that the house acquired by their joint efforts became the matrimonial home and this value of the house will be increase in future, therefore it can be consider so called this earning capacity of the property as matrimonial property subject for distribution upon divorce. The judge interpreted the earning capacity as capital appreciation which means capable of the property value to be increase on market value but it also qualified by the requirement that the increase must be confined to the duration of their marriage. In Cambridge Dictionary, the “capital appreciation” means an increase in the value of an asset such as property or an investment. In Investopedia, “capital appreciation” means a rise in an investment’s market price.

Further to the discussion above, the Court of Appeal’s ruling in the case *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17 at p 21 reluctant to consider the value of appreciation which also can defined as future assets because that terms is not stated under section 76 of the LRMDA. The judge in the said case stated that, if the parliament intended to include any terms, they should be done so. Thus, this open many questions, which allows the court to interprets the statutory provision by identifying the property which one should be subject for distribution as matrimonial property because the LRMDA is generally silent on types of property that subject for distribution as matrimonial property, even though the section 76 doesn’t define on the types of property which should be distributed as matrimonial property, as to the definition is, that any property which was acquired during the course of marriage or property obtained before marriage but substantial improved during the course of marriage, would be transformed into matrimonial property.

The rationale behind it is to safeguard the financial resource of the divorcee spouse upon divorce because there is scenario where a wife who has to give up her job or career in consideration of marriage life often gives up not only her income but also the chance to continue to build up her financial resources such as contribution for her EPF funds. Thus, to secure a wife’s financial resources by considering her economic status upon divorce would allow the court to granted husband EPF’s money to be distributed as matrimonial. This can be seen in the recent case of *Shilashshree Shirely Gomez v Raymond Shilendran A/L Simon* [2019] MLJU 1578, the high court granted wife claiming on 50% of former husband’s EPF money (at the date of this order) which was kept with EPF in accordance with section 53A of Employment Provident Fund Act 1991. Further the court said, EPF is matrimonial asset and half of the monies standing to the husband’s EPF account as the date of divorce, be paid to the wife when it is paid to the husband when he attains the age of withdrawal.

In another case, the court recognised public mutual fund as matrimonial property, as decided in the *Shilashshree Shirely Gomez v Raymond Shilendran a/l Simon* [2019] MLJU 1578, the high court held that the former wife claims and allowed 50% of RH’s share in the Public Mutual Fund (Public Far East Select Fund and Public Regular Saving Fund) to be transferred to PW and to be calculated up to the date of this order. Further, it is considered that former husband in the course of marriage, invested in those trust funds for the benefit of the family and they are matrimonial assets for all intent and purposes. *Yap Yen Piow V. Hee Wee Eng* [2017] 1 MLJ 17 stated that if insurance monies are already due to be withdrawn, then such assets may fall within the definition of matrimonial assets, it should as far as practicable be reserved partly for the welfare of minor children and/or hold in their interest if minor interest is involved.

Notwithstanding, there is no case reported for pension or benefit retirement employment transformed into matrimonial property before amended Section 76 of LRMDA, nevertheless there is case of EPF converted to pensions which was held in the case *Renuka A/P Muniandy @ Ramakrishnan V Jeeva A/L Kalia Perumal* [2017] 9 MLJ 473 at p 481 and maintenance post

retirement stated in the case of *Shudesh Kumar A/L Moti Ram V Kamlesh A/P Mangal Sain Kapoo* [2005] 5 MLJ 82 at p 85, however the court reluctant to discuss further on the terms it enhances the capacity of the fund accumulated during pensions and transformed into matrimonial property. However, with the new ruling after the amended Section 76 of LRMDA via Act A1546, where Hayatul Akmal Abdul Aziz, J stated in *Kamalahasan a/l Singaram v Portia Ceri Pooran* [2019] MLJU 1442, held that the former wife is entitled to 50% of the compulsory savings plan and/or retirement plan of former husband in HSBC Bank, Maybank and/or any other banks and/or governmental authorities in Singapore and Malaysia. It shall be duly apportioned and calculated from the date of the marriage to the date it is dissolved by this court. In this case, both spouses are working had been married for 6 years and they were raising two young children who are still minors. This ruling perhaps where the court is inclined towards equality of division by considering on the facts of the case and strictly within the formula as set out in section 76(1), (aa), (c) and (d) of LRMDA 1976. With refer to the case above, the court doesn't identify on the savings plan and/or retirement whether its termed in such way classify as future assets, however give it meaning under section 76 as property which subject for distribution as matrimonial property.

Thus, in Malaysia under section 76 of Law Reforms (Marriage and Divorce) Act 1976, clearly included any property acquired during the course of marriage would be consider as matrimonial property if the either spouse can prove on their acquisition or contribution elements, thus, indirectly includes the terms of “financial resource” or “future assets” which has been acknowledged in many cases as to the evidence of the cases discussed above with the different names such as EPF, Public mutual trust, Savings and retirements plan, insurance and etc which should be subject for distribution as matrimonial property. This will allow for a claim for distribution as matrimonial property to compensated the disparity occurred between spouse upon divorce so that no one is left behind when the matrimonial property is distributed because each spouse have contributed either to the acquisition of the property or to the welfare of the family or children (if any).

3.0 Conclusion

In the nutshell, New Zealand under the section 15 of the Property (Relationships) Act 1976, Australia under section 75(2)(b) of the Family Law Act 1975 and Malaysia under section 76 of Law Reforms (Marriage and Divorce) Act 1976 were allow for any claim on the financial resource or future assets as matrimonial property if, there is necessary for the court to do so upon cross examined on the evidence produced by both spouse's on the acquisition and contribution for any property acquired during the course of marriage or any property acquired by one spouse before marriage with substantial improved by other spouse during the course of marriage.

Thus, in Malaysia, the court directly or indirectly interpreted section 76 of Law Reforms (Marriage and Divorce) Act 1976 to include the terms of “financial resource” or “future assets” as a property defined under matrimonial property which has been identified in the cases discussed above with the different ideology or names used such as EPF, Public mutual trust, Savings and retirements plan, insurance and etc which should be subject for distribution as matrimonial property. This will allow the spousal rights to get fair and equitable matrimonial distribution on the economic disparity suffered by the spouses upon divorce. This will ensure the broader scope of matrimonial property being accomplished as a fair and just distribution

among the spouse so that the spouse who suffered disadvantage disparity would be compensated upon divorce for the welfare of herself and the children (if any). Spousal rights on the matrimonial property would be acknowledge regardless who owned or contributed to the said property during the course of marriage.

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