

立法會

Legislative Council

LC Paper No. LS82/09-10

Paper for the House Committee Meeting on 2 July 2010

Legal Service Division Report on Matrimonial Proceedings and Property (Amendment) Bill 2010

I. SUMMARY

- 1. Object of the Bill** To amend the Matrimonial Proceedings and Property Ordinance (Cap. 192) to empower the Hong Kong courts to order financial relief for former spouse whose marriage has been dissolved or annulled, or who has been legally separated, by means of judicial or other proceedings in a place outside Hong Kong.
- 2. Comments** To address the deficiency in the Ordinance as identified in the case of *ML v YJ* (HCMC 13/2006, CACV 89/2008), the Bill adds to the Ordinance a new Part IIA which is substantially modelled on the Part III of the English Matrimonial and Family Proceedings Act 1984.
- 3. Public Consultation** According to the Administration, the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Family Law Association, the Judiciary and Home Affairs Bureau were consulted on the working draft of the Bill in January 2010. They were supportive of the amendment proposal.
- 4. Consultation with LegCo Panel** The Panel on Administration of Justice and Legal Services was briefed on the draft Bill on 29 March 2010. Members of the Panel expressed support for the amendment proposal in principle and noted the views received from the two legal professional bodies on the draft Bill.
- 5. Conclusion** Members may wish to consider setting up a Bills Committee to study the Bill in detail.

II. REPORT

Object of the Bill

To amend the Matrimonial Proceedings and Property Ordinance (Cap. 192) (the Ordinance) to empower the High Court and the District Court to order financial relief for a former spouse whose marriage has been dissolved or annulled, or who has been legally separated, by means of judicial or other proceedings in a place outside Hong Kong.

LegCo Brief Reference

2. LP 5060/1C issued by the Department of Justice on 17 June 2010.

Date of First Reading

3. 30 June 2010.

Comments

Existing deficiency in matrimonial legislation

4. Currently, the Hong Kong courts have no power under the existing legislation to hear applications by a former spouse for financial relief after a decree or order in respect of whose marriage has been made in a jurisdiction outside Hong Kong.

5. Under the Ordinance which, among others, deals with applications for financial relief in matrimonial proceedings, a decree nisi of divorce, nullity or judicial separation must have been granted by Hong Kong courts before any order for financial relief can be made. Further, no such order shall take effect until the decree has been made absolute. A party to a marriage which was dissolved by a foreign decree that is recognized in Hong Kong may not apply for financial relief in Hong Kong because the Hong Kong courts have no power to make such order under existing legislation. This may cause hardship to a party where no or insufficient financial provisions have been made under the foreign order, notwithstanding that the parties may have properties in Hong Kong.

6. This deficiency has been demonstrated in the recent case of *ML v YJ* (HCMC 13/2006, CACV89/2008) the facts of which may be considered typical. In that case, the couple was married in Shenzhen and later moved to Hong Kong. The wife filed a divorce petition in Hong Kong and applied for financial relief in respect of matrimonial properties situated in both Hong Kong and Shenzhen. Before a decree absolute was made by the Hong Kong court, the husband obtained a divorce order from the Shenzhen court. In the judgments, both the Court of First Instance and the Court of Appeal urged the legislature to consider putting in place legislation similar to Part III of the English Matrimonial and Family Proceedings Act 1984 (the Act) so that the Hong

Kong courts could be empowered in appropriate cases to deal with claims for ancillary relief after giving recognition to an overseas divorce.

The Proposed Amendments

7. The Bill adds to the Ordinance a new Part IIA (sections 29AA to 29AL) which is substantially modelled on Part III of the Act and makes certain consequential amendments. The essential provisions of the Bill are summarized in the ensuing paragraphs.

Application for financial relief after a foreign divorce

8. Under the proposed section 29AB, a party may apply for financial relief after his/her marriage has been dissolved or annulled by a court outside Hong Kong unless he/she has remarried. The new section 29AC requires that leave of the court must first be obtained before applying for financial relief. The court will only grant leave if it considers that substantial ground has been shown for the making of such application.

9. If leave is granted, the court may make an interim order for periodical payments if it appears to the court that the applicant or any child of the family is in immediate need of financial assistance (new section 29AD).

Jurisdictional requirements

10. Under the proposed section 29AE, the court has jurisdiction to entertain an application for an order for financial relief under the new Part IIA and the jurisdictional requirements are based on either of the parties to the marriage -

- (a) being domiciled in Hong Kong;
- (b) being habitually resident in Hong Kong for at least three years immediately before the date of the application for leave or the divorce, annulment or legal separation obtained outside Hong Kong; or
- (c) having a substantial connection with Hong Kong.

11. This section is substantially modelled on section 15(1) of the Act but has not incorporated section 15(1)(c) of the Act which provides that a party may make an application if either or both parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated within jurisdiction (i.e. in England and Wales), which was a matrimonial home some time during the marriage.

Matters to be considered in deciding whether Hong Kong is an appropriate venue

12. Section 29AF provides that the Court must consider all the circumstances of the case before making an order for financial relief. If the court is not satisfied that it

would be appropriate for such an order being made by a court in Hong Kong, it must dismiss the application.

13. This section also set outs the relevant matters the court must consider in making such an order, including the connection that the parties have with Hong Kong, the place in which the foreign decree was granted or any other relevant places; any financial benefit received or to be received by the applicant or a child of the family as a result of divorce etc. by virtue of an agreement or operation of law of a place outside Hong Kong; the availability of any property in Hong Kong in respect of which an order could be made in favour of the applicant; the extent to which any order for financial relief is likely to be enforceable; and the length of the time lapsed since the date of the divorce, annulment or legal separation.

Types of orders that may be made by the court

14. Under section 29AG, the court is empowered to make any order that it can make under section 4, 5 or 6 of the Ordinance as if a decree of divorce, nullity of marriage or judicial separation has been granted in Hong Kong. This includes a periodical payments order, a secured periodical payments order, a lump sum order, a transfer of property order or a settlement of property order. Section 29AH further sets out the matters to which the court must pay regard in exercising its powers under section 29AG.

Avoidance of transactions intended to defeat applications made under new Part IIA

15. If the court is satisfied that the other party to the marriage is about to dispose of or deal with any property with the intent to defeat the application for financial relief, the court may, after the leave is granted, make an order restraining that party from disposing of or dealing with any property, or setting aside the disposition (new section 29AJ).

16. The court may also make an order restraining the other party to the marriage from making any disposition or transferring out of the jurisdiction or dealing with any property if it is satisfied that the disposition or dealing is intended to defeat any prospective application for financial relief (new section 29AK).

Consequential Amendments

17. The Bill adds five new rules of court (Rules 103A to 103E) to the Matrimonial Causes Rules (Cap. 179 sub. leg. A) setting out the procedure for various applications to be made under new Part IIA and prescribes the respective forms to be used for those applications. Various consequential amendments are also made to the Matrimonial Causes Ordinance (Cap. 179), the Inheritance (Provision for Family and Dependents) Ordinance (Cap. 481) and the Rules of the High Court (Cap. 4 sub. leg. A).

Public Consultation

18. According to the Administration, the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Family Law Association, the Judiciary and Home Affairs Bureau were consulted on the working draft of the Bill in January 2010. They were supportive of the amendment proposal.

Consultation with LegCo Panel

19. At its special meeting held on 22 October 2009, the Panel on Administration of Justice and Legal Services (the Panel) discussed the Administration's legislative proposal to address the existing deficiency as identified in the judgment of recent matrimonial cases. The Panel was briefed by the Administration on progress of the Bill at its meeting on 29 March 2010. The Panel also received views from the Hong Kong Bar Association and the Law Society of Hong Kong at the meeting.

20. Members of the Panel expressed support for the amendment proposal in principle. In the light of the views from the two legal professional bodies on the jurisdictional requirements and other areas in the amendment proposal, members asked the Administration to provide more details on the proposed amendments, the relevant provisions of the Act (and how far they had been incorporated into the proposed amendments), views received from its consultation and the Administration's response thereto.

21. Members may wish to refer to the minutes of the meetings held on 22 October 2009 and 29 March 2010 (LC Paper No. CB(2)506/09-10 and CB(2)1581/09-10) and the paper issued by Department of Justice in May 2010 (LC Paper No. CB(2)1615/09-10(01)) for details of discussion and the Administration's response.

Conclusion

22. In the light of the members' concern expressed and the views received from the two legal professional bodies, members may wish to consider setting up a Bills Committee to study the Bill in detail.

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