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**Report of the Bills Committee on Matrimonial Proceedings  
and Property (Amendment) Bill 2010**

**Purpose**

This paper reports on the deliberations of the Bills Committee on Matrimonial Proceedings and Property (Amendment) Bill 2010.

**Background**

Existing deficiency in matrimonial legislation

2. 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.

3. Under section 25(1)(b) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("MPPO"), the court's powers to make an order for financial provision or property transfer in favour of a spouse are conditional on the grant of a decree absolute by the Hong Kong court. As a result, parties who have obtained a divorce decree in a jurisdiction outside Hong Kong cannot apply for financial relief to the Hong Kong courts. Parties are barred from making such an application as the Hong Kong courts can no longer grant any decree absolute after the marriage has been dissolved by the court of another jurisdiction where the decree is recognized in Hong Kong. This may cause hardship to parties where no or insufficient financial provisions have been made under the foreign orders, notwithstanding that the parties may have property or assets in Hong Kong.

4. The existing deficiency in matrimonial legislation has been demonstrated in the recent case of *ML v YJ* (HCMC 13/2006, CACV89/2008). 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 ("CFI") 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 1984 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 Bill**

5. The object of the Bill is to amend MPPO 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, in judicial or other proceedings outside Hong Kong. The Bill adds to the Ordinance a new Part IIA (sections 29AA to 29AL) which is substantially modelled on Part III of the 1984 Act and makes certain consequential amendments.

## **The Bills Committee**

6. At the House Committee meeting on 2 July 2010, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in the **Appendix**. Under the chairmanship of Dr Margaret NG, the Bills Committee has held four meetings with the Administration.

## **Deliberations of the Bills Committee**

### Impact of the Bill on the workload on the courts

7. Members are in general supportive of the Bill in order to address the existing deficiency in matrimonial legislation. They have, however, expressed concern that given the increasing number of Mainland-Hong Kong marriages, implementation of the Bill would bring about a significant increase in the workload on the courts. Noting that it is the Administration's intention to bring the Amendment Ordinance (if enacted) into operation as soon as possible, i.e. within one or two months after its enactment, members have stressed that the Administration should make an assessment of the caseload arising from its implementation.

8. After consultation with the Judiciary, the two legal professional bodies and the Hong Kong Family Law Association, the Administration has advised that it is difficult to estimate the caseload arising from the implementation of the Bill, but additional resources would be sought should there be a substantial increase in caseload.

Restriction to apply for financial relief after a remarriage under new section 29AB

9. 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 proposed section 29AB(3) provides that "[t]he reference in subsection (2) to remarriage includes a marriage that is by law void or voidable". Mr James TO has queried whether it is reasonable that a remarriage that is by law void or voidable would operate as a bar to an application for financial relief after divorce.

10. The Administration has explained that a similar provision can be found in section 12(3) of the 1984 Act. In its Report on "Family Law - Financial Relief after Foreign Divorce" published in 1969, the English Law Commission recommended that "remarriage" should include a void or voidable marriage. The similar restriction applies to applications for ancillary relief after a marriage has been dissolved in Hong Kong. The new section 29AB(2) corresponds to section 9(4) of MPPO. A "void" or "voidable" marriage is defined by section 20 of the Matrimonial Causes Ordinance (Cap. 179) ("MCO"). There is no specific explanation offered for the inclusion of a void or voidable marriage in the case of remarriage.

11. Dr Margaret NG has advised that the English law on judicial separation and alimony has its origins in ecclesiastical law. Under the English ecclesiastical law, a husband has the obligation to support his separated wife. However, a wife having left her husband and lived with another man could not claim alimony, as her conduct has signified the termination of her husband's obligation to support her. Once terminated, the husband's obligation could not be revived, whatever the outcome of the wife's relationship with another man. This historical background can explain why remarriage, even one which is by law null and void, would operate as a bar to an application for financial relief.

12. The Administration has informed the Bills Committee that its research has indicated that in some other jurisdictions, remarriage (including a marriage which is "void" or "voidable") continues to operate as a bar against application for financial relief against a former spouse, for instance, under section 70A of the Family Proceedings Act 1980 of New Zealand. It is submitted that if the restriction were to be removed, this may encourage parties who would otherwise be restricted from applying for financial relief against his/her former spouse in their home jurisdiction to apply to the Hong Kong court for such relief. The Administration is not aware of any cases in Hong Kong where a party had been barred from applying for financial relief due to a remarriage which is by law void or voidable. The Administration does not consider it necessary to change the existing provision. As section 2(2) of MPPO has

already provided a provision similar to the proposed section 29AB(3), the Administration has agreed to move a Committee Stage amendment ("CSA") to delete the proposed provision from the Bill.

13. Mr James TO maintains his view that it is not justifiable to retain a void or voidable marriage as a bar to applications for financial relief in matrimonial legislation. He has urged the Administration to conduct an overall review and propose changes to the relevant provisions after enactment of the Bill.

#### Leave to apply for financial relief under new section 29AC

14. The proposed 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. If leave is granted, the court under the proposed section 29AD 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.

15. Some members have queried whether it is appropriate to adopt "substantial ground" as the threshold required for granting leave under the proposed section 29AC(2). They have also requested the Administration to consider whether the use of its Chinese rendition "充分理由" is appropriate. These members consider that it is unreasonable that the threshold for granting leave under the proposed section 29AC(2) is higher than that for making an order for financial relief under the proposed section 29AF (i.e. the court is required, before making an order for financial relief, to consider whether in all the circumstances of the case it would be appropriate for a court in Hong Kong to make the order).

16. The Administration has explained that the proposed section 29AC(2) is similar to section 13 of the 1984 Act which was introduced in accordance with the English Law Commission's recommendation in its 1982 Report. By reference to the 1982 Report and the relevant case precedents, it would seem that the English Law Commission has deliberately set a relatively high threshold to filter applications for financial relief under Part III of the 1984 Act. The English court has held that in determining whether there is "substantial ground" for the making of an application for financial relief, the court should take into account the factors stated in section 16 of the 1984 Act (the equivalent of the proposed section 29AF of the Bill). The Administration submits that the "substantial ground" test provided in the proposed section 29AC(2) should be retained to safeguard the interests of respondents given that applications under the new section 29AB is to be made *ex parte*. In addition, the application of section 13 of the 1984 Act has been thoroughly discussed by the

English courts including the United Kingdom ("UK") Supreme Court. These cases would become useful references if the issue of "substantial ground" has to be determined by the courts of Hong Kong after the enactment of the Bill.

17. Members note that on the proper application of the threshold of "substantial ground", the UK Supreme Court in *Agbaje v Agbaje* ([2010] UKSC 13) commented that -

"In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than 'serious issue to be tried' or 'good arguable case' found in other contexts. It is perhaps best expressed by saying that in this context 'substantial' means 'solid'...."

The Administration has confirmed that such interpretation of the "substantial ground" threshold accords with the policy intent of the Administration. Having regard to this comment, the Administration has also proposed to move a CSA to the Chinese text of the proposed section 29AC(2) by deleting "充分理由" and substituting "實質理由".

18. Members have agreed to adopt the Chinese rendition "實質理由" proposed by the Administration as they consider that the phrase denotes a lower threshold for granting leave.

19. Mr James TO and Ms Miriam LAU have expressed concern whether the expression "make any payment or transfer of any property" in the proposed section 29AC(3) would be adequate to cover any order of financial provisions made by the court, whatever the nature of the property is concerned. They have pointed out that an order for financial relief could cover more than the making of payment or transfer of property, for instance, an order requiring a party to surrender his/her rights under a family trust.

20. According to the Administration, the concept of transfer of property is not novel in MPPO and can be found in section 6(1)(a) of the Ordinance. "Property" is defined in section 2(1) of MPPO to mean "any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, any prescribed instrument within the meaning of section 137B of the Banking Ordinance (Cap. 155), debt or other chose in action, and any other right or interest whether in possession or not." In view of the broad definition of "property" in MPPO, the Administration submits that the wording of the new section 29AC(3) should be able to cover any property included in an order for financial relief as may be made by a foreign court.

### Jurisdiction of court

21. 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.

22. According to the Administration, this section is substantially modelled on section 15(1) of the 1984 Act but has not incorporated section 15(1)(c) of the 1984 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. The Administration has explained to the Bills Committee that the court's jurisdiction was initially proposed to be based on habitual residence or permanent resident status of the parties to the marriage. When the Law Society of Hong Kong ("Law Society") was consulted on the working draft bill, it had suggested that the "matrimonial home" ground in section 15(1)(c) of the 1984 Act should be added to the jurisdictional clause to provide an avenue for redress to those people who fell outside the requirements based on habitual residence in Hong Kong or permanent resident status. The Administration had not included such a ground in the working draft bill as it noted that under section 20 of the 1984 Act, the court's power to make an order for financial relief where its jurisdiction depended solely on the existence of a former matrimonial home in England and Wales were more restrictive than when jurisdiction was founded on one of the other two grounds. Factual difficulties and controversies could also arise in establishing jurisdiction solely on that ground.

23. The Administration has also advised that the Hong Kong Bar Association ("Bar Association") and the Judiciary are of the view that the court's jurisdiction to deal with applications for financial relief should be the same as that for divorce proceedings in Hong Kong. Under section 3 of 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 three years immediately preceding the date of the petition or

application, or had a substantial connection with Hong Kong. The Bar Association considers that if the "substantial connection" test along the lines of section 3(c) of MCO is to be adopted, then the inclusion of the "matrimonial home" test will not be necessary. The Law Society has been informed of this approach and has raised no objection to the proposal.

24. In response to members' enquiry about the applicability of the proposed legislation to on-going judicial proceedings (including cases on appeal), the Administration has advised that there are no provisions on transitional arrangements in the Bill. After the bill is enacted, the court would be empowered to deal with an application for an order for financial relief after a foreign divorce provided that the parties could satisfy the jurisdictional requirements set out in the proposed section 29AE.

25. Members have further enquired about the factors that the Hong Kong court might take into account when considering the jurisdictional requirement of "substantial connection" in divorce proceedings. The Administration has explained that the relevant case law demonstrates that the Hong Kong courts tend to adopt a liberal approach in the interpretation of "substantial connection with Hong Kong" in divorce proceedings. The court in deciding the issue of a party's connection with Hong Kong for the purpose of section 3(c) of MCO would have regard to all relevant facts instead of limiting to particular circumstances such as the time that a party has remained in Hong Kong. The presence of a matrimonial home in Hong Kong (whether in purchased or rented property), nature of their stay in Hong Kong, place of education of the children of the marriage, as well as maintaining bank accounts and acquiring family assets in Hong Kong may all be relevant, and the list is not exhaustive.

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

26. The proposed 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 to be made by a court in Hong Kong, it must dismiss the application. This section also sets out the relevant matters the court must consider in making such an order, including the connection that the parties to the marriage 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.

27. Ms Miriam LAU has expressed concern that as a party who has obtained financial relief made under a foreign order after an overseas divorce could apply for financial relief to the Hong Kong courts under the new Part IIA, fairness issue might arise if that party is given another opportunity to seek additional financial relief.

28. The Administration has explained that the financial relief granted by a foreign order, if any, is one of the matters set out in the proposed section 29AF which the court should have regard to before making an order for financial relief. There have been cases in UK where a party who has obtained insufficient financial provisions under a foreign order applied to the courts in UK for financial relief. On the basis of the experience of the UK courts in dealing with applications for financial relief under Part III of the 1984 Act, the UK courts would be slow to interfere with an order made by a foreign court which is regarded to have been properly seised of the matter and was the natural forum for the resolution of the dispute between the parties.

29. The Bills Committee notes that the UK Supreme Court in *Agbaje v Agbaje* set out the general principles in determining the amount of provision to be made under the 1984 Act. First, primary consideration had to be given to the welfare of any children of the marriage. Second, it would never be appropriate to make an order which gave the claimant more than she or he would have been awarded had all proceedings taken place within England and Wales. Third, where possible the order should have the result that provision was made for the reasonable needs of each spouse.

30. Referring to the UK cases of *Holmes v Holmes* and *Jordan v Jordan*, Mr James TO has expressed concern that the court would set a high threshold for granting financial relief after a foreign divorce, i.e. making an order for financial relief only when the financial provision made by a foreign order is manifestly unjust or inadequate. Mr TO has suggested stating explicitly in the proposed section 29AF(1) that injustice of a foreign order is not a pre-condition for the making of an order for financial relief by the court. Mr TO's concern, however, is not shared by Dr Margaret NG, Mr Albert HO and Ms Audrey EU. They take the view that the threshold for granting financial relief as laid down in the proposed section 29AF(1) (i.e. "whether in all the circumstances of the case it would be appropriate for the order to be made by a court in Hong Kong") is not high. In *Agbaje v Agbaje*, the UK Supreme Court set out clearly the proper approach for the courts to take when considering applications for financial relief under Part III of the 1984 Act. The UK Supreme Court specifically stated that both hardship and injustice should not be regarded as pre-conditions of the exercise of jurisdiction.

31. The Administration has advised that courts should have regard to all relevant circumstances of a case in making an order for financial relief. In *Agbaje v Agbaje*, the UK Supreme Court held that the proper approach depended on a careful application of sections 16, 17 and 18 of the 1984 Act (the equivalents of proposed sections 29AF, 29AG and 29AH of the Bill respectively) in the light of the legislative purpose, which is the alleviation of the adverse consequences of no, or inadequate, financial provision being made by a foreign court. The Administration has further pointed out that as the proposed section 29AF(1) is modelled on section 16(1) of the 1984 Act, applicability of relevant UK case law would be affected if amendments are made to the proposed section 29AF(1).

#### Types of orders that may be made by the court

32. Under the proposed section 29AG, the court is empowered to make any order that it can make under section 4, 5 or 6 of MPPO 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. Proposed section 29AH further sets out the matters to which the court must pay regard in exercising its powers under section 29AG.

33. Noting that under the existing MPPO, the Hong Kong courts are not empowered to deal with applications for financial relief made by a former spouse after a foreign divorce, Ms Audrey EU has sought clarification as to whether the Hong Kong courts has the power to deal with applications for financial relief made by or on behalf of a child of the family after a foreign divorce. Ms EU is concerned about the impact of the inclusion of references to section 5 of MPPO (relating to financial provision for child of the family) in the proposed section 29AG(1) and (2) on applications for financial relief made by or on behalf of a child, if there is no such restriction at present.

34. The Administration has explained that an application under section 5 of MPPO for financial provision for a child of the family must be made in proceedings for divorce. Where parties to the marriage have obtained a divorce in a jurisdiction outside Hong Kong, no such proceedings would exist for the purposes of the section. Under the Guardianship of Minor Ordinance (Cap. 13) ("GMO"), the court is empowered to make certain orders requiring payment by a parent of the minor for the maintenance of the minor. No reference is made to MPPO although orders made under section 10 of GMO may include periodical payments, secured periodical payments and payment of a lump sum. Section 3 of GMO provides that the proceedings concerned are in relation to the custody or upbringing of a minor, and in relation to the

administration of any property belonging to or held in trust for a minor. Those proceedings are however not part of the matrimonial proceedings under MPPO.

35. It is the Administration's submission that the courts of Hong Kong do not seem to have the power to entertain application for financial provisions for a child of the family, for the purpose of MPPO, if the parents have obtained a divorce in another jurisdiction. Removing the references to section 5 of MPPO from the proposed section 29AG(1) and (2) would, in effect, prevent the new Part IIA of MPPO from applying to applications for financial relief for a child of the family in case of a foreign divorce. The departure from section 17 of the 1984 Act is likely to raise the argument that the new Part IIA of MPPO should not apply to applications for financial relief relating to children as the legislation has omitted the references to section 5.

36. The Administration further considers that as far as the impact of the Bill on applications for financial relief made by or on behalf of a child of the family after a foreign divorce is concerned, it is equally important that such a child should not suffer from any adverse consequences if the foreign court failed to provide any financial provisions or inadequate provisions have been made for the child. To attain this purpose, the Administration therefore submits that the proposed section 29AG should explicitly empower the court to make an order under section 5 of MPPO.

37. Members raise no query over the Administration's position of retaining the references to section 5 of MPPO in the proposed section 29AG(1) and (2).

38. The legal adviser to the Bills Committee has pointed out that as it is specified in the proposed section 29AG(2) that the court may make an order for sale of property under section 6A(1) of MPPO after the making of an order under section 4(1)(b) or (c), 5(2)(b) or (c) or 6 of MPPO, the effect would be that the court could not make an order for sale of property upon or after the making of an order for periodical payments under section 4(1)(a) or 5(2)(a). Such restriction is not found under section 6A(1) of MPPO in respect of applications for financial provisions after a divorce in Hong Kong.

39. Having considered the views of the legal adviser to the Bills Committee, the Administration has agreed to move amendments to the proposed section 29AG(2) to reflect the policy intent that section 6A(1) of MPPO in respect of the court's power to make an order for sale of property should also apply to a periodical payment order made under section 4(1)(a) or 5(2)(a) of MPPO.

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

40. Members note that under the proposed section 29AJ, 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. Members further note that under the proposed section 29AK, 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

Transfer of applications to the High Court

41. The Bill adds five new rules of court (Rules 103A to 103E) to the Matrimonial Causes Rules (Cap. 179 sub. leg. A) ("MCR") 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 MCO, the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481) and the Rules of the High Court (Cap. 4 sub. leg. A).

42. The Bills Committee notes that the Bar Association has proposed allowing appropriate cases to be commenced in CFI. The Administration has explained that the proposal in the Bill for the commencement of the relevant proceedings in the Family Court is in line with the existing arrangement for ancillary relief proceedings after a marriage is dissolved in Hong Kong. The Judiciary is of the view that an application under the new Part IIA should commence in the Family Court and the Family Court Judge should have the discretion to transfer the relevant applications to CFI.

43. The Bills Committee also notes that under section 2A of MPPO, proceedings under the Ordinance shall be commenced in the District Court but rules may be made for the transfer of any proceedings to the High Court. By virtue of this provision, any applications to be made under the new Part IIA of the Ordinance will be similarly commenced in the District Court. Rule 80 of MCR sets out the procedures for the transfer of an application for ancillary relief from the District Court to CFI. As rule 80 of MCR only relates to an application for ancillary relief under Part II of the Ordinance, the new rule 103E which provides that in appropriate cases, an application could be transferred to CFI as in the case of other ancillary relief proceedings under the Ordinance is proposed to be added to MCR under clause 12 of the Bill so that rule 80 may

also apply to an application under the proposed Part IIA of MPPO. The Administration has further pointed out that section 42 of the District Court Ordinance (Cap. 336) also gives the District Court a general power of transferring any proceedings before it to CFI.

### **Committee Stage amendments**

44. Apart from the CSAs set out in paragraphs 12, 17 and 39 above, the Administration has also agreed to take on board the suggestions of the legal adviser to the Bills Committee by moving amendments to improve the drafting of the Chinese text of the proposed section 29AB(2), the proposed section 29AJ(5) and the proposed section 29AK(1). The Bills Committee supports these CSAs to be moved by the Administration.

### **Date of resumption of Second Reading debate**

45. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 15 December 2010.

### **Consultation with the House Committee**

46. The Bills Committee reported its deliberations to the House Committee on 19 November 2010.

Council Business Division 2  
Legislative Council Secretariat  
10 December 2010

**Bills Committee on Matrimonial Proceedings  
and Property (Amendment) Bill 2010**

**Membership list**

**Chairman** Dr Hon Margaret NG

**Members** Hon Albert HO Chun-yan  
Hon James TO Kun-sun  
Hon LAU Kong-wah, JP  
Hon Miriam LAU Kin-ye, GBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Cyd HO Sau-lan  
Hon Paul TSE Wai-chun

(Total : 8 Members)

**Clerk** Miss Flora TAI

**Legal Adviser** Ms Clara TAM

**Date** 12 July 2010