

For discussion
on 27 January 2003

**Paper for the Panel on
Administration of Justice and Legal Services**

**Pilot Scheme for the Reform of Ancillary
Relief Procedures in Matrimonial Proceedings**

Background

The existing ancillary relief¹ procedures in matrimonial proceedings in Hong Kong have been in operation since 1972. Hong Kong has since been transformed dramatically. Along with a growth in affluence, traditional views of marriage have changed. Divorce no longer carries the same stigma. The result has been an almost exponential expansion in the number of divorce cases filed each year and with it increasingly complex litigation concerning the equitable distribution of family assets.

2. The statistics on divorce cases filed with the Family Court Registry over the past three years are as follows :

	2000	2001	2002
Defended divorce	101	93	33
Undefended divorce	13,962	15,287	16,806
Total	14,063	15,380	16,839

¹ The term ‘ancillary relief’ is defined in rule 2 of the Matrimonial Causes Rules, Chapter 179 and means-

- (a) an avoidance of disposition order,
- (b) a lump sum order,
- (c) an order for maintenance pending suit,
- (d) a periodical payments order,
- (e) a secured periodical payments order,
- (f) a settlement of property order,
- (g) a transfer of property order,
- (h) a variation of settlement order, or
- (i) a variation order.

3. By way of introduction, the standard procedures for divorce, including those for claiming custody and/or access to children of the marriage as well as ancillary relief, are broadly outlined below and illustrated in the flowcharts at Annex I.

Procedures for divorce

4. The petitioner starts divorce proceedings by filing a Petition for divorce in the Family Court Registry. The Petition will then be served on the respondent. The respondent has to file an Acknowledgement of Service to the Petition within 8 days of service of the Petition indicating whether he/she wishes to

- (a) defend the divorce;
- (b) claim for custody or access;
- (c) claim for ancillary relief; or
- (d) respond to any claim for custody or ancillary relief.

For undefended divorce

5. If the respondent decides not to defend the divorce, the petitioner can apply for directions for trial and file an Affirmation in support of the petition. At a divorce hearing which normally takes place some 3 to 4 months after the application for directions for trial, the court will consider the petitioner's Affirmation (in the absence of the parties). If it is satisfied that the petitioner has sufficient grounds to seek a divorce, it will pronounce a Decree Nisi (which is not a final Decree) in open court.

For defended divorce

6. If the respondent decides to defend the divorce, he/she must file an Answer within 21 days of returning the Acknowledgement of Service. The petitioner may file a Reply to the Answer within 14 days of receiving the Answer. The petitioner then applies for directions for trial.

7. The divorce hearing normally scheduled to take place 3 to 4 months thereafter is conducted in open court. Both parties have to attend the hearing. The court will either grant a Decree Nisi dissolving the marriage or dismiss the petition.

For both undefended and defended divorces

8. If the petitioner and the respondent can agree on custody and/or ancillary relief in the suit, the court may approve the agreement and make an order in terms of the agreement on pronouncement of the Decree Nisi.

9. If the parties cannot agree on custody or ancillary relief, the issues will be adjourned to chambers for trial. For disputes on custody, the court will normally direct the Director of Social Welfare to prepare a report for the consideration of the court and the parties. The custody hearing is held 2 to 3 months after the Decree Nisi has been granted if custody is no longer contested, or 5 to 6 months after the granting of the Decree Nisi if custody is contested.

10. For disputes on ancillary relief, the parties have to file affirmations of means to disclose their respective financial position and needs. The hearing for ancillary relief is held after the custody hearing.

11. An application for the Decree Absolute may, at the earliest, be applied 6 weeks after the court has granted the Decree Nisi. The Decree Nisi will not be made Absolute by the court until it is satisfied with the arrangements for children of the marriage and there is agreement on ancillary relief.

Procedures for claiming custody

12. An application for custody or access can be made at any time after the Divorce Petition has been filed. If both parents agree on the arrangements and the court is satisfied that they are appropriate, the court may make an order in terms of the agreement on pronouncement of the Decree Nisi.

13. If the parents disagree on the arrangements, the court will give directions for further conduct of the proceedings related to custody (or access) at a chambers hearing after the pronouncement of the Decree Nisi. When the custody hearing will be held will hinge on how early an amicable compromise can be reached by the parents on the issue of custody.

Existing ancillary relief procedures

14. The ancillary relief proceedings commence when one party gives to the other a formal notice of intention to seek money or property orders from the court. If a petitioner seeks ancillary relief, the notice will invariably be contained in the body of the Divorce Petition. If a respondent seeks ancillary relief, the notice will be contained in the respondent's Answer to the Petition.

15. A respondent receiving a Notice of Application for Ancillary Relief is obliged to file an Affidavit of Means giving full particulars of property and income within 14 days. The petitioner should then reply to the Affidavit of Means within 14 days.

16. The petitioner or respondent may each raise a financial Questionnaire for further discovery on the other's Affidavit of Means. In addition, the parties may file further Affidavits commenting on the matters raised in the other's Affidavit.

17. The discovery of documents taking the form of Questionnaires, further Affidavits of Means and Replies thereto is usually a lengthy and sometimes complex process. Discovery can be extensive, often exceeding the realistic requirements of the case.

18. Directions are often given at the divorce hearing which, in the majority of cases, occurs before the discovery of documents. The court will order discovery of documents within a certain time. The court may also fix a date for the hearing for ancillary relief.

19. At the hearing, the court will investigate the allegations made in support of, and in answer to, the application and may order the attendance of any person for the purpose of being examined or cross-examined. The court may also order the discovery and production of any document or require further Affidavits. In a simple case, the judge may deliver judgment at the end of the hearing. In a complex case, the judge will reserve judgment for delivery on another day.

Problems with the existing ancillary relief procedures

20. It is observed that the present system allows too much leeway for litigants to turn ancillary relief proceedings into a battlefield for the exhaustion of their marital antagonisms. The adoption of an antagonistic approach by the parties very often prolongs the emotional trauma of divorce, resulting in the dissipation of family assets in costs.

21. The current ancillary relief procedures are generally considered :

- (a) too adversarial in nature;
- (b) not in any way designed to promote a culture of settlement;
- (c) too susceptible to obstructionist tactics, especially oppressive discovery proceedings;
- (d) too expensive, and
- (e) too complex in nature.

22. In particular, the current procedures do not make provision for a mandatory directions hearing. Delays in bringing ancillary relief proceedings to conclusion often mean that in the interim period the financial circumstances of the parties change. This requires the parties to file further Affidavits of Means to bring matters up to date.

23. Furthermore, the matter of settlement is left entirely to the discretion of the parties and their legal advisors. Settlements reached 'at the door of the court' on the morning of the ancillary relief hearing or during the course of the hearing itself are common. By then, all too often the legal costs incurred by the parties frustrate any substantive benefit which the parties receive from an otherwise equitable distribution of the matrimonial assets.

Overseas experience

24. In recent years, a number of common law jurisdictions have attempted to tackle similar problems by changing the nature of their ancillary relief proceedings. Over the past 15 years, Australia and New Zealand have instituted far-reaching reforms.

25. In England and Wales, the need for reform was recognized as far back as 1992 when the Family Law Bar Association made proposals for wide-ranging reforms. In that same year, an ad hoc group was set up under the chairmanship of Lord Justice Thorpe. The group called itself the Ancillary Relief Working Party. A new set of procedures (much of it drawn from Australasian models) was drafted. This culminated in 1996 in the decision of the Lord Chancellor to pilot the new procedures in a limited number of courts.

26. In order to evaluate the success of the English pilot scheme, the Lord Chancellor's Department briefed independent consultants, KPMG, to conduct an assessment. In their report, the consultants found that there was significant evidence that the overall length of cases was being reduced and there was some evidence that settlement rates were increasing. The report was generally very positive. In addition, there was wide-spread support for the pilot scheme from the legal profession. The pilot scheme not only simplified and rationalized proceedings, but promoted a 'culture of settlement' which took much of the sting out of the traditional adversarial process.

27. As a result, the Lord Chancellor directed that the scheme be extended to all the courts of England and Wales. This was implemented through the Family Proceedings (Amendment No. 2) Rules 1999 which came into force in June 2000.

The appointment of a Working Group to consider reform

28. In November 1999, being aware of developments in other jurisdictions, the Chief Justice appointed a Working Group to consider the reform of the ancillary relief procedures with a view to making them quicker, cheaper, less adversarial and more conducive to a culture of settlement.

29. The terms of reference of the Working Group was as follows :

“To consider whether there should be a reform of existing ancillary relief procedures and, if so –

(a) to recommend a new procedural framework for the resolution of ancillary relief disputes and, where custody

(and access) disputes are integral to a resolution of such disputes, their incorporation into that new procedural framework; and

- (b) if thought appropriate, to recommend a pilot scheme to test the effectiveness of any new procedural framework.”

30. The membership of the Working Group was as follows :

The Hon Mr Justice Hartmann (Chairman)

H H Judge Carlson

H H Judge Chan

The late Ms Pam Baker, Hong Kong Family Law Association

Ms Corinne Remedios, Hong Kong Bar Association

Miss Anita Yip, Hong Kong Bar Association

Ms Bebe Chu, The Law Society of Hong Kong

Mr Robin Egerton, The Law Society of Hong Kong

Representative from the Legal Aid Department

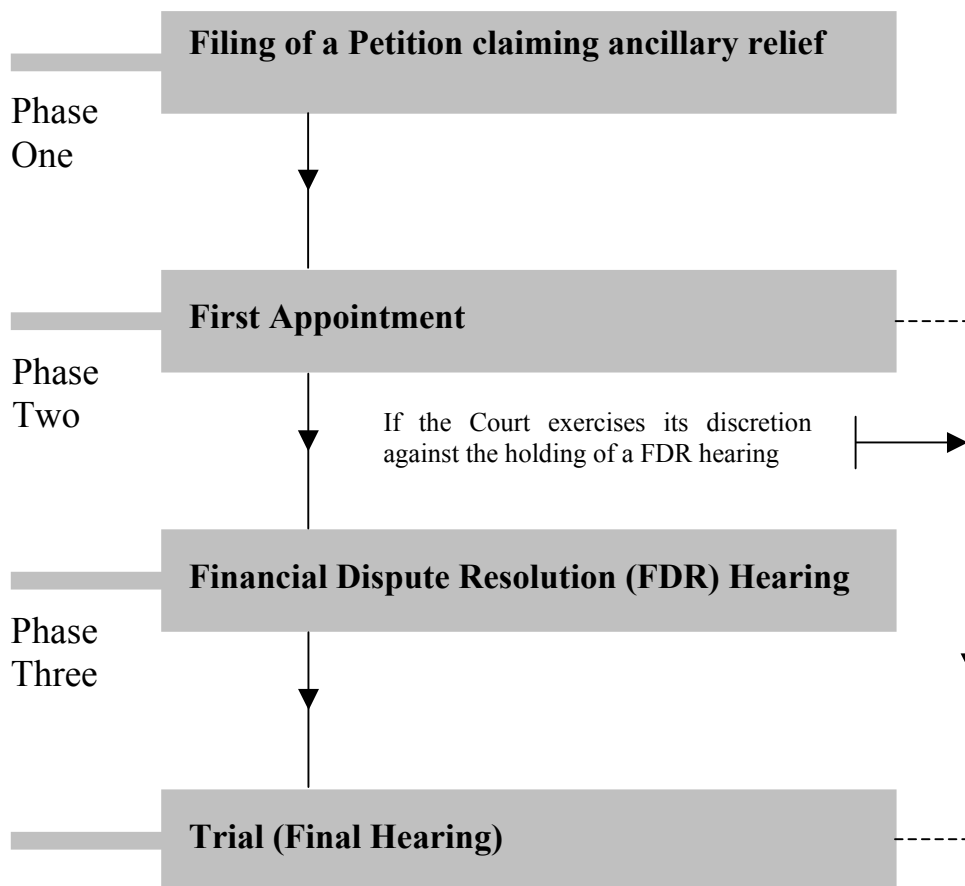
Representatives from the Judiciary Administration

31. Having regard to the overseas experience, the Working Group considered that the English pilot scheme presented the best model for Hong Kong. That pilot scheme had itself adopted a number of the salient features of the ancillary relief regimes introduced into Australia and New Zealand and therefore reflected a broad consensus of opinion in the common law world as to the best way forward.

32. The Working Group further agreed that the introduction of the reformed procedures into Hong Kong should be tested by a two-year pilot scheme. This recommendation has been approved by the Chief Justice.

The reformed ancillary relief procedures

33. Broadly speaking, the reformed ancillary relief procedures are divided into three phases, each phase concluding with a ‘milestone’ court hearing, as illustrated in the flowchart below (and also at Annex I).



Phase One

34. This phase commences with the filing of a Petition, Joint Application or Answer in which a claim for ancillary relief, other than only nominal maintenance, is contained and concludes with the holding of the First Appointment.

35. The date of the First Appointment will in the ordinary course of events be some 10 to 14 weeks ahead. A later date within such time frame may be given, if, for example, difficulties are anticipated in serving process on the other party.

36. At least 28 days before the date of the First Appointment, the parties must each file with the court and simultaneously exchange their respective Financial Statements. A failure to file the Statement on due date may be penalized in costs. Where one party only is in the position to file and exchange the Financial Statement, that party shall be at liberty

to file the Statement in a sealed envelope so that it cannot be read by the defaulting party until that party has filed his/her Statement and is in the position to exchange his/her Statement.

37. After the exchange of the Financial Statements, and at least 14 days before the hearing of the First Appointment, the parties are required to file a bundle of documents including a concise statement of the issues between the parties; a brief chronology relevant to the matters in issue; a questionnaire (if necessary); and a statement of costs incurred and to be incurred by the conclusion of the First Appointment.

38. The First Appointment will be presided over by the judge who will ‘manage’ the case. Issues will be defined and a broad range of directions will be given by the judge at the First Appointment to ensure that the matter proceeds to resolution economically and with a minimum of delay.

39. If the court at the First Appointment exercises its discretion against the holding of a Financial Dispute Resolution (FDR) hearing, then it will proceed directly to trial.

Phase two

40. This phase proceeds from the First Appointment and concludes with the FDR hearing.

41. All correspondence between the parties aimed at settlement will be considered at the FDR hearing. This hearing is presided over by the judge who has been given management of the case. The purpose of the FDR hearing is to explore possible grounds for settlement.

42. At the FDR hearing, the judge sits essentially in the role of a ‘facilitator’, assisting the parties to try to reach a settlement. The parties are obliged to provide a statement of their costs incurred to date. If a settlement is not obtained at the FDR hearing, the matter will be set down for trial before another judge.

Phase Three

43. This phase proceeds from the conclusion of the FDR hearing, if that has not been fully successful, and concludes with the trial.

44. At least 21 days before the trial, the applicant must file and serve an open proposal and the respondent must, within seven days of receipt of that open proposal, file his or her open proposal.

45. At the commencement of the trial, each party must submit a final statement of their costs, such costs being estimated to the end of the trial.

46. The trial will proceed in the usual manner before a judge other than the one who presided at the FDR hearing. As the issues will have been defined at the First Appointment and pleadings kept within realistic limits, trials are expected to be shorter.

Application of the pilot scheme

47. The pilot scheme will apply to all cases involving claims for ancillary relief, except for those in which nominal maintenance only is claimed. When the resolution of a custody dispute is integral to the resolution of an ancillary relief dispute, that custody dispute will also fall under the pilot scheme.

48. All claims for ancillary relief contained in Petitions or Joint Applications which are filed on or after the commencement date of the pilot scheme are subject to the pilot scheme. Claims contained in Petitions or Joint Applications filed prior to the commencement date of the pilot scheme will not be subject to the pilot scheme unless the parties agree and the court so orders. If so, and depending on the stage of that prior litigation, it may be necessary to seek directions from the court.

The aims of the pilot scheme

49. The aims of the pilot scheme are as follows :

- (a) To identify the issues which are important to the parties and to encourage them to reach settlement on those issues.
- (b) To reduce unnecessary costs, delay and personal distress for the parties.
- (c) To ensure that the parties are made aware at every stage of the proceedings of the costs incurred to date and, where

appropriate, the costs that may be incurred if the matter is to proceed.

- (d) To curb exhaustive and unnecessary disclosure of financial information, especially copious discovery (and copying) of documents so that the parties and the court can, at a reduced cost, focus on the matters of material relevance.

The main features of the pilot scheme

50. The main features of the pilot scheme include the following :

- (a) Substitution of Affidavits of Means with a disclosure of financial information in a standardized form (the “Financial Statement”). All parties must file a Financial Statement notwithstanding the level of their affluence.
- (b) Mandatory attendance of the parties at the First Appointment and the FDR hearing.
- (c) Once a date for the hearing of the First Appointment is given, a timetable is thereby created. Such timetable cannot be altered without the leave of the court.
- (d) The First Appointment will be presided over by the judge who will ‘manage’ the case. The issues must be defined and a broad range of directions will be given at the First Appointment to ensure that the matter proceeds to resolution economically and with a minimum of delay.
- (e) The FDR hearing will take place after the filing of all necessary documents on a date fixed at the First Appointment. This hearing is presided over by the judge who has been given management of the case. The purpose of the FDR hearing is to explore possible grounds for settlement. All settlement proposals that the parties have made to each other, together with any fresh proposal, will be tabled at the hearing to enable the parties to seek common ground for settlement. The judge, where appropriate, will attempt to facilitate settlement.

- (f) If a settlement is not obtained at the FDR hearing, the matter will be set down for trial before another judge.
- (g) A requirement for the parties or their legal representatives to submit at each hearing a statement of costs incurred by them to date. The purpose of this is to ensure that both the parties and the court are, at each milestone event, kept aware of the costs incurred to date and thereby their impact on the family assets.
- (h) Matters of custody are often integral to ancillary relief proceedings. At the First Appointment, the judge will have discretion to seek a way to best manage the collateral custody proceedings, perhaps by directing that custody issues be resolved first in a separate hearing, and the ancillary relief hearings will be consequent upon that resolution.

Synchronisation between the divorce proceedings and the pilot scheme

51. If the divorce is undefended, the proposed First Appointment under the pilot scheme which occurs before the divorce hearing will allow early and more effective case management of any dispute over ancillary relief.

52. If the divorce is defended, the proposed First Appointment which occurs before the divorce hearing will have the advantage of being a pre-trial review of the case generally. The FDR hearing will be adjourned pending the pronouncement of the Decree Nisi.

Matrimonial Causes (Amendment) Rules 2003

53. The pilot scheme concerns primarily matters of procedure at the Family Court. Its implementation will be governed by a Practice Direction to be issued by the Chief Justice. However, the effective working of the pilot scheme demands that certain existing Matrimonial Causes Rules (Cap. 179 sub. leg.) have to be set to one side.

54. For this purpose, it is proposed to amend the Matrimonial Causes Rules :

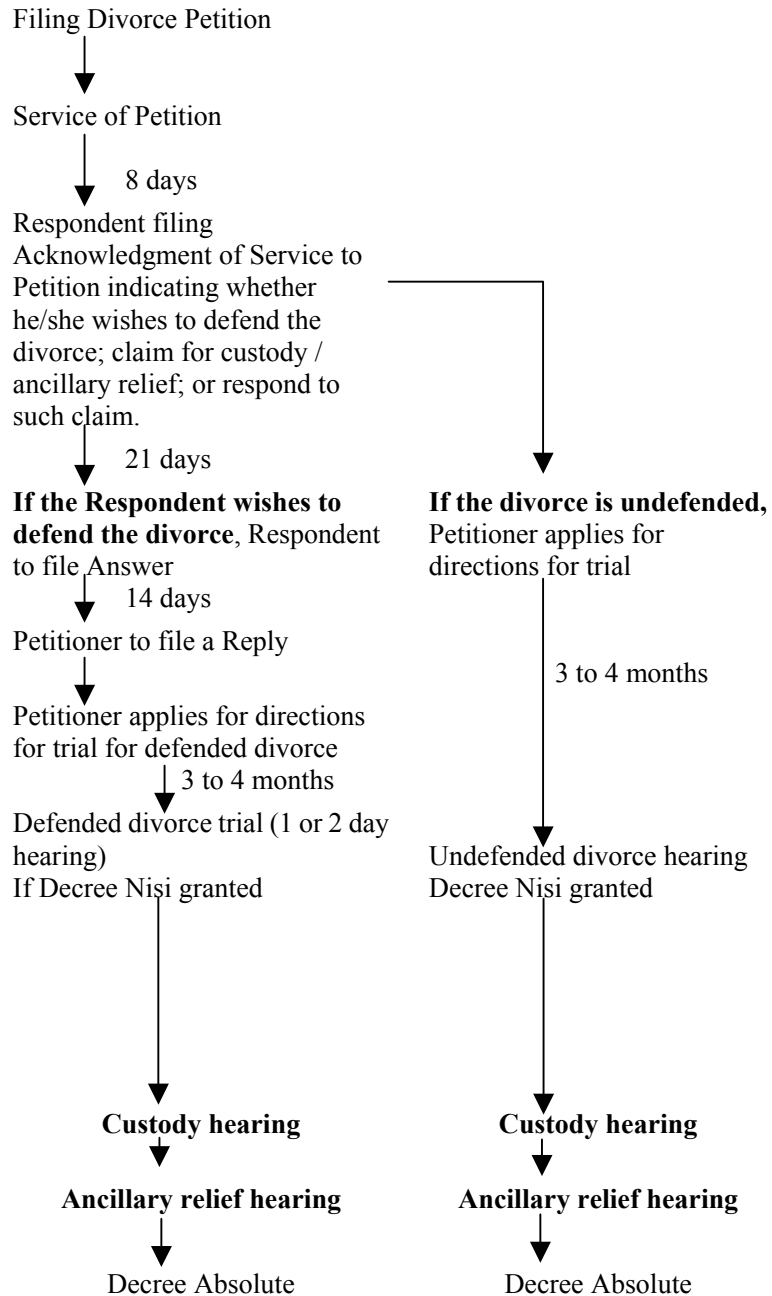
- (a) to disapply certain provisions under the principal Rules in respect of –
 - (i) an application by the respondent to a petition for divorce for the Family Court to consider his financial position after the divorce, where the petition is presented to the Family Court on or after the commencement of the amending Rules; and
 - (ii) an application for ancillary relief where the petition for divorce or joint application is presented to the Family Court on or after the commencement of the amending Rules; and
- (b) to prescribe new forms to be used in the proceedings of those applications.

55. A set of the latest draft of the Matrimonial Causes (Amendment) Rules 2003 to be made by the Chief Justice is at Annex II.

Judiciary Administration
January 2003

Broad Outline of Divorce Proceedings

DIVORCE



CHILDREN

Filing Application for custody (application can be filed any time after filing of Divorce Petition)

Granting of Decree Nisi

2 to 3 months (if custody is uncontested) / 5 to 6 months (if custody is contested)

Custody hearing

ANCILLARY RELIEF

Filing Notice of Application for Ancillary Relief

14 days

Respondent files Affidavit of Means

14 days

Petitioner files Affidavit of Means in reply

Questionnaire on the Affidavit of Means

Directions for fixing date for hearing

2 to 3 months (for a simple case)

Ancillary relief hearing

REFORMED ANCILLARY RELIEF

Filing Divorce Petition (including any claim for ancillary relief)

2½ to 3½ months

Exchange of Financial Statements (at least 28 days before First Appointment)

First Appointment

Financial Dispute Resolution hearing (can also deal with custody, if possible)

If unsuccessful

Ancillary relief hearing

DRAFT

Matrimonial Causes (Amendment) Rules 2003

(Made under section 54 of the Matrimonial Causes Ordinance (Cap. 179))

1. Commencement

These Rules shall come into operation on a day to be appointed by the Chief Justice by notice published in the Gazette.

2. Rule added

The Matrimonial Causes Rules (Cap. 179 sub. leg.) is amended by adding immediately after rule 84 -

"84A. Applications under rule 56B and applications for ancillary relief where petitions for divorce or joint applications are presented on or after commencement of Matrimonial Causes (Amendment) Rules 2003

(1) Rule 56B(2) and (3) shall not apply to an application by the respondent to a petition for divorce for the court to consider his financial position after the divorce, where the petition is presented to the court on or after the commencement of the Matrimonial Causes (Amendment) Rules 2003 (L.N. [] of 2003).

(2) Subject to paragraph (4), rules 70, 71, 73, 74, 76 and 77(1), (3), (4) and (7) shall not apply to an application for

ancillary relief made in relation to a petition for divorce or joint application, where the petition for divorce or joint application is presented to the court on or after the commencement of the Matrimonial Causes (Amendment) Rules 2003 (L.N. [] of 2003).

(3) Insofar as -

- (a) rule 56B(1) applies to an application referred to in paragraph (1), any reference to Form 8A in that rule shall be construed as a reference to Form [26];
- (b) rule 56B(5) applies to an application referred to in paragraph (1), any reference to rule 77(3), (4), (5), (6) and (7) in that rule shall be construed as a reference to rule 77(5) and (6); and
- (c) rule 68, 68A or 69 applies to an application for ancillary relief referred to in paragraph (2), subject to paragraph (4), any reference to Form 8 or 8B in that rule shall be construed as a reference to Form [25].

(4) Paragraphs (2) and (3)(c) shall not apply where -

- (a) the application for ancillary relief concerned only relates to an order for periodical nominal payment in the sum of \$1 per annum;
- (b) the application is made for a variation order; or
- (c) the parties to the application for ancillary relief concerned have reached agreement on terms

of the proposed order."

3. Forms

The Appendix is amended -

- (a) in Form 8, by repealing "[Rule 68(2)(a) and (3)]" and substituting "[Rules 68(2)(a) & (3) & 84A(3)(c)]";
- (b) in Form 8A, by repealing "[Rule 56B]" and substituting "[Rules 56B & 84A(3)(a)]";
- (c) in Form 8B, within the square brackets, by repealing "& 77" and substituting ", 77 & 84A(3)(c)";
- (d) by adding -

"FORM [25]

[Rule 84A]

*Notice of [Intention to Proceed with]
Application for Ancillary Relief*

In the District Court / High Court*	
Case No. Always quote this	

Between	Petitioner / 1 st Applicant* Solicitor's ref.	And	Respondent / 2 nd Applicant* Solicitor's ref.
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TAKE NOTICE that -

The Petitioner / 1st Applicant / Respondent / 2nd Applicant* intends
[to apply to the Court for]

[to proceed with the application in
the [petition] [answer] [application] for

- (a) an order for maintenance pending suit;

- (b) a periodical payments order;
- (c) a secured periodical payments order;
- (d) a lump sum order;
- (e) a settlement of property order;
- (f) a transfer of property order;
- (g) a variation of settlement order;
- (h) an avoidance of disposition order

and on behalf of the children of the family for

- (a) an order for maintenance pending suit;
- (b) a periodical payments order;
- (c) a secured periodical payments order;
- (d) a lump sum order;
- (e) a settlement of property order;
- (f) a transfer of property order;
- (g) a variation of settlement order;
- (h) an avoidance of disposition order

* delete if not applicable.

Signed:

Date:

[Solicitor for the] [Petitioner / 1st Applicant] [Respondent / 2nd Applicant]

Address all communications to the Chief Judicial Clerk or if the matter is in the High Court, the Clerk of Court and quote the case number. If you do not quote this number, your correspondence may be returned.

Chief Judicial Clerk
Family Court Registry
Wanchai Law Courts

OR

If the matter is in the High Court
The Clerk of Court
High Court of Hong Kong

FORM [26]

[Rule 84A]

Notice of Application under Rule 56B

In the District Court / High Court*	
Case No. Always quote this	

Between

Petitioner Solicitor's ref.

 And

Respondent Solicitor's ref.

TAKE NOTICE that -

The Respondent intends to apply to the Court under section 17A of the Matrimonial Causes Ordinance for the Court to consider the financial position of the respondent after the divorce.

- * The application will be heard on a date to be fixed.
- * A first appointment date has been fixed by the Court on the _____ day of _____ 20__ at _____ o'clock.

Dated this _____ day of _____ 20__ .

* delete if not applicable.

Signed: _____ Date: _____

[Solicitor for the] Respondent

Address all communications to the Chief Judicial Clerk or if the matter is in the High Court, the Clerk of Court and quote the case number. If you do not quote this number, your correspondence may be returned.

Chief Judicial Clerk
Family Court Registry
Wanchai Law Courts

OR

If the matter is in the High Court
The Clerk of Court
High Court of Hong Kong "

Chief Justice

2003

Explanatory Note

These Rules amend the Matrimonial Causes Rules (Cap. 179 sub. leg.)("the principal Rules") to -

- (a) disapply certain provisions under the principal Rules in respect of an application -
 - (i) by the respondent to a petition for divorce for the District Court ("the court") to consider his financial position after the divorce, where the petition is presented to the court on or after the commencement of the Rules; and
 - (ii) for ancillary relief, where the petition for divorce or joint application is presented to the court on or after the commencement of the Rules; and
- (b) prescribe new forms to be used in the proceedings of those applications.