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Family Law: Is it all about money?

DENIS
CHANG'S
CHAMBERS

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The Speakers

Hugill & Ip is a young, independent Hong Kong law firm, established in 2018. Its partners have decades of experience providing bespoke legal advice and exceptional client service to businesses in Hong Kong and internationally. Its solicitors have achieved outstanding results in the most recent editions of international legal guides. They have also been recognised multiple times by for their pro bono service to the community.

Denis Chang's Chambers was established in 1978 by a young Denis Chang. DCC is today recognised as a modern and progressive set committed to legal excellence, justice, and the rule of law. It currently has 53 members including 5 silks. The strong portfolio of barristers has collectively and individually contributed not only to the development of DCC, but also towards the legal fabric of the Common Law world and the jurisprudence of Hong Kong.

Alfred Ip assists high net-worth individuals in handling their wealth-related issues, such as contentious and non-contentious trust and probate, mental capacity, family office, amongst other wealth management matters. He is also a leading Family and Dispute Resolution lawyer with over 20 years of experience in Hong Kong.

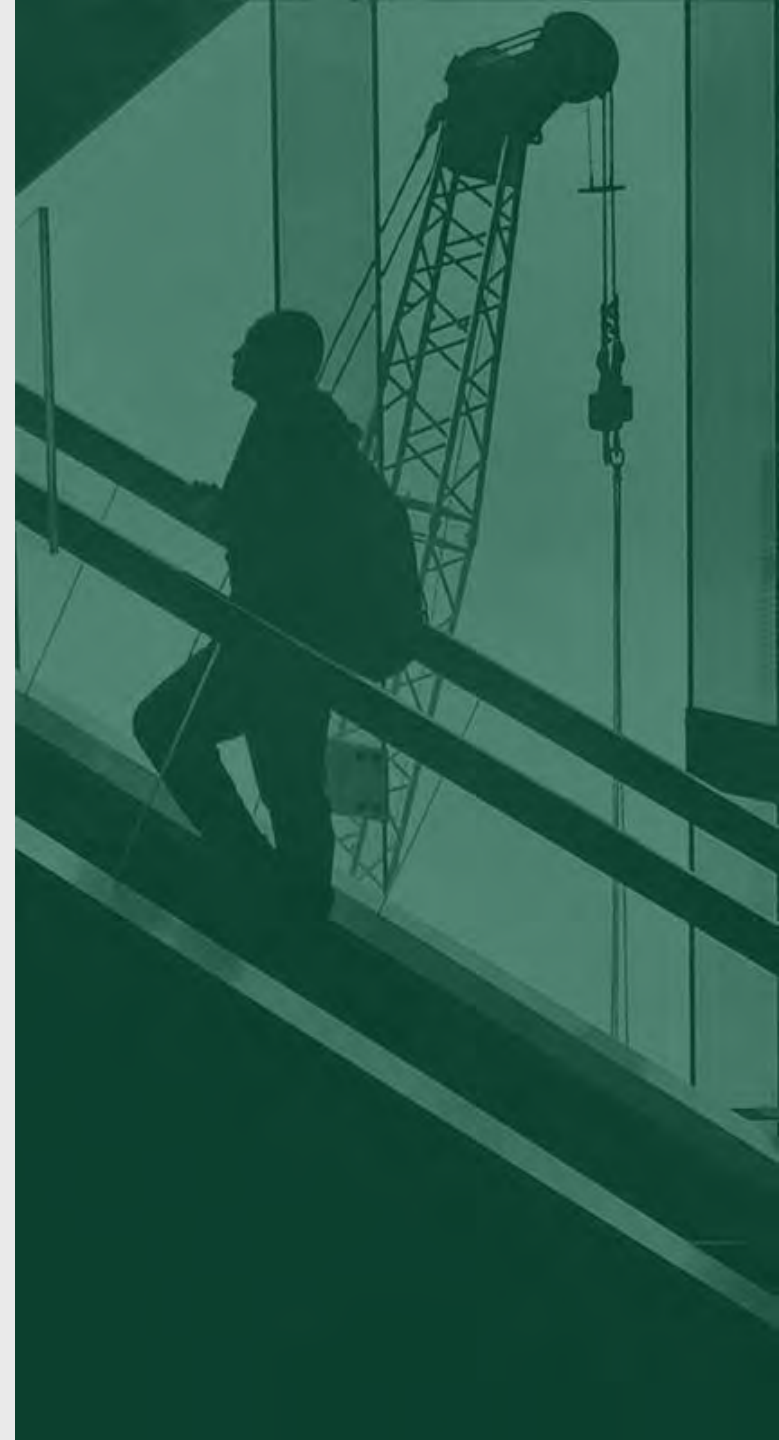
Raphael Wong specializes in Family and Private Client practice, including matrimonial, Probate & Trusts – both contentious and non-contentious.

Jeremy S.K Chan is a leading Junior Counsel specializing in all areas of Family Law with a particular focus on the areas of Matrimonial Finance, Private Client, Inheritance, Probate and Trusts and has forged a career as a “go-to Junior” for Family matters.

Tracy Chu joined Chambers in 2020 upon completion of her pupillage. Tracy is developing a predominately civil based practice with particular interest in matrimonial, personal injuries, criminal law, contract and commercial disputes.



Maintenance Pending Suit (MPS) / Interim Maintenance



Maintenance Pending Suit (MPS) / Interim Maintenance

Interim maintenance (interlocutory order made prior to final substantive decision) can arise in a number of different contexts, some of the main examples include :-

- Divorce - when husband and wife go through divorce proceedings in Hong Kong, MPS is available under Section 3 MPPO (Cap.192)
- Unmarried parents - where a child has parents who are (usually) not married to one another, Section 10(2) GMO (Cap.13)
- Upon a financial provider passing away, under IPFDO (Cap.481)

Maintenance Pending Suit (MPS) / Interim Maintenance

The law is slightly different depending on whether it is Divorce, GMO or Cap.481. Below are some of the salient features.

In divorce situations :-

Section 3 MPPO (Cap.192)

“Maintenance pending suit in case of divorce, etc.

On a —

(a) petition or joint application for divorce; or

(b) petition for nullity of marriage or judicial separation,

The court may order either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition or making of the application and ending on the date of the determination of the suit, as the court thinks reasonable”.

Maintenance Pending Suit (MPS) / Interim Maintenance

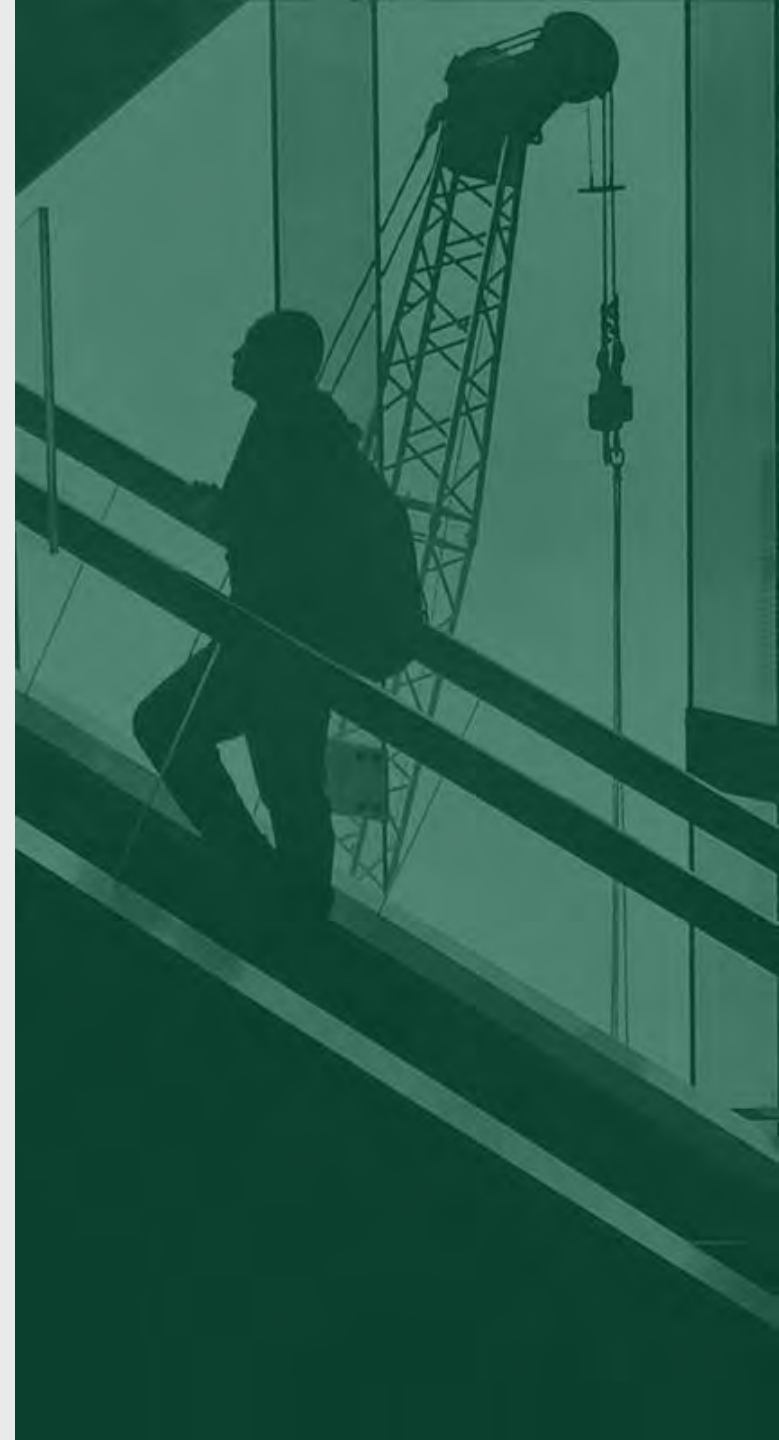
- Section 3 is only engaged from “*the date of the presentation of the petition*”. So, there must first be extant proceedings before the Court.
- Section 3 terminates - “*ending on the date of the determination of the suit*”. ‘Determination of the suit refers to *Decree Absolute* (the ‘main suit’). In atypical cases where *Decree Absolute* is obtained before ancillary relief is determined, it may be necessary to continue interim maintenance even after *Decree Absolute*. There are authorities dealing with *Post-Decree Absolute* continuation of ‘MPT’(Maintenance Pending Trial).
- Strictly speaking, Section 3 is only dealing with the wife or husband (*the court may order either party to the marriage to make to the other such periodical payments for his or her maintenance*); Children are dealt with under Section 5, although very few cases draw this statutory distinction, and the real-life practical differences are minimal.

Maintenance Pending Suit (MPS) / Interim Maintenance

Note the definition of “*child of the family*” used in MPPO (Cap.192). Section 2(1) - “*child of the family (家庭子女), in relation to the parties to a marriage, means - (a) a child of both those parties; and (b) any other child who has been treated by both those parties as a child of their family*”.

- There may or may not be genetic linkage / bloodline - the law also looks to whether a child “*has been treated by both those parties as a child of their family*”.
- MPPO applications in the course of divorce are apt to cover maintenance for spouses and children, as well as legal costs provision (*Currey*) - but the threshold test is different.

GMO (Cap.13)



GMO (Cap.13)

- By contrast, GMO looks to 'parents' and 'minors' - and the expanded definition of "*child of the family*" is not included.
- In GMO, the focus is on the minor's maintenance - the caretaking parent / receiving parent (often the mother) has no standalone / independent claim under GMO in her/his own right against the paying parent (often the father), although there might be an element of "carer's allowance".

GMO (Cap.13)

- There are limitations based on cohabitation or non-cohabitation - Section 10(3) - *“An order may be made under subsection (1) or (2) notwithstanding that the parents of the minor are then residing together, but —*
 - (a) no such order shall be enforceable, and no liability thereunder shall accrue, while they are residing together; and*
 - (b) any such order shall cease to have effect if for a period of 3 months after it is made they continue to reside together:*

Provided that, unless the court in making the order directs otherwise, paragraphs (a) and (b) shall not apply to any provision of the order giving the custody of the minor to a person other than one of the parents or made with respect to a minor of whom custody is so given”.

GMO (Cap.13)

- There is an odd statutory limit of '3 months' under Section 13(3) :-

“On an application under section 10 the court may, in any case where it adjourns the hearing of the application for more than 7 days, make an interim order, to have effect until such date as may be specified in the order and containing —

(a) provision for payment by either parent to the other, or to any person given the custody of the minor, of such periodical payments towards the maintenance of the minor as the court thinks reasonable having regard to the means of the parent on whom the requirement is imposed; and

(b) where by reason of special circumstances the court thinks it proper, any provision regarding the custody of the minor or the right of access to the minor of either of his or her parents, but an interim order under this subsection shall not be made to have effect after the end of the 3 months beginning with the date of the order or of any previous interim order made under this subsection with respect to the application, and shall cease to have effect on the making of a final order or on the dismissal of the application”.

GMO (Cap.13)

- Authorities have developed to clarify the jurisdiction; e.g. :-
- *LCTK v. TKKP (Interim Maintenance)* [2010] HKFLR 442 see in particular at 444H Paragraph 8 - “Our GMO is based on the UK Guardianship of Minors Act which is now incorporated in Sch 1 of the children Act 1989. Para 9 of Sch 1 relates to interim orders. However, there is now no 3 month limitation for an interim order in the UK provisions. Why there still remains in our legislation this limitation is not quite clear, but there seems to be nothing to stop the Court to make a further interim order, upon the cessation of the first one.”.

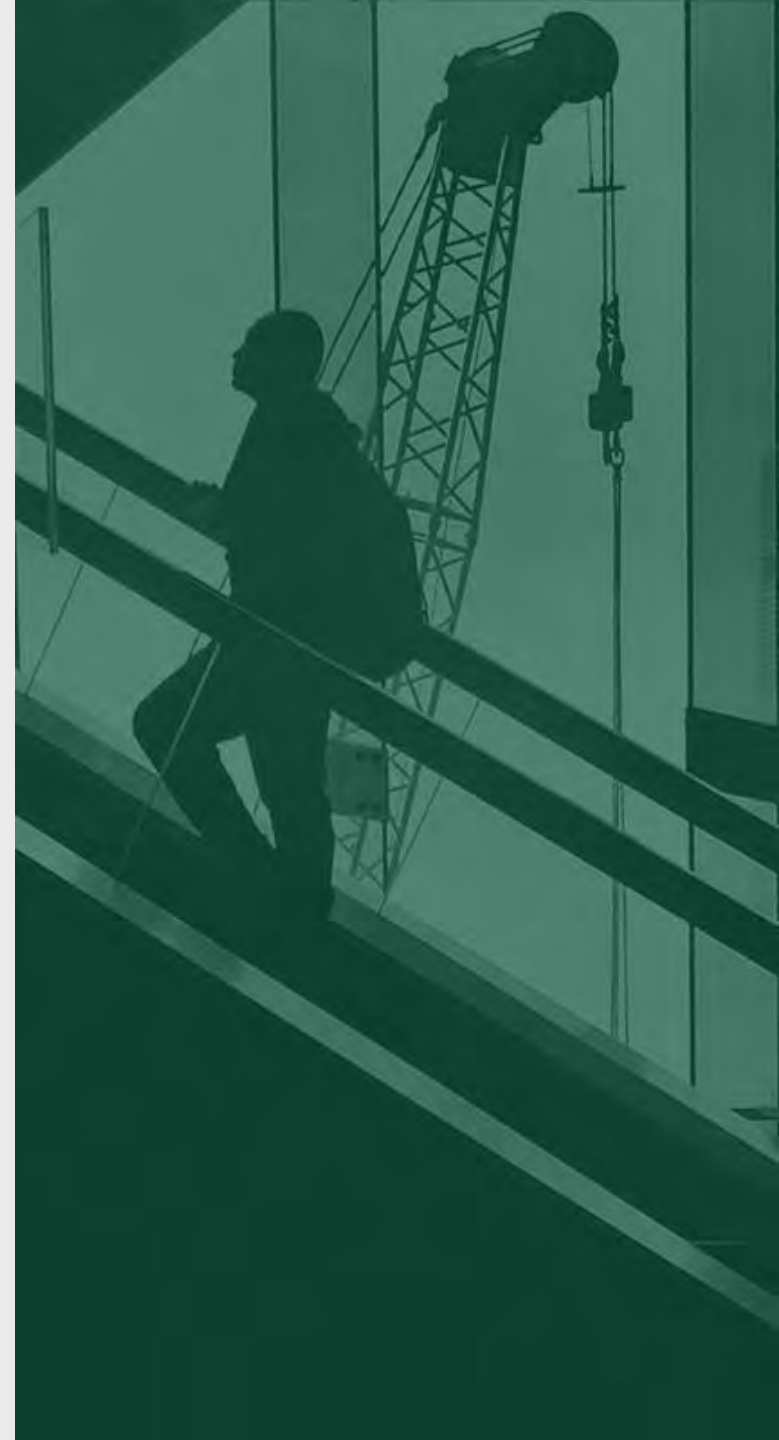
GMO (Cap.13)

- *IDC v. SSA [2019] HKFC 225 (FCMP No. 158 of 2011; 27 Sept 2019) paragraph 18 - “I am further aware that the wordings of section 10(3) may impose a period of 3 months for such an interim order. But as pointed out by Mr. Chan, the accepted practice is to treat such period being automatically extended saving the parties' trouble in coming back to court every 3 months, provided that the court should consider such a longer period is indeed justified.”*

GMO (Cap.13)

- Currey legal costs provision is available under GMO - the relevant provision is Section 13(3) [not Section 10(2)] -
“After hearing counsel, I accept Mr. Chan’s present submission that if the order on litigation funding is granted under section 10(2) of GMO, the court must be satisfied that they are expenses reasonably incurred or to be incurred, which is, failing the parties’ agreement, an impossible exercise before the full consideration of the evidence. On the contrary, if the order is to be granted under section [13](3) as an interim order, the usual broad-brush approach can be adopted and there is no need to go into the evidence in detail. By this analysis, I accept that a section 10(2) order must be a final order, subject only to appeal or a future variation if change of circumstances, whereas a section 13(3) order is only an interim order which can be properly adjusted or taken into account after the final adjudication of the claim. Based on the above discussion, I am satisfied that a litigation funding order should be made under section 13(3) instead of section 10(2) of GMO”. [IDC v. SSA [2019] HKFC 225 (FCMP No. 158 of 2011; 27 Sept 2019)]

IPFDO (Cap.481)



IPFDO (Cap. 481)

- Note the time limit; Section 6 - *“An application for an order under section 4 shall not, except with the permission of the court, be made after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out”.*
- There are different kinds / categories of applicants, including spouses [s.3(1)(i)] and children [s.3(1)(v)]
- Special meaning of spouse - the definition of ‘husband’ and ‘wife’ includes *“a person who in good faith entered into a void marriage with the deceased”*. This is to be contrasted with other Ordinances.

IPFDO (Cap. 481)

- The expanded definition of “*child of the family*” is not included as a general interpretation provision. However, a financially dependent minor (non-child) might nevertheless fall within Section 3(1)(vii) - “*any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage and was being maintained, either wholly or substantially, by the deceased immediately before his death*”.
- Note that some of the categories of applicants are required to show “*immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased*” [e.g. the ‘others’ category in Section 3(1)(ix) - often relied upon by mistresses and girlfriends].

IPFDO (Cap. 481)

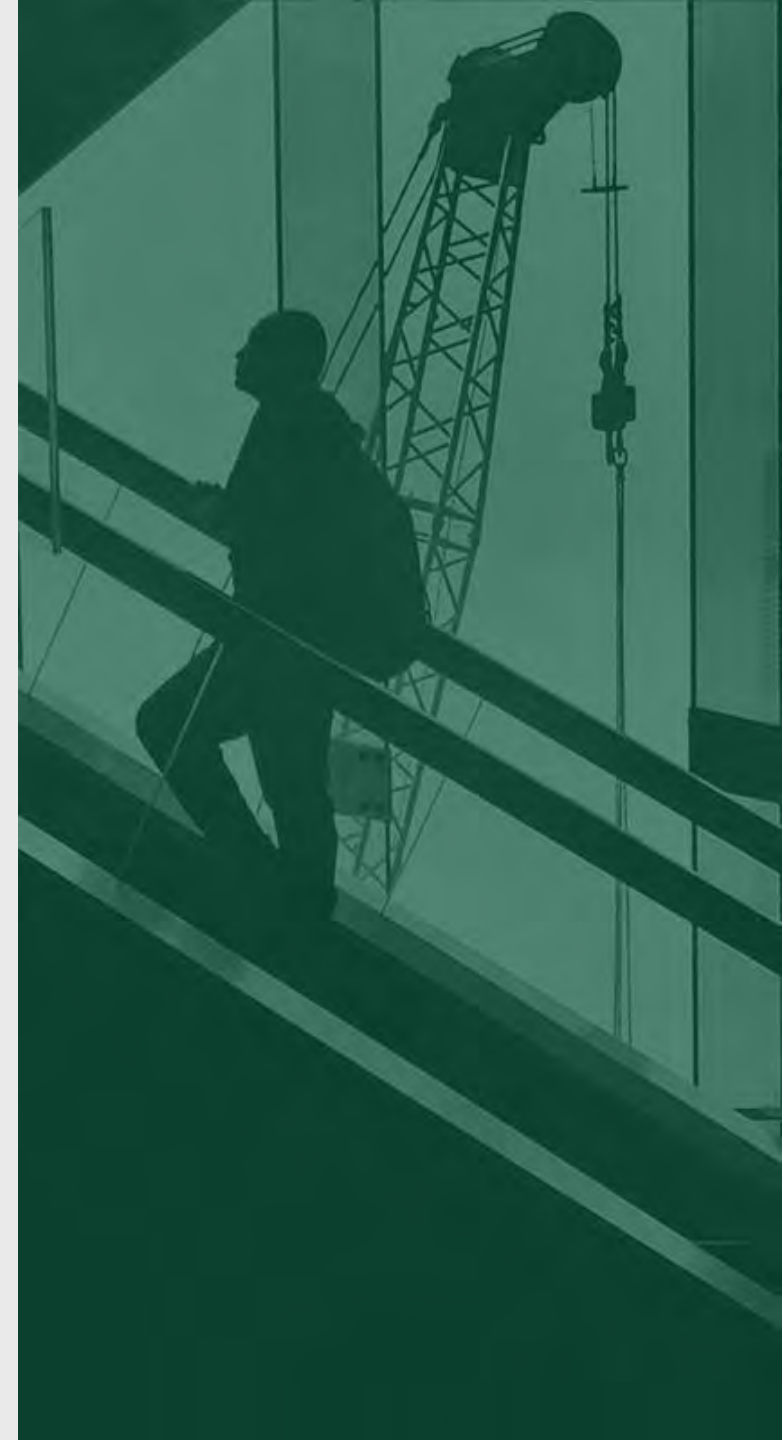
- This requirement of 'was being maintained immediately before death by the deceased' is a requirement that only applies to some of the categories of applicants but not others.
- The category of applicant also affects the statutory definition of "reasonable financial provision"; there are 2 possibilities :-
 - *"such financial provision as it would be reasonable in all the circumstances of the case for such a person to receive, whether or not that provision is required for his or her maintenance"* [Section 3(2)(a)];
 - *"such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance"* [Section 3(2)(b)].

IPFDO (Cap. 481)

- In the case of a widow / widower, there is also the quasi-divorce provision - Section 5(2) - *“in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce”*.
- For interim maintenance in Cap.481 scenarios, there is the added requirement under Section 7 to show - *“that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section”* and *“that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant”*.

Interim Maintenance Applications

- Takeaway Points



Interim maintenance applications - Takeaway Points

- *“The sole criterion to be applied in determining the application is ‘reasonableness’, which is synonymous with ‘fairness’.” [HJFG v. KCY [2012] HKFLR 27]*
- The predominant focus is on the financial *status quo* - in particular standard of living of receiving party and any children. *“A very important factor in determining fairness is the marital standard of living. This is not to say that the exercise is merely to replicate that standard” [HJFG v. KCY [2012] HKFLR 27]*
- *“In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration” [HJFG v. KCY [2012] HKFLR 27]*

Interim maintenance applications - Takeaway Points

- Children expenses are often a mixture of Undertakings (especially for direct payments such as school fees and variable billings) and a monthly dollar sum.
- There should be a reasonable amount of evidence re: expenses / outgoings.
- Assessment of quantum is 'broad brush' and can be subject to adjustments later on
- The financial means of paying party is important - including assets and income, and can standard of living be continued without undue hardship ?

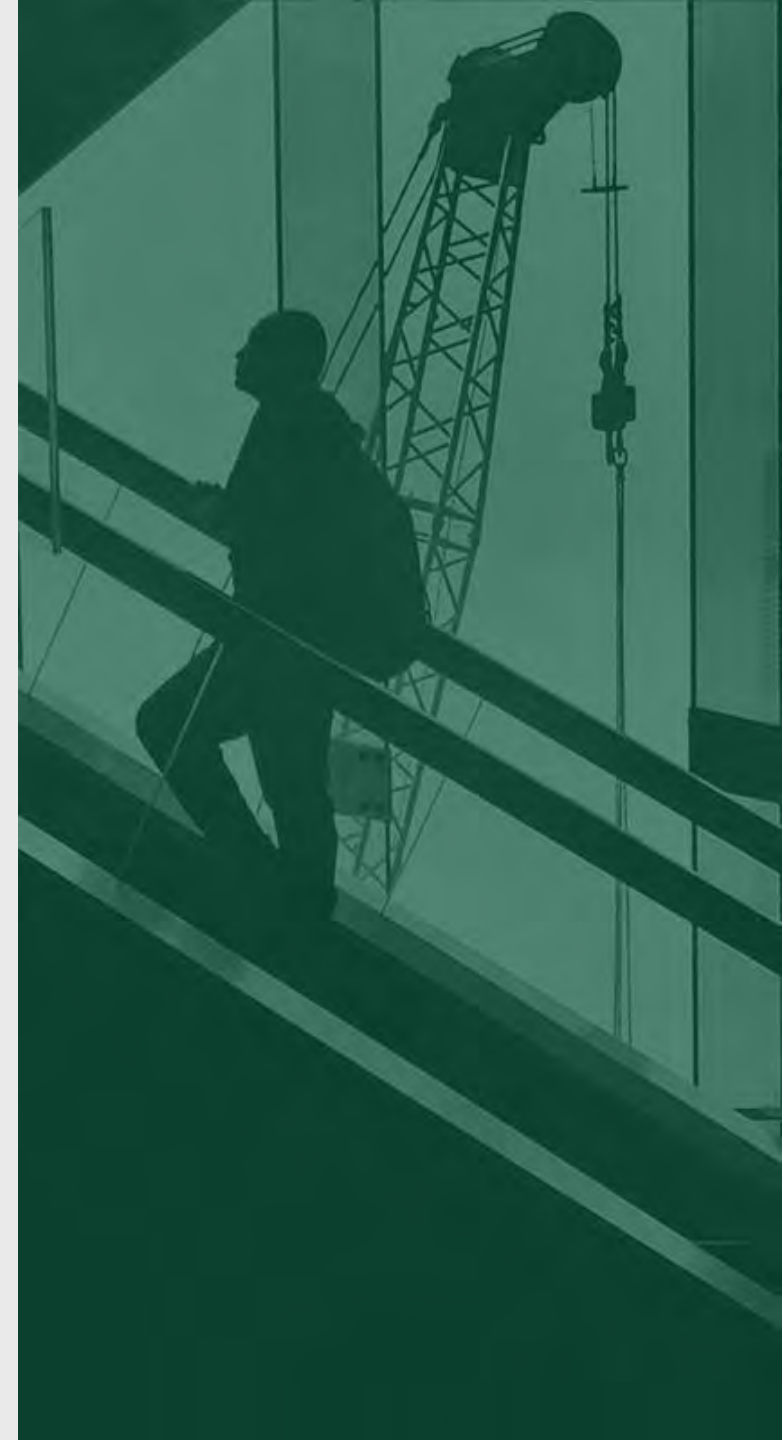
Interim maintenance applications - Takeaway Points

- Has there been full and frank financial disclosure ? *“Where the affidavit or form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation, the court should err in favour of the payee”* [HJFG v. KCY [2012] HKFLR 27]
- In *DX v. LN* (FCMC No. 7870 of 2014; 21 September 2015) at Page 35 §81, H.H. Judge B. Chan sounded a warning to all litigants and their lawyers - *“Henceforth, except for those “big money cases” where it is commonly accepted that whatever the standard of living during the marriage, the parties can afford to maintain it and should do so while going through litigation whether on voluntary basis or by way of maintenance pending suit, but for the majority of cases, of which I believe to include this case as well, in reality divorcing couple simply cannot afford to maintain the same standard of living for the reason that upon separation there would be 2 households and hence 2 sets of almost every item of expenses to meet instead of one during the marriage, and more significantly because of the litigation very often 2 sets of legal costs as well which very often, as in the present case, simply dwarf the former items, with the couple’s income remaining as before and that whatever other financial resources such as savings would dwindle fast to exhaustion. This is simply the unfortunate reality.”*

Interim Maintenance Applications – Takeaway Points

- In *Cornick v. Cornick* (No.3) [2001] 2 FLR 1240 at §105 Charles J. held - *“For example if the payor’s available resources decreased dramatically the payee would not be able to argue successfully against a downward variation because the payee’s standard of living would then fall below the standard enjoyed by the family before the breakdown of the marriage. In my judgment in those circumstances the payee would be likely to have to suffer the consequences of the inability of the payor to pay as much”*.

Interim Maintenance Applications – The Process and Urgency



Interim Maintenance Applications – The Process and Urgency

- As with most applications, the first hearing is usually a callover for directions, and there is usually opportunity to file evidence in opposition and in reply, with substantive hearing for argument
- Are there grounds for urgency that require interim orders ? e.g. interim MPS prior to substantive hearing.
- Receiving spouse and children may be in such dire financial circumstances and they will not be able to ‘make do ’until substantive hearing, or receiving spouse may not have the financial means to fund lawyers so as to get to the substantive hearing.
- Do you have Form E yet ? Is there sufficient financial disclosure to pursue the application ? Is there sufficient urgency to apply before Form E is available ?

Interim Maintenance Applications – The Process and Urgency

Currey Legal Costs Provision :-

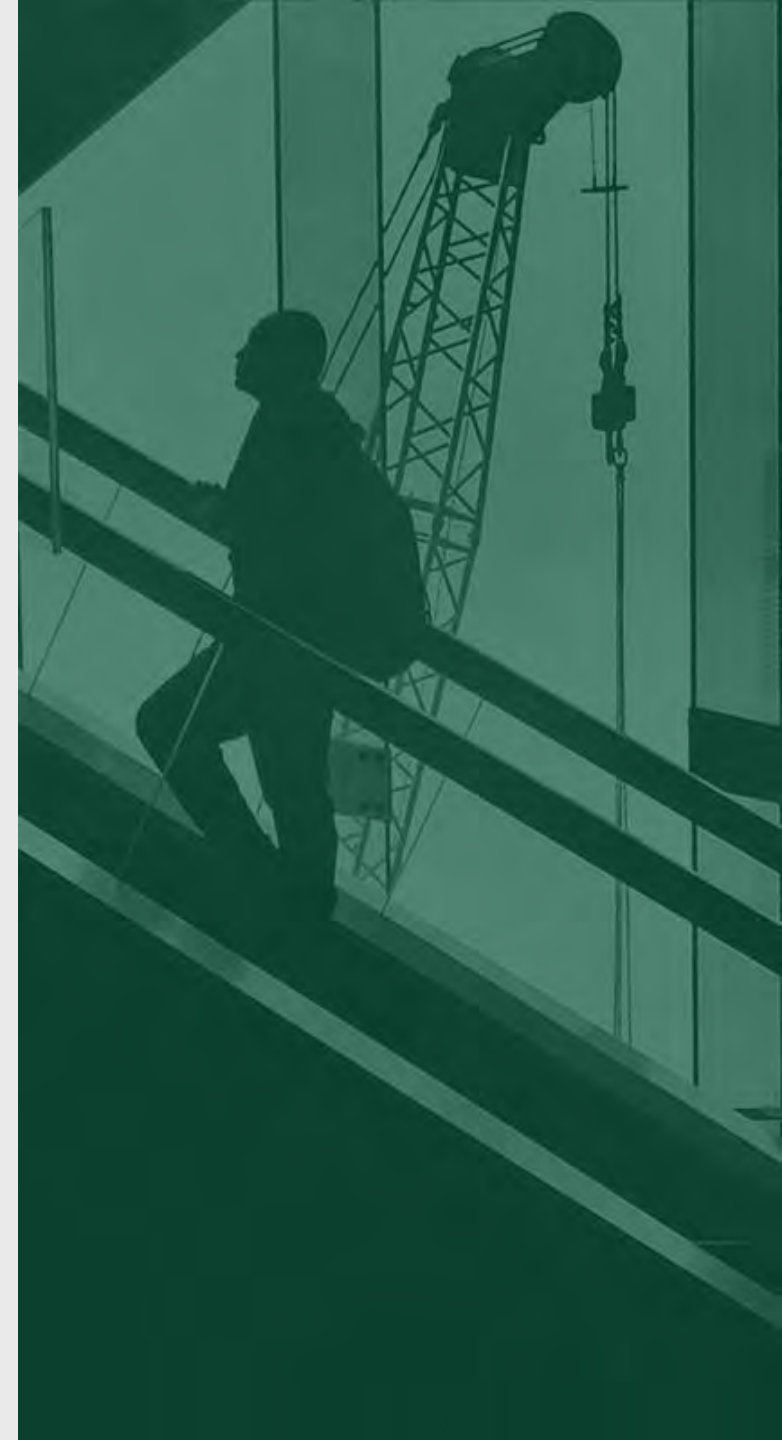
- *“the initial, overarching inquiry should be into – ‘... whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services.’”. [HJFG v. KCY [2012] HKFLR 27]*
- Legal Aid ? - *“There is no reason why public funds should be expended to fund litigation when there are ample resources available within family funds. With proposals for more active juridical involvement in pre-trial proceedings to restrict the incidence of costs this is in line with the modern approach. The court can keep better control of litigation if it’s funding is at least in part within its purview. The party that controls the funds will be less willing to use them on unnecessary interlocutory procedures if he or she will have to provide funding for the other side” [HJFG v. KCY [2012] HKFLR 27]*

Interim Maintenance Applications – The Process and Urgency

- Legal costs provision are usually provided for in 'stages' - in the first instance this is often for up to and including FDR, as the case may settle at FDR and therefore not require further legal fees.
- There should be a 'back of envelop' estimate of fees - similar to security for costs.
- However quantum is not the same as security for costs; which is usually on party-and-party taxation basis (because the security being provided is for 'taxed costs'). For *Currey* legal costs provision, the basis is more akin to solicitor own client basis, as the focus is on how much the receiving spouse requires in order to fund his/her own lawyers and have broad equality of arms.

Interim Maintenance Applications

- Quick Summary and difficulties practitioners may face in practice



Interim Maintenance Applications – Summary

- Not only available to divorce couples.
- Purpose is to allow the applicants to maintain as much as possible their “statue quo” pending the determination of their main dispute.
- The test:
 - Determined based on “broad brush” approach.
 - The reasonable needs of the applicant with reference to the parties’ standard of living
 - The Respondent’s ability to pay.
- If there is over or under payment, adjustments can be made in the final order.
- The application may also include legal costs provision.

Interim Maintenance Applications – common issues

- Standard of living
 - no standard established yet? (e.g. Short marriage with an infant)
 - Not everyone keep receipts.
 - Established pattern?

“In my view, unless there is cogent evidence showing a material change of financial circumstances to the extent affecting the Husband’s ability to continue with what he had so far been paying to the Wife for years, there is no room for the Husband to cease an established pattern of payment simply because a divorce suit was filed against him. Had this been allowed, it is tantamount to set up some form of financial threat or duress to deter a spouse from taking court proceedings. Put it the other way, it is akin to ‘ *penalise* ’ the Wife for filing the divorce.” (CWK v. YCHS AND ANOTHER, [2015] HKFC 161)
- Ability to pay
 - Lost of job (earning capacity?)
 - Sometimes it might be hard to proof means to pay (on paper with business that is losing money for example.)
 - The need to use capital?
- How COVID affects the application?
 - is staycation a reasonable need? [CCL aka L, CC v JRC aka C, JR (FCMC no. 1548 of 2020)]
 - How does it affect the assessment of earning capacity?
- The law only allows for periodical payment. What about stopping the using of credit cards? Memberships? One time purchase of certain necessary expenses (back dating?)

Interim Maintenance Applications – common issues

- How to assess the amount of legal costs provision?

WW v. LLN Formerly Known As LSM (CACV 524/ 2019)

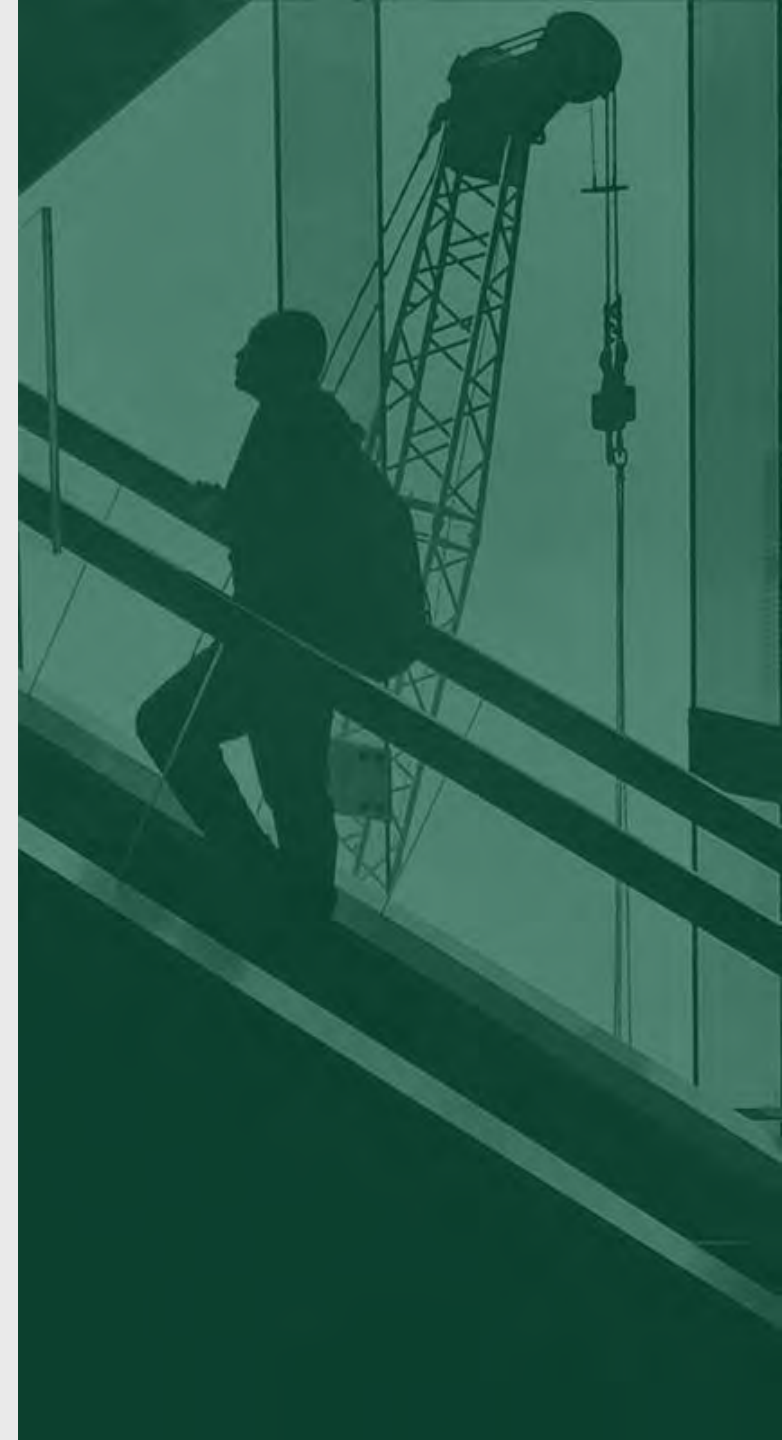
“In our judgment, there should be some flexibility in the evidential requirement on the quantum of costs in a litigation funding application which should be processed summarily. In a case where the claim is for a modest amount and the case is at a relatively early stage, it would be counter-productive to require a detailed breakdown for future costs as this may generate lengthy and costly but fruitless debates on such details. This would go against the summary nature of the exercise and the broad brush approach that the court should adopt in processing the same. Provided that a judge can be satisfied on the strength of a Form H that the ongoing costs are reasonable and the sums asked for are commensurate with a proportionate scale of the litigation, an award could still be made.

On the other hand, a “big money case” in which both sides are represented by counsel of senior standing with high level of fees would merit greater details being given. Even in those cases, breakdowns and details commonly found in a statement of costs for summary assessment should be sufficient. The court would only demand greater details in cases where the amount sought is exorbitant or there are other reasons for a closer examination of the figures put forward by an applicant. In this connection, we note that the amount awarded in *HJFG v KCY*, *supra*, is \$500,000 per month.”

Interim Maintenance Applications – common issues

- Enforcement (may become a real issue if there is delay in proceedings or got protracted for whatever reasons)
- Legal costs for the application itself
 - Can costs be recovered?
 - No choice but to take out application?
- Legal aid
 - Legal aid first charge. (18A Legal Aid Ordinance)
 - Any payment over HK\$9,100 are subject to legal aid first charge.
 - only applies to maintenance payable to spouse, not children.

Determination of ancillary relief: Spouse and Children



When can final orders be made?

- Section 4 MPPO – financial provision for spouse:
 - After granting of a decree nisi (section 25(1)(a) MPPO)
 - Can be made before (or after) the decree absolute
 - Order takes effect after the decree is made absolute (section 25(1)(b) MPPO)
- Section 5 MPPO – financial provision for children:
 - Before or on granting decree nisi or absolute
 - Section 25 MPPO. Does not apply to section 5 applications
 - Section 10(2) GMO for children with unmarried parents

What type of order are available?

Orders for financial provisions:

- Periodical payments
- Secured periodical payments
- Lump sum orders

Other orders

- Orders for transfer and settlement of property
- Orders for sale of property

Periodical Payments

- Duration of the order for spouse
 - Normally until remarriage or the death of either party, whichever is earlier
 - If paying party predeceases claimant, she can make a claim against the estate under IPFDO
- Duration of the order for child
 - Normally begins any time after the application is made, and cease at 18
 - Court may include provisions to extend payment to the child beyond 18 under section 10 MPPO

Periodical Payments

Section 10(3) MPPO:

“The court may make such an order as is mentioned in subsection (1)(a) in favour of a child who has attained the age of 18 and may include in an order made under section 5 or 8 in relation to a child who has not attained that age a provision extending beyond the date when the child will attain that age the term for which by virtue of the order any payments are to be made or secured to or for the benefit of that child , if it appears to the court that—

(a) that child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of the order or provisions.”

Is a clean break appropriate

- Clean break may occur when a party's claims for periodical payments and secured periodical payments are dismissed by the court
- Following a clean break, party is at no liberty to make an application for maintenance at all
- Generally considered beneficial to parties to be able to finalize their dealings with each other if they can and to proceed independently into the future unburdened by the past
- IDC v SSA (CACV 91/2013): *"The concept of clean break as between a husband and wife which underlies the lump sum award under the MPPPO in such context has no application to the relationship between a parent and a child."*

Is a clean break appropriate

- Where a clean break is considered, Duxbury calculation may be adopted
- Duxbury calculation originated in *Duxbury v Duxbury* [1987] 1 FLR 7
- Use of program that can calculate the lump sum which, if invested will produce enough income to meet the recipient's income needs for her life to cover her expenses
- Takes into account life expectancy, rate of inflation, growth of capital, taxation, return on investment
- Normally calculated by accountant
- *White v White* [2001] 1 AC 596 – Duxbury approach is not required by statute and it is a tool and not a rule.

Financial Provisions for the spouse

S7(1) MPPO:

- a) Income, earning capacity, property and other financial resources of parties which each of the parties to the marriage has or is likely to have in the foreseeable future;
- b) Financial needs, obligations, responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- c) Standard of living enjoyed by family before the breakdown of the marriage;
- d) Age of each party to the marriage and duration of the marriage
- e) Physical or mental disability of either parties to the marriage
- f) Contributions made by each of the parties to the welfare of the family
- g) Value to either of parties to the marriage of any benefit which by reason of the dissolution of the marriage, that party will lose the chance of acquiring

Financial Provisions for the spouse

Section 7 MPPPO is similar to section 25 of the Matrimonial Causes Act

Not one factor is more important than the other and the court must also bear in mind all circumstances of the case

Piglowska v Piglowski [1999] 1 WLR 1360 – “the exercise of the discretion under section 24 in accordance with section 25 requires the court to weigh up a large number of different considerations. The Act does not lie down any hierarchy.”

Financial Provisions for the spouse

Income, earning capacity, property and other financial resources of parties which each of the parties to the marriage has or is likely to have in the foreseeable future;

- Date for assessing value of assets is at date of trial
- Other financial resources include all matrimonial property, other properties in HK or abroad, shares, bonds, cars, boats, etc.
- Foreseeable future financial resources include annual bonuses, but inheritance not normally taken into account (wills can be changed and estates can diminish) (Morgan v Morgan[1977] Fam 122)

Financial Provisions for the spouse

Financial needs, obligations, responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

- Obligations include debt, financial support for family, and foreseeable obligations
- Where resources are limited, needs refer to daily necessities and accommodation
- Where parties are wealthy, needs interpreted more liberally to cover reasonable requirements, capital reserves, etc.

Financial Provisions for the spouse

Standard of living enjoyed by family before the breakdown of the marriage

- Court should ensure that the standard of living of one party does not deteriorate to a greater extent than that of the other
- HJFG v KCY [2012] 1 HKLRD 95 - It does not mean previous standard of living will be replicated. It would depend on the paying party's ability to pay

Financial Provisions for the spouse

Age of each party to the marriage and duration of the marriage

- *Miller v Miller; McFarlane v McFarlane [2006] 2 A.C. 618 – “in the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other’s non matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage”*
- *LKW v DD (2010) 13 HKCFAR 582 – “while the sharing principle applies to both long and short marriages, it is clear that when a short marriage comes to an end, fairness may dictate that one party should exit the relationship with less than half of the total assets”*

Financial Provisions for the spouse

Contributions made by each of the parties to the welfare of the family

- Court must consider both financial and non-financial contributions
- Non-financial contributions: caring for the family, creating a home, supporting the breadwinner in promoting his or her career
- WLK v TMC (2010) 13 HKCFAR 618 – Wife complied with husband's wishes that she should accompany him on his frequent business travels, kept her mother-in-law and sisters-in-law company, etc. This was considered as part of her contributions and 2% of total assets was added to her needs-based award

Financial Provisions for the spouse

Value to either of parties to the marriage of any benefit which by reason of the dissolution of the marriage, that party will lose the chance of acquiring

- McFarlane v McFarlane [2006] 2 AC 618 – wife was a lawyer in leading London firm but after marriage, couple decided Wife would devote her time and energy to the children. She was deprived of her own income
- WLK v TMC – wife had given up her career ambitions in order to fall into line with husband's wishes in contemplation of their marriage

Financial Provisions for the Children

- KS v YP (FCMC 2649/2016): ““It is generally understood, when considering the issue of maintenance for children, that both the children’s direct and indirect expenses should be shared between the parties in an equitable way. The appropriate amount is generally based on the financial resources of each party. On occasion this may be a 50:50 basis – especially if the parties are earning a similar amount. Alternatively, it may be a percentage based on the relative earnings of each party, or simply a reasonable amount in the circumstances.”

Financial Provisions for the Children

S7(2) MPPO:

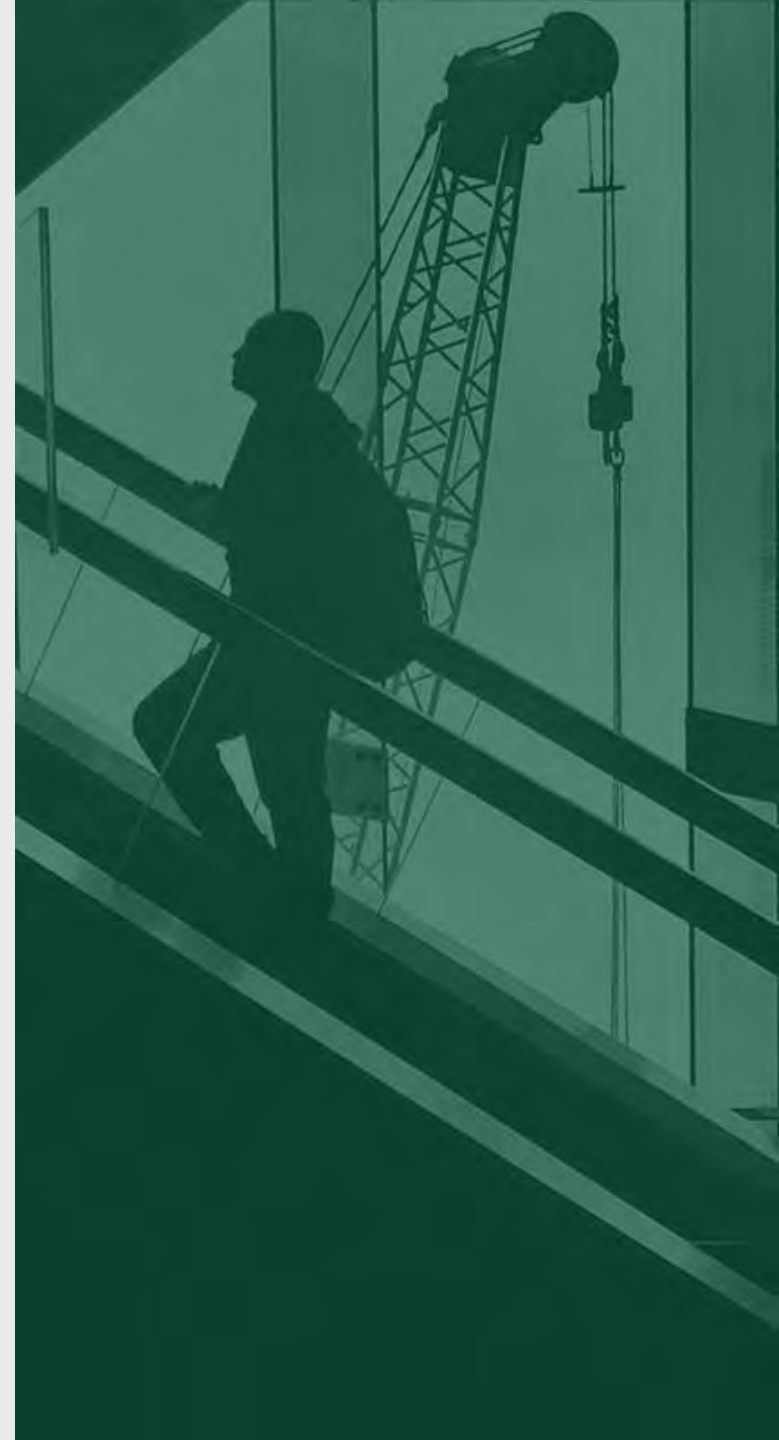
- a) The financial needs of the child;
- b) The income, earning capacity (if any), property and other financial resources of the child;
- c) Any physical or mental disability of the child;
- d) The standard of living enjoyed by the family before the breakdown of the marriage;
- e) The manner in which he was being and in which the parties to the marriage expected him to be educated;

Financial Provisions for the Children

Primary purpose when considering S7(2) MPPO factors:

“to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.”

The Sharing Principle



LKW v DD (2010) 13 HKCFAR 537

- Provides 4 guidelines and 5 steps as to how section 7 factors are considered
- In most cases, available assets are insufficient to cater for the needs of both parties after termination of the marriage. Therefore, the exercise does not go beyond considering the parties' needs
- Only cases where there are surplus assets to be distributed that the guidelines may require consideration

LKW v DD (2010) 13 HKCFAR 537

- Four guidelines:
 - I. Objective of fairness
 - II. Rejection of discrimination
 - III. Yardstick of equality
 - IV. Rejection of minute retrospective investigations

LKW v DD (2010) 13 HKCFAR 537

Objective of fairness

- The section 7 exercise should aim to arrive at a distribution of assets which is fair between the parties
- Court rejected C v C, which restricted contributions to financial and considered only 'reasonable requirements' of the parties.

LKW v DD (2010) 13 HKCFAR 537

- The court said in paragraph 28:

“What is fair treatment upon dissolution of a marriage involves concepts which “change from one generation to the next” and the values underlying C v C do not reflect elementary notions of fairness as between husband and wife in present day Hong Kong. To confine a non-working wife’s award to the sum needed to meet her “reasonable requirements” and to permit the husband to keep the remaining assets is patently unfair and discriminatory....”

LKW v DD (2010) 13 HKCFAR 537

Rejection of discrimination

- Concept of fairness requires refutation of any gender or role discrimination
- There should be no bias in favour of the money-earner and against home-maker and child-carer

LKW v DD (2010) 13 HKCFAR 537

Yardstick of equality

General rule is that equality should be departed from only if there is good reason for doing so

Note that an equal status to the role played by each party does not mean the assets should be equally divided.

More often than not, having looked at all the circumstances, one party will receive a bigger share

LKW v DD (2010) 13 HKCFAR 537

Rejection of minute retrospective investigations

Court should not countenance any attempt to engage in costly and futile retrospective investigations of the failed marriage which tend to deplete the parties' (and the courts') resources to increase antagonism and discourage settlement

LKW v DD (2010) 13 HKCFAR 537

- Five steps:
 - I. Identify the assets
 - II. Assessing the parties' financial needs
 - III. Deciding to apply the sharing principal
 - IV. Considering whether there are good reasons for departing from division
 - V. Deciding the outcome

LKW v DD (2010) 13 HKCFAR 537

Step 1: Identify the assets

- Court must regard section 7(1)(a) MPPPO, which includes the income, earning capacity, property and other financial resources of the parties
- There is no need to distinguish between matrimonial and non-matrimonial assets at this stage

LKW v DD (2010) 13 HKCFAR 537

Step 2: Assessing the parties' financial needs

- If there are insufficient assets to go beyond meeting the parties' needs, the section 7 exercise stops at this point
- Parties' needs should be generously interpreted and should not be assessed according to some perceived lowest common denominator
- Should ensure as best as possible that parties and children can enjoy the standard of living they enjoyed during the marriage

LKW v DD (2010) 13 HKCFAR 537

Step 3: Deciding to apply the sharing principal

- Sharing principal will be applied if there are surplus assets after parties' needs have been catered for

LKW v DD (2010) 13 HKCFAR 537

Step 4: Considering whether there are good reasons for departing from equal division

- In practice, more often than not, it is necessary to depart from it
- Any of the matters listed in section 7(1) may provide an appropriate reason to depart
- However, just because one or more factors are engaged does not mean departure must occur
- Weight to be given to such factors is in the court's discretion

LKW v DD (2010) 13 HKCFAR 537

Factors that may be material when considering whether sharing principal should be departed from:

- Sources of assets
 - Property acquired during the marriage (ex: gift or inheritance)
 - Assets derived from a business or an investment conducted solely by one party (unilateral assets)
 - Importance of the sources of assets may diminish overtime (duration of marriage may be considered)

LKW v DD (2010) 13 HKCFAR 537

- Conduct
 - Conduct is only relevant to financial provision if it is 'obvious and gross' (Wachtel v Wachtel (No. 2) [1973] 1 ALL ER 829)
- Examples where conduct was 'obvious and gross'
 - wife assisted husband with suicide attempts so she could benefit and set up home with another man
 - Wife hiring contract killer to murder her husband
 - Wanton dissipation of assets
- Examples where conduct not NOT 'obvious and gross'
 - Husband had a mistress
 - Wife had a child with another man

LKW v DD (2010) 13 HKCFAR 537

- Financial needs (s 7(1)(b))
 - One or more of section 7 factors may also be relevant in deciding whether equal division should be departed from
- Duration of marriage (s 7(1)(d))
 - When a short marriage comes to an end, fairness may dictate one party should exit the relationship with less than half of the total assets
- Contributions to welfare of the family (s7(1)(f))
 - Stellar contribution may justify departure from an equal division
 - The bar for raising the issue has been set very high
 - Only considered in circumstances of exceptional nature

LKW v DD (2010) 13 HKCFAR 537

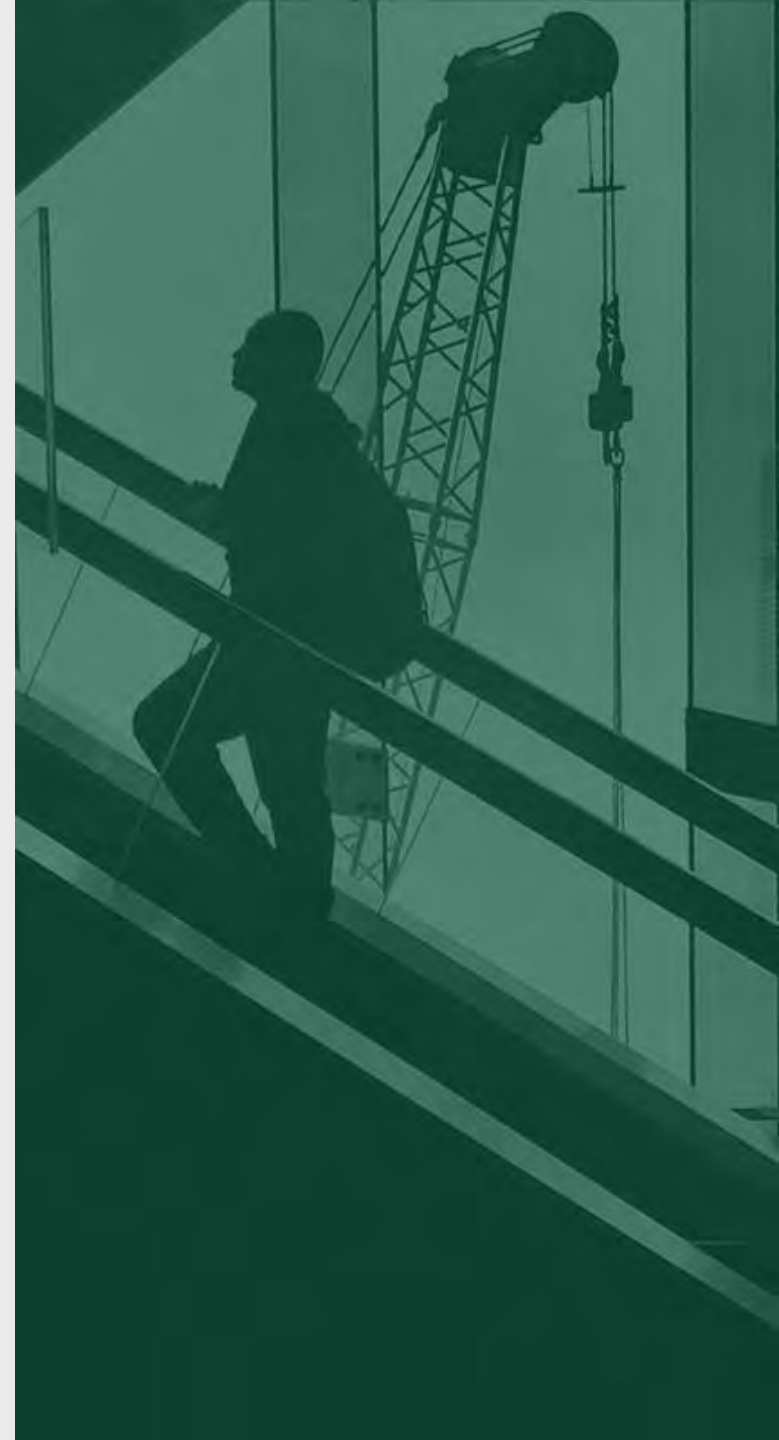
- Compensation (s7(1)(g))
 - Compensation and financial needs often overlap in practice, so double-counting should be avoided
 - compensation for relationship generated disadvantage is already intrinsically factored in as part of the sharing principal
 - Court should proceed that compensation is already factored in upon application of the sharing principal
 - Only in exceptional cases that a separate element of the award over and above the amount already factored should be dedicated to. Compensation on the special facts of the particular case
 - Broad brush approach generally sufficient

LKW v DD (2010) 13 HKCFAR 537

Step 5: Deciding the outcome

- Court should step back and look at the overall impact of all the factors found to be relevant
- Weight given to each consideration is a matter of discretion
- Where there is departure of equality in division of assets, court should explain its basis

Case Study



Case Study

- Andrew (39) and Betty (36) were married in 2005.
- They have two children, Cindy (9) and Danny (6).
- Andrew is a banker. His annual remuneration package is around HKD15m;
- Betty was a teacher before Cindy was born and she is now a homemaker;
- They live in the matrimonial home held in the joint name of Andrew and Betty, acquired in 2005 at HK\$15m and is now worth HK\$40m. There is a mortgage of HK\$20m which Andrew is servicing;
- Andrew has an investment portfolio with his private banker and is now worth around HKD20m;

Case Study

- Betty owns a flat that she inherited from her father before she married. She is currently receiving rental income of HK\$20,000 per month and its current value is around HK\$10m. She has no other valuable assets under her name.
- The monthly expenses of Betty is around HK\$25,000.00, and the children around HK\$40,000.00

Case Study

- Betty just found out that Andrew had an affairs. They had a huge fight last night and Andrew checked himself in a hotel.
- Andrew is now very nervous. How can you help?

Case Study

- How would Andrew's situation be different if :-
 - Andrew is 59 instead of 39, and Betty is 26 instead of 36;
 - Andrew is a businessowner instead of a banker;
 - Andrew's investment portfolio is worth HKD200m instead of HKD20m; and
 - Betty inherited the flat from her father after they got married.

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