



## Research Article

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# Prenuptial Agreement: Legal Position in Malaysia

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### **Abstract**

*Prenuptial agreements are agreements made by couples before marriage concerning their assets. There are indeed many couples opting to prenuptial agreements before marriage. Prenuptial agreements can be very positive experience to some. A plethora of cases in England and other common law jurisdictions shows that prenuptial agreements are enforceable. However, there is a lacuna in law as regards to the position of prenuptial agreements in Malaysia. In other words, the legislation in Malaysia is still unclear on this issue. Being a pure legal study, the conducted research has been based on the qualitative design. Data and materials on prenuptial agreements are collected via library research method. These data and materials are then analysed by way of content and critical analysis methods. This article analyses the enforceability of prenuptial agreements by the common law in England, eventually comparing it to that of the Malaysian legal scenario. It then strives at identifying problems relating to such legal enforcement in Malaysia. This article eventually offers some legal suggestions on how to validate and enforce prenuptial agreements in Malaysia.*

**Keywords:** Prenuptial Agreement, Malaysia; Common Law

## **1. Introduction**

Many couples these days agreeing to prenups before getting hitched. These couples are regular couples which do not have considerable amount of wealth. These are couples who intends to put all

their budgetary cards on the table before their big day. A prenuptial agreement is a signed and notarized agreement that spells out how couples would handle their finances if a breakdown of marriage would occur. Having prenuptial agreements before marriage may appear or sound unromantic, but having this financial discussion prior to a wedding ceremony is very much a positive and matured process which experience could be very enriching and satisfying.

Despite the fact that prenups have been prominent in the West for a considerable length of time, in Malaysia, it has rather slow until recently (The Star, 2017). As the number of separations increase, it is important to be aware of the requirements of the same. One may argue that prenups are bad omen of love. This is because some may argue that a marriage starting on the platform of distrust is doomed for failure. On the other hand, others may foresee that having a prenuptial agreement prior to an actual marriage can preserve family ties and inheritance.

This paper discusses on the position of prenuptial agreement in Malaysia. The first part explains on the meaning of prenuptial agreement. The second part discusses on the position of prenuptial agreement in some selected jurisdiction of common law while the last part of the paper analyses the position of prenuptial agreement in Malaysia.

## **2. Research Methodology**

This article used a qualitative method which employed a pure legal research design. Therefore, the data for this article were collected through relevant legislations and cases. Apart from that, the method of content analysis was used to analyse the data from the statutes and cases (Ramalinggam Rajamanickam et al. 2015). Furthermore, the article made a comparative study with selected jurisdiction on the issue of prenuptial agreement. The collected data were critically analysed to discuss the issue of prenuptial agreement.

## **3. Definition of Prenuptial Agreement**

Prenuptial agreement is an agreement or a contract entered prior to a marriage. It is also known as antenuptial agreement or premarital agreement. The substance of the prenup may vary extensively but it normally incorporates arrangements for division of property, spouses and children maintenance, and guardianship of children in the event of a divorce.

The couples entered into an agreement before their marriage with regards to a matter or certain matters which may become an issue after the marriage is solemnised.

## **4. Literature Review for Prenuptial Agreement in Matrimonial Property**

When discussing about divorce among the non-Muslims, it always concerned with the division of matrimonial property. Mohd Norhusairi and Mohd Hafiz (2016) explained that jointly acquired property refers to properties acquired by joint effort of both Muslim spouses during the subsistence of their marriage whereas for non-Muslims, the properties or assets acquired by the spouses during their marriage either jointly or solely by either spouse will be referred to as matrimonial properties (Mohd Norhusairi Mat Hussin and Mohd Hafiz Jamaludin, 2016). The concept of matrimonial property involves the use and extent of how such property benefits the family. If the property does not involve the interest of use of other family members, the property is then excluded from the concept of matrimonial property.

Norliah Ibrahim and Nora Abdul Hak (2007) shared the history of matrimonial property among the Chinese and Indians in Malaya. According to them, no information is available in relation to the history of matrimonial property among the Chinese as if it was not recognised in the Chinese customs due to the lower position of women in their traditional society. Women were often considered as oppressed. They were denied the rights to inherit property and relied solely on their husbands. Similarly, Indian women after marriage, had to devote their lives to their husbands. They depended on their husbands in terms of social and economic aspects. Thus, when a divorce occurred, the issue of matrimonial properties was irrelevant as whatever was acquired by the husband would remain as his sole right (Norliah Ibrahim dan Nora Abdul Hak, 2007). However, the

rights of the Chinese and Indian women to matrimonial property in Malaya and subsequently Malaysia, have been recognised by the law beginning with Married Women Ordinance 1957 and followed by the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976). Based on the decided cases by the courts such as *Chin Shak Len v. Lin Fah* [1962] MLJ 418, and *The Estate of T.M.R.M Vengadasalam Chettiar (Deceased)* [1940] MLJ 55, Chinese and Indian women were also entitled, in the eyes of the law, to matrimonial property.

The relevant provisions of the law on the division of matrimonial property under the LRA 1976 is Section 76. The explanation to Section 76 can be seen in many cases decided by the courts, among others in the case of *Yap Yen Piow V. Hee Wee Eng* [2016] 1 LNS 1060. The Court of Appeal through Hamid Sultan bin Abu Backer, JCA, affirmed by Abdul Rahman bin Sebli and Prasad Sandosham Abraham, JCA, clarified that the matrimonial property pursuant to Section 76 LRA 1976 are divided into two parts, namely matrimonial property as described by subsection 1 of Section 76 and also non-matrimonial property as categorised under Section 76(3) and/or (5) LRA 1976. Matrimonial property under Section 76(1) is property obtained through joint effort of both spouses. The division of matrimonial property should be made by the court on the basis of the rights of each of the party. Meanwhile, non-matrimonial property under Section 76(3) is the property acquired as a result of the sole effort of either spouse. Unlike matrimonial property, the division of non-matrimonial property is not based on rights, but the court may still be able to order its division in certain circumstances. There is another category of property under matrimonial property that is the property acquired prior to the marriage, but has been upgraded or enhanced during the marriage by either of the spouses or even both of them as stipulated under Section 76 (5) of the Act. In this case, the Court decided that for the first and second categories, the interests of the minors should be the primary consideration in the division of the property, but not for the third category.

In the case of *Yap Yen Piow* (supra), the Court decided that, among others, despite being registered under both spouses' name, the house in Australia cannot be divided equally between them as ordered by the Sessions Court Judge. This is because that house did not amount to matrimonial property as both spouses had never intended to make the house as such. In fact, both spouses expressed their intention to hand over the house to their daughter. Therefore, the High Court ordered both spouses to keep the property as a trust for their daughter. Besides, it was also decided that the monies in the husband's Employees Provident Fund (EPF) account did not fall under the matrimonial properties that could be divided as it fell short of being categorised as property prescribed by Section 76 (3).

The interest of minors on the issue of division of the matrimonial property has been mentioned by Zuhairah Ariff Abd Ghadas and Norlia Ibrahim (2011) in their article entitled *Best Interest of Children in the Division of Family Business as Matrimonial Property: The Civil and Shariah Courts' Perspectives in Malaysia* (Zuhairah Ariff Abd Ghadas and Norlia Ibrahim, 2011). In this article, it is stated that the interest of minors should also be considered irrespective of whether the properties were acquired solely or jointly. Apart from the couple themselves, the children will also be directly affected and may also experience emotional trauma due to the divorce of their parents. Therefore, to lessen the impact of the divorce on the children, the law places an emphasis on the rights and interest of children. Normally, parents who are granted custody will be given the right to the matrimonial house to ensure that their children can continue their lives with minimal impact on their daily routine after the divorce. In addition, the court may also make appropriate orders such as temporarily suspending the sale of the house until the children reached the age of majority. This situation can be seen in the case of *Lim Tiang Hock Vincent v Lee Siew Kim Virginia* [1991] 1 MLJ 274 (CA). In this case, in ensuring the interests of minors are reserved, the Court of Appeal had affirmed the decision of the trial judge in disallowing the matrimonial house to be sold until the youngest daughter of the couple, Charlene Lim Yu-Shan reaches adulthood. Hence, the father's application to sell their matrimonial house was dismissed.

Apart from minors, Norlia Ibrahim (2008) said that the court should also consider the couple's financial ability especially when it involves the matrimonial house acquired jointly by both parties, but was only registered under either party's name. The court will usually transfer the matrimonial house to one party only, normally the wife, subject to lump sum payment to the aggrieved party,

usually the husband, as compensation for the loss of his share of the house. Therefore, such orders are only suitable for couples having sufficient capital or high income to pay the other party. This order seems to force a party to buy the interests of the other so that he or she may be able to gain full interest of the house (Norliah Ibrahim, 2008). However, for those without the same advantage, a different mechanism and approach needs to be considered to dispense justice for all parties, not only for the couple, but also their children, in particular the minors.

Buvanish Karupiah (2015) in an article entitled *Matrimonial Property Division of Married Couples in Malaysia* was of the opinion that the Malaysian Civil Courts place an emphasis on financial contributions by the couples in distributing the matrimonial properties. In other words, this kind of approach gives more credit to the contributors of the asset as compared to other contributions to the marriage. There are also circumstances where an equal distribution of property in Malaysia is allowed when there is a clear evidence on the financial contribution towards the acquisition of the property, or at least if the property is registered under both spouses' name. If the property is obtained as a result of the sole effort of either one of the spouses, then equal distribution of the property cannot be made (Buvanish Karupiah, 2015).

Foo Yet Ngo (2014), in his working paper entitled *Division and Entitlement of Assets: Is the Wife Worse off in Malaysia?* (Foo Yet Ngo, 2014) compared Malaysian laws in the division of matrimonial property with the laws of other countries such as the United Kingdom and Singapore. Based on the decided cases, matrimonial properties include home, cash, cars, jewelries, liquor collection, saving in the Employees Provident Fund (EPF), insurance policy, retirement benefits, shares and even club memberships earned during a marriage. On the other hand, the Malaysian Court has arrived at two different decisions in interpreting the word "acquire" in so far as the inherited properties and gifts gained prior to the marriage from a third party during the marriage period are concerned. In the case of *Doris Howell v Pui Jin Kong & Anor* (1998) 1 LNS 27, the High Court of Kuching ruled that a gift or a will is included in the definition of matrimonial property under Section 76 because the word "acquire" does not prescribed any limit to the form of acquisition. Whereas in the case of *N(f) v C* (1997) 3 MLJ 855, the court stated that the word "acquire" refers to the acquisition of such party through his money, property or occupation. However, since the court is vested with such a broad jurisdiction, it may make due order as long as the court finds that it is fair and reasonable for all parties.

Shamsuddin Suhor (2011) is of the opinion that apart from the distinction of approach taken by these two courts in handling these two properties, the means and the usage of the properties acquired during the marriage would also distinguish both concepts of the properties. In civil law, any property acquired by a party and brought into a marriage which is then utilised by all family members and supports the well-being of the household is considered as matrimonial property. Similarly, the status of a property brought into the marriage and commonly used by the household would be treated as matrimonial property despite its source of acquisition, be it a gift, grant, inheritance, etc. In addition, the income or savings, earned or received during the marriage would also amount to matrimonial properties claimable by the parties to the marriage in the event of a divorce between them. This situation is quite in contrast with the jointly acquired properties for Muslims as the concept of jointly acquired property for Muslims covers properties acquired during the marriage term which has the element of contribution of the parties in acquiring the property. Be that as it may, any property inherited by a party from his or her family shall not be considered as a jointly acquired property, despite being used commonly by the household.

In comparison with neighboring country, Singapore, reference was made to a book, *Family and Juvenile Court Practice* written by a joint effort of Singaporean judicial officers and academicians. In Singapore, pursuant to Section 112 (1) of the Women's Charter, the court was vested with the power to order a distribution of matrimonial properties. Unlike the LRA 1976, Section 112 (10) of the Women's Charter provides a clear definition of "matrimonial asset" as:

*"(a) any asset acquired before the marriage by one party or both parties to the marriage-*  
*i. ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter or transportation or for household, education, recreational, social or aesthetic purpose; or*

ii. which has been substantially improved during the marriage by the other party or by both parties to the marriage; and  
(b) any other asset of any nature acquired during the marriage by one party or both parties to the marriage, but does not include any asset (not being matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during the marriage by the other party or by both parties to the marriage (Khoo Oon Soo and et al, 2008).

In Singapore, the power to distribute the properties is at the discretion of the court. For instance, in the case of *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] SGCA 19, the court refused to exercise its discretion under Section 112 to order the division of a house located in Malvern Springs. Although originally both spouses intended to make and have the house registered under both spouses' name, later on, the wife cancelled the purchase of the house since the husband disagreed with the conditions set forth by his wife leading to disagreement in their marriage. Initially, the wife did not include the Malvern Springs' home as a property to be divided after the divorce. However, during the divorce proceedings, the wife found out that the husband went on with the purchase of the Malvern Springs' house and the price had soared. Therefore, the wife demanded her shares of the rights over the house in Malvern Springs. In this case, the Court of Appeal decided not to exercise its discretion to distribute the Malvern Springs' house because the husband had resumed with the purchase of the house by paying 10% of the deposit as well as the second 10% as instalment using his own money after his wife refused to proceed with the purchase of the house. As such, the wife was not entitled to the Malvern Springs' house.

Debbie Ong (2015) stated that the Singapore courts have arrived at different opinions on the issue of whether a gift during marriage may be considered as matrimonial property based on decided cases in Singapore (Debbie Ong, 2015). For example, in the case of *Wan Lai Cheng v Quek Seow Kee*, [2011] 2 SLR 814 the court decided that a gift from the husband or wife is not a matrimonial asset and must be taken out from the matrimonial assets list for the purpose of distributing matrimonial properties. Whereas, in two other cases, i.e. *Tan Cheng Guan v Tan Hwee Lee* [2011] 4 SLR 1148 and *Sigrid Else Roger Marthe Wauters v Lieven Corneel Leo Raymond Van Den Brande* [2011] SGHC 237 Justice Choo Han Teck decided otherwise. Debbie Ong concluded that any gift during the marriage must be seen from a wider context. The first step to be taken is to include the gift given during the marriage into the list of matrimonial properties. The next step is to determine how to distribute the gift fairly and equally. If it was found that the gift falls within the category under Section 112(e) of the Women's Charter, i.e. the existence of an agreement between the parties that the property is a gift from one party to the other, then the court may enforce the agreement. It, however, should not be a restriction to the court to make any other order as it thinks fair and just since it is vested with such powers.

After examining some of the textbooks and articles from Malaysia, most of them are more focused on how matrimonial properties may be divided based on the decided cases by the courts as compared to the issues and problems that arise after the order is pronounced by the court, especially in terms of its enforcement and its solutions. An example can be seen in a book entitled *Malaysian Law on Division of Matrimonial Assets* by Wee Wui Kiat (2014). The author of this book discussed at length about the division of matrimonial assets including among Muslims, non-Muslims as well as the natives of Sabah and Sarawak. Among the issues raised in this book is the need for the application of discovery under Orders 24 and 25 of the Marriage and Divorce Proceedings Rules 1980 to ascertain the matrimonial properties that are going to be claimed. Besides that, full and frank disclosures by the parties are required in order to prevent the court from invoking an adverse inference against the parties. In this book, Wee Wui Kiat also discusses on the issue of matrimonial properties being disposed when the proceeding of disbursement is still ongoing for the purpose of evading distribution. On this issue, based on the decided cases, Wee Wui Kiat concluded that the property should also be taken into consideration and still be subjected to division. In fact, the court may also pass an order to set aside the disposal of such properties and issue an injunction so that the party disposing the same would not be able to proceed with his or her intention. Of the 540 pages, only a few pages in this book deal with the issue of execution of the order after the judgment of the court is obtained (Wee Wui Kiat, 2014). Among them are committal

proceedings. Order 45 Rule 7 (4) of the Rules of Court 2012 allows the committal proceeding to be initiated against any person deliberately defaulting the orders in the *Decree Nisi*. Nevertheless, if the parties choose to commence an action pursuant to Order 45 rule 7 (4) of the Rules of Court 2012, they must ensure that the *Decree Nisi* contains the "Penal Indorsement" failing which, the committal proceeding would not be allowed to commence. The Majority of the *Decree Nisi* granted by the court are granted on mutual agreement between the parties and often lack such indorsement. Therefore, those applying for committal proceedings will be aggrieved by the requirement of Penal Indorsement. Similarly, there is the absence of a consequential or specific order by the court such as a specific period of time for the sale of the matrimonial property in order to crystallise the property into cash flows to be distributed among the parties. One party may circumvent the execution of the order by manipulating this situation on the grounds that there is no order by the court for him or her to sell the property or the word "immediately" to sell the property indefinitely will give that party an opportunity to escape from being cited for contempt. Hence, based on the decision in the case of *Tan Bee Ang v Siew Chee Choong* [2011] 1 LNS 121 and Orders 1A and 92 Rules 4 of the Rules of Court 2010, Wee Wui Kiat suggested for the aggrieved party to apply to the court to amend the order duly granted earlier to include the consequential terms and specific orders in so far as it relates to its execution so that any injustice can be avoided (Wee Wui Kiat, 2014).

Besides that, other issues raised in another book entitled *Family Law in Malaysia* by Kamala M. G. Pillai (2009) were relate to the monies kept in the EPF, properties obtained after the divorce and the issue of being a trustee of the properties for minors at the time the distribution of the properties is being made (Kamala M. G. Pillai, 2009). However, there is no discussion on the problems faced by parties in executing court orders related to matrimonial properties in this book.

In the context of agreement prior to marriage which is known as prenuptial agreement, there is no significant literatures discussing this issue in Malaysia. Therefore, it is high time to discuss the issue of prenuptial agreement from the perspective of law especially in Malaysia.

## 5. The Position of Prenuptial Agreements in Selected Common Law Jurisdictions

### 5.1 England

The England Courts have generally held that premarital agreement is unenforceable on the basis of public policy. England enacted the Matrimonial Causes Act 1973 which was intended to govern matrimonial proceedings, maintenance agreements, and divorce. Prenups are said to violate Section 25 (1) of the Act which provides for the powers of the court. Further prenups are deemed to be void as it restricts the right for an order from the court in relation to financial arrangements as provided under Section 34 (1) of the Act.

However, as time goes by, there are cases that have raised up the issue of prenuptial agreements in UK. The first reported case is *F v F* [1995] 2 F.L.R 45 where the court gave no weight to the agreement, expounding that "in this jurisdiction they must be of limited significance." In *M v M* (2002) 1 FLR 654, the court stated that:

*... the Court should look at any such agreement and decide in the particular circumstances what weigh should, in justice, be attached to it ... The public policy objection to such agreements, namely that they tend to diminish the importance of the marriage contract, seem to me to be less importance now that divorce is so commonplace.*

Further, the court stated that:

*The marriage was fairly short. The prenuptial agreement in my view is relevant as tending to guide the court to a more modest award than might have been made without it. I reject outright the suggestion that it should dictate the wife entitlement; but I bear it in mind nevertheless.*

In *K v K* (2003) 1 FLR 120, the court held a more decisive decision, 120,000 pounds was granted to the wife as per the Prenuptial Agreement, regardless the husband acquired assets

amounting to at least 25 million pounds. The court stated that:

*Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the agreement? My answer is a no; not insofar as capital for the wife is concerned. On the contrary, I think that injustice would be done to the husband if I ignored the agreement one of the circumstances of the case to be considered under S.25 of the English Matrimonial Causes Act 1973? Does the entry into this agreement constitute conduct which it would be inequitable to disregard under s.25 (2)(g)? Yes.*

The court in *K v K* also stated that when considering the binding effect of the agreement, the following pre-requisite have to be met: (a) whether the parties were properly advised as to its terms; (b) whether the parties signed the agreement willingly, without pressure; (c) whether there was full disclosure regarding assets; (d) whether either party exploited his or her dominant financial position; (e) the length of the marriage; (f) the contributions of a party to the marriage to the other party's wealth; and (g) whether there were unforeseen circumstances arising from the agreement which would make it unjust to hold the parties to it.

In *Crossley v Crossley* [2008] 1 FCR 323, the court affirms that prenups are contracts entered between two individuals intending to marry which look to pre-decide their monetary liabilities and obligations. In this case, the Court of Appeal upheld the prenuptial agreement between Susan Crossley and Stuart Crossley. The court stated:

*If ever there is to be a paradigm case in which the court will look to the prenuptial as not simply one of the peripheral factors but a factor of magnetic importance ... this is just a case.*

The case of *Radmacher v Granation* [2010] UKSC 42 held that courts are not bound by prenups. Parties cannot, via an agreement defeat the jurisdiction of the court to decide division of their finances and/or properties. However, the Court expounded that:

*The court should give effect to the nuptial agreement if freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold parties to their agreement.*

In the latter case of *BN v MA* [2013] EWHC 4250, the court expounded that it is not inherently unfair to enter into an agreement to protect non-matrimonial assets prior to the marriage." In *WW v HW* [2015] EWHC 1844, the court gave substantial weight to a prenup. The husband claimed against his significant other after the breakdown of their marriage despite having agreed to prenup not to proceed claims against her. His other half had acquired a wealth of amounting to 27 million pounds aforesaid the marriage. After getting some legal advice, they have entered into a prenup. The prenup states that if they decide to get a divorce, neither would guarantee against the other. The husband had exaggerated his earnings and assets and wrongly claimed he was financially self-sufficient when the prenup was signed, possibility to bolster his wife. The agreement was given significant weight. She knew the prenup was a prerequisite to her marrying him. The former matrimonial house was worth 4.35 million pounds. The parties' contributions were 86 % and 14% to the wife and husband respectively. The court granted/proportionate 3.75 million pounds for the wife and 0.6 million pounds for the husband. Further, a fund of 1.7 million pounds for housing was granted to him.

Based on the later cases, it can be said that the English courts have been receptive towards prenuptial agreement.

## 5.2 Ireland

Prenuptial agreement is unenforceable in Ireland for the reasons of public policy. The Constitution of Ireland exhibits how the country esteems families. The Constitution provides fundamental rights, including the family.

This can be seen in Article 41 of the Constitution. The state ensures the families especially establishment of marriage and only grants a divorce in circumstances where there is no way of

compromise and as recommended by the law.

### 5.3 Australia

An amendment to the Family Law Act on December 2000 formed binding financial agreements which can be agreements entered into before, amid and after marriage. Before that time, prenups were not enforceable. The intention of the amendment is to enable individuals to enter into agreements which were contractually binding upon them and which defeated the jurisdiction of the family courts over any financial related question. The reformation of the law to enable couples to enter binding prenups was a progressive step. To be binding, there must be consent and also the terms that are agreed upon. The lawyer in the current circumstances only has to ensure that the effect of the agreement has been explained to the respective parties (Denis Farrar, 2013).

Another basic requirement is that the agreement must state the section of the Family Law Act that the agreement is made under. In *Black v Black* (2008) 38 FamLR 503, the Family Law Court stated that there is a strict test to be adhered for financial agreements to be binding. In that case, failure to refer to the correct section was fatal to the agreement. In the case of *Hault* (2011) FamCA 1023, Murphy J held that a party is entitled to go behind the Statement of Independence Advice of the solicitor if they were not given advice of the effect of the agreement on the rights of the parties. His honour held that he could not be satisfied that the solicitor had provided the advice which she certified in the Statement. The solicitor had not produced file notes or correspondences. In this case, the prenuptial agreement had met all the requirements but nonetheless the agreement was set aside.

In *Fevia & Carmel-Fevia* (2009) FamCA 816, court set aside a prenuptial agreement between a man who he found at the time of marriage of a very considerable wealth and a woman who was of modest means. The reason for the agreement being set aside was that after his fiancé had signed the prenuptial agreement, his solicitor has added a schedule illustrating his assets and liabilities to which later their client signed it. As a result, it was held that she had not signed the same documents to which her husband had signed to. The parties subsequently married but separated 7 years later. Following the agreement being set aside, the wife had received \$20,000,000 more than she would receive had the prenuptial agreement been binding.

### 5.4 Singapore

In *Kwong Sin Hwa v Lau Yee Yen* [1993] 1 SLR (R) 90, the Singapore Court of Appeal held that, "an agreement made between spouses, or between intended spouses, is not inherently wrong or against public policy."

In the case of *TQ v TR* [2009] SGCA, the Court of Appeal of Singapore has recognised and enforced prenuptial agreement. Based on the facts, the prenuptial agreement was made 16 years ago and was made before they were in Singapore. The factors and principles that were taken into account by the court were general principles of formation of a contract. However, in Singapore the court has complete power to divide assets in a just and equitable manner as provided under Section 112 of the Woman's Charter which basically means the court is not bound to follow the prenuptial agreement and the court has full means and discretion to decide on the enforceability of prenuptial agreement (Debbie Ong, 2012).

## 6. Position on Prenuptial Agreements in Malaysia

Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) governs marriage and divorce in Malaysia. The Act accommodates the importation of English principles. There is a misconception that a prenuptial agreement is not enforceable in Malaysia. However, the courts may consider prenuptial agreements when determining the distribution of matrimonial assets, so long as the agreement is not contrary to anything in the LRA 1976. Provided that the terms and conditions are fairly and properly agreed to and do not in any way contradict the LRA 1976, there is no reason why the court cannot value and determine the prenup in deciding the division of the matrimonial assets

on divorce.

To date, there is no decision on the issue of validity of prenuptial agreements. In the absence of case law or decision, English law is looked for guidance. Unlike other countries, Malaysia takes a different approach to govern marriage and divorce by following English law directly (John Sill, 2014). Section 47 of the LRA states as follows:

*Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which The High of Justice in England acts and gives matrimonial proceedings.*

Although the LRA does not say prenups, the outcome of divorce proceedings might be fundamentally the same as the ones in England. The cases like Crossley could be persuasive. Ultimately, the validity of the prenup is still up to the courts. The inherent jurisdiction held by our courts is to see justice taking place. The court can examine various factors such as the bargaining position of the respective spouses and their conduct when deciding on a prenup. Principles laid down concerning postnuptial agreements could be used as a tool/benchmark in determining the prenups.

Further, courts in Malaysian have the power to order for division of property. Section 76(1) of the LRA provides the courts power to decide on division of assets/properties acquired amid the marriage by their joint endeavors and efforts, or to order the sale of such assets to which the proceeds shall be shared by the parties accordingly. Section 76(3) provides that the courts may order the division of any assets acquired during marriage. Section 56 of the LRA allows parties of a divorce to apply to the court to refer prenups drawn between them. The provision allows agreements to be referred to the court for consideration in determining matrimonial division of properties and assets.

## 7. Conclusion

It is found that couples may enter into prenuptial agreement before they marry. It is often used to formalise property division after the breakdown of marriage whether before or after divorce. Often times, prenuptial agreement deals with property that does not exist yet. Prenuptial agreements serve a valuable purpose. They enable the parties to preserve assets they bring into the relationship.

English courts and few other common law jurisdictions have admitted prenuptial agreement. Although English cases may be persuasive, however there are yet any case laws in Malaysia that have decided on the enforceability and validity of prenuptial agreement. Courts in Malaysia may, however, use prenups as a factor in determining liabilities and assets after the breakdown of the marriage. The weightage and validity of the prenuptial agreement to be decided by the courts.

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