

THE HONG KONG LAW LIBRARY

FAMILY LAW AND PRACTICE IN HONG KONG

FOURTH EDITION

GENERAL EDITOR

Philippa Hewitt

and a team of
expert contributors



SWEET & MAXWELL

TABLE OF CONTENTS

<i>Foreword to the Fourth Edition</i>	v
<i>Preface to the Fourth Edition</i>	vii
<i>List of Authors</i>	xi
<i>Acknowledgements</i>	xiii
<i>Table of Hong Kong Cases</i>	xiv
<i>Table of Cases from International Jurisdictions</i>	lxxv
<i>Table of Hong Kong Legislation</i>	xcvii
<i>Table of International Legislation</i>	cxxxv

PREAMBLE: THE POSITION OF SAME SEX COUPLES IN HONG KONG

By Jocelyn Tsao

1. Introduction	1.1
2. Same Sex Marriage	1.8
3. Same Sex Spousal Rights and Benefits	1.13
(a) Dependant Visa	1.17
(b) Spousal Status under Policies Concerning Tax and Civil Service Benefits	1.23
(c) Public Housing and Subsidised Housing	1.29
(d) Intestate/Inheritance Entitlements and Benefits	1.33
(e) After-death Arrangements	1.40
4. Same Sex Families	1.42
(a) Custody and Guardianship	1.49
(b) Parental Status	1.56
5. Need for an Alternative Framework	1.66
6. Conclusion	1.72

CHAPTER 1 DIVORCE AND DISSOLUTION OF MARRIAGE

By Philippa Hewitt

1. Introduction	1.001
2. Applications to Present a Divorce Petition Before One Year	1.015
3. Jurisdiction	1.019
(a) Jurisdictional grounds to file in Hong Kong	1.019
(b) Recognition of Foreign Decrees	1.023
4. Divorce; Irretrievable Breakdown and the Five Facts	1.026
(a) Irretrievable breakdown – The sole ground for divorce	1.026
(b) The five facts	1.029

(i) Adultery (s.11A(2)(a))	1.029
(ii) Unreasonable behaviour (s.11A(2)(b))	1.042
(iii) One year's separation with consent (s.11A(2)(c))	1.060
A. Rescission of decree <i>nisi</i>	1.067
(iv) Two year's separation without consent (s.11A(2)(d))	1.068
A. Protection for Respondents in Separation Cases under the Matrimonial Causes Ordinance (Cap.179) (MCO)	1.072
B. Applications under s.15B of the MCO	1.074
C. Applications under s.17A of the MCO	1.079
(v) Desertion (s.11(e))	1.086
5. Attempted Reconciliation and the Six-month Rule	1.089
6. Decree <i>Nisi</i> and Decree Absolute	1.093
7. Remarriage and the Effect of Final Decree	1.094
8. Petitions for Judicial Separation	1.099
(a) Jurisdiction requirements for a decree of Judicial Separation	1.103
9. Petitions for Nullity	1.106
(a) Void marriages	1.107
(b) Voidable marriages	1.109
(c) Jurisdiction of the court in nullity	1.115
(d) Bigamy	1.117
10. Petitions for a Decree of Presumption of Death	1.119
11. Chinese Customary Marriages	1.123
(a) Background	1.123
(b) Some definitions	1.132
(c) Validating a customary marriage	1.135

CHAPTER 2 PRACTICE AND PROCEDURE OF DIVORCE, JUDICIAL SEPARATION AND NULLITY

By Philippa Hewitt

1. Relevant Law	2.001
(a) Jurisdiction and transfer between the Family Court and the Court of First Instance	2.010
2. Names of the Parties	2.012
3. Preliminary Matters	2.013
(a) The marriage certificate	2.013
(b) The pre-action letter	2.014
(c) Omission of the petitioner's address in certain circumstances	2.015
4. Drafting the Divorce Petition	2.016
(a) The particulars	2.017
(b) The prayer	2.022

5. Drafting the Joint Application	2.032
6. Drafting the Nullity Petition	2.038
7. Drafting the Petition for Judicial Separation	2.041
8. Drafting the Petition for Presumption of Death and Dissolution	2.042
9. Statement as to Arrangements for the Children	2.043
10. The Certificate of Reconciliation	2.050
11. Filing	2.052
12. Service	2.056
(a) Documents to be served on the respondent	2.059
(b) Deemed service	2.064
(c) Substituted service	2.066
(d) Order dispensing with service	2.071
(e) Service out of the jurisdiction of Hong Kong	2.073
13. Subsequent Pleadings	2.076
14. Amending the Pleadings	2.080
15. Directions for Trial and Affidavit in Support of Petition	2.088
16. Special Procedure Divorce and Decree <i>Nisi</i>	2.090
17. The Decree <i>Nisi</i> Hearing	2.093
(a) Decree <i>nisi</i> hearing for divorce and joint applications	2.093
(b) Decree <i>nisi</i> hearing for nullity	2.098
(c) Judicial separation	2.099
18. Drafting the Decree <i>Nisi</i> and Accompanying Order	2.100
19. Rescission or setting aside of Decree <i>Nisi</i>	2.106
20. The Decree Absolute	2.113
(a) Application for decree absolute by the respondent	2.117
(b) Application to abridge the six-week time limit	2.119
(c) Certificate to make decree <i>nisi</i> absolute	2.121
(d) Application for decree absolute within one year	2.122
(e) Application to set aside decree absolute	2.124
21. Acting for the Respondent – The Acknowledgment of Service	2.127
22. The Procedure if Acting for an Applicant in a Joint Application	2.137
23. The Defended Suit	2.141
(a) Filing an acknowledgment of service and answer	2.143
(b) Application to file an answer out of time	2.149
(c) Directions for trial following filing of acknowledgment of service	2.160
(d) The answer	2.162
(e) The cross-petition	2.165
(f) The statement as to arrangements for the children	2.167
(g) Filing and service	2.168
(h) Drafting the reply	2.170

(i) Directions for trial after the close of pleadings	2 171
(j) Preparation for hearing	2 173
(k) In court	2 178
(l) The opening	2 179
(m) The examination-in-chief	2 180
(n) Cross-examination	2 181
(o) Re-examination	2 182
(p) Witnesses	2 183
(q) Closing	2 184
(r) Compromise	2 185
(s) Costs	2 185

CHAPTER 3 JURISDICTION AND FORUM

By Mairéad Rattigan, SC and Alexander Tan

1. Statutory Jurisdiction	3 003
Limb (a) – Domicile	3 004
Limb (b) – Habitual residence	3 004
Limb (c) – Substantial connection	3 007
2. Forum Conveniens	3 048
(a) Stage I: Appropriate forum	3 055
(b) Stage II: Juridical advantage	3 064
(c) Stage III: Balancing exercise	3 068
3. Challenges to Jurisdiction	3 071
(a) Challenge based on lack of statutory jurisdiction	3 074
(b) Challenge based on <i>forum non conveniens</i> and submission to jurisdiction	3 083
4. Concurrent Proceedings in Court Overseas: Anti-suit Injunctive Relief	3 088
5. Recognition of Overseas Divorce: Jurisdiction of the Hong Kong Courts	3 096
6. Applications under PT.IIA of the Matrimonial Proceedings and Property Ordinance	3 104
(a) Statute	3 104
(b) <i>C v H</i>	3 110

CHAPTER 4 ANCILLARY RELIEF: FINANCIAL DIVISION

By Philippa Hewitt

1. Introduction	4 001
(a) The section 7 factors	4 002
(b) Guidance on division of assets from the Court of Final Appeal in <i>LKW v DD</i>	4 007
(c) Judicial discretion	4 010
2. Factors: Section 7 of the MPPO (Cap.192)	4 016
(a) Differences between s.25, Matrimonial Causes Act and s.7, MPPO	4 016
(i) The child is the first consideration	4 017
(ii) Provision as to clean break	4 020

(b) The statutory provisions – s.7(1), MPPO	4.025
(c) All the circumstances of the case	4.027
(i) Remarriage	4.029
(ii) Cohabitation	4.031
(iii) Agreements – pre- or post-nuptial	4.032
(d) Conduct of the parties	4.039
(i) Financial and non-financial misconduct	4.043
(ii) Addbacks for bad behaviour or dissipation of funds	4.047
(iii) Litigation misconduct	4.060
3. The Financial Resources	4.063
(a) Determining the parties' financial resources	4.063
(b) Income	4.072
(c) Earning capacity	4.075
(d) Property and other financial resources	4.082
(e) Determining beneficial ownership	4.087
(f) Financial resources a party is likely to have in the foreseeable future: Bonuses, inheritances	4.093
4. Needs and Obligations	4.098
(a) "Needs"	4.100
(b) "Obligations" and "responsibilities"	4.108
(c) "Obligations in the foreseeable future"	4.110
5. Standard of Living	4.111
6. Age and Duration of Marriage	4.118
(a) Age of the parties	4.119
(b) Duration of marriage and contribution	4.121
(c) Cohabitation prior to marriage	4.133
7. Physical and Mental Disability	4.140
8. Contribution	4.141
(a) Non-financial contribution	4.143
(b) Financial contribution	4.151
(c) Inherited wealth as a contribution	4.155
(d) "Special contribution"	4.161
9. Compensation for Loss of Benefit and for Relationship-Generated Loss	4.171
(a) Compensation for relationship-generated loss	4.172
(i) <i>McFarlane v McFarlane</i>	4.172
(ii) <i>LKW v DD</i>	4.181
(iii) <i>WLK v TMC</i>	4.184
(iv) <i>A v B</i>	4.191
(v) <i>Waggott v Waggott</i>	4.193
(vi) <i>EBS v NTCD</i>	4.197
(vii) <i>Loss of chance to invest</i>	4.198

(b) Loss of pension	4 199
(i) Disclosure of pension details	4 201
(ii) Pension schemes	4 203
(iii) Jurisdiction of the pension scheme	4 205
10. Application of <i>LKW v DD</i> guidelines	4 211
(a) Application of the LKW guidelines in <i>WLK v TMC</i>	4 211
(i) The nature and duration of the marriage	4 215
(ii) Compensation	4 216
(iii) Contribution	4 217
(b) Conclusion	4 221

CHAPTER 5 FINANCIAL ORDERS

By Philippa Hewitt

1. Introduction	5 001
2. Financial Provision: Periodical Payments, Secured Periodical Payments and Lump Sum Orders	5 001
3. Periodical Payments	5 001
(a) Duration of the order	5 008
(b) Index linking	5 013
(c) Tax	5 014
(d) Important considerations in respect of a periodical payments order	5 015
(e) Earning capacity	5 018
(i) Potential, deemed and actual earning capacity	5 019
(ii) The effect of disabilities on the earning capacity of both parties	5 026
(f) Cohabitation	5 028
(g) Quantum of periodical payments	5 035
(h) The clean break, term maintenance or maintenance for life?	5 044
(i) Policy considerations for a clean break	5 044
(ii) Deferred clean break or term order	5 047
(iii) Term maintenance versus "meal ticket for life"	5 048
(iv) Guidance on spousal maintenance	5 051
(a) <i>G v G</i>	5 052
(b) <i>SS v NS</i>	5 055
(v) Nominal maintenance	5 057
(vi) Considerations when deciding on making a clean break	5 062
4. Secured periodical payments	5 068
5. Lump sum orders	5 070
(a) <i>Duxbury</i> orders	5 080
(b) Sharing cases	5 089
(c) Matrimonial and non-matrimonial property	5 092
(i) The date of valuation of assets	5 094

(ii) What constitutes matrimonial and non-matrimonial property?	5 097
(iii) Post-separation accruals	5 110
A. Future income	5 112
B. Bonuses	5 115
C. Capital post-separation accruals	5 124
(iv) Premarital assets	5 136
(v) Inheritances and gifts	5 144
A. Inheritances	5 145
B. Gifts	5 152
(d) Business cases: Private companies	5 155
(i) Piercing the corporate veil	5 156
(ii) Valuation of a private business	5 172
(iii) How to distribute a company?	5 183
(e) Trusts	5 195
6. Property adjustment orders	5 201
7. Transfer of Property Orders	5 206
(a) Real property and the matrimonial home	5 209
(b) Transfers free of or subject to mortgage	5 212
(c) Transfers subject to tax?	5 213
(d) <i>Mesher</i> and <i>Martin</i> orders	5 214
(i) <i>Mesher</i> orders	5 214
(ii) <i>Martin</i> orders	5 219
(e) Transfer on condition	5 221
(f) Transfer of tenancies	5 222
8. Settlement of Property Orders	5 227
9. Variation of Settlement	5 232
10. Orders for Sale of Property	5 235
11. Financial Provision for Children	5 245
(a) Orders the court can make	5 245
(i) Financial provision under s.5 of the MPPO	5 246
A. Differences to spousal financial provision	5 246
B. Orders to the party for the benefit of a child or to the child directly	5 248
C. Ability to pay a lump sum liability in relation to a child	5 250
D. Periodical payments and/or lump sum	5 252
(ii) Financial provision under the Guardianship of Minors Ordinance	5 254
A. Section 10(2)	5 254
B. Inherent discrimination in the treatment of children of married and unmarried parents under the MPPO and the GMO	5 257
(iii) Duration of an order	5 261
(b) Factors to which a court must have regard	5 269
(i) Under the MPPO	5 269

(ii) Under the GMO	5.272
(iii) Section 7(2) MPPO factors	5.273
A. Financial needs of the child (s.7(2)(a))	5.273
I. Accommodation needs	5.273
II. Child maintenance to cover a proportion of general household expenses?	5.274
B. Financial resources of the child (s.7(2)(b))	5.281
C. Physical or mental disability (s.7(2)(c))	5.284
D. Standard of living (s.7(2)(d))	5.290
I. General considerations	5.291
II. Achieving parity for the children's benefit	5.294
E. The manner in which the child was and is expected to be educated (s.7(2)(e))	5.297
(c) Drawing up an order and the s.18 declaration	5.298
(i) Drafting the order	5.299
(ii) The s.18 of the MPPO declaration	5.300
(d) Where a child is not the child of a party to the marriage	5.301

CHAPTER 6 MAINTENANCE PENDING SUIT AND VARIATION APPLICATIONS

By Philippa Hewitt

1. Maintenance Pending Suit	6.001
(a) Statutory provisions	6.001
(b) General principles	6.004
(c) Court of Appeal decision: <i>HJFG v KCY</i>	6.017
(d) Parental support and MPS	6.025
(e) Application for leave to appeal MPS order	6.028
(f) Provision for legal costs	6.031
(i) Duration of litigation funding order	6.040
(ii) Rationale: Equality of arms	6.043
(iii) Lump sum or monthly payments?	6.045
(iv) Public funding	6.050
(v) Quantum of litigation funding	6.053
(g) MPS and nuptial agreements	6.055
(h) Financial disclosure in MPS applications	6.061
(i) Procedure	6.067
2. Applications to Vary	6.068
(a) Statutory provisions	6.070
(b) Orders to which this section applies	6.072
(i) Orders that can be varied	6.072
(ii) Orders that cannot be varied: Capital orders	6.075
(c) Factors to which the court will have regard: Change in circumstances	6.082
(i) The court's approach	6.083
(ii) Leading case: <i>AEM v VFM</i>	6.090

(d) Varying a consent order	6.096
(e) Application to vary MPS order	6.104
(f) Appeal or vary?	6.109
(g) Applications to vary child maintenance	6.112
(h) Applications to vary an undertaking	6.124
(i) Effect of remarriage or co-habitation on variation applications	6.129
(j) Applications to recover arrears of maintenance and backdating	6.132
(k) Applications to vary and enforcement	6.140
(l) Financial disclosure in applications to vary	6.142
(m) Procedure	6.146

CHAPTER 7 FINANCIAL CONSENT ORDERS

By Sebastian Leung and Sharon Ser

1. Consent Orders	7.001
(a) The form of a consent order	7.008
(i) Recitals of fact	7.009
(ii) Undertakings and agreements	7.014
(iii) The orders	7.026
(b) Dismissal of claims	7.036
(c) Liberty to apply and s.18 declaration	7.038
(d) Costs	7.040
(e) Finalising a consent order	7.041
(f) Whether to appeal or apply to set aside a consent order	7.045
(g) Jurisdiction to set aside a consent order	7.053
(h) Basis on which to set aside a consent order	7.055
(i) Non-disclosure, fraud and misrepresentation	7.060
(ii) Remarriage of a party	7.070
(iii) Supervening event: <i>Barder v Barder (Caluori)</i>	7.074
(iv) Supervening event: Change in the value of the assets	7.077
(v) Global financial crisis – A supervening event under the <i>Barder</i> principles	7.079
(vi) COVID-19 – A supervening event under the <i>Barder</i> principles	7.086
(i) Determination of ancillary relief after consent order is set aside	7.089
(j) Nearly concluded or imperfect settlements and financial consent orders	7.094

CHAPTER 8 THIRD-PARTY APPLICATIONS AND PRELIMINARY ISSUES

By Jeffrey Li

1. The <i>TL v ML</i> Procedure	8.007
2. Joinder	8.017
(a) Joinder and service of documents in variation of settlement and avoidance of disposition applications	8.032

3. Determining Beneficial Ownership	8 036
(a) Resulting trusts	8 040
(i) Commercial contexts	8 046
(b) Common intention constructive trusts	8 057
(i) Stage one – Common intention	8 062
A. Express common intention	8 062
B. Inferred common intention	8 065
C. Detrimental reliance	8 070
(ii) Stage two – Quantification	8 075
(c) Proprietary estoppel	8 078
4. Conclusion	8 079

CHAPTER 9 APPLICATIONS UNDER THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ORDINANCE (CAP.481)

By Billy Ko

1. Applications under the Inheritance Ordinance	9 001
(a) Who can apply?	9 004
(b) Orders the court can make	9 008
(c) Factors a court should consider	9 010
(i) Section 5(1) factors	9 010
(ii) Further factors relating to different applicants	9 013
2. The Position of Spouses	9 018
(a) How to assess financial provision for spouses	9 018
(b) Restrictions in respect of former spouses	9 033
3. Position of de facto Spouses	9 036
(a) <i>HCC v LPL</i>	9 037
(b) <i>LYYC v CHL and CSMS, the Executrices of the Estate of CGSK also known as CSKG, Deceased</i>	9 043
(c) <i>LKYI v GJS, as the Personal Representative of KO, the Deceased (Financial provision claimed by de facto wife under section 3(1)(ix) (Cap. 481) IO)</i>	9 047
4. Children	9 054
5. Interim Orders	9 056
(a) Immediate need	9 058
(b) Application for litigation funding	9 062
6. Power of the Court to Vary Periodical Payments and Payment of Lump Sums by Instalments	9 064
(a) Power to vary periodical payments	9 064
(b) Power to vary lump sum by instalments	9 068
7. Property Available for Financial Provision: "Net Estate"	9 069
8. Procedure	9 070
(a) Making an application under the IO	9 070
(b) Time limit for application	9 076

CHAPTER 10 ANCILLARY RELIEF: PRACTICE, PROCEDURE AND DISCLOSURE

By Peter Barnes

1. Reform of Family Procedure Relating to Financial Relief	10 001
2. Financial Dispute Resolution (FDR)	10 019
3. The FDR Procedure	10 036
(a) Phase 1 – First appointment	10 037
(b) Phase 2 – FDR	10 038
(c) Phase 3 – Trial	10 039
(d) Case management hearings and court timetable	10 040
(e) Decrees nisi & absolute	10 048
(f) Preparing for the first appointment	10 049
(i) Form E financial statements	10 049
(ii) Exchange of Forms E	10 054
(iii) First Appointment bundle	10 059
(iv) List of orders and directions sought	10 061
(v) Questionnaire/list of documents sought from the other party	10 062
(vi) Statement of issues	10 070
(vii) Chronology	10 072
(viii) Estimate of costs (Forms H1 – H4)	10 074
(ix) "Running" bundles	10 077
(g) The First Appointment hearing	10 078
(h) The FDR	10 081
(i) The FDR bundle	10 081
(ii) The FDR hearing	10 084
(iii) Mediator assisted FDRs	10 097
(i) Procedure at the hearing of contested applications	10 105
(i) Pre-Trial Reviews	10 105
(ii) Statement of open proposals	10 108
(iii) Bundles for the final hearing	10 111
(iv) Additional documents	10 121
(v) Procedure at trial	10 122
Oral openings	10 122
Witnesses	10 123
Expert witnesses	10 126
Closing submissions	10 128
(j) Private financial adjudication (PFA)	10 129
4. Discovery and Non-Disclosure	10 136
(a) Financial Disclosure: Form E Financial Statement	10 136
(i) The importance of full and frank disclosure	10 138
(ii) Effect of non-disclosure: costs, adverse inferences	10 144

(b) Contents of the Form E	10.154
(i) Part 1 – General Information	10.156
(ii) Part 2 – Assets	10.158
(iii) Part 3 – Income	10.205
(iv) Part 4 – Expenses	10.215
(v) Paragraph 4.2 – Anticipated future expenses	10.226
(vi) Part 5 – Other information	10.228
(vii) Part 6 – Orders sought	10.240
(viii) Part 7 – Schedule of attachments	10.243
(ix) Attestation	10.245
(c) Discovery – “self help”	10.247
(d) Discovery	10.266
(i) Applications for specific discovery	10.266
(ii) Documents in possession of a third party	10.271
5. Evidence – Other than the Parties: Experts and Witnesses	10.281
(a) Rules in relation to expert evidence	10.282
(b) Timing for expert evidence	10.288
(c) Real property valuations	10.289
(d) Company valuations	10.290
(e) <i>Duxbury</i> calculator	10.291
(f) Dispute as to valuations	10.292
(g) Subpoena of witnesses	10.296
(h) Determination of third party interests, joinder of a third party	10.300
6. Appeals	10.301
(a) Application for leave to appeal to the Court of Appeal	10.303
(i) New evidence	10.307
(ii) Jurisdiction of the Court of Appeal: <i>TCWF v LKKS</i>	10.309
(iii) Importance of observance of procedure and formalities: <i>CCMJ v SSM</i> (<i>Appeals; Bundles; Case management</i>)	10.312
(b) Appeal to the Court of Final Appeal	10.316

CHAPTER 11 INJUNCTIVE RELIEF ON FINANCIAL MATTERS

By Peter Barnes and Nicole H.K. Liu

1. Introduction	11.001
2. Section 17 of the Matrimonial Proceedings and Property Ordinance (Cap.192) (MPPO) – “The Avoidance of Transactions Intended to Defeat Claims”	11.007
(a) Introduction	11.007
(b) Applications made under s.17 of the MPPO	11.009
(c) “Property”	11.018
(d) “Dealing With”	11.024

(e) “Intention”	11.027
(f) “Defeating the Claim”	11.031
(g) Constructive Notice Sufficient	11.033
(h) Undertaking as to damages	11.038
(i) Procedure	11.039
(j) <i>UL v BK (Freezing Orders: Safeguards: Standard Examples)</i>	11.043
2A. Sections 29AJ and 29AK MPPO, – “Avoidance of transactions intended to defeat applications for financial relief”	11.046
(a) Introduction: Part IIA MPPO	11.046
(b) Applications made under ss.29AJ and 29AK of the MPPO	11.048
(c) Procedure	11.053
3. <i>Mareva</i> Injunctions – Freezing Assets	11.058
(a) Introduction	11.058
(b) <i>Ex parte</i> Application	11.061
(c) Requirements for the Grant of <i>Mareva</i> Injunction	11.066
(d) Ceiling Figure Necessary	11.075
(e) Cross-undertakings	11.076
(f) Procedure	11.078
(g) Ancillary Orders	11.082
(h) Limitations on <i>Mareva</i> injunctions	11.085
3A. <i>Chabra</i> injunction Orders	11.090
(a) Introduction	11.090
(b) Requirements for the grant of <i>Chabra</i> injunctions	11.091
(c) Limitations on <i>Chabra</i> injunctions	11.096
4. <i>Anton Piller</i> Orders	11.101
(a) Search and Seizure	11.101
(b) Requirements for <i>Anton Piller</i> orders	11.105
(c) Full and Frank Disclosure Necessary	11.116
(d) Cross-undertakings	11.121
(e) Service and Execution of Order	11.123
(f) Supervising Solicitor	11.131
(g) Procedure	11.132

CHAPTER 12 NUPTIAL AGREEMENTS

By Peter Barnes and Jain Brown

1. Introduction	12.001
(a) Historical background	12.006
2. Pre-Nuptial/Post-Nuptial Agreements	12.008
(a) The position pre- <i>Radmacher</i>	12.008
(b) <i>Radmacher v Granatino</i>	12.018

(c) <i>SPH v SA</i>	12.030
(d) Cases since <i>Radmacher</i> , and <i>SPH v SA</i>	12.037
3. Ancillary Relief Claims Involving Challenges to PNA	12.043
A. UK cases	12.043
(i) <i>Kremen v Agrest</i> (2012 EWFC)	12.044
(ii) <i>B v S</i> (2012, EWFC)	12.050
(iii) <i>Z v Z</i> (2012, EWFC)	12.056
(iv) <i>V v V</i> (2012, UKCA)	12.065
(v) <i>Luckwell v Limata</i> (2014, UKHC)	12.071
(vi) <i>Y v Y</i> 2014, UKHC	12.080
(vii) <i>Brack v Brack</i> (2018, UKCA)	12.087
(viii) <i>Versteegh v Versteegh</i> (2018, EWCA)	12.094
(ix) <i>KA v MA</i> (2018, EWFC)	12.100
(x) <i>Ipekci v McConnell</i> (2019 EWFC)	12.109
(xi) <i>D v D</i> (2020, EWFC)	12.117
(xii) <i>CMX v EJX (French marriage contract)</i> (2022, EWFC)	12.121
(xiii) <i>WC v HC</i> (2022, EWFC)	12.128
(xiv) <i>HD v WB</i> (2023, EWFC)	12.135
(xv) <i>MN v AN</i> (2023, EWFC)	12.139
B. Hong Kong case	12.149
(i) <i>LCYP v JEK and Another</i>	12.149
4. MPS Applications in the Context of a Prenuptial Agreement	12.153
(a) <i>England & Wales BN v MA</i> (2013, EWFC)	12.154
(b) Hong Kong	12.160
(i) <i>DL, EP v K, ME</i>	12.160
(ii) <i>LM v FM</i> (FCMC 7076/2022) (Judgment 22 March 2024)	12.163
5. Planning, Drafting and Executing a Pre-Nuptial Agreement	12.166
(a) Advising as to jurisdiction and powers	12.166
(b) Drafting a pre-nuptial agreement	12.172
(c) Safeguards: procedural fairness and substantive fairness	12.175
(i) Procedural fairness	12.176
(ii) Substantive fairness	12.184
(iii) Evidence of overseas law	12.193
6. Other Marital Agreements	12.195
(a) Separation agreements: overview	12.195
(b) Agreements for compromise	12.201
7. Procedural Aspects Relating to Enforcing/Challenging a Nuptial Agreement	12.203
(a) Practice of bringing Court's attention to the nuptial agreement	12.229
8. Conclusion	12.233

CHAPTER 13 TRUSTS AND DIVORCE

By Marcus Dearle

1. Trusts in Context	13.001
2. Approaches to Trusts in Divorce	13.004
3. Impact of <i>LKW v DD</i>	13.007
4. Variation of Settlements and Offshore Settlements (Ante-nuptial or Post-nuptial)	13.009
5. Trust Interests as a Resource	13.022
6. Sham Trusts	13.043
7. Set aside of Disposition Creating Trust	13.049
8. Trustees as Parties in Ancillary Relief Proceedings	13.050
9. Disclosure of Trust Documents and Financial Information	13.069
10. Enforcement	13.083
11. The Implications of Other Cases including <i>Prest v Petrodel Resources Ltd</i> – Resulting Trusts and Can Corporations Be Treated as Variable Nuptial Settlements?	13.089
(a) <i>KG v LG</i>	13.097
(b) <i>Joy v Joy-Morrancho</i>	13.098
(c) <i>Quan v Bray</i>	13.101
(d) <i>P v P</i>	13.102
(e) <i>NR v AB</i>	13.103
(f) <i>Chai v Peng</i>	13.105
(g) <i>M v M (Financial Remedies)</i>	13.109
(h) <i>HD v WB</i>	13.111
(i) <i>WC v HC (Financial Remedies Agreements) (Rev 1)</i>	13.113
(j) <i>HO v TL</i>	13.115

CHAPTER 14 ENFORCEMENT OF JUDGMENTS

By Peter Barnes

1. In General	14.001
2. The Temporal Limit for Enforcing a Judgment or Order	14.009
3. Judgment Summons	14.013
(a) Section 87 of the MCR	14.013
(b) <i>CYM v YML</i>	14.033
(c) <i>YBL v LWC</i>	14.037
(d) Section 88 of the MCR	14.058
4. Writ of <i>Fieri Facias</i>	14.064
5. Committal for Contempt of Court	14.079
(a) <i>Hadkinson</i> orders	14.110
(b) “Unless” orders	14.123
6. Charging Order	14.133
7. <i>Garnishee</i> Order	14.151

8. Attachment of Income Order	14.164
9. Prohibition Orders	14.174
10. Bankruptcy Orders	14.181
11. Mirror Orders	14.184
12. Reciprocal Enforcement of Orders	14.190
(a) Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap.188)	14.191
(i) Enforcement of Hong Kong maintenance orders overseas	14.191
(ii) Enforcement of overseas orders in Hong Kong	14.193
(iii) Subsidiary legislation	14.198
(b) Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319)	14.199

CHAPTER 15 COHABITATION

By Philippa Hewitt and Samantha Gershon

1. Introduction	15.001
2. The Legal Status of Cohabitees: Same Sex and Opposite Sex Couples	15.003
3. Property Problems: Determining the Beneficial Ownership	15.011
(a) Equitable principles	15.011
(b) Guidance from caselaw	15.020
(i) Joint tenants but unequal division: <i>Stack v Dowden</i>	15.020
(ii) Joint names without any express declaration of beneficial interests, both responsible for the mortgage: <i>Jones v Kernott</i>	15.021
(iii) Where a family home was put into the name of one party only	15.022
(iv) Where the property is not used as a home but a share is held by a company: <i>Smith v Bottomley</i> [2013] EWCA Civ 953	15.023
(v) Commercial property: <i>Marr v Collie</i> [2017] UKPC 17	15.024
(vi) Property held by family members and friends cohabiting	15.031
(c) Hong Kong cases	15.033
(d) Land law considerations	15.041
4. Cohabitation Agreements and Declarations of Trust/Deeds of Trust	15.042
(a) The contract	15.045
(b) Contents	15.047
(c) Requirements in the absence of a cohabitation agreement	15.055
5. Children of Cohabitees	15.056
(a) Legitimacy and the position of fathers	15.056
(b) Registration of the birth	15.067
6. Custody and Financial Provision for Children of Unmarried Parents	15.068
(a) Custody	15.069
(b) Financial provision	15.070
(c) Case law: <i>IDC v SSA</i> : a lump sum to meet a child's immediate and non-recurring needs	15.074

7. Carer's Allowance	15.080
8. Engaged Couples	15.086
9. Intestacy	15.089

CHAPTER 16 CHILDREN: CUSTODY, CARE AND CONTROL AND ACCESS

By Frances Irving and Philippa Hewitt

1. Introduction	16.001
(a) The Proposed Children's Proceedings (Parental Responsibility) Bill	16.008
(b) Practice Direction 15.13 and Guidance from the Chief Justice	16.011
(c) Children's cases to be dealt with expeditiously	16.017
2. The Current Legislation	16.020
(a) Matrimonial Proceedings and Property Ordinance (MPPO) (Cap.192)	16.023
(i) Section 19 of the MPPO: Orders for custody and education	16.023
(ii) Section 18 of the MPPO: No divorce without s.18	16.030
(iii) Section 10 of the MPPO: Power to provide maintenance	16.036
(b) Guardianship of Minors Ordinance (GMO) (Cap.13)	16.042
(i) Section 3 of the GMO: General Principle: The best interests of the minor	16.043
(ii) Section 10 of the GMO: Custody and maintenance	16.052
(iii) Other relevant provisions of the GMO	16.065
A. Care and supervision orders	16.065
B. Provision for a social welfare report	16.068
(c) Matrimonial Causes Ordinance (MCO) (Cap.179)	16.071
(i) Care and supervision orders under the MCO	16.073
(ii) Removal applications under the MCO	16.075
(d) Matrimonial Causes Rules (MCR) (Cap.179A)	16.076
(i) Rule 92: Procedure	16.076
(ii) Rule 94(1): Permanent removal	16.080
(iii) Rule 108: Separate representation	16.081
3. The Orders Made by a Court: Custody, Care and Control and Access	16.088
(a) Definitions in statute	16.088
(b) Meaning of custody	16.090
(i) Joint or sole custody?	16.095
(ii) Lack of communication	16.096
(iii) Domestic violence and the parties' mental condition	16.103
(iv) Removal cases or practical geographical difficulty	16.105
(v) The correct terminology: <i>PD v KWW</i>	16.110
(c) Meaning of care and control	16.114
(i) Joint or sole care and control, or "shared care"?	16.117

(b) Access	16.137
(i) Meaning of access	16.137
(ii) The child's right to access	16.140
(iii) Types of access: Reasonable or defined; visiting or staying	16.148
A. Reasonable access	16.148
B. Defined access: Visiting or staying access (young children)	16.149
C. Supervised access	16.158
(c) "No order"	16.163
(d) Parental alienation	16.167
4. Factors the Court Will Take into Account: The Welfare Principle and Suggested Checklist	16.170
(a) The Welfare Principle	16.170
(b) The welfare checklist of factors	16.174
(i) The views of the child	16.181
A. How to ascertain a child's views	16.184
B. Inherent difficulty	16.188
C. Age and maturity	16.192
(ii) The physical, emotional and educational needs of the child	16.200
(iii) The nature of the relationship of the child with each of the child's parents and with such other persons	16.211
(iv) Preserving the <i>status quo</i> – The likely effect on the child of any change in his circumstances	16.215
(v) The age, maturity, sex, social and cultural background and characteristics of the child	16.228
A. Age, maturity and sex	16.228
B. Social and cultural background	16.234
(vi) Any harm which the child has suffered or is at risk of suffering	16.237
(vii) Any family violence involving the child or a member of the child's family; the nature of the relationship of the child with each of the child's parents and with such other persons	16.239
(viii) How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs	16.240
(ix) The practical difficulty and expense of the child having contact with a parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis	16.253
(x) The range of powers available to the court and in the proceedings in question	16.255
(xi) Other factors	16.256
5. Social Welfare Reports	16.258
(a) Social welfare report recommendation	16.261
6. Other Expert Reports	16.270

CHAPTER 17 CHILDREN: GUARDIANSHIP, ADOPTION, SURROGACY, CHANGE OF NAME AND DECLARATIONS AS TO PARENTAGE, JURISDICTION AND CHILD PROTECTION

By Frances Irving and Philippa Hewitt

1. Guardianship	17.001
2. Changing a Child's Name	17.021
(a) Changing a child's surname at common law	17.028
3. Adoption	17.036
(a) "Best interests" principle	17.038
(b) Effect of an adoption order	17.040
(c) Who may adopt?	17.041
(d) Residence requirement	17.047
(e) Procedure	17.048
(f) Consent	17.049
(g) The adoption checklist	17.064
(h) International adoptions	17.069
4. Surrogacy	17.071
(a) Who are the legal parents?	17.076
(b) Restrictions in Hong Kong	17.078
(c) Parental orders	17.083
(d) Recent developments	17.090
(i) <i>FH & MH v WB & HB</i> (Surrogacy) [2019]	17.090
(i) Time extension	17.095
(ii) The expenses issue	17.097
(ii) <i>A v B</i> [2019] HKCFI 1749	17.102
(iii) <i>Re LH and LW</i> (Surrogacy)	17.103
(iv) <i>S v T</i> (Surrogacy)	17.104
(v) <i>T v N</i> (Surrogacy)	17.106
(vi) HC formerly known as <i>HWH v WYH</i> (Children; surrogacy; adoption)	17.107
(vii) <i>CS v SW</i> (Surrogacy)	17.108
5. Declaration as to Parentage	17.111
(a) Scientific tests	17.117
6. Jurisdiction in Children's Cases: <i>QMY v GSS</i>	17.122
(a) <i>QMY v GSS</i>	17.123
(b) Questions of forum	17.129
7. Child Protection	17.135

CHAPTER 18 PRACTICE AND PROCEDURE IN RELATION TO CHILDREN

By Winnie Chong

1. Powers of the Court in Family Proceedings	18.000
(a) The overriding principle	18.001
(b) Section 18 declaration	18.002
2. The CDR Process	18.003
(a) Children's appointment	18.004
(b) The CDR hearing	18.005
(c) The trial	18.006
3. Preparation of the Pleadings	18.007
(a) Application for custody, care and control in divorce proceedings	18.008
(i) Statement of arrangements for children of the family	18.009
(ii) Children's appointment of the CDR	18.010
(iii) CDR before FDR	18.011
(b) Application for custody, care and control and access under the GMO	18.012
(c) Applications for interim custody, care and control and access	18.013
(i) Access	18.014
(ii) Supervised access	18.015
4. The Evidence – The Party's Affidavit in Support of the Application or in Reply	18.016
5. Expert Reports	18.017
6. Evidence from the Social Welfare Officer	18.018
7. Evidence of Other Parties – Witnesses	18.019
8. Children's Views – Judicial Interview and Separate Legal Representation	18.020
(a) Judicial interview	18.021
(b) Separate representation for children	18.022
9. Preparing the Client for the Hearing	18.023
10. The Hearing	18.024
11. Costs in Children's Cases	18.025
12. Summary – The Attitude to Adopt	18.026

CHAPTER 19 INTERNATIONAL ASPECTS OF THE LAW RELATING TO CHILDREN AND CHILD PROTECTION

By Philippa H...

1. Introduction	19.000
2. Wardship Jurisdiction of the Court	19.001
(a) Background to wardship	19.002
(b) Who can be made a ward of court	19.003
(c) Who can make the application?	19.004
(d) Minor's welfare the "first and paramount consideration"	19.005

(e) Application to make a child a ward of court	19.031
(f) Effect of wardship	19.049
(g) Costs	19.052
(h) Appeals	19.053
3. Removal of Children from the Jurisdiction	19.054
(a) Application restricting the removal of a child	19.056
(b) Application to remove a child temporarily from the jurisdiction	19.061
(c) Application to remove a child permanently from the jurisdiction	19.067
(d) Contested applications	19.071
(e) Factors a court may consider	19.083
(i) Status quo	19.085
(ii) Children's wishes	19.086
(iii) Financial considerations	19.087
(iv) A practical plan	19.089
(v) Social and cultural factors	19.091
(f) Appeals from removal orders	19.092
4. Applications under the Child Abduction and Custody Ordinance (Cap.512)	
"Hague Applications"	19.094
(a) The Convention	19.094
(i) Role of the Central Authority/Secretary for Justice	19.101
(ii) Article 1: The objects of the Convention	19.106
(iii) Articles 4 and 5: Rights of custody and habitual residence	19.111
(iv) Article 3 of the Convention: wrongful removal or retention	19.114
(b) Habitual residence	19.119
(c) Rights of custody	19.125
(d) Article 13 Exceptions: The court's discretion to refuse return	19.131
(i) Consent or acquiescence	19.133
(ii) Allegations of risk of harm	19.138
(iii) The child's view	19.145
(e) Procedure	19.152
(i) Declaration under the Convention	19.166
(ii) Location Order	19.169
(f) Costs	19.170

CHAPTER 20 DOMESTIC VIOLENCE IN HONG KONG

By Anne Scully-Johnson

1. Introduction	20.001
(a) Legislative history	20.004
(b) The effect and impact of the 2008 and 2009 reforms	20.006

2. Injunctive Relief from Domestic Violence	20.023
(a) Who can apply?	20.030
(b) Practical matters: Making the application	20.041
3. The Forms of Injunctive Relief Available to Victims of Domestic Violence	20.050
(a) The injunctions	20.050
(b) The non-molestation order	20.055
(c) The ouster/occupation order	20.062
(d) Existing custody and access orders	20.074
4. Practical Matters	20.075
(a) Advising the client: Acting for the applicant	20.075
(b) The non-molestation order/ouster or occupation order	20.078
(c) The restraining order	20.080
(d) The restraining order in relation to children	20.084
(e) Practical matters: Advising the client: Acting for the respondent	20.086
(f) Practical matters: Drafting the summons and affidavit in support	20.087
5. Enforcement Issues	20.088
(a) Contempt of court and authorisation of arrest	20.088
(b) Practical matters: The authorisation of arrest	20.097
(c) Practical matters: The hearing	20.100
(i) Procedure if acting for the applicant: The <i>ex parte</i> hearing	20.100
(ii) Procedure if acting for the applicant: Inter partes hearing of return hearing date on an <i>ex parte</i> application	20.102
6. Alternatives to Injunctive Relief	20.104
(a) Undertakings	20.104
(b) Criminal justice	20.105
(c) Social welfare and therapeutic assistance	20.106

CHAPTER 21 COSTS

By Jonathan Mok

1. Introduction	21.001
2. The Principles of Costs	21.005
(a) The discretion of the court	21.006
(b) Costs arising from a party's misconduct or neglect	21.008
(c) Costs orders in favour of or against non-parties	21.009
(d) Wasted costs orders	21.010
(i) Procedure for making a wasted costs order	21.012
(ii) A means of intimidation	21.015
(e) The several bases of taxation and assessment of costs	21.016
(i) The indemnity principle	21.016
(ii) Party and party basis	21.018
(iii) Common fund basis	21.019

(iv) Indemnity basis	21.022
(v) Costs as between a solicitor and own clients basis	21.026
(vi) Costs on the trustee basis	21.027
(f) Litigants in person	21.028
(g) Legal aid cases	21.030
3. Summary Assessment Of Costs	21.031
(a) Summary assessment of costs in interlocutory proceedings	21.032
(b) Procedure	21.035
4. Costs in Family Proceedings	21.039
(a) Ancillary relief	21.043
(i) Unreasonable conduct	21.044
(ii) Calderbank offers	21.047
(iii) "No order as to costs"	21.052
(iv) Costs in interlocutory proceedings	21.056
(b) Children	21.060
(i) The starting point of no costs orders	21.062
(ii) Costs consequences of failure to mediate	21.076
(c) Wardship proceedings and the role of the official solicitor	21.077
(d) Estimate of costs in family proceedings	21.081
5. Taxation	21.087
(a) Costs-only proceedings	21.089
(b) Powers of taxing officers	21.091
(c) Provisional taxation	21.094
(d) Procedure on taxation	21.097
(i) Preparing the bill of costs	21.099
(ii) Time limit for commencement of taxation	21.107
(iii) Commencement of taxation	21.110
(iv) The list of objections	21.112
(v) Setting down a bill for taxation	21.114
(e) Taxation with a hearing	21.116
(f) Certificates issued by the taxing master	21.118
(i) Interim certificates	21.118
(ii) Final certificates	21.119
(g) Sanctioned costs offers and payments	21.120
(i) Sanctioned offers by receiving parties	21.123
(ii) Sanctioned payments by paying parties	21.124
(iii) Clarification of sanctioned offer or sanctioned payment notice	21.126
(iv) Time for accepting sanctioned offers or sanctioned payments	21.127
(v) Consequences of acceptance of a sanctioned offer or payment	21.128

(vi) Costs consequences if receiving party fails to better the sanctioned payment	21.129
(vii) Costs consequences if receiving party does better than his sanctioned offer	21.130
(viii) Disclosure of sanctioned offers or payments to the court	21.132

CHAPTER 22 LEGAL AID

By Carmen Cheng

1. Legal aid in Hong Kong	22.001
(a) Legal aid in matrimonial and family proceedings	22.004
(b) The Pilot Scheme on legal aid for mediation of legally aided matrimonial cases	22.007
(c) The legal aid schemes	22.009
2. Applying for Legal Aid	22.013
(a) The "means" test	22.016
(b) Calculation of financial resources	22.018
(c) Calculation of a spouse's income	22.020
3. The "Merits" Test	22.021
4. Grant and Refusal of Legal Aid	22.023
5. Stay of Proceedings	22.025
(a) Lift of stay of proceedings	22.028
6. Costs and Contributions by the Legally Aided Person	22.036
(a) Contributions	22.037
(b) Director's First Charge	22.039
(c) Enforcement of the Director's First Charge	22.041
(d) Duty of the solicitor to the aided person	22.046
(e) Costs liability of aided persons	22.050
(f) Payment of costs by aided persons	22.055
(g) Costs of counsel and solicitors	22.056
7. Taxation of Costs	22.060
(a) Payment of money due to legally aided persons	22.064
8. Discharge and Revocation of Legal Aid Certificates	22.067
(a) "Regulation 11" Orders	22.071
9. Legal Aid Appeals	22.073

CHAPTER 23 FAMILY ALTERNATIVE DISPUTE RESOLUTION

By Anisha Ramanathan

1. Mediation	23.001
(a) Definition, training and practice of family mediation	23.008
(b) Mediation as an alternative to other dispute resolution processes	23.016
(i) Mediation and counselling	23.016
(ii) Mediation and the adversarial process	23.021

(iii) The process	23.022
(iv) Use of experts in mediation	23.023
(v) Pre-mediation session	23.024
(vi) Disclosure	23.026
(vii) Confidentiality	23.027
(viii) Children	23.028
(ix) Interest-based negotiation	23.029
(x) Parties in control	23.030
(xi) Summary	23.031
(c) Background to family mediation	23.032
(d) Future of family mediation	23.043
(i) The court and mediation	23.050
(ii) Role of lawyers in mediation	23.053
(iii) Domestic violence and mediation	23.055
(iv) Parenting plans	23.057
(v) Case study	23.059
2. Collaborative Practice	23.064
3. Private Adjudication of Financial Disputes	23.069

CHAPTER 24 THE PRC AND THE RECIPROCAL ARRANGEMENT WITH HONG KONG

By Jeremy S.K. Chan and Jie Tian

1. Introduction	24.001
2. The Position in Hong Kong: Mainland PRC Orders and Judgments	24.004
3. Mainland Divorce Certificates – Recognition in Hong Kong	24.012
(a) Registration required – Application for recognition order	24.013
(b) Affidavit in support and draft recognition order	24.015
(c) Granting recognition order – Presumption as to validity	24.019
(d) Service and notice of recognition order	24.021
(e) Taking effect – Period for applying to set aside, extension and expiry	24.027
(f) Application to set aside recognition order	24.031
(g) Disposal of application and effect	24.036
(h) Security for costs	24.039
4. Certification of Hong Kong Judgments – Application Required	24.041
(a) Certification of Hong Kong Judgments – Contents, particulars and exhibits	24.047
(b) Hong Kong Judgments – Meaning of "Matrimonial or Family Cases"	24.049
(c) Power of variation preserved and effectiveness not affected	24.052
5. Mainland Judgments – Specified Orders and Schedule 2	24.057
(a) Mainland Judgments – Meaning of "effective"	24.062

(b) Registration in Hong Kong of Mainland Judgments given in matrimonial or family cases – Pt.2, Div.1 – Registration applications	24.064
(c) Draft registration order and affidavit in support	24.071
(i) Affidavit in support – Mandatory provisions	24.075
(ii) Registration and order – Mandatory provisions	24.084
(d) Granting registration order – Presumption as to validity	24.090
(e) Service and notice of registration order	24.092
6. Part 2, Division 3 – Setting Aside Registration	24.097
(a) Grounds for setting aside registration	24.101
(b) Disposing of application and effect	24.106
7. Security for Costs	24.113
8. Part 2, Division 4 – Effect etc of Registration	24.115
9. Transfer to Court of First Instance	24.119
10. Enforcement – Effect of Registration, Jurisdiction and Powers	24.122
11. Part 2, Division 5 – Restriction on Hong Kong Court Proceedings	24.131
(a) Restriction on bringing proceedings on same cause of action in Hong Kong	24.139
12. Matrimonial Law in the PRC	24.144
(a) Financial division in the PRC	24.144
(i) Statutory framework	24.144
(ii) What assets are considered marital assets/liabilities?	24.145
A. Jointly owned assets	24.146
B. Individually owned assets	24.148
C. Prenuptial and nuptial agreements	24.150
D. Joint/individual liabilities	24.151
E. Matrimonial home/properties jointly owned by the husband and wife: Gifts and loans	24.153
(iii) The factors to consider on the division of assets in a divorce	24.154
A. Compensation for contribution	24.157
B. Economic assistance	24.158
C. Conduct	24.159
(iv) Summary on division of assets	24.161
(b) Enforcement: Financial orders made in Hong Kong – Enforcement in Mainland PRC	24.162
(c) Hong Kong Divorces – Status in Mainland PRC: Capable of Being Recognised and Enforced	24.164
(d) Children Care Orders Made in Hong Kong – Status in Mainland PRC	24.166
13. Effect of the Arrangement and Summary	24.169

Appendices: Sample Documents

APPENDIX A DOCUMENTS RELATING TO DIVORCE, JUDICIAL SEPARATION AND NULLITY

Statement of Truth	967
Petition for Nullity – Void	969
Petition for Nullity – Voidable	971
Petition for Judicial Separation-Behaviour	973
Petition by Wife for Presumption of Death and Dissolution of Marriage: Alternative Charge of Desertion	975
Petitioner's/Respondent's Certificate as to Mediation	976
Notice of Discontinuance	978
Form 3 - Notice of Proceedings (for service overseas)	980
Affirmation for Deemed Service	983
Draft Order for Deemed Service	985
Draft Order for Substituted Service	986
Notice for Substituted Service	987
Affirmation to Dispense with Service	988
Consent Summons to amend petition	990
Decree <i>Nisi</i>	992
Accompanying Order with Decree <i>Nisi</i>	993
Summons for an Extension of Time	994
Answer	995
Answer and Cross Petition	996
Notice of Desired Place of Trial of Defended Cause	998

APPENDIX B CONSENT SUMMONS

APPENDIX C MAINTENANCE PENDING SUIT AND VARIATION APPLICATIONS

Notice of application to vary	1007
Affidavit in support of application to vary	1008
Court Order for Variation of Maintenance	1011
Notice of intention to proceed with an application for Maintenance Pending Suit	1012
Affidavit in support of the application for Maintenance Pending Suit	1013
Affidavit in Reply	1016
Court Order for Maintenance Pending Suit	1019

APPENDIX D FIRST APPOINTMENT BUNDLE [RESPONDENT]

Chronology	1023
List of Directions and Orders Sought	1024
Statement of Issues	1025

APPENDIX E NUPTIAL AGREEMENTS

Pre-nuptial Agreement	1029
Deed of Separation	1037

APPENDIX F CHILDREN

Order for Custody and Access made on Decree <i>Nisi</i>	1043
Summons for Custody Care and Control	1044
Affidavit in support of Application for Custody, Care and Control	1045
Order for Custody, Care and Control	1047
Consent Summons for Directions	1048
Summons for Defined Access	1049
Affidavit (Affirmation) in Support of Application for Defined Access	1050
Order for Defined Access	1052
Penal Notice	1053

APPENDIX G WARDSHIP AND REMOVAL

Originating Summons for a Wardship Application	1057
Memorandum	1059
Notice of Wardship Application	1060
Reply to Notice	1061
Letter to Immigration Department	1062
Affirmation in Support of Application	1063
Affirmation of Service	1064
Notice of Appointment to hear Originating Summons	1065
Order for Wardship	1066
Removal from the Jurisdiction	1067
Ex parte application to prevent removal of the children	1067
<i>Ex Parte</i> Summons to prevent Removal of the Children	1068
Affidavit in Support of Application to Prevent the Removal of the Children	1069
Order to Prevent the Removal of the Children	1070
Temporary removal	1071
Ex Parte Summons to Apply for the Temporary Removal of the Children	1072
Affidavit in Support of Application for Temporary Removal of the Children	1072

Order to Permit Temporary Removal of the Children	1074
Undertaking	1075
Consent Summons	1076
<i>Inter Partes</i> Summons to Remove the Children Temporarily from the Jurisdiction	1077
Affidavit in Support of an <i>Inter Partes</i> Summons to Apply for Temporary Removal of the Children	1078
Permanent removal	1080
<i>Inter Partes</i> Summons to Apply for the Permanent Removal of the Children	1080
Affidavit in Support of an <i>Inter Partes</i> Summons to Apply for the Permanent Removal of the Children	1081
Letter to the Immigration Department	1083

APPENDIX H INJUNCTIONS

Inter partes summons to restrain a respondent from dealing with matrimonial property	1086
Restraining Order	1088
Inter partes summons for a non-molestation and exclusion order	1088
Undertaking of the Respondent on a non-molestation injunction application	1089
Affidavit in support of <i>ex parte</i> summons for a non-molestation injunction and exclusion order	1090
Order for a non-molestation injunction and an exclusion order on an <i>ex parte</i> summons	1092
Order under the Guardianship of Minors Ordinance with penal notice and power of arrest attached	1094

APPENDIX I MEDIATION

Agreement to Mediate	1099
Mediation Agreement	1103
<i>Index</i>	1107

(c) Proprietary estoppel

- 8.078 Though the two equitable claims of proprietary estoppel and common intention constructive trusts are often made alongside each other, they are not to be assimilated. Lord Walker expressed caution against the convergence of the two doctrines in *Stack*:

"Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice ... which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."¹⁰¹

4. CONCLUSION

- 8.079 The involvement of third-party interests in matrimonial proceedings influences the entire conduct of the proceedings. Determination of the matter as if it were in the Chancery Division dictates the differing legal basis on which the question of beneficial ownership over disputed properties is resolved. Each party's case would thus premise on their respective pleadings, where there usually are none insofar as ancillary relief matters are otherwise concerned. Additional implications in terms of time, costs, and embroilment of third parties into a dispute originally only between the two parties are also matters to be borne in mind by practitioners in their advice to lay clients.

¹⁰¹ At [37]; see also *Cheung Lai Mui*, [1.4] (Lam VP as Lam PJ then was).

CHAPTER 9

APPLICATIONS UNDER THE INHERITANCE
(PROVISION FOR FAMILY AND
DEPENDANTS) ORDINANCE (CAP.481)

By Billy Ko

Section	Para.
1. Applications under the Inheritance Ordinance	9.001
(a) Who can apply?	9.004
(b) Orders the court can make	9.007
(c) Factors a court should consider-	9.010
(i) Section 5(1) factors	9.010
(ii) Further factors relating to different applicants	9.013
2. The Position of Spouses	9.018
(a) How to assess financial provision for spouses	9.018
(b) Restrictions in respect of former spouses	9.033
3. Position of de facto Spouses	9.036
(a) <i>HCC v LPL</i>	9.037
(b) <i>LIYC v CHL and CSMS, the Executrices of the Estate of CGSK also known as CSKG, Deceased</i>	9.043
(c) <i>LKYI v GJS, as the Personal Representative of KO, the Deceased (Financial provision claimed by de facto wife under section 3(1)(ix) (Cap. 481) IO)</i>	9.047
4. Children	9.054
5. Interim Orders	9.056
(a) Immediate need	9.058
(b) Application for litigation funding	9.062
6. Power of the Court to Vary Periodical Payments and Payment of Lump Sums by Instalments	9.064
(a) Power to vary periodical payments	9.064
(b) Power to vary lump sum by instalments	9.068
7. Property Available for Financial Provision: "Net Estate"	9.069
8. Procedure	9.070
(a) Making an application under the IO	9.070
(b) Time limit for application	9.076

1. APPLICATIONS UNDER THE INHERITANCE ORDINANCE

The Inheritance (Provision for Family and Dependants) Ordinance (referred to in this chapter as the Ordinance or the IO) empowers the court to make orders of financial provision out of the estate of a deceased person for certain members of that person's family and dependants of that person. It was based on, and is similar to, the English Inheritance (Provision for Family and Dependants) Act 1975.¹ 9.001

Practice Direction 15.12 includes applications under the Inheritance (Provision for Family and Dependants) Ordinance within the definition of Family Proceedings. 9.002

Applications are invariably made under this ordinance when the deceased has died intestate without providing for a dependant, or the applicant claims that the deceased did not make adequate provision for them in the will. Applications are therefore made by the claimant against the estate. 9.003

(a) Who can apply?

Section 3 of the IO provides a list of persons who can challenge the provision of the deceased's will, or the provision under the laws of intestacy, on the basis that the provision will not make reasonable financial provision for the applicant.² A claim can only be made if the deceased was domiciled or was ordinarily resident for three years in Hong Kong immediately prior to his death. Applicants include: 9.004

- (i) the wife or husband of the deceased;
- (ii) a former wife or former husband of the deceased who has not remarried and was being maintained, either wholly or substantially, by the deceased immediately before his death;
- (iii) a tsip or male partner of the deceased by a union of concubinage;³
- (iv) a parent of the deceased who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased;
- (v) an infant child of the deceased, or a child of the deceased who is, by reason of some mental or physical disability, incapable of maintaining himself;
- (vi) an adult child of the deceased who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased;
- (vii) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage and was being maintained, either wholly or substantially, by the deceased immediately before his death;

¹ The English Act was updated in 2014 by the Inheritance and Trustees' Powers Act. See *Rayden and Jackson on Relationship Breakdown, Finances and Children* for further details.

² As in the case of *Kwok Lok Yin v Woo Bik Wah (Application under the Inheritance (Provision for Family and Dependants) Ordinance)* [2010] HKFLR 213, which involves the claim of an illegitimate child.

³ See Chapter 1 for information and definitions on concubinage.

- (viii) a brother or sister of the half blood or the whole blood of the deceased who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased;
- (ix) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased.

9.005 Most applicants, other than a former spouse or concubine and disabled child, must prove that the deceased had been maintaining them immediately preceding death⁴ and that the deceased, either wholly or substantially, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.⁵

9.006 Under s.3(2), "reasonable financial provision" has been defined to mean:

- (1) in the case of an application by a husband, wife or concubine (including male partner) "such financial provision as it would be reasonable in all the circumstances of the case for such a person to receive, whether or not that provision is required for his or her maintenance";
- (2) in the case of any other application, such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(b) Orders the court can make

9.007 Section 4 provides the court with the power to make periodical payment⁶ and lump sum⁷ orders out of the estate as well as transfer⁸ and settlement of property⁹ orders from property comprised in the estate and under s.4(1)(e) "an order for the acquisition out of the property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit". The court's discretion as to the amount of periodical payment is not fettered, and it is possible for the judge to transfer all of the income of the net estate to the applicant. The court also has wide powers in giving effect to such provision.

9.008 In respect of orders for periodical payments under s.4(1)(a), they may include specified amounts, payments equal to the whole of the income of the net estate and "payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the making out of the income thereof of payments".¹⁰ The court can set aside an amount from the net estate to cover these payments, and

⁴ Section 3(1).

⁵ Section 3(3).

⁶ Section 4(1)(a).

⁷ Section 4(1)(b).

⁸ Section 4(1)(c).

⁹ Section 4(1)(d).

¹⁰ Section 4(2).

the court will bear in mind that the order should operate fairly between beneficiaries of the estate.¹¹ The court has wide powers to control how the payments can be made, including the power to vary the will or the disposition according to the law of intestacy, and to confer power on the trustees as may be "necessary or expedient".¹²

The court does not, however, have the power to sell property under the IO.

9.009

(c) Factors a court should consider

(i) Section 5(1) factors

Section 5 of the IO sets out the factors to be taken into account by the court when the order is made. These factors are similar to the s.7 of the MPPO factors a court must take into account in an application for financial provision in divorce (particularly when both sub-ss. (1) and (2) are considered), save that there is an additional duty of the court to bear in mind the needs of any other beneficiary of the estate, which may result in a complicated case involving conflicting interests of several individuals.

9.010

Section 5(1) provides as follows:

9.011

"(1) Where an application is made for an order under section 4, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters:

- (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (b) the financial resources and financial needs which any other applicant for an order under section 4 has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- (d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 4 or towards any beneficiary of the estate of the deceased;
- (e) the size and nature of the net estate of the deceased;
- (f) any physical or mental disability of any applicant for an order under section 4 or any beneficiary of the estate of the deceased;

¹¹ Section 4(3) and (4).

¹² Section 4(4)(c).

- (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.”

9.012 There was no hierarchy among the matters to which the court will have regard in exercising its powers.¹³

(ii) *Further factors relating to different applicants*

9.013 In addition to the above, there are further factors the court should consider in respect of the different category of applicant under s.3. The court will take into account facts known as at the date of the hearing and will consider the earning capacity and financial needs and resources of the applicant.¹⁴

9.014 In respect of spouses, former spouses and concubines, the court must take into account the age of the applicant and the duration of the marriage or concubinage and the contribution made to the welfare of the family. In the case of a surviving spouse, the court must also have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.¹⁵

9.015 In respect of a dependant parent of the deceased, the court is also bound to consider the dependant's age and the contribution (if any) in money or money's worth made by the deceased towards the needs of the applicant immediately before the death of the deceased.¹⁶

9.016 In respect of children, the court must have regard to the manner in which the applicant was being or in which he might expect to be educated or trained. In respect of children who had been treated by the deceased as a child of the family, but was not a child of the deceased, the court must further consider whether and to what extent the deceased had assumed responsibility and for how long he had been discharging that responsibility, taking into account whether the deceased knew the child was not his and the liability of anyone else to maintain the child.¹⁷

9.017 In respect of brothers and sisters of the whole or half blood and all other applicants (such as cohabitants or partners), the court will also have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and to the length of time for which the deceased discharged that responsibility.¹⁸ In respect of “all other applicants”, the court must have regard to the closeness of the relationship between the applicant and the deceased immediately before the death of the deceased.¹⁹

¹³ *LWH v YMY (Claim under the IO)* [2023] HKFC 8; [2023] HKFLR 13, [42] (HHJ I Wong, sitting with HHJ J Lilleyman) [2013] Ch 225.

¹⁴ Section 5(7) and (8).

¹⁵ Section 5(2) and see further discussions at Section 2 “The Position of Spouses”.

¹⁶ Section 5(3).

¹⁷ Section 5(4).

¹⁸ Section 5(5).

¹⁹ Section 5(6).

2. THE POSITION OF SPOUSES

(a) How to assess financial provision for spouses

9.018 There are two standards by which reasonable financial provision is assessed, the spousal standard and the standard which applies to other claimants. Provision for a widow or widower will afford the most protection.

9.019 In the case of an application by a spouse, a former spouse or a concubine,²⁰ in addition to the factors listed under s.5(1), the court should also have regard under s.5(2) to the age of the applicant and the duration of the marriage of the spouse, former spouse or union of concubinage and the contribution to the welfare of the family including any contribution made by looking after the home or caring for the family. Further, in respect of the surviving spouse, the court should have “regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce”.

9.020 Therefore, an applicant who is the surviving spouse (or a tsip or male partner of the deceased by a union of concubinage) is in a position different from other categories of applicants in terms of the standard of “reasonable financial provision”. In the case of a surviving spouse, “reasonable financial provision” means “such financial provision as it would be reasonable in all the circumstances of the case for such a person to receive, whether or not the provision is required for his or her maintenance”.²¹

9.021 In the case of applicants under other categories (eg a former wife or former husband or a parent of the deceased), the definition of “reasonable financial provision” is less generous as it means “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance”. In addition, such an applicant would have to satisfy the court that the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards his reasonable needs.²²

9.022 In *LZX v WYL*,²³ the judge referred to the “surviving spouse standard” and the “divorce standard”. The surviving spouse standard is provided by s.3(2)(a) whereby the surviving spouse is entitled to reasonable provision over and above that which is required for her maintenance. As seen above, s.5(2) requires the court to consider the divorce standard.

9.023 In this case, the judge looked in detail at the Court of Final Appeal case of *LKW v DD*²⁴ and concluded that, due to the shortness of this marriage and the source of the acquisition of the two major assets, there justified a departure from equality. In this case, there had been no provision under the will for a spouse who had been married

²⁰ This includes “a tsip or male partner of the deceased by a union of concubinage”.

²¹ Section 3(2)(a).

²² Section 3(2)(b) and (3). See also *LWH v YMY (Claim under the IO)* [2023] HKFC 8; [2023] HKFLR 13, [35], [36] (HHJ I Wong).

²³ [2012] HKFLR 270; [2012] 6 HKC 52.

²⁴ [2010] 13 HKCFAR 537; [2011] HKFLR106.

to the deceased for only two years; the beneficiaries were the children from his first marriage. The judge ordered a lump sum in favour of the wife. Ongoing periodical payments were not deemed appropriate due to the extreme hostility between the wife and the family.

- 9.024 The case of *TWH v CSK (Inheritance)*²⁵ involved a Chinese customary marriage, which had taken place in China in 1940. At the time of the hearing, the Plaintiff was 94 years of age and suffered from mental incapacity. They had four children. In this case, the deceased moved to Hong Kong in 1951 and in 1967 he married again and had three further children. Over time, the children from the first marriage came to live in Hong Kong, as did the Plaintiff. In 1986, the deceased made a will, leaving his estate to his second family. The deceased suffered a stroke in 2006 and in 2007, the Plaintiff issued divorce proceedings. The next week, the deceased gifted shares worth HK\$16 million to his daughter from his second marriage. Inter alia, the counsel for the second family argued that the first was a "fossil marriage". The court held that the Plaintiff was entitled to make her application, and it was difficult to make no order simply because the marriage was a fossil marriage.

- 9.025 This was a complex case but ultimately the court held it was bound to consider the matters listed under s.5, the maintenance and the divorce standard were mandatory considerations.²⁶ The judge had sympathy with the Plaintiff who, he found, had supported the deceased while in China and who had singlehandedly brought up their four children. Clearly the deceased had maintained contact with the Plaintiff as he had assisted her move to Hong Kong. In ancillary relief cases, the parties' needs were to be generously interpreted, and the same approach should be adopted for applications under the IO, and needs should not be assessed at the lowest common denominator. The court held that it was reasonable for the Plaintiff to rent a decent flat near her son and to live comfortably. The needs of the other beneficiaries were also taken into account, in particular their medical requirements and their earning capacities.

- 9.026 In respect of the divorce standard, the court found that due to the different provisions of the two ordinances, the MPPPO and the IO, the guidelines laid down in the CFA case of *LKW v DD* cannot be mechanically transplanted to the spouses' claim under the IO. On the other hand, the principle against discrimination is equally applicable to each claim. With the aim of achieving a fair and non-discriminatory result, the court should treat the divorce standard as a cross-check so as to decide on what would be a reasonable financial provision for a spouse under the IO.

- 9.027 In *SLY v DL, the Executor of the Estate of LFY, the Deceased (Provision for Family and Dependents)*,²⁷ the applicant was the wife of the deceased who had, in his last will,

²⁵ [2011] HKFLR 449.

²⁶ Citing English case *Cunliffe v Fielden* [2006] Ch 361; [2006] 2 WLR 481; [2006] 2 All ER 115.

²⁷ *SLY v DL, the Executor of the Estate of LFY, the Deceased (Provision for Family and Dependents)* [2023] HKFC 44; [2023] HKFLR 76. There was also an interesting argument in this case concerning the rights of the eldest son in respect of inheriting village land and whether his rights as the male descendant of the deceased and his right of primogeniture should be protected and was protected under the basic law Art.40. The court did not find that it had to rule on whether Art.40 should prevail over ss.4 and 5 of the Ordinance.

named his son from his first marriage to be the heir of all his estate. As the spouse of the deceased, her claim was not restricted to the extent of her maintenance, and she was awarded approximately a third of the estate. The wife had been married to the deceased for over 39 years and the heir was the son of his first marriage, born in 1976, who lived in England with his family.

The Judge, HHJ S Lo cited his earlier case of *TWH v CSK (Inheritance)*.²⁸

"The divorce standard must be one of the very important considerations, to which the court should have due regard, in the case of the spouse's claim. With the objective of achieving a fair and non-discriminatory result, the court shall treat the divorce standard as a statutory cross-check so as to decide what reasonable financial provision shall be ordered to the spouse under the Ordinance. I take the view that the award to the Applicant shall not be confined to her need only and that she shall be entitled to share part of the Deceased's Estate."

He went on to say:

"I also accept that the court shall respect the testamentary freedom of the testator albeit the ambit and effect of the Ordinance obviously interferes a person's right to make testamentary gifts under a will to whomever he pleases according to his wishes. The exercise under the Ordinance must be proportional to achieve the legitimate aim of attaining a fine balance between the testator's private property right and his spouse's entitlement for reasonable financial provision under the said legislation."

Therefore, the court needed to find a balance and make an order that was fair and non-discriminatory for all parties concerned. The wife had discharged her burden of proof that she was entitled to a share of the estate following a long marriage.

In *LWH v YMY (Claim under the IO)*,²⁹ the deceased had left his estate, which comprised a three-storied village house to his mother and daughter. He had not provided for his wife in his will. Although the parties had been separated since 2012, the duration of the marriage prior to separation had been approximately 11 years. The length of the marriage would generally call for an equal division of assets on divorce and the age, illness and earning capacity of the deceased would have tipped the balance in his favour. The Court deemed that, on a notional divorce, and taking a broadbrush approach, the wife should be given 45% of the assets and the husband 55%. Therefore, from the total estate valued at approximately HK\$14 million, the wife was to receive HK\$5,645,500, taking into account her pension.

The Court noted that it had discretionary power to rewrite a particular will and alter the effect of the statutory rules of intestacy, so as to make reasonable provision for the members of what might be called the "family circle" of the deceased. In so doing, the Court had to balance the competing claims of the applicant and the beneficiaries by

²⁸ *TWH v CSK*, [118]–[124].

²⁹ *LWH v YMY (Claim under the IO)* [2023] HKFC 8; [2023] HKFLR 13 (HHJ I Wong).

reference to their different resources and needs, and the obligations and responsibilities owed by the deceased to each of them. The relative weight to be given must depend on the facts of the particular case and there was sufficient flexibility in the powers of the court to make orders accommodating different parties.³⁰

(b) Restrictions in respect of former spouses

- 9.033 "Spouse" in certain circumstances will include former spouses where no relief was given in divorce proceedings as no application had been made or had not been determined. In that case, an applicant would be treated by the court as if the decree had not been made absolute.
- 9.034 In respect of the duration of orders in favour of former husbands or wives, the order under s.4 will take effect as from the deceased's death and will cease upon remarriage of the applicant. Under Pt.V, there are certain provisions which relate to cases of divorce and separation. The court 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 the ordinance.³¹ Where such an order has come into force with respect to a party to a marriage, then, on the death of the other party to that marriage or civil partnership, the court must not entertain any application for an order.³²
- 9.035 The court has power under this Part to vary and discharge secured periodical payments orders which had been made under the MPPO³³ and to vary and revoke maintenance agreements which had provided for the continuation of payments after the death of the deceased, having regard to all the circumstances of the case. A maintenance agreement for the purpose of this section means any agreement made by the deceased with any person with whom he entered into a marriage, governing the rights and liabilities towards each other when living apart and includes rights and liabilities in respect of the maintenance and education of a child, whether or not that child was a child of the family.³⁴

3. POSITION OF DE FACTO SPOUSES

- 9.036 There have been a number of cases relating to de facto wives or mistresses. Such applicants come within the category of s.3(1)(ix) "any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased".

³⁰ Citing *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell, 21st ed.) [53-01] and [54-03].

³¹ Section 17(1); see also s.17A(1) in respect of Pt.IIA of the MPPO applications.

³² Section 17(3); see also s.17A(3) in respect of Pt.IIA of the MPPO applications.

³³ Section 18.

³⁴ Section 19(4).

(a) *HCC v LPL*³⁵

The applicant had co-habited with the deceased since 1997. The deceased's wife, who had married him in 1972, was the executor of his estate. The applicant and the deceased had co-habited in a property bought by the deceased in the name of a company. When the deceased passed away, the company brought an action against the applicant to remove her from the home. It was then that the applicant decided to make an application under the ordinance. She was, however, out of time. The court considered the merits of her application and whether leave should be given despite the delay. 9.037

In considering her application under the IO, the court noted that, as she fell into the "any person" category, the applicant could claim such maintenance which would be reasonable in all the circumstances. Therefore, the court would take into account the applicant's own financial resources and weigh them against her needs. If her assets could meet her needs, no award would be necessary.³⁶ 9.038

The court had a duty under s.3(3) to scrutinise whether the applicant was being maintained by the deceased (1) wholly or substantially immediately before his death and (2) for full valuable consideration and (3) her reasonable needs. DDJ J Chow quoted HHJ Grace Chan in *LPC v CYC, the Administrator of the Estate of EHC, the Deceased*, who gave the following guidance:³⁷ 9.039

"(i) 'wholly or substantially immediately before his death'

'By the word "immediately", the court should look at "something more substantial and enduring" and a settled basis or general arrangement between the applicant and the deceased as regards maintenance during the latter's lifetime, but not the actual, or perhaps fluctuating, variation of it which exists immediately before the latter's death'.³⁸

(ii) 'full valuable consideration':

'As regards "full value consideration", the court has to balance what an applicant was contributing against what the deceased was contributing. If the applicant was contributing more than the deceased or if the contribution were equal, then there is no dependency, either because the deceased depended on the applicant or because there was mutual dependency, and any dependency claim must fail'.³⁹

(iii) In respect of the applicant's reasonable needs, the court did not consider that her need was sufficient to warrant provision under the ordinance."

In this case, the applicant was not able to discharge her burden that she had an arguable case under the IO. She would have to state how she was being maintained by the 9.040

³⁵ *HCC v LPL* [2019] HKFLR 38; [2019] HKFC 46.

³⁶ Citing *LPC v CYC, the Administrator of the Estate of EHC, the deceased* [2014] HKFLR 445.

³⁷ *Ibid.*, [10].

³⁸ *Ibid.*, [9].

³⁹ Citing *LPC v CYC, the Administrator of the Estate of EHC, the deceased* [2014] HKFLR 445 and *Jelly v Liffe* [1981] 2 All ER 29.

The Appeal Committee of the CFA granted leave to appeal to the CFA to enable the consideration of the following two questions:

- (1) Is s.63B of the DCO inconsistent with art 82 of the Basic Law and thus unconstitutional?
- (2) Does the CFA have jurisdiction to entertain an appeal from a judgment of the CA refusing leave to appeal to it?

10.325 Ribeiro PJ, who authored the main judgment with which the other members of the Court agreed, answered both questions in the negative. His analysis of s.63B of the DCO was in two parts:

- (i) First, as a matter of statutory construction, s.22(1)(b) of the HKCFAO having been enacted earlier, it must give way to the later provision – s.63B of the DCO was enacted in 2008. The DCO provisions are to be construed as “investing with finality a decision of the CA in refusing leave”. Construing s.22(1)(b) as entitling an application to be brought contrary to the DCO provisions would lead to an absurd result¹²¹.
- (ii) Secondly, s.63B was not invalid insofar as it represented a proportionate interference with the constitutional right of appeal under Art. 82 of the Basic Law.¹²²

10.326 Ribeiro PJ found that all relevant limbs of the Hysan test were satisfied.¹²³ The provision met the legitimate aims and rational connection tests, including proportionality and procedural economy in the conduct of proceedings, and the fair distribution of court resources.¹²⁴ The provision was no more than necessary, the third test. In this respect, it was argued by the appellant that s.63B went far beyond what was necessary in operating as an absolute ban. Ribeiro PJ found that this was not so, as the Court of Appeal would grant leave in appropriate cases, resulting in a judgment which would then be appealable to the CFA.

10.327 It is therefore settled law that s.63B of the DCO operates as a bar to applications for leave to appeal to the CFA against refusals by the Court of Appeal of leave to appeal to it from decisions of the Family Court.

¹²¹ (2017) 20 HKCFAR 240 at [20], [21], [23].

¹²² (2017) 20 HKCFAR 240 at [33 et seq].

¹²³ *Hysan Development & Ors v Town Planning Board* (2016) 19 HKCFAR 372. Ribeiro PJ found that the fourth Hysan step was not directly engaged in this case: (2017) 20 HKCFAR 240 at [54].

¹²⁴ (2017) 20 HKCFAR 240 at [35]–[41]. Reference to *Piglowski v Piglowski* [1999] 1 WLR 1360, All ER 632 at [39] of CFA judgment.

CHAPTER 11

INJUNCTIVE RELIEF ON FINANCIAL MATTERS

By Peter Barnes and Nicole H.K. Liu*

Section	Para.
1. Introduction	11.001
2. Section 17 of the Matrimonial Proceedings and Property Ordinance (Cap.192) (MPPO) – “The Avoidance of Transactions Intended to Defeat Claims”	11.007
(a) Introduction	11.007
(b) Applications made under s.17 of the MPPO	11.009
(c) “Property”	11.018
(d) “Dealing With”	11.024
(e) “Intention”	11.027
(f) “Defeating the Claim”	11.031
(g) Constructive Notice Sufficient	11.033
(h) Undertaking as to damages	11.038
(i) Procedure	11.039
(j) <i>UL v BK</i> (Freezing Orders: Safeguards: Standard Examples)	11.043
2A. Sections 29AJ and 29AK MPPO – “Avoidance of Transactions Intended to Defeat Applications for Financial Relief”	11.046
(a) Introduction: Part IIA MPPO	11.046
(b) Applications made under ss.29AJ and 29AK of the MPPO	11.048
(c) Procedure	11.053
3. <i>Mareva</i> Injunctions – Freezing Assets	11.058
(a) Introduction	11.058
(b) <i>Ex parte</i> Application	11.061
(c) Requirements for the Grant of <i>Mareva</i> Injunction	11.066
(d) Ceiling Figure Necessary	11.075
(e) Cross-undertakings	11.076
(f) Procedure	11.078
(g) Ancillary Orders	11.082
(h) Limitations on <i>Mareva</i> injunctions	11.085
3A. <i>Chabra</i> Injunction Orders	11.090
(a) Introduction	11.090
(b) Requirements for the grant of <i>Chabra</i> injunctions	11.091
(c) Limitations on <i>Chabra</i> injunctions	11.096
4. <i>Anton Piller</i> Orders	11.101
(a) Search and Seizure	11.101
(b) Requirements for <i>Anton Piller</i> orders	11.105

* The original edition of this chapter was authored by Russell Coleman SC, now Mr. Justice Coleman of the High Court of the HKSAR, and subsequently updated.

(c) Full and Frank Disclosure Necessary	11.116
(d) Cross-undertakings	11.121
(e) Service and Execution of Order	11.123
(f) Supervising Solicitor	11.131
(g) Procedure	11.132

1. INTRODUCTION

This chapter deals with injunctive relief in respect of financial matters, in particular, ss. 17, 29AJ and 29AK of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (MPPO), *Mareva* injunctions, *Chabra* injunctions and *Anton Piller* orders. Each remedy has a distinct use but all relate to the marital assets. 11.001

Section 17 of the MPPO protects a party who has reason to believe that the other party intends to transfer family assets out of his or her name in order to defeat the claim of the other spouse. Sections 29AJ and 29AK largely mirror the effect of s. 17, such that a party who obtained a divorce decree in a jurisdiction outside Hong Kong may apply to the Hong Kong Courts for similar relief. 11.002

Mareva injunctions are appropriate when a party believes that it is appropriate to freeze the assets of the other party to stop them from transferring or otherwise dealing with marital assets. 11.003

A *Chabra* injunction is a *Mareva* injunction over the assets of a non-party. In a matrimonial context, the non-party may be a family member, friend or related entity holding assets of a party. The *Chabra* injunction may be used to freeze the assets of a non-party to prevent a party from defeating certain financial claims. 11.004

Anton Piller orders are used in matrimonial proceedings in order to obtain documents that a party believes the other party is trying to hide or destroy, which may provide evidence of marital assets. 11.005

Section 17 applications are common within matrimonial proceedings, *Mareva* injunctions, *Anton Piller* orders and *Chabra* injunctions less so. 11.006

2. SECTION 17 OF THE MATRIMONIAL PROCEEDINGS AND PROPERTY ORDINANCE (CAP. 192) (MPPO) – “THE AVOIDANCE OF TRANSACTIONS INTENDED TO DEFEAT CLAIMS”

(a) Introduction

Section 17 of the MPPO is a protective measure that a party involved in matrimonial proceedings could take to safeguard their family assets in the course of their proceedings. Section 37 of the English Matrimonial Causes Act 1973 (MCA) is equivalent to s. 17 of the MPPO although the wording of the two statutes vary to some extent.¹ 11.007

The purpose of s. 37 of the MCA has been said to protect the family assets rather than the interest, if any, enjoyed by the applicant in any of those assets.² 11.008

¹ *CCL aka L, CC v JRC aka C, JR (Injunction)* [2021] HKFLR 202, [49].

² *CCL aka L, CC v JRC aka C, JR (Injunction)* [2021] HKFLR 202, [52]; *Kemmis v Kemmis* [1988] 1 WLR 1307, 1315 (Purchas LJ) (CA).

(b) Applications made under s.17 of the MPPO

11.009 To be eligible to apply under s.17 of the MPPO, a person must commence legal proceedings against the other person for financial relief under any of the provisions of ss.3, 4, 5, 6, 6A, 8, 11 (except subs.(6)) and s.15 of the MPPO. The application can be made at the time when a person is seeking financial relief under the above provisions of the MPPO.

11.010 The court may, on an application under s 17(1) of the MPPO:

- (a) if it is satisfied that the other party is, with the intention of defeating the claim for financial provision,³ 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 doing so or otherwise for protecting the claim;⁴
- (b) if it is satisfied that the other party has, with the intention of defeating the claim for financial provision, made a disposition of property and that if the disposition were set aside financial provision or different financial provision would be granted to the applicant, make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property);⁵
- (c) if it is satisfied, in a case where an order under the relevant provisions of the MPPO has been obtained by the applicant against the other party, that the other party has, with the intention of defeating the claim, made a disposition of property, make such an order and give such directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property);⁶ and an application for the purposes of para (b) shall be made in the proceedings for the financial provision in question.⁷

11.011 Section 17(1)(b) and 17(1)(c) of the MPPO applies respectively to any disposition made by the other party (whether before or after the commencement of the proceedings for financial provision), not being a disposition 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 any notice of the intention to defeat the claim on the part of the other party.⁸

11.012 Under s.17(3) of the MPPO, where an application to avoid a transaction intended to defeat a claim for financial relief is made with respect to a disposition that took place

³ Under Matrimonial Proceedings and Property Ordinance (Cap.192), ss.3, 4, 5, 6, 6A, 8, 1 (except subs.(6)) and s.15.

⁴ MPPO, s.17(1)(a).

⁵ MPPO, s.17(1)(b).

⁶ MPPO, s.17(1)(c).

⁷ MPPO, s.17(1).

⁸ MPPO, s.17(2).

less than three years before the date of the application or to a disposition or other dealing with property that is about to take place and the court is satisfied either:

- (a) in a case falling within s.17(1)(a) or s.17(1)(b) of the MPPO, that the disposition or other dealing would have the consequence of defeating the applicant's claim for financial provision; or
- (b) in a case falling within s.17(1)(c) of the MPPO, that the disposition has had the consequence of defeating the applicant's claim for financial provision, it shall be presumed, unless the contrary is shown, that the other party disposed of the property with the intention to defeat the applicant's claim or, as the case may be, is, with that intention, about to dispose of or deal with the property.⁹

Section 17 of the MPPO shall not apply to a disposition made more than three years before the commencement of the MPPO.¹⁰ **11.013**

Notwithstanding the enactment of s.17 of the MPPO, the court may make orders under s.52B of the District Court Ordinance (DCO) to freeze assets that might be put beyond the reach of the applicant. The court, in deciding whether to exercise its jurisdiction to restrain the respondent in matrimonial proceedings, was not required to have regard to the many restrictions and safeguard surrounding the use of worldwide *Mareva* injunctions and to assimilate the use of procedure for injunctions in the Family Division to those in commercial law.¹¹ **11.014**

The procedure or the test applicable to the two routes available to obtain a freezing order does not differ. Either way, there must be evidence showing the likelihood of the movement or dissipation of assets with the intention of defeating the applicant's claim.¹² As Thorpe LJ held in *Khreino v Khreino*,¹³ "there must be a good cause put before the court supported by objective facts, that there was a likelihood of movement, or the dissipation, or the spiriting away, or the salting away, or the squirrelling away, or the making of a disposition, or the transfer of assets with the intention of defeating the claim". **11.015**

The court has a general power to preserve specific tangible assets *in specie* where they were the subject matter of a claim. Such an order did not necessarily require **11.016**

⁹ MPPO, s.17(3). In the case of *SLA nee S v HKL (No 1)* [2013] 5 HKLRD 117, the presumption that the disposition had been made with the intention of defeating the wife's claim was made out. This case involved the transfer of company shares. Here the court found that, even without the benefit of the presumption, given the timing of the events, the court was abundantly satisfied that the wife had demonstrated that the husband had decided to create documentation which gave the impression that he had sold his shares in the company.

¹⁰ MPPO, s.17(5). The commencement date of the MPPO is 1 July 1972.

¹¹ *Shipman v Shipman* [1991] 1 FLR 250; *Roche v Roche* (1981) 11 Fam Law 243 (CA). However, see *YB v LX* [2022] HKFLR 508, [53]–[55], which held that an applicant is not subject to a more relaxed disclosure rule than that generally required of *ex parte* applications. Even in the family context, the duty for full and frank disclosure (especially in *ex parte* applications) is an important safeguard to ensure justice.

¹² *CCL aka L, CC v JRC aka C, JR (Injunction)* [2021] HKFLR 202, [41]–[42]; *CYYC v TVKT (Injunction)* [2017] HKFLR 43, [14]–[15]. In *CYYC v TVKT*, HHJ I Wong quoted from a decision by Mr Justice Mostyn in *ND v KP (ex p application)* [2011] EWHC 457(Fam), [2011] 2 FLR 662.

¹³ [2000] FCR 80 (CA). *Khreino v Khreino* was subsequently cited in *CCL aka L, CC v JRC aka C, JR (Injunction)* [2021] HKFLR 202, [38].

application of all freezing order principles and safeguards, although it was open to the court to impose them. For a freezing order in a sum of money which is capable of embracing all of a respondent's assets up to the specified figure to succeed, it is essential that all the principles and safeguards are scrupulously applied and the applicant must show, by reference to clear evidence, an unjustified dealing with assets (including threats) giving rise to the conclusion that there is a solid risk of dissipation of assets to the applicant's prejudice.¹⁴

- 11.017 However, it is not advisable to apply for an injunction freezing all the assets. In matrimonial proceedings, a party is unlikely to be awarded the whole of the available assets and therefore it would not be appropriate to seek an injunction freezing them all.¹⁵ An injunction should be limited to the maximum amount that the applicant could realistically obtain from the divorce proceedings

(c) "Property"

- 11.018 In the context of the MPPO, there is no distinction drawn between property easily disposable or not. The court has to be satisfied that the object and effect of that dealing must be to defeat the other party's claim.¹⁶
- 11.019 Section 17 of the MPPO is not intended to freeze the respondent's disposable assets pending the determination of the applicant's claim¹⁷ and therefore does not give the court a general power to freeze property pending determination of the other party's claim for financial relief.
- 11.020 "Property" under s.17 of the MPPO does not mean property in general. It refers only to property in which either or both of the parties to the marriage had or have had a beneficial interest, either in possession or reversion.¹⁸ The property in question must be properly described when applying for orders under s.17 of the MPPO.
- 11.021 Property that is situated outside the court's jurisdiction is also covered by s.17 of the MPPO. The court has the discretion to decide whether to exercise its jurisdiction over the property abroad or not. In the exercise of that discretion, the court will not generally make an order that depends for its effectiveness on it being recognised or enforced by the court of the foreign locus if the evidence shows that the order will not be recognised or enforced.¹⁹
- 11.022 Disputes commonly arise in Hong Kong as to the beneficial ownership of property. This involves an investigation into the circumstances of the purchase. Many Hong Kong families share property with family members or buy property in the names of family members. Such applications will often turn on their facts. For example, in the

¹⁴ 梁對陳 [2024] HKFC 10, [23], citing Mostyn J in *L v K* (Freezing Orders: Principles and Safeguards) [2013] EWHC 1735 (Fam), [2014] Fam 35.

¹⁵ *CKK v CKF* [2018] HKFC 53, [33]; *Ghoth v Ghoth* [1992] 2 All ER 920.

¹⁶ *Will v Will* [1993] 2 HKLR 398, 406–407 (Penlington JA) (CA).

¹⁷ *Smith v Smith* (1973) 4 Fam Law 80, in relation to the English equivalent, s.37 of the MCA 1973.

¹⁸ *Crittenden v Crittenden* [1990] 2 FLR 361, cited with approval by *WYSL v FHCBA* [2019] HKFLR 345, [11], footnote 15.

¹⁹ *CCL aka L, CC v JRC aka C, JR (Injunction)* [2021] HKFLR 202, [53]; *Hamlin v Hamlin* [1986] Fam 11.

case of *WCY v CTL and CKH*,²⁰ the husband was able to prove on the evidence that he had no beneficial interest in the property that was held to be the property of his parents, although he was registered as owning a half share.

In the case of *CLC v SKW*,²¹ the Court of Appeal considered the position of a soft loan to the husband's sister, made six years prior to the application to set aside under s.17 of the MPPO. The loan was made to assist the sister with payment of her son's educational expenses. It was argued unsuccessfully that as a soft loan the husband was entitled to demand the repayment and the sister was obliged to pay. It was further argued that forgiveness of the loan was not made for valuable consideration and the disposition was caught by s.17(2) and that the timing of the disposition should be from the date the gift was forgiven rather than the payment which brought the gift within the time limit for the section. The Court of Appeal disagreed and found on the facts that the disposition was unlikely to have been done with the intention of defeating the wife's claim for ancillary relief, and there had been no change in intention. *Kemmis* was cited with approval "that the natural consequence of the disposition would not generally be enough by itself to support an inference of the requisite intention".

(d) "Dealing With"

"Dealing with" under s.17 of the MPPO is a question of fact. It refers to some positive dealing with the property and does not cover a lack of dealing with it.²² "Disposition" under s.17(4) of the MPPO has a broad meaning. It includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise but excludes any provision contained in a will or codicil.²³

In England, s.37(4) of the MCA provides that in the case of a disposition made to a third party, that the party applying must establish, among others, either that the third party in whose favour the disposition had been made has acted without good faith or in the knowledge of the disposing party's intention at the time of acquiring the property. In Hong Kong, s.17(2) of the MPPO has the same effect as s.37(4) of the MCA in protecting dispositions made for valuable consideration, in good faith and without notice of the disponent's intention to defeat the claim.

An applicant under s.17 of the MPPO may face difficulty in recovering the property where there has been a further disposition of that property by the person to whom the original disposition was made, since the court does not have jurisdiction to set aside that further disposition. *C v T* (s.17 application)²⁴ is an example of a situation where the wife's dispositions of properties could not be set aside as a matter of law, because they had been transferred on by the donee. However, their value was taken into account for the purposes of assessing the value of the matrimonial pool.²⁵

²⁰ (Ancillary relief and section 17 applications) [2011] HKFLR 409.

²¹ [2019] HKFLR 175, [2018] HKCA 143.

²² *Crittenden v Crittenden* [1990] 2 FLR 361, 365.

²³ MPPO (Cap.192), s.17(4).

²⁴ *C v T* (s.17 application) [2010] HKFLR 38.

²⁵ *ZSL v TMF* [2022] HKFC 179, [18]; *Kemmis v Kemmis* [1988] 1 WLR 1307, 1331 (Nourse LJ) (CA).

(e) "Intention"

- 11.027 "Intention" under s.17 is in a subjective sense requiring investigation of the state of mind and not the consequence of acts. The requisite intention need not be the sole or dominant intention of the disponent.²⁶ It is sufficient if it played a substantial part in his intentions as a whole.
- 11.028 Where an application is made under s.17 with respect to a disposition that took place less than three years before the date of the application (or to a disposition or other dealing with the property that is about to take place), there is a rebuttable presumption under subs.(3) that the disponent had the intention of defeating the claim should the court be satisfied that the disposition or other dealing would have the consequence of defeating the claim. In *LHK v CLH* (s.17 applications),²⁷ a deed of family arrangement that was entered into by the Husband with his siblings in respect of his late father's estate was held not to be made with the intention of defeating the wife's claim for ancillary relief. Since the disposition was made more than three years prior to the application under s.17 and the burden of proof was on the wife, which she failed to meet.
- 11.029 Where the onus is on the applicant to show the requisite intention, the standard of proof to be applied is that the circumstances must be such as would lead the guarded discretion of a "reasonable and just man" to the conclusion. The standard of proof remains the balance of probabilities, although it has been said that since what has to be proved is not merely a dishonourable intention but a dishonest and fraudulent one, the evidence which is required to tip the balance, has to be correspondingly more convincing. "Satisfied" in this context means no more than that the judge has to make up his or her mind:

"In considering the intention of the parties it is necessary to look at each disponent's conduct. In other words, can each side's intention to defeat the other's claim, be gleaned from their conduct at the time in question? Consequently... the circumstances surrounding the making of the dispositions are highly relevant."²⁸

- 11.030 The court is entitled to consider the disponent's conduct in his affairs and his lack of frankness to the court. The court may also draw an inference when there is no direct evidence of the intention and may have regard to the natural consequences of that act, although there is no presumption as with s.17(3). In *W v H*,²⁹ the court clearly found that the husband had established a charitable trust and a family trust in order to defeat the wife's claims. See also *B v B*³⁰ in which the husband transferred funds out of a joint

²⁶ *Kemmis v Kemmis* [1988] 1 WLR 1307, 1331 (Nourse LJ) (CA). Quoted in *ZSL v TMF* [2022] HKFC 179, [18] and *C v T* [2010] HKFLR 38, 50. See *NSK v KRW* [2019] HKFC 89, [34], where the husband had very believable reasons for setting up trusts for his son and daughter, but by so doing he significantly undermined the wife's claim for ancillary relief. While it was not his main intention, the court accepted it must have formed a substantial part of his intention overall.

²⁷ [2009] HKFLR 173. See also *CLC v SKW* [2018] HKCA 143.

²⁸ *DJA v OFI* [2019] HKFC 234, [19] (Mellor J); cf *ZSL v TMF* [2022] HKFC 179, [18] (E Liu J), *CCCR v CLL* [2018] HKEC 2084 citing *Kemmis v Kemmis* [1988] 1 WLR 1307.

²⁹ (*Financial Relief – Big Money*) [2009] HKFLR 230.

³⁰ [2008] HKFLR 226.

bank account in Hong Kong to accounts in his sole name and in the name of a company that he controlled in Singapore and Belize respectively. These dispositions could be set aside. He also removed marital furniture and household items. However, these were then sold to parties who had no knowledge of his intentions to defeat the wife's claim and therefore these transactions could not be set aside.³¹

(f) "Defeating the Claim"

"Defeating the claim" has a broad meaning in this context. Under s.17(4) of the MPPO, "defeating the claim" is referred to as "preventing financial provision from being granted to the applicant, or to the applicant for the benefit of a child of the family, or reducing the amount of any financial provision which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of the applicant under the relevant provisions" of the MPPO.³²

In *WLT v GWH*,³³ the husband transferred a valuable painting to his father. The Court held that if the transfer of the painting was set aside, a different financial provision would not necessarily be made for the wife. It was clear that the painting was "inherited property" in the classic sense of that term. It did not follow that the wife would be entitled to half of its value or indeed to any of its value in any event. It was also of note that financial arrangements between the husband and his father in relation to the painting took place prior to the parties' marriage and that there could and would likely be further argument about this painting being pre-marital.

(g) Constructive Notice Sufficient

If a disponent had constructive notice of the disponent's intention to defeat the other party's claim for financial relief, then the relevant disposition could be set aside even if it was for valuable consideration and the disponent had acted in good faith without actual notice of the disponent's intention.³⁴

Similar to s.37(4) of the MCA, applicants under s.17 of the MPPO may establish a lack of good faith where it is not possible to establish actual knowledge so as to set aside a disposition under s.17(1)(b) and 17(1)(c) of the MPPO. However, this would afford no protection in a situation whereby the disponent deliberately withheld his intention from the disponent as envisaged by s.17(2) of the MPPO.

³¹ See also *C v T* [2010] HKFLR 38, [42]–[44] and [93] (citing *McGladdery v McGladdery* [1999] 2 FLR 1102 and *HKCB Finance Ltd v Yuen Yi Wan Sandy and Wong Chiu Mui* (unrep., CACV 355/2005). This case was cited recently in *CCCR v CLL* [2018] HKFC 95.

³² MPPO (Cap.192), s.17(4). See also *Sze v Yiu* [2005] HKFLR 1 in which the repayment to the wife's mother for funds advanced to buy a property was not held to be a transaction made to "defeat the claim" of the husband. See also *C v T* [2010] HKFLR 38, in which the court held that the wife's arguments in respect of her intentions when making the dispositions had no merit and held that it had been her intention to ensure that the assets were held as far as possible from the reach of the husband.

³³ *WLT v GWH* (Section 17 application; inherited asset) [2021] HKFLR 416.

³⁴ *Kemmis v Kemmis* [1988] 1 WLR 1307; *Akhmedova v Akhmedov* [2021] EWHC 545 (Fam), [111].

- 11.035 In *Kemmis v Kemmis*,³⁵ Purchas LJ addressed this issue when dealing with s.37(4) of the MCA (which has the same effect as s.17(2) of the MPPO). Purchas LJ emphasised that constructive notice, in the context of s.37(4) of the MCA, concerns notice of a "dishonest intent" on the part of the disponor and not notice of the applicant's interest, if any, in the asset disposed.³⁶
- 11.036 As to the meaning of "constructive notice", Purchas LJ referred to the following principles of constructive notice articulated by Farewell J in *Hunt v Luck*:³⁷

"Constructive notice is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him to further inquiry or from his wilfully abstaining from inquiry, to avoid notice".

- 11.037 Purchas LJ observed that the basic concepts of constructive notice are "knowing something" that ought to have stimulated inquiry or "wilfully abstaining from inquiry to avoid notice".³⁸ Both concepts imply that the inquiry, if made, would necessarily have revealed the knowledge, constructive notice of which is to be imported.

(h) Undertaking as to damages

- 11.038 There is no requirement that an undertaking as to damages be given in applications made by a spouse in matrimonial proceedings unless specifically required by the court.³⁹ However, if the court considers that there are sound reasons in any particular case for an applicant to give an undertaking in damages, despite the fact that it has been satisfied that the respondent is about to make a disposition with the intention of defeating the applicant's claim, the court will require it and an applicant who declines to give the undertaking will be denied the relief sought.⁴⁰

(i) Procedure

- 11.039 Once proceedings for relief under any of the financial provisions of the MPPO have been brought, an application for an order under s.17 of the MPPO can be made to a judge.⁴¹
- 11.040 Under r.74 of the Matrimonial Causes Rules (Cap.179A) (MCR), where an application is made for an avoidance of disposition order, the application shall state briefly the nature of the disposition to be set aside and the notice in Form 8 shall, unless otherwise directed, be supported by an affidavit by the applicant stating the facts relied upon in support of the application.⁴²

³⁵ [1988] 1 WLR 1307.

³⁶ *Kemmis v Kemmis* [1988] 1 WLR 1307, 1317 (Purchas LJ) (CA).

³⁷ [1901] 1 Ch 45.

³⁸ *Ibid.*

³⁹ *Will v Will* [1993] 2 HKLR 398, 405 (Fuad VP) (CA), cited in *AK v MYNT* [2019] HKFC 62, [15].

⁴⁰ *Will v Will* [1993] 2 HKLR 398, 405–406 (Fuad VP) (CA).

⁴¹ MCR (Cap.179A), r.84.

⁴² MCR, r.74(1).

The supporting affidavit shall contain full particulars of the property in respect of which the application is made and the persons in whose favour the disposition is alleged to have been made. Where the disposition is alleged to have been made by way of settlement, particulars of the trustees and the beneficiaries of the settlement should be included in the affidavit. If the application relates to land, the affidavit shall state whether the title of the land is registered or unregistered and, if registered, the Land Registry title number. The affidavit shall also give particulars of any mortgage on or interest in the land, if any.⁴³

The applicant shall serve a copy of Form 8 together with a copy of the supporting affidavit on the respondent to the application and the person in whose favour the disposition is alleged to have been made and such persons, if any, as the registrar may direct.⁴⁴ Notice of an application to set aside a disposition order should be given to any such person or body who might be adversely affected.⁴⁵ Any person served with the said notice may, within 14 days after service, file an affidavit in answer.⁴⁶

(j) *UL v BK (Freezing Orders: Safeguards: Standard Examples)*⁴⁷

Guidance has been given by the High Court in London in respect of freezing orders under s.37 of the MCA.⁴⁸ Here, Mostyn J highlighted the essential points missing from an application for a freezing order that the wife obtained in respect of property in Spain worth GBP10 million and other assets, to be nominated by the husband, to a value of GBP20 million. The judge was of the view that some notice, even short informal notice, should have been given to the husband and that there should have been provision in the order for the husband to meet his own living and legal costs and for the disposal of assets in the ordinary course of business. Further, the Judge held that there should have been undertakings by the wife to pay damages to the husband or any third party if the order has caused loss, pay the reasonable costs of anyone other than the husband, agree not to use the information obtained and agree not to enforce the judgment outside England and Wales without the permission of the court.

The judge further commented that there was insufficient evidence for a freezing order in most of the evidence that did not show "solid evidence of an unjustified dealing by the husband with his assets". The only exception was evidence of the husband's threats that he would disappear and she would get nothing if she divorced him. Even here the evidence fell short because the wife did not specify the details of this conversation – the judge commented that for the wife to rely on this, the event must be "fully particularised, placed in context, and painted in full colour". Therefore, mere suspicion and anxiety would not be enough to justify a freezing order, which should not proceed without objective evidence. In this case Mostyn J further said that there

⁴³ See Rayden and Jackson's Law and Practice in Divorce and Family Matters (18th ed, Vol 1(1), 2016), para 20.6. MCR, r.74(3)(b).

⁴⁴ *Poon Hing Chow Dorothy v Louvet* [1990] 2 HKC 74.

⁴⁵ MCR (Cap.179A), r.74(4).

⁴⁶ [2013] EWHC 1735. *UL v BK* has been cited with approval in *YB v LX (Injunction)* [2022] HKFLR 508.

⁴⁷ The English equivalent to s.17 of the MPPO.

must be evidence of an unjustified dealing: merely holding assets in an off shore trust will not by itself amount to unjustified conduct.

- 11.045 The judge commented that the without notice procedure was intrinsically unfair. He said "except in cases where it is essential that the respondent must not be aware of the applications, the applicant should take steps to notify the respondent informally of the application". He commented that cases which begin with an *ex parte* application only go one way thereafter – the respondent is so enraged he looks to take "counter-offensive measures".

2A. SECTIONS 29AJ AND 29AK MPPO, – "AVOIDANCE OF TRANSACTIONS INTENDED TO DEFEAT APPLICATIONS FOR FINANCIAL RELIEF"

(a) Introduction: Part IIA MPPO

- 11.046 Prior to the enactment of Part IIA MPPO, the court's powers to make an order for financial provision in favour of a spouse were conditional on the grant of a divorce decree by a Hong Kong court. A party who obtained a divorce decree in a jurisdiction outside Hong Kong could not apply for financial relief because the Hong Kong courts could no longer grant any decree absolute. This potentially caused hardship to a party where no or insufficient financial provisions were made under the foreign order.⁴⁹ Part IIA MPPO was enacted to cure this problem.
- 11.047 Part IIA is modelled on Part III of the English Matrimonial and Family Proceedings Act 1984. See *C v H*⁵⁰ for a comparison table setting out each of the provisions in Part IIA of MPPO against its English equivalent. The Hong Kong provisions do not copy the English counterparts verbatim but have made certain modifications on drafting. However, valuable judicial guidance can still be derived from the English case law to inform the approach to Part IIA generally and on its interpretation and operation specifically.⁵¹

(b) Applications made under ss.29AJ and 29AK of the MPPO

- 11.048 The English counterpart of s.29AJ of the MPPO is s.23 of the English Matrimonial and Family Proceedings Act 1984. It is of particular note that the drafting in s.23 of the English Matrimonial and Family Proceedings Act 1984 also bears a striking similarity to the drafting in s.17 of the MPPO. As such, the court's approach under s.17 of the MPPO may also be instructive in considering s.29AJ of the MPPO.

⁴⁹ See the *obiter* comments of the Court of Final Appeal in *ML v YJ* (2010) 13 HKCFAR 794, [144] and the Court of Appeal below in [2010] 1 HKLRD 1, [85]–[87]. See also Chapter 3.

⁵⁰ *C v H* (Foreign Decree: Part IIA) [2012] HKFLR 199 CFI.

⁵¹ See also *SPH v SA* (Forum and Marital Agreements) (2014) 17 HKCFAR 364, [2014] HKFLR 286, [56] and *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628, [4].

Decisions on applications under s.29AJ of the MPPO are relatively rare. One example is *CWG v MH & ors.*⁵² In that case, the husband had disposed of shares held by him in various Hong Kong companies to offshore companies incorporated in the British Virgin Islands. The wife successfully applied to set aside these dispositions under s.29AJ of MPPO. It can be seen that the approach of the court did not deviate, in substance, from the typical approach adopted by Hong Kong courts under s.17 of the MPPO: see paragraphs 60–61.

Section 29AK of the MPPO also provides a party who intends, but has not yet applied for leave to make an application for an order for financial relief with protection.

The court may make any order it thinks fit for restraining the other party to the marriage from making any disposition or transferring out of the jurisdiction or otherwise dealing with any property where 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 a place outside Hong Kong;
- (b) that the divorce, annulment or legal separation is recognized as valid by the law of Hong Kong;
- (c) that the applicant intends to apply for leave to make an application for an order for financial relief as soon as he or she has been habitually resident in Hong Kong throughout a period of 3 years immediately before the date of the application; and
- (d) 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.⁵³

Section 29AK(3) of the MPPO supplies a presumption that where a disposition or other dealing with property is about to take place and the court is satisfied that the disposition or other dealing would (apart from this section) have the consequence of defeating the applicant's claim for financial relief, it is to be presumed, unless the contrary is shown, that the person who is about to dispose of or deal with the property is about to do so, with the intention of defeating the applicant's claim for financial relief.

(c) Procedure

An application for an order preventing a transaction under s.29AK of the MPPO must be made by originating summons in Form 30 of the Appendix to the Matrimonial Causes Rules⁵⁴ and supported by an affidavit by the applicant stating the facts relied on in support of the application.

⁵² *CWG v MH & ors* (unrep., HCMP643/2012, 26 March 2013).

⁵³ Section 29AK of the MPPO.

⁵⁴ MCR, r.103D.

- 11.054 The applicant must serve a sealed copy of the originating summons on the respondent, together with a copy of the affidavit in support and a notice of proceedings and acknowledgment of service in Form 29. If the respondent intends to contest the application, the respondent must within 28 days after the time limited for giving notice of intention to defend, file an affidavit in answer to the application setting out the grounds on which he or she relies.
- 11.055 An application for an order under s.29AJ must be made by originating summons in Form 28 of the Appendix to the Matrimonial Causes Rules⁵⁵ and supported by an affidavit by the applicant stating the facts relied on in support of the application. The application shall state briefly the nature of the disposition to be set aside.
- 11.056 The applicant must serve a sealed copy of the originating summons on the respondent, together with a copy of the affidavit in support, if one has been filed in the registry; and a notice of proceedings and acknowledgment of service in Form 29. If the respondent intends to contest the application, the respondent must within 28 days after the time limited for giving notice of intention to defend, file an affidavit in answer to the application setting out the grounds on which he or she relies; and serve a copy on the applicant⁵⁶.
- 11.057 An application for an order under s.29AJ of the MPPPO must be determined by a judge⁵⁷.

3. MAREVA INJUNCTIONS – FREEZING ASSETS

(a) Introduction

- 11.058 Pursuant to its inherent jurisdiction and O.29 of the Rules of the High Court (RHC),⁵⁸ the court has jurisdiction to order a *Mareva* injunction,⁵⁹ on the application by the applicant, restraining the respondent from disposing of or transferring out of the jurisdiction or otherwise dealing with his assets if it is satisfied that the respondent is about to do so with the intention of defeating the applicant's claim for financial provision.⁶⁰
- 11.059 In granting a *Mareva* injunction against the respondent, the court has to balance the competing interests of the applicant and the respondent. It has to guard the applicant against the manipulations of the respondent, without unreasonably and unnecessarily stifling the working capital of the respondent.⁶¹

⁵⁵ MCR, r.103D.

⁵⁶ MCR, rr.103B, 103D.

⁵⁷ MCR, r.103D(5).

⁵⁸ Or its jurisdiction under s.52B of the DCO and under DCR O.29.

⁵⁹ It is named after the well-known case of *Mareva Compania Naviera SA v International Bulk Carriers SA* ("The *Mareva*") [1980] 1 All ER 213. Examples of cases in the Family Court in Hong Kong in which *Mareva* injunctions have been featured include *C v L* (Injunction to Restrain Disposing of Matrimonial Property) [2008] HKFLR 188 and *K v H* (Maintenance Pending Suit and Application to Restrain from Dealing with Property) [2009] HKFLR 51.

⁶⁰ See, for example, *Shipman v Shipman* [1991] 1 FLR 250.

⁶¹ *Mercedes Benz AG v Leiduck* [1996] 1 AC 284.

A *Mareva* injunction may be granted before as well as after judgment in aid of execution. 11.060

(b) *Ex parte* Application

In a *Mareva* injunction, speed and *ex parte* are of the essence. If there is delay, or if warning is given in advance, the assets may well be dissipated before the injunction can bite. Therefore, an application for a *Mareva* injunction must be made speedily *ex parte* before the respondent removes the assets.⁶² Nonetheless, if the *Mareva* injunction is granted unjustly, the respondent may suffer incalculable damage.⁶³ 11.061

In an *ex parte* application for a *Mareva* injunction, the applicant is under an utmost duty of disclosure.⁶⁴ He has to make the fullest disclosure of all material facts to the court, including any possible defence that may be put forward by the respondent.⁶⁵ 11.062

Materiality is to be determined by the court and not by the assessment of the applicant or his legal advisers.⁶⁶ The usual consequence of failure to disclose material facts is that the applicant will be deprived of the fruits of the order without consideration of the merits, irrespective of whether the non-disclosure was innocent or deliberate.⁶⁷ In *Tan Li Hui Cheng v Tan Kian Chee*⁶⁸ Le Pichon J, as she then was, held that there is no requirement that an applicant put all facts material to the substantive application before the court in a s.17 application. However, as explained in *YB v LX*⁶⁹ this does not mean the applicant is absolved from the duty of providing full and frank disclosure. Such applications involve third parties and, more often than not, the applicant knows very little detail of the transaction in the initial discovery of the same. As such, it is impracticable in the preliminary stages, when there is likely to be minimal information, to require the applicant to be able to relay all material facts. Hence, the applicant is not expected or required to make a full disclosure of all material facts of or surrounding the substantive application. Notwithstanding this, the applicant is not entitled to pick and choose which facts they wish to disclose under the guise of Le Pichon J's dictum in *Tan Li Hui Cheng*⁷⁰. The same reasoning applies equally to applications for a *Mareva* injunction and for s.17 relief. 11.063

An applicant must also conduct proper inquiries for any relevant additional facts before making the *Mareva* application. This is because not only facts known to the applicant but also any additional facts, which he would have known had he made proper inquiries, will determine whether there has been material non-disclosure.⁷¹ The extent of the inquiries that will be held to be proper, and hence necessary, must depend on all the 11.064

⁶² *Third Chandris Corp v Unimarine SA* [1979] QB 645, 669E–F (Lord Denning MR).

⁶³ *Third Chandris Corp v Unimarine SA* [1979] QB 645, 653–654 (Lord Denning MR).

⁶⁴ *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc* (Lavens, Third Party) [1988] 1 WLR 1337 (CA). See *YB v LX* [2022] HKFLR 508, [53]–[55].

⁶⁵ *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc* (Lavens, Third Party) [1988] 1 WLR 1337 (CA).

⁶⁶ *Brink's-Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA).

⁶⁷ *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc* (Lavens, Third Party) [1988] 1 WLR 1337 (CA).

⁶⁸ [1997] 4 HKC 94.

⁶⁹ [2022] HKFLR 508.

⁷⁰ *YB v LX* [2022] HKFLR 508, [56].

⁷¹ *Brink's-Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA).