

(Amended 1 of 1960 s. 6; 71 of 1999 s.3)

### [11.01] Enactment history

14 of 1926 s 5 allowed the term "Registrar of Marriages" to be inserted in lieu of "Secretary for Chinese Affairs", the latter office having previously been responsible for the registration of marriages. 20 of 1948 is the Revised Editions of the Laws Ordinance, of which s 4 served to streamline existing ordinances and to achieve consistency.

50 of 1911 and 62 of 1911 Schedule are Law Amendment Ordinances. Like the revised Edition of the Laws Ordinance, 20 of 1948, the purpose of these ordinances is largely to achieve consistency and to repeal or amend errors. The passage of time has meant that the amendments herein are of limited note today.

71 of 1999 s 3 provides that the term "Chief Executive" should replace "Governor". This has effect retrospectively and is deemed to have some into effect on 1 July 1997: 71 of 1999 s 2(1)(a).

1 of 1960 s 6 refers to a marginal note in the original 14 of 1875 version of the ordinance. The marginal note originally stated "special licence in the case of emergency". 1 of 1960 s 6 removed the words "in case of emergency", thus broadening the scope of the power to grant a special licence under s 11.

Form 3 of Sch 1 certifies that sufficient cause has been shown to the Chief Executive why the parties should be allowed to marry and declares the notice or certificate dispensed with and authorises "any competent person" to celebrate the marriage on a set date and in a set place, between set hours (see also [19.03]).

### [11.02] England

The Marriage Act 1949 also provides for a special licence to be granted. This discretion may be exercised by the Archbishop of Canterbury.

### [11.03] Discretionary nature of power to grant a special licence

The Chief Executive has a discretion, and not a duty, to grant a special licence when "he thinks fit". For a discussion of the scope of this discretion, see [3.03]. See also [4.03] and [4.05].

### [11.04] In the prescribed form

The prescribed form is Form 3, Sch 1: see [11.01].

### [11.05] Effect of the special licence

By granting the special licence, the Chief Executive may dispense with the need to give notice, to issue a certificate for marriage or even both of these requirements. This has a considerable impact on the waiting time usually necessary prior to marriage. It should be noted though that s 11 does not allow for the affidavit to be dispensed with (see [12.03]). This is not the only consequence of obtaining a special licence. The special licence may also

enable parties to marry at a place other than a licensed place of worship or registrar's office (see [11.06] and [22.01]). However, wherever the marriage is celebrated, the location and date of the marriage must be stipulated in the special licence.

### [11.06] Need for a special licence

There are two main reasons why a couple may wish to apply for a special licence. The first is to avoid the usual waiting time. This may arise when a couple are about to be parted for reasons beyond their control and wish to marry prior to that separation. The second reason for seeking a special licence is if the parties seek to marry in a particular place. This may be for practical rather than romantic reasons. For example, if one party is disabled and cannot travel, the special licence may be necessary. Alternatively, if one party is a prisoner and cannot easily gain permission to travel outside of the place of detention in order to marry in a registry office or licensed place of worship, the couple may wish to obtain a special licence allowing them to marry at a suitable location within the prison.

### [11.07] Fees

The Chief Executive has the power under s 11(2) to waive or reduce the fees usually charged for a special licence (see Sch 2). At the date of publication, the fee charged for a special licence was \$10,785. The fee for filing notice of marriage in the normal manner was \$305 and the fee for the issue of a certificate by the Registrar in the normal manner was \$3,010. Therefore, the cost of obtaining a special licence is considerably greater than proceeding towards marriage by the normal route. The power to waive or reduce fees means that persons who are unable to afford the higher fee for a special licence are not automatically prevented from obtaining a licence (see [11.06]).

It should be further noted that the Chief Executive's power to waive or reduce fees is not limited to reasons of poverty, unlike the similar power held by the Registrar (see [37.02]). Therefore, if the Chief Executive wishes to waive or reduce the fee on the basis that the parties have no choice but to apply for the special licence, then he may do so.

## 12. Affidavit before issue of certificate or grant of licence

Before the Registrar issues any certificate and before the Chief Executive grants any licence, one of the parties to the intended marriage shall appear personally before the Registrar and make affidavit (which the Registrar is hereby authorized to take) that he or she believes that there is not any impediment of kindred or alliance or any other lawful hindrance to the marriage, and either that the consent of the parties required by law to consent to the marriage has been obtained or that no such consent is required.

(Amended 14 of 1926 s. 5; 20 of 1948 s. 4; 71 of 1999 s.3)

extent of those laws. One rationale that may be proposed for simply importing the restrictions found in English law into Hong Kong law may be historical, that the law on civil marriage in Hong Kong has derived in large part from English law. However, given the culturally specific nature of morality and taboo, it is unsurprising that commentators in Hong Kong have suggested that directly importing the English provisions on this matter into Hong Kong law is unsatisfactory (see B Rwezaura, "Putting Cyber Weddings & Aquatic Nuptials in Their Wider Context" (2002) 32 *Hong Kong Law Journal* 1). Nonetheless, the law as it currently stands is, by statutory fiat, the English law. The question that arises is what will happen when the English legislature amends or reforms these provisions in its own jurisdiction? On the literal wording of s 27, it seems that the Hong Kong Marriage Ordinance can be presumed to have altered as well. It is debatable whether this is constitutionally feasible, let alone desirable.

#### [27.05] Void on the basis of knowing and wilful acquiescence

There are a number of grounds, other than kindred or affinity, on which a marriage might be void under s 27. These are found in s 27(2) and each ground requires that both parties, not only one party, acted knowingly and wilfully. If only one party acts knowingly and wilfully, this is insufficient to automatically invalidate the marriage: for persuasive authority see *Greaves v Greaves* (1872) LR 2P & D 423.

To act knowingly and wilfully means that the parties were aware of what they should do and intentionally did not do so. For example, in *Greaves v Greaves* (1872) LR 2 P & D 423, Lord Penzance refers to parties to a marriage being cognisant of the formalities to marriage and, despite that knowledge, going ahead with the marriage ceremony (at p 424). Similarly, but more recently, in *Gereis v Yagoub* [1997] 1 FLR 854 a decree of nullity was issued where a couple had gone through a religious marriage ceremony. Their minister had told them that they would also have to go through a civil marriage (under English law) in order for the marriage to be valid. The couple therefore had knowledge of the necessary formalities but did not comply with them. In a later English case, which is of only persuasive authority since it occurred after 1 July 1997, the court declared that recent Sikh immigrants to England who had gone through a Sikh wedding ceremony could not be said to have knowingly and wilfully married in non-compliance with the formalities to marriage due to their youth, illiteracy and lack of access to information about domestic laws and culture (*Chief Adjudication Officer v Bath* [2000] 1 FLR 8; for commentary on this case see A Bradney, "Formalities to the Marriage Ceremony" *Law Quarterly Review* (2000) Vol 116, p 351). See also *Gompertz v Kensit* (1871-1872) LR 13 Eq 369.

On the meaning of "knowingly and wilfully" when read together, see *R v Sood* [1998] 2 Cr App R 355 (note that this is a case concerning a statement made on a death certificate but has relevance to marriage legislation). In this case, the court determined that where the words "knowingly" and "wilfully" were read together in a statutory provision regarding state of mind, "wilfully" referred to the intention of the party to do an act or make a statement and "knowingly" referred to the party's knowledge of the falsity of the action or

statement. See also *R v Else, R v Kemp* [1964] 2 QB 341 (at [27.09] & [33.03]).

#### [27.06] Void on the basis of celebration of marriage in a place other than the office of the Registrar or a licensed place of worship

Other than the exemptions set out in s 27(2), a marriage should take place in either a Registrar's office or a licensed place of worship. However, a marriage will not be declared void unless the couple knowingly and wilfully marry elsewhere (see [27.05]). Therefore, having regard to *Gereis v Yagoub, Chief Adjudication Officer v Bath* (see [27.05]) and *R v Bham* [1966] 1 QB 159, knowledge and intention must be shown.

#### [27.07] False name

The purpose of requiring a marriage to be contracted in one's proper name is partly to ensure full and accurate record keeping but, more importantly, to avoid the creation of unlawful marriages. Marriage under a false name may enable a party to marry bigamously or in the identity of another person. However, it is not enough that a party uses a false name, but that must be done knowingly and intentionally. It should be noted that using a false name does not, in English law, automatically invalidate the marriage (see *Puttick v Attorney-General* [1979] 3 All ER 463; *Plummer v Plummer* [1917] P 163 at pp 171-172).

Although there are no reported Hong Kong cases on this point, there are two analogous English cases. In the first case, *Chipchase v Chipchase* [1942] P 37, the woman had used a false name for the then English equivalent of giving notice. She had maintained this name and had married under it. The court found that she had adopted the false name for the purpose of concealment, namely to hide the fact that she was already married. The court held that the formalities had not been complied with and the marriage was null and void. Thus, in the language of the Hong Kong legislation, it might be said that the woman had knowingly and wilfully adopted a false name and as a consequence the marriage must be void. The second case presents almost the opposite motivation. In *Dancer v Dancer* [1949] P 147, the woman had been born the daughter of Mr & Mrs Knight. When she was three years old, her mother began to live with a Mr Roberts. Mr Roberts brought up the young woman as his own daughter and she only became aware of her real, legal name when she was 16 years of age. When giving the equivalent of the Hong Kong notice of marriage, she told her minister her real name and, on his advice, gave notice in her adopted name. The purpose of this being to ensure that notice of the intended marriage would be meaningful to those who knew her, and her acquaintances all knew her by her adopted name. Therefore, her motivation was not to conceal her identity, but rather to ensure that there was no concealment that it was she who intended to marry. Again, in the language of the Hong Kong legislation, she might be said not to have used a false name within the meaning of the legislation.

See also [12.09] on perjury.

*Hick v Raymond & Reid* [1893] AC 22 (HL), per Lord Herschell LC at 28. Facts of the case must be considered first as "reasonable" is a relative term; see *Booth v Clive* (1851) 10 CB 827; *Re a Solicitor* [1945] KB 368, [1945] 1 All ER 445; *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110; and *Centaline Property Agency Ltd v Wong Tak Leung* [1994] 1 HKC 808.

"Reasonably practicable" is a narrower term than "physically possible" and appears to imply that a prior computation must be made as to risk and consequence; see *Edwards v National Coal Board* [1949] 1 KB 704 at 712, [1949] 1 All ER 743 (per Asquith LJ).

#### [9.08] Subs (4): Consent

One cannot consent to a thing unless he has knowledge of it; see *Re Caughey ex p Ford* (1876) 1 Ch D 521 at 528 (per Jessel MR). "Consent" often involves some affirmative acceptance, not merely standing by and absence of objection. In this connection, it is the antithesis to "acquiescence"; see *Bell v Alfred Franks & Bartlett Co Ltd* [1980] 1 All ER 356 at 362 (per Megaw LJ). See also *Sidaway v Bethlem Royal Hospital Governors* [1984] QB 493 (CA), [1985] 1 AC 871 (HL). It is thought, however, that actual knowledge is not necessary; cf *Knox v Boyd* [1941] JC 82 at 86; *Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445 at 449 per Devlin J, [1951] WN 385; *James & Son Ltd v Smea* [1955] 1 QB 78 at 91, [1954] 3 All ER 273 at 278 per Parker J; and *Mallon v Allon* [1964] 1 QB 385 at 394, [1963] 3 All ER 843 at 847.

#### [9.09] In writing

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include writing, printing, lithography, photography, typewriting and any other mode of representing words in a visual form.

#### [9.10] Prescribed manner

As to the prescribed form, see the Marriage Reform (Forms) Regulations (Cap 178 sub leg C) in the Appendix below. As to the prescribed fee, see the Marriage Reform (Fees) Regulations (Cap 178 sub leg B) in the Appendix below.

#### [9.11] Subs (5): Certificate of marriage in the prescribed form

A certificate, *ex vi termini*, imports that the party certifying knows the fact that he certifies: *Farmer v Legg* (1797) 7 TR 186. As to the prescribed form, see the Marriage Reform (Forms) Regulations (Cap 178 sub leg C) in the Appendix below.

#### [9.12] Sign

This is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 to include in the case of a person unable to write the affixing or making of a seal, mark, thumbprint or chop.

#### [9.13] Cannot reasonably be made available

As to what is reasonable, see [9.07] above.

#### [9.14] Definition

As to the meaning of "appointed day", "customary marriage", "parties to a customary marriage", "Registrar" and "validated marriage", see s 2 above.

### 10. Power of registrar

- (1) Upon receipt of an application under section 9 for the registration of a customary marriage or a validated marriage, the Registrar may-
  - (a) summon before him any applicant, any alleged party to the marriage and any person alleged to have been present at the marriage, and may require any person so summoned to answer such questions as the Registrar may ask for the purpose of determining the application before him;
  - (b) require any applicant to furnish such further information either by statutory declaration or otherwise as he may reasonably require.
- (2) Any person who, without lawful excuse, fails to comply with a summons or requirement issued or made under subsection (1) shall be guilty of an offence and shall be liable to a fine [at level 1] and to imprisonment for 6 months. (*Amended L.N. 25 of 1996*)

#### [10.01] Enactment history

The words within the square brackets were substituted pursuant to the Resolution of the Legislative Council under s 100A of the Interpretation and General Clauses Ordinance (Cap 1), para (7) on 10 January 1996 (LN 25/1996).

#### [10.02] Subs (1): Answer

Whenever a reference is made to an answer to a question, the Legislature meant a true answer, an honest bona fide answer; see *R v Hulme* (1870) LR 5 QB 377 at 388 (per Lush J).

#### [10.03] Furnish

"Furnish" means "provide for use"; see *Kime v Hamilton Radial Electric Pty Co* (1921) 50 OLR 113 at 116 (per Riddell J).

#### [10.04] Statutory declaration

This is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 to mean, if made in Hong Kong, a declaration under the repealed Statutory Declaration Ordinance or the Oaths and Declaration Ordinance

**[16.06] Subs (2): Cancel**

For cases on meaning of "cancel", see *R v Linthwaite (Inhabitants)* (1849) 13 LTOS 116; *Re Jamieson & Newcastle Steamship Freight Insurance Association* [1895] 2 QB 90; *In re an Arbitration between Standard Insurance Co Ltd and MacFarlan* [1940] VR 74; and *Willcocks v New Zealand Insurance Co* [1926] NZLR 805.

**17. Parties may appear before designated public officer**

- (1) Not less than one month after the giving of notice under section 16(1), the parties to the marriage may, if neither of them has cancelled the notice under section 16(2), appear personally before the designated public officer to whom notice was given for the purpose of satisfying him that each of them wishes voluntarily and freely to dissolve his or her marriage to the other.
- (2) If a designated public officer is satisfied that the parties appearing before him-
  - (a) have given notice of intention to dissolve their marriage under subsection (1) of section 16 and notice of changed intention under subsection (2) of that section has not been given; and
  - (b) understand that the effect of dissolution is to put an end to the marriage so as to permit the parties to marry again should either of them so wish; and
  - (c) freely and voluntarily desire to dissolve the marriage,
 he shall sign the prescribed form in duplicate and deliver one copy to each of the parties.

**[17.01] Designated public officer**

As to the identity of the designated officer, see the Designation of Public Officers Notice (Cap 178 sub leg D) in the Appendix below.

**[17.02] Subs (1): Not less than one month**

The words "not less than" indicate that the specified number of clear days must intervene between the start and the termination of residence; see *R v Turner* [1910] 1 KB 346; *Re Hector Whaling Ltd* [1936] Ch 208, [1935] All ER Rep 302. See also *Dodds v Walker* [1981] 2 All ER 609, [1981] 1 WLR 1027; *E J Riley Investments Ltd v Eurostile Holdings Ltd* [1985] 3 All ER 181, [1985] 1 WLR 1139 as to the day of expiry of periods of a month or a specified number of months.

"Month" is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean calendar month. As to reckoning of calendar months, see *Migotti v Colvill* (1879) 4 CPD 233, 14 Cox CC 305; and *Swordland Ltd v Wharf Properties Ltd* [1994] 2 HKC 223.

"Month" is used in several senses. It may mean one of the twelve unequal parts into which the calendar year is divided; it may mean the period which, beginning on any day of a calendar month other than the first, ends on the day next before the corresponding day of the next month; or it may denote a lunar month, that is to say, a period consisting of 28 days: *Halsbury's Laws of England* (4th Ed) Vol 45 para 1107.

**[17.03] Cancelled**

As to meaning, see [16.06] above.

**[17.04] Subs (2): Permit**

To "permit" denotes a general or particular permission, as distinguished from a mandate, and the permission may be express or implied: *McLeod (or Houston) v Buchanan* [1940] 2 All ER 179 (HL), per Lord Wright at 187. A person cannot permit unless he is in a position to forbid (*Goodbarne v Buck* [1940] 1 KB 771, [1940] 1 All ER 613, CA (Eng); *Lloyd v Singleton* [1953] 1 QB 357, [1953] 1 All ER 291, DC (Eng)) and no one can permit what he cannot control (*Tophams Ltd v Earl of Sefton* [1967] 1 AC 50, [1966] 1 All ER 1039 (HL)). For cases on the meaning of "permit", see *Berton v Alliance Economic Investment Co* [1922] 1 KB 742 at 759, CA (Eng) (per Atkin LJ); *Lomas v Peek* [1947] 2 All ER 574 at 575 (per Lord Goddard CJ); *Vettraino v Grosset* 1948 SC (JC) 49 at 55 (per Lord Carmont); *Broad v Parish* (1941) 64 CLR 588 at 594 (per Rich ACJ); and *Broadhurst v Larkin* [1954] VLR 541 at 544 (per Herring CJ). See also *R v Ng Lai Sim* [1973-1976] HKC 286; and *Cheung Wong Shi v Chan Fook Tai* [1982] HKC 450 (DC).

**[17.05] Sign**

As to meaning, see [9.12] above.

**[17.06] Prescribed form**

As to the prescribed form, see the Marriage Reform (Forms) Regulations (Cap 178 sub leg C) in the Appendix below. As to the prescribed fee, see the Marriage Reform (Fees) Regulations (Cap 178 sub leg B) in the Appendix below.

**18. Functions of designated public officer**

For the purposes of section 17, a designated public officer-

- (a) shall interview each of the parties to a marriage appearing before him in the presence of each other and also in the absence of each other, and no other person, except an interpreter (should one be necessary), shall be present at any such interview;
- (b) may require the parties or either of them to appear before him again on some specified occasion or occasions;

makes reference to "whether before or after the commencement of this Ordinance", s 1(1) of the Married Women (Restraint upon Anticipation) Act 1949 refers to "or purported to be attached... after the passing of this Act".

**[4.02] General note: Subs (1)**

The purpose of subs (1) is to give married women the right to separate ownership of property of all kinds so that it would assimilate the rights of married women to ownership of property to those of unmarried women.

**[4.03] General note: Subs (2)**

The purpose of subsection (2) is to abolish all restraints upon anticipation or alienation, past or future, attached to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man.

**[4.04] Subs (1): Married woman**

As to meaning, see [3.02] above.

**[4.05] Subs (2): Commencement of this Ordinance**

i.e. 7 October 1971.

**[4.06] Property**

As to meaning, see [3.04] above.

**[4.07] Definition**

For "marriage", see [2.04] above.

**5. Actions in tort between husband and wife**

- (1) Subject to this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were unmarried. [cf. 1962 c.48 s.1(1) U.K.]
- (2) Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may stay the action if it appears-
  - (a) that no substantial benefit would accrue to either party from the continuation of the proceedings; or
  - (b) that the question or questions in issue could more conveniently be disposed of on an application made under section 6. [cf. 1962 c.48 s.1(2) U.K.]
- (3) Without prejudice to subsection (2)(b), the court may, in such an action, either exercise any power which could be exercised on an application under section 6 or give such directions as it thinks fit for the disposal under that section of any question arising in the proceedings.

- (4) The references in subsection (1) to the parties to a marriage include references to the persons who were parties to a marriage which has been dissolved. [cf. 1962 c.48 s.3(3) U.K.]
- (5) This section does not apply to any cause of action which arose, or would but for the subsistence of a marriage have arisen, before the commencement of this Ordinance. [cf. 1962 c.48 s.3(4) U.K.]

**[5.01] England**

The wording of this section is based on s 1 of the Law Reform (Husband and Wife) Act 1962. The wording of subs (1) of the Ordinance is similar to s 1(1) of the Act, except that whereas the Ordinance makes reference to "unmarried", the Act refers to "not married".

The wording of subs (2) and (3) of the Ordinance is to the same effect as s 1(2) of the Act, except that whereas the Ordinance makes reference to "section 6" below, the Act refers to "section seventeen of the Married Women's Property Act 1882 (determination of questions between husband and wife as to the title to or possession of property)".

The wording of subs (4) and (5) of the Ordinance are to the same effect as s 3(3) and (4) of the Act, respectively, except that whereas subs (5) refers to "this section", s 3(4) of the Act refers to "this Act".

The Law Reform (Husband and Wife) Act 1962 gave effect, with some modification, to the 9th Report of the Law Reform Committee (Cmnd 1268) relating to the liability in tort between a husband and a wife. The Act abolished the rule of the English common law by which spouses were precluded from suing each other in tort. The abolition of the common law rule gives husband and wife a general right of action against each other, subject to certain safeguards, and also improves the position of third parties. Previously, if a spouse was injured by the negligence of the other spouse and a stranger, the stranger could not claim a contribution from the delinquent spouse under the Law Reform (Married Women and Tortfeasors) Act 1935 because the spouse would not, if sued, have been liable in respect of the same damage: see *Chant v Read* [1939] 2 KB 346, [1939] 2 All ER 286; *Drinkwater v Kimber* [1952] 2 QB 281, [1952] 1 All ER 701. These cases were subsequently overruled by the passing of the Law Reform (Husband and Wife) Act 1962.

The strict common law rule preventing actions in tort between husband and wife had earlier been relaxed by the Married Women's Property Act 1882 s 12. This provided that a wife could sue her husband for 'the protection and security of her own property'. In *Curtis v Wilcox* [1948] 2 KB 474, [1948] 2 All ER 573, the Court of Appeal said that a right of action acquired before marriage was part of the wife's separate property and therefore, under the 1882 Act, she was entitled to sue her husband in tort for ante-nuptial injuries suffered through the husband's negligence. However, it was decided a few years later, that the reverse position did not apply and that a husband could

the respondent but he found out without difficulty where she was and forced his way in. He treated her with some violence. He forced her to have intercourse, she says against her will, from time to time. He began staying at her bed and breakfast accommodation about three times a week, ignored her requests to go away and in October 1978 he moved into her accommodation permanently, she says in spite of her protests" (per Lord Ormrod at p 28). Similarly, an unhappy cohabiting couple who merely share a roof over their heads but have no further interaction are still a cohabiting couple for the purposes of the legislation: "These two have been living as man and wife to all intents and purposes for at least three years. She has taken his name and, to anyone looking at them from outside, there can be no doubt whatever that they were and are apparently living together as husband and wife... She said that she had ceased to cook for the respondent in January 1980 and stopped washing his clothes ... They continued to share the electricity, gas and the rent between them. They have not been on speaking terms, at least since some time last year, communicating by notes... So that is the state of the relationship. In other words, in ordinary human terms, the relationship is exactly comparable to a marriage which is in the last stages of break-up". (*Adeoso v Adeoso*, [1981] 1 All E.R. 107, [1980] 1 WLR 1535 per Lord Ormrod, at p.1537). See also *Rowland v Dyer* [1983] 134 NLJ 631.

If eligible unmarried relationships are those parallel to marriages, then, like married applicants, parties to unmarried relationships should no longer qualify for injunctive relief under the Ordinance once the relationship has terminated. However, once again, it is less easy to determine when an unmarried relationship ends than when a marriage ends. It was thought initially that the unmarried couple must be living together at the time the injured party made the application. This would, however, deprive the legislation of much of its potential effect. Indeed, women would have to stay in a violent home simply to be eligible for injunctive relief (see *B v B* [1978] 2 WLR 160). Happily, the courts have since established that the cohabitation relationship has not ended just because an unmarried applicant has left the shared home, particularly when the applicant has been driven out of the shared home by the other party's violence. The House of Lords in *Davis v Johnson* [1979] AC 264 approved injunctive relief granted to an unmarried applicant who had been forced to leave the shared home in order to escape her violent partner. The violence had occurred while they were living together and therefore the application fell within the ambit of the statute (see also *McLean v Nugent* above). While it does not matter then that the couple no longer live together at the date of the application, as the court decided in *O'Neill v Williams* [1984] FLR 1, the remedy is intended to be a short-term remedy so it is only available to the applicant for a short period of time after the parties have separated. In this case, a gap of six months between separation and application was too long. Delay is not, however, fatal to an application as long as the delay is not attributable to the applicant and does not extend to a period as long as six months: *Holmes v Clarke* (CA) (unreported) 6 April 1990. It is essential, however, that the violence occurs during the course of the relationship. Lord Ormrod in *McLean v Nugent* (above) said obiter dicta that "It might have been a different story if there had

been no violence whatever between them until after the parting and, of course, the longer the time that elapses between the cessation of their relationship and the summons, the more difficult it will be for an applicant to bring herself within the section" (at p 32). This was subsequently confirmed in *Harrison v Lewis* [1988] 2 FLR 339 where the Court of Appeal declared that injunctive relief under the domestic violence legislation was unavailable to an applicant who had terminated the unmarried relationship and experienced violence at the hands of her former partner some nine months later.

Note that the applicant is a party to a marriage which means that a child living with applicant has no standing to apply for relief themselves.

### [3.05] District Court

District Court means the District Court of the HKSAR: s 3 Interpretation and General Clauses Ordinance (Cap 1), added 26 of 1998 s 4. See also District Court Ordinance (Cap 336). Jurisdiction to grant injunctive relief under the Ordinance resides with the District Court alone, except in exceptional circumstances: see s 4 and [4.04].

### [3.06] Child living with the applicant

The relationship between the applicant and the child is unimportant as long as the child is living with the applicant. Thus, step children, foster children and children who are part of an extended family will be covered by this provision. The child does not have to be a "child of the family": see s 2 Matrimonial Proceedings and Property Ordinance (Cap 192).

However, this section does not extend to an application for an injunction to prevent the violent party from molesting a child living with the violent party. It only extends to protect a child living with the applicant. If the applicant leaves home to escape violence but leaves the children behind, perhaps to avoid making the children homeless, the court may still award an injunction in respect of the children because they were living with the applicant at the time the violence occurred. Notwithstanding this possibility, what happens if the violent party only becomes violent towards the child once the applicant has left the matrimonial home? This section might result in the applicant returning home to face another bout of violence in order to bring the children within the protection of the law. (see *B v B* (*Domestic Violence: Jurisdiction*) [1978] 2 WLR 160 although this should be read in light of subsequent cases including *Davis v Johnson* [1979] AC 264 so that where the relationship can be deemed still to subsist and the home is still the matrimonial home, the injunctive relief may still be available.)

Where the child is not living permanently with the applicant but is, for example, at boarding school, in care or staying with grandparents, the court's decision to award an injunction to protect the child would have to be based upon the extent to which the child was within the care and control of the applicant. "Living with" should not equate to having custody of a child because this would unduly limit the scope of application of the provision.

**3. Grounds on which application for s. 5 order may be made**

- (1) Where a married person-
- (a) has been convicted summarily of an assault upon the other party to the marriage which in the opinion of the convicting magistrate is of an aggravated character;
  - (b) has been convicted whether on indictment or summarily of an assault upon the other party to the marriage, and sentenced to pay a fine of more than \$500 or to a term of imprisonment exceeding 2 months;
  - (c) has deserted the other party to the marriage;
  - (d) has been guilty of persistent cruelty to the other party to the marriage or that party's children;
  - (e) has failed to provide reasonable maintenance for the other party to the marriage or reasonable maintenance and education for that party's children whom the married person is legally liable to maintain;
  - (f) has, while suffering from a venereal disease, and knowing that he or she was so suffering, insisted on having sexual intercourse with the other party to the marriage;
  - (g) has compelled the other party to the marriage to submit to prostitution;
  - (h) is a habitual drunkard, or a drug addict,
- that other party may apply to the District Court for an order under this Ordinance.
- (2) For the purpose of subsection (1)(g), where a married person has, in the opinion of the District Court, been guilty of such conduct as was likely to result and has resulted in the other party to the marriage submitting to prostitution, that person shall be deemed to have compelled the other party to the marriage so to submit.

(Replaced 69 of 1997 s. 10)

**[3.01] Enactment history**

This section was replaced with the present wording pursuant to the Marriage and Children (Miscellaneous Amendments) Ordinance 1997 (69 of 1997) s 10, commencing 4 July 1997.

**[3.02] English counterpart**

Contrast can be made with the Matrimonial Proceedings (Magistrates' Court) Act 1960 [Eng] s 1.

**[3.03] District Court**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the District Court of the Hong Kong Special Administrative

Region. As to the constitution of the District Court, see s 4 of the District Court Ordinance (Cap 336).

**[3.04] Subs (1): Convicted summarily**

This refers to a summary trial of an indictable offence before a magistrate under the Magistrates Ordinance (Cap 227) Pt V, ss 91 – 94A.

**[3.05] Convicted ... on indictment**

"Indictment" is defined in the Criminal Procedure Ordinance (Cap 221) s 2 to include any criminal information triable by a jury. As to trial upon indictment, see Criminal Procedure Ordinance (Cap 221) ss 17 to 30.

**[3.06] Assault**

This can refer to either an offence of assault occasioning actual bodily harm or an offence of common assault, contrary to the Offences against the Person Ordinance (Cap 212) ss 39, 40 respectively. In view of the additional ingredient of "aggravated character", the offence is more likely to be one of assault occasioning actual bodily harm. The maximum penalty upon conviction on indictment for the offence of assault occasioning actual bodily harm is a term of imprisonment of 3 years, whereas that of common assault is a term of imprisonment of 1 year. It should also be noted that a permanent magistrate may sentence on summary conviction of an indictable offence the accused to imprisonment for 2 years and to a fine of \$100,000: Magistrates Ordinance (Cap 227) s 92.

**[3.07] Deserted**

Desertion has the same meaning as for the purpose of matrimonial causes in the District Court and the Court of First Instance. It means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. See *Halsbury's Laws of Hong Kong*, Vol 12 para [180.120]. It is not necessary that the desertion should have continued for three years or for any defined period: *Frowd v Frowd* [1904] P 177; *Smith v Smith* [1905] P 249. However, there must be desertion at the date of the originating summons: *Graeff v Graeff* (1928) 93 JP 48. See also *Williams v Williams* [1904] P 145. It is a question of fact: *Pulford v Pulford* [1923] P 18. Desertion being a continuing act, any time limit does not apply: *Heard v Heard* [1896] P 188; *Bowron v Bowron* [1925] P 187, [1925] All ER Rep 148, CA (Eng); *Wilkinson v Wilkinson* (1894) 58 JP 415.

**[3.08] Persistent cruelty**

Cruelty also has the same meaning as for the purposes of matrimonial causes in the Court of First Instance and the District Court: *Barker v Barker* [1949] P 219, [1949] 1 All ER 247. But "persistent" cruelty means cruelty continued over a period of time and persevered in, and not merely a sudden act of violence on a sudden quarrel: *Cornall v Cornall* (1910) 74 JP 379; *Barker v Barker* (above); *Goodman v Goodman* (1931) 95 JP 95; *Rigby v Rigby* [1944]

- (e) the recovery from the maintenance payer of the clerical and administrative costs incurred in complying with an attachment order;
- (f) the variation or discharge of an attachment order;
- (g) the enforcement of an attachment order.

[(6A) Rules made under subsection (6) may empower the court to dispense with or relax any procedure or abridge any time limit specified in the rules if the court is satisfied that it is fair and reasonable to do so in the circumstances of the case.] (Added 20 of 2001 s. 3)

- (7) Rules made under subsection (6) may provide that the contravention of any rule shall constitute an offence punishable by a fine at level 2 and by imprisonment for 1 month.
- (8) The Chief Justice may specify the form of any document which is to be or may be filed in proceedings under subsection (1).

(Added 69 of 1997 s. 14)

#### [9A.01] Enactment history

The section was replaced pursuant to the Marriage and Children (Miscellaneous Amendments) Ordinance 1997 (69 of 1997) s 14, commencing on 3 April 1998. Subs (1AA) was added, subs (1) was replaced, subs (2) was repealed, subss (1A), (2A), (2B) and (6A) were added, and subs (3) was amended by substituting with the words in square brackets pursuant to the Attachment of Income Orders (Amendment) Ordinance 2001 (20 of 2001) s 3, commencing on 25 January 2002.

The definition of "maintenance order" in subs (1AA) was repealed pursuant to s 6 of the Interest and Surcharge on Arrears of Maintenance Ordinance 2003 (18 of 2003) s 3, commencing on 1 May 2005.

#### [9A.02] Payment

As to meaning, see [5.13] above.

#### [9A.03] Payable

For meaning of "payable", see *Smith v De la Fontaine* (1785) Holt NP 366; *Head v Sewell* (1816) Holt NP 363, 171 ER 272; and *Latilla v Inland Revenue Cmrs* [1943] AC 377 at 384 (per Lord Porter).

#### [9A.04] Reasonable grounds to believe

The facts of the case must be considered first as "reasonable" is a relative term; see *Booth v Clive* (1851) 10 CB 827; *Re a Solicitor* [1945] KB 368, [1945] 1 All ER 445; and *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110.

"Reasonably believes" require not only that the person in question has reason to believe but also that he does actually believe. See *Nakkuda Ali v Jayaratne*

[1951] AC 66 (PC); *R v Banks* [1916] 2 KB 621, [1916-17] All ER Rep 356; and *R v Harrison* [1938] 3 All ER 134 (CCA). Belief includes or absorbs suspicion: *Gifford v Kelson* (1943) 51 Man R 120 at 124 (per Dysart J).

The existence of the reason to found the belief is ultimately a question of fact to be tried on evidence and the grounds on which the officer acted must be sufficient to induce in a reasonable person the required belief. See *Nakkuda Ali v Jayaratne* [1951] AC 66 (PC); *McArdle v Egan* (1933) 150 LT 412, [1933] All ER Rep 611 (CA); *Registrar of Restrictive Trading Agreements v W H Smith & Son Ltd* [1969] 1 WLR 1460 at 1468, [1969] 3 All ER 1065 at 1070 (per Lord Denning MR); and *Inland Revenue Cmrs v Rossminster Ltd* [1980] AC 952, [1980] 1 All ER 80 (HL).

In criminal cases, it was for the person who arrested to prove the reasonable grounds. The justification had to be regarded objectively and it would not be sufficient to simply inquire as to whether such a person believed he had reasonable ground. The test is whether a reasonable man, assumed to know the law and possessed of the same information as the person who arrested would have believed there had been reasonable and probable cause; see *Chow Hou Yung v Pang Chun Ying* [1946-1972] HKC 322.

#### [9A.05] Full and punctual payment

The authorities appear to show that "punctual payment" means payment on the very day specified or fixed for payment; see *Leeds & Hanley Theatre of Varieties v Broadbent* [1898] 1 Ch 343, CA (Eng); *Maclaine v Gatty* [1921] 1 AC 376, [1920] All ER Rep 70 (HL); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1976] QB 835, [1976] 2 All ER 249, CA (Eng).

#### [9A.06] Income

"Income" signifies "what comes in" and can be used to denote "a person's receipts"; see *Jones v Ogle* 42 LJ Ch 336; *Re Huggins* 51 LJ Ch 938.

#### [9A.07] Wages of employee

In ordinary parlance, "wages" is a term used for remuneration paid for other than "white collar" jobs: *Mutual Acceptance Co Ltd v Federal Cmr of Taxation* (1944) 69 CLR 389. For cases as to what constitute "wages", see *Kournavous v JR Masterton & Sons (Demolition) Ltd* [1990] ICR 387; *Delaney v Staples* [1992] 2 WLR 451, [1992] 1 AC 687, [1992] 1 All ER 944 (HL); *Foster Wheeler (London) Ltd v Jackson* [1990] ICR 757; *Janstorp International (UK) Ltd v Allen* [1990] ICR 779; *Kent Management Services Ltd v Butterfield* [1992] ICR 272; *Robertson v Blackstone Franks Investment Management Ltd* [1998] IRLR 376, (1998) The Times 7 April.

The words "employ" and "employment" are capable of two meanings which are apt to cause confusion. They may relate to the general nature of a workman's employment, or they may be confined to the particular work or job, which he is doing under his contract of service at any particular moment

the nature of the case, then it may dismiss the petition or, if it grants a decree, direct that the decree not to be made absolute during that period (s 15(3)). A decree may be refused in divorce proceedings sought on the basis of living apart for continuous period of at least two years on the ground of grave financial or other hardship resulting from dissolution of marriage and upon the court considering it to be wrong in all the circumstances to dissolve the marriage (s 15B). A decree may be rescinded if the divorce proceedings were commenced on the basis of living apart for a continuous period of at least one year before presentation of petition or making of application and the court finds that the one party to the marriage has been misled by the other party on a matter he or she took into account in deciding whether to consent to the petition or to make the application (s 15C). All decrees for divorce are decrees nisi at first instance to be made absolute only at the expiration of three months from its grant, unless a shorter period is fixed (s 15(5)).

- Provisions are made to protect the financial position of a respondent to divorce proceedings commenced on the basis of the parties living apart so that the court would not make absolute a decree of divorce unless it is satisfied that the petitioner should not be required to make any financial provision for the respondent or the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in circumstances. The court may also make absolute the decree without delay after obtaining a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve (s 17A).
- Either party to a former marriage may marry again after a decree for divorce is made absolute and avenues of appeals have been exhausted without the decree having been reversed but no clergyman may be compelled to solemnize, or permit the solemnization of, the remarriage so long as the former spouse is still living (s 18).
- A husband or wife may petition the court for a declaration that his or her marriage be declared null and void on a number of grounds, some of which if proved would render the marriage void and some of which if proved would render the marriage voidable. A decree of nullity of a voidable marriage operates to annul the marriage only as respects any time after the decree has been made absolute and the marriage is to be treated as if it had existed up to that time, notwithstanding the decree. Provisions are also made to prohibit the court from granting a decree of nullity on specified grounds. Where evidence of sexual capacity is to be heard in a petition for nullity of marriage, such evidence is to be received in camera. The rules for determining nullity under the Ordinance shall not affect the determination of the validity of a marriage by reference to the law of a country outside Hong Kong (ss 19-22, 52(3)).

- Either party to a marriage may petition the court for a decree of judicial separation on any of the facts prescribed in the Ordinance to substantiate a petition for divorce and the court is to grant a decree of judicial separation on evidence showing any of such facts without being concerned as to whether the marriage has broken down irretrievably. Upon the grant of a decree of judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent. A decree of judicial separation may be rescinded on the ground that it was obtained in the absence of the spouse against whom the decree has been made (s 24).
  - The District Court or the High Court may make a decree of presumption of death and dissolution of marriage upon being satisfied of reasonable grounds that a party to a marriage is dead. It is presumed that a party to a marriage is dead if he has been continually absent from the other party for a period of 7 years or more and that other party has no reason to believe that he is living within that time (s 26).
- Either the court or any person may ask the Proctor (ie the Secretary for Justice) to intervene in proceedings for divorce, nullity of marriage or presumption of death and dissolution of marriage, whether to argue before the court a question relating to the matter; to show cause why a decree nisi should not be made absolute; or to take steps in relation to a matter material to the due decision of the case. A person other than a party to the proceedings may also show cause why a decree nisi should not be made absolute by reason of material facts not having been brought before the court (ss 16, 17(1), 22, 26(3)).
- If a decree nisi for divorce, nullity of marriage or presumption of death and dissolution of marriage has not been made absolute after the expiration of a period of 3 months, an application to make it absolute may be made by the person against whom the decree was granted in the petition or either of the parties by whom the application was made (ss 17(2), 22, 26(3)).
  - Collusion between the parties or misconduct on the part of the petitioner is not to be a ground for dismissing a petitioner for divorce or an application to make absolute a decree nisi; for not granting a decree of nullity; for not granting a decree of judicial separation; or for dissolving a marriage by operation of presumption of death (ss 18A, 23, 24(1), 26(4)).
  - The District Court and the High Court are empowered, in extension of their jurisdiction under the Ordinance or of the Matrimonial Proceedings and Properties Ordinance (Cap 192), to make an order for the custody of a child, to order that that child be under the supervision of the Director of Social Welfare, or be committed to the care of the Director and in deciding whether to make such an order, the welfare of the child shall be the first and paramount consideration (ss 48, 48A, 48C).

**[15.14] Definition**

As to meaning of "court", see s 2 above.

**15A. Provisions to encourage reconciliation**

- [(1) If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period, as it thinks fit to enable attempts to be made to effect such a reconciliation.
- (2) The power of the court to adjourn under subsection (1) shall be additional to any other power of the court to adjourn proceedings.
- (3) Where the parties to the marriage have lived with each other for any period or periods after it has become known to the petitioner that the respondent has, since the celebration of the marriage, committed adultery-
- (a) if the length of that period or of those periods together is 6 months or less, their living with each other during that period or those periods shall be disregarded in determining for the purposes of section [11A(2)(a)] whether the petitioner finds it intolerable to live with the respondent; but (*Amended 29 of 1995 s. 17*)
- (b) if the length of that period or of those periods together exceeds 6 months, the petitioner shall not be entitled to rely on that adultery for the purpose of section [11A(2)(a)]. (*Amended 29 of 1995 s. 17*)
- (4) Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him, but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining, for the purposes of section [11A(2)(b)], whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together is 6 months or less. (*Amended 29 of 1995 s. 17*)
- [(5) In considering for the purposes of this Part whether the period during which the parties to a marriage have lived apart has been continuous, no account shall be taken of any period or periods together not exceeding 6 months during which the parties have resumed living with each other, but no period during which the parties lived with each other shall count as part of the period during which the parties to the marriage have lived apart.] (*Replaced 29 of 1995 s. 11*)

- (6) References in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.]

(*Added 33 of 1972 s. 7*) [*cf. 1969 c. 55 s. 3(2)-(6) U.K.*]

**[15A.01] Enactment history**

This section was added pursuant to the Matrimonial Causes (Amendment) (No 2) Ordinance 1972 (33 of 1972) s 7, commencing on 1 July 1972. Subsection (5) was replaced with the present wording pursuant to the Matrimonial Causes (Amendment) Ordinance 1995 (29 of 1995) s 11, commencing on 24 June 1996. Subsections (3) and (4) were amended by substituting with the words in square brackets pursuant to the Matrimonial Causes (Amendment) Ordinance 1995 (29 of 1995) s 17, commencing on 24 June 1996.

**[15A.02] English counterpart**

This section has wording similar to that in the Divorce Reform Act 1969 [Eng] ss 3(2)-(6). The current English corresponding provisions are the Matrimonial Causes Act 1973 [Eng] ss 2(1), (2), (3), (5), (6).

**[15A.03] 6 months**

As to meaning of "month", see [15.10] above.

**[15A.04] Subs (3): Lived with each other**

Cf the expression "living apart" in [11A.07] above.

**[15A.05] Whether petitioner finds it intolerable to live with respondent**

As to determination of this issue, see [11A.05] above.

**[15A.06] Subs (4): Respondent has behaved in such a way that petitioner cannot reasonably be expected to live with him**

As to determination of this issue, see [11A.06] above.

**[15A.07] Fact of living together to be disregarded**

This provision does not have the effect that where the parties are together for more than six months after the final occurrence it is necessarily a bar to the petition: *Bradley v Bradley* [1973] 3 All ER 750, [1973] 1 WLR 1291, CA (Eng). However, the court may exercise its discretion to grant a decree absolute notwithstanding that the spouses have cohabited for more than six months since the last act of unreasonable behaviour; see *Court v Court* [1982] Fam 105.

**[15A.08] Subs (5): Lived apart**

As to meaning, see [11A.07] above.

**[46.01] Enactment history**

This section was repealed pursuant to the Matrimonial Proceedings and Property Ordinance 1972 (39 of 1972) s 33, commencing on 1 July 1972. The repeal was subject to savings set out in the First Schedule to the Matrimonial Proceedings and Property Ordinance 1972 (39 of 1972) that are now spent.

**47. (Repealed with savings-see s. 33 of 39 of 1972)****[47.01] Enactment history**

This section was repealed pursuant to the Matrimonial Proceedings and Property Ordinance 1972 (39 of 1972) s 33, commencing on 1 July 1972. The repeal was subject to savings set out in the First Schedule to the Matrimonial Proceedings and Property Ordinance 1972 (39 of 1972) that are now spent.

**48. Power to provide for supervision of children**

- (1) Where the court has jurisdiction by virtue of this Ordinance [or of the Matrimonial Proceedings and Property Ordinance (Cap 192)] to make an order for the custody of a child and it appears to the court that there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may, as respects any period during which the child is, in exercise of that jurisdiction, committed to the custody of any person, order that the child be under the supervision of the Director of Social Welfare. (*Amended 39 of 1972 s. 33*)
- (2) Where a child is under the supervision of the Director of Social Welfare in pursuance of this section the jurisdiction possessed by a court to vary any order made with respect to the child's custody, maintenance or education under this Ordinance [or under the Matrimonial Proceedings and Property Ordinance (Cap 192)] shall, subject to any rules, be exercisable at the instance of that court itself. (*Amended 39 of 1972 s. 33*)
- (3) The court shall have power from time to time by an order under this section to vary or discharge any provision made in pursuance of this section.
- [(4) The court shall not make an order that a child be under the supervision of the Director of Social Welfare under this section after the child has attained the age of 18, and an order made by virtue of this section shall cease to have effect as respects any child when he attains that age.] (*Added 69 of 1997 s. 19*)

[*cf. 1965 c. 72 s. 37 U.K.*]

**[48.01] Enactment history**

Subsections (1) and (2) were amended by inserting the words within the square brackets pursuant to the Matrimonial Proceedings and Property Ordinance 1972 (39 of 1972) s 33, commencing on 1 July 1972. Subsection (4) was added pursuant to the Marriage and Children (Miscellaneous Amendments) Ordinance 1997 (69 of 1997) s 19, commencing on 4 July 1997.

**[48.02] English counterpart**

This section resembles in wording with the Matrimonial Causes Act 1965 [Eng] s 37.

**[48.03] Custody of a child**

Custody, in contradistinction with guardianship, is essentially concerned with control, and the preservation and care of the child's person, physically, mentally and morally; responsibility for a child in regard to his needs, food, clothing, instruction and the like: *Wedd v Wedd* [1948] SASR 104. See also *F v Johnson* [1957] St R Qd 594; *Re B (A Minor) (Abduction)* [1994] 2 FLR 249; *McKiver v McKiver (O H)* 1995 SLT 790; *Pirrie v Sawacki* 1997 SLT 1160, 1997 SCLR 59; *S v H (Abduction: Access Rights)* [1998] Fam 49.

Although the Ordinance does not define "child", the Matrimonial Proceedings and Property Ordinance (Cap 192) s 2(1) defines "child" to include, in relation to one or both parties to a marriage, an illegitimate or adopted child of that party or, as the case may be, of both parties.

**[48.04] Vary**

To "vary" means "to cause to change to alter; to introduce changes or alterations into"; see *R v Tonkin ex p Federated Ship Painters' Union* [1954] ALR 777; and *R v Industrial Court* (1982) 30 SASR 504 at 512 (per Mitchell J).

**[48.05] Subs (1): Exceptional circumstances**

For a case on existence of exceptional circumstances, see *F v F* [1959] 3 All ER 180, [1959] 1 WLR 863 (mother living in undesirable conditions; father not a fit and proper person).

**[48.06] Subs (2): Education**

The word "education" where it appears as part of the terms of a testamentary gift for a child, connotes an obligation as can reasonably be expected from the person who has to discharge the obligation, to supply such reasonable and proper scholastic instruction, either at school or by private tuition; and such amusements and surroundings as shall be calculated to fit the child for the station in life and fortune he or she is to occupy and enjoy: *Ross v Ross* 23 Rettie (HL) 67. The same word is to be construed in its widest possible sense in a covenant by a parent to contribute towards the expenses of educating the child, so that it includes not only tuition fees but also the house fees of a

**82. Request for periodical payments order at same rate as order for maintenance pending suit**

- (1) Where at or after the date of a decree nisi of divorce or nullity of marriage an order for maintenance pending suit is in force, the party in whose favour the order was made may, if he has made an application for an order for periodical payments for himself in his petition, answer or joint application, as the case may be, request the registrar in writing to make such an order (in this rule referred to as a "corresponding order") providing for payments at the same rate as those provided for by the order for maintenance pending suit.
- (2) Where such a request is made, the registrar shall serve on the other spouse a notice in Form 10 or 11, as may be appropriate requiring him, if he objects to the making of a corresponding order, to give notice to that effect to the registrar and to the applicant within 14 days after service of the notice in Form 10 or 11, as may be appropriate.
- (3) If the other spouse does not give notice of objection within the time aforesaid, the registrar may make a corresponding order without further notice to that spouse and without requiring the attendance of the applicant or his solicitor, and shall in that case serve a copy of the order on the applicant as well as on the other spouse.

(L.N. 135 of 1972; L.N. 172 of 1996)

**84. Application for order under section 17(1)(a) of the Matrimonial Proceedings and Property Ordinance (Cap. 192)**

- (1) An application under section 17(1)(a) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) for an order restraining any person from attempting to defeat a claim for financial provision or otherwise for protecting the claim shall be made to a judge.
- (2) Rule 81 (except paragraph (2)) shall apply with the necessary modifications to the application as if it were an application for ancillary relief.

(L.N. 135 of 1972)

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

- (1) Rule 56B(2) and (3) shall not apply to an application by the respondent to a petition for divorce for the court to consider his

- financial position after the divorce, where the petition is presented to the court on or after the commencement\* of the Matrimonial Causes (Amendment) Rules 2003 (L.N. 209 of 2003).
- (2) Subject to paragraph (4), rules 70, 71, 73, 74, 76 and 77(1), (3), (4) and (7) shall not apply to an application for ancillary relief made in relation to a petition for divorce or joint application, where the petition for divorce or joint application is presented to the court on or after the commencement\* of the Matrimonial Causes (Amendment) Rules 2003 (L.N. 209 of 2003).
  - (3) Insofar as—
    - (a) rule 56B(1) applies to an application referred to in paragraph (1), any reference to Form 8A in that rule shall be construed as a reference to Form 26;
    - (b) rule 56B(5) applies to an application referred to in paragraph (1), any reference to rule 77(3), (4), (5), (6) and (7) in that rule shall be construed as a reference to rule 77(5) and (6); and
    - (c) rule 68, 68A or 69 applies to an application for ancillary relief referred to in paragraph (2), subject to paragraph (4), any reference to Form 8 or 8B in that rule shall be construed as a reference to Form 25.
  - (4) Paragraphs (2) and (3)(c) shall not apply where—
    - (a) the application for ancillary relief concerned only relates to an order for periodical nominal payment in the sum of \$1 per annum;
    - (b) the application is made for a variation order; or
    - (c) the parties to the application for ancillary relief concerned have reached agreement on terms of the proposed order.

(L.N. 209 of 2003)

Note:

\* Commencement date: 29 December 2003

**ENFORCEMENT OF ORDERS****86. Enforcement of order for payment or money, etc**

- (1) Before any process is issued for the enforcement of an order made in matrimonial proceedings for the payment of money to any person, an affidavit shall be filed verifying the amount due under the order and showing how that amount is arrived at.
- (2) Except with the leave of the registrar, no writ of fieri facias or warrant of execution shall be issued to enforce payment of any sum due under an order for ancillary relief or as order made under the provisions of section 8 of the Matrimonial Proceedings

equivalent section to s 7 below, for the purposes of an order under s 3 above, the principles governing permanent and interim maintenance are similar and the former section may thus be thought to be of some use as a guide in the application of this section: see *Halsbury's Statutes* (4th Ed, 2000 Reissue) Vol 27 Matrimonial Law, p 954.

There is no arithmetical rule of proportion in allotting the joint income of the spouses as maintenance in cases of divorce: see *Horniman v Horniman* [1933] P 95, [1933] All ER Rep 790. As to the admissibility of the "one-third rule" as a starting point, see *Wachtel v Wachtel* [1973] Fam 72, [1973] 1 All ER 829, CA (Eng); *Gengler v Gengler* [1976] 2 All ER 81, [1976] 1 WLR 275. As to when the earning capacity of the wife is to be taken into account, see *Rose v Rose* [1951] P 29, [1950] 2 All ER 311, CA (Eng); *J-P C v J-A F* [1955] P 215, [1955] 2 All ER 617, CA (Eng). It is not right for the Court of Appeal to interfere with the judge's discretion unless it is satisfied that he has arrived at a totally erroneous estimate: see *Davis v Davis* [1967] P 185, [1967] 1 All ER 123, CA (Eng).

#### [3.08] Definition

For "court", see s 2(1) above.

#### 4. Financial provision for party to a marriage in cases of divorce, etc

- (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of section 25(1), make any one or more of the following orders, that is to say-
  - (a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;
  - (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;
  - (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.
- (2) Without prejudice to the generality of subsection (1)(c), an order under this section that a party to a marriage shall pay a lump sum to the other party-
  - (a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;

- (b) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

[cf. 1970 c.45 s.2 U.K.]

#### [4.01] England

The wording of this section is the same as s 2 of the Matrimonial Proceedings and Property Act 1970, which was incorporated into the Matrimonial Causes Act 1973 as part of s 23 of the latter Act. This section amalgamated both ss 2 and 3 of the Matrimonial Proceedings and Property Act 1970 and now covers financial provisions for both a party to a marriage and a child of the family, unlike s 4 of the Ordinance which deals only with the former.

The wording of subs (1)(a)-(c) of the Ordinance is similar to s 23(1)(a)-(c) of the Matrimonial Causes Act 1973. The wording of subs (2)(a) and (b) of the Ordinance is similar to s 23(3)(a) and (c) of the Matrimonial Causes Act 1973. There is no equivalent provision in the Ordinance to s 23(6) of the Matrimonial Causes Act 1973, which was added pursuant to s 16 of the Administration of Justice Act 1982 and provides that where payment of a lump sum is either deferred or is payable by instalments, those payments will carry interest. However, the Court of Appeal in Hong Kong has held that an order for such payments is a judgment debt and will carry interest: see *Elman v Elman* [1987] HKLR 172 (CA).

#### [4.02] General note

At this stage it is appropriate for the court to make a detailed investigation of the financial position of the parties having regard to the factors listed in s 7(1) below.

If one of the parties remarries after the grant of a decree dissolving or annulling a marriage, then he or she loses any entitlement to apply for an order under this section against a former spouse. See also ss 22 and 23 below.

#### Further provisions

See further, s 7 (matters to which the court is to have regard); s 9 (duration of continuing financial provision orders in favour of a party to the marriage and the effect of remarriage); s 10 (duration of continuing financial provision orders in favour of children and age limit on making certain orders in their favour); s 11 (variation, discharge etc of orders); s 12 (payment of certain arrears unenforceable without leave of the court); s 13 (order for re-payment of sums paid); s 17 (avoidance of transitions intended to defeat claim for financial provision); s 23 (orders for repayments of sums paid after cessation of order by reason of remarriage); s 26 (direction for settlement instrument for securing payments); s 27 (payments under order made in favour of person suffering from mental disorder); s 28 (attachment of income to satisfy order); s 28AA (payment of interest in case of failure to make full and punctual

time when the child could have been conceived: see *Banbury Peerage Case* (1811) 1 Sim & St 153, [1803-13] All ER Rep 171. Modern legislation has removed almost all the financial disadvantages of illegitimacy and it has been difficult to foretell how grave a handicap the stigma will be in later life but the final abolition of the strong presumption of legitimacy by this section showed that, in the view of the legislature, public policy no longer required special protection to be given to the status of legitimacy: see *S v S, W v Official Solicitor* [1972] AC 24, [1970] 3 All ER 107 (HL) per Lord Reid at 111. See also *Kwan Chui Kwok & Anor v Tao Wai Chun & Ors* [1995] 1 HKC 374 at 414 - 416, where the presumption of legitimacy was raised because the parents were lawfully married. No scientific evidence was available as the parents were dead and the judge had to consider the facts of the case when deciding if the presumption had been rebutted.

Subsection (1)(b) introduces a new presumption. Previously an entry in the register of births was only a piece of evidence tending to establish paternity. The new presumption reflects the general practice of treating the man who appears on the register as the father. This presumption does not apply if the marriage-based presumption in subs (1)(a) applies. Thus if the mother is married but a man other than her husband is registered as the father, there is no presumption that he is the father.

Note, however, that where an unmarried woman is artificially inseminated, then under s 10(3) the woman's "male partner", if she has one, may be regarded as the father.

#### [5.04] Commencement

1e 19 June 1993.

#### [5.05] Subs (2): May be rebutted

Thus the presumption now merely determines the onus of proof and evidence must be weighed without using the presumption as a make-weight in the scale for legitimacy. Once evidence has been led, the presumption can only arise in the very rare case of the evidence being so equally balanced that the court cannot reach a decision on it. Where bodily samples are used (Pt VI (ss 13-15) of this Ordinance below), mutations can be ignored because of their rarity and the court is looking for a sufficient degree of probability rather than for certainty. So, if a child's blood has a characteristic absent from the blood of a husband and his wife, the husband cannot be the father. But, if characteristics were common to both husband and child and could be supplied by half the men in this country, the test would be useless to prove that the husband was the father. If, on the other hand, those characteristics were so uncommon that if they were not derived from the husband they could only have been derived from one man in a thousand, then the result of the test would go a long way towards proving that the husband was in fact the father. And if it appeared that one man in a hundred or one man in ten might be the father, that might go some way towards making it probable that the husband was the father. Such an inference should not be lightly drawn, but it should not be ruled out: see *S v S, W v Official Solicitor* [1972] AC 24, [1970] 3 All

ER 107 (HL) at 109-110 per Lord Reid. So where the result of a blood test showed that one man in nine or ten of Western Europe could be the father of a child, Rees J took careful note of Lord Reid's warning that an inference should not be lightly drawn but found that the evidence went some way towards making it probable that the husband in the case was the child's father, and it was therefore for the husband to establish that the child was illegitimate, but he had not discharged that onus: see *T(H) v T(E)* [1971] 1 WLR 429, [1971] 1 All ER 590.

In *McC (RD) v McC (JA)* [1971] 2 All ER 1097, CA (Eng), leave to appeal out of time was refused partly on the ground that this section had been enacted in the period since the original hearing and would apply to the disadvantage of the child.

The relatively new technique of deoxyribo nucleic acid (DNA) profiling can establish a man's paternity with virtually complete certainty using a variety of bodily samples, often blood samples from the man, the mother and the child. As to directions by the court for use of scientific tests, see s 13 below.

#### [5.06] On balance of probabilities

While this appears to be worded clearly, the English Family Law Reform Act 1969 s 26 appears to have provided similarly for rebuttal by evidence "which shows that it is more probable than not" that he is illegitimate, but the English Court of Appeal in *Serio v Serio* [1983] 4 FLR 756, refused to accept that the standard of proof referred to was "a mere balance of probability" and said it must indicate a standard commensurate with the seriousness of the issue involved.

#### [5.07] Subs (4): Void ... marriage

This term is not defined in this Ordinance. Section 27 of the Marriage Ordinance (Cap 181) designates a number of grounds on which a marriage deemed to be void. For example, parties to the marriage are within the prohibited degrees of kindred or affinity; if both parties knowingly and wilfully acquiesce in its celebration in any place other than the office of the Registrar or a licensed place of worship, or under a false name or without a certificate of notice or licence duly issued, or by a person not being a competent minister or the Registrar or his deputy, or if either party to the marriage is at the time of its celebration under the age of 16 years. See also *Annotated Ordinances of Hong Kong*, Marriage Ordinance (Cap 181) [27.02].

Section 20(1) and (2) of the Matrimonial Causes Ordinance (Cap 179) also lists out a number of grounds for marriage to be void or voidable. Section 11(3) of the Legitimacy Ordinance (Cap 184) defines "void marriage" to mean a marriage, not being voidable only, in respect of which the court has or had jurisdiction to grant a decree of nullity, or would have or would have had such jurisdiction if the parties were domiciled in or had substantial connection with Hong Kong.

**[20.19] Fine at level 2 and imprisonment for 1 month**

A penalty prescribed for an offence under an Ordinance shall be deemed maximum penalties; see Criminal Procedure Ordinance (Cap 221) s 101F.

As to levels of fines see the Criminal Procedure Ordinance s 113B and Sch 8.

**[20.20] Subs (8): Document**

This is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 to mean any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means.

**[20.21] Definition**

As to the definition of "court", see s 2 above.

**20A. Interest on arrears of maintenance**

(1) In this section and section 20B –

"commencement date" (生效日期) means the date on which the Interest and Surcharge on Arrears of Maintenance Ordinance 2003 (18 of 2003) comes into operation;

"judgment creditor" (判定債權人) means a person entitled to enforce a maintenance order;

"judgment debtor" (判定債務人) means a person liable under a maintenance order.

(2) Where a maintenance order has been made against a judgment debtor, and the judgment debtor fails to make full and punctual payment in compliance with the maintenance order, the judgment creditor is entitled to interest in respect of arrears of maintenance which accrue on or after the commencement date.

(3) For the purposes of subsection (2) –

(a) the arrears in respect of each periodical payment, secured periodical payment or payment of a lump sum, as the case may be, under a maintenance order shall be treated as a judgment debt for the purposes of section 50 of the District Court Ordinance (Cap. 336);

(b) the interest under subsection (2) shall be calculated in accordance with that section 50; and

(c) for the purposes of that section 50, the date on which payment is due as specified by the maintenance order shall be treated as the date of the judgment.

(4) The judgment debtor is liable to pay the interest under subsection (2).

- (5) If any payment under a maintenance order is not paid and interest in respect of the arrears has accrued under subsection (2), and subsequently the judgment debtor makes payment, the payment is deemed to be made in the following order in or towards the discharge of –
- (a) interest accrued under subsection (2);
  - (b) surcharge payable under section 20B;
  - (c) if there are any proceedings instituted for enforcing the maintenance order, the costs ordered by the court to be paid under those proceedings;
  - (d) any sums from time to time falling due under the maintenance order, with the sums discharged in the reversed chronological sequence of the dates on which payment is due (that is, the most recent arrears will be discharged first);
  - (e) if the court makes an order in any proceedings instituted for enforcing the maintenance order, the amount of the maintenance in arrears, whether in one amount or by instalments, payable by the judgment debtor under the order.
- (6) A judgment debtor who considers that he has reasonable grounds not to pay the interest under subsection (2) may, within a reasonable time after having knowledge of the requirement to pay, apply by summons to the court not to pay the interest, and shall set out the grounds in the application.
- (7) If an application is made under subsection (6), in deciding whether to require the judgment debtor to pay interest and, if so, the amount of interest, the court shall take into account all the circumstances of the case, including (but not limited to) the following–
- (a) whether the judgment debtor has a reasonable excuse for his failure to comply with the maintenance order;
  - (b) whether the judgment debtor has evaded service of court documents;
  - (c) the judgment debtor's past record and conduct in connection with the making of maintenance payments to the judgment creditor pursuant to the maintenance order or an undertaking in any proceedings;
  - (d) whether the judgment debtor has given the judgment creditor a reasonable explanation for his failure to comply with the maintenance order; and
  - (e) the judgment debtor's ability to pay.
- (8) A judgment debtor who is aggrieved by a requirement under subsection (7) to pay interest may appeal to the Court of Appeal against the decision under section 63 of the District Court Ordinance (Cap. 336).

(Added 18 of 2003 s. 4)