

For information

LegCo Panel on Administration of Justice and Legal Services

**Amendments to the
Matrimonial Proceedings and Property Ordinance (Cap. 192)**

Purpose

At the meeting of the Panel on Administration of Justice and Legal Services on 29 March 2010, the Administration was requested to provide the Panel with a supplementary information paper on the details of the amendments proposal, the relevant provisions of the English Matrimonial and Family Proceedings Act 1984 (and how far they had been incorporated into the proposed amendments), the views of the two professional bodies and other consultees, and the Administration's response thereto.

Background

2. In the case of *ML v YJ* (HCMC 13/2006, CACV 89/2008), both the Court of First Instance and the Court of Appeal asked the Administration to consider if legislation similar to Part III of the English Matrimonial and Family Proceedings Act 1984 ("1984 Act") should be introduced so that the Hong Kong courts could be empowered to deal with ancillary relief matters after giving recognition to an overseas divorce decree. After taking the initial views of the legal professional bodies, the Administration agreed to introduce legislative amendments to the *Matrimonial Proceedings and Property Ordinance* (Cap. 192) ("the Ordinance") so that the Hong Kong courts could be empowered to deal with ancillary relief matters after giving recognition to an overseas divorce decree.

3. In January 2010, the Administration consulted the legal professional bodies, the Judiciary and relevant policy bureaux on the legislative proposals to ensure that the proposed amendments could effectively deal with the issues identified in *ML v YJ*.

Proposed Amendments to the Ordinance

4. It is proposed that a new Part IIA, similar to Part III of the 1984 Act (Annex A), should be added to the Ordinance. The main provisions of the new Part II A are summarized below.

(i) *Application for financial relief after a foreign divorce*

5. Similar to section 12 of the 1984 Act, it was proposed that 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 party who wishes to make an application must first obtain the leave of the court, and the court will only grant leave if it considers that “substantial ground” has been shown for the making of an application (reference to section 13 of the 1984 Act).

6. The jurisdiction of the court to deal with applications for financial relief after overseas divorces would be provided in the new Part IIA. The proposed jurisdictional requirements would be based on either of the parties to the marriage being –

- (a) habitually resident in Hong Kong for at least one year, or
- (b) a permanent resident of Hong Kong;

either on the date of the application for leave or the date when the foreign divorce, annulment or legal separation took effect.

7. After leave has been granted, the court may make interim orders for financial relief if it appears to the court that the applicant or any child of the family is in immediate need of financial assistance (reference to section 14 of the 1984 Act).

(ii) *Duty of the Court to consider whether Hong Kong is an appropriate venue for application*

8. The court would be required to consider whether it would be appropriate for such an order to be made by a court in Hong Kong.

In doing so, the court must have regard to the following matters:

- (a) the connection that the parties to the marriage have with Hong Kong;
- (b) the connection that those parties have with the place in which the marriage was dissolved or annulled or in which they were legally separated;
- (c) the connection that those parties have with any other place outside Hong Kong;
- (d) any financial benefit that the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a place outside Hong Kong;
- (e) if an order has been made by a court in a place outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;
- (f) any right that the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any place outside Hong Kong and if the applicant has omitted to exercise that right, the reason for that omission;
- (g) the availability of any property in respect of which an order could be made in favour of the applicant;
- (h) the extent to which any order made is likely to be enforceable;
- (i) the length of time that has elapsed since the date of the divorce, annulment or legal separation.

Similar considerations can be found in section 16 of the 1984 Act.

9. The court would be empowered to make any order that it could make under section 4, 5 or 6 of the Ordinance as if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation has been

granted in Hong Kong. This would include a periodical payments order, a secured periodical payments order, a lump sum order, a transfer of property order or a settlement of property order etc. It was also suggested that the order should not be made in relation to any real property outside Hong Kong. Section 17 of the 1984 Act however contains no such restriction.

(iii) *Matters to which the court is to have regard in exercising its powers*

10. In deciding whether to exercise its power to make an order for financial relief, the court would be required to consider the conduct of the parties and all the circumstances of the case including matters described in s.7(1) and 7(2) of the Ordinance. These include the financial resources and financial needs of each of the parties and that of the child of the family.

11. Certain provisions of the Ordinance will apply as if the order had been ancillary to divorce proceedings in Hong Kong. These provisions are suitably adapted from sections 18 and 21 of the 1984 Act.

(iv) *Avoidance of transactions intended to defeat applications for financial relief under Part IIA*

12. If the court is satisfied that the other party to the marriage is about to dispose of or otherwise deal with, or has disposed of, any property with the intent to defeat the claim for financial relief, the court may make an order restraining that party from disposing of or dealing with any property, or setting aside the disposition.

13. The court would also be empowered to make an order to restrain the other party to the marriage from making any disposition or transferring out of the jurisdiction or otherwise dealing with any property if it is satisfied that the disposition etc. is made with the intent to defeat any prospective application for financial relief. Similar anti-avoidance provisions can be found in sections 23 and 24 of the 1984 Act.

14. For the purposes of the new Part IIA, it was suggested that section 32 of the Ordinance should be amended to empower the Chief

Justice to make rules of court with regard to the procedure under the amended provisions and to prescribe forms etc.

Consequential amendments

15. Various consequential amendments would be proposed and the following rules of courts would be added to the *Matrimonial Causes Rules* (Cap. 179 sub. leg. A) –

(a) Rule 103A

An application for leave to apply for an order for financial relief must be made *ex parte* by originating summons in prescribed form and must be supported by an affidavit by the applicant stating the facts he relied on.

(b) Rule 103B

After leave has been obtained, an applicant may apply for an order for financial relief by way of originating summons in prescribed form together with an affidavit in support giving full details of his or her property and income.

(c) Rule 103C

An application for an interim order for maintenance must be made by way of originating summons. An application for an order to avoid certain transactions intending to defeat an application for financial relief must be supported by an affidavit.

(d) Rule 103D

An application for an order to prevent transactions intending to defeat a prospective application for financial relief must be made by originating summons.

Jurisdiction of the court to deal with applications under Part IIA

16. As discussed in paragraph 6 above, the proposed provisions on the jurisdiction of the court differed from section 15(1) of the 1984 Act. Under section 15(1)(a) and (b) of the 1984 Act, the court's jurisdiction to entertain an application for an order for financial relief is based on either of the parties to a marriage was domiciled or habitually resident in England or Wales on the date of the application for leave or when the divorce etc took effect. Section 15(1)(c) further 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 in England and Wales which was a matrimonial home some time during the marriage.

17. The proposed jurisdictional requirements under the new Part IIA are based on habitual residence in Hong Kong or permanent resident status. It was considered that those grounds would be sufficient to establish a proper connection with Hong Kong for the court to assume jurisdiction where there has been a foreign divorce. The Administration also noted that under section 20 of the 1984 Act, the court's power to make an order for financial relief where its jurisdiction depends solely on the existence of a former matrimonial home in England and Wales are more restrictive than when jurisdiction is founded on one of the other grounds.

Consultation

18. In January 2010, the Department of Justice ("DoJ") forwarded the draft legislative proposals to the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Family Law Association, the Judiciary, and the Home Affairs Bureau (including the Director of Legal Aid) for views. All consultees supported the proposal to amend the Ordinance. A summary of their views are reproduced below.

(i) *The Law Society of Hong Kong*

19. The Law Society was represented at the Panel meeting held on 29 March 2010. A paper was submitted to the Panel on 22 March 2010 (LC Paper No. CB(2) 1156/09-10(09)) giving their views on the amendment proposals. The Law Society suggested that the jurisdiction clause should be revised to include a ground similar to section 15(1)(c) of the 1984 Act. In essence, the Law Society considered that the “matrimonial home” ground should be added to the jurisdictional clause in the new Part IIA.

(ii) *The Bar Association of Hong Kong*

20. The Bar Association (“the Bar”) offered their comments to the DoJ on 9 April 2010 and a copy of which is at Annex B. The Bar were of the view that the court’s jurisdiction to entertain applications for financial relief after a foreign divorce should be analogous to the court’s jurisdiction in divorce proceedings in Hong Kong. Under section 3 of the *Matrimonial Causes Ordinance* (Cap 179) (“MCO”), the court shall have jurisdiction in divorce proceeding if either of the parties to the marriage was domiciled in Hong Kong, was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application, or had a substantial connection with Hong Kong.

21. The Bar considered that if the “substantial connection” test along the lines of section 3(c) of the MCO was to be adopted, then the inclusion of the “matrimonial home” test would not be necessary.

22. The Bar further commented that the restriction against an order to be made in relation to any real property outside Hong Kong would not be necessary.

23. Other comments of the Bar included –

- (a) allowing appropriate cases to be commenced in the Court of First Instance (“CFI”);
- (b) the “remarriage” of the applicant should not operate as a bar to an application for financial relief under the new Part IIA.

(iii) *The Hong Kong Family Law Association* (“the Association”)

24. The Association supported the proposed amendments to be made to the Ordinance but cautioned that this might result in a significant number of applications being made to the Hong Kong court, particularly from litigants from the Mainland (A copy of the Association’s letter of 23 March 2010 is attached at Annex C).

25. The Judiciary provided their comments in May. On the jurisdiction of the court in dealing with an application for financial relief under the new Part IIA, the Judiciary considered that it should not be wider than the present jurisdiction of the court for divorce proceedings in Hong Kong and that the “matrimonial home” test should not be adopted at this stage. The Judiciary also considered that the provision preventing a party to make an application for financial relief on the ground of “remarriage” should be retained.

The Administration’s Response

26. The Administration proceeded to revise the working draft of the Bill to take account of the comments received. The jurisdiction of the court to deal with ancillary relief matters after recognition of an overseas divorce decree will be analogous to that of divorce proceedings under section 3 of the MCO.

27. The proposed restriction as regards any real property outside Hong Kong will be removed so that the court may make any order as it deems fit.

28. The Judiciary is of the view that an application under the amended provisions may be commenced in the Family Court and the Family Judge should have discretion to transfer the relevant applications to the High Court. The Bar’s suggestion that an application may be commenced in the CFI has not been adopted. Rules of court will be included in the draft Bill so that in appropriate case, an application may be transferred to the CFI as if in other ancillary relief proceedings under the Ordinance. With the agreement of the Judiciary, the rule-making power under the Ordinance will be transferred to the Chief Judge.

29. The Administration also noted that after a marriage has been dissolved in Hong Kong, a party who has been remarried is equally prevented to make an application for ancillary relief (section 9(4) of the Ordinance). A similar provision can also be found in section 12(2) of the 1984 Act. Accordingly, the Bar's suggestion to remove "remarriage" as a bar to an application under the new Part IIA has not been adopted.

30. As indicated by the Administration at the meeting of 29 March 2010, the Matrimonial Proceedings and Property (Amendment) Bill will be introduced into the Legislative Council in June 2010.

Department of Justice
May 2010

Matrimonial and Family Proceedings Act 1984 (c. 42)

Main body

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PART III

FINANCIAL RELIEF IN ENGLAND AND WALES AFTER OVERSEAS DIVORCE ETC.

Applications for financial relief

Applications
for financial
relief after
overseas
divorce etc.

12. — (1) Where—

- (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and
- (b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,

either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.

(2) If after a marriage has been dissolved or annulled in an overseas country one of the parties to the marriage remarries that party shall not be entitled to make an application in relation to that marriage.

(3) For the avoidance of doubt it is hereby declared that the reference in subsection (2) above to remarriage includes a reference to a marriage which is by law void or voidable.

(4) In this Part of this Act except sections 19, 23, and 24 “order for financial relief” means an order under section 17 or 22 below of a description referred to in that section.

Leave of the
court
required for
applications
for financial

13. — (1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained in accordance with rules of court; and

relief.

the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.

(2) The court may grant leave under this section notwithstanding that an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.

(3) Leave under this section may be granted subject to such conditions as the court thinks fit.

Interim
orders for
maintenance.

14. — (1) Where leave is granted under section 13 above for the making of an application for an order for financial relief and it appears to the court that the applicant or any child of the family is in immediate need of financial assistance, the court may make an interim order for maintenance, that is to say, an order requiring the other party to the marriage to make to the applicant or to the child such periodical payments, and for such term, being a term beginning not earlier than the date of the grant of leave and ending with the date of the determination of the application for an order for financial relief, as the court thinks reasonable.

(2) If it appears to the court that the court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (c) of section 15(1) below the court shall not make an interim order under this section.

(3) An interim order under subsection (1) above may be made subject to such conditions as the court thinks fit.

Jurisdiction
of the court.

15. — (1) Subject to subsection (2) below, the court shall have jurisdiction to entertain an application for an order for financial relief if any of the following jurisdictional requirements are satisfied, that is to say—

- (a) either of the parties to the marriage was domiciled in England and Wales on the date of the application for leave under section 13 above or was so domiciled on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or
- (b) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took

effect in that country; or

- (c) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated in England or Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

(2) Where the jurisdiction of the court to entertain proceedings under this Part of this Act would fall to be determined by reference to the jurisdictional requirements imposed by virtue of Part I of the ^{M1}Civil Jurisdiction and Judgments Act 1982 (implementation of certain European conventions) [^{F1}or by virtue of Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or] then—

- (a) satisfaction of the requirements of subsection (1) above shall not obviate the need to satisfy the requirements imposed by virtue of [^{F2}that Regulation or] Part I of that Act; and
- (b) satisfaction of the requirements imposed by virtue of [^{F2}that Regulation or] Part I of that Act shall obviate the need to satisfy the requirements of subsection (1) above;

and the court shall entertain or not entertain the proceedings accordingly.

Annotations:

Amendments (Textual)

F1 Words in s. 15(2) inserted (1.3.2002) by S.I. 2001/3929, arts. 1(b), 5, Sch. 3 para. 19(a)

F2 Words in s. 15(2)(a)(b) inserted (1.3.2002) by S.I. 2001/3929, arts. 1(b), 5, Sch. 3 para. 19(b)

Marginal Citations

M1 1982 c. 27.

Duty of the court to consider whether England and Wales is appropriate venue for application.

16. — (1) Before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.

(2) The court shall in particular have regard to the following matters—

- (a) the connection which the parties to the marriage have with England and Wales;
- (b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;
- (c) the connection which those parties have with any other country outside England

and Wales;

- (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;
- (e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;
- (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission;
- (g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made;
- (h) the extent to which any order made under this Part of this Act is likely to be enforceable;
- (i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.

Orders for financial provision and property adjustment

Orders for financial provision and property adjustment.

17. — ^{F3}(1) Subject to section 20 below, on an application by a party to a marriage for an order for financial relief under this section, the court may—

- (a) make any one or more of the orders which it could make under Part II of the 1973 Act if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in England and Wales, that is to say—
 - (i) any order mentioned in section 23(1) of the 1973 Act (financial provision orders); and
 - (ii) any order mentioned in section 24(1) of that Act (property adjustment

orders); and

- (b) if the marriage has been dissolved or annulled, make one or more orders each of which would, within the meaning of that Part of that Act, be a pension sharing order in relation to the marriage.]

(2) Subject to section 20 below, where the court makes a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order under subsection (1) above, then, on making that order or at any time thereafter, the court may make any order mentioned in section 24A(1) of the 1973 Act (orders for sale of property) which the court would have power to make if the order under subsection (1) above had been made under Part II of the 1973 Act.

Annotations:

Amendments (Textual)

- F3** S. 17(1) substituted (1.12.2000) by 1999 c. 30, s. 84, Sch. 12 Pt. I para. 3; S.I. 2000/1116, art. 2 (b)

Matters to which the court is to have regard in exercising its powers under s. 17.

18. — (1) In deciding whether to exercise its powers under section 17 above and, if so, in what manner the court shall act in accordance with this section.

(2) The court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(3) As regards the exercise of those powers in relation to a party to the marriage, the court shall in particular have regard to the matters mentioned in section 25(2)(a) to (h) of the 1973 Act and shall be under duties corresponding with those imposed by section 25A(1) and (2) of the 1973 Act where it decides to exercise under section 17 above powers corresponding with the powers referred to in those subsections.

[^{F4} (3A) The matters to which the court is to have regard under subsection (3) above—

- (a) so far as relating to paragraph (a) of section 25(2) of the 1973 Act, include any benefits under a pension arrangement which a party to the marriage has or is likely to have (whether or not in the foreseeable future), and
- (b) so far as relating to paragraph (h) of that provision, include any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring.]

(4) As regards the exercise of those powers in relation to a child of the family, the court

shall in particular have regard to the matters mentioned in section 25(3)(a) to (e) of the 1973 Act.

(5) As regards the exercise of those powers against a party to the marriage in favour of a child of the family who is not the child of that party, the court shall also have regard to the matters mentioned in section 25(4)(a) to (c) of the 1973 Act.

(6) Where an order has been made by a court outside England and Wales for the making of payments or the transfer of property by a party to the marriage, the court in considering in accordance with this section the financial resources of the other party to the marriage or a child of the family shall have regard to the extent to which that order has been complied with or is likely to be complied with.

[^{F5}(7) In this section—

- (a) “pension arrangement” has the meaning given by section 25D(3) of the 1973 Act, and
- (b) references to benefits under a pension arrangement include any benefits by way of pension, whether under a pension arrangement or not.]

Annotations:

Amendments (Textual)

F4 S. 18(3A) inserted (1.12.2000) by 1999 c. 30, s. 22(1)(2); S.I. 2000/1116, art. 2(a)

F5 S. 18(7) added (1.12.2000) by 1999 c. 30, s. 22(1)(3); S.I. 2000/1116, art. 2(a)

Consent
orders for
financial
provision or
property
adjustment.

19. — (1) Notwithstanding anything in section 18 above, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application.

(2) Subsection (1) above applies to an application for a consent order varying or discharging an order for financial relief as it applies to an application for an order for financial relief.

(3) In this section—

“consent order”, in relation to an application for an order, means an order in the terms applied for to which the respondent agrees;

“order for financial relief” means an order under section 17 above; and

“prescribed” means prescribed by rules of court.

Restriction of powers of court where jurisdiction depends on matrimonial home in England or Wales.

20. — (1) Where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England or Wales of a dwelling-house which was a matrimonial home of the parties, the court may make under section 17 above any one or more of the following orders (but no other)—

- (a) an order that either party to the marriage shall pay to the other such lump sum as may be specified in the order;
- (b) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of a child of the family, or to such a child, such lump sum as may be so specified;
- (c) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be so specified for the benefit of such a child, the interest of the first-mentioned party in the dwelling-house, or such part of that interest as may be so specified;
- (d) an order that a settlement of the interest of a party to the marriage in the dwelling-house, or such part of that interest as may be so specified, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (e) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage so far as that settlement relates to an interest in the dwelling-house;
- (f) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement so far as that interest is an interest in the dwelling-house;
- (g) an order for the sale of the interest of a party to the marriage in the dwelling-house.

(2) Where, in the circumstances mentioned in subsection (1) above, the court makes an order for the payment of a lump sum by a party to the marriage, the amount of the lump sum shall not exceed, or where more than one such order is made the total amount of the lump sums shall not exceed in aggregate, the following amount, that is to say—

- (a) if the interest of that party in the dwelling-house is sold in pursuance of an order

made under subsection (1)(g) above, the amount of the proceeds of the sale of that interest after deducting therefrom any costs incurred in the sale thereof;

- (b) if the interest of that party is not so sold, the amount which in the opinion of the court represents the value of that interest.

(3) Where the interest of a party to the marriage in the dwelling-house is held jointly or in common with any other person or persons—

- (a) the reference in subsection (1)(g) above to the interest of a party to the marriage shall be construed as including a reference to the interest of that other person, or the interest of those other persons, in the dwelling-house, and
- (b) the reference in subsection (2)(a) above to the amount of the proceeds of a sale ordered under subsection (1)(g) above shall be construed as a reference to that part of those proceeds which is attributable to the interest of that party to the marriage in the dwelling-house.

Application to orders under ss. 14 and 17 of certain provisions of Part II of Matrimonial Causes Act 1973.

21. — [^{F6}(1)] The following provisions of Part II of the 1973 Act (financial relief for parties to marriage and children of family) shall apply in relation to an order ^{F7} . . . under section 14 or 17 above as they apply in relation to a like order ^{F7} . . . under that Part of that Act, that is to say—

- (a) section 23(3)(provisions as to lump sums);
- (b) section 24A(2), (4), (5) and (6)(provisions as to orders for sale);
- [^{F8}(ba) section 24B(3) to (5)(provisions about pension sharing orders in relation to divorce and nullity);
- (bb) section 24C (duty to stay pension sharing orders);
- (bc) section 24D (apportionment of pension sharing charges);]
- [^{F9}(bd) section 25B(3) to (7B)(power, by financial provision order, to attach payments under a pension arrangement, or to require the exercise of a right of commutation under such an arrangement);
- (be) section 25C (extension of lump sum powers in relation to death benefits under a pension arrangement);]
- (c) section 28(1) and (2)(duration of continuing financial provision orders in favour of

- party to marriage);
- (d) section 29 (duration of continuing financial provision orders in favour of children, and age limit on making certain orders in their favour);
 - (e) section 30 (direction for settlement of instrument for securing payments or effecting property adjustment), except paragraph (b);
 - (f) section 31 (variation, discharge etc. of certain orders for financial relief), except subsection (2)(e) and subsection (4);
 - (g) section 32 (payment of certain arrears unenforceable without the leave of the court);
 - (h) section 33 (orders for repayment of sums paid under certain orders);
 - (i) section 38 (orders for repayment of sums paid after cessation of order by reason of remarriage);
 - (j) section 39 (settlements etc. made in compliance with a property adjustment order may be avoided on bankruptcy of settlor); and
 - (k) section 40 (payments etc. under order made in favour of person suffering from mental disorder).

[**F10**(1) section 40A (appeals relating to pension sharing orders which have taken effect).]

[**F11**(2) Subsection (1)(bd) and (be) above shall not apply where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England or Wales of a dwelling-house which was a matrimonial home of the parties.

(3) Section 25D(1) of the 1973 Act (effect of transfers on orders relating to rights under a pension arrangement) shall apply in relation to an order made under section 17 above by virtue of subsection (1)(bd) or (be) above as it applies in relation to an order made under section 23 of that Act by virtue of section 25B or 25C of the 1973 Act.

(4) The Lord Chancellor may by regulations make for the purposes of this Part of this Act provision corresponding to any provision which may be made by him under subsections (2) to (2B) of section 25D of the 1973 Act.

(5) Power to make regulations under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

Annotations:

Amendments (Textual)

- F6** S. 21 "(1)" inserted (1.12.2000) by 1999 c. 30, s. 22(4); S.I. 2000/1116, art. 2(a)
F7 Words in s. 21 repealed (1.12.2000) by 1999 c. 30, ss. 84(1), 88, Sch. 12 Pt. I para. 4(a), Sch. 13 Pt. II; S.I. 2000/1116, art. 2(b)(d)(g)
F8 S. 21(ba)(bb)(bc) inserted (1.12.2000) by 1999 c. 30, s. 84(1), Sch. 12 Pt. I para. 4(b); S.I. 2000/1116, art. 2(b)
F9 S. 21(1)(bd)(be) inserted (1.12.2000) by 1999 c. 30, s. 22(4); S.I. 2000/1116, art. 2(a)
F10 S. 21(1)(l) inserted (1.12.2000) by 1999 c. 30, s. 84(1), Sch. 12 Pt. I para. 4; S.I. 2000/1116, art. 2(b)
F11 S. 21(2)-(5) inserted (1.12.2000) by 1999 c. 30, s. 22(5); S.I. 2000/1116, art. 2(a)

Orders for transfer of tenancies

Powers of court in relation to certain tenancies of dwelling-houses.

[**F12** **22.** — (1) This section applies if—

- (a) an application is made by a party to a marriage for an order for financial relief;
and
- (b) one of the parties is entitled, either in his own right or jointly with the other party, to occupy a dwelling-house situated in England or Wales by virtue of a tenancy which is a relevant tenancy within the meaning of Schedule 7 to the Family Law Act 1996 (certain statutory tenancies).

(2) The court may make in relation to that dwelling-house any order which it could make under Part II of that Schedule if—

- (a) a divorce order,
- (b) a separation order, or
- (c) a decree of nullity of marriage,

had been made or granted in England and Wales in respect of the marriage.

(3) The provisions of paragraphs 10, 11 and 14(1) in Part III of that Schedule apply in relation to any order under this section as they apply to any order under Part II of that Schedule.]

Annotations:

Amendments (Textual)

- F12** S. 22 substituted (1.10.1997) by 1996 c. 27, s. 66(1), Sch. 8 Pt. III para. 52 (with Sch. 9 para. 8-10); S.I. 1997/1892, art. 3(1)(b)

Avoidance of transactions intended to defeat applications for financial relief.

23. — (1) For the purposes of this section “financial relief” means relief under section 14 or 17 above and any reference to defeating a claim by a party to a marriage for financial relief is a reference to preventing financial relief from being granted or reducing the amount of relief which might be granted, or frustrating or impeding the enforcement of any order which might be or has been made under either of those provisions at the instance of that party.

(2) Where leave is granted under section 13 above for the making by a party to a marriage of an application for an order for financial relief under section 17 above, the court may, on an application by that party—

- (a) if it is satisfied that the other party to the marriage is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;
- (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition.

(3) Where an order for financial relief under section 14 or 17 above has been made by the court at the instance of a party to a marriage, then, on an application made by that party, the court may, if it is satisfied that the other party to the marriage has, with the intention of defeating the claim for financial relief, made a reviewable disposition, make an order setting aside the disposition.

(4) Where the court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (c) of section 15(1) above, it shall not make any order under subsection (2) or (3) above in respect of any property other than the dwelling-house concerned.

(5) Where the court makes an order under subsection (2)(b) or (3) above setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(6) Any disposition made by the other party to the marriage (whether before or after the

commencement of the application) is a reviewable disposition for the purposes of subsections (2)(b) and (3) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(7) Where an application is made under subsection (2) or (3) above with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

- (a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or
- (b) in a case falling within subsection (3) above, that the disposition has had the consequence,

of defeating a claim by the applicant for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

(8) In this section "disposition" does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

(9) The preceding provisions of this section are without prejudice to any power of the High Court to grant injunctions under section 37 of the Supreme Court Act 1981.

Prevention of transactions intended to defeat prospective applications for financial relief.

24. — (1) Where, on an application by a party to a marriage, it appears to the court—

- (a) that the marriage has been dissolved or annulled, or that the parties to the marriage have been legally separated, by means of judicial or other proceedings in an overseas country; and
- (b) that the applicant intends to apply for leave to make an application for an order for financial relief under section 17 above as soon as he or she has been habitually resident in England and Wales for a period of one year; and
- (c) that the other party to the marriage is, with the intention of defeating a claim for financial relief, about to make any disposition or to transfer out of the jurisdiction

or otherwise deal with any property,

the court may make such order as it thinks fit for restraining the other party from taking such action as is mentioned in paragraph (c) above.

(2) For the purposes of an application under subsection (1) above—

- (a) the reference to defeating a claim for financial relief shall be construed in accordance with subsection (1) of section 23 above (omitting the reference to any order which has been made); and
- (b) subsections (7) and (8) of section 23 above shall apply as they apply for the purposes of an application under that section.

(3) The preceding provisions of this section are without prejudice to any power of the High Court to grant injunctions under section 37 of the Supreme Court Act 1981.

Financial provision out of estate of deceased party to marriage

Extension of powers under Inheritance (Provision for Family and Dependants) Act 1975 in respect of former spouses.

25. — (1) The ^{M2}Inheritance (Provision for Family and Dependants) Act 1975 shall have effect with the following amendments, being amendments designed to give to persons whose marriages are dissolved or annulled overseas the same rights to apply for provision under that Act (as amended by section 8 of this Act) as persons whose marriages are dissolved or annulled under the 1973 Act.

(2) In section 25(1), for the definition of “former wife” and “former husband” there shall be substituted the following definition—

““former wife” or “former husband” means a person whose marriage with the deceased was during the lifetime of the deceased either—

- (a) dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of any part of the British Islands, or
- (b) dissolved or annulled in any country or territory outside the British Islands by a divorce or annulment which is entitled to be recognised as valid by the law of England and Wales;”.

(3) After section 15 (restriction in divorce proceedings etc. of applications under the Act) there shall be inserted the following section—

" Restriction imposed in proceedings under Matrimonial and Family Proceedings Act 1984 on application under this Act.

15A. — (1) On making an order under section 17 of the Matrimonial and Family Proceedings Act 1984 (orders for financial provision and property adjustment following overseas divorces, etc.) the court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 2 of this Act.

In this subsection "the court" means the High Court or, where a county court has jurisdiction by virtue of Part V of the Matrimonial and Family Proceedings Act 1984, a county court.

(2) Where an order under subsection (1) above has been made with respect to a party to a marriage which has been dissolved or annulled, then, on the death of the other party to that marriage, the court shall not entertain an application under section 2 of this Act made by the first-mentioned party.

(3) Where an order under subsection (1) above has been made with respect to a party to a marriage the parties to which have been legally separated, then, if the other party to the marriage dies while the legal separation is in force, the court shall not entertain an application under section 2 of this Act made by the first-mentioned party."

Annotations:

Marginal Citations

M2 1975 c. 63.

Recovery of maintenance in magistrates' courts after overseas divorce etc.

F13
26.

Annotations:

Amendments (Textual)

F13 S. 26 repealed (5.4.1993) by Maintenance Orders (Reciprocal Enforcement) Act 1992 (c. 56), s. 2(2), Sch. 3; S.I. 1993/618, art.2.

Interpretation

27. In this Part of this Act—

“the 1973 Act” means the Matrimonial Causes Act 1973;

“child of the family” has the same meaning as in section 52(1) of the 1973 Act;

“the court” means the High Court or, where a county court has jurisdiction by virtue of Part V of this Act, a county court;

“dwelling-house” includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling-house and occupied therewith;

“order for financial relief” has the meaning given by section 12(4) above;

“overseas country” means a country or territory outside the British Islands;

“possession” includes receipt of, or the right to receive, rents and profits;

“property adjustment order” means such an order as is specified in section 24(1)(a), (b), (c) or (d) of the 1973 Act;

“rent” does not include mortgage interest;

“secured periodical payments order” means such an order as is specified in section 23(1)(b) or (e) of the 1973 Act.

Note: These attributes apply to this level only, lower levels have their own attributes.

Attributes of: Part III Financial Relief in England and Wales After Overseas Divorce etc.					
Version no	Start date	End date	Extent	Confers power	Blanket amendment
> 1	01/02/1991		E+W	N	N

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Hong Kong Bar Association's comments

Amending the Matrimonial Proceedings & Property Ordinance (Cap.192)

Introduction

Unless otherwise indicated, references to 'sections' or 'sub-sections' are to the Draft Bill's provisions in the newly proposed draft Part IIA.

References to MCO are to the Matrimonial Causes Ordinance (Cap.179)

References to the '1984 Act' are to Part III of the English Matrimonial & Family Proceedings Act 1984.

References to 'LCWP77' are to the English Law Commission Working Paper No. 77 on Family Law Financial Relief after Foreign Divorce.

The Draft Bill largely follows the 1984 Act, and therefore we presume that both are designed to address the same mischief, and accordingly LCWP77 and its recommendations are in general applicable.

The Bar wholeheartedly supports the introduction of such legislation.

We would however sound a cautionary note about importing the English legislation wholesale as there are different jurisdictional approaches (as we shall explain herein) and in particular where the English legislation was drafted at a time when the main principles governing ancillary relief were "needs" / "reasonable requirements" based, and were prior to the current principle of sharing and fairness in the re-distribution of assets *post-White v. White*.

Hence, for example, consideration should be addressed to whether the remarriage of the would-be applicant should be a bar to invoking the legislation. We recommend that it should not, as the Court can in any event take into account the effect of remarriage upon periodical payments, but may nevertheless consider the issue of redistribution of assets if appropriate.

Given the need first to overcome the hurdle of obtaining leave, one has to consider whether thereafter the proposed legislation is intended:-

- (a) to limit the ambit of the Hong Kong Courts in granting ancillary relief, i.e. a statutory fetter; alternatively
- (b) to permit the Hong Kong Courts to exercise its discretion in the circumstances of the case, i.e. so that case law, rather than statutory provisions, determine the appropriate ancillary relief.

If asked to say which option should prevail, we would recommend the latter.

In making the following comments, the Hong Kong Bar Association has also considered the recent United Kingdom Supreme Court's decision in *Adbaje v. Akinnoye-Agbaje* [2010] UKSC 13.

Section 29AE

Section 29AE contains the first jurisdictional hurdle. It is the precursor to section 29AF in that, if section 29AE is not first of all satisfied, then the section 29AF exercise premised upon 'appropriateness of Hong Kong' does not even arise for consideration. However, even if one or more sub-section of 29AE is satisfied, section 29AF still has to be considered.

In Part III under 'The Problems of Reform' of LCWP77, the English Law Commission proposed that only "in some circumstances" should the English Courts have power to make financial orders where the marriage was terminated by foreign decree. The English Law Commission carefully considered and balanced the various considerations including *inter alia* "forum-shopping" and the 'policies' of different jurisdictions. LCWP77 merits careful reading.

Sub-sections 3(a) & (c) MCO

As a matter of principle, Part IIA jurisdiction (the first absolute hurdle at least) should be available, or should not be barred, where a person at least in theory *could have*, but for the foreign divorce, obtained a Hong Kong divorce and thus Hong Kong ancillary relief.

Note that section 29AG is worded in terms that “*the court may make any one or more of the orders that it could make ... if a decree of divorce ... had been granted in Hong Kong*”. Naturally, the two jurisdictions (Part IIA and ancillary relief upon Hong Kong divorce) are supposed to be analogous.

The omission in Part IIA to mention anything along the lines of sub-sections 3(a) and/or 3(c) MCO is therefore curious. The rationale here being that *if* the parties *could have* been divorced in Hong Kong (i.e. the Hong Kong Courts *would have* had jurisdiction *if* the marriage were still extant), then there is no reason why the first absolute jurisdictional hurdle should not be considered satisfied (subject of course to the section 29AF exercise premised upon ‘*appropriateness of Hong Kong*’).

Section 3 MCO defines the Hong Kong Court’s jurisdiction for divorce, and is premised upon (a) either of the parties to the marriage being *domiciled* in Hong Kong at time of petition; or (b) either of the parties to the marriage being *habitually resident* in Hong Kong for 3 years prior to petition; or (c) either of the parties to the marriage having a *substantial connection* with Hong Kong.

The domicile test is self-explanatory. It is to be found in sub-section 15(a) of the 1984 Act, and it is unclear as to why this is missing from section 29AE. We suggest that this be reinserted. This is especially so since it is present in section 3(a) MCO.

As for ‘substantial connection’ – a person may well have a “substantial connection” with Hong Kong without being habitually resident in Hong Kong

(the present section 29AE(a)) nor being a permanent resident (the present section 29AE(b)). It is a different test – and should also be present in Part IIA.

Given that failure to satisfy section 29AE amounts to an absolute and automatic bar to jurisdiction, and given that the primary mischief being addressed is to curb abuse of ‘forum-shopping’, we suggest that a ‘substantial connection’ test along the lines of section 3(c) MCO ought to be inserted into section 29AE. If either of the parties have a substantial connection with Hong Kong, there is little reason why Part IIA ought not to be available as a matter of absolute and automatic bar to jurisdiction.

Furthermore, paragraph 31 of LCWP77 ‘Rules of jurisdiction’ noted that *“the task is to formulate jurisdictional rules strict enough to prevent persons, whose marriage is insufficiently connected with this country to make it appropriate for the English court to adjudicate on financial matters, from invoking the court’s powers; but not so strict as to exclude meritorious cases”*. The purpose of the exercise is *“to ensure that the marriage in question is sufficiently connected with this country to minimise the problems we have outlined above”*.

Moreover, paragraph 32 of LCWP77 discussed the ‘Analogy with jurisdiction in divorce’, and recommended that *“there is, we think, a strong argument for basing the jurisdictional rules governing applications in this country for financial relief after a foreign decree on the principles which govern jurisdiction in divorce, nullity and judicial separation. After all, if those rules are satisfied the applicant could have brought divorce or other proceedings in this country in the first place; had the applicant done so, the court would have had jurisdiction to grant the financial relief sought”*.

Section 15 sub-sections (1) & (2) of the 1984 Act are actually modelled after the English Court’s jurisdiction for divorce – which is triggered by domicile and habitual residence.

Note that the English Court’s jurisdiction for divorce was not triggered by a ‘substantial connection’ test *per se*; i.e. there was no English equivalent of

section 3(c) MCO. This explains why section 15 of the 1984 Act also does not contain any ‘substantial connection’ test. But it does not explain why we should not have it in Part IIA of the proposed Hong Kong legislation.

However, given that Hong Kong’s section 3(c) MCO contains a ‘substantial connection’ test, there is every reason to insert that into section 29AE as well, to ensure equivalence in parallel and analogy.

Note also that section 15(b) of the 1984 Act is premised upon “one year” because the English Court’s jurisdiction for divorce is also triggered by “one year” of habitual resident. However Hong Kong’s section 3(b) MCO is only triggered by “3 years” of habitual residence. We suggest reconsidering whether section 29AE(a) ought to be brought in line with section 3(b) MCO, by replacing “one year” with “3 years”. It is anomalous that section 3(b) MCO requires 3 years, whereas Part IIA only requires one.

We suggest that section 29AE ought to be modelled after section 3 MCO generally as a matter of principle.

In paragraph 45 of LCWP77 it was also expressed that *“we have come to the tentative conclusion that the most appropriate jurisdictional test for applications for financial relief after a foreign divorce, both in principle and as a means of restricting forum-shopping, is the analogy with jurisdiction in divorce proceedings”*.

Section 15(1)(c) of the 1984 Act

Paragraph 44 of LCWP77 recommended rejecting the ‘matrimonial home’ test. Nevertheless, section 15(1)(c) made its way into the 1984 Act.

We note however that section 3 MCO does not confer jurisdiction on grounds of having a matrimonial home in Hong Kong *simpliciter*; but on the other hand, nor is the English Court’s jurisdiction for divorce triggered by the same.

However, if a ‘substantial connection’ test along the lines of section 3(c) MCO is to be adopted into section 29AE (as above suggested), then arguably a ‘matrimonial home’ test is unnecessary – as that would merely be one, amongst many other possible variations and variants, ‘substantial connection’.

The ‘matrimonial home’ test in the English legislation arises from the existence of the Matrimonial Homes Act, which has no parallel in Hong Kong. We are of the view that a ‘matrimonial home’ test *per se* ought to be avoided.

A ‘substantial connection’ test along the lines of section 3(c) MCO is more appropriate and will already suffice.

Section 29AE(b)

As a matter of principle, Part IIA should only be available to a person who at least in theory *could have*, but for the foreign divorce, obtained a Hong Kong divorce and thus Hong Kong ancillary relief. In other words, Part IIA should **not** be available to anybody who could never have applied in the Hong Kong Courts for divorce and therefore could never have obtained Hong Kong ancillary relief.

That is to say, in principle Part IIA should not be wider than section 3 MCO.

It is unclear as to why section 29AE(b) (re: permanent resident) has been inserted. This is anomalous, since even section 3 MCO does not confer jurisdiction upon the Hong Kong to effect any divorce by reason merely of holding the status of ‘Hong Kong permanent resident’.

Section 29AE(b) appears to give the Court even wider jurisdiction than that which is available under the MCO’s section 3.

It would be possible to satisfy section 29AE(b) (by simply being permanent resident) even though the parties could never have satisfied any of sub-sections

3(a), (b) or (c) MCO; i.e. even where the parties could never have applied for divorce (and thus ancillary relief) in the Hong Kong Courts. The fact that there was a foreign decree should not suddenly extend the jurisdiction to grant financial relief. This is in principle wrong.

Moreover, a person may well be a permanent resident but yet other than that, has no connections whatsoever with Hong Kong; e.g. having emigrated long ago abroad and not having returned for decades and having no properties nor assets in Hong Kong. This is especially so given that the status of permanent resident is not usually or generally 'lost'.

As was warned in paragraph 48 LCWP7 *"it is important to take a view on the mischief at which the proposed legislation is aimed. In our view, the proposals should be concerned primarily to give a remedy in those exceptional cases where a spouse, usually the wife, has been deprived of financial relief in circumstances where an English court might be driven to hold that it would be unjust to recognise the foreign decree. It follows that we consider the mischief at which the legislation should be aimed to be a narrow one. ... In particular, we do not think that it would be appropriate to encourage applications to the court of this country inviting them to act, in effect, as a court of appeal from courts of another country"*.

To confer jurisdiction on the basis of mere 'permanent residency' *simpliciter* is far too wide and far too easily open to abuse (albeit that the abuse can be curbed at the section 29AF stage). The Hong Kong Courts should not be troubled with applications by 'permanent residents' who are neither of Hong Kong domicile nor are habitual residents (whether 1 year or 3 years) nor are substantially connected with Hong Kong (and/or have a matrimonial home in Hong Kong).

We suggest that sub-section 29AE(b) ought to be deleted, and replaced by an equivalent to sub-sections 3(a) and/or 3(c) of the MCO (the domicile and substantial connection tests).

Section 29AF(2)(g) vs. Section 16(2)(g) 1984 Act

We note that the words “*in Hong Kong*” are missing from section 29AF(2)(g) whereas the words “*in England and Wales*” are present in section 16(2)(g) 1984 Act.

Section 29AF(2) and section 16(2) 1984 Act lists out mandatory factors that must be taken into account. Section 16(2)(g) of the 1984 Act appears to have been based upon paragraph 52(e) of LCWP77, the relevant factor being “*the prospects of any order made by a court in this country being enforceable; and, in particular, the availability of any property which might be the subject matter of such an order in this country*”. The important emphasis was being placed upon the availability of properties within the Court’s jurisdiction, rather than the availability of properties *per se simpliciter*.

As presently worded, section 29AF(2)(g) concentrates upon the availability of properties *simpliciter*, without care as to whether or not the same is within the Hong Kong Court’s jurisdiction.

It is unclear as to why the wording of section 16(2)(g) of the 1984 Act was departed from. The rationale was that the more properties there are available in England and Wales, the more appropriate that forum becomes, and *vice versa*, the less properties there are in England and Wales, the less appropriate that forum becomes.

Bear in mind that section 29AF(2) only exists to complement section 29AF(1) – which proscribes the test of ‘appropriateness of Hong Kong’. As presently worded section 29AF(2)(g) targets the availability of property for financial relief, without regard as to whether those properties are in Hong Kong or elsewhere. We do not see how such a test would be relevant to the question of whether or not Hong Kong is the appropriate forum.

Section 29AG(3)

Section 29AG(3) proposes a curious restriction that the order must not be made in relation to any real property outside Hong Kong.

If enforcement problems abroad are the perceived mischief, then it is unclear as to why such perceived problems would not also exist in relation to foreign personalty and chattels.

Moreover, there are many foreign jurisdictions that welcome reciprocal enforcement of Hong Kong Court's Orders and/or where Hong Kong Court Orders are enforceable, whether upon landed properties or personalty.

This restriction is also open to easy abuse. For example, a spouse may arrange his or her finances so that almost everything of value exists by way of foreign landed properties. We do note that the Hong Kong Courts can nevertheless take their 'value' into account (even if they are foreign landed properties) and make an appropriate lump sum order on that basis, albeit not a property transfer order. But there is no apparent reason to unduly restrict the Court's ability to make transfer orders of foreign landed properties, especially when many jurisdictions will enforce them.

Another obvious example is where the parties have a piece of foreign landed property in a 'third' jurisdiction (in a jurisdiction that is neither Hong Kong *nor* the place outside Hong Kong where they were lawfully divorced) under joint ownership – in such situations, the Hong Kong Courts may well find it necessary (albeit powerless) to order that the jointly owned landed property be transferred into the sole ownership of one party, with equalisation money paid over by the party receiving title.

This topic was in fact discussed and considered by the English Law Commission in LCWP77 paragraphs 57 to 58, which merits careful reading.

In particular, the English Law Commission “[did] *not propose that there should be any statutory bar on the court making orders in relation to foreign assets of the respondent*”; “*the test is whether the order would be effective*”. The English Courts have (and the Hong Kong Courts will) refuse to order transfers of foreign property in the knowledge that the foreign courts will not give effect to such an order. “*We do not therefore think that there is any need for a special bar on the making of orders relating to foreign assets in cases of applications following a foreign decree. In many cases the court would not make such an order, because any such order would be nugatory; a statutory bar on the court dealing with foreign property after a foreign divorce would not only be unnecessary, but could cause hardship where it appears that the order could be given effect to in the foreign country*”.

Observations on Appropriate Court / Tribunal

Although the Hong Kong Court’s Orders will act *in personam* and naturally can be enforced upon Hong Kong properties and assets, it can be imagined that many cases may well involve enforcement abroad. It will be useful to be able to pray in aid of enforcement from foreign courts where appropriate and necessary.

We note that it is presently intended that Part IIA applications will take place in the District Court. Whilst this is the primary Family Jurisdiction in Hong Kong dealing with most of the local divorce and ancillary relief cases, the District Court is an inferior tribunal albeit of record; and it would be desirable that appropriate cases being suitably brought in the Court of First Instance instead – which is a Higher or Superior Court of Record.

This will lessen (albeit not eliminate) enforcement problems, and at least gets around difficulties brought about from obtaining orders from an inferior court rendering them unrecognised and/or unenforceable abroad.

We suggest that provisions be made permitting Part IIA applications to be commenced in the Court of First Instance, especially and in particular where it is contemplated that there will likely be enforcement abroad involved.

Paragraphs 53 to 54 of LCWP77 discussed and considered the appropriate court, and recommended that the Family Division of the High Court have exclusive jurisdiction, and not the County Courts. These reasons may well be thought to be applicable to England and Wales, and are not necessarily relevant to Hong Kong.

We leave open the possibility of the Family Judges of the District Court dealing with suitable cases, but would urge that appropriate cases be commenced in and/or transferred up to the Court of First Instance, and that mechanisms be put in place to cater for this; e.g. in the rules, and/or transfer provisions. Where it is plain and obvious that foreign enforcement is involved, it might be thought to be somewhat pointless to commence in the District Court only to then immediately transfer up to the Court of First Instance.

Remarriage

Sub-sections 29AB(2) & (3) provide that remarriage automatically bars the possibility of applying for ancillary relief in Hong Kong. This essentially tracks sub-sections 12(2) & (3) of the 1984 Act.

It is unclear as to why this absolute bar should exist. It is neither necessary nor justified.

The English Law Commission does not appear to have discussed or considered this in LCWP77. This was not amongst the recommendations set out in LCWP77.

Remarriage had considerably more significance in the *pre-White v. White* era; i.e. during the 1970's and 1980's, when these legislative reforms were being

formulated. *Pre-White*, receiving ex-spouses were typically awarded ancillary relief on a 'reasonable requirements' / 'needs' basis, and ongoing maintenance was a regular occurrence. Even lump sum orders were typically on the basis of calculating capitalised (*Duxbury* calculations) maintenance.

Statutory provisions such as section 9 MPPO provided for remarriage to terminate ongoing maintenance.

There is no need for sub-sections 29AB(2) & (3) in that, given section 29AG is worded in terms of only permitting the Court under Part IIA to "*make any one or more of the orders that it could make under section 4, 5 or 6*", the Court's powers are already necessarily restricted by section 4, 5 and 6 themselves, which are subject to provisions such as section 9. Therefore, there is no need for the sub-sections 29AB(2) & (3) if and insofar as ongoing maintenance is in question.

For the complete avoidance of doubt, something along these lines could be inserted into section 29AG – "the Court's powers under this section are subject to the restrictions upon section 4 imposed by section 9".

Moreover, sub-sections 29AB(2) & (3) are liable to cause severe hardship in the *post-White v. White* and *post-DD v. LKW* era.

Remarriage does not affect lump sum orders and property transfer orders. There is no reason why an ex-spouse should be debarred from claiming a lump sum order and/or property transfer order which she would otherwise have been entitled but for the fact that he / she was remarried.

It may well be that remarriage (or indeed intended, future or potential remarriage) is a factor to be taken into account; but so may cohabitation or having a new partner, and the financial circumstances of that new partner or new union. But there is no reason for there to be an absolute bar to entitlement to apply by reason only of remarriage.

A properly advised ex-spouse intending to make a Part IIA application would simply 'put off' remarriage temporarily. This is wholly artificial. It is pointless to essentially *force* ex-spouses to artificially refrain from remarrying until after a Part IIA application in order to preserve the ability and entitlement to obtain lump sum orders and/or property transfer orders. On the other hand, an unrepresented litigant without the benefit of legal advice may have unwittingly remarried and thus unfairly 'lost out'.

Moreover, the Part IIA jurisdiction in fact includes section 5 and section 7(2) & (3) – i.e. children matters. There is even more so no reason whatsoever to prevent children's finances from being applied for just because remarriage has taken place. We do recognise however that there nevertheless remains a parallel jurisdiction to apply for and obtain children's maintenance, notwithstanding the unavailability of the new proposed Part IIA. Indeed, it was observed in *YJ v. ML* that this is so – and in fact children's maintenance was ordered by the Hong Kong Courts notwithstanding that the Wife herself was not entitled to ancillary relief in the Hong Kong Courts.

We suggest that sub-sections 29AB(2) & (3) be deleted.

FDR

For the new Part IIA applications – once leave is granted, these applications ought to be subject to the Financial Dispute Resolution Scheme, as these applications are for all intents and purposes analogous to the usual ancillary relief applications that fall unto the FDR process.

Form 29 paragraph 3

Form 29 paragraph 3 refers to "a lawyer"; the reference ought to be to "a solicitor".

Hong Kong Bar Association

9th April 2010

THE HONG KONG FAMILY LAW ASSOCIATION

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23rd March, 2010

BY FAX 2501-0371

Mr. Ian Wingfield
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Dear Ian

Thank you for your letter of the 22nd January 2010, and thank you for giving us some extra time in order to respond to you.

The FLA would certainly agree with the decision of the Department of Justice to amend the MPPPO to reflect the existing provisions under Part III of the English Matrimonial and Family Proceedings Act 1984 to confer powers on the Courts in Hong Kong to deal with ancillary relief matters after recognition of an overseas divorce decree, including a mainland decree.

You may already be aware of the UK decision *Agbage v Agbage*, where in England, on the 10th March 2010, the Supreme Court reinstated an Order made by the High Court in favour of Mrs Agbage giving her additional financial provision following a very limited award in divorce proceedings in Nigeria. This is an important decision as the UK Courts consider the circumstances of a spouse where a divorce had already been concluded and a financial award had already been made overseas, with the full and active participation of both parties.

We need to consider how that would impact us upon here, as there is a strong argument for not allowing the Hong Kong Court to be used as a device to increase a financial award if a spouse is dissatisfied with the financial provision he or she has been ordered to receive, or make, in the foreign jurisdiction, particularly if jurisdiction has not been challenged prior to the litigant being dissatisfied with the award made.

As far as the proposed Hong Kong amendments are concerned, the FLA welcomes an amendment to the law, as this should certainly restrict the number of jurisdiction fights going on with the unseemly rush that goes on in the foreign jurisdiction to grant a decree of divorce in order to effectively bar a litigant in Hong Kong from securing a Decree Absolute or any ancillary relief.

In paragraph 15 of the consultation paper, paragraphs 15(d) and (e) do potentially make a Hong Kong Court an effective overseas Court of Appeal, when there has already been an overseas financial determination. Therefore perhaps stronger consideration needs to be given to paragraphs (f) and (i) to ensure that the burden on the applicant is a high and there is a clearly defined threshold to cross, particularly if the applicant has participated in the overseas ancillary relief proceedings.

It is suggested in paragraph 16 of the consultation paper that Orders under Section 29AG will not cover real property situated outside Hong Kong. We can understand the difficulties for the Hong Kong Court in this regard, but that will not, of course, prevent the Court from making an Order against a litigant to take certain steps with regard to the signing of transfer documents, as is the case now. The applicant would have the normal rights of enforcement against the other person, provided both parties are subject to actual Hong Kong jurisdiction. Enforcement would be in personam, as opposed to in rem.

The FLA supports the proposed amendments to be made to the Hong Kong legislation, and we welcome such amendments in order to bring Hong Kong in line with other modern matrimonial jurisdictions. However, this does mean that this is likely to result in a significant number of applications being made to the Hong Kong Court, particularly from litigants from the PRC.

If we can be another further assistance, then please let us know.

Kind regards

A handwritten signature in black ink, appearing to read 'Linda C. Heathfield', written in a cursive style.

Linda Heathfield

Chairman of the Hong Kong Family Law Association