

'Matrimonial Proceedings' means any proceedings with respect to which the Matrimonial Causes Rules (Cap 179A) (MCR) apply: ie proceedings under the Matrimonial Causes Ordinance (Cap 179) (MCO) or the Matrimonial Property and Proceedings Ordinance (Cap 192) (MPPO).⁵ This includes proceedings for financial orders under the MPPO related to matrimonial causes (known as Ancillary Relief).

Ancillary relief

[1-3]

The term 'Ancillary Relief'⁶ is often confusing to laymen (this topic is fully explored in **Chapter 4**). For the avoidance of doubt, in short it covers the following applications which must be specifically pleaded in any petition or application (in a matrimonial cause):

- (a) an avoidance of disposition order ('set-aside order');
- (b) a lump sum order;
- (c) an order for maintenance pending suit;
- (d) a periodical payments order;
- (e) a secured periodical payments order;
- (f) a settlement of property order;
- (g) a transfer of property order;
- (h) a variation of settlement order; or
- (i) a variation order.

Family proceedings

[1-4]

A procedural definition of 'Family Proceedings' may be found in Practice Direction 15.12 but no definition appears in any of the relevant Ordinances. The Practice Direction states that Family Proceedings generally do not include applications under the Child Abduction and Custody Ordinance (Cap 512); Hague Convention cases or Wardship proceedings. These continue to be dealt with exclusively by the High Court. However, 'Family Proceedings' in both the Family Court (District Court) and the High Court may be issued under the following Ordinances, and any of their respective subsidiary legislation:⁷

- (a) Adoption Ordinance (Cap 290) (AO)
- (b) Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) (DCRVO)
- (c) Guardianship of Minors Ordinance (Cap 13) (GMO)

⁵ See definition under MCR r 2 of 'Matrimonial Proceedings', which includes any proceedings for which rules may be made under MCO s 54(1) and MPPO s 32; see also PD 15.12 para 2.

⁶ See MCR r 2.

⁷ See PD 15.12 para 4.

- (d) Inheritance (Provision for Family and Dependents) Ordinance (Cap 481) (IPFD)O
- (e) Legitimacy Ordinance (Cap 184) (LO)
- (f) Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188) (MO(RE)O)
- (g) Marriage Ordinance (Cap 181) (MO)
- (h) Married Persons Status Ordinance (Cap 182) (MPSO)
- (i) Marriage Reform Ordinance (Cap 178) (MRO)
- (j) Matrimonial Proceedings and Property Ordinance (Cap 192) (MPPO)
- (k) Parent and Child Ordinance (Cap 429) (PCO)
- (l) Separation and Maintenance Orders Ordinance (Cap 16) (SMOO)

Child protection and child abduction proceedings

[1-5]

The government and public bodies have particular responsibilities towards children. As a result, the procedures for children's matters that involve a public element are dealt with separately from matrimonial causes, matrimonial proceedings and family proceedings (for a more complete discussion, see **Chapter 5**). Specifically, such proceedings include:⁸

- (a) Care and protection proceedings;⁹
- (b) Wardship proceedings;¹⁰ and
- (c) Child abduction proceedings.¹¹

Wardship and care and protection proceedings involve a public element because they exist primarily for the government to exercise its duty to protect children whose welfare is in jeopardy.

MATRIMONIAL CAUSES & MATRIMONIAL PROCEEDINGS

Jurisdiction over matrimonial causes

[1-6]

Where the Hong Kong courts have jurisdiction under the MCO, the issues are determined as if both parties are domiciled in Hong Kong.¹²

Because of the nature of Hong Kong's transitory population, the

⁸ See PD 15.12 para 5.

⁹ Ie proceedings under the Protection of Children and Juveniles Ordinance (Cap 213) (PCJO).

¹⁰ Ie proceedings under the High Court's inherent jurisdiction; see s 26 of the High Court Ordinance (Cap 4) (HCO).

¹¹ Ie proceedings under the Child Abduction and Custody Ordinance (Cap 512) (CACO).

¹² MCO s 8.

question of jurisdiction can be an issue. Hong Kong only has jurisdiction to entertain a divorce petition if, at the date of the petition, either the husband or wife is domiciled in Hong Kong, or has been habitually resident in Hong Kong throughout the previous 3 years, or has a substantial connection to Hong Kong.¹³ Jurisdiction cannot be conferred on Hong Kong courts by consent of the respondent in matrimonial cases affecting status.¹⁴ For a more full discussion of jurisdiction for matrimonial causes, see **Chapter 3**.

Domicile

[1-7]

Domicile can be a complex matter in divorce,¹⁵ but for those born outside Hong Kong the issue is usually 'substantial connection' or 'habitual residence'. The law of domicile was previously uncertain, complex, confusing and at times discriminatory.¹⁶ The law has now been reformed by the passage of the Domicile Ordinance (Cap 596),¹⁷ which implements the recommendations of the HKLRC report 'Rules for Determining Domicile' (April 2005).

The basic structure of the new rules are as follows:

- (a) The basic common law rules are maintained (s 3):
 - no person can be without a domicile;
 - no person can at the same time and for the same purpose have more than one domicile; and
 - where an individual's domicile is in issue before any court in Hong Kong, the issue is to be determined by the law of Hong Kong.
- (b) As to the domicile of children (s 4):
 - A child's domicile is determined by the 'close connection' test;
 - There is a presumption that the child shares the domicile shared by the parents;

13 See MCO s 3. Substantial connection is a factor that should be given proper recognition: see *Nan Tung Bank Ltd, Zhu Hai v Wangfoong Transportation Ltd* [1999] 2 HKC 606 (CA); and *Yap Lup Man v Good First Investment Ltd* [1998] 1 HKC 726.

14 *De Reneville v De Reneville* [1948] P 100 at 113, [1948] 1 All ER 56 at 61 (CA, Eng), per Lord Greene MR; *Addison (otherwise McAllister) v Addison* [1955] NI 1 at 13, per Lord MacDermott CJ, both these cases were nullity suits; and further, even in a matter of ancillary relief, *Cammell v Cammell* [1965] P 467 at 473, [1964] 3 All ER 255 at 259 per Scarman J.

15 See *ML v YJ* (2010) 13 HKCFAR 794, [2011] 1 HKC 447 (CFA); also Michelle Tsang 'Applying for Ancillary Relief after a Foreign Divorce' *Hong Kong Lawyer*, 19 March 2011.

16 Eg the new Domicile Ordinance (Cap 596) has overridden the common law rule that a married woman has at all times the domicile of her husband (see s 14).

17 See also *Y v W (Domicile)* [2011] HKFLR 482, [2012] 2 HKC 455.

- Where the parents do not share a domicile, the child's domicile is presumed to be with the parent with whom the child shares a home.
- (c) Adults retain their childhood domicile but may acquire a new domicile where they are present in a country where they intend to make a home indefinitely (s 5),¹⁸ para 6R-001.
- (d) An adult's domicile in Hong Kong is not acquired unless his/her presence here is lawful (s 6).

While the notion of permanent home can be explained largely in the light of common sense principles, the same is certainly not true of domicile. Domicile is 'an idea of law' which diverges from the notion of a permanent home in two principal respects. First, the elements which are required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. In order to acquire a domicile of choice in a country, a person must intend to reside in it permanently or indefinitely. Second, domicile differs from 'permanent home' in that the law in some cases says that a person is domiciled in a country whether or not he has his permanent home in it.

In *W v C*,¹⁹ the Court of Appeal adopted the list of factors identified by Chu DJ (as she then was) in *Y v W*²⁰ which may be taken into account in determining an individual's intention whether to make a permanent (indefinite) home in a particular place:

- (a) Length of residence;
- (b) Condition of residence (eg purchased property, leased property, furnished lodgings, hotels);
- (c) Marriage with a local partner;
- (d) Whereabouts of the family;
- (e) Business interest;
- (f) Whereabouts of personal belongings;
- (g) Whereabouts of the person's property and investments;
- (h) The fact of naturalisation;
- (i) Decision made as to the nationality of the children;
- (j) Education of the children;
- (k) Memberships of clubs or religious associations;
- (l) Place of work; and
- (m) Relation between a man and his family.

Chu DJ decided in *Y v W* that, a holder of Hong Kong Identity Card cannot be inferred to have an intention to stay in Hong Kong permanently for the

18 See discussion in *ZC v CN* [2014] 5 HKLRD 43, [2014] HKCU 1890 (CA). See also Rule 4 of Dicey, Morris & Collins: *The Conflict of Laws* (15th ed) Chapter 6 para 6R-001.

19 *W v C* [2013] 2 HKLRD 602, [2013] 6 HKC 313 (CA).

20 *Y v W* [2011] HKFLR 482, [2012] 2 HKC 455.

purpose of proving domicile in Hong Kong. The concept of domicile ('居籍') does not have anything to do with a person's right of abode in Hong Kong ('居留權') because his right of abode does not depend on his domicile.

Habitually resident

[1-8]

A person's residence is a certain place where that person dwells. It connotes the idea of a home, or habitation, though it need not be exclusive or permanent. It denotes the place where that person eats, drinks and sleeps.²¹ In the matrimonial context, the test for 'residence' (habitual, ordinary or otherwise) is broad and allows even for unlawful residence.²²

The question of *habitual residence* is rarely an issue in Hong Kong because if a person has been living and working here for 3 years prior to the date of the divorce petition, there is usually no difficulty in determining whether this criterion can be met. Whether a person regularly takes long business trips or holidays out of Hong Kong, it is not going to affect the definition of habitual residence in Hong Kong. Habitual or ordinary residence refers to:

a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. ... All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.²³

In the leading case of *Shah & Akbarali v Barnet London Borough Council*,²⁴ Lord Scarman applied the natural and ordinary meaning approach in construing the words 'ordinarily resident' of the United Kingdom's Education Act 1962 and the same meaning of habitual or ordinary residence is to be given to the family law legislation.²⁵ Unlike domicile, one may have habitual or ordinary (the terms are the same) residence in two places at the same time.²⁶ In *Vallejos v Commissioner of Registration*,²⁷ an immigration case, the Court of Final Appeal construed 'ordinarily resident' in Article 24(2)(4) of the Basic Law. The Court of

21 *R v North Curry (Inhabitants)* (1825) 4 B & C 953 at 959, 107 ER 1313 at 1315, per Bayley J.

22 See eg *Re NTH* [1996] 1 HKC 93, where the court accepted jurisdiction to order an adoption (under the Adoption Ordinance (Cap 290) s 5(6)) for a child who was born to Vietnamese boat people in an internment camp, dismissing the government's argument that residence must be lawful. This principle of law was confirmed by the House of Lords in *Mark v Mark* [2006] 1 AC 98 (HL).

23 *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309 (HL), judgment of Lord Scarman at pp 340-344.

24 *Shah & Akbarali v Barnet London Borough Council* [1983] 2 AC 309 (HL).

25 See Cheung JA's judgment in *ZC v CN* [2014] 5 HKLRD 43, [2014] HKCU 1890 (CA); *Ikimi v Ikimi* [2002] Fam 72 (CA, Eng) per Thorpe LJ at p 82, reaffirmed in *Mark v Mark* [2006] 1 AC 98 (HL).

26 *Ikimi*, *ibid*.

27 *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, [2013] 4 HKC 239 (CA).

Final Appeal emphasised the purposive and contextual approach in statutory interpretation (para 50) and qualified the natural and ordinary meaning approach of Lord Scarman by regarding it only as a starting point but not decisive (para 80).

Substantial connection

[1-9]

The question of 'substantial connection' under s 3(c) is a little more fraught. The two leading judgments on 'substantial connection' are *B v A* [2007] 4 HKC 610 and *S v S* [2006] 3 HKLRD 751, [2006] HKFLR 460.²⁸ In *Savournin v Lau Yat Fung* [1971] HKLR 180, [1971] HKCU 16, Briggs J confirmed that the sub-section had established a new basis for determining the personal law of the parties to a marriage and had established an additional ground of jurisdiction although with a slightly wider meaning than the other two requirements:

Domicile in a country is obviously a substantial connexion with that country: so may three years ordinary residence be so considered. Paragraph (c), a substantial connexion with Hong Kong, is in addition to those two requirements. It is not substituted for them. A meaning must be given to the phrase wider than domicile or three years ordinary residence.

As Hartmann J then went on to say in *B v A* [2007] 4 HKC 610 at paras 18-21:

[18] As to the meaning of the phrase 'substantial connection', Briggs J said that it was to be given its ordinary meaning. It is not a term of art. In my view, that must be right. As such, it would be wrong to burden the phrase with qualifications, for example, by specifying *inter alia* that a person must ordinarily reside here for at least a year before he can be considered to have a substantial connection with Hong Kong. An accumulation of such qualifications would reduce the phrase to a term of art and that, I believe, would be contrary to the legislative intent.

[19] The word 'substantial' is not a technical term nor is it a word that lends itself to a precise measurement. In an earlier judgment on this issue, that of *S v S* [2006] 3 HKLRD 751, [2006] HKFLR 460, I said that it is not a word –

... that lends itself to precise definition or from which precise deductions can be drawn. To say, for example, that 'there has been a substantial increase in expenditure' does not of itself allow for a calculation in enumerative terms of the exact increase. It is a statement to the effect that it is certainly more than a little but less than great. It defines, however, a significant increase, one that is weighty or sizeable.

[20] That being the case, if the phrase is to be given a wider meaning than domicile or three years ordinary residence, whether a party to a marriage did or did not have a 'substantial connection' with Hong Kong at the time of the institution of proceedings can only be determined in each case by having regard to the facts of that case and coming to a broad conclusion based on those facts.

28 See also the discussion in *YS v TTWD* [2012] HKCU 666 (unreported, FCMC 676/2011, 3 February 2012).

[21] In *S v S* [2006] 3 HKLRD 751, [2006] HKFLR 460, I said that, when considering the meaning and extent of the phrase ‘substantial connection’, it is important to recognise that the legislature saw fit to qualify it with the indefinite article ‘a’. It is not therefore necessary to show that a party’s substantial connection to Hong Kong is his or her only substantial connection with a jurisdiction or is the single most substantial connection. In the present case, therefore, while the fact that the husband and wife have a substantial connection with Argentina may go to an issue of *forum non conveniens*, it does not determine whether either party had a substantial connection with Hong Kong at the time when the wife’s petition was issued. As I said in *S v S* [2006] 3 HKLRD 751, [2006] HKFLR 460, no exercise of comparisons is required.

In practical terms what this means for those people currently living and working in Hong Kong on anything other than a temporary basis, getting divorced in Hong Kong should be possible. On the other hand the mere fact that a person was married in Hong Kong or owns property here or was resident here sometime in the past, will almost certainly – without more – be insufficient grounds to establish jurisdiction in the Family Court.

For further comment see para 30–37 of the Department of Justice LC Paper No. CB(2)2228/09-10(01) – ‘Matrimonial Proceedings and Property (Amendment) Bill 2010 (“the Bill”)’ – which concludes:

In deciding the issue, the court would have regard to all relevant facts instead of limiting to particular circumstances such as the time that a party has remained in Hong Kong. The presence of a matrimonial home in Hong Kong (whether in purchased or rented property), nature of their stay in Hong Kong, place of education of the children of the marriage, as well as maintaining bank accounts and acquiring family assets in Hong Kong may all be relevant. The list is not exhaustive.

Kwan JA in *LCYP v JEK* [2015] HKCU 1999 (unreported, CACV 98 & 125/2015, 13 August 2015) concluded that a person cannot have more than one domicile at the same time, however, one can have a substantial connection with more than one jurisdiction at a time. It will be unduly restrictive if one confines the connecting factors solely to that of a family context (matrimonial home and the presence of spouse and children). Section 1(3)(c) of MCO requires either party to have the substantial connection, it does not require both the man and the wife to be in the same place. Kwan JA held that,

39. Unlike domicile which a person cannot have more than one at the same time and for the same purpose, one can have a substantial connection with more than one jurisdiction at a time. Hence, it is not necessary for the wife to demonstrate her connection with Hong Kong is the only substantial connection or the most substantial connection she has with any jurisdiction. It is sufficient if she demonstrates among others that she has ‘a’ substantial connection with Hong Kong (*S v S* at para 13).

40. ... I emphasise again that whether a party to a marriage would have a substantial connection with Hong Kong is a question of fact, so the factors to be taken into consideration and the weight to be given to each relevant factor would vary according to the particular circumstances of each case (*S v S* at para 18).

Declaration as to customary or validated marriage

[1-10]

The Family Court has jurisdiction to hear and determine an application by a person claiming to be a party to a customary marriage or a validated marriage for a declaration that such a marriage, as the case may be, subsists between that person and the other party to such marriage where:

- (a) the other party disputes the existence of the marriage;
- (b) the other party is unwilling to join in the application for registration; or
- (c) the whereabouts of the other party cannot after careful and reasonable inquiry be ascertained or it is for any other reason impracticable for such other party to be apprised of the application for the registration of the marriage, Marriage Reform Ordinance (Cap 178) s 9(3).

Other matrimonial relief

[1-11]

As to the law on financial remedies in family proceedings, see **Chapter 4**. As to the injunctive relief available in matrimonial causes and matrimonial proceedings, see **Chapter 7**.

The Family Court may make orders for separation and maintenance under the SMOO in respect of parties to the following marriages:

- (a) a marriage celebrated or contracted in accordance with the provisions of the Marriage Ordinance (Cap 181);
- (b) a modern marriage validated by the Marriage Reform Ordinance (Cap 178);
- (c) a customary marriage declared to be valid by the Marriage Reform Ordinance (Cap 178);
- (d) a union of concubinage as defined by the Legitimacy Ordinance (Cap 184);
- (e) a *kim tiu* marriage entered in accordance with Chinese law and custom in Hong Kong before 7 October 1971, under the Marriage Reform Ordinance (Cap 178);
- (f) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed.

See the definition of ‘wife’ and ‘married woman’ in SMOO s 2.

As to enforcement of relief, see **Chapter 8**.

FORUM, COURTS & JUDICIARY

Courts, judiciary and registry

[1-12]

Family matters are dealt with at all levels of the Hong Kong courts:

High Court

[1-13]

At first instance, all family law proceedings within the jurisdiction of the High Court are heard by the Court of First Instance.²⁹ There is no official specialist division of the court or presiding judge specifically responsible for such cases. Such cases may be heard by any permanent High Court Judges or Deputy High Court Judges or Recorders.³⁰ However, urgent and high priority cases are typically assigned to experienced judges.

Family Court

[1-14]

The Family Court is simply that division of the District Court which is assigned by the Chief Justice to deal with Matrimonial Causes, Matrimonial Proceedings and Family Proceedings. It occupies the lower floors of the Wanchai Law Courts, Wanchai Tower, 12 Harbour Road.

The Family Court is headed by the Principal Family Court Judge,³¹ who is responsible for the Family Court List but cases may be assigned to any permanent District Court judge and Deputy District Court judge.³²

The Family Court has its own 'Family Registry', which is located on level M2.

Juvenile Court

[1-15]

The Juvenile Court, located in the Magistrates' Courts, has a limited jurisdiction under the Protection of Children and Juveniles Ordinance (Cap 213) (PCJO) to hear care and protection proceedings in respect of children and young people (up to age 18).

The Juvenile Court only sits in the Eastern, Kowloon City, Tsuen Wan, Fanling and Tuen Mun Magistrates' Courts. Cases are only assigned to a special list of permanent magistrates.

Duties and powers of the Registrar

[1-16]

For the general jurisdiction, powers and duties of the Registrar (of each respective court) see HCO s 38 and DCO s 14.³³ Additionally:

²⁹ HCO s 12(2).

³⁰ HCO s 4.

³¹ For the current PFCJ (and lists of judges) see: <<http://www.judiciary.gov.hk/en/organization/judges.htm>>.

³² District Court Ordinance (Cap 336) s 4.

³³ In Matrimonial Causes, Matrimonial Proceedings and Family Proceedings, the Family Court Registrar has the same powers as the High Court Registrar: PD15.12 para 6. However, these powers are subject to (1) r 3 of the MCR (for Matrimonial Proceedings); (2) r 3 of the Domestic and Cohabitation Relationships Violence Rules (Cap 189A) (DCRVR) (for DCRVO proceedings); (3) any other rules made under the respective Ordinances applicable to the relevant proceedings.

- (a) The Registrar has power to deal with an application to dispense with the service of a copy of a petition on the respondent or on any person: MCR r 14(10).
- (b) The Registrar may issue a writ of subpoena in a cause pending in the Court of First Instance: MCR r 42(2).
- (c) The Registrar may administer oaths: Rules of the High Court (Cap 4A) (RHC)/Rules of the District Court (Cap 336H) (RDC), O 32 r 16(3); and Oaths and Declarations Ordinance (Cap 11) s 3.
- (d) Any application for an order of committal in matrimonial proceedings, if the Registrar is satisfied of the urgency of the matter and that it is expedient to make such an order and no judge is conveniently available to hear the application: MCR r 90(2).
- (e) The Registrar may deal with any order in terms agreed between the parties relating to the custody or education of a child or access to a child where the other party consents to give access and the only question for determination is the extent to which access is given: MCR r 90(2).
- (f) Any unopposed applications for leave to remove a child permanently out of Hong Kong: MCR r 94(1).
- (g) Together with the Chief Judge, the Registrar may issue directions for the purpose of securing in the district courts due observance of statutory requirements and uniformity of practice in matrimonial proceedings: MCR r 122.

Any notice of election under the District Court (Fixed Costs in Matrimonial Causes) Rules (Cap 336F) r 4 must be given to the Registrar who must consider any additional amounts claimed in the table of costs, Schedule 1[5], r 4(1) and (2). The Registrar is the taxing master and has the power to tax costs.³⁴

There is no registry or registrar in the Magistrates' Courts. All the court's powers are performed by the magistrates, and filing and administrative roles are performed by the clerk to the court.

Forums for commencing proceedings

Child protection and child abduction proceedings

(1) Care and protection proceedings

[1-17]

Care and protection proceedings under the PCJO are within the sole jurisdiction of and must be commenced in the Juvenile Court.³⁵

³⁴ See RHC/RDC O 62.

³⁵ PCJO s 34.

(2) Wardship proceedings

[1-18]

Wardship proceedings are within the sole jurisdiction of and must be commenced in the Court of First Instance of the High Court.³⁶

(3) Child abduction proceedings

[1-19]

Wardship proceedings,³⁷ intercountry adoption proceedings,³⁸ and child abduction proceedings (under the CACO)³⁹ are within the sole jurisdiction of the Court of First Instance of the High Court.

Matrimonial causes and matrimonial proceedings**[1-20]**

Only the District Court or the Court of First Instance has power to pronounce a decree of divorce, nullity, judicial separation or presumption of death and dissolution of marriage, or to make any other order in respect of customary marriages⁴⁰ and monogamous marriages.⁴¹ A marriage will be classified as monogamous if: (1) it took place in Hong Kong and was celebrated or contracted in accordance with the provisions of the MO or was validated and registered under the MRO (see s 8, MRO); or it took place outside Hong Kong and was celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed and recognised by such law as involving the voluntary union for life of one man and one woman to the exclusion of all others. See s 2, MCO. See also *Tang Lai Sau-kiu v Tang Loi* [1987] 1 HKLR 85 (CA), where a marriage in China in 1940 was a marriage in accordance with the Civil Code 1930 and therefore monogamous. See also *Chan Sui-fai* [1966] HKLR 796, [1946–1972] HKC 337 (HC). On proof of customary marriage in China, see *Chung Kai Fun v Lau Wai King* [1966] HKLR 881, [1966] HKCU 90 (HC); *Lui Yuk-ping v Chow To* [1962] HKLR 515, [1962] HKCU 65 (CA) and *Chan Chiu Lam & Ors v Yau Yee Ping* [2000] 3 HKLRD 443, [2000] HKCU 441 (CA) on the meaning of ‘concubinage’ and ‘Chinese customary marriage’.

All matrimonial causes and matrimonial proceedings must be commenced in the Family Court,⁴² and thereafter may be transferred⁴³ (on the application of the parties or *sua sponte*)⁴⁴ to the High Court. However,

36 HCO ss 12, 26; PD 15.12 para 5; RHC O 90.

37 HCO ss 12, 26; PD 15.12 para 5; RHC O 90.

38 AO s 20C(3).

39 CACO s 6; PD 15.12 para 5; RHC O 121.

40 If celebrated in accordance with the s 7 of the MRO; and registered in accordance with that Ordinance, see Pt IV ss 9–13.

41 MCO s 9.

42 MCO s 10A.

43 MCR r 32(1).

44 MCR r 32(2).

this is a two-way street and the High Court has the power to transfer back ‘down’ to the Family Court any matter it regards as best dealt with in that court.⁴⁵

The monetary limit of the District Court⁴⁶ is inapplicable to matrimonial causes and matrimonial proceedings.⁴⁷ Indeed, the Family Court regularly deals with cases that exceed the District Court’s limits.

Family proceedings

(1) Adoption

[1-21]

Adoption proceedings are divided into local adoption proceedings, which must be commenced in the District Court but may be transferred to the High Court,⁴⁸ and Intercountry adoption proceedings, which fall within the sole jurisdiction of the High Court.⁴⁹

(2) Domestic violence

[1-22]

Applications under the DCRVO must be brought in the District Court, save (i) in cases of urgency; or (ii) where the Court is satisfied that special circumstances are present which make it appropriate for the Court of First Instance rather than the District Court to exercise those powers.⁵⁰

(3) Guardianship of minors proceedings

[1-23]

Applications under the GMO may be commenced in either the High Court or the Family Court.⁵¹

(4) Status, parental orders and legitimacy

[1-24]

Proceedings under the PCO and the LO may be commenced in either Family Court or in the High Court.⁵²

45 MCR r 32(3).

46 DCO s 32.

47 MCO s 10A(3).

48 AO s 4A(1) (local adoption proceedings must be commenced in the District Court).

49 If proceedings under Part 5.

50 DCRVO s 4.

51 GMO s 2.

52 See PCO s 16; LO s 2 (‘court’ is defined as either the District Court or the High Court).

(5) Separation and maintenance orders

[1-25]

Separation and Maintenance Orders under the SMOO must be commenced in the Family Court, but may be transferred to the High Court.⁵³

(6) MPPO Part IIA proceedings

[1-26]

As with all proceedings under the MPPO, proceedings under Part IIA of the MPPO must be commenced in the Family Court,⁵⁴ though they may be transferred to the High Court.⁵⁵

(7) Orders under the Inheritance (Provision for Family and Dependents) Ordinance (Cap 481)

[1-27]

Proceedings under the I(PFD)O must be commenced in the Family Court, though they may be transferred to the High Court.⁵⁶

Transfer between the Family Court and CFI⁵⁷

[1-28]

Unless specifically provided for by statute,⁵⁸ where both courts having overlapping jurisdiction, the Family Court may transfer proceedings to the Court of First Instance and vice versa.⁵⁹ This discretion is unfettered. However, relevant considerations include: public interest, novel or difficult points of law, likely delay causing injustice if there is no transfer, complicated or conflicting evidence likely to unduly prejudice the Family Court lists. The nature and value of the property involved is unlikely to be sufficient without a showing of special complexity.⁶⁰

For the procedures on transfer from the Family Court to the High Court, see RDC Orders 4 and 78, RHC O 78, and particularly Practice

53 SMOO s 8.

54 MCO s 10A.

55 MCR r 32(1).

56 I(PFD)O s 25.

57 Refer to the *Law Society Circular 16-820* for procedure upon transfer to the Court of First Instance. The Circular advises, inter alia, that where a case has been transferred, First Directions Hearing Bundles should be lodged within 14 days of the case being given a High Court Case number. It is only after such bundles have been lodged that a docket Judge will be assigned and provide directions, including the fixing of a hearing date for directions.

58 Eg see the exceptions in DCRVO s 4 (domestic violence subject to specific considerations); Adoption Rules (Cap 290A) r 17 (contested local adoption, mandatory transfer).

59 DCO ss 42-44.

60 See *B v B* [2000] HKCU 1095 (unreported, FCMC 3105/1999, 11 July 2000); *H v H* [2002] HKCU 1661 (unreported, FCMC 7173/2000, 1 February 2002); and *SWM v PYC* [2002] HKCU 1303 (unreported, CACV 308/2002, 6 November 2002). Also, see eg *Re D (Parental Order: s 12 Parent and Child Ordinance (Cap 429))* [2015] 1 HKLRD 229, where the District Court found in the case of an application for parentage of a child born by surrogacy in California that the potential conflict between: (i) the prohibition of commercial surrogacy at s 17 of the Human

Direction 15.14 'Transfer of Proceedings from the Family Court to the Court of First Instance', which provides:

- (a) Applications for transfer must be made promptly, by summons supported by affidavit.
- (b) The Family Court may, before transfer, deal with interlocutory matters.
- (c) The court may also, on making the order for transfer, give directions as to the further conduct of the proceedings.
- (d) Before making an order of its own motion the court must give the parties an opportunity of being heard on the question of transfer and for that purpose the registrar may give the parties notice of a date, time and place at which the question will be considered.
- (e) Upon transfer, the Family Court will direct the parties to prepare a First Directions Hearing Bundle for the Court of First Instance.

It should be noted that in PD 15.13 it provides the procedure for Children Disputes Resolution to be dealt with in the Family Court if there be any dispute on custody and access to the children. At present, this process is mandatory in the Family Court. It is not unlikely for any case transferred to the Court of First Instance, the issue on children may remain to be dealt with in the Family Court under the CDR.

HEARINGS & RIGHTS OF AUDIENCE

Rights of audience

[1-29]

The legal profession is split into two groups: barristers and solicitors. Barristers have unlimited rights of audience in all courts and tribunals where legal representation is allowed.

The rights of audience of solicitors are limited to where they have been acquired through statute, rule or usage of a particular court. However, in most areas of family law, solicitors have long been allowed to appear before the courts without counsel:

- (a) In the Magistracy (and therefore the Juvenile Court),⁶¹ solicitors have rights of audience, and on any appeal therefrom to the Court of First Instance (ie not reserved for the Court of Appeal).⁶²

Reproductive Technology Ordinance (Cap 561); and (ii) the allowance of 'expenses reasonably incurred' at s 12(7) of the PCO, gave rise to unusual complexity which warranted a transfer to the Court of First Instance.

61 Juvenile Offenders Ordinance (Cap 226) (JOO) s 3A(4).

62 Magistrates Ordinance (Cap 227) s 118(2), see also s 2 (definition of counsel). See *R v Ng Man Chiu* [1959] HKLR 335, [1959] HKCU 47 (HC).

- (b) In the District Court (and therefore the Family Court), solicitors have rights of audience before judges and masters in the District Court.⁶³
- (c) As to rights of audience before a master or taxing master in the High Court, see PD 14.1 'Right of Audience before a Master'; and PD 27 'Civil Proceedings in the District Court' paras 8 and 8A (District Court).
- (d) As to appearance before a judge or master in the District Court in chambers on an uncontested application or on an application listed for a 3-minute hearing, see PD 27 para 7.
- (e) As to rights of audience in the District Court for trainee solicitors in their last 12 months of their traineeship, see PD 27 para 9.

Solicitors have rights of audience in the higher courts (the High Court and the Court of Final Appeal) for in chambers hearings (whether closed or open to the public).⁶⁴

Solicitors may appear in open court in the Court of First Instance:⁶⁵

- (a) At the discretion of a judge to in an emergency;
- (b) In formal or unopposed proceedings, that is to say those proceedings where (a) by reason of agreement between the parties there is unlikely to be any argument; and (b) the court will not be called upon to exercise a discretion; and
- (c) Where judgment is delivered in open court following a hearing in chambers at which that solicitor conducted the case for his client.

Additionally, in the High Court and the Court of Final Appeal, solicitors may now be granted higher rights of audience through Part IIB of the Legal Practitioners Ordinance (Cap 159).

However, solicitors exercising their rights of audience in open court in the District Court, High Court and Court of Final Appeal must be dressed in gown, wing collar and bands.⁶⁶

Hearings in open court, in chambers or in camera

Principle of open justice

[1-30]

A hearing in 'Open Court' is open to the public and the press. A hearing 'In Chambers Open to the Public' is one where the hearing is open to the press and the public may attend. A hearing 'In Chambers Not Open to the Public' is a closed one where the public (and generally the press) are

⁶³ See DCO s 15; PD 27 'Civil Proceedings in the District Court' at para 6.

⁶⁴ PD 25.1 'Chambers Hearings in Civil Proceedings in the High Court, the District Court, the Family Court and the Lands Tribunal' at para 13.

⁶⁵ PD 21.1 'Solicitors – Appearance in Open Court' at paras 1 and 2.

⁶⁶ PD 21.1 'Solicitors – Appearance in Open Court' at para 3.

excluded from attending.⁶⁷ Public justice demands that the courts are open unless there is a legitimate reason for excluding the press and the public.⁶⁸

Practitioners should note that applications may be made by parties in respect of the High Court's powers to exclude the public (or to revoke such orders) under PD 25.1.

In chambers hearings

[1-31]

Generally, all chambers hearings (interlocutory or otherwise) are held in public. However, it has long been accepted that it will be legitimate to exclude the public in cases involving the guardianship and interests of children or the proceedings concerning matrimonial disputes.⁶⁹

(1) Matrimonial causes and matrimonial proceedings

[1-32]

The trial of a 'matrimonial cause' (ie a decree of nullity, separation or divorce) is heard in open court and in rare circumstances the judges may exercise their inherent jurisdiction and exclude the public from the court during such part of the hearing as may be necessary and no more.⁷⁰ Indeed, a decree made in a judge's private room is not a valid decree.⁷¹ However, in any proceedings for nullity of marriage, evidence on the

⁶⁷ PD 25.1 'Chambers Hearings in Civil Proceedings in the High Court, the District Court, the Family Court and the Lands Tribunal' at para 1; and PD 25.2 'Reports on Hearings held In Chambers Not Open to the Public' para 1.

⁶⁸ See DCO s 6; HCO s 32A. See Hong Kong Bill of Rights Ordinance (Cap 383) (HKBORO) s 8, article 10.

⁶⁹ See HKBORO s 8, article 10.

⁷⁰ Some circumstances which might justify the clearing of the court were indicated in *Scott v Scott* [1913] AC 417 (HL). See *Stone v Stone* [1949] P 165 (CA, Eng); *Prior v Prior* (1970) 114 Sol Jo 72; *Official Solicitor to the Supreme Court v K* [1965] AC 201, [1963] 3 All ER 191 (HL); *Fowler v Fowler and Sine* [1963] P 311, [1963] 1 All ER 119 (CA, Eng).

⁷¹ *Stone v Stone* [1949] P 165 (CA, Eng). See *McPherson v McPherson* [1936] AC 177 (PC) at 200–202, trial in judge's library with a 'warning-off notice' to public: order voidable, but unassailable, and *Scott v Scott* [1913] AC 417 (HL), general principles discussed; and also *Stevens v Stevens* [1954] 2 All ER 381, [1954] 1 WLR 900 (CA, Eng), it is not desirable that the judge, at any stage of the trial, to see the two parties separately and individually; if he sees them apart from their legal advisers, he should see them together; *Schlesinger v Schlesinger* [1959] 1 All ER 155 at 160, [1959] 1 WLR 92 at 99–100 (CA, Eng), nothing should be done to impair public confidence by even giving room for suspicion that any part of a public trial is being conducted behind closed doors; and see *Fisher v Fisher* (1955) Times, 23 June (CA, Eng), after trial of substantive issue, court should go in camera to hear custody application then and there, *RA v RA* (1955) Times, 26 and 27 July, appeal relating to taking child out of jurisdiction heard in camera; judgment given in camera; questions as to newspaper reports; only matters reported said to be those mentioned in court before it went into camera; *Anon* (1955) Times, 14 July (CA, Eng), undesirable that children should hear divorce cases. Note that in England and Wales on 27 April 2009, new rules came into force governing, inter alia, the attendance of media representatives at family proceedings. The new r 10.28 under the Family Proceedings Rules 1999, allows for 'duly accredited' media representatives to be present during family proceedings. The practice direction states that media representatives 'should' be allowed to attend

necessary for the court to decide (or review) the decisions of the parents to protect the best interests of the child.

Normally, the court will be called upon to decide how the big decisions in the child's life will be made and by whom (Custody), with whom the child will live (Care and Control), when each parent will be allowed to see the child (Access), where the child will live or when the child may leave Hong Kong (Relocation and Removal), and who will fund the child's upbringing (Maintenance).

Throughout this process, the courts emphasise a conciliatory approach,² which is in line with the statutory and paramount consideration before the court in all such matters: the child's best interests.³ To this end, all judges in the family courts will insist that parents (and certainly any legal representatives), fully understand this axiom at the outset and come to court prepared to argue their respective positions only within these very strict parameters.

The axiomatic status of the 'best interests of the child' should never to be confused with the best interests of either parent. Save in very exceptional circumstances (for example, in a case of cruelty, sexual abuse or severe physical mistreatment of the child or where grave domestic violence is established), it is an example of a statutory principle that really brooks no challenge.

So embedded is this principle that it is fair to say that it would save much court time and litigation costs if parents (and their legal advisors) clearly understood what the family court expects of them at the outset.

What the Family Court expects

[5-2]

The courts will generally consider that these guidelines apply to all children and all parents in all cases. It is very important that both parents and their legal representatives do not think that their case is ever likely to be an exception to these general rules.

her parents that she may have developed certain psychological symptoms that one can only hang his head in despair and rendered speechless.'

² See the speech of Baroness Hale of Richmond in *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] UKHL 7, [2009] 1 FLR 904 (HL): 'The reality is that every effort is made, both before and during any family proceedings, to encourage the parents to agree between themselves what will be best for their children. There are many good reasons for this. The parents know their own children better than anyone. They also know their own circumstances, what will suit them best, what resources are available and what they can afford. Agreed solutions tend to work much better and last much longer than solutions imposed by a court after contested proceedings. The contest is likely to entrench opposing viewpoints and inflame parental conflict. Conflict is well known to be bad for children. Not only that, the arrangements made when the couple separate are bound to have to change over time, as the children grow up and their own and their parents' circumstances change. Parents who have been able or helped, through mediation or in other ways, to agree a solution at the outset are more likely to be able to negotiate those changes for themselves, rather than to have to return to court for further orders.'

³ Section 3(1)(a)(i), GMO.

Thus, where any parent is thinking of asking the court for any order in relation to a child the family court requires⁴ both parties to think about these things first:

- As parents, you share responsibility for your children and have a duty to talk to each other and make every effort to agree about how you will bring them up.
- Even when you separate this duty continues.
- Try to agree the arrangements for your child. If talking to each other is difficult, ask for help. Trained mediators can help you talk to each other and find solutions, even when things are hard. The court staff can give you details.
- If you cannot agree you can ask the court to decide for you. The law says that the court must always put the 'best interests' of your child first.
- What you want may not be the best thing for your child. The court has to put your child first, however hard that is for the adults.
- Experience suggests that court-imposed orders work less well than agreements made between you as parents.

The court therefore expects you to do what is best for your child:

- Encourage your child to have a good relationship with both of you.
- Try to have a good enough relationship with each other as parents, even though you are no longer together as a couple.
- Arrange for your child to spend time with each of you.

Remember, the court expects you to do what is best for your child even when you find that difficult:

- It is the law that a child has a right to regular personal contact with both parents unless there is a very good reason to the contrary. Denial of contact is very unusual and in most cases contact will be frequent and substantial.
- The court may deny contact if it is satisfied that you or your child's safety is at risk.
- Sometimes a parent stops contact because she/he feels that she/he is not getting enough money from the other parent to look after the child. This is not a reason to stop contact.

Your child needs to:

- Understand what is happening to their family. It is your job to explain.
- Have a loving, open relationship with both parents. It is your job to encourage this. You may be separating from each other, but your child needs to know that he/she is not being separated from either of you.

⁴ See generally Practice Direction 15.13 and the Form J in particular.

- Show love, affection and respect for both parents.

Your child should not be made to:

- Blame him/herself for the break up.
- Hear you running down the other parent (or anyone else involved).
- Turn against the other parent because they think that is what you want.

You can help your child:

- Think about how he or she feels about the break up.
- Listen to what your child has to say:
 - (a) About how he/she is feeling.
 - (b) About what he/she thinks of any arrangements that have to be made.
- Try to agree arrangements for your child (including contact) with the other parent.
- Talk to the other parent openly, honestly and respectfully.
- Explain your point of view to the other parent so that you don't misunderstand each other.
- Draw up a plan as to how you will share responsibility for your child.
- When you have different ideas from the other parent, do not talk about it when the children are with you.

If you want to change agreed arrangements (such as where the child lives or goes to school):

- Make sure the other parent agrees.
- If you cannot agree, go to mediation.
- If you still cannot agree, apply to the court.

If there is a court order in place:

- You must do what the court order says, even if you don't agree with it.
- If you want to do something different you have to apply to the court to have the court order varied or discharged.

Ordinances dealing with children and family breakdown

[5-3]

The Family Court and the High Court have broad jurisdiction to determine questions relating to children where there are disputes between parents, including: custody, care and control, access, maintenance and financial support, and removal/relocation.

This jurisdiction arises under:

- (a) the High Court's inherent jurisdiction (see **Part IV Wardship and Child Protection**);

- (b) the Guardianship of Minors Ordinance (Cap 13) (GMO), where there are disputes between parents and/or guardians;
- (c) the Separation and Maintenance Orders Ordinance (Cap 16) (SMOO), where parents apply for separation or maintenance; and
- (d) the Matrimonial Causes Ordinance (Cap 179) (MCO) and the Matrimonial Property and Proceedings Ordinance (Cap 192) (MPPO), in matrimonial disputes (ie divorce, nullity of marriage, judicial separation, ancillary relief).

Custody, Care and Control, and Access

[5-4]

In Hong Kong, custody refers to the bundle of rights that parents have over their children. This includes the right to make all important decisions affecting the child.⁵

In other words the term 'custody' means making the important decisions about a child's life.⁶

The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child's legal representative.⁷

Where custody (in this wide sense) is assigned to one parent (ie the 'custodial-parent'), the non-custodial parent/guardian still has the right to be consulted on all matters affecting the child.⁸ The non-custodial parent also retains the duty to financially support the child. In the United Kingdom, the neutral term 'child arrangement order' is used to refer to this concept.

Generally, *custody* also includes the right to *care and control*, with which it is unfortunately sometimes confused:

'Custody', however, is capable of bearing a more restrictive meaning; in particular the right to physical possession and control of the infant's movement. This is sometimes referred to as actual or physical custody or 'care and control'.⁹

⁵ See A Liu, *supra*, at 213; HKLRC Report: *Child Custody and Access* (March 2005) at para 2.16; *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165, per HHJ Melloy.

⁶ *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165, per HHJ Melloy.

⁷ *PD v KWW (Joint Custody, Care and Control)* [2010] 4 HKLRD 191, [2010] HKFLR 184, [2010] 5 HKC 543 (CA) at para 31, per Hartmann JA.

⁸ *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165 at para 13, per HHJ Melloy, following *Dipper v Dipper* [1980] 2 All ER 722 (CA, Eng).

⁹ A Liu, *supra*, at 213.

[The] decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline.¹⁰

The person with *care and control* of a child is responsible for:

the day-to-day looking after of the child ie getting the child up for school, making sure that he is fed and watered, that he does his homework and that he has an appropriate structure to his day.¹¹

However, it is possible for a court to order joint-custody, ie shared between parents, but care and control to be placed with only one of those parents. The parent or guardian that does not have *care and control*, or *custody* in the wider sense, is usually given *access* (in the UK: *contact*) to the child and is sometimes referred to as 'the non-custodial parent':

Access is the right of the child to see the non-custodial parent, or in the case of joint custody, the right of the child to see the parent without care and control. The normal order is for reasonable access – and the details are left for the parents to work out between them. Alternatively access can be defined – 'Access is the right to have contact with the child, such as through letters, e-mails, telephone calls, visiting the child, taking him out or having him to stay from time to time'.¹²

When a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent's physical custody. Rights of access, it is to be remembered, are given – in the interests of the child¹³ – to ensure continued bonding between parent and child.¹⁴

Jurisdiction over custody and upbringing of a child

[5-5]

In disputes between parents, the court has powers to award or determine custody, care and control, and access to a child under:

- (a) Section 10(1) of the GMO on the application of any parent, if the court thinks fit having regard to the best interests of the child and to the conduct and wishes of the parents;

10 *PD v KWW (Joint Custody, Care and Control)* [2010] 4 HKLRD 191, [2010] HKFLR 184, [2010] 5 HKC 543 (CA) at para 32, per Hartmann JA.

11 *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165 at para 16.

12 *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165 at para 17.

13 See eg *TE v SH* [2010] 1 FLR 1785 (emotional distress and estrangement from parent caused to child by loss of access).

14 *PD v KWW (Joint Custody, Care and Control)* [2010] 4 HKLRD 191, [2010] HKFLR 184, [2010] 5 HKC 543 (CA) at para 43, per Hartmann JA.

- (b) Section 5(1)(b) of the SMOO, in relation to a child of the marriage, on the application of a married parent, where their spouse and co-parent:
- (i) has committed an aggravated or serious assault against them;
 - (ii) has deserted them;
 - (iii) has been persistent cruelty to them or any of their children;
 - (iv) has failed to provide reasonable maintenance for them or their children or provide for their children's education which they were liable for;
 - (v) has, while knowingly suffering from a venereal disease, insisted on having sex with them;
 - (vi) has compelled them to submit to prostitution; or
 - (vii) is a habitual drunkard or drug addict;¹⁵
- (c) Section 19(1) of the MPPO, in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree, or where such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal,¹⁶ in relation to any child of the family;¹⁷ and
- (d) Section 20(1) of the MPPO, where the court makes a financial order under s 8 of the MPPO (where a spouse has neglected to maintain the other spouse and co-parent or the child), in relation to any child of the family.¹⁸

The court has additional powers to award custody in cases assumption of guardianship and disputes between guardians (ss 11 and 12, GMO).

The court's jurisdiction extends to granting custody of children to strangers¹⁹ with the exception of s 5(1)(b) of the SMOO, which only permits the court to award legal custody to the applicant parent.

15 See s 3(1), SMOO.

16 This only applies in respect of legitimate, illegitimate or adopted children of one or both parties to the marriage: ss 2 and 19(2).

17 'Child of the family' is defined at s 2(1), MPPO to include any child who is treated by both spouses as a child of their family. A child will become a child of the family if treated as such by both parties, even though one or both parents are ignorant of the facts relating to the child's paternity: *W(RJ) v W(SJ)* [1971] 3 All ER 303. However, both parties must treat the child as the 'child of the family': *Dixon v Dixon* [1967] 3 All ER 659.

18 This only applies in respect of legitimate, illegitimate or adopted children of one or both parties to the marriage: ss 2 and 19(2).

19 See *Re R (an infant) (Custody to Non-parent)* [1974] 1 All ER 1033 (DC); *J v C* [1970] AC 668, [1969] 2 WLR 540, [1969] 1 All ER 788 (HL). On the other hand, it must be recognised that the welfare of the minor is in normal circumstances best served by placing him or her with the parents: *Re W (a minor) (Residence Order)* [1993] 2 FLR 625 (CA, Eng). The parents must be shown to be entirely unsuitable before another family is considered: *Re K (a minor) (Wardship: Adoption)* [1991] 1 FLR 57 (CA, Eng).

These powers are wide discretionary powers, but they are not unfettered. The court is required to have regard to the matters set out in s 3(1)(a) of the GMO, ie the paramount consideration of the best interests of the child and the principle of per se equality between the claims of mothers and fathers.²⁰ The court will also normally order the preparation of a social welfare report, which it will be specifically required to consider in making its order (s 3(1)(a)(i)(B), GMO).²¹

However, when parents disagree on a specific question relating to their child's welfare and no other applications are before the court, they can apply to the court for a direction without giving the court the power to determine custody or access.²² Furthermore, and in any event, such powers as to custody and access terminate on the child reaching the age of majority.

Expert evidence and child orders

[5-6]

There is considerable flexibility in the family court's jurisdiction to fashion workable arrangements between parents. Although most cases will be driven by the practical realities of life, there will often be disputes about what is best for the child's development and how orders will affect the child in the long run. To assist the court and the parties in understanding child development and welfare it is common for the court or for the parties to seek expert advice or evidence to consider the likely effect of different applications on children.²³

Assessing the necessity of such reports requires that practitioners should be at least superficially aware of the science of child development. For example, the family practitioner will often hear and will have to understand specialist terms (eg *attachment*).²⁴ In this regard, the authors

20 See eg discussion in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, [2010] HKFLR 184, [2010] 5 HKC 543 (CA), especially at para 27 regarding s 19 of the MPO.

21 As to social welfare reports, see **Part II Practice and Procedure**.

22 Section 4(2) and (3) of the GMO.

23 It is generally preferable for the investigating social welfare officer to consider the contents of such reports before advising the court: *LMM v LKKV (Custody, Care and Control, Access and Shared Care)* [2013] HKFLR 580, [2013] HKCU 2970 at para 45.

24 The psychological theory of the dynamics of long-term interpersonal relationships between humans (principally developed by EJM Bowlby): ie how human beings respond within relationships when hurt, separated from loved ones, or perceiving a threat. In infants, attachment as a motivational and behavioural system directs the child to seek proximity with a familiar caregiver when they are alarmed, with the expectation that they will receive protection and emotional support. The most important tenet of this theory is that an infant needs to develop a relationship with at least one primary caregiver for the child's successful social and emotional development, and in particular for learning how to effectively regulate their feelings. Fathers or any other individuals, are equally likely to become principal attachment figures if they provide most of the child care and related social interaction. In the presence of a sensitive and responsive caregiver, the infant will use the caregiver as a 'safe base' from which to explore.

commend the reader to the entirety of Volumes 49 Issue 3 (2011) and Volume 50 Issue 3 (2012) of *Family Court Review*, which provides a relatively up-to-date discussion of the relevant principles and science.

Sole custody and joint custody

[5-7]

There is no presumption that a child of any age should be living with either parent.²⁵ The normal options for custody orders, as between parents, are: *sole custody*, *split custody*²⁶ and *joint custody*. Superficially, a *sole custody* order purports to vest custody in one parent (together with care and control); a *joint custody* order purports to vest custody with both parents (although usually only one will have care and control); and a *split order* vests daily care and control in one parent and gives custody to the other.²⁷

These terms are not defined by statute and have proved to be highly contentious. In fact, it is right to say that there is currently real concern amongst family law professionals and the judiciary that the statutory framework in Hong Kong, based as it is on outmoded UK law from the 1970s, remains in urgent need of reform.

There is a traditional misperception amongst parents that, if granted sole custody, that parent thereby 'wins' the right to determine all matters big and small in the upbringing of that child while the parent who is not given custody 'loses' the right to have any say in the child's upbringing.²⁸ This misperception may have been fed by the previous usual practice of ordering 'sole custody' (usually to the mother), unless the parents have a relationship which is cooperative and workable and one which enables the arrangements for any child to be reasonably amicably agreed between the parents as and when required.

However, the courts no longer take this approach to custody because of the twin concerns of the interests of the child and gender equality. The recent trend is that the court would generally encourage 'joint custody' unless there are justifiable reasons to depart from this.²⁹ The 'new' approach emphasises 'joint parental responsibility' and the continuing responsibilities of both parents towards their children rather than their individual parental rights.

25 *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332 (CA, Eng).

26 See eg *Dipper v Dipper* [1980] 3 WLR 626, [1980] 2 All ER 722 (CA, Eng). The courts are extremely reluctant to make such an order except in exceptional circumstances: *YLS v TL (Custody and Domestic Violence)* [2009] HKFLR 19, [2009] HKCU 28.

27 See discussion in the HKLRC's report: *Child Custody and Access* (March 2005) at paras 2.26 et seq.

28 *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, [2010] HKFLR 184, [2010] 5 HKC 543 (CA), especially at para 33.

29 See eg *H v A* [2005] HKFLR 304, where the judge believed that the parents in that case would regain the ability to communicate with each other once the custody dispute was resolved.

In the leading case of *PD v KWW (Child: Joint Custody)*,³⁰ Hartmann JA explained that the distinction between sole and joint custody is a fine one:

38. A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.

39. While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter.

40. Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent.

...

52. Today, although there has been no change in our law similar to many other common law jurisdictions, orders of joint custody are in no way exceptional. This is because it is accepted that, in principle, such orders are in the interests of children.

53. In all but the most exceptional circumstances, the effect of divorce on the children of the marriage, especially children of tender years, is deeply felt. In all but the most exceptional circumstances, such children desire that they should continue to be protected and guided by both parents.

54. In the result, in the best interests of the child, the fact that, as a result of the breakdown of the marriage, relations between the parents are strained is not of itself a reason to refuse to make a joint order of custody. Nor is the fact that the parent to be given care and control does not agree. Such orders look to the future. They will govern a limited area of exchange between the parents, albeit one of the greatest importance.

55. Accordingly, the issue for the judge is whether, with the court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on

³⁰ *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, [2010] HKFLR 184, [2010] 5 HKC 543 (CA). This case was the culmination of earlier cases where the court's had become hesitant to order 'sole custody' for fear they would strip the rights of the other parent, see *ML v YJ (Joint or Sole Custody)* [2008] HKFLR 88, approved in *Y v P* [2009] HKFLR 308, [2009] HKCU 1205 (CA).

the questions of importance that will determine the upbringing of their child, both recognising that, as difficult as it may be for them, this process of cooperation is in the best interests of the child.

56. In determining this issue, the judge is entitled to proceed on the presumption that competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child will be able to cooperate with each concerning matters of importance in the upbringing of the child.

57. At all times, of course, the welfare of the child remains the first and paramount consideration. As this Court has recognised (see, for example, *Y v P* [2009] HKFLR 308, [2009] HKCU 1205), there may be occasions when the ability of the parents to reach any rational accord in respect of important matters concerning the upbringing of their child is so deeply undermined that to compel attempts at cooperation will not protect the interests of the child but only leave the child more vulnerable.³¹

A key question is whether parties will be able to cooperate, or whether a joint custody order will lead to argument and discord that will harm the child. In *PD v KWW*, the mother sought sole care and control because she did not want to be disturbed by the father's continuing involvement. The father had sought joint custody. The trial judge ordered joint custody, despite the recommendations of the social welfare officer, and made an order for defined access which included staying access. The Court of Appeal dismissed the mother's on the grounds that the judge was entitled to proceed on the presumption that competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child would be able to co-operate with each other concerning the matters of importance in the upbringing of the child. There was no evidence that their ability to communicate on matters of real importance in the child's life had been destroyed.³²

³¹ For recent application of these principles, see: *FKYP v KHYF* [2013] HKCU 2291 (unreported, FCMC 7952/2012, 28 August 2013) per HHJ Pang; *SKP v Y, ITT (Legal Terminology to be used in Children's Arrangements)* [2012] HKCU 2640 (unreported, FCMC 17772/2011, 12 November 2012) per HHJ Melloy. Such over-arching principles are not, at the present time, enshrined in statute in Hong Kong. However, these views have stemmed from the reforms in the UK under the 1989 Act, which were followed in Australia and more recently New Zealand, and discussed in Hong Kong. See the HKLRC Reports: (1) *Guardianship of Children* (January 2002); (2) *International Parental Child Abduction* (April 2002); (3) *The Family Dispute Resolution Process* (March 2003); (4) *Child Custody and Access* (7 March 2005). This latter report, on custody and access, amongst a myriad of much needed reforms in this area, recommended Residence and Contact Orders, and the replacement of custody with parental responsibility. See also the discussion in *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165, per HHJ Melloy.

³² See also the earlier case of *FHY v GJS* [2008] HKCU 949 (unreported, FCJA 973/2004, 30 April 2008) (DC), where HHJ Chu discussed the terminology of custody, care and control, and access and the importance of joint custody in encouraging parents to overcome their differences. For recent sole custody cases see eg: *RWS v KCC* [2012] HKCU 483 (unreported, FCMC 9661/2010, 20 January 2012), per HHJ Melloy (medical issues requiring single ultimate decision maker);

Joint care and control

[5-8]

HH Judge Melloy in *SKP v YITT*³³ explained,

Consequently, joint care and control denotes a situation where the parties are sharing the day to day practicalities of raising a child. It will normally mean that the child is spending significant periods of time with both parents in each of their homes, but not necessarily on a 50:50 basis. However, the time shared is likely to be more significant than in a standard custody/access type order and will probably mean that the child is spending at least 35% of his time based with each of his parents. One would expect that both parents are involved in the schooling and extracurricular activity schedule and it normally denotes a high level of co-operation between the parents. Consequently, one would normally expect an order for joint custody and joint care and control to be made by consent. However, court intervention to that effect is not precluded. (para. 21)

Shared care distinguished

[5-9]

In some cases joint custody may not be appropriate, ie where it is more appropriate for the ultimate decision making power to vest in only one parent. However, the court may determine that it is in the child's interest for the care of the child to be split to ensure that the child continues to spend significant amounts of time with both parents. In order to recognise this and the fact that the non-custodial parent continues to have a great deal of practical control in the child's day-to-day life, the court will split the care and control of the child. Such arrangements are called *shared care* orders.³⁴ The concept of shared care as an alternative to joint care and control has developed over time. There is no order for access per se. Section 3 of GMO further provides for parents to have equal rights and authority in relation to the custody and upbringing of their children. By s 3(1)(b) '... a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall

ULS v ERJ [2013] HKCU 2455 (unreported, FCMC 16107/2011, 17 September 2013), per HHJ Melloy (small child, serious allegations against father); *CCMJ v SSM* [2013] 3 HKLRD 497, [2013] HKCU 1456 (CA) (joint custody unworkable, overbearing attitude made cooperation wishful thinking). See also *Naziya Aslam v Rafaqat Ali (Custody and Removal)* [2009] HKFLR 294, [2004] 2 HKC 657 (CA) (custody on permanent relocation). For a UK perspective in an intractable residence and contact (custody and access) dispute, see *A v A (Shared Residence)* [2004] 1 FLR 1195, per Wall J, shared care used to recognize the need for cooperation and equality between parents.

33 See *SKP v Y, ITT (Legal Terminology to be Used in Relation to Children's Arrangements)* [2012] HKFLR 422, [2012] HKCU 2640.

34 See *LMM v LKKV (Custody, Care and Control, Access and Shared Care)* [2013] HKFLR 580, [2013] HKCU 2970; *TAC v VDC nee VDM* (unreported, FCMC 16497/2010, 20 June 2012); and *SKP v Y, ITT (Legal Terminology to be Used in Relation to Children's Arrangements)* [2012] HKFLR 422, [2012] HKCU 2640, following *H v H* [2002] HKCU 1053 (unreported, CACV 42/2002, 6 September 2002) (CA). *PJM v GPN* [2018] HKFC 65, FCMC 4999/2014 (shared care and control, child special needs).

be equal and be exercisable by either without the other'. A court should not automatically assume that care and control should be to a mother unless the father shows otherwise. It should be approached on the basis of equality – '*Parental stereotypes have no place today*'.³⁵

Shared care may be implemented by means of alternative parenting arrangements: eg *cooperative parenting*, *parallel parenting* or *separate parenting* – depending upon the nature of the case. For example, to avoid contact between them, the parties may make arrangements for a parallel parenting regime, ie where there is a very high level of conflict between the parents which makes cooperative parenting virtually impossible, but where it is in the child's best interests to spend significant periods of time with both parents. It would be normal in a situation like that to set out very clearly how the child's time is to be split between both parents.³⁶ Although such arrangements do not form part of the order of the court, as such, the court may make an order that supports such arrangements (ie through an order for shared care as opposed to a traditional order for care and control and access).

That said, the Court of Appeal in England and Wales continues to exercise a note of caution when it was stated as follows:³⁷

56. It is still the case that 50/50 shared care arrangements between parents are comparatively rare in private law children cases. Research shows that a number of factors have to be in place, practical matters such as the close geographical proximity, but, above all, the couple have to be on reasonable or good terms so that the to and fro of everyday life for a child is accommodated without undue emotional fallout.

57. There is no longer any need, because of the change in the legislation, to impose a 'shared' order under section 8. Both parents have equal status. So a division of time 50/50 will remain, in my view, a rare order and only to be contemplated where there is some confidence that it will not work to the disadvantage of the child, albeit that the aim is to give good quality and substantial time with each parent. Given her findings of fact, I cannot see how the judge could contemplate a shared care arrangement of the type that she endorsed here.

In *SKP v YITT*, HH Judge Melloy sets out a whole array of different orders, which include:

- (1) custody and care and control to one parent and reasonable access to the other;
- (2) joint custody with care and control to one parent and reasonable access to the other;
- (3) joint custody and joint care and control to both parents;

35 *H v H* [2002] HKCU 1053 (unreported, CACV 42/2002, 6 September 2002) (CA).

36 See eg *RWS v KCC* [2012] HKCU 483 (unreported, FCMC 9661/2010, 20 January 2012). See also *N v W* [2017] HKCU 1432 (unreported, FCMC 5026/2015, 28 April 2017) where the court adopted a '2/2/5/5' shared care and control split, thus demonstrating some innovation and flexibility in terms of possible orders.

37 *In the matter of M (A Child)* [2014] EWCA Civ 1755 (CA, Eng).

- (4) sole custody to one parent and shared care;
- (5) joint custody and shared care;
- (6) it is also possible to make an order for joint custody and to be silent on care and control/access/shared care;
- (7) in addition, as intimated above, it is also possible to make a whole array of orders with respect to access. (see para 19).

Access

[5-10]

The parent or party that does not have care and control or custody of the child, has 'access'³⁸ which is either described as reasonable or defined access. This may be visiting or staying access. Usually staying access is encouraged to enable the child or children to have a meaningful relationship with both parents. However, the court has a broad power to fashion an access order to suit the circumstances.³⁹

Reasonable access means that the parties are left to determine the specifics of when, how and where access takes place. If no agreement can be reached, the parties may apply to court for directions.

Defined access means access defined by order of court, and may include:

- (a) *Visiting access*, meaning that parents and children spend time together without staying overnight.
- (b) *Staying access*, meaning that children are permitted to stay with the parent overnight.
- (c) *Supervised access*, meaning access supervised by a third party. The third party may be, for example, a representative of the Social Welfare Department. However:

18. It is open to the court to ask for arrangements to be supervised by the social welfare department. This can be very intrusive, for example where access takes place within the confines of a Social Welfare Department office. Or it can simply be that the social welfare office provides back up from time to time and intervenes as appropriate. The court may ask for a progress report. This means that the court is kept in the picture regarding any particular arrangements and can ascertain whether they are working effectively, with a view to bringing the parties back if necessary.⁴⁰

Access is fundamental to the rights of the child and the parents. It is only in very exceptional circumstances that a parent will be denied access. A

³⁸ This is perhaps better described as parental 'contact'.

³⁹ See eg *Wong Chiu Ngar-chi v Wong Hon-wai* [1987] 2 HKLR 179, [1987] HKCU 158.

⁴⁰ *S v Z*, reported as *SEB v ZX (Custody)* [2007] HKFLR 165, per HHJ Melloy.

total failure or obstruction by the parent with care and control may result in the court reverting care and control to the other parent to preserve access.⁴¹

Access will only be refused if it offends the welfare of the child, which is the paramount consideration. In *G v G* (1981) 11 Fam Law 148 (CA, Eng), a transsexual father was granted access to his daughter so long as he dressed in a way which did not unduly confuse the child about her father's present role, and so long as he did not bring along his friend who was posing as the father's 'husband'. In *Re B (Minors) (Access)* [1992] 1 FLR 140 (CA, Eng), a father's eccentric and bizarre non-violent conduct was held not to justify the refusal of access. A father's right of access to an illegitimate child should be governed by the same principle; and relying on the same principle, it is possible that access may be granted to a non-parent third party, as long as this serves the welfare of the minor.⁴²

International contact (access)

[5-11]

For cases concerning access to children that involves temporary removal of the child to another jurisdiction, see below 'Temporary Removal'. See also the Permanent Bureau of the Hague Conference on Private International Law's guide to good practice for the courts in international contact (or access) cases titled 'Transfrontier Contact Concerning Children'.⁴³

Alternative parenting arrangements (and high conflict cases)

[5-12]

Each divorce is unique and has its own distinctive circumstances. Sometimes matters can be settled amicably, other cases will be more contentious. Although it is preferable for parties to work out matters amicably, with the minimum of court intervention, this is not always possible. In particular, disputes regarding children can be particularly belligerent where the inter-parent relationship has deteriorated – resulting in real risks to the mental or physical welfare of the child. Such cases are known as 'high conflict cases'.

High conflict cases need early and special attention, intervention and assessment by the courts, as delay and instability can be a danger to the child (see **Part II**, especially at **CDR – Child Dispute Resolution**). In such cases, the court will be especially vigilant to ensure that it and others (eg Social Welfare Officers) are perceived as fair.⁴⁴ In such cases, the

⁴¹ See eg *Re S (Child)* [2010] EWCA Civ 219.

⁴² *Re R (an infant) (custody to non-parent)* [1974] 1 All ER 1033.

⁴³ Available at <http://www.hcch.net/upload/guidecontact_e.pdf>.

⁴⁴ See eg *LMM v LKKV (Custody, Care and Control, Access and Shared Care)* [2013] HKFLR 580, [2013] HKCU 2970 at para 51 (social welfare officer did not conduct home visit with the mother).

courts have sought to defuse conflicts by means of non-traditional orders that support non-traditional parenting arrangements.⁴⁵

(1) Parenting arrangements

[5-13]

Broadly speaking, parenting arrangements actively involving both parents may be classified into *cooperative parenting*, *parallel parenting* or *separate parenting*. These concepts are often discussed before the courts, implicitly or explicitly.⁴⁶ It is, therefore, helpful for practitioners to understand the distinction between these arrangements (see table below):

Cooperative Parenting	Parallel Parenting	Separate Parenting
Child Focused	Adult Focused	Adult/Third Party Focused
Parents communicate regularly	Parents communicate over emergencies	Parents communicate through third party only
Parents able to communicate in person or over the telephone	Parents communicate via email/third party/parenting notebook	Parents use email filtered through or only sent to third party (eg Parenting Coordinator). Messages are never sent directly
Major decisions are jointly discussed	Major decisions are communicated rather than discussed	Major decisions handled through third party. When agreement is impossible, decided by third party (by contract or court intervention)
Parents work together to resolve issues related to the child	Households are separate: each make decisions about child when in that household	Third party communicates with each parent to align schedules and routines
Smooth transitions	Transitions require third party assistance or neutral locations	Transitions at neutral sites with supervision (eg police station, Social Welfare offices) or done by third parties
Allowance for schedule change flexibility	Written parenting plan/court orders followed precisely. Parents need external authority	Absolutely no flexibility, parenting plans written with specificity and followed exactly. Parents may not plan activity during other parent's time

⁴⁵ See *SKP v Y, ITT (Legal Terminology to be Used in Relation to Children's Arrangements)* [2012] HKFLR 422, [2012] HKCU 2640 and *RWS v KCC* [2012] HKCU 483 (unreported, FCMC 9661/2010, 20 January 2012).

⁴⁶ See eg regarding parallel parenting: *TWC v LKL* [2014] HKCU 194 (unreported, FCMC 8460/2012, 12 December 2013); and *SKP v Y, ITT (Legal Terminology to be Used in Relation to Children's Arrangements)* [2012] HKFLR 422, [2012] HKCU 2640.

Cooperative Parenting	Parallel Parenting	Separate Parenting
Parents able to discuss issues between other parent and child	Each parent is responsible for own relationship with child	Each parent handles own relationship with child. Consultation with other parent is done through third party

The 'No Order' principle

[5-14]

The prospect of the court making 'No Order' has been mooted in Hong Kong. This was based on the practice in the UK, and the proposition that it may be in the interests of the child for the court to make no order. This approach, in respect of matrimonial cases, was rejected by the Family Court in *S v Z*,⁴⁷ per HHJ Melloy:

19. Before I leave the issue of terminology I should perhaps also address the no order principle ... There is under the English Children Act 1989, a no order principle. This is however based on the premise, also set out under the act, that both parties on a divorce retain joint parental responsibility. This is not the case in Hong Kong. Consequently in the vast majority of cases the courts in England and Wales will not intervene in the parties own arrangements in relation to their children. It is left to them to continue to parent and to make decisions for their children as they deem appropriate post divorce. This includes access arrangements. The court only intervenes if there is a problem. The remedies include 'contact' (or what we might term access) and 'residence' (ie care and control).

20. The Law Reform Commission has referred to the no order principle in recommendation 30 of its report where it said as follows:

'We recommend that the option of 'no order' should be available where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child.'

21. This provision does not exist in Hong Kong legislation at present. ...

22. There are, it is true, certain circumstances where the court is unable to make an order in relation to children. For example where the petitioner does not know where the child of the family is and there has been no contact for a number of years. In those circumstances the court makes 'no order' and the s 18 declaration [MPPO] reads as follows:

'I am satisfied that it is impractical for the petitioner appearing before the court to make any arrangements for the child (children) of the family and I accordingly make a declaration in accordance with section 18 of Cap 192 to this effect.'

23. Otherwise, it seems to me that the court is rightly or wrongly duty bound to make an order.

However, no higher court has examined this question and there is reason

⁴⁷ Reported as *SEB v ZX (Custody)* [2007] HKFLR 165.

to doubt its force. In the first place, the powers set out in the relevant legislation use the discretionary language that 'the court may make such order as it thinks fit'.⁴⁸ As such, the correct approach should be according to the Welfare Principle. If in the circumstances of a case the child's best interest requires that no order be made, the court should make no order.⁴⁹

In any event, this jurisdictional quandary may not apply in non-divorce cases. In matrimonial cases, s 18(1)(b) requires the court to make arrangements for children before the conclusion of matters. In proceedings that do not involve orders for divorce, nullity of marriage, or judicial separation, it appears that the court's power to make an order is purely discretionary.

Relocation and removal from jurisdiction

[5-15]

It is common in Hong Kong for parents, on family breakdown, to want to remove their children from the jurisdiction permanently (ie for relocation) or temporarily (eg for holidays). However, this should not be done in breach of an order of the court⁵⁰ or the applicable statutes. So, for example, if the court has awarded access or care and control to the other parent who has not consented to the removal, which would defeat that parent's rights under the court order, it would be unlawful for the parent to remove the child without leave of the court.

The Family Court and the High Court considering a family matter involving a child have inherent⁵¹ and statutory⁵² jurisdiction to prevent an unlawful removal of a child⁵³ or give leave for such removal. The paramount concern in all such cases is the best interests of the child.⁵⁴

⁴⁸ See eg s 19(1), MPPO.

⁴⁹ For discussion of the origin of this principle, see *Dawson v Wearmouth* [1999] Fam 378 (CA, Eng), [1999] 2 AC 308, [1999] 2 All ER 353 (HL) ('... [the court should] not make an order for the change of name unless there is some evidence that this would lead to an improvement from the point of view of welfare of the child', per Lord Mackay of Clashfern. 'If he fails to make out that *positive* case, his application will fail', per Lord Hobhouse) (cited in *Re X and Y (leave to remove from jurisdiction: no order principle)* [2001] 2 FCR 398, [2001] 2 FLR 118 by Munby J as the origin of the principle). However, see also *Re H (children) (residence order: condition)* [2001] EWCA Civ 1338, [2001] 3 FCR 182, [2001] 2 FLR 1277 (CA, Eng), per Thorpe LJ at para 19 ('... I do not consider that these dicta will bear the weight of the edifice that Munby J sought to build on them'). See also *Re C (a child) (HIV testing)* [2000] Fam 48, [2000] 2 WLR 270, [1999] 3 FCR 289, [1999] 2 FLR 1004 (permission to appeal refused by the Court of Appeal).

⁵⁰ Eg orders giving another parent rights (custody, care and control, or access) that would be defeated by the removal; or an order under s 21 CACO (Cap 512) (non-removal order).

⁵¹ See above, **Part IV Wardship and Child Protection, 'Inherent Jurisdiction and Wardship'**.

⁵² See s 10, GMO and s 19, MPPO.

⁵³ See eg r 94(2), MCR.

⁵⁴ Section 3(1)(a)(i), GMO.

Non-removal applications

[5-16]

See below, **Part V Abduction, 'Non-Removal and Rule 94 Orders'**.⁵⁵

Relocation (permanent removal)

[5-17]

Pursuant to s 19 of the Matrimonial Proceedings and Property Ordinance (Cap 192), the court has jurisdiction to make such order as it thinks fit for the custody and education of any child who is under the age of 18 in any proceedings for divorce, judicial separation or nullity. When making a custody order, the court will usually direct that the child may not be removed from Hong Kong without leave.⁵⁶ Where an application for formal leave to remove (permanently) is considered, the Hong Kong courts continue to rely on the guidance provided by the English authorities⁵⁷ and particular reference is regularly made to both *Poel v Poel*⁵⁸ and (now the leading case on this issue) *Payne v Payne*⁵⁹. The Family Court is bound by its own Court of Appeal's decision in *SMM v TWM*⁶⁰ which re-affirms Hong Kong's reliance on these authorities.⁶¹ Since then the Court of Appeal in England and Wales has handed down its most recent decision on relocation namely *MK v CK*⁶² which reiterates that in all cases concerning children the relevant principle is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child:

the principle – the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount

⁵⁵ See also O 90, r 10, RDC.

⁵⁶ Removal of a Child out of Hong Kong – the Matrimonial Causes Rules (Cap 179A), r 94(2) was repealed on 5th April 2014. The reason for the repeal is because on the same date the Child Abduction and Custody Ordinance (Cap 512) (CACO) was amended to reflect recommendations in the LRC Report on 'International Parental Child Abduction'. There are many substantial amendments to the CACO, including Location Orders (s 15) Mirror Orders (s 16) Recovery Orders (s 17) and Prohibition Orders (s 21). Of course, most of the amendments attach to Hague applications for unlawful removal. However, the frequently used ex-parte application under MCR r 94(2) on prevention of removal of a child from Hong Kong now arises under Part 3, s 21 CACO (Cap 512) as amended.

⁵⁷ See Patrick Siu 'The Law on Relocation of Children: Bringing about Change', *Hong Kong Lawyer*, 15 February 2012.

⁵⁸ *Poel v Poel* [1970] 1 WLR 1469.

⁵⁹ *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1053.

⁶⁰ *SMM v TWM* [2010] 4 HKLRD 37, [2010] HKCU 1263. See for example *RK v YS* [2015] HKCU 141 (unreported, FCMC 4931/2012, 6 January 2015) and *TWAMA v T, TJ-PF* (unreported, FCMC 13094/2012, 14 November 2014).

⁶¹ Even earlier, in *K v W (Children – Removal from Jurisdiction)* [2006] 2 HKFLR 292, Hartmann J (as he then was) held (at 296) that *Payne* 'correctly reflects the law as it is' in Hong Kong. See also *Re A: Letter to a Young Person* [2017] EWFC 48, an extraordinary and inspired judgment from Mr Justice Peter Jackson, sitting in the Family Division on an application (by father) for removal of a 14-year old boy from UK to Scandinavia.

⁶² *MK v CK* [2011] EWCA Civ 793 (CA, Eng).

consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child. (Lady Justice Black, paragraph 141).⁶³

Although, in *MK v CK* there is a common thread running through each of the three judgments delivered by Thorpe, Moore-Bick and Black LJ (ie the guidance in *Payne* is subordinate to the welfare paramountcy principle), the three judges viewed the *Payne* principles in distinctive ways. It is this difference in their reasoning that, some have argued, might pave the way for and appeal to the CFA at some point.⁶⁴

Wall LJ pointed out in *Re D (Leave to Remove: Appeal)* [2010] 2 FLR 1605, that there had been considerable criticism of *Payne*. The decision of *Payne* was said to be controversial, at least in some quarters, for arguably perpetuating a covert presumption in favour of relocation, at least where the application was made by the child's primary carer. However any judicial reservations in *Payne* were further clarified by Moore-Bick LJ in *K v K* [2012] Fam 134. In that case, Moore-Bick LJ opined that the controversy was the result of a failure to distinguish clearly between legal principle and guidance, and that the only principle of law enunciated in *Payne* was that the welfare of the child was paramount; all the rest was guidance. In the same case, Black LJ (as she then was) also stated that the only authentic principle that ran through the entire line of relocation authorities was that the welfare of the child is the court's paramount consideration.⁶⁵

In *ZJ v XWN (Leave to Appeal: Child Relocation)* [2018] HKCU 2484, [2018] 3 HKLRD 644, [2018] HKCA 436 (Lam V-P and Bebe Chu J) the Court of Appeal agreed with Vos LJ in the decision of the English Court of Appeal *In re C (A Child)* [2016] Fam 253, where it was reiterated that the only test that the court applies is the paramountcy as to the welfare of the child. His Lordship further said at [82] and [83]:

82. ... The application of that test involves a holistic balancing exercise ... The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.

83. ... Whilst the *Payne* factors may still be of some utility in some cases, they are no part of the applicable test or the applicable principles. In some circumstances, the judge may find them useful. In others, the judge may not. If the judge finds them a useful guide to some of the factors that he should consider, he will be doing so only as part of the multi-factorial balancing exercise that is required.

⁶³ Black LJ at paragraph 141.

⁶⁴ Patrick Siu *op cit*.

⁶⁵ See Mostyn J in *Re TC and JC* [2013] 2 FLR 484 at para 10.

The CA continued '*In re C (A Child)*, supra, was a case which concerned an internal relocation. As seen in the case, there are different statutory provisions in the Children Act 1989 governing (i) removal from UK where there is a child arrangements order in place and removal is restricted and (ii) removal where there is no child arrangements order and so no automatic restriction. Black LJ (as she then was) said that although the welfare checklist is not imported into the decision making process for a s 13 application [8], the courts have nonetheless treated it as if it were, expecting that it will be used. Black LJ has said that this is sensible and unsurprising because the welfare checklist 'is a useful aide memoire and because any other approach would lead to an artificial situation in which the outcome of a case might depend upon the precise form of the application made initiating it ...'. On the utility of the guidance in *Payne*, Black LJ said at:

[26]: ... The only principle to be applied when determining an application to remove a child permanently from the UK is that the welfare of the child is paramount. Guidance from the Court of Appeal as to factors to be weighed in the search for what is in the best interests of the child, such as that in *Payne v Payne*... is valuable in so far as it helps judges to identify factors which are likely to be of importance but it is not to be applied rigidly. ...

Bodey J, the third member of the English Court of Appeal in *In re C (A Child)*, supra, also emphasised at [85] sub-paragraph (c) that 'helpful though the *Payne* guidance is, it should not be regarded as a prescriptive blueprint.'

The CA concluded that: 'We respectfully agree with the above comments in *In re C (A Child)*, supra, on the guidance from *Payne*. We are further of the respectful view that the observations of Cheung JA in *SMM v TWM* based on *Payne* should be read in light of these comments.'

Nevertheless, the Family Court is currently bound by the approach taken by Lord Justice Thorpe in *Payne*, who suggested that relocation cases should be approached in the following manner:

(40) ... To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's [father's] proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

- (a) Pose the question: is the mother's [father's] application genuine in the sense that it is not motivated by some selfish desire to exclude the father [mother] from the child's life. Then ask is the mother's [father's] application realistic, by which I mean, founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father's [mother's] opposition; is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him [her] and his [her] future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal [paternal] family and homeland?

- (d) Garnishee order;
- (e) Charging order;
- (f) Appointment of a receiver; and
- (g) Committal.

Other types of orders include: orders for land (writ of possession, writ of sequestration and committal) and order for delivery of goods (writ of delivery, writ of sequestration and committal). Orders for access to a child may be enforced by *Hadkinson* order (see **Hadkinson orders** below) or committal for contempt of court.

Time limits

[8-2]

Parties may not bring fresh action on a judgment after 12 years.¹ However, it has been held that applications for enforcement are not fresh actions, but matters of procedure, and the time limit does not apply to enforcement.² However, parties should be aware that many methods of enforcement are subject to the court's discretion, of which delay may be a factor.

Undertakings

[8-3]

An undertaking is a formal promise given by a party to the court. They are considered essential to the efficient operation of our judicial system³, and may be enforced in the same ways as a court order⁴ (including by committal, *Hadkinson* order, and judgment summons⁵). Undertakings are particularly common in family cases since they do not involve the time, expense or risk of trial and judicial findings of fact. They also provide the court with a means of encouraging conduct it would not otherwise be able to order without a party's consent (such as medical or psychiatric treatment⁶).

Undertakings may be express or implied. Parties are bound by an implied undertaking not to disclose, or use for a collateral purpose,

1 Limitation Ordinance (Cap 347) s 4(4).

2 *National Westminster Bank v Powney* [1991] Ch 339, [1990] 2 All ER 416 (CA, Eng); *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897 (HL).

3 *Lau Koon Foo v Champion Concord Ltd & Anor* (2011) 14 HKCFAR 837, [2012] 1 HKC 467 (CFA).

4 *Gandolfo v Gandolfo* [1981] QB 259; *Symmons v Symmons* [1993] 2 FCR 247; *Hussain v Hussain* [1986] 1 All ER 961, [1986] Fam 134 (CA, Eng) at 139–140, per Donaldson MR; *Roberts v Roberts* [1990] 2 FLR 111 (CA) at 113D–E per Butler-Sloss LJ; *Milburn v Newton Colliery Ltd* (1908) 52 Sol Jo 317; *Khoo Ee Liam v Chen Aun Li* [2014] HKCU 1513 (unreported, HCMP 3449/2013, 24 June 2014) (CFI).

5 *Symmons v Symmons* [1993] 2 FCR 247.

6 *Harris v Harris* [2001] Fam 502 at para 10, per Munby J (reversed on appeal on different grounds).

documents obtained on discovery without leave of the court.⁷ This extends to documents obtained voluntarily as part of the duty of full and frank disclosure in ancillary relief proceedings⁸ (though not to documents read in open court⁹).

When an undertaking is offered, the judge should explain what an undertaking is, what the consequences are of breaking it and what the particular undertaking means. All of this needs to be done in ordinary non-technical language. Having done this, the judge should satisfy himself that the 'undertaker' has understood the terms of the undertaking. If the judge is not satisfied he should refuse to accept the undertaking. The person giving the undertaking should be required to sign the undertaking in writing before leaving the court.

The procedural requirements for enforcing an undertaking are not as strict as for a court order, as the Rules of the High Court (Cap 4A) (RHC) do not apply directly.¹⁰ A person giving an undertaking is presumed to know what he is doing, and it may be enforced by way of committal although no penal notice has been served.¹¹ Undertakings need not be recorded in a court order, however it is prudent to reduce them to writing (preferably within a court order) and serve them on the undertaker.

Undertakings are also simpler to vary than court orders, and the court has the discretion to revoke or modify an undertaking at any time upon good cause being shown.¹²

Execution of documents

[8-4]

Where a party fails to comply with an order to sign an instrument transferring property, the court can simply direct that it be signed by the Registrar of the High Court. This is usually done under s 26(a) Matrimonial Proceedings and Property Ordinance (Cap 192) (MPPO) to enforce: (a) transfer or sales of property under ss 6 and 6A MPPO; or (b) secured payments. The court may also defer the grant of a decree (for divorce, nullity or judicial separation) until the instrument has been executed,¹³ retaining its jurisdiction to order maintenance pending suit.

The terms of the deed must be clear so that title passes according to the court order.¹⁴ The court retains the power to order a deed to be rectified¹⁵

7 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, [1982] 1 All ER 532 (HL); *SJ v Florence Tsang Chiu Wing & Ors* [2014] HKCU 2546 (unreported, FACV 5/2014, 6 November 2014) (CFA); *Omar v Omar* [1995] 3 All ER 571.

8 *Clibbery v Allan* [2002] 1 All ER 865 (CA, Eng).

9 RHC O 24 r 14A.

10 *Hussain v Hussain* [1986] 1 All ER 961, [1986] Fam 134, per Donaldson MR.

11 *Winner Food Products Ltd v Chung Yat-ming* [1998] 1 HKLR 371, [1988] HKC 473.

12 *In re Hudson, Hudson v Hudson* [1966] 2 WLR 398, at 400E–401C; *Mid Suffolk District Council v Clarke* [2006] EWCA Civ 71.

13 MPPO s 26(b).

14 *Liu Kin Leung v Tsang Mi Ling* [2000] HKCU 422 (unreported, HCMP 7660/1999, 20 June 2000) (CFI).

15 *Burroughes v Abbott* [1922] 1 Ch 86.

or varied.¹⁶ Parties should note that there are similar powers in the District Court and the Court of First Instance¹⁷ for use under other statutory orders,¹⁸ and should be careful to make an application to the correct court.¹⁹

Arrears

[8-5]

Parties should be aware of the difficulties in collecting ancillary relief payments in arrears once significant time has passed. Arrears of judgment interest are not recoverable at all after 6 years,²⁰ and leave is required to claim arrears of ancillary relief ordered under the MPPO after more than 12 months²¹ (although not for foreign judgments).²²

The application for leave to claim arrears of ancillary relief is generally made in the enforcement process by inclusion in a judgment summons, although it may also be made by free-standing summons. Leave may be granted on such conditions as the court thinks fit.

As a matter of practice, leave will not be granted to claim arrears of ancillary relief outstanding for more than 12 months, unless good reason or 'special circumstances' exist.²³ The burden is on the payee to prove such circumstances exist,²⁴ and the fact that the payer is irregular or reluctant is not by itself sufficiently special circumstances.²⁵ An inability to obtain legal advice occasioned by the arrears may be sufficient.²⁶

Transfer of proceedings

[8-6]

Enforcement of any order made by the District Court in matrimonial proceedings may be transferred to the Court of First Instance, upon an application made ex parte by affidavit. The application is made to the registrar of the District Court, who must be satisfied that the order cannot conveniently be enforced in the District Court.²⁷

16 MPPO s 11(3).

17 District Court Ordinance (Cap 336) (DCO) s 38A and High Court Ordinance (Cap 4) (HCO) s 25A.

18 Such as applications to set aside transactions under s 17(1)(b) and (c), MPPO.

19 *Lai Yin Fun v Wong Fai Kun* (unreported, HCMP 7967/1999, 28 November 2000) (CFI).

20 Limitation Ordinance (Cap 347) s 4(4).

21 MPPO s 12(1).

22 *CY v PYKC* [2005] HKCU 1819 (unreported, FCMP 31/2005, 25 November 2005) (DC).

23 *CSL v WWK* [2006] 1 HKFLR 518, [2004] HKCU 226 (CA); *K v K* [2005] 1 HKC 303 (CFI); *C v S (Maintenance Order: Enforcement)* [1997] 3 FCR 423, [1997] 1 FLR 298.

24 *L v C* (unreported, FCMC 11799/1996, 8 November 2012) (DC).

25 *CSL v WWK* [2004] HKCU 226 (unreported, CACV 278/2003, 25 February 2004) (CA); *Russell v Russell* [1986] 1 FLR 465; and *Dickens v Pattison* [1985] FLR 610.

26 *Arif v Anwar* [2014] EWHC 4669 (Fam).

27 Matrimonial Causes Rules (Cap 179A) (MCR) r 91(1).

Setting aside for fraud

[8-7]

Generally, where a final judgment for financial relief has been made, and a party seeks to challenge it on the ground that it was obtained by fraud, misrepresentation or lack of full disclosure, the only way of doing so is by appeal or by bringing a fresh action to set the judgment or order aside.²⁸

Stays of execution

[8-8]

Enforcement action may be stayed under certain circumstances: (a) pending appeal to the Court of Appeal;²⁹ (b) on the basis of material matters that have occurred since the judgment (under O 45 r 11);³⁰ or (c) on a writ of *fieri facias*.³¹

The court has unfettered discretion to grant a stay of execution pending appeal. However, it will generally be reluctant on the principle that a party should not without good reason be deprived of the fruits of their judgment. In exercising its discretion, the court will balance prejudice to each of the parties. The main factors considered by the court are the merits of the appeal and whether a stay would render the judgment nugatory.³²

There are similarly strict criteria for granting a stay from on the basis of new matters since the judgment. The matters must go to the validity of the judgment, and be such that they might have prevented judgment being given.³³

A stay of execution of a writ of *fieri facias* may be granted where the judgment debtor shows:³⁴ (a) 'special circumstances'; or (b) that he is unable to pay.³⁵ This stay does not apply to other methods of enforcement.³⁶ The special circumstances considered must relate to enforcement of the judgment³⁷ (not the validity of the judgment). The application for a stay may either be made at the time judgment is given, or later by summons with supporting affidavit.³⁸

28 *de Lasala v de Lasala* [1980] AC 546, [1979] 2 All ER 1146 (PC); *Robinson v Robinson* [1982] 2 All ER 699, [1983] 4 FLR 102 (CA); *Lui Sik-kuen v Lee Suk-ling* (1992) 2 HKLR 371, [1992] HKCU 464 (CA).

29 Rules of the High Court (Cap 4A) (RHC)/Rules of the District Court (Cap 336H) (RDC).

30 RHC/RDC O 45 r 11.

31 RHC/RDC O 47 r 1.

32 *Star Play Development Ltd v Bess Fashion Management Ltd* [2007] 5 HKC 84 (CFI), per Ma J (as he then was).

33 *Tam Ho Man v Wong Kwok Tai* [1986] HKCU 154 (unreported, HCA 4736/1985, 20 October 1986) (CFI); *Wellstech International Ltd v Earntruth Ltd* [1999] HKCU 649 (unreported, HCA 21682/1998, 4 June 1999) (CFI); *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321, [1968] 1 All ER 372.

34 RHC/RDC O 47 r 1(1).

35 *Sanyo Electric Trading Co Ltd v Leung Kwok Hing* [1993] 1 HKLR 253, [1992] 2 HKC 509.

36 *Kwangtung Provincial Bank v Cheung Tin Ming* [1992] 1 HKC 344.

37 *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295 (CA).

38 RHC/RDC O 47 r 1.

JUDGMENT SUMMONS & ORAL EXAMINATION

[8-9]

Judgment debtors can be ordered to attend an 'oral examination', to answer questions from the judgment creditor and the court. The court then has the power to commit the judgment debtor to prison for up to 3 months³⁹ (see **Post examination powers and committal** below). The application is called a 'judgment summons', and it is the most common form of enforcement in the Family Court.

Judgment summons is the most common method for enforcing orders for child and spousal maintenance, particularly when there is a lack of information on the debtor's assets and income. Although this chapter focuses on judgment debts (ie orders to pay money),⁴⁰ the process also applies to non-money orders.⁴¹

There are two separate methods for oral examination contained in the rules of court: O 48⁴² and O 49B.⁴³ There are important differences between the two and parties should carefully consider which is the more appropriate for their purposes. In addition, when the order is to pay money under the MCO or the MPPO (ie for a lump sum, for periodical payments, or for costs), the O 48 regime is modified by the MCR (rr 87–88).

Judgment summons is considered a draconian procedure as it may result in imprisonment (see Bill of Rights concerns below). It has been said that it should only be invoked as a last resort in the Family Court,⁴⁴ and that parties should first consider whether less draconian procedures are appropriate.⁴⁵ It is thought that the court will be more reticent when the order to be enforced is for access to a child that it would be for financial orders. The reason is that, unless the debtor spouse has valuable assets in the jurisdiction, there are few other options available to the judgment creditor spouse.⁴⁶

Order 48 or Order 49B?

[8-10]

The O 48 procedure (as modified by the MCR) is the most common form of judgment summons. It has three main advantages over the O 49B procedure:

- (a) It is available for non-money orders;⁴⁷

39 RHC/RDC O 49B r 1B(1).

40 RHC/RDC O 48 & 49B, MCR r 87.

41 RHC/RDC O 48 r 2.

42 The O 48 procedure is modified by MCR rr 87–88 where the order is under the MCO or MPPO.

43 RHC O 59 r 13, RDC O 58 r 3.

44 *Malcolm Ernest Gray v Diane Cary Barber Servino* (2001) 4 HKCFAR 419, [2001] 3 HKLRD 842, [2001] HKCU 1273 (CFA); *L v L (Ancillary Relief – Enforcement)* [2007] HKFLR 121 (CA); *X v Y* [2005] HKFLR 267 (CFI).

45 *CYM v YML* [2013] 1 HKLRD 701, [2012] HKCU 2541 (CA); *Ansah v Ansah* [1977] Fam 138 (CA).

46 *Zuk v Zuk* [2012] EWCA Civ 1871 (CA), per Thorpe LJ at para 16.

47 RHC/RDC O 48 r 2.

- (b) It applies to officers⁴⁸ of corporate bodies as well as natural persons;⁴⁹
- (c) The court may impose a suspended sentence of imprisonment (for applications under the MCR).⁵⁰

The chief advantages of the O 49B procedure are as follows:

- (a) The judgment debtor may be arrested and brought to court for the examination;⁵¹
- (b) The court may make a prohibition order before the examination;⁵²
- (c) The judgment debtor may be arrested if he fails to attend the examination;⁵³
- (d) The scope of the examination is wider (O 49B: full disclosure of all assets, liabilities, income and expenditure and of the disposal of any assets or income);⁵⁴
- (e) There is wider provision for discovery (such documents or records as the court may specify);⁵⁵
- (f) The court may order imprisonment or a prohibition order if the hearing is adjourned.⁵⁶

Warrant for arrest

[8-11]

Where the court orders the arrest of the judgment debtor under the O 49B process, it must be executed by a bailiff. Solicitors should provide the bailiff with a copy of the warrant, their contact details, and any instructions to the Immigration Department to put the judgment debtor on the Watch List.⁵⁷

The Order 48 process (under the Matrimonial Causes Rules)

[8-12]

The O 48 process (as modified by the MCR) must be conducted in open

48 'Officer' is to be construed widely as anyone actively concerned in the management or direction of a company, see *Toppan Printing Co Ltd v Champion Dragon Development Ltd* [1985] HKC 371; *Sano Screen Manufacturers Ltd & Anor v J&R Bossini Trading Ltd* [2001] 3 HKC 465 (CA).

49 RHC/RDC O 48 r 1(1).

50 MCR r 87(6).

51 RHC/RDC O 49B r 1(1)(b).

52 RHC/RDC O 49B r 1(2).

53 RHC/RDC O 49B r 1(3).

54 RHC/RDC O 49B r 1A(2); cf. RHC/RDC O 48 r 1(1) and MCR r 87(2), requiring the judgment debtor to answer 1) whether and what debts are owed to them, and 2) whether and what means or property they have.

55 RHC/RDC O 49B r 1(1)(a); cf. RHC/RDC O 48 r 1(1) and MCR r 87(2), requiring discovery or relevant books or documents in the possession of the judgment debtor.

56 RHC/RDC O 49B r 1A(3).

57 Practice Direction 12.1 'Warrants of arrest of judgment debtors'.

court. The judgment summons should not be dealt with until any other outstanding substantive applications have been heard.⁵⁸ The hearing must be before a judge⁵⁹ (unlike the unmodified O 48 and O 49B processes which are typically before masters⁶⁰).

The judgment creditor may enforce any order for payment of money under the MPPO and the MCO (ie lump sums, periodical payments and costs). They may also enforce claims for interest and a surcharge for arrears of maintenance (under the GMO,⁶¹ the SMOO,⁶² the MPPO, and the MCO).

The MCR rr 87 and 88 process is not available for the underlying amounts due under the GMO or the SMOO, which appears to be oversight by the legislature. The gap is filled by a nearly identical process (that also applies to the MO(RE)O⁶³), under O 90A RDC.

There are 3 steps required to commence the O 48 process (as modified by the MCR):

- (a) The judgment creditor applies ex parte by affidavit (setting out the amount due and how it was calculated, and exhibiting the defaulted order),⁶⁴ and Form 22 (Praecipe for Issue of Judgment Summons);⁶⁵
- (b) The judgment summons order is drawn up in Form 23 (with penal notice);⁶⁶
- (c) The order is served personally on the judgment debtor at least 10 clear days before the hearing, and a sum paid to cover the debtor's expenses for travel to court⁶⁷ (it is good practice to subsequently file an affidavit of service).

It is important that the court ensure the process is as fair as possible. The judgment debtor may be ordered to produce relevant books or documents in his possession, and an initial hearing should be held to give directions to the parties for production of documents and the filing and exchange of evidence.⁶⁸ Fairness requires that the judgment debtor be provided with a copy of the creditor's affidavit evidence. Evidence in chief may be given by affidavit⁶⁹ and witnesses may be summoned, or subpoenaed by writs issued from the registry.⁷⁰

58 *C v C* [2004] 1 HKLRD 242, [2003] 4 HKC 141 (CA).

59 MCR r 87(5).

60 Practice Direction 14.2 'Proceedings before Masters'.

61 Guardianship of Minors Ordinance (Cap 13).

62 Separation and Maintenance Orders Ordinance (Cap 16).

63 Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188).

64 MCR rr 86(1), 87(2) and (3), and RHC/RDC O 48 r 1(1).

65 MCR, Appendix, Form 22.

66 MCR, Appendix, Form 23.

67 MCR r 87(4).

68 Law Society Circular No 301/1984 (PA).

69 MCR r 88(1) and RHC O 38 r 2(3).

70 MCR r 88(2).

At the hearing itself, unlike in an ordinary O 48 application, the provisions of the MCR⁷¹ require the judgment debtor to be questioned on oath (as in the O 49B process⁷²). 'Relevant questions' must be related to:⁷³

- (a) Whether any and, if so, what debts are owing to the judgment debtor; and
- (b) Whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order.

Non-attendance

[8-13]

Where the judgment debtor fails to attend, the court may order an adjournment.⁷⁴ If the judgment debtor then fails to attend the adjourned hearing, or attends and fails to 'show good cause why an order of commitment should not be made', the court may order committal.⁷⁵ Where the court orders committal for non-attendance under the MCR, its jurisdiction on sentence is not limited to 3 months (unlike under O 49B and the unmodified O 48).

The court should not dismiss a judgment summons on the ground of absence of the judgment creditor when his legal representatives are present. Nor should it dismiss a judgment summons where the judgment debtor is absent.⁷⁶

Travel expenses

[8-14]

The court has discretion to order the costs of the judgment debtor's travel expenses to be allowed as the expenses of a witness. However, if no order of commitment is made, the judgment debtor may also be awarded 'proper costs', including compensation for loss of time.⁷⁷

Costs

[8-15]

Unless the judge otherwise directs, the judgment creditor's costs should be assessed summarily. When the judgment debtor pays the amount ordered before the hearing, the creditor may be awarded: court fees, travel expenses paid to the debtor, and solicitors' fees. The judgment debtor will also have to pay counsel's fees if he pays too late to prevent attendance at the hearing, or if he does not pay the amount due and there is an order against him after the hearing.

71 MCR r 87(1).

72 RHC/RDC O 49B r 1A(1).

73 MCR r 87(2) and RHC/RDC O 48 r 1(1).

74 MCR r 87(5)(b).

75 MCR r 87(5)(c).

76 *TKSF v TSH* [2002] 2 HKC 267 (CA).

77 MCR r 88(3).

Post examination powers and committal

[8-16]

After hearing the judgment summons, if the court finds against a judgment debtor, it has the power to order:

- (a) Imprisonment for up to 3 months;⁷⁸
- (b) A new order for payment by instalments or at a specified time;⁷⁹ and
- (c) A suspended sentence of imprisonment⁸⁰ (on an application under O 48 as modified by the MCR).

Where a judgment summons is the only application before the court, it has no jurisdiction to vary the underlying order, and is restricted to making a new order (for payment of the underlying amount, costs of the judgment summons, interest and surcharge – at another date or by instalments).

The court may make an order for imprisonment where it finds that the judgment debtor:⁸¹

- (a) Is able to satisfy the judgment wholly or partly;
- (b) Has disposed of assets with a view to avoiding satisfaction of the judgment; or
- (c) Has wilfully⁸² failed to make a full disclosure as required or to answer any question.

The burden of proof is on the judgment creditor to provide evidence against the debtor, and they must prove their case to the criminal standard, ie 'beyond reasonable doubt'.⁸³

Release

[8-17]

An imprisoned judgment debtor may be released:⁸⁴ once the amount due is paid; at the request of the judgment creditor; or when the judgment creditor fails to pay maintenance money as ordered to the Commissioner for Correctional Services.⁸⁵

78 RHC/RDC O 49B r 1B(1).

79 RHC/RDC O 49B r 1B(2) and MCR r 87(5).

80 MCR r 87(6).

81 RHC/RDC O 49B r 1B(1).

82 See for example: *Timekeeping Systems v Oberlander* [2009] HKCU 1170 (unreported, HCA 612/2007, 7 August 2009) (CFI); and *Secretary for Justice v Siegfried Lee Siu Fung* [2006] HKCU 1762 (unreported, HCMP 2851/2004, 23 October 2006) (CFI) at para 9.

83 *Kao, Lee & Yip v Donald Koo Hoi-yan & Ors* (2009) 12 HKCFAR 830, [2009] 5 HKC 36 (CFA); *Bank of India v Murjani & Ors* [1991] HKCU 466 (unreported, CACV 12/1991, 1 May 1991) (CA).

84 RHC/RDC O 49B r 4.

85 RHC/RDC O 49B r 2.

Bill of Rights concerns

[8-18]

The procedure outlined above compels a judgment debtor to give evidence against him or herself at risk of imprisonment. It has been suggested that, by combining examination with committal, the 'judgment summons' procedure may be incompatible with the rights to a fair trial protected by articles 10 and 11 HKBoR.⁸⁶ On 30th December 2016, the Court of Appeal addressed this issue regarding the implications of Articles 10 and 11 of HKBoR on the existing judgment summons procedure as prescribed under Rule 87, and held that the existing procedure is not compatible with the fundamental fair trial rights of a judgment debtor in the following respects:

- (a) The examination process is heard at the same time with the committal process;
- (b) There is no safeguard in terms of the judgment debtor, who is subject to the potential risk of being committed to prison, being informed of the nature and cause of the charge against him;
- (c) The reference in Rule 87(5)(c) and Form 23 to the judgment debtor showing cause reverses the burden of proof and infringes Article 11(1). Though this had been ameliorated by binding decisions from this Court holding that the burden of proof is on the judgment creditor and the standard of proof is beyond reasonable doubt, the reference to the judgment debtor showing cause should be removed from the rule and the form;
- (d) The automatic committal under Rule 87(5)(c) of a judgment debtor who fails to appear despite being ordered to attend court is incompatible with Article 11(2)(d);
- (e) The practice of expanding the scope of a judgment summons by including ongoing arrears in the amount in default may be adopted for the examination process and a new order can be made under Rule 87(5)(a) at the conclusion of the examination process. But it cannot be adopted for the committal process as it would infringe Article 11(2)(a) and (b).

The Court of Appeal has identified the following as constitutional provisions for the purposes of judgment summons:

- (a) Right to a fair and public hearing under Article 10;
- (b) Presumption of innocence under Article 11(1);
- (c) Right to be informed of the nature and cause of the charge under Article 11(2)(a);

86 The Hong Kong Bill of Rights (HKBoR), s 8 of the Hong Kong Bill of Rights Ordinance (Cap 383). See *CYM v YML* [2013] 1 HKLRD 701, [2012] HKCU 2541 (CA) at para 52; *SJ v FTCW* [2014] HKCU 66 (unreported, CACV 101/2013, 10 January 2014) (CA); *Mubarak v Mubarak* [2001] 1 FLR 698 (CA).

- (d) Right to be informed of the right to have legal assistance and to have such assistance assigned for a person who does not have sufficient means to pay under Article 11(2)(d);
- (e) Right to examine the witnesses against him under Article 11(2)(e);
- (f) Right not to be compelled to testify against himself or to confess guilt under Article 11(2)(g).

The procedure provided by Rule 87 is considered as depriving the judgment debtor the right to a fair trial, removal of the presumption of innocence and reversal of burden of proof. The court went on to say (at para [17]) that 'as a matter of Hong Kong jurisprudence and the legislative framework underpinning Rule 87, we are satisfied that a judgment debtor can only be committed to the prison under the judgment summons if the court is satisfied beyond reasonable doubt that he or she is able to satisfy the judgment wholly or partly or has disposed of assets with a view to avoiding satisfaction of the judgment wholly or partly. In other words, imprisonment can only be ordered when one of the criteria in O 49B r 1B(1) of the Rules of the High Court (Cap 4A) is satisfied'.

Applying the remedial interpretation to rule 87 to render it constitutional, the Court of Appeal set out the manner in which to read down and read into this rule to render it compatible with Articles 10 and 11. In the interpretation section of rule 87(1), to segregate the examination process from the committal application, the definition of 'judgment summons' should be read as meaning 'a summons issued under an order made under RHC O 48 r 1(1) requiring a judgment debtor to appear and be examined on oath as to his means ('Examination Summons'); or a summons for committal issued under RHC O 52 ('Committal Summons')'.⁸⁷ The Court provides suggestion for the segregation of the two processes and the two different applications. Rule 87(2) and (3) should be read for the Examination Summons and reference to the words 'judgment summons' in rule 87(3) and Form 22 would be read as Examination Summons. Form 23 is not going to be used as Committal Summons. A judgment creditor must apply ex parte to a judge for leave to apply for an order of committal. The judgment creditor shall issue a Committal Summons in accordance with O 52 r 3(1) setting out the grounds in respect of which leave for making an application for an order of committal has been granted.⁸⁸

At para 113, the CA concluded:

Following from the analysis and the remedial interpretation we give to rule 87 above, there is an urgent need to revise the current practice for the judgment summons regime. The best way forward is of course to amend Rule 87. But unfortunately, experience shows that such a course is likely to take considerable time. Pending legislative amendments, it would be necessary to issue a practice direction to set out the proper practice. We urge the judge in charge

⁸⁷ *YBL v LWC* [2017] 1 HKLRD 823, [2017] 1 HKC 555 (CA) at paras [102]–[103].

⁸⁸ *YBL v LWC* [2017] 1 HKLRD 823, [2017] 1 HKC 555 (CA) at paras [104]–[112].

of the Family Law List in the High Court and the judges in the Family Court to give the matter immediate attention and to issue practice direction setting out the procedures for the judgment summons regime having regard to Articles 10 and 11 of HKBoR. The Family Court should also consider publishing leaflets and standard forms to assist and guide litigants in person in applying and defending judgment summons. In this connection, the Director of Legal Aid would also have to review the current policy of not providing representation in judgment summons.'

It is expected that some guidance will be issued by the judiciary to provide for more detail rules to take enforcement action under the rules for judgment summons.

WRITS OF EXECUTION

Writs of execution generally

[8-19] The writs of execution are among the oldest powers of enforcement available to the courts. They are:⁸⁹

- (a) The writ of *fi fa* (known as *fi fa*);
- (b) The writ of possession;
- (c) The writ of delivery;
- (d) The writ of sequestration; and
- (e) Writs in aid of the main writs (ie restitution and assistance).

Each applies in different circumstances, and consideration should be given to which is most appropriate:

- (a) The writ of *fi fa* allows property (including goods and chattels) to be seized and sold to meet a judgment debt (ie an order to pay money);
- (b) The writ of possession is used to enforce an order for land;
- (c) The writ of delivery enforces an order to deliver goods; and
- (d) The writ of sequestration applies to both money orders and non-money orders. It provides for the land and goods of the person in contempt to be seized and detained until the contempt is purged.

This chapter focuses on the writs of *fi fa* and sequestration.

Leave requirement

[8-20]

Where there is a pending application to vary an order for ancillary relief (or maintenance of a spouse or child),⁹⁰ leave must first be sought from the registrar to enforce by way of writ of *fi fa* or warrant for

⁸⁹ RHC/RDC O 46 r 1.

⁹⁰ MPPO s 8.

execution.⁹¹ Leave is also required when the writ of execution is sought more than 6 years after the date of the order,⁹² and in a range of other circumstances.⁹³ An application for leave is generally made *ex parte* by affidavit.⁹⁴ Leave is always required for a writ of sequestration,⁹⁵ which must be made by summons served personally on the defaulter.

Procedure

[8-21]

The rules for an application for a writ of execution are set out in Orders 45 and 46 RHC/RDC. There are 3 main steps to obtain a sealed writ:⁹⁶

- (a) An applicant should file a signed praecipe of the writ along with a completed writ;⁹⁷
- (b) The applicant should produce a copy of the relevant judgment or order, along with any order giving leave to issue the writ of execution;
- (c) The applicant should pay the filing fee; and
- (d) The registrar should be satisfied that the time given for obeying the order has expired.

Parties should register a writ against land at the Land Registry in order to maintain priority over third parties.⁹⁸

Writs of *feri facias*

[8-22]

The writ of *feri facias* permits debtor's property to be seized and sold to meet the judgment debt. It can only be used to enforce orders for payments of money.⁹⁹

There is no requirement for service to obtain a writ of *feri facias*, and it may be issued as soon as the judgment debtor is in default.¹⁰⁰ The debtor may obtain a stay of execution of the writ of *feri facias* (see **Stays of execution** above).¹⁰¹

The writ is executed by a bailiff, who is empowered to seize goods, money and securities.¹⁰² He may enter a debtor's premises to seize his goods, but may not be entitled to break open the front door.¹⁰³ The bailiff is not

91 MCR r 86(2).

92 RHC/RDC O 46 r 2(1)(a).

93 RHC/RDC O 46 rr 2 and 3.

94 Unless the court directs it to be by summons, see RHC/RDC O 46 r 4.

95 RHC/RDC O 46 r 5.

96 RHC/RDC O 46 r 6.

97 See RHC/RDC O 45 r 12 for the relevant forms.

98 Land Registration Ordinance (Cap 128) ss 2(1) and 3(2).

99 RHC/RDC O 45 r 1(1).

100 *Re an Application by the Official Solicitor (No 1)* [1983] 2 HKC 259 (CA).

101 RHC/RDC O 47 r 1(1).

102 HCO s 21D(1).

103 *Semayne's Case* (1604) 5 Co Rep 91a, 91b.

permitted to seize the tools of the debtor's trade, his bedding or his clothing, up to a value of HK\$10,000.¹⁰⁴

Writs of sequestration

[8-23]

The writ of sequestration may be used to enforce any order to do an act *within a specified time*, or to abstain from doing act (ie mandatory and prohibitory judgments).¹⁰⁵ It applies to both orders for payments of money, and other orders. The contemnor's assets (land, and goods) may be detained until the contempt is purged.

Leave is always required for a writ of sequestration, and it must be obtained by means of summons served personally on the contemnor (unless the court agrees to dispense with service).¹⁰⁶ The leave application is generally heard in open court.

Sequestration is considered a draconian remedy, and should only be permitted as a last resort and when the misconduct is tantamount to contempt of court,¹⁰⁷ ie that it was 'contumacious'¹⁰⁸ (see **Committal for contempt of court** below). The burden is on the applicant to prove contempt to the criminal standard, beyond reasonable doubt.¹⁰⁹ All procedural requirements should be strictly followed, including personal service of the order (unless the court is otherwise satisfied there was notice or dispenses with service) and endorsement with a penal notice.¹¹⁰

Unlike the other writs of execution, a writ of sequestration is not executed by a bailiff, but by at least four 'commissioners' appointed by the applicant.¹¹¹ The contemnor may apply to discharge the writ by summons or motion in the name of the commissioners, once his contempt is purged.¹¹²

PROHIBITION ORDERS

[8-24]

A person subject to a judgment for money, to delivery property, or to do an act, may be prohibited from leaving Hong Kong by way of a 'Prohibition Order'.¹¹³ This can be ordered even before there has been a failure to comply with the order. The applicant must provide probable

104 HCO s 21D(1).

105 RHC/RDC O 45 r 5(1).

106 RHC/RDC O 46 r 5.

107 *Lord Wenman v Osbaldiston* (1719) 2 Bro Parl Cas 276 (HL); *Hulbert and Crowwe v Cathcart* [1894] 1 QB 244; *Director of Fair Trading v Buckland* [1990] 1 All ER 545.

108 Deliberate disobedience, not merely casual or accidental and unintentional: *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] AC 15 (HL).

109 *Ku Yu Sein Trading Co Ltd v Suratwala Rubin Talakchand alias Rubin Talakchand* [1982] HKLR 121 (CA); *Re Bramblevale Ltd* [1970] Ch 128.

110 RHC/RDC O 45 r 7.

111 *Rowley v Ridley* (1784) 2 Dick 622.

112 *Crone v O'dell* (1824) 2 Mol 355.

113 HCO s 21B and DCO s 52E; RHC/RDC O 44A.

cause that: (a) the person is about to leave Hong Kong; and (b) for that reason, satisfaction of the order is likely to be obstructed or delayed.

A prohibition order may also be obtained before any order is given, or even before proceedings have commenced¹¹⁴ if the applicant can additionally show probable cause that: (a) he has a good cause of action; and (b) the judgment debtor incurred the liability while present in Hong Kong; carries on business in Hong Kong; or is ordinarily resident in Hong Kong.

The application for a prohibition order is typically made ex parte by affidavit, with a copy of the draft order.¹¹⁵ The sealed copy of order should be served on the Director of Immigration, the Commissioner of Police, and the judgment debtor if he can be found.¹¹⁶

CHARGING ORDERS

[8-25]

The court has discretion on an application by a judgment creditor to grant a charging order over the debtor's property.¹¹⁷ The judgment debt may arise out of an interlocutory order, but it must have permanent effect and be for a fixed sum.¹¹⁸ The order secures the judgment debt against the property of the judgment debtor.

The property charged must be held by the debtor beneficially,¹¹⁹ either directly or on trust. It may include land, certain securities, and funds in court.¹²⁰ If payment under the order is not made the security may be enforced, possession gained, and the property sold to diminish the debt.

Before giving an order, the court will consider all of the circumstances of the case, as well as the personal circumstances of the debtor and any prejudice to any other creditor.¹²¹ This is particularly at issue where a spouse mortgages the matrimonial home in spite of the other spouse's beneficial interest.¹²² When spouses are joint tenants, a charging order absolute will amount to severance, and only one party's share will be affected by the charge.¹²³

The application is commenced ex parte with supporting affidavit for an 'order to show cause' at a future *inter partes* hearing.¹²⁴ It must generally

114 HCO s 21B(1)(c) and DCO s 52E(1)(c); RHC/RDC O 44A r 1.

115 RHC/RDC, Appendix A, Form 106.

116 HCO s 21B(6), DCO s 52E(6).

117 HCO s 20, DCO s 52A, RHC/RDC O 50.

118 *Ng Yat Chi & Anor v China Resources (Holdings) Co Ltd* [2006] HKCU 1562 (unreported, HCA 424/2005, 15 September 2006) (CFI).

119 *SJ v Chau Mei Ha (t/a Ramco International Co)* (unreported, HCA 787/1992, 29 January 1999) (CFI); *Field v Field* [2003] 1 FLR 376; *Bank of China (Hong Kong) Ltd v Kanishi (Far East) Ltd* [2002] 2 HKLRD 52.

120 HCO s 20B, DCO s 52AA.

121 HCO s 2(3), DCO s 52A(2).

122 See *Wan v Lai* [2007] HKCLR 30 (DC), where the charging order was set aside due to the misconduct of the finance company.

123 *Y v A* (unreported, FCMC 12889/2002, 4 January 2005) (DC); *Malahon Credit Co Ltd v Siu Chun Wah Alice* [1987] 2 HKC 79.

124 RHC/RDC O 50 r 1.

be served on the judgment debtor and on interested third parties.¹²⁵ The court has discretion¹²⁶ to make the order absolute at the appointed hearing.¹²⁷ The charge may be registered in the Land Registry¹²⁸ (if it is over land), and it may be enforced by either sale¹²⁹ or appointment of an equitable receiver.¹³⁰

GARNISHEE ORDERS

[8-26]

If the judgment creditor knows of any third party who owes money to the judgment debtor, he can attach the debt by garnishee proceedings.¹³¹ The money is then owed to the judgment creditor. The order must be for at least HK\$1,000, there should be a third party 'garnishee' who owes money to the judgment debtor, and they must be in the jurisdiction.¹³²

The order only applies to debts recognised in law (payable now or in the future), including bank deposit accounts.¹³³ It does not apply to contingent liabilities¹³⁴ (such as potential future insurance payments), nor dividends or wages.¹³⁵ The debts must exist at the time of the 'order to show cause',¹³⁶ and fresh proceedings must be brought to garnish any future debts. The debt must be held solely and beneficially by the judgment debtor (ie jointly held debts cannot be attached).¹³⁷ The burden of proof is on the judgment creditor, at the civil standard (balance of probabilities).¹³⁸

The application is commenced ex parte with supporting affidavit for an 'order to show cause' at a future *inter partes* hearing.¹³⁹ It must generally be served on the third party creditor and the judgment debtor.¹⁴⁰ The court has discretion¹⁴¹ to make the order absolute if the third party does not

125 RHC/RDC O 50 r 2.

126 *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 All ER 685 (CA, Eng) (reversed by the House of Lords on unrelated grounds); *Harman v Glencross* [1986] 1 All ER 545 (CA, Eng).

127 RHC/RDC O 50 r 3.

128 HCO s 20B(2), DCO s 52AB(2).

129 RHC/RDC O 50 r 9.

130 RHC/RDC O 51.

131 HCO s 21, DCO s 52C, RHC/RDC O 49.

132 RHC/RDC O 49 r 1(1).

133 HCO s 21(1) and DCO s 52C(1); see for example: *Incorporated Owners of Million Fortune Industrial Centre v Jikan Development Ltd* [2003] HKCU 733 (unreported, HCA 14915/1998, 26 June 2003) (CFI).

134 *Webb v Stenton* (1883) 11 QBD 518 (CA); *Heppenstall v Jackson* [1939] 1 KB 585, [1939] 2 All ER 10 (CA, Eng); *Regal Properties (Pte) Ltd v Choo Kim San* [1983] 2 HKC 515.

135 Employment Ordinance (Cap 57) s 66.

136 RHC/RDC O 49 r 3(2).

137 *Boush v Death* (1879) 4 Ex D 133; *Hischorn v Evans* [1938] 2 KB 801 (CA, Eng).

138 *Kwok Sin Hung v Hang On Tai Building Contractors* [1958] HKLR 215.

139 RHC/RDC O 49 rr 1-2.

140 RHC/RDC O 49 r 3.

141 *Rooke v HV Construction Services Ltd* [1998] 2 HKLRD 319, [1998] 1 HKC 686 (CA).

attend the hearing, does not dispute the liability, or attends and the matter is determined in favour of the judgment creditor.¹⁴² The order is then treated as a final order for payment against the third party, and may be enforced as such.¹⁴³

ATTACHMENT OF INCOME ORDERS

[8-27]

The 'Attachment of Income Order' is a means of enforcing maintenance¹⁴⁴ under the MPPO¹⁴⁵ (except for spousal maintenance pending suit¹⁴⁶), the GMO¹⁴⁷ and the SMOO.¹⁴⁸ It may be used for orders for ancillary relief under the MPPO by diverting a judgment debtor's income.

The court has discretion¹⁴⁹ to make an attachment of income order when the payee spouse satisfies the court that the debtor has: (a) failed to make payment without reasonable excuse; or (b) that there are reasonable grounds to believe debtor will not make full and punctual payments.¹⁵⁰ An application may be made by the court of its own motion, the maintenance payer, payee or both.¹⁵¹

The order can attach to wages and other forms of income, including a civil servant's pension (though not a civil servant's wages¹⁵²), in order to satisfy arrears of maintenance and maintenance falling due. A civil servant's pension may be attached by drafting the order to direct the Director of Accounting Services to pay so much of the pension over as is required to settle the arrears of maintenance and maintenance falling due.¹⁵³

An attachment order may be made by the court on its own motion or on the application by the judgment creditor or debtor.¹⁵⁴ It is commenced by summons or originating summons with supporting affidavit,¹⁵⁵ served on the debtor along with a 'statement of means'.¹⁵⁶ A sealed copy of the

142 RHC/RDC O 49 rr 4-5.

143 RHC/RDC O 42 r 4(2).

144 Including periodical payments, secured periodical payments, lump sum payments, and lump sum payments by installments.

145 MPPO s 28.

146 However this appears to be an inadvertent omission, and it does apply to interim maintenance for children.

147 GMO s 20.

148 SMOO s 9A.

149 See *YY v Choa* [2012] HKCU 2034 (unreported, FCMC 7598/2010, 15 August 2012) (DC); and *KGK v WHL* [2006] HKFLR 263 (DC), regarding the impact of an order on a payer's job security.

150 MPPO s 28(1)(a); *SMC v JAC* [2011] HKCU 2092 (unreported, FCMC 5555/2009, 21 October 2011) (DC).

151 MPPO s 28(2B); *HWK v TCWP* (unreported, FCMC 15424/2006, 26 August 2008) (DC).

152 Crown Proceedings Ordinance (Cap 300) s 23(1); *L v L* [2007] 1 HKLRD 236, [2006] HKCU 2044 (CA).

153 *K v K* [2005] 1 HKC 303 (CFI).

154 MPPO s 28(2B)/SMOO s 9A(2B)/GMO s 20(2B).

155 Attachment of Income Rules (Cap 13A) (AOIR) rr 2A and 3.

156 AOIR r 3(3).

order should be served on the debtor and the income source.¹⁵⁷ The court has power to abridge time and dispense with or relax any procedures in the AOIR rules 3-8 if satisfied that it is fair and reasonable to do so in the circumstances of the case.¹⁵⁸ Failure by the debtor or the income source to comply with the order is a criminal offence.¹⁵⁹

BANKRUPTCY ORDERS

[8-28]

Default of an order for ancillary relief is grounds for a bankruptcy petition.¹⁶⁰ A bankruptcy order has the effect of vesting all of the debtor assets in a 'trustee in bankruptcy',¹⁶¹ who will use it to pay off the various creditors. The trustee can also set aside property dispositions in certain circumstances,¹⁶² claim assets acquired after the bankruptcy order,¹⁶³ and apply for the bankrupt to pay a portion of his income towards his debts.¹⁶⁴

A judgment creditor spouse may commence the application by way of a 'creditor's petition',¹⁶⁵ verified by affidavit,¹⁶⁶ for a liquidated sum of HK\$10,000 or more.¹⁶⁷ The judgment debtor must deposit HK\$11,250 with the Official Receiver's Office,¹⁶⁸ file the petition in the Registry of the High Court, and serve a sealed copy on the debtor.¹⁶⁹

Whereas a lump sum order or an order for costs are provable debts,¹⁷⁰ an order of periodical payments for maintenance pending suit is not.¹⁷¹ A bankruptcy order will only be made for a non-provable debt in 'exceptional circumstances'.¹⁷² A bankrupt's protection against enforcement is only from provable debts,¹⁷³ and a judgment creditor spouse may still seek to enforce such debts once a bankruptcy has been discharged. There is no bar to enforcement proceedings against a bankrupt spouse, although they may be stayed by the court.¹⁷⁴

157 AOIR r 6(4).

158 AOIR r 13.

159 AOIR r 11.

160 Bankruptcy Ordinance (Cap 6) (BO), s 3.

161 BO s 12.

162 See for example: BO ss 42, 49 and 50.

163 BO s 43A.

164 Ie an 'Income Payments Order', see BO s 43E.

165 Bankruptcy (Forms) Rules (Cap 6B), Form 10B.

166 Bankruptcy Rules (Cap 6A), r 56.

167 BO s 6.

168 Bankruptcy Rules (Cap 6A), r 52.

169 Bankruptcy Rules (Cap 6A), r 59.

170 *Curtis v Curtis* [1969] 1 WLR 422.

171 It is thought that the court's power to vary periodical maintenance is so wide that their value is incapable of being fairly estimated, see: *Re Lo Man Hong* [2013] HKCU 1980 (unreported, HCB 625/2013, 26 August 2013) (CFI).

172 *Russell v Russell* [1999] 2 FCR 137; *Levy v Legal Services Commission* [2001] 1 All ER 895; *Re Lo Man Hong* [2013] HKCU 1980 (unreported, HCB 625/2013, 26 August 2013).

173 BO s 12(1).

174 BO s 14.