

# **REVIEW OF FAMILY PROCEDURE RULES**

Interim Report and Consultative Paper

Chief Justice's Working Party  
on Family Procedure Rules

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Hong Kong Special Administrative Region  
The People's Republic of China



## *Acknowledgements*

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In July 2013, five judicial members of the Working Party on Family Procedure Rules visited London. They were warmly received by many judges at different levels of courts in England and Wales, including The Right Honourable Baroness Hale of Richmond, Deputy President of The Supreme Court, The Right Honourable Lord Justice Munby, President of the Family Division of the High Court and Chairman of the Family Procedure Rule Committee, The Right Honourable Lord Justice Thorpe, Justice of Appeal and Head of International Family Justice, The Right Honourable Lord Justice Ryder, Justice of Appeal, The Right Honourable Lady Justice Black, Justice of Appeal, The Right Honourable Lord Justice McFarlane, Justice of Appeal, The Honourable Mr Justice Moylan, High Court Judge, His Honour Judge Waller, Circuit Judge and Judge Darbyshire, District Judge. The English Judges all have very rich and extensive experience in family law. They generously shared their views and insights on the English family law system and the Family Procedure Rules 2010, which sets the latest development trend in family procedures within the common law world. The Working Party wishes to thank them most sincerely for their sharing which has provided the Working Party with very useful and practical guidance in the preparation of this Interim Report and Consultative Paper.



***Your Views are Crucial  
Please Take the Time to Respond***

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***THE CONSULTATION PERIOD ENDS ON 16 June 2014***

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- *This Interim Report and Consultative Paper affects everyone who has a stake in there being an effective and efficient family justice system.*
- *Whether you are someone involved in family and matrimonial proceedings – or legal professionals or other stakeholders – your response is crucial.*
- *The review of family procedure rules can only succeed with input and feedback from parties concerned.*
- *Please read the Interim Report and Consultative Paper and let us have your comments on the Proposals put forward for consultation on or before 16 June 2014.*
- *If you do not wish to comment on all the Proposals, you may just address those aspects of particular interest to you.*
- *The Interim Report and Consultative Paper is also available at the Judiciary's website at [http://www.judiciary.gov.hk/en/other\\_info/family\\_review.htm](http://www.judiciary.gov.hk/en/other_info/family_review.htm) (English version) and [http://www.judiciary.gov.hk/tc/other\\_info/family\\_review.htm](http://www.judiciary.gov.hk/tc/other_info/family_review.htm) (Chinese version). You are also invited to browse the above website for information on the family procedure rules review exercise.*

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## *Table of Abbreviations*

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2008 Direction	Practice Direction on Allocation and Transfer of Proceedings issued by the President of the Family Division of the High Court on 3 November 2008 (UK)
2008 Order	Allocation and Transfer of Proceedings Order 2008 (UK)
2009 Direction	Family Proceedings (Allocation to Judiciary) Directions 2009 (UK)
AIOR	Attachment of Income Order Rules Cap. 13A
AM(RP)O	Age of Majority (Related Provisions) Ordinance Cap. 410
AO	Adoption Ordinance Cap. 290
AR	Adoption Rules Cap. 290A
BOR	Hong Kong Bill of Rights
CA 2003	Courts Act 2003 (UK)
CACO	Child Abduction and Custody Ordinance Cap. 512
CAR	Convention Adoption Rules Cap. 290D
CCR	County Court Rules (UK)
CDR	Children Dispute Resolution
CFI	Court of First Instance of the High Court
Ch A 1989	Children Act 1989 (UK)
CJR	Civil Justice Reform

CJR Interim Report	Civil Justice Reform Interim Report and Consultative Paper by the Chief Justice's Working Party on Civil Justice Reform, November 2001
CJR Final Report	Civil Justice Reform Final Report by the Chief Justice's Working Party on Civil Justice Reform, March 2004
CPR	Civil Procedure Rules (UK)
DCO	District Court Ordinance Cap. 336
DCRVO	Domestic and Cohabitation Relationships Violence Ordinance Cap. 189
DCRVR	Domestic and Cohabitation Relationships Violence Rules Cap. 189A
DVO	Domestic Violence Ordinance Cap. 189 (now known as DCRVO)
Family Court	that division of the District Court which is for the time being assigned by the Chief Justice to deal with family and matrimonial matters
FDR	Financial Dispute Resolution
FLA 1996	Family Law Act 1996 (UK)
FMO	Foreign Marriage Ordinance Cap. 180 (not adopted as laws of HKSAR)
FPR 1991	Family Proceedings Rules 1991 (UK)
FPR 2010	Family Procedure Rules 2010 (UK)
FPR Committee	Family Procedure Rule Committee (UK)
GMO	Guardianship of Minors Ordinance Cap. 13

Hague Convention	Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980
HCO	High Court Ordinance Cap. 4
HFEA 2008	Human Fertilisation and Embryology Act 2008 (UK)
HKCP 2013	Hong Kong Civil Procedure 2013 Vol.1
HRTO	Human Reproductive Technology Ordinance Cap. 561
I(PFD)O	Inheritance (Provision for Family and Dependants) Ordinance Cap. 481
JOO	Juvenile Offenders Ordinance Cap. 226
JP(RR)O	Judicial Proceedings (Regulation of Reports) Ordinance Cap. 287
LO	Legitimacy Ordinance Cap. 184
MA 1949	Marriage Act 1949 (UK)
MCA 1973	Matrimonial Causes Act 1973 (UK)
MCO	Matrimonial Causes Ordinance Cap. 179
MCR	Matrimonial Causes Rules Cap. 179A
MCR 1977	Matrimonial Causes Rules 1977 (UK)
MFPA 1984	Matrimonial and Family Proceedings Act 1984 (UK)
MO	Marriage Ordinance Cap. 181
MO(RE)O	Maintenance Orders (Reciprocal Enforcement) Ordinance Cap. 188

MO(RE)R	Maintenance Orders (Reciprocal Enforcement) Rules Cap. 188A
MO(RE) Order	Maintenance Orders (Reciprocal Enforcement) (Designation of Reciprocating Countries) Order Cap. 188B
MPPO	Matrimonial Proceedings and Property Ordinance Cap. 192
MPSO	Married Persons Status Ordinance Cap. 182
MRO	Marriage Reform Ordinance Cap. 178
MRR	Marriage Reform Regulations Cap. 178A
MWPA 1882	Married Women's Property Act 1882 (UK)
PCJO	Protection of Children and Juvenile Ordinance Cap. 213
PCO	Parent and Child Ordinance Cap. 429
PD / PDs	Practice Directions
RDC	Rules of the District Court Cap. 336H
RHC	Rules of the High Court Cap. 4A
RSC	Rules of the Supreme Court (UK)
SMOO	Separation and Maintenance Orders Ordinance Cap. 16

## *Table of Contents*

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### TABLE OF ABBREVIATIONS

<b>EXECUTIVE SUMMARY</b>	<b>I - XLI</b>
<b>PROPOSALS FOR CONSULTATION</b>	<b>i - xxxvi</b>

<b>INTRODUCTION.....</b>	<b>1</b>
<b>PART I – THE PROBLEMS IDENTIFIED.....</b>	<b>3</b>
<b>A. THE FAMILY JUSTICE SYSTEM IN HONG KONG – AN OVERVIEW.....</b>	<b>3</b>
A1. Wide range of subject matters .....	3
A2. Jurisdiction of the courts .....	4
A3. Rules and PDs .....	5
A4. Extension of CJR measures.....	8
<b>B. DESIRED CHARACTERISTICS OF AN EFFECTIVE FAMILY JUSTICE SYSTEM.....</b>	<b>9</b>
<b>C. PERCEIVED PROBLEMS.....</b>	<b>12</b>
C1. Adversarial excesses and hostile litigation culture .....	12
C2. Procedure fragmented and difficult to use .....	13
C3. Applying the RHC not always straightforward .....	13
C4. English practice not entirely appropriate .....	14
C5. No rules for specified proceedings.....	14
C6. Antiquated and inconsistent language.....	15

C7.	Different rule-making authorities.....	15
C8.	Jurisdiction of the Registrar and Masters very limited .....	15
<b>PART II – PROPOSED REFORMS .....</b>		<b>17</b>
<b>D.</b>	<b>MAIN OBJECTIVES OF REFORMS.....</b>	<b>17</b>
<b>E.</b>	<b>A UNIFIED PROCEDURAL CODE .....</b>	<b>19</b>
E1.	Overseas experience.....	19
E1.1.	England.....	19
E1.2.	Australia .....	20
E1.3.	New Zealand .....	21
E1.4.	Common feature – a unified code.....	21
E2.	The case for Hong Kong .....	22
E2.1.	Perceived benefits .....	22
E2.2.	The CJR methodology.....	22
E2.3.	Other factors.....	23
	(a) Possible lacunae.....	23
	(b) Drafting effort.....	24
	(c) Training effort .....	24
	(d) Costs .....	24
	(e) Modernisation of language.....	25
E2.4.	New Code.....	25
E3.	A unified rule-making authority.....	25
E4.	Consequential amendments.....	25
<b>F.</b>	<b>ADOPTING THE FPR AS THE BASIC FRAMEWORK FOR THE NEW CODE.....</b>	<b>28</b>
<b>G.</b>	<b>GENERAL CONTENTS OF THE NEW CODE .....</b>	<b>31</b>
G1.	Modelling on the RHC .....	31
G2.	Selecting from the FPR 2010 .....	33

<b>H.</b>	<b>SPECIFIC TOPICS OF REFORMS.....</b>	<b>35</b>
H1.	Application of the New Code.....	35
H2.	Definition and jurisdiction of the courts .....	38
H2.1.	Definition of the courts .....	38
H2.2.	Powers and functions of the judge .....	38
H2.3.	Jurisdiction of the Family Court .....	39
	(a) Set-up of the Family Court.....	39
	(b) Monetary jurisdiction .....	39
	(c) Jurisdiction in children matters .....	41
H2.4.	Jurisdiction of the High Court.....	42
	(a) Exclusive jurisdiction.....	42
	(b) Inherent jurisdiction in children matters .....	43
H3.	Underlying objectives .....	45
H3.1.	The need for adoption .....	45
H3.2.	Regard to welfare issues.....	47
H4.	Case management powers.....	48
H5.	Alternative dispute resolution .....	50
H6.	Commencement and transfer of proceedings.....	52
H6.1.	The current statutory scheme .....	52
	(a) MCO/MCR .....	53
	(b) MPPO .....	56
	(c) SMOO.....	56
	(d) DCRVO .....	57
	(e) GMO .....	58
	(f) PCO.....	58
	(g) AO.....	59
	(h) I(PFD)O .....	60
	(i) Other family proceedings .....	61
H6.2.	The English experience .....	61
H6.3.	Rationalising the entry point.....	66
H6.4.	Regulating transfer and retransfer.....	68
H7.	Commencement of proceedings and forms.....	70

H8.	Service and acknowledgement .....	73
H8.1.	Retaining the current mode .....	76
H8.2.	Service by fax and electronic means.....	79
H8.3.	Service outside the jurisdiction .....	79
H9.	Interlocutory applications.....	81
H10.	Procedures for matrimonial causes .....	81
H10.1.	An overview of the MCR.....	81
H10.2.	Matters of general application.....	86
H10.3.	Specific matters .....	87
	(a) Application to consider agreement (Rule 6).....	88
	(b) Reconciliation.....	90
	(c) Naming of co-respondents (Rule 13) .....	90
	(d) Special procedure for undefended cases (Rule 47A) ..	91
	(e) Medical examination (Rules 30 and 31).....	92
	(f) Rescission (Rules 56A, 64 and 67) .....	93
	(g) Making a decree absolute (Rule 65).....	93
H10.4.	Structure of the rules .....	95
H11.	Application for a financial order .....	95
H11.1.	A compendious code .....	95
H11.2.	Limited application to the MPSO .....	97
H11.3.	Clear definition for financial order .....	99
H11.4.	General approach.....	101
H11.5.	Where to start proceedings, etc .....	102
H11.6.	Mode of commencement.....	103
H11.7.	Mode of hearing .....	104
H11.8.	Service and joinder of third-parties.....	105
	(a) Variation of settlement orders .....	105
	(b) Avoidance of disposition orders.....	106
	(c) Applications relating to landed property and notice of ancillary relief (registration against landed property) .	106
	(d) Disputed beneficial ownership or legal rights and entitlements.....	108
H11.9.	Financial Dispute Resolution (FDR).....	112
	(a) Codification .....	112
	(b) First appointment.....	113
	(c) Costs estimates .....	114
	(d) Open proposals .....	115
	(e) Sanctioned offers .....	115
	(f) Forum of FDR hearings.....	117



H11.10.	Application under the I(PFD)O.....	118
	(a) Applications for alteration of maintenance agreement after the death of one party .....	124
	(b) Application for provision from deceased’s estate .....	125
H12.	Procedures for miscellaneous applications .....	125
H12.1.	Types of applications .....	125
H12.2.	General approach for the new rules .....	126
H12.3.	Specific applications .....	127
	(a) Declarations .....	127
	(b) Applications under the DCRVO.....	128
	(c) Applications for non-cohabitation under the SMOO ..	129
	(d) Applications for consent to marry under the MO.....	129
H13.	Children proceedings .....	130
H13.1.	Scope of the new rules .....	130
H13.2.	Parts 12 and 14 as broad framework.....	132
H13.3.	A unified definition for “child”.....	132
H13.4.	Statement as to arrangements for children.....	134
H13.5.	Custody, care and supervision, removal, and related matters .....	134
	(a) Rule 92.....	134
	(b) Rule 93.....	135
	(c) Rule 94.....	135
	(d) Rule 95.....	136
	(e) Rule 96.....	136
H13.6.	Child dispute resolution .....	137
H13.7.	Guardianship .....	141
H13.8.	Inherent jurisdiction including wardship .....	141
H13.9.	CACO.....	141
H13.10.	Parentage, etc. ....	142
H13.11.	Surrogacy .....	143
H13.12.	Adoption.....	144
H13.13.	Separate representation of children.....	145
H13.14.	Other miscellaneous applications.....	146
H13.15.	Guidance for judicial meetings of children.....	146
H14.	Interim remedies and security for costs .....	147
H14.1.	Interim remedies.....	147
H14.2.	Security for costs.....	148

H15.	Evidence .....	150
H15.1.	General procedural rules .....	150
H15.2.	Discovery, etc.....	154
H16.	Experts and assessors .....	158
H16.1.	Experts.....	158
H16.2.	Assessors .....	162
H16.3.	Use of expert evidence .....	163
H17.	Statement of truth .....	165
H18.	Trial .....	166
H19.	Appeals.....	168
H20.	Setting aside decree nisi/absolute .....	170
H21.	Costs .....	172
H21.1.	The current position .....	172
H21.2.	The English position .....	174
H21.3.	Retaining the current practice .....	176
H22.	Enforcement .....	177
H22.1.	General .....	177
H22.2.	Judgment summons .....	179
H22.3.	Attachment of income order.....	183
H22.4.	Committal for contempt .....	184
H22.5.	Writ of sequestration .....	185
H22.6.	Injunction .....	185
H22.7.	Charging order.....	185
H22.8.	Garnishee order .....	186
H22.9.	Prohibition order .....	186
H22.10.	Writ of fieri facias or warrant of execution.....	187
H22.11.	Appointment of receivers: equitable execution .....	187
H22.12.	The position in England .....	188
H22.13.	Proposals .....	190
H22.14.	Enforcement of undertakings .....	191
	(a) Enforcement by committal for contempt of court.....	192
	(b) Enforcement of undertaking for the payment of money .....	193

H23.	Reciprocal enforcement of maintenance orders.....	195
H24.	Hearing and reporting of proceedings.....	196
H24.1.	Current practice in Hong Kong and proposals.....	196
	(a) Hearing .....	196
	(b) Reporting of proceedings and judgments .....	198
	(c) Access to court documents .....	200
	(d) Anonymisation .....	202
	(e) A new Part .....	203
H24.2.	The English experience .....	203
H25.	Representation.....	205
H25.1.	Change of solicitor/Acting in person .....	205
H25.2.	Representation of protected parties.....	207
H26.	Registrar and Masters.....	210
H26.1.	The Registrar .....	210
H26.2.	Powers and duties of the Registrar.....	210
H26.3.	Proposals .....	212
H27.	Modernisation of language.....	214
H27.1.	Benefits.....	214
H27.2.	The English experience .....	215
H27.3.	Proposals .....	217
H28.	Removal of inconsistent language .....	219
<b>I.</b>	<b>MISCELLANEOUS TOPICS.....</b>	<b>220</b>
I1.	Information technology .....	220
I2.	Implications on resources.....	221
I2.1.	Manpower resources .....	221
I2.2.	System changes .....	222
I2.3.	Training .....	223
I2.4.	Publicity materials for litigants in person and the public ....	223

<b>Annex 1</b>	Schedule 1 to the Supreme Court Act 1981 (now renamed as the Senior Courts Act 1981)	A1
<b>Annex 2</b>	Commencement of Proceedings	A3
<b>Annex 3</b>	List of Modes of Enforcement in Matrimonial and Family Proceedings	A9
<b>Annex 4</b>	List of the Nature of Ex-parte Applications filed at the Family Court	A10

# ***EXECUTIVE SUMMARY***

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## *Executive Summary*

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1. The Working Party was appointed by the Chief Justice in March 2012 with the following terms of reference :-

- “(1) To examine the current procedures in the family jurisdiction and, with a view to securing that the family justice system is accessible, fair and effective, to make recommendations to the Chief Justice for changes thereto and in particular to consider formulating a single set of rules for the family jurisdiction applicable both to the Family Court and the High Court; and
- (2) To advise the Chief Justice initially on the desirability, impact and practicalities of any such changes as may be recommended.”

2. The Working Party is only tasked to review the practice and procedure of the family jurisdiction exercised by the Family Court and the High Court. We will not examine or make any proposal to change the substantive law on family and matrimonial matters, which is entirely a matter for the Administration. Further, its purview does not include the public law proceedings of the juvenile court, that is, a magistrate appointed by the Chief Justice pursuant to section 3A(2) of the JOO in exercising the jurisdiction under the PCJO.

3. This Interim Report and Consultative Paper seeks :-

- (i) to identify the defects which impede the effective operation of the family justice system;
- (ii) to formulate proposals for possible reforms to the family procedural rules; and
- (iii) to consult court users, the legal profession, other stakeholders and all interested members of the public on the proposals.

## **PART I – THE PROBLEMS IDENTIFIED**

### **An Overview of the Family Justice System in Hong Kong**

4. Hong Kong's family justice system embraces a wide range of subject matters, such as family and matrimonial matters, including dissolution of marriage, children related applications, ancillary and other financial relief and those arising from various Ordinances, with both the Family Court and the High Court exercising concurrent jurisdiction, other than those falling within the exclusive preserve, under some seriously fragmented and labyrinthine procedural rules and PDs.

### **Desired Characteristics of an Effective Family Justice System**

5. An effective family justice system should share all the typical characteristics of a well-functioning civil justice system :-

- (i) it should be just in the results it delivers;
- (ii) it should be fair and be seen to be so;
- (iii) it should be able to deal with cases with reasonable speed;
- (iv) it should be understandable to those who use it;
- (v) procedures should be simple, user-friendly and proportionate to the issues;
- (vi) it should be reasonably affordable with costs being proportionate to the issues;
- (vii) it should be able to provide as much certainty as the nature of the cases allows; and
- (viii) it should be effective, adequately resourced and organised.

6. An effective family justice system must also be designed to meet the challenges presented by the special nature, breath and complexity of family and matrimonial disputes, possessing the following essential features :-

- (i) it should be responsive to the varied needs of the family jurisdiction to facilitate the best possible outcomes;
- (ii) it should ensure that children's welfare is adequately addressed and where necessary, children are represented and heard;



- (iii) it should promote a conciliatory litigation culture which encourages the parties to make decisions as equal partners without any perceived bias, prejudice or ill-feelings associated with the drama of divorce;
- (iv) it should provide a mechanism for alternative dispute resolution; and
- (v) it should have a sufficient number of specialist judges.

### **Perceived Problems**

7. When measured against the above characteristics, Hong Kong's family justice system suffers from a number of defects :-

- (i) many of the adversarial excesses continue to haunt hotly contested family and matrimonial cases, which are as hostile and litigious as before;
- (ii) fragmented and labyrinthine procedures are not conducive to the efficient disposal of disputes;
- (iii) where the MCR is silent on a procedural point, identifying the applicable rules in the RHC and debating the extent of the necessary modifications cause inconvenience and waste time and costs;
- (iv) where there is no provision in the MCR or the RHC, the English practice is applicable. However, the English practice may no longer be entirely appropriate;
- (v) the majority of family proceedings have no rules of their own. There are likewise the problems of identifying the extent of the applicability of the RHC or the RDC and the lack of harmonisation. In some specific matters, one may even have to resort to the English practice;
- (vi) some of the language in the existing rules appears outdated and inconsistent;
- (vii) different principal Ordinances provide for different rule-making authorities, which is confusing and discourages any coherent approach in introducing rules and forms; and
- (viii) the Registrar's and the Masters' jurisdiction and powers are extremely limited. Consequently, judges are overwhelmed with matters which otherwise could have been handled by the Registrar and the Masters.

## **PART II – PROPOSED REFORMS**

### **Main Objectives of Reforms**

8. Rules and procedures underpin an effective operation of the family justice system. Because of the problems discussed above, our family justice system is not functioning effectively. The procedural rules are in urgent need of comprehensive and fundamental reform.
9. The following main objectives of reforms are identified :-
  - (i) the family justice system is to be accessible, fair and efficient;
  - (ii) the shift in litigation culture started with the initiative of PD15.11 on financial dispute resolution is to continue;
  - (iii) undue and excessive procedural distortions are to be reduced;
  - (iv) the procedural rules are to be both simple and simply expressed for the benefit and comprehension of both qualified and lay court users and the court administration;
  - (v) the procedures in the Family Court and the High Court are to be aligned;
  - (vi) the procedural rules are to be streamlined and harmonised with the post-CJR RHC/RDC;
  - (vii) procedures are to be introduced for proceedings and matters where hitherto no rules have existed;
  - (viii) all extant inconsistencies in the procedural rules are to be removed;
  - (ix) the legal language is to be modernised to reduce complexity and outdated terminology is to be replaced;
  - (x) the procedural rules are to be compatible with and/or have the ability to accommodate modern technological advancements;
  - (xi) a simpler approach with modernised process is to be adopted for contested family and matrimonial cases; and
  - (xii) dedicated PDs and user-friendly statutory forms are to be designed to supplement the rules and to give all necessary procedural guidance for court users.

## **A Unified Procedural Code**

10. In their recent reforms, England, Australia and New Zealand have all adopted a stand-alone unified procedural code that comprehensively deals with the processes and procedures for all family and matrimonial matters.

11. There are a number of perceived benefits in adopting a single unified procedural code :-

- (i) it will help underline a fresh start to promote the necessary cultural change for the modernisation of family litigation;
- (ii) it will facilitate a more streamlined procedure and contribute to a common approach across the Family Court and the High Court, resulting in a more efficient and cost-effective system;
- (iii) it will be easier for both qualified lawyers and unrepresented litigants to refer to one procedural source for guidance;
- (iv) it is more preferable to put the new rules for proceedings where no rules hitherto have existed in one unified code, thus making them readily accessible;
- (v) possible clashes between old rules and new procedural concepts, and hence satellite arguments, may be avoided;
- (vi) the need for cross references to the RHC/RDC will be greatly reduced; and
- (vii) the new code will repeal the existing rule-making powers under the various Ordinances and replace them with a comprehensive rule-making power to cover them all.

12. Having considered all the relevant factors, the Working Party proposes to adopt a single set of self-contained procedural rules (“the New Code”). **[Proposal 1]**

13. It is undesirable to have different rule-making authorities for family and matrimonial matters. We consider that the rule-making powers should be collected under the umbrella of a single rule-making authority. This is of particular importance for the New Code which requires a coherent, cohesive and consistent approach. We therefore propose that a new Family Procedure Rules Committee be set up by way of primary legislation as the single rule-making authority for the New Code and any subsequent amendments, which should be modelled on the powers, composition and approach for the two rules committees established for the High Court and

the District Court respectively, namely, the High Court Rules Committee and the District Court Rules Committee. **[Proposal 2]**

14. All the proposed reforms concern rules and procedures only. However, in order to implement some of the proposals, it may be necessary to introduce consequential amendments to the relevant principal Ordinances and/or subsidiary legislation. A ready example is the proposed creation of the Family Procedure Rules Committee. The Working Party therefore proposes that where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation. **[Proposal 3]**

### **Adopting the FPR as the Basic Framework for the New Unified Procedural Code**

15. The FPR 2010, which sets out the latest developments in family procedural reforms within the global common law community, may be adopted as the basic framework for the New Code. The FPR 2010 uses detailed PDs substantively. The legitimacy of such approach is rooted in the express provisions in the CA 2003. However, in Hong Kong, in the absence of any similar provisions in the primary legislation, the same approach cannot be adopted. Subject to the reservation about the use of PDs, the Working Party proposes to adopt the FPR 2010 as the New Code's broad, basic framework. **[Proposal 4]**

### **General Contents of the New Code**

16. To align the general practice and procedure in both the family and civil jurisdictions in the post-CJR era, to harmonise as far as possible the general parts of the family rules with those for civil proceedings and to reap the benefits of the CJR reforms, the Working Party proposes to model the general provisions of the New Code on the equivalents in the RHC or incorporate the relevant provisions of the RHC with modifications as appropriate for family and matrimonial matters. **[Proposal 5]**

17. As a self-contained instrument, the New Code should not, in principle, fall back on other provisions of the RHC. However, as a prudent measure, the Working Party proposes to create a general fall-back provision on the applicable rules with the RHC to fill any unforeseen procedural gap in the New Code. **[Proposal 6]**

18. The Working Party has identified a number of provisions in the RHC which are of general applicability and proposes that those provisions be adopted into the New Code, with modifications appropriate for family and matrimonial matters. **[Proposal 7]**

19. The Working Party proposes to select from the FPR 2010 and those necessary PDs relevant applicable provisions for adoption as rules in the New Code. **[Proposal 8]**

## **Specific Topics of Reforms**

### *Application of the New Code*

20. The New Code should apply to all matrimonial and family proceedings as defined, whether they are in the High Court or the Family Court. **[Proposal 9]**

21. The Working Party proposes to largely follow the English approach that the statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code, that to avoid redundancy, it is not necessary to give a definition of “matrimonial proceedings” and that the term “family proceedings” should be comprehensive and list out all family-related proceedings, whether in the High Court or in the Family Court. **[Proposal 10]**

22. Since the meaning of “court” or “judge” has not been consistently set out in the various Ordinances and rules of court relating to family law, the Working Party proposes that there should be a clear definition of “court” and of “judge” in the New Code. **[Proposal 11]**

23. The powers of judges to perform functions under the New Code should also be spelt out. **[Proposal 12]**

### *Jurisdiction of the Family Court*

24. There is no statutory provision setting out the establishment, jurisdiction or constitution of the Family Court. Apart from the MCO, the MPPO and the MPSO, there are no clear provisions dealing with the monetary jurisdiction of the Family Court. It has very limited inherent jurisdiction over children matters but a majority of the cases concerning

custody or upbringing of a child, or any other matters concerning a child are disposed of in the Family Court.

25. There should be a definition of “Family Court” in the New Code, setting out its jurisdiction, including the jurisdiction in children matters, and stating that there are no monetary limits in any financial applications. A list of matters assigned to be dealt with by the Family Court should also be set out in the New Code. **[Proposals 13 and 14]**

### *Jurisdiction of the High Court*

26. The New Code should set out clearly the matters over which the Court of First Instance of the High Court has exclusive jurisdiction. **[Proposal 15]**

27. The High Court enjoys inherent jurisdiction in children-related matters. Presently, one has to refer to case law for the relevant inherent jurisdiction. The FPR 2010 and PD 12D comprehensively define inherent jurisdiction in children-related matters of the High Court of England, hence greatly reducing the need to refer to case law. The provisions for transfer in PD 12D enable the High Court to transfer cases to the lower court for dealing with relatively minor or more mundane or non-contentious matters concerning a ward. Both the provisions for inherent jurisdiction and transfer should be adopted in the New Code with necessary modifications. **[Proposal 16]**

### *Underlying objectives*

28. The extension of the underlying objectives as set out in Order 1A of the RHC, a fundamental source of guidance for the operation of the civil justice system, to family procedural rules is the first and essential response to tackle adversarial excesses and to instil a shift of litigation culture. A statement similar to “the underlying objectives” in Order 1A of the RHC encapsulating the fundamental purpose of the New Code and the key concepts of family case management should be adopted. **[Proposal 17]**

29. Welfare issues have special relevance for the family jurisdiction, and in Hong Kong, the welfare or the best interests of children are always paramount in family and matrimonial cases. In England, welfare issues are also something the courts need to take into account when applying the

overriding objectives in the FPR 2010. The New Code should follow the FPR 2010 in requiring the court to have regard to welfare issues when applying the underlying objectives for family procedure. **[Proposal 18]**

### ***Case management powers***

30. By drawing the case management powers together and placing them on a clear and transparent legal footing under Order 1B of the RHC, a scheme of fair and consistent judicial case management is created. The New Code should have provisions setting out the court's case management powers similar to those under Order 1B of the RHC to ensure that the procedural steps are effectively carried out in accordance with the underlying objectives. **[Proposal 19]**

### ***Alternative dispute resolution***

31. To enhance the court's powers in promoting alternative dispute resolution, express provisions modelled on Part 3 of the FPR 2010 which sets out the court's powers to encourage the use of alternative dispute resolution and to facilitate its use should be adopted and considerations should be given to see if the mediation procedures now stipulated in PD 15.10 need any further enhancement. **[Proposals 20 and 21]**

32. The Working Party recognises the rationale behind a pre-action protocol as that contained in PD 3A of the FPR 2010 but notes that front loading of costs and delayed access to courts are the major concerns of those who object to it. Readers are asked to express their views if a pre-action protocol for mediation is suitable in local circumstances. **[Proposal 22]**

### ***Commencement and transfer of proceedings***

33. At present, the procedural law relating to the commencement and transfer of proceedings is seriously fragmented. There is a confusing mixture of primary and secondary legislation determining where matrimonial and family cases are heard. Only some of the primary legislation has designated the relevant court for commencing particular proceedings or allowed transfer and/or retransfer of proceedings.

34. The New Code should provide a simple route for access to family justice system and therefore should set out clearly the relevant court(s) for

commencing each type of proceedings and should provide that proceedings should generally begin in the Family Court unless the High Court has exclusive jurisdiction or in exceptional circumstances; and the exceptional circumstances should be spelt out. **[Proposals 23 and 24]**

35. In England, the FPR 2010 contains clear provisions for the transfer of family proceedings. The 2008 Order, supplemented by the 2008 Direction, stipulates the exceptional circumstances under which proceedings may be commenced in the High Court and may be transferred from the county court to the High Court, hence ensuring that the criteria for transfer of proceedings are applied in such a way that proceedings are heard at the appropriate level of court, that the capacity of lower courts is properly utilised, and that proceedings are only dealt with in the High Court if the relevant criteria are met.

36. The New Code should contain provisions on transfer and retransfer for all types of transferable proceedings between the Family Court and the High Court (with empowering provisions added to the individual primary legislation if required), to be modelled on the relevant provisions in the FPR 2010 and augmented by PDs modelled on the 2008 Order and the 2008 Direction, with modifications to suit local circumstances. **[Proposal 25]**

### ***Commencement of proceedings and forms***

37. At present there is a plethora of originating processes such as petition, originating application and originating summons designated by different rules or PDs, coupled with an array of statutory forms, if available. And depending on the particular mode of commencement of proceedings, the parties are called differently when their capacity is in substance the same.

38. Following the English approach, a new unified mode of originating process for both matrimonial and family proceedings, namely, “originating application”, should be adopted and new statutory forms should be introduced to cater for different types of proceedings. The nomenclature for the parties should be unified to simply read “Applicant” and “Respondent”, save for joint application for divorce, where the parties should be called “1<sup>st</sup> Applicant” and “2<sup>nd</sup> Applicant”. **[Proposals 26 and 27]**



### *Service and acknowledgement*

39. The mode of service and acknowledgement of service of documents in matrimonial proceedings is governed by provisions set out in the MCR. The Working Party proposes that generally the present provisions should be retained but refined and put in one place in the New Code. **[Proposal 28]**

40. Rule 14(1) of the MCR allows service of petition by post without specifying the requirement of registered post, but in order to facilitate the obtaining of a deemed service order, a petitioner may try to serve the petition by double registered post (i.e. by producing advice of delivery) in order to show the respondent's actual notice of the petition. There is a suggestion that the rules in this area should be simplified and aligned with those in the RHC/RDC which provide for service by registered post and a deemed service order is unnecessary.

41. In England, an application for a deemed service order is still necessary if a signed acknowledgment of service has not been returned. The position in Australia and New Zealand is even stricter, in that there is no provision for a deemed service order and the alternatives are an application for substituted service or dispensation of service.

42. Readers are invited to express their views on whether the provision for service of matrimonial cause by ordinary post should be replaced by registered post for the alignment of the MCR, RHC and RDC, and to do away with the need for a deemed service order in cases where a signed acknowledgment of service has not been returned. **[Proposal 29]**

43. The FPR 2010 allows service of documents other than an application for a matrimonial order to be effected by fax or other means of electronic communication. Views are invited as to whether documents other than the originating process and judgment summons should, as a matter of principle, be able to be served by fax or other electronic communication in line with the FPR 2010. **[Proposal 30]**

### *Service outside the jurisdiction*

44. Rule 109(1) of the MCR allows service outside the jurisdiction without leave. Whilst this provision should be retained, the manner of

service of documents should be aligned with that of the general civil practice as contained in Order 11 of the RHC. **[Proposal 31]**

45. The Working Party also proposes to follow the FPR 2010 by expressly providing that all documents in matrimonial and family proceedings may be served outside the jurisdiction without leave. **[Proposal 32]**

### *Interlocutory applications*

46. For any interlocutory application in extant proceedings for matrimonial causes and family proceedings in the New Code, such an application should be made by summons. **[Proposal 33]**

### *Procedures for matrimonial causes*

47. The MCR is the principal rules governing the procedures for matrimonial causes and matrimonial proceedings. Many of the essential features in the MCR should be retained and incorporated into the New Code but they need to be updated so as to reflect the current and modern practice and modified with a view to simplifying the procedural steps and harmonising them with other provisions in the New Code. Reference can be made to Part 7 of the FPR 2010 (Procedure for Applications in Matrimonial and Civil Partnership Proceedings) in identifying areas of possible improvement.

### *Matters of general application*

48. For those provisions which are matters for general application, it is not necessary to make separate provisions for them in the procedures governing matrimonial causes. These provisions will be covered by the relevant provisions in the New Code. **[Proposal 34]**

### *Specific matters*

49. The Working Party considers that specific matters which feature in matrimonial causes only should be improved and, if desirable, be adapted in accordance with the relevant provisions in Part 7 of the FPR 2010.

*Application to consider agreement*

50. Such applications to enable the parties to seek the court's opinion on an agreement or proposed arrangements before or after the presentation of a petition are now seldom, if ever, made, and there are no rules dealing with their practice and procedure.

51. In the absence of a comprehensive statutory code, the law and practice relating to such agreements should continue to be developed by the courts and the New Code should not include any specific provision to enable the parties to make such application, except in the context of a joint application for the agreement or proposed arrangements to be incorporated in an order of the court or in the context of a FDR or CDR hearing. **[Proposal 35]**

*Reconciliation*

52. The requirement for a legally represented applicant to file a statement certifying whether the legal representative has discussed the possibility of reconciliation is contained in PD 15.3 but not in the MCR. The Working Party proposes that the application and the scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code. **[Proposal 36]**

*Naming of co-respondents*

53. The New Code should discourage the naming of co-respondents, in that the other person should not be named unless the applicant believes that the other party to the marriage is likely to object to the making of a matrimonial order. **[Proposal 37]**

*Special procedure for undefended cases*

54. Since the vast majority of cases are disposed of under the special procedure, the New Code should follow the FPR 2010 so that this procedure becomes the norm to which the rules primarily apply and defended cases are treated as exceptions. The procedure should also be extended to nullity proceedings. The New Code should also include those relevant procedural matters which are currently set out in PD 15.14. **[Proposals 38 and 39]**

### *Medical examination*

55. The New Code should have provisions similar to Rule 7.26 of the FPR 2010 and PD 7B which provide for medical examination in proceedings for nullity, and which place the onus of determining whether medical examiners should be appointed on the court, without any application needing to be made. The court must only make an appointment where it is necessary for the proper disposal of the case. **[Proposal 40]**

### *Rescission*

56. Provisions relating to rescission should be grouped together in the New Code and such applications should be made in accordance with a common procedure. **[Proposal 41]**

### *Making a decree absolute*

57. While the procedures under the relevant rules in the FPR 2010 are broadly the same as those under Rule 65 of the MCR, the English provisions set out more clearly when an application must be made to a judge other than a district judge and prescribe the information to be included in the notice of application if there is a delay of more than 12 months after the decree nisi was made. The New Code should include provisions similar to those in the FPR 2010. **[Proposal 42]**

58. The Working Party also considers that the precise time when a decree nisi was made absolute could be relevant and therefore proposes that the New Code should include provisions to record the precise time at which the decree was made absolute. **[Proposal 43]**

### *Structure of the rules*

59. Subject to the discussions above, considerations should be given to see (a) if and how the structure of the procedural rules of matrimonial causes in the New Code should be modelled on Part 7 (Procedure for Applications in Matrimonial and Civil Partnership Proceedings) of the FPR 2010; and (b) if and how the relevant provisions in that Part should be best adopted with necessary modifications. **[Proposal 44]**

## *Application for a financial order*

### *A compendious code*

60. Applications for a financial order may arise in different scenarios and are governed by different statutory provisions such as the SMOO, GMO, MCO, MCR, MPPO and I(PFD)O. There is no compendious set of rules that applies to matters of a financial order generally. This situation is unsatisfactory and the New Code should provide for the practice and procedure for a financial order that arises in matrimonial causes and family proceedings, applicable to both the High Court and the Family Court, to rationalise, reconcile and consolidate the procedural rules by way of a compendious code. **[Proposal 45]**

61. An application for a financial order after overseas proceedings should also be included in the Part of the New Code applying to applications for financial orders.

### *Limited application to the MPSO*

62. The MPSO enables applications for financial orders to be made under various provisions. The Working Party considers that where any of these applications is brought in fresh proceedings, notwithstanding that the general civil procedure should apply, the New Code should still apply to such an application whether or not it is brought within the extant family or matrimonial proceedings. **[Proposal 46]**

### *A clear definition for financial order*

63. While Rule 2 of the MCR uses the archaic term “ancillary relief” to define the financial order available in the MCO and the MPPO generally, the MPPO however defines the term more narrowly to mean “*relief under any of the provisions of sections 3, 4, 5, 6 and 6A*” of the legislation. The New Code should modernise the language used and promote consistency in the terminology. The use of the descriptive term “ancillary” which connotes that the remedy sought is not free-standing may not be correct. The Working Party considers that “*financial order*” is more preferable as a neutral and general all-encompassing term and that the New Code should define “*financial order*” to cover all categories of financial applications in matrimonial causes and all family proceedings, whether in the High Court or

the Family Court, together with definitions for related terminologies. **[Proposal 47]**

*General approach*

64. The procedure for all applications for financial order should be simplified and, so far as circumstances permit, unified. The New Code should adopt this as the general approach, which is also the approach adopted in the FPR 2010. The Working Party proposes to adopt the relevant part in the FPR 2010 with all necessary modifications to suit local circumstances. **[Proposal 48]**

*Where to start the proceedings, etc.*

65. Applications for financial order will generally be commenced in the Family Court, with power to transfer to the High Court and also power to re-transfer. Following Rule 9.5 of the FPR 2010, the New Code should clearly state the court in which the application should be commenced; and should provide for the practice and procedure to apply for transfer and re-transfer. **[Proposal 49]**

66. Where there are family proceedings extant between the parties, an application for financial order should be made within the extant family proceedings, otherwise such application should in general be commenced by way of separate family proceedings. **[Proposal 50]**

*Mode of commencement*

67. The New Code should provide for standardised originating applications, summonses, forms and affidavits, together with the evidence that is to be provided for each type or form of financial order sought. **[Proposal 51]**

*Mode of hearing*

68. The current default mode of hearing in Chambers and not being open to the public should continue. **[Proposal 52]**

*Service and joinder of third-parties*

69. The New Code should adopt the relevant provisions in the FPR 2010 which involve the interests of a third-party with necessary modifications.

*Variation of settlement orders and avoidance of disposition orders*

70. The New Code should follow Rules 9.13(1) and 9.13(2) of the FPR 2010 to provide for service upon third-parties in applications for variation of settlement and for avoidance of disposition respectively. **[Proposals 53 and 54]**

*Applications relating to landed property and notice of ancillary relief (registration against landed property)*

71. The New Code should provide for service upon the registered owner and mortgagees where there is an application relating to landed property or where a notice of ancillary relief has been lodged with the Land Registry. **[Proposal 55]**

*Disputed beneficial ownership or legal rights and entitlements*

72. It is conducive to efficient case management that matters on joinder of third-parties, pleadings or determination of preliminary issues should be raised and appropriate directions (if any) should be given as early as practicable and separate civil proceedings should be avoided. Therefore, the New Code should set out the duties of the parties and those of their legal advisors to constantly monitor the progress of the proceedings. In the event any party becomes aware of any issue or dispute involving third-parties, the party should as soon as practicable make an application for appropriate directions. Where third-parties have become aware of the dispute or the issues involved, the third-parties are permitted to make an application for appropriate directions and for the determination of the disputed issues. The New Code should also provide for the general directions that the court may give in such an application. **[Proposals 56 to 59]**

73. The rules in the RHC in relation to joinder of third-parties should also be included in the New Code. Jurisdiction as to making an application

for declaration of beneficial ownership against a third-party should also be provided for. **[Proposal 60]**

### *Financial Dispute Resolution (FDR)*

#### *Codification*

74. The FDR procedure has worked successfully in procuring settlements and is now being codified into rules. The New Code should largely adopt and incorporate the FDR procedure and the abandonment of the practice of “affidavit of means” should be clarified and reference to the same be deleted from the rules and PDs. The FDR procedure should also be extended to cover applications for variation under section 11 of the MPPO. **[Proposals 61 and 62]**

#### *First appointment*

75. Paragraph 2 of PD 15.11 provides for the filing and exchange of Form Es. There should be provisions catering for the situation where parties have been unavoidably prevented from including documents with Form E, for the provision of documents at the earliest opportunity together with a written explanation for the failure to do so earlier. **[Proposal 63]**

#### *Costs estimates and open proposals*

76. Parties should be aware of their potential liability for costs so that they may consider whether litigation is justified. The New Code should provide for costs estimates in a comprehensive and consolidated manner, incorporating the extant provisions in PD 15.11, PD 15.12, PD 15.9 and Rule 9.27 of the FPR 2010. Costs estimates, together with open proposals, should be prepared and provided prior to the substantive hearing. **[Proposal 64]**

#### *Sanctioned offers*

77. PD 15.12 has not listed Order 22 to be of general applicability to matrimonial and family proceedings, hence clarification is needed. Considering that (1) the nature of financial order proceedings and their potential outcomes may lead to more scope and latitude for reasonable debate concerning whether the eventual judgment is “*more advantageous*



*than*” the sanctioned offer; (2) confusion may be caused from the interplay between the mandatory “open proposals” and the optional sanctioned offers; and (3) conditions in Order 22 were designed with general civil proceedings in mind, the Working Party, therefore, proposes that Order 22 of the RHC shall not apply. **[Proposal 65]**

*Forum of FDR hearings*

78. Although FDR hearings have also been conducted in the High Court, there are occasions when cases are re-transferred to the Family Court for the purpose of FDR. This has the advantage of “*not conflicting out*” the judge of the Court of First Instance where at present there is a limited number of judges handling financial order matters. The New Code should provide for the possible partial re-transfer from the High Court to the Family Court for FDR, either upon application or of the court’s own motion. **[Proposal 66]**

*Application under the I(PFD)O*

79. Proceedings under this Ordinance are commenced in the Family Court and may be transferred to the High Court pursuant to section 25(2) of the Ordinance. The New Code should have a new Part for the practice and procedure of proceedings under the Ordinance, applicable to both the Family Court and the High Court. **[Proposal 67]**

80. The Ordinance does not stipulate the parties that ought to be joined. The New Code should stipulate the parties to be named, including the personal representatives, all beneficiaries and other persons affected by the application. Where there is an application for an order under section 11 to sever a joint tenancy, the joint tenant shall be joined as a party. **[Proposals 68 and 69]**

81. Where an application is made after 6 months from the date on which representation to the estate is first taken out as stipulated in section 6 of the Ordinance, the New Code should provide that such application for leave for late application should be made in the originating application and supported by affidavit. **[Proposal 70]**

82. The New Code should also provide that applications for interim relief should be made in the originating application or thereafter by way of

summons; and in general interlocutory applications should be made by way of summons. **[Proposal 71]**

83. Provisions for the practice and procedure relating to applications for variation, discharge, suspension or revival under sections 8 and 9 should also be made. **[Proposal 72]**

84. Where an application is made for a “*donee*” to provide financial provision under sections 12 and 13, the New Code should provide that such application be made in the originating application or thereafter by way of summons and the alleged “*donee*” shall be joined as a party. **[Proposal 73]**

85. Although the executor or personal representative would normally adopt a neutral position in contested proceedings, he or she may sometimes need to bring an application for court directions. Such application would have to be made in the Probate Court by way of a separate action. Such proceedings lie outside “family proceedings” and the New Code should not apply to such proceedings.

86. The Working Party considers that proceedings under the I(PFD)O are suitable to be resolved by way of mediation or alternative dispute resolution and proposes that there should be provisions in the New Code for giving directions for mediation or for the FDR procedure to be made applicable. **[Proposal 74]**

*Alteration of maintenance after the death of one party*

87. The court has the power to alter an agreement under section 16 of the MPPO. The court also has jurisdiction to vary or revoke a maintenance agreement under section 19 of the I(PFD)O. Under section 20 of the I(PFD)O, the powers of the court can also be exercised in relation to an application under either section 11(6) or 16(1) of the MPPO. In view of the overlapping jurisdiction, the New Code should provide rules for both in the same Part as the I(PFD)O. **[Proposal 75]**

*Application for provision from deceased's estate*

88. The New Code should include, in the same Part as the I(PFD)O, rules which apply to all proceedings by which a person applies for provision

from a deceased's estate, both under the I(PFD)O and the MPPO. **[Proposal 76]**

### *Procedures for miscellaneous applications*

#### *Types of applications*

89. There are various miscellaneous applications which arise in family proceedings. Those relating to financial applications have been grouped under the section on applications for financial orders, and those relating to children will be grouped under the section on children proceedings. Other miscellaneous applications are :-

- (i) declarations;
- (ii) applications under the DCRVO;
- (iii) applications for non-cohabitation under the SMOO; and
- (iv) applications for consent to marry under the MO.

90. There is no coherent set of procedural rules covering all these miscellaneous applications. The New Code should, so far as circumstances permit, include uniform procedures for all miscellaneous family proceedings, which would assist all persons involved in the conduct of such proceedings in their timely, just and cost-effective disposal. Further, the procedures for miscellaneous applications should be grouped together in the New Code and a uniform format should be adopted. **[Proposals 77 and 78]**

#### *Specific applications*

##### *Declarations*

91. At present, there are no prescribed procedures for applications for marital status, parentage, legitimacy or legitimation and adoptions effected overseas. The New Code should follow Chapter 5 of Part 8 of the FPR 2010 to provide for procedures for such applications. **[Proposal 79]**

##### *Application under the DCRVO*

92. Specific rules are contained in the DCRVR, but subject to those rules, the RHC applies. Rules which apply to the DCRVO should be included in a separate part of the New Code. **[Proposal 80]**

### *Applications under the SMOO*

93. Apart from Order 89, rule 1 of the RDC which provides for proceedings to be commenced by originating summons, there are no prescribed rules. Rules should be made in the New Code to provide for such applications to be made to the Family Court in accordance with the proposed uniform procedures. **[Proposal 81]**

### *Application for consent to marry under the MO*

94. Chapter 9 of Part 8 of the FPR 2010 provides rules for similar applications. The New Code should include rules for such applications. **[Proposal 82]**

### ***Children proceedings***

#### *Scope of the new rules*

95. Hong Kong does not have a comprehensive ordinance which exclusively deals with children's matters. Inevitably, the existing rules and procedures are seriously fragmented and in some cases there are simply no rules at all. A unified set of procedural rules for children proceedings should be introduced.

96. The scope of the new rules should include all extant proceedings under :-

- Sections 10, 11 and 12, GMO
- Section 19, MPPO
- Section 48, MCO
- Sections 6,12 and 13, PCO
- Section 5(1)(b), SMOO
- Applications under inherent jurisdiction of the High Court including wardship proceedings under Order 90 of the RHC
- The Hague Convention under the CACO and Order 121 of the RHC
- Adoption proceedings under the AO

**[Proposal 83]**

Broad framework

97. Part 12 of the FPR 2010 may be adopted as a broad framework for the new procedures relating to children in the New Code. Part 14 of the FPR 2010 which deals with adoption proceedings is also a good model to follow. The Working Party proposes that both Parts 12 and 14 of the FPR 2010 should be adopted with necessary modifications as the broad framework for the procedural rules on children proceedings in the New Code. **[Proposal 84]**

Unified definition for “child”

98. In the family and matrimonial context, different Ordinances use different expressions to describe the same person who is under 18. In order to promote consistency with respect to both terminology and approach, the Working Party proposes that a single unified term should be used for all procedures concerning children irrespective of how they are described under different Ordinances, subject to any contrary definition in any principal Ordinance. **[Proposal 85]**

Statements as to arrangements for children

99. The Working Party considers that the current Rules 9(3) and 15B of the MCR concerning the filing of a statement as to arrangements for children are adequate and should be incorporated into the New Code to cover all children under the age of 18. **[Proposal 86]**

Custody, care and supervision, removal, and related matters

100. Rules 92 to 96 of the MCR deal with the procedures for custody, care and supervision, removal and related matters concerning children. Subject to Proposals 88 to 89, the Working Party proposes that Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code. **[Proposal 87]**

101. Rule 92(5) and (6) relate to the procedure to be adopted where it is alleged that one party has committed adultery or formed an improper association with another. They are effectively obsolete, and therefore should not be incorporated into the New Code. **[Proposal 88]**

102. Rule 95(2) of the MCR and section 17 of the GMO allow for a social welfare report to be called for. Apart from such a report, the Working Party proposes that a clinical psychologist's report and an international social welfare report which are routinely called for in practice should also be included in the New Code. **[Proposal 89]**

### *Child Dispute Resolution*

103. The CDR pilot scheme was a mandatory scheme introduced by PD 15.13 to deal with all children disputes in the Family Court, except adoptions. The purpose of the scheme is to ensure that whilst the best interests of children remain the court's paramount concern, lasting agreements concerning children are obtained quickly and in a less adversarial manner.

104. As a matter of principle, the Working Party supports the incorporation of PD 15.13 into the New Code. The Working Party further observes that there are presently no rules governing a child being medically examined or assessed by a psychiatrist or psychologist. This is different from Rule 25.4(2)-(4) of the FPR 2010 where it is clearly stated that no person may cause a child to be medically or psychiatrically examined without the court's leave or that no evidence arising out of such examination may be adduced without the court's leave.

105. At present, the court may under paragraph 10 of PD 15.13 direct the parties to attend counselling, a parent education programme and/or any other form of third-party direct intervention that may assist the parties. Unlike section 11A of the English Ch A 1989, which provides the English court with the power to make a "contact activity direction", there is no local equivalent in the MCR. As PD 15.13 will be reviewed in three years' time, any future amendments arising from the review also need to be incorporated into the New Code.

106. The Working Party proposes to incorporate into the New Code PD 15.13, with all future amendments arising from the review, and Rule 25.4(2)-(4) of the FPR 2010 with necessary modifications. Readers are invited to express their views on whether or not the CDR procedure should also be extended to the High Court. **[Proposal 90]**

### Guardianship

107. The procedures for applications under the GMO are contained in Order 90 of the RHC/RDC and Rule 69 of the MCR, to which PD 15.13 also applies. The Working Party considers the current practice under such rules adequate and proposes that the provisions under Order 90 of the RHC/RDC and Rule 69 of the MCR, which are relevant to guardianship proceedings, should be incorporated into the New Code. **[Proposal 91]**

### Inherent jurisdiction and wardship

108. The procedure for wardship proceedings is governed by Order 90, rule 3 of the RHC, supplemented by PD 23.1 on Wards of Court. In formulating the desired reform, the Working Party repeats Proposal 16 of this report which deals with the inherent jurisdiction of the Court of First Instance of the High Court.

### CACO

109. The procedures for applications brought under the CACO are set out in Order 121 of the RHC. The Working Party considers the extant practice satisfactory and proposes to incorporate Order 121 into the New Code. **[Proposal 92]**

### Parentage, etc.

110. Under section 49 of the MCO, an applicant may seek a declaration of legitimacy. The LO also sets out the applications that can be made by a legitimated person. The procedure is set out in Rule 124 of the MCR. The Working Party proposes to incorporate Rule 124 of the MCR into the New Code. **[Proposal 93]**

111. The PCO also deals with the law relating to parentage, legitimacy and legitimation. Section 18 of the PCO empowers the Chief Justice to make rules providing for the practice and procedure to be adopted. To date, no such rules have been made.

112. The Working Party proposes that provisions be made in the New Code to cater for the practice and procedure to be applied in applications under the PCO, including applications under sections 6 and 12, and for the

transfer of applications to the High Court pursuant to section 16. Considerations should also be given as to the manner of giving effect to directions under section 13 such as by making rules or by means of PD or guidance notes if necessary. **[Proposal 94]**

### Surrogacy

113. The law on surrogacy in Hong Kong is set out in the HRTO but without any specific rules. It is, however, possible to apply for a parental order under the PCO.

### Adoption

114. The AR applies to local adoptions and the CAR intercountry adoptions. The Working Party considers the current practice under the AR and CAR satisfactory, except :-

- (i) there are currently no rules for certain types of applications; and
- (ii) for service out of jurisdiction, both the AR and CAR merely provide that the documents must be served in accordance with the law of that place.

115. The Working Party proposes that the AR and CAR should be incorporated into the New Code. There should be rules for all the applications referred to in the AO. The practice for service outside jurisdiction should be aligned with that for other family and matrimonial cases. **[Proposals 95 to 97]**

### Separate representation of children

116. Under Rule 108 of the MCR, the court has a broad discretion to order that a child be separately represented in any matrimonial proceedings. However, there are no similar provisions under the GMO, SMOO or I(PFD)O.

117. The Guidance on Separate Representation for Children in Matrimonial and Family Proceedings, containing many provisions of PD 16A of the FPR 2010, was issued to assist judges and family practitioners in considering whether an order for separate representation of a child should be



made. The Working Party considers the Guidance useful but also notes the associated policy and resource implications. The Working Party proposes that considerations should be given to incorporate it into the New Code. **[Proposal 98]**

*Other miscellaneous applications*

118. For other miscellaneous applications relating to children in our existing Ordinances of which no rules exist, the Working Party proposes to adopt the relevant provisions in the FPR 2010, if applicable, with necessary modifications in the New Code. **[Proposal 99]**

*Guidance for judicial meetings of children*

119. There is no provision in the existing rules relating to the judicial meeting of children. This gap has been largely dealt with by the Guidance on Meeting Children that took effect on 2 May 2012. Although the Guidance is useful, it remains guidance to judges and no more. The Working Party does not consider it necessary to incorporate it into the New Code.

***Interim remedies and security for costs***

*Interim remedies*

120. Interim remedies, in terms of civil proceedings, refer to a series of measures including interlocutory injunctions, interim preservation of property, applications for interim relief in aid of foreign proceedings and interim payments provided under Order 29 of the RHC/RDC. For matrimonial proceedings, the granting of an injunction is governed by sections 17(1)(a) and 29AJ of the MPPO and Rules 81 and 84 of the MCR.

121. The Working Party proposes that sections 17(1)(a) and 29AJ of the MPPO and Order 29 of the RHC should be combined and incorporated into the New Code with all necessary modifications. **[Proposal 100]**

*Security for costs*

122. The Working Party notes that because of the special nature of family litigation, the granting of an order for security for costs is extremely

rare. Despite its rarity, an order for security for costs may still serve a useful purpose in the rare case where a foreign or impecunious third party may be involved. The Working Party proposes that the current Rule 37 of the MCR and Order 23 of the RHC should be incorporated into the New Code with all necessary modifications. **[Proposal 101]**

### *Evidence*

123. There are only a few procedural rules in the existing subsidiary legislation to deal with evidence in family and matrimonial proceedings, including Rules 38 to 42 of the MCR. Thus, resort has to be made to Order 38 of the RHC/RDC to fill the gap.

124. In England, Parts 22 to 24 of the FPR 2010 seek to provide a self-contained set of procedural rules for all family and matrimonial proceedings, which is supplemented by various practice directions.

125. The Working Party proposes that the New Code should include procedural rules relating to evidence in matrimonial causes and family proceedings similar to those contained in Parts 22 to 24 of the FPR 2010. Similar PDs, like those contained in PDs 22A and 24A which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules. **[Proposal 102]**

### *Discovery, etc.*

126. There are very few rules on discovery, except Rules 28 and 29 of the MCR providing that the formal procedures for discovery, inspection and interrogatories in Orders 24 and 26 of the RHC shall apply with necessary modifications. In practice, the procedures relating to discovery in matrimonial causes and family proceedings are very different from those in civil proceedings.

127. In England, there are different procedural rules relating to discovery for defended divorce, ancillary relief or children proceedings.

128. The Working Party proposes that the New Code should follow the model in the FPR 2010 to provide for a self-contained set of procedural rules relating to discovery, inspection and interrogatories for defended

matrimonial causes, financial order proceedings and children proceedings. **[Proposal 103]**

129. The Working Party also proposes that there should be a provision in the New Code to empower the courts, in all matrimonial causes and family proceedings, to carry out investigations and to make orders for discovery of documents against parties involved in the proceedings and other third parties. **[Proposal 104]**

### *Experts and assessors*

#### Experts

130. At present, there is no specific rule on expert evidence under the MCR. Therefore, resort has to be made to Part IV of Order 38 of the RHC.

131. In matrimonial causes and family proceedings, the parties may seek to rely on the following expert evidence to substantiate their cases :-

- (i) forensic accountants to examine the potential or hidden assets of the other party;
- (ii) experts to value the assets of the parties; and
- (iii) psychologists in children cases.

132. In England, Part 25 of the FPR 2010 provides a self-contained set of procedural rules for expert evidence which is supplemented by PDs 25A-25F.

133. The Working Party proposes that the New Code should follow the model in England and contain procedural rules similar to those in Part 25 of the FPR 2010. PDs similar to PDs 25A-25F should also be introduced to give guidance to practitioners about the procedural rules relating to expert evidence in family and matrimonial proceedings. **[Proposal 105]**

#### Assessors

134. In Hong Kong, section 53 of the HCO and section 58 of the DCO provide that the court can hear any civil proceedings with the assistance of assessors. The procedural rules relating to trials involving assessors can be found in Order 33, rule 6 of the RHC/RDC.

135. In England, very detailed procedural rules relating to hearings involving assessors in family proceedings can be found in Rule 25.14 of the FPR 2010. As hearings involving assessors are extremely rare in Hong Kong, the Working Party does not see the need to incorporate elaborate provisions into the New Code for such hearings. The present provisions in Order 33, rule 6 of the RHC/RDC, should suffice. The Working Party proposes to incorporate Order 33, rule 6 of the RHC/RDC, into the New Code with necessary modifications. **[Proposal 106]**

### *Use of expert evidence*

136. There are concerns in England over the use of expert evidence in family proceedings, including :-

- (i) the inappropriate or excessive use of experts, which increases costs, the duration of the proceedings and their complexity;
- (ii) partisanship and a lack of independence among experts, devaluing their role in the judicial process; and
- (iii) poor quality of the advice of certain experts.

137. In the Final Report of the Family Justice Review published in England in November 2011, the Family Justice Review Panel has made a number of recommendations to combat the existing shortcomings.

138. In the context of Hong Kong, after the CJR, the courts now have more extensive case management powers to regulate and restrict the use of expert evidence. Similar case management powers will be made available to the family judges under the New Code, which would, to a great extent, address some of the concerns expressed in England about the use of expert evidence in family proceedings. The Working Party is of the view that with the similar procedural rules and PDs as in England to be adopted into the New Code, there is no need to make proposals similar to the recommendations of the Family Justice Review Panel in England.

### ***Statement of truth***

139. The Working Party proposes that provisions of Statements of Truth in Order 41A of the RHC be incorporated into the New Code with all necessary modifications. **[Proposal 107]**

### ***Trial***

140. At present, Rules 44 to 55 and 88 of the MCR deal with some general procedures of trial in a matrimonial cause or ancillary relief in matrimonial proceedings. However, the detailed procedures to be adopted at trial are lacking. In order to fill this gap, one has to apply Order 35 of the RHC/RDC.

141. The Working Party proposes that Order 35 of the RHC, relevant provisions in Chapter 3 of Part 7 and Part 27 of the FPR 2010 and the existing MCR should, with necessary modifications, be incorporated into one single set of rules in the New Code to govern the setting down and conduct of a trial in matrimonial causes and family proceedings. **[Proposal 108]**

### ***Appeals***

142. At present, there is only one rule under the MCR which deals with appeals against a Registrar's decisions. As to other appeals, reference has to be made to Orders 55 to 61 of the RHC and Order 58 of the RDC.

143. The Working Party considers the reference to the RHC/RDC for procedures on appeal both inconvenient and burdensome. It proposes that a single set of rules should be drafted to cater for appeals from both the Court of First Instance and the District Court, by incorporating the present provisions in the MCR and RHC/RDC on appeal. **[Proposal 109]**

144. If Proposals 127 to 130 relating to the Registrars and Masters are to be adopted, the Working Party proposes that further consideration needs to be given to the new rules governing the appeals from the Registrar/Masters to the judge or to the Court of Appeal. **[Proposal 110]**

### ***Setting aside decree nisi/absolute***

145. There are 3 ways to set aside the service and the subsequent decrees :-

- (i) an application for re-hearing under Rule 55 of the MCR;
- (ii) a fresh action to set aside the decree absolute for fraud; and
- (iii) an appeal to the Court of Appeal to set aside the decree absolute.

146. The Working Party respectfully agrees with the Court of Appeal's observations in *CFF v ZWJ*<sup>1</sup> that for setting aside a decree under such circumstances, it may be more appropriate for the court granting the decree to set it aside under Rule 55 of the MCR, instead of the Court of Appeal on appeal, especially when there is dispute on facts. The Working Party proposes that express rules should be provided in the New Code for the application for setting aside the decrees, judgments or orders obtained by irregular service to be dealt with by the court granting such decrees, judgments or orders. **[Proposal 111]**

### ***Costs***

147. Costs in matrimonial proceedings are governed by Rule 91A of the MCR, Order 62 of the RHC and PD 14.3(costs). As for family proceedings, depending on the venue, either Order 62 of the RHC or the RDC together with PD 14.3 (costs) apply.

148. Apart from children's cases, though the starting point on costs in matrimonial and family proceedings remains to be "*costs follow the event*", the court's discretion on costs may be broader than in civil matters generally.

149. For children's cases and wardship proceedings, subject to the court's discretion, the general principle is "*no order as to costs*". When the Official Solicitor is appointed as *guardian ad litem*, the court retains an unfettered discretion on costs.

150. The Working Party considers that the current law and practice is serving well and gives the courts a sufficiently wide discretion on costs in order to achieve justice and fairness. The Working Party proposes to incorporate into the New Code Orders 62 and 62A of the RHC with necessary modifications. **[Proposal 112]**

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<sup>1</sup> CACV 171/2012, unreported, 27 May 2013.

## ***Enforcement***

### **General**

151. The provisions on enforcement in the MCR, being Rules 86 to 91A, are by no means comprehensive or exhaustive. Hence, references have to be made to the RHC.

152. Court orders made in matrimonial and family proceedings may be enforced by Judgment Summons, Attachment of Income, Committal for Contempt, Writ of Sequestration, Injunction, Charging Order, Garnishee Order, Prohibition Order, Writ of Fieri Facias and Appointment of Receivers: Equitable Execution, the relevant provisions for which are contained in Orders 44A to 52 of the RHC or the RDC.

153. The rules on enforcement of orders are fragmented and scattered over a number of Ordinances, i.e. the MCR, RHC, RDC and AIOR. The distinction between matrimonial proceedings and family proceedings appears to be artificial but this leads to the duplication of rules.

154. In *CYM v YML* [2013] 1 HKLRD 701, the Court of Appeal referred to the English Court of Appeal case *Mubarak v Mubarak* [2001] 1 FLR 698 and cast doubt on the compatibility of the judgment summons proceedings with the rights enshrined in Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance, Cap. 383. In *Mubarak v Mubarak*, it was held that judgment summons was a criminal proceeding and hence caught by Article 6 of the European Convention on Human Rights and the proceedings were not in compliance with the said Article. In short, it is recognised that the right to remain silent is inherently inconsistent with the examination procedure in judgment summons proceedings. The FPR 2010 retains a “Convention compliant” judgment summons proceedings in Chapter 2 of Part 33.

155. The Working Party notes the close resemblance of Hong Kong’s judgment summons provisions with the previous English provisions and considers there is a real risk that the former might be held inconsistent with the Hong Kong Bill of Rights. The Working Party proposes that considerations should be given to whether any amendments to the existing provisions are required. **[Proposal 113]**

156. At present, the AIOR does not apply to maintenance pending suit for spouses, and only applies to interim maintenance orders for children. This anomaly partly was an inadvertent omission at the time when the AIOR was introduced. The Working Party proposes that the New Code should provide that the relevant AIOR provisions are to apply to maintenance pending suit for spouses. **[Proposal 114]**

157. In England, the provisions on enforcement are contained in Part 33 of the FPR 2010 but it is not a comprehensive code and refers to relevant provisions in the CPR, RSC and CCR with necessary modifications. Any amendment to the latter provisions will not apply automatically to family proceedings. But steps have been taken to bring all the necessary rules on enforcement into the FPR 2010.

158. The Working Party prefers the English approach and proposes that the New Code should include the enforcement provisions in the MCR and the AIOR and refer to all the relevant provisions in Orders 44A to 52 of the RHC, with necessary modifications. Any future amendments to the RHC/RDC will not automatically apply to the New Code. **[Proposal 115]**

159. The Working Party also proposes that Rule 33.3(2) of the FPR 2010 should be adopted so that apart from applying for an order specifying the method of enforcement, an applicant may ask the court to decide which method of enforcement is the most appropriate in the circumstances. **[Proposal 116]**

### ***Enforcement of undertakings***

160. PD 33A which supplements Part 33 of the FPR 2010 enables enforcement for breach of an undertaking as if it was an order. The PD also provides the form of penal notice to be endorsed on the undertaking and that the person giving the undertaking must make a signed statement to the effect that he understands the undertaking and the consequences of failure to comply with it.

161. The Working Party proposes that provisions similar to PD 33A are to be adopted with necessary modifications in order to provide a solid legislative underpinning for the enforcement of the undertaking and to ensure that the person giving the undertaking is fully aware of the undertaking and the serious consequences if in breach. **[Proposal 117]**



162. Subject to the foregoing proposal being accepted, the New Code should provide the express legislative underpinning whilst the form of penal notice and statement to be signed by the person giving the undertaking are to be dealt with by way of a PD. **[Proposal 118]**

### ***Reciprocal enforcement of maintenance orders***

163. The practice and procedure on registration and transmission of maintenance orders made by a reciprocating country are set out in the MO(RE)R. The MO(RE)R is already a single code. The Working Party proposes that the present provisions of the MO(RE)R be incorporated into the New Code. **[Proposal 119]**

### ***Hearing and reporting of proceedings***

#### ***Hearing***

164. The principle of open justice, which is firmly enshrined in case law and the Hong Kong Bill of Rights, is essential to the impartial and efficient administration of justice. There are, however, recognised exceptions for family cases. For example, evidence on the question of sexual capacity in proceedings for nullity normally must be heard in camera, all proceedings under the AO are heard in private and matters relating to children and applications for financial provisions and ancillary relief are usually heard in private.

165. The Working Party proposes that the New Code should expressly provide that subject to any enactment or any rules, all proceedings to which the New Code applies, where they are pending in the first instance courts, should be held in private, but the court retains the discretion to order the hearing to be open to the public if none of the reasons in Article 10 of the Hong Kong Bill of Rights is satisfied in the circumstances of the case. **[Proposal 120]**

166. However, family cases in the Court of Appeal are invariably heard in open court. Very often, measures such as an anonymity order or an injunction restricting publication of sensitive information would be sufficient for protection of parties' interests.

### *Reporting of proceedings and judgments*

167. The restrictions on publication of judgments in family cases may unnecessarily inhibit dissemination of judgments, which is essential to the development of the case law, and deprive practitioners of access to authorities. Thus, the Family Court has adopted the practice of publishing judgments delivered after a trial of 2 days or more or after any hearing touching on legal principles. Further, the Chief Justice has issued an internal instruction, requiring that all judgments in family and matrimonial cases should be suitably anonymised before release.

168. The Working Party considers that the present practice and the internal instruction of the Chief Justice should be incorporated into a new PD under the New Code. **[Proposal 121]**

### *Access to court documents*

169. Apart from the general provision on access to court documents which is Order 63, rule 4 of the RHC/RDC, there are specific provisions for specific matrimonial and family proceedings. Hence, confidentiality is preserved by an express order prohibiting public search and inspection of documents relating to Hague Convention cases, with Rule 121(2) of the MCR restricting the public's access to documents in relation to matrimonial proceedings without leave of the court and Rule 21 of the AR restricting the provision of a duplicate of an adoption order.

170. The Working Party considers these provisions should be incorporated into the New Code, but confidentiality protection from public search and inspection should be extended to all documents filed in children proceedings save with leave of the court. **[Proposal 122]**

### *Anonymisation*

171. Rule 6 of the AR provides for the anonymisation of identity of an applicant for an adoption order and Rule 14A(5) of the AR provides for the anonymisation of identity of a parent applying for revocation of consent.

172. The Working Party proposes that the New Code should incorporate these provisions and should include provisions for anonymisation in children

proceedings to preserve confidentiality as from the filing of the originating process. **[Proposal 123]**

*A new Part*

173. The provisions relating to hearing and reporting of proceedings, access to court documents, anonymisation of parties and judgments and orders discussed above are currently scattered in different places. They should be put in one place in the New Code. **[Proposal 124]**

***Representation***

*Change of solicitors/Acting in person*

174. Order 67 of the RHC/RDC applies to matrimonial and family proceedings.

175. Part 26 of the FPR 2010 deals with this subject matter and the provisions are similar to those in our Order 67 of the RHC/RDC.

176. The Working Party considers that the present provisions have all along been working well. However, in *Dianoor International Limited v Aiyer Vembu Subramaniam*, HCA 806/2008, unreported, 19 November 2010, it was held that a defendant in general civil proceedings must give an address within the jurisdiction for service in his Notice of Intention to Act in Person. As for matrimonial proceedings, no leave is required for service out of the jurisdiction and it has been the practice of the Family Court Registry to accept an address outside the jurisdiction for service by a respondent. Whilst the practice and procedure on this subject should align with those in general civil matters as much as practicable, the reality is that there is now a significant number of parties residing out of Hong Kong, and the imposition of the same requirement may cause hardship to them. Further, if a respondent is allowed to give an address outside Hong Kong, one may question, for parity, why a petitioner should not be allowed to do so.

177. Readers are therefore invited to express their views on whether or not an address within the jurisdiction should be given. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC into the New Code. **[Proposal 125]**

### *Representation of protected parties*

178. For matrimonial proceedings, Rules 105 to 107 of the MCR contain provisions similar to those in Order 80 of the RHC/RDC. As for family proceedings, depending on the venue, either Order 80 of the RHC or the RDC applies. The Working Party proposes to have one set of codes for both matrimonial and family proceedings on this subject matter, incorporating the extant provisions in Rules 105 to 107 of the MCR and Order 80 of the RHC with duplicated provisions removed. **[Proposal 126]**

### ***Registrar and Masters***

179. Apart from taxation pending in the District Court, the Registrar for all cases pending in the Family Court and the Court of First Instance is the Registrar of the High Court. The Registrar has various case management or administrative duties, judicial functions and the power to grant the Registrar's certificate in undefended petitions or joint applications for divorce pursuant to the MCR.

180. The Family Court should have its own Registrar, who should be the Registrar of the District Court. The Registrar of the High Court should only act as the Registrar for cases pending in the High Court. Like the general civil cases, the jurisdiction, powers and duties of the "Registrar" should also be exercised or performed by Masters. **[Proposal 127]**

181. The Working Party considers that duties of the Registrar should be expanded to cover simple applications such as amendments to the originating process, time extension and approval of consent summons on procedural matters. **[Proposal 128]**

182. The Working Party also considers that the Registrar's jurisdiction, powers and duties should be conveniently set out in one place in a coherent manner. If and when it is necessary to expand their scopes in the future, it can be conveniently done by revising the PD.

183. The New Code should provide that the Registrar may under the general or special directions of a judge hear and determine any application or matter which may be heard and determined in Chambers and that any matter or application before the Registrar may be adjourned to be heard

before a judge. A PD should be introduced to list out all the matters and applications that the Registrar may hear and determine. **[Proposal 129]**

184. All the jurisdiction, powers and duties conferred on the Registrar may be exercised and performed by a Master. **[Proposal 130]**

### *Modernisation of language*

185. Modernisation of language used in legislation has the benefits of making legislation more readable, more easy to understand and more accessible to the public. An important element of modernisation is the use of plain language.

186. The FPR 2010 was introduced with the aim to ensure that the rules are both simple and simply expressed. The language has been modernised by replacing outdated or archaic terms with user-friendly style and plain English terminology which mirror that of the CPR. There is also a glossary which guides the meaning of certain legal expressions used in the rules.

187. While adopting an approach similar to that of the FPR 2010 is an attractive option, the following concerns merit attention :-

- (i) Hong Kong is a bilingual legal system. Modernising legislative language and simplifying drafting cannot be fully effective unless plain and simple legislative language can be achieved for both the English and Chinese counterparts;
- (ii) further, one should be careful that any modernisation of terminology in family procedural law would give rise to read-across implications on the general civil procedure/provisions in the RHC/RDC; and
- (iii) there is also a risk in migrating to a modernised code, with possible resource implications and the need for IT support.

188. Having balanced all the factors, the Working Party considers as a matter of principle, the New Code should be simple and simply expressed, and where appropriate, the language used may be modernised. But considerations should be given as to how to pursue this objective, bearing in mind the concerns discussed above. **[Proposal 131]**

### ***Removal of inconsistent language***

189. Extreme care must be exercised in order to ensure that all the provisions in the New Code are consistent in their approaches, meanings and contents.

### **Miscellaneous Topics**

#### ***Information technology***

190. The Judiciary has formulated a strategy plan called the Information Technology Strategy Plan (“ITSP”) for the implementation of an integrated court case management system. The ITSP will be implemented in two phases. Phase I is expected to last for 6 years from July 2013 and with the experience to be gained, the Judiciary will consider implementing Phase II for the remaining courts and tribunals.

191. In light of the present reform and other considerations including resources, the Judiciary considers it more desirable to have the ITSP implemented in the Family Court in Phase II. Therefore, the Working Party will not carry out detailed consultation on issues relating to the use of information technology (“IT”) at this stage.

#### ***Implications on resources***

##### **Manpower Resources**

192. Proposals on having Registrar(s) and Masters to help ease the workload of family judges may require additional Registrar/Master posts and extra support staff. The Working Party proposes an assessment on the organisational and manpower implications on the Judiciary be carried out. **[Proposal 132]**

##### **System Changes**

193. The implementation of a revised set of procedural rules and proposed changes in terminologies would require corresponding support from the IT system. The Judiciary should consider undertaking a further study on the scope of system changes required and the approach to be

adopted in the context of implementation of Phase II of the ITSP. [**Proposal 133**]

*Training*

194. The New Code would bring about changes to the existing processes and arrangements. To ensure a smooth transition, suitable training should be provided to judges and judicial officers dealing with family cases, the support staff and the legal professionals. [**Proposal 134**]

*Publicity materials for litigants in person and the public*

195. To enhance the understanding of the overall procedures by litigants in person, the Judiciary should consider producing suitable publications and materials to assist them in navigating through the process. [**Proposal 135**]

196. General publicity materials should be produced to enable interested bodies such as family and welfare organisations and members of the public to have a good general understanding of the New Code. [**Proposal 136**]





***PROPOSALS FOR  
CONSULTATION***

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## ***Proposals for Consultation***

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### ***Proposal 1***

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Hong Kong's family justice system should adopt a single set of self-contained procedural rules to implement the reforms ("the New Code").

*Report para. 56*

### ***Proposal 2***

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A new Family Procedure Rules Committee should be set up by way of primary legislation as the single rule-making authority for making the New Code and any subsequent amendments. The proposed Rules Committee should model on the powers, composition and approach for the two rules committees established for the High Court and the District Court respectively (namely, the High Court Rules Committee and the District Court Rules Committee).

*Report para. 57*

### ***Proposal 3***

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Where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation.

*Report para. 58*

### ***Proposal 4***

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Subject to the reservation about the use of PDs as discussed herein, the FPR 2010 should be adopted as the broad, basic framework for the New Code.

*Report para. 65*

### ***Proposal 5***

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The general provisions in the New Code should be modelled on the equivalents in the RHC or incorporate the relevant provisions of the RHC, as the case may be, with modifications as appropriate for family and matrimonial matters.

*Report para. 67*

### ***Proposal 6***

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A general fall-back provision on the applicable rules in the RHC should be created to fill any unforeseen procedural gap left in the New Code.

*Report para. 69*

### ***Proposal 7***

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All the provisions in the RHC, as set out above, which are of general applicability, should be adopted into the New Code, with modifications appropriate for family and matrimonial matters.

*Report para. 70*

### ***Proposal 8***

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The relevant applicable provisions in the FPR 2010 and those necessary PDs should be selected for adoption with necessary modifications as rules in the New Code.

*Report para. 73*

### ***Proposal 9***

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The New Code should apply to all family and matrimonial proceedings as defined, whether they are in the High Court or the Family Court.

*Report para. 75*

### ***Proposal 10***

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The statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code.

It is not necessary to give a definition of “matrimonial proceedings” in the New Code.

The term “family proceedings” should be comprehensive and list out all family-related proceedings to which the New Code is to apply, whether such proceedings are in the High Court or in the Family Court.

*Report para. 78.3*

### ***Proposal 11***

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There should be a clear definition of “court” and of “judge” in the New Code.

*Report para. 79*

### ***Proposal 12***

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The powers of judges to perform functions under the New Code should be spelt out.

*Report para. 80*

### ***Proposal 13***

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There should be a definition of “Family Court” in the New Code, setting out its jurisdiction, including the jurisdiction in children matters, and stating there are no monetary limits in any financial applications to which the New Code is to apply.

*Report para. 87*

### ***Proposal 14***

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A list of matters assigned to be dealt with by the Family Court should also be set out in the New Code.

*Report para. 88*

### ***Proposal 15***

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The New Code should set out clearly the matters over which the Court of First Instance of the High Court has exclusive jurisdiction.

*Report para. 89*

### ***Proposal 16***

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The “inherent jurisdiction” of the Court of First Instance of the High Court in children matters should be defined in the New Code, following the FPR 2010, and the provisions in PD 12D therein should be adopted with necessary modifications, in particular the transfer of certain matters to be dealt with by the Family Court.

*Report para. 92*

***Proposal 17***

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Provisions expressly setting out the underlying objectives of the family justice system, similar to those in Order 1A of the RHC, should be adopted in the New Code.

*Report para. 97*

***Proposal 18***

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The New Code should require the court to have regard to welfare issues when applying the underlying objectives for family procedure.

*Report para. 102*

***Proposal 19***

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The New Code should have provisions setting out the court's case management powers similar to those under Order 1B of the RHC.

*Report para. 105*

***Proposal 20***

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Express provisions modelled on Part 3 of the FPR 2010 should be adopted into the New Code with necessary modifications to enhance the court's powers in dealing with alternative dispute resolution.

*Report para. 108*

### ***Proposal 21***

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Considerations should be given to see if the mediation procedure as now stipulated in PD 15.10 needs any further enhancement and if so, how.

*Report para. 109*

### ***Proposal 22***

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Readers are asked to express their views on if a pre-action protocol for mediation for family and matrimonial disputes is suitable in local circumstances.

*Report para. 110*

### ***Proposal 23***

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The New Code should set out clearly the relevant court(s) for commencing the matrimonial causes and each type of the family proceedings.

*Report para. 147*

### ***Proposal 24***

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The New Code should provide that matrimonial causes and family proceedings should generally begin in the Family Court unless the High Court has exclusive jurisdiction or in exceptional circumstances; and the New Code should further expressly spell out the exceptional circumstances where proceedings may begin in the High Court.

*Report para. 148*



### ***Proposal 25***

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The New Code should adopt a simple, focused and efficient practice and procedure for the transfer and/or retransfer of all types of transferable proceedings between the Family Court and the High Court (with empowering provisions added to the individual primary legislation if required), to be modelled on the relevant provisions in the FPR 2010 and augmented by PDs modelled on the 2008 Order and the 2008 Direction, with modifications to suit local circumstances.

*Report para. 153*

### ***Proposal 26***

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Originating application should be adopted as the unified mode of originating process for matrimonial causes and all family proceedings, accompanied by different statutory forms created specifically for the proceedings concerned.

*Report para. 160*

### ***Proposal 27***

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In the originating application, the nomenclature for the parties should be unified so that the applicant should be called “Applicant” and the respondent “Respondent”, save for joint application for divorce where the parties should be called “1st Applicant” and “2nd Applicant”.

*Report para. 160*

### ***Proposal 28***

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Generally, the present mode of service and acknowledgement of service in the MCR should be retained but refined and put in one place in the New Code.

*Report para. 164*

### ***Proposal 29***

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Readers are invited to express their views on whether the provision for service in matrimonial causes by ordinary post should be replaced by registered post for the alignment of the MCR, the RHC and the RDC, and to do away with the need for a deemed service order in cases where a signed acknowledgment of service by the respondent has not been returned to the Registry.

*Report para. 166*

### ***Proposal 30***

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Views are invited on whether in the New Code, documents other than the originating process and judgment summons should, as a matter of principle, be permitted to be served by fax or other electronic communication in line with the FPR 2010.

*Report para. 169*

### ***Proposal 31***

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The provision in Rule 109(1) of the MCR on service outside the jurisdiction without leave should be retained in the New Code. Order 11 of the RHC should also be incorporated into the New Code for the manner of service of documents outside the jurisdiction.

*Report para. 171*

### ***Proposal 32***

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The New Code should follow the FPR 2010 by expressly providing that all documents in matrimonial causes and family proceedings may be served outside the jurisdiction without leave.

*Report para. 172*

### ***Proposal 33***

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For any interlocutory application in extant proceedings for matrimonial causes and family proceedings, such an application should be made by summons.

*Report para. 173*

### ***Proposal 34***

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It is not necessary to make separate provisions in the procedures governing matrimonial causes for matters that are of general application, which will be covered by the relevant provisions in the New Code.

*Report para. 177*

### ***Proposal 35***

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The New Code should not include any specific provision to enable the parties to a marriage to seek the court's opinion on an agreement or proposed arrangements before or after the presentation of a petition, except in the context of a FDR or CDR hearing.

*Report para. 181*

### ***Proposal 36***

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The application and scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code.

*Report para. 183*

### ***Proposal 37***

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The New Code should discourage the naming of co-respondents similar to that of PD 7A in the FPR 2010.

*Report para. 184*

### ***Proposal 38***

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The New Code should follow the FPR 2010 so that what hitherto has been regarded as a special procedure becomes the norm to which the rules primarily apply and defended cases are treated as the exception. The current special procedure should also be extended to nullity proceedings.

*Report para. 187*

### ***Proposal 39***

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The New Code should include those procedural matters which are currently set out in PD 15.4, including the Registrar's directions for trial in the Special Procedure List, attendance of the parties, pronouncement of the decree in open court and subsequent procedures.

*Report para. 187*

### ***Proposal 40***

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Similar to Rule 7.26 of the FPR 2010, the New Code should provide for medical examination in proceedings for nullity, which places the onus of determining whether medical examiners should be appointed on the court, without the need to make any application. The court must only appoint examiners where it is necessary for the proper disposal of the case. Provisions similar to PD 7B should also be supplemented.

*Report para. 189*

***Proposal 41***

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The provisions of the New Code relating to rescission should be grouped together and parties seeking rescission of all matrimonial decrees should do so by application made in accordance with a common procedure.

*Report para. 190*

***Proposal 42***

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The New Code should include provisions similar to Rules 7.32 and 7.33 of the FPR 2010 on making a decree absolute, save that the application must be made to a judge including a district judge.

*Report para. 192*

***Proposal 43***

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The New Code should include provisions to record the precise time when the decree nisi is made absolute.

*Report para. 193*

***Proposal 44***

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Considerations should be given to see (a) if and how the structure of the procedural rules of matrimonial causes in the New Code should be modelled on Part 7 of the FPR 2010; and (b) if and how the relevant provisions in Part 7 of the FPR 2010 should best be adopted with necessary modifications.

*Report para. 194*

***Proposal 45***

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The New Code should have provisions to provide for the practice and procedure for an application for a financial order that is made in matrimonial causes and family proceedings.

*Report para. 197*

***Proposal 46***

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The New Code should clearly state that it does apply to financial applications made under the MPSO whether or not such applications are made within extant matrimonial proceedings or family proceedings.

*Report para. 202*

***Proposal 47***

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The New Code should define “financial order” to cover all categories of financial order for which application may be made in matrimonial causes and all family proceedings to which the New Code is to apply, whether in the High Court or the Family Court, together with definitions for related terminologies.

*Report para. 207*

***Proposal 48***

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The New Code should adopt a similar general approach as that in the FPR 2010 for the procedures for applications for a financial order and follow as far as possible the procedural steps with all necessary modifications to suit local circumstances.

*Report para. 209*

### ***Proposal 49***

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The New Code should clearly state the court in which the application should be commenced; and should provide for the practice and procedure to apply for transfer and re-transfer.

*Report para. 212*

### ***Proposal 50***

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The New Code should provide that where there are family proceedings extant between the parties, a financial order should be applied for within the extant family proceedings; if there are no extant family proceedings, a financial order (if available) should in general be commenced by way of separate family proceedings.

*Report para. 213*

### ***Proposal 51***

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The New Code should provide for standardised originating applications, summonses, forms and affidavits, together with the evidence that is to be provided for each type or form of financial order sought. The originating applications, summonses or forms should require that the orders applied for be stated with particularity unless the applicant provides reasonable grounds for being unable to do so. Particulars of orders applied for, including any changes thereto, ought to be stated by way of amendment as soon as practicable. Where an application is made before filing Form E, there should be written evidence in support explaining why the order is necessary and giving up-to-date information about the applicant's financial circumstances.

*Report para. 214*

***Proposal 52***

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The New Code should clearly state the default mode of hearing is in Chambers (not open to the public).

*Report para. 216*

***Proposal 53***

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The New Code should provide for service upon third-parties where a variation of settlement order has been applied for.

*Report para. 220*

***Proposal 54***

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The New Code should provide for service upon alleged recipients where an avoidance of disposition order has been applied for.

*Report para. 223*

***Proposal 55***

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The New Code should provide for service upon the registered owner and mortgagee where an application for financial order includes an application relating to landed property, or where a notice of ancillary relief has been lodged with the Land Registry for registration against landed property.

*Report para. 227*



### ***Proposal 56***

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The New Code should set out the duties of the parties and those of their legal advisors to constantly monitor the progress of matrimonial proceedings and family proceedings. In particular, a party should be under a duty to forthwith notify the other parties and the court as soon as that party becomes aware of other proceedings that arise from, may affect or are connected with the matrimonial proceedings and family proceedings.

*Report para. 232*

### ***Proposal 57***

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The New Code should expressly provide that as far as possible separate civil proceedings should be avoided.

*Report para. 232*

### ***Proposal 58***

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The New Code should provide that in the event any party becomes aware of any issue or dispute arising involving third-parties, including where ownership or beneficial ownership of properties and assets is disputed or where legal rights and entitlements are disputed, the party should as soon as practicable make an application for appropriate directions to be given.

The New Code should provide that third-parties are permitted to make an application for appropriate directions and for the determination of disputed issues.

*Report para. 232*

### ***Proposal 59***

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The New Code should provide for the general directions that the court may consider giving – including for the joinder of third-parties, the pleading of issues by way of points of claim and points of defence, the filing of separate witness statements, the hearing of the disputed issues separately by way of preliminary issue, the stay of other extant proceedings pending the relevant matrimonial proceedings or family proceedings, and other directions as the court may consider appropriate in the circumstances.

*Report para. 232*

### ***Proposal 60***

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The rules in the RHC in relation to joinder of third-parties should be included in the New Code. Jurisdiction as to making an application for declaration of beneficial ownership against a third-party should also be provided for.

*Report para. 233*

### ***Proposal 61***

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The New Code should largely adopt and incorporate the FDR procedure and PD 15.11.

Abandonment of the former practice of ‘affidavit of means’ should be clarified and reference to the same deleted from the rules and PDs.

*Report para. 236*

### ***Proposal 62***

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The New Code should provide that the FDR procedure and PD 15.11 shall also apply to applications for a variation order under section 11 of the MPPO.

*Report para. 237*

### ***Proposal 63***

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The New Code should incorporate provisions catering for the situation where parties have been unavoidably prevented from including documents with the Form E, for the provision of documents at the earliest opportunity together with a written explanation for the failure to do so earlier.

*Report para. 239*

### ***Proposal 64***

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The New Code should provide for and deal with costs estimates in a comprehensive and consolidated manner, incorporating paragraph 10 of PD 15.11, PD 15.9, paragraphs 26 and 27 of PD 15.12 and Rule 9.27 of the FPR 2010.

Costs estimates should be prepared and provided prior to the substantive hearings (in particular the FDR hearing and the financial order hearing) and should also be provided together with open proposals.

*Report para. 242*

### ***Proposal 65***

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The New Code should specifically stipulate that Order 22 of the RHC shall not apply in family proceedings.

*Report para. 251*

***Proposal 66***

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Where proceedings have been transferred to the High Court, the New Code should provide for the possible partial re-transfer from the High Court to the Family Court for the conduct of the FDR hearing, either upon application or of the court's own motion.

*Report para. 255*

***Proposal 67***

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The New Code should have a new Part to provide for the practice and procedure for proceedings brought under the I(PFD)O, which should also be included within the meaning of "Family Proceedings".

This should include provisions providing for the practice and procedure relating to commencement of proceedings in the Family Court, the filing of evidence and documents in support, and other procedural matters, including interlocutory applications, transfer and re-transfer.

*Report para. 258*

***Proposal 68***

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The New Code should stipulate the parties to be named in the originating application, including the personal representatives, executors (if any), all beneficiaries (whether testate, intestate or upon partial intestacy) and other persons affected by the application.

*Report para. 259*

***Proposal 69***

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Where there is an application for an order to be made under section 11 of the I(PFD)O, the joint tenant should be joined as a party.

*Report para. 260*

***Proposal 70***

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The New Code should provide that where an application is made after the 6-month period stipulated by section 6 of the I(PFD)O, the originating application shall include an application for leave to bring such late application, to be supported by affidavit setting out the grounds and evidence justifying the same.

*Report para. 261*

***Proposal 71***

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The New Code should provide that applications for interim relief should be made in the originating application wherever appropriate or thereafter by way of summons.

The New Code should provide that in general interlocutory applications should be made by way of summons.

*Report para. 262*

***Proposal 72***

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The New Code should provide for the practice and procedure relating to applications under section 8 of the I(PFD)O for variation, discharge, suspension or revival and section 9 of the I(PFD)O for variation.

*Report para. 263*

***Proposal 73***

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The New Code should provide that applications under section 12 or 13 of the I(PFD)O should be made in the originating application wherever appropriate or thereafter by way of summons.

Where there is an application for an order to be made under section 12 or 13 of the I(PFD)O, the alleged “donee” should be joined as a party.

*Report para. 264*

***Proposal 74***

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The New Code should make provisions for directions to be given for mediation or for the FDR procedure to be made applicable to proceedings under the I(PFD)O.

*Report para. 268*

***Proposal 75***

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The New Code should provide rules for Part V of the I(PFD)O and sections 11(6) and 16 of the MPPO in the same Part as the I(PFD)O.

*Report para. 272*

***Proposal 76***

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The New Code should include, in the same Part as the I(PFD)O, rules which apply to all proceedings by which a person applies for provision from a deceased’s estate, both under the I(PFD)O and the MPPO.

*Report para. 273*

***Proposal 77***

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The New Code should, so far as circumstances permit, include uniform procedures which cover all miscellaneous family proceedings which would assist all persons involved in the conduct of such proceedings in their timely, just and cost-effective disposal.

*Report para. 277.1*

***Proposal 78***

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The procedures for miscellaneous applications not falling into any of the categories in paragraph 277.1 should be grouped together in the New Code and a uniform format similar to that in Part 8 of the FPR 2010 should be adopted.

*Report para. 277.2*

***Proposal 79***

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The New Code should provide for procedures for applications for declarations as to marital status, parentage, legitimacy or legitimation and adoptions effected overseas.

*Report para. 282*

***Proposal 80***

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Rules applicable to the DCRVO should be included in a separate part of the New Code.

*Report para. 283*

### ***Proposal 81***

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Rules should be made in the New Code to provide for applications for non-cohabitation under the SMOO to be made to the Family Court in accordance with the proposed uniform procedures.

*Report para. 285*

### ***Proposal 82***

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The New Code should include rules for applications under section 18A of the MO to the Family Court.

*Report para. 286*

### ***Proposal 83***

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The new rules on children proceedings should cover all the extant proceedings relating to children arising from the applications brought under sections 10, 11 and 12 of the GMO; section 19 of the MPPO; section 48 of the MCO; sections 6, 12 and 13 of the PCO; section 5(1)(b) of the SMOO; applications under the inherent jurisdiction of the High Court, including wardship proceedings under Order 90 of the RHC; the Hague Convention under the CACO and Order 121 of the RHC; and adoption proceedings under the AO.

*Report para. 288.1*

### ***Proposal 84***

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Parts 12 and 14 of the FPR 2010 should be adopted as the broad framework for the new procedural rules on children proceedings in the New Code.

*Report para. 290*



***Proposal 85***

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The New Code should contain a unified term for the procedures concerning children irrespective of how they are described under different Ordinances, subject to any contrary definition in any principal Ordinance.

*Report para. 293*

***Proposal 86***

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Rules 9(3) and 15B of the MCR should be incorporated into the New Code and should cover all children under the age of 18 years.

*Report para. 294*

***Proposal 87***

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Subject to Proposals 88 to 89 below, Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code.

*Report para. 296*

***Proposal 88***

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Rule 92(5) and (6) of the MCR should not be incorporated into the New Code.

*Report para. 297*

***Proposal 89***

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It should be expressly stated in the New Code that when the court directs that a report be filed by the Director of Social Welfare, it may also order that a clinical psychologist's report or an international social welfare report be provided.

*Report para. 298*

***Proposal 90***

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PD15.13 with all future amendments arising from the review and Rule 25.4(2)-(4) of the FPR 2010 with all necessary modifications should be incorporated into the New Code. Readers are also invited to express their views with respect to whether or not the CDR procedure should be extended to the High Court.

*Report para. 301*

***Proposal 91***

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The provisions in Order 90 of the RHC, Order 90 of the RDC and Rule 69 of the MCR, which are relevant to guardianship proceedings, should be incorporated into the New Code.

*Report para. 302*

***Proposal 92***

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Order 121 of the RHC should be incorporated into the New Code.

*Report para. 304*

***Proposal 93***

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Rule 124 of the MCR should be incorporated into the New Code.

*Report para. 305*

***Proposal 94***

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Provisions should be made in the New Code to cater for the practice and procedure to be applied in applications under the PCO, including applications under sections 6 and 12, and for the transfer of applications to the High Court pursuant to section 16. Considerations should also be given as to the manner of giving effect to directions under section 13 such as by the making of rules or by means of PDs or guidance notes if necessary.

*Report para. 308*

***Proposal 95***

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The AR and the CAR should be incorporated into the New Code.

*Report para. 311*

***Proposal 96***

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There should be rules in the New Code for all the applications referred to in the AO.

*Report para. 311*

***Proposal 97***

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In the New Code, the practice for service outside jurisdiction for adoption cases should be aligned with that for other family and matrimonial cases.

*Report para. 311*

***Proposal 98***

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Considerations should be given to see if the provisions in the Guidance on Separate Representation for Children in Matrimonial and Family Proceedings should be incorporated into the New Code.

*Report para. 313*

***Proposal 99***

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For other various miscellaneous applications relating to children in our existing Ordinances of which no rules exist, the relevant provisions in the FPR 2010, if applicable, should be adopted in the New Code with necessary modifications.

*Report para. 314*

***Proposal 100***

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Sections 17(1)(a) and 29AJ of the MPPO and Order 29 of the RHC/RDC should be combined and incorporated into the New Code with all necessary modifications.

*Report para. 321*

***Proposal 101***

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The current Rule 37 of the MCR and Order 23 of the RHC/RDC should be incorporated into the New Code with all necessary modifications.

*Report para. 326*

***Proposal 102***

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The New Code should include procedural rules relating to evidence in matrimonial causes and family proceedings similar to those contained in Parts 22 to 24 of the FPR 2010. Similar PDs, like those contained in PDs 22A and 24A which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules.

*Report para. 332*

***Proposal 103***

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The New Code should follow the model in the FPR 2010 to provide for a self-contained set of procedural rules relating to discovery, inspection and interrogatories for defended matrimonial causes, financial order proceedings and children proceedings.

*Report para. 339*

***Proposal 104***

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There should be a provision in the New Code to empower the court, in all matrimonial causes and family proceedings, to carry out investigations and to make orders for the discovery of documents against parties involved in the proceedings and other third-parties.

*Report para. 340*

***Proposal 105***

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The New Code should include procedural rules relating to expert evidence in family and matrimonial proceedings similar to those contained in Part 25 of the FPR 2010. Similar PDs, like those contained in PDs 25A-25F which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules.

*Report para. 347*

***Proposal 106***

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Order 33, rule 6 of the RHC/RDC, should be incorporated into the New Code with necessary modifications.

*Report para. 349*

***Proposal 107***

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Provisions on Statements of Truth in Order 41A of the RHC/RDC should be incorporated into the New Code with all necessary modifications.

*Report para. 358*

***Proposal 108***

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Order 35 of the RHC/RDC, relevant provisions in Chapter 3 of Part 7 and Part 27 of the FPR 2010 and the existing MCR should, with necessary modifications, be incorporated into one single set of rules in the New Code to govern the setting down and conduct of a trial in matrimonial causes and family proceedings.

*Report para. 361*

***Proposal 109***

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A single set of rules should be drafted to cater for appeals in matrimonial causes and family proceedings from both the Court of First Instance and the District Court, by incorporating the present provisions in the MCR, the RHC and the RDC.

*Report para. 365*

***Proposal 110***

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In the event that Proposals 127 to 130 in this report are to be adopted, the Working Party proposes that further consideration needs to be given to the new rules governing the future appeals from the Registrar/Masters to the judge or to the Court of Appeal.

*Report para. 366*

***Proposal 111***

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Express rules should be provided in the New Code for the application for setting aside the decrees, judgments or orders obtained by irregular service to be dealt with by the court granting such decrees, judgments or orders.

*Report para. 372*

***Proposal 112***

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Orders 62 and 62A of the RHC/RDC should be incorporated into the New Code with necessary modifications.

*Report para. 383*

***Proposal 113***

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Considerations should be given to whether any amendments to the existing provisions on judgment summons are required in light of Articles 10 and 11 of the Hong Kong Bill of Rights.

*Report para. 394*

***Proposal 114***

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The New Code should provide that the relevant AIOR provisions are to apply to maintenance pending suit for spouses.

*Report para. 397*

***Proposal 115***

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It is proposed that our New Code should include the enforcement provisions in the MCR and the AIOR and all the relevant provisions in Orders 44A to 52 of the RHC, with necessary modifications. Any future amendments to the RHC/RDC will not automatically apply to the New Code.

*Report para. 418*

***Proposal 116***

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It is proposed that Rule 33.3(2) of the FPR 2010 be adopted into the New Code.

*Report para. 419*



### ***Proposal 117***

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Provisions similar to the English Practice Direction 33A (Enforcement of Undertakings) should be adopted with necessary modifications in order to provide a solid legislative underpinning for the enforcement of the undertaking and to ensure that the person giving the undertaking is fully aware of the undertaking being given and the serious consequences that it entails if in breach.

*Report para. 423*

### ***Proposal 118***

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Subject to Proposal 117 being accepted, the New Code should provide the express legislative underpinning for the enforcement of undertakings whilst the form of the penal notice and statement to be signed by the person giving the undertaking are to be dealt with by way of a PD.

*Report para. 424*

### ***Proposal 119***

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The present provisions in the MO(RE)R should be incorporated into the New Code.

*Report para. 428*

### ***Proposal 120***

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The New Code should expressly provide that subject to any enactment or any rules in the New Code, all proceedings to which the New Code applies, where they are pending in the first instance courts, should be held in private to the exclusion of the public, but the court retains the discretion to order the hearing to be open to the public if it is of the view that none of the reasons in the BOR Article 10 is satisfied in the circumstances of the case concerned.

*Report para. 431*

### ***Proposal 121***

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The New Code should have a new PD to include the extant practice of the Family Court for publishing judgments and the internal instruction of the Chief Justice for anonymising judgments before release for publication.

*Report para. 437*

### ***Proposal 122***

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The New Code should incorporate the provisions of Order 63, rule 4 of the RHC, Rule 121(2) of the MCR and Rule 21 of the AR, but should expressly provide for prohibition against public search and inspection of all documents filed in the Court Registry in children proceedings, other than a decree or order made in open court, without leave of the court.

*Report para. 440*

### ***Proposal 123***

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The New Code should incorporate the provisions in Rules 6 and 14A of the AR pertaining to anonymisation in adoption proceedings, and should include provisions for anonymisation in children proceedings to preserve confidentiality as from the filing of the originating process.

*Report para. 443*

### ***Proposal 124***

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In the New Code, all the relevant provisions relating to hearing and reporting of proceedings, access to court documents, anonymisation of parties and judgments and orders should be put together in a new Part, to be augmented by PDs if necessary.

*Report para. 444*

### ***Proposal 125***

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Readers are invited to express their views on whether or not an address within the jurisdiction should be given in the Notice of Intention to Act in Person. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC/RDC into the New Code.

*Report para. 453*

### ***Proposal 126***

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It is proposed to have one set of codes for both the matrimonial and family proceedings for rules governing representation of parties under disabilities in the New Code, incorporating the extant provisions in Rules 105 to 107 of the MCR and Order 80 of the RHC with duplicated provisions removed.

*Report para. 458*

***Proposal 127***

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In the New Code, “Registrar” should be defined as the Registrar of the District Court if the case is pending in the Family Court, and the Registrar of the High Court if the case is pending in the High Court.

*Report para. 462*

***Proposal 128***

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The scope of the duties of the Registrar, other than those extant matters, should be expanded to cover simple applications such as amendments to the originating process, time extension and approval of consent summonses on procedural matters.

*Report para. 463*

***Proposal 129***

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The New Code should provide that the Registrar may under the general or special directions of a judge hear and determine any application or matter which under the principal Ordinances and provisions in the New Code may be heard and determined in Chambers; and that any matter or application before the Registrar may at any time be adjourned by him to be heard before a judge. A PD should be introduced to list out all the matters and applications that the Registrar may hear and determine.

*Report para. 465*

***Proposal 130***

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All the jurisdiction, powers and duties conferred on the Registrar in the New Code may be exercised and performed by a Master.

*Report para. 466*

### ***Proposal 131***

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As a matter of principle, the provisions in the New Code should be simple and simply expressed, and where appropriate, the language used may be modernised. Further consideration should be given as to how to pursue this objective as far as practicable, bearing in mind the various concerns.

*Report para. 475*

### ***Proposal 132***

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An assessment on the organisational and manpower implications of the proposals on the Judiciary should be carried out.

*Report para. 482*

### ***Proposal 133***

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In taking forward the proposals, the Judiciary should consider undertaking a further study on the scope of IT system changes required and the approach to be adopted in the context of Phase II of the Judiciary-wide Information Technology Strategy Plan for better synergy and cost-effectiveness etc.

*Report para. 484*

### ***Proposal 134***

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Suitable training on the New Code should be provided to judges and judicial officers dealing with family cases, the support court staff and the legal professionals.

*Report para. 485*

***Proposal 135***

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The Judiciary should consider producing suitable publications and materials to assist the litigants in person in navigating through the process.

*Report para. 486*

***Proposal 136***

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Considerations should be given by the Judiciary for producing general publicity materials to enable the interested bodies and members of the public to have a good general understanding of the New Code.

*Report para. 487*

***INTERIM REPORT  
AND  
CONSULTATIVE PAPER***

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## *Interim Report and Consultative Paper*

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### INTRODUCTION

1. In March 2012, the Chief Justice appointed a Working Party on Family Procedure Rules (“Working Party”) with the following terms of reference :-

- “(1) To examine the current procedures in the family jurisdiction and, with a view to securing that the family justice system is accessible, fair and effective, to make recommendations to the Chief Justice for changes thereto and in particular to consider formulating a single set of rules for the family jurisdiction applicable both to the Family Court and the High Court; and
- (2) To advise the Chief Justice initially on the desirability, impact and practicalities of any such changes as may be recommended.”

2. The Working Party is only tasked to review the practice and procedure of the family jurisdiction exercised by the Family Court and the High Court. We will not examine or make any proposal to change the substantive law on family and matrimonial matters, which is entirely a matter for the Administration. Further, its purview does not include the public law proceedings of the juvenile court, that is, a magistrate appointed by the Chief Justice pursuant to section 3A(2) of the JOO in exercising the jurisdiction under the PCJO.

3. The Working Party consists of the following members :-

The Hon Mr Justice Jeremy Poon, the Judge in charge of the Family Law List, High Court (Chairperson)

Deputy High Court Judge Bebe Chu, formerly Principal Family Court Judge (Deputy Chairperson)

Deputy High Court Judge David Lok

Deputy High Court Judge Marlene Ng

HH Judge Bruno Chan, Acting Principal Family Court Judge

HH Judge Sharon Melloy

HH Judge CK Chan

Mr Jeremy Chan, representative of the Bar Association

Mr Dennis Ho, representative of the Law Society

Mr Ian Wingfield, representative of the Family Law Association

Mrs Annie Williams, Deputy Director of Legal Aid (Litigation), representative of the Legal Aid Department (until 31 August 2012)

Ms Sherman Cheung, Assistant Principal Legal Aid Counsel, representative of the Legal Aid Department (as from 1 September 2012)

Ms Mary Ho, Assistant Law Officer (Civil) (Advisory), representative of the Department of Justice

Deputy District Judge Ivan Wong (Secretary)

Mr Arthur Ng, Deputy Judiciary Administrator (Operations) (In Attendance)

Ms Wendy Cheung, Assistant Judiciary Administrator (Development) (In Attendance)

4. The Working Party now issues this Interim Report and Consultative Paper, seeking :-
- (i) to identify the defects which impede the effective operation of the family justice system;
  - (ii) to formulate proposals for possible reforms to the family procedural rules; and
  - (iii) to consult court users, the legal profession, other stakeholders and all interested members of the public on the proposals.

## PART I – THE PROBLEMS IDENTIFIED

### A. THE FAMILY JUSTICE SYSTEM IN HONG KONG – AN OVERVIEW

5. Historically, family and matrimonial legislation in Hong Kong has been premised on the English model. But over the years our family justice system has evolved into a rather distinct jurisdiction to cater for the local needs. In the process, piecemeal procedural rules, accompanied by PDs, have grown in an *ad hoc* way. As explained below, our system now embraces a very wide range of subject matters with both the Family Court and the High Court exercising concurrent jurisdiction, other than those falling within the latter's exclusive preserve, under some seriously fragmented and labyrinthine procedural rules.

#### *A1. Wide range of subject matters*

6. Family and matrimonial matters typically and mostly arise from the MCO on dissolution of marriage and from the MPPO on matters including custody, care and control of children as well as ancillary and other financial relief in the context of dissolution of marriage.
7. Significantly, the family and matrimonial jurisdiction also covers a very wide range of other subject matters and proceedings arising from various Ordinances and the inherent jurisdiction of the court including :-
  - (a) the GMO on guardianship, custody and upbringing of children;
  - (b) the SMOO, which is rarely used in practice but may still be relevant to the rights of parties to a customary marriage or a union of concubinage or a non-monogamous marriage who may not be able to apply for a divorce or a decree of judicial separation under the MCO;

- (c) the LO on the law relating to children born out of wedlock;
- (d) the MO(RE)O on recovery of maintenance by or from persons in Hong Kong from or by other persons in reciprocating countries;
- (e) the DCRVO, which tackles domestic violence by, among other things, injunctive relief;
- (f) the AO on adoption of children including intercountry adoption;
- (g) the PCO, which deals with, among other things, disabilities associated with illegitimacy, the law relating to paternity, legitimacy and legitimation, including parental orders in favour of gamete donors;<sup>1</sup>
- (h) the I(PFD)O, which empowers the court to make orders for the making out of the estate of a deceased person of provision for certain members of his family and dependants;
- (i) the CACO on international abduction of children; and
- (j) wardship proceedings.

**A2. *Jurisdiction of the courts***

8. The Family Court and the High Court exercise concurrent family jurisdiction save and except for those which are exclusively within the jurisdiction of the High Court including international abduction of children,<sup>2</sup> inherent jurisdiction and wardship,<sup>3</sup> non-consensual

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<sup>1</sup> The HRTO regulates reproductive technology procedures and related matters. However, unlike its English counterpart, i.e. the HFEA 2008, it does not have any provision dealing with parental orders, which are covered by section 12 of the PCO.

<sup>2</sup> CACO.

<sup>3</sup> Section 26, HCO and the inherent jurisdiction of the High Court.

application for an adoption order,<sup>4</sup> Convention adoption,<sup>5</sup> application for an order passing care of an infant to a person authorised by the Director of Social Welfare<sup>6</sup> and interim relief in aid of foreign proceedings.<sup>7</sup>

9. Pursuant to section 10A of the MCO, matrimonial causes and any other proceedings under the MCO are brought in the first instance in the Family Court, subject to subsequent transfer to the High Court if appropriate. However, for some other family and matrimonial proceedings, it is not entirely clear where they should begin or how a transfer between the courts is to be effected.

### ***A3. Rules and PDs***

10. Rules of court governing the practice and procedure in family and matrimonial proceedings are contained in different instruments supplemented by an array of PDs. They are exceedingly fragmented, difficult to navigate and burdensome to use.
11. The MCR is the principal instrument on procedure. It contains extensive provisions to be used in proceedings under the MCO and the MPPO, including ancillary relief. However, the RHC are also applicable generally, even if the matter remains in the Family Court.<sup>8</sup> Further, where no specific provision is made, the court's jurisdiction so far as regards procedure, practice and powers must be exercised in accordance with the procedure, practice and powers being in force in the High Court of Justice in England with reference to matrimonial proceedings.<sup>9</sup> So if need be, one may have to refer to the MCR, the RHC and even the English rules and

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<sup>4</sup> Part 5, AO.

<sup>5</sup> Part 5, AO.

<sup>6</sup> Section 23B, AO.

<sup>7</sup> Sections 21M and 21N, HCO.

<sup>8</sup> Rule 3, MCR.

<sup>9</sup> Section 10, MCO.

practice on a procedural point.

12. The procedure for ancillary relief is further governed by PD 15.11 (Financial Dispute Resolution Pilot Scheme). The pilot scheme for FDR procedure was first introduced on 29 December 2003. Over the years, it has worked successfully in procuring settlements in many of the claims for financial relief heard by the Family Court.<sup>10</sup> Presently, steps have been taken to amalgamate the FDR procedure into the rules. The draft rules are likely to be tabled at the Legislative Council in 2014.
13. In October 2012, PD 15.13 (Children's Dispute Resolution Pilot Scheme) came into force. The CDR pilot scheme follows the lead provided by the success of the FDR procedure by ensuring that the culture of settlement in the Family Court is not simply limited to financial matters but extends to children matters as well. It will run for three years. A research project will then be undertaken in order to establish, in broad terms, its effectiveness.
14. On children's proceedings, there are also the Guidance on Meeting Children and Guidance on Separate Representation for Children in Matrimonial and Family Proceedings.
15. For other family and matrimonial proceedings, the procedural rules are to be found in the specific rules, if any, for the principal Ordinances. However, only a few Ordinances have made specific procedural rules.<sup>11</sup> Further, pursuant to PD 15.12 (Matrimonial Proceedings and Family Proceedings), the RHC and the RDC shall apply with necessary modifications to those proceedings as respectively set out in paragraphs 6 and 7 thereof.
16. There are other PDs that concern family and matrimonial proceedings :-

(a) PD 15.1 (Divorce);

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<sup>10</sup> It is estimated that roughly over 60% of contested financial applications were settled at the FDR.

<sup>11</sup> They are the AIOR for the MPPPO; the AR and the CAR for the AO; and the MO(RE)R for the MO(RE)O.

- (b) PD 15.2 (Petition – Personal Service);
- (c) PD 15.3 (Reconciliation);
- (d) PD 15.4 (Special Procedure);
- (e) PD 15.5 (Affidavit of Means);
- (f) PD 15.6 (Appointment of Medical Inspectors);
- (g) PD 15.7 (Decree Absolute);
- (h) PD 15.8 (Decrees and Orders: Agreed Terms);
- (i) PD 15.9 (Ancillary Relief in Matrimonial Causes – Estimates of Costs);
- (j) PD 15.10 (Family Mediation);
- (k) PD 15.14 (Transfer of Proceedings from the Family Court to the Court of First Instance);
- (l) PD 17.1- Part I (Parties in Particular Proceedings - Separate Representation of Infants);
- (m) PD 23.1 (Wards of Court);
- (n) PD 25.1 (Chambers Hearings in Civil Proceedings in the High Court, the District Court, the Family Court and the Lands Tribunal); and
- (o) PD 25.2 (Reports on Hearings Held in Chambers Not Open to the Public).

17. Other PDs applicable to general civil proceedings which are also relevant to family and matrimonial matters include PD 11.1 (*Ex Parte*, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)), PD 11.2 (Mareva Injunctions and Anton Piller Orders) and PD 11.3 (High Court and District Court Restricted Application and Restricted Proceedings Orders).

***A4. Extension of CJR measures***

18. The CJR came into force on 2 April 2009. It was introduced to tackle the problems of excessive costs, delay and complexity in our civil justice system, in particular by :-
- (a) preserving the best features of the adversarial system but curtailing its excesses by promoting the use of greater case management powers by the court;
  - (b) streamlining and improving civil procedures; and
  - (c) facilitating early settlement by the parties, eliminating unnecessary applications and, where appropriate, penalising such applications.<sup>12</sup>
19. On the same day, PD 15.12 was introduced to extend some of the new CJR measures, with necessary modifications, to family and matrimonial proceedings, including case management powers, expert evidence, statements of truth, costs and costs offers, appeals against decrees *nisi* and imprisonment orders. However, as will be seen below, PD 15.12, which lacks statutory backing, has so far achieved little of its desired effects in actual practice.

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<sup>12</sup> LC Paper No. CB(2)713/11-12(01), being the Judiciary Administration's information paper dated 30 December 2011 informing the Legislative Council Panel on Administration of Justice and Legal Services of the findings of the implementation of the CJR for the first two years from 2 April 2009 to 31 March 2011, paras. 2-3.



## **B. DESIRED CHARACTERISTICS OF AN EFFECTIVE FAMILY JUSTICE SYSTEM**

20. As part of the general civil justice system, an effective family justice system should share all the typical characteristics of a well-functioning civil justice system :-
- 20.1 The system should be just in the results it delivers.
- 20.2 It should be fair and be seen to be so by :-
- (a) ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - (b) providing every litigant with an adequate opportunity to state his own case and answer his opponent's; and
  - (c) treating like cases alike.
- 20.3 It should deal with cases with reasonable speed.
- 20.4 It should be understandable to those who use it.
- 20.5 Procedures should be simple, user-friendly and proportionate to the issues involved.
- 20.6 It should be reasonably affordable with costs being proportionate to the issues involved.
- 20.7 It should provide as much certainty as the nature of the cases allows.
- 20.8 It should be effective, adequately resourced and organised.<sup>13</sup>
21. An effective family justice system must also be designed specifically to meet the challenges presented by the special nature, breadth and complexity of family and matrimonial disputes.

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<sup>13</sup> See para. 25, CJR Interim Report.

- 21.1 Family law lies at the heart of our society. It deals with failures at a most personal level, whether of family or parenting relationships. The crisis caused by the breakdown of such relationships can be complicated, costly, stressful and even traumatic. It affects the whole spectrum of the society.
- 21.2 The issues involved in family and matrimonial disputes are very personal and sometimes sensitive. Very often, their legal, emotional and economic facets cannot be separated. This is particularly so when children's welfare is at issue. Proceedings involving two loving parents who think they know what best suits the welfare of their children are most difficult.
- 21.3 These well-recognised difficulties are further exacerbated by the nature of the disputes, which may change course during or even after litigation as financial circumstances alter, parties find new partners, children grow up with their own views, and family members change place of residence. Family litigation often does not bring about the usual finality to be expected in other civil cases.
- 21.4 The family justice system cannot be a panacea for fixing fractured relationships. But a sustainable and effective legal framework is necessary for resolving intractable contentions, clarifying legal principles and enforcing obligations, especially as between uncompromising parties.
- 21.5 Traditionally, the family justice system in the common law world had adopted an adversarial procedural framework. However, the adversarial approach is now widely recognised to be unsuitable for families in the turmoil of separation or disputes because it tends to drive the parties further apart, threatening the values of family cooperation and the best interests of children. Rather than being entrenched in their unyielding positions, the parties and their legal advisers should, with proper guidance by the court, adopt functions and values that are compatible with the needs of families and the best interests of children. A conciliatory procedural framework is thus preferred. Indeed, the conciliatory procedural framework has now become a fundamental feature underpinning the effective operation of a modern family justice system.

22. An effective family justice system should therefore possess the following essential features as well :-
- 22.1 It should be responsive to the varied needs of the family jurisdiction to facilitate outcomes that are the best possible in the circumstances.
- 22.2 It should ensure that issues concerning children's welfare are adequately addressed and where necessary, children are represented and heard.
- 22.3 It should promote a conciliatory rather than adversarial litigation culture which encourages the parties, having entered into the marriage as equal partners, to both leave it as such, and to decide as equal partners, important decisions such as the division of the matrimonial assets and the future welfare of the children without any perceived bias, prejudice or ill-feelings associated with the drama of divorce.
- 22.4 It should provide a mechanism for alternative dispute resolution whereby the family and matrimonial disputes can be resolved consensually through dialogue and co-operation between the parties.
- 22.5 It should have a sufficient number of specialist judges, who are reasonably supported by the system.

## C. PERCEIVED PROBLEMS

23. When measured against the desired characteristics, Hong Kong's family justice system suffers from a number of defects.

### *C1. Adversarial excesses and hostile litigation culture*

24. In Hong Kong, it is well recognised that the adversarial process is of itself not conducive to an expeditious resolution of family and matrimonial disputes. PD 15.11 was therefore introduced on 29 December 2003, which began the process of shifting the litigation culture. And as noted, some success has been achieved by the FDR procedure. In April 2009, when the CJR was introduced, PD 15.12 came into force at the same time to extend some of the CJR measures to the family justice system, with a view to curbing the same adversarial excesses impeding its effective operation.

25. However, vigorously contested family and matrimonial cases are, generally speaking, as hostile and litigious as before. This is especially for cases heard in the High Court.

25.1 The proceedings are disproportionately expensive and extremely drawn out.

25.2 Parties are very often carried away by their emotions, thereby losing sight of the real issues and embroiling themselves in peripheral matters.

25.3 Issues are usually not sufficiently defined at an early stage of the proceedings to enable the court to regulate the extent of the disclosure of documents and expert evidence to make sure that they are all proportionate to the issues in question.

25.4 Satellite skirmishes, some of which are clearly conducted to wear down the other party's financial resources, still exist.

25.5 Discovery is essential to a just and expeditious distribution of family assets but non-compliance, typically by the paying party, is

prevalent.

- 25.6 Another major problem is the indiscriminate use of experts without first obtaining proper directions from the court.
26. In short, many if not all the adversarial excesses continue to haunt those hotly contested family and matrimonial cases. As much as the court may wish to do, managing the progress of the case towards a just resolution as expeditiously and cost-effectively as possible is still very difficult.
27. One of the principal reasons why the adversarial excesses are not reined in is that the new CJR measures have not been extended and implemented with full force. The Working Party notes the precursory steps undertaken by way of PD 15.11 to change the litigation culture and the success achieved by the FDR procedure so far. But an essential and further shift of the litigation culture for contested family and matrimonial proceedings is possible only if all the applicable CJR measures, with necessary modifications, are to be adopted by way of rules. With no statutory backing, PD 15.12 can only be regarded as an interim measure and is not sufficiently effective. Checking the adversarial excesses and shifting the litigation culture further by incorporating all the applicable CJR measures with necessary modifications into the procedural rules and practice for family and matrimonial cases is urgently needed.

***C2. Procedure fragmented and difficult to use***

28. Fragmented and labyrinthine procedures are not conducive to the efficient disposal of family and matrimonial disputes, imposing extra burden on the court and court users as well as adding to the costs of the litigation process. There is indeed a strong case for introducing a unified procedural code for all family and matrimonial cases.

***C3. Applying the RHC not always straightforward***

29. If the MCR is silent on a procedural point, one needs to apply the RHC with necessary modifications. However, identifying the

applicable rules in the RHC and debating the extent of the necessary modifications always cause inconvenience and even disruption to the proceedings and waste time and costs. Harmonisation of the rules is required.

***C4. English practice not entirely appropriate***

30. Further, if no provision in the MCR or the RHC is applicable, one looks further to the English practice. That, however, was derived from a time when the substantive laws in England and Hong Kong were very similar. But over the years, the substantive laws in the two jurisdictions have diverged.<sup>14</sup> The English practice may no longer be entirely appropriate. Plainly, it is necessary to introduce provisions to plug the gap in our rules in response to local needs.

***C5. No rules for specified proceedings***

31. The majority of family and matrimonial cases other than matrimonial causes have no rules of their own. So pursuant to PD 15.12 one has to rely on either the RHC or the RDC with necessary modifications. This approach likewise suffers from the problems of identifying the extent of their applicability and the lack of harmonisation.
32. In specific matters such as declaratory proceedings concerning marital status, parentage, legitimacy or legitimation, there are no specific provisions on how and where to commence such proceedings. One may have to resort to the English practice even though it is not provided for in any Ordinance or rule.<sup>15</sup> The situation is entirely unsatisfactory. There is a strong need to introduce specific rules for those proceedings where presently no rules exist.

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<sup>14</sup> For example, we do not have a comprehensive code on children such as the English Ch A 1989.

<sup>15</sup> See, e.g., *Re A (Parent and Child: Declaration)*[2008] 4 HKLRD 526, applying Rules 3.13 and 3.16 of the FPR 1991, and *Re P (Parentage: Blood Tests)* [2010] 4 HKLRD 497, applying Schedule 1, Form 1, Blood Tests (Evidence of Paternity) Regulations 1971.

**C6. *Antiquated and inconsistent language***

33. Some of the language in the existing rules appears outdated. In some places, the rules contain inconsistent language. A good example is the antiquated term “ancillary relief”. “Financial order”, which conveys the exact nature of the proceedings, may be preferable. A ready example is the different ages regarding children in the MCR: 16 years in Rule 9(3) and 18 years in Rule 94(2). As a matter of principle, the language of the rules should be modernised and any inconsistency should be removed as far as possible.

**C7. *Different rule-making authorities***

34. The principal Ordinances relating to family and matrimonial matters provide for an array of different rule-making authorities, including the Chief Executive;<sup>16</sup> the Chief Justice;<sup>17</sup> the Chief Judge;<sup>18</sup> and the High Court Rules Committee.<sup>19</sup> Such fragmented rule-making powers are confusing, and discourage any coherent and cohesive approach in introducing rules and forms for the purposes and provisions of the principal Ordinances. A single rule-making authority should be established instead.

**C8. *Jurisdiction of the Registrar and Masters very limited***

35. In general civil proceedings, the Registrar and the Masters, both in the High Court and the District Court, provide considerable judicial and administrative support to the judges on procedural matters. For example, they are empowered by the RHC/RDC to deal with various interlocutory applications. However, for family and matrimonial matters, their jurisdiction and powers are extremely limited. They can only provide very little support to the

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<sup>16</sup> Section 24, MRO.

<sup>17</sup> Section 20(6), GMO, section 9A(6), SMOO, section 19, MO(RE)O, section 8, DCRVO, section 12, AO, and section 18, PCO.

<sup>18</sup> Sections 18B and 54, MCO and section 32, MPPO.

<sup>19</sup> Section 55, HCO, section 12, CACO.

judges, who are overwhelmed with matters which otherwise could have been handled and disposed of by the Registrar and the Masters. Plainly, judicial resources should be better deployed and coordinated. The Registrar and the Masters should be given wider jurisdiction and powers under the family procedural rules so that they can render more meaningful assistance to the judges.



## **PART II – PROPOSED REFORMS**

### **D. MAIN OBJECTIVES OF REFORMS**

36. Rules and procedures underpin an effective operation of the family justice system. They inform the users of how the system works and are fundamental in ensuring that it works well. If there are problems impeding its effective operation, then the system is not serving its users well. Because of the problems discussed above, our family procedural rules are in urgent need of comprehensive and fundamental reform. We need to provide an accessible and responsive procedural source for the courts and all court users, represented or otherwise, in achieving the fundamental objective of dealing with and disposing of family and matrimonial disputes justly and efficiently.
37. To steer the discussion below, the Working Party has identified the following main objectives of reforms :-
- 37.1 The family justice system is to be accessible, fair and efficient.
- 37.2 The shift in litigation culture started with the initiative of PD15.11 on financial dispute resolution is to continue.
- 37.3 Undue and excessive procedural distortions are to be reduced.
- 37.4 The procedural rules are to be both simple and simply expressed for the benefit and comprehension of both qualified and lay court users and the court administration.
- 37.5 The procedures in the Family Court and the High Court are to be aligned.
- 37.6 The procedural rules are to be streamlined and harmonised with the post-CJR RHC/RDC.
- 37.7 Procedures are to be introduced for proceedings and matters where hitherto no rules have existed.

- 37.8 All extant inconsistencies in the procedural rules are to be removed.
- 37.9 As far as possible, the legal language is to be modernised to reduce complexity and outdated terminology is to be replaced.
- 37.10 The procedural rules are to be compatible with and have the ability to accommodate modern technological advancements.
- 37.11 A simpler approach with modernised process is to be adopted for contested family and matrimonial cases.
- 37.12 Dedicated PDs and user-friendly statutory forms are to be designed to supplement the rules and to give all necessary procedural guidance for court users.

## **E. A UNIFIED PROCEDURAL CODE**

38. The first question that arises is how can the proposals for reforms, when approved, be best implemented and translated into the procedural rules? Two options are available. One is to introduce an entirely new stand-alone unified family procedural code as the appropriate framework. The other is to amend the existing rules and introduce new rules for proceedings where hitherto no rules have existed. In searching for the answer to this fundamental question, the Working Party has consulted the recent reforms undertaken in three major common law jurisdictions. Their experience is most illuminating.

### ***E1. Overseas experience***

#### ***E1.1. England***

39. The general civil procedural reforms in England started with the CPR enacted in April 1999. It applied to all civil proceedings but family proceedings under the MFPA 1984 were expressly excluded, subject to any provisions otherwise under another enactment.<sup>20</sup> It was already envisaged that similar procedural reforms for the family jurisdiction would be undertaken separately. The then position was less than satisfactory. Rules of court governing the practice and procedure in family proceedings (excluding adoption proceedings) in the High Court, county courts and magistrates' courts were contained in different instruments made under different rule-making powers. Rules were difficult to find, outdated and out of line with those applying to civil proceedings.<sup>21</sup>

40. Under the CA 2003, a new rule-making body, FPR Committee, was set up. Sections 75(2) and 75(5) empower the FPR Committee to make new family procedure rules with a view to securing that (a) the family justice system is accessible, fair, and efficient and (b)

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<sup>20</sup> Para. 2.1(2), CPR.

<sup>21</sup> *Family Procedure Rules – A new procedural code for family proceedings*, a consultative paper produced by the Department for Constitutional Affairs (UK) on 30 August 2006 (“2006 Consultation”), p. 8.

the rules are simple and simply expressed. In the 2006 Consultation, the FPR Committee consulted on the need for (1) modernisation of language, (2) harmonisation with the CPR, (3) a single unified code of practice, and (4) alignment of procedures in all levels of court. Eventually draft rules were prepared and the Family Procedure Rules: An Invitation to Comment on the Draft Rules, Practice Directions and Forms was issued on 28 November 2008 to consult on the draft rules.

41. The fully consolidated FPR 2010 came into force on 6 April 2011. It provides for the first time a unified procedural code for family proceedings in the English family courts, replacing all the existing rules and creating a comprehensive and accessible source for all who come into contact with the family justice system. Like the CPR, the FPR 2010 is supplemented by dedicated PDs, an extensive suite of forms and various pre-application protocols. It establishes a comprehensive modernised code for family procedure, thereby replacing a large body of unconsolidated rules, guidance and forms for different courts and different types of family proceedings.

### ***E1.2. Australia***

42. The family law courts in Australia comprise the Family Court of Australia, a superior court of record, and the Federal Circuit Court of Australia. Both courts have jurisdiction in family law matters in all states except Western Australia, which has its own Family Court. Both courts are independent but cooperate to provide streamlined access to the federal family law system. The Family Court of Australia deals with more complex matters, and the Federal Circuit Court less complex matters that are likely to be decided quickly.
43. The family procedural code for the Federal Circuit Court is the Federal Circuit Court Rules 2001. For the Family Court of Australia, the Family Law Rules 2004 made under the Family Law Act 1975 totally revamped family procedure with a view to making the Family Court of Australia more accessible to all who use it. The focus was on clarity and ease of use. The rules, structured in 27 Chapters, are comprehensive and incorporate a number of PDs, so there is only need to look in one place. Strategies aimed at

changing the culture of non-compliance were introduced, practices and procedures specifically aimed at addressing clients' needs were implemented, archaic language was removed, a number of unnecessary forms were slashed, and tighter controls on disclosure and use of experts were exercised.

44. The Family Court of Western Australia is vested with state and federal jurisdiction in matters of family law and deals with divorce, property of marriage or *de facto* relationships, and matters relating to children, maintenance and adoptions. Family procedure in the Family Court of Western Australia is also governed by the Family Court Rules 2004.<sup>22</sup>

### ***E1.3. New Zealand***

45. The Family Court of New Zealand is established under the Family Courts Act 1980 as a division of the District Court with close to 60 courts throughout the country. It has its own Family Courts Rules, introduced in 2002, that set out the process and procedures for family proceedings. The procedures are further bolstered by practice notes, guidelines and protocols.

### ***E1.4. Common feature – a unified code***

46. A common feature readily emerges from the overseas experience.<sup>23</sup> They may or may not have a unified family court. But they all have a stand-alone, unified procedural code that comprehensively deals with the processes and procedures for all family and matrimonial matters. Practices and procedures are rationalised, reconciled and consolidated in one single instrument. The old system in which one has to navigate through various procedural codes has disappeared.

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<sup>22</sup> Note that the latest changes to the Family Court Rules 2004 made in March 2009 have not been adopted.

<sup>23</sup> We have also briefly looked at the recent experience of British Columbia, Canada where the new Supreme Court Family Rules came into force on 1 July 2010, a unified code introduced for the first time to replace the previous complex combination of general civil procedural rules and a series of family rules for the family jurisdiction exercised by the BC Supreme Court.

## ***E2. The case for Hong Kong***

### ***E2.1. Perceived benefits***

47. There are a number of perceived benefits in adopting a single unified procedural code for our family justice system :-
- 47.1 It will help underline and represent a fresh start to promote the necessary cultural change for the modernisation of family litigation.
- 47.2 It will facilitate a more streamlined procedure and contribute to a common understanding and approach across the Family Court and the High Court, resulting in a more efficient and cost-effective system to serve the court users better.
- 47.3 It will be easier for both qualified lawyers and unrepresented litigants to refer to one procedural source for guidance, which is more accessible and more easily understood.
- 47.4 It is preferable to put the new rules for proceedings where no rules hitherto have existed in one unified code, thus making them readily accessible, than to leave them scattering around in different instruments.
- 47.5 Possible clashes between old rules and new procedural concepts, and hence satellite arguments, may be avoided by a single unified code.
- 47.6 With all the relevant provisions incorporated into the new code, the need for cross references to the RHC/RDC will be greatly reduced.
- 47.7 The new code will repeal the existing rule making powers under the various Ordinances and replace them with a single rule-making power to cover them all.

### ***E2.2. The CJR methodology***

48. The Working Party notes that when the CJR was introduced, Hong Kong decided not to adopt an entirely new code of civil procedure along the lines of the CPR. Instead, the reforms were implemented

by grafting amendments onto the existing RHC and RDC, borrowing from the CPR as appropriate. In explaining why that approach was preferred, the CJR Working Party said that in local circumstances :-

- (a) it would be less disruptive and less demanding than adopting an entirely new code;
- (b) some of the most beneficial reforms can readily be adopted; and
- (c) the preferred approach would allow any particular reforms that prove unsuccessful to be more readily reversed.<sup>24</sup>

49. The Working Party recognises the force of these conclusions in relation to the general civil justice system. But some of the major problems now plaguing our family justice system are unique. Overly fragmented and labyrinthine procedural rules for a wide range of subject matters provide a ready example. Non-existence of rules for a number of specific proceedings is another. The challenges our family justice system now faces can only be met adequately by a unified procedural code.

### ***E2.3. Other factors***

50. The Working Party has taken into account the following factors as well.

#### ***(a) Possible lacunae***

51. There may be concern over possible lacunae in any stand-alone family procedural code. If the current system is kept, one can make up for any gap by looking at the RHC/RDC or even the English procedure and practice. We think with careful drafting, any possible lacunae should be extremely rare. Further, as a prudent measure, a general provision can be created to enable the court to fall back on the RHC to fill any such procedural gap, if

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<sup>24</sup>

Para. 10, CJR Final Report, Executive Summary.

existed. The necessary rules can then be introduced swiftly. Alternatively, in the absence of such a general fall-back provision, the court may resort to its inherent jurisdiction and very wide case management powers to deal with the procedural lacunae pending the introduction of the necessary rules.

**(b) *Drafting effort***

52. Whether it is a single unified code or whether amendments are to be made to existing rules with new rules to be introduced, substantial drafting effort will be required. The effort for drafting a new code speaks for itself. Further, if Hong Kong is to borrow from overseas experience and develop a new code, borrowed provisions would probably require a significant amount of revision to suit the local circumstances and needs. On the other hand, if the amendment approach is to be adopted, other than fresh drafting and significant revision, care is needed to ensure that the amendments and new rules harmonise with the retained rules.

**(c) *Training effort***

53. It is likely that whichever option is adopted, all stakeholders will need to make substantial efforts to migrate to a modern approach in family litigation. One may argue that it will be relatively easy to Master amendments than learn a whole new code. But by now the CJR has been in operation for over three years, so reforms for modernising family procedure based substantially on the CJR model are less likely to be as demanding as when the CJR was first introduced. Further, migration to a new simpler set of rules is likely to be more user-friendly than adherence to the existing web of rules complicated by amendments and introduction of new rules under different principal Ordinances.

**(d) *Costs***

54. Another consideration is whether any wholesale change will bring costs down. There has been concern that the CPR has generated a body of procedural jurisprudence and has not brought costs down



or reduced complexity.<sup>25</sup> Further, the FPR 2010 as modelled on the CPR is too new to provide any empirical information as to its cost-effectiveness. On the other hand, piecemeal amendments to the existing rules and procedures incorporated in different places are unlikely to be cost-saving, and may in the long run make more demands on the court and court users as a whole.

**(e) *Modernisation of language***

55. The benefits of removing outdated language and replacing them with a simplified terminology in a single unified code are obvious. It is not a mere language refinement but may serve as a stimulus for culture change to family litigation.

**E2.4. *New Code***

56. Having consulted the overseas experience and considered all the relevant factors, the Working Party proposes to adopt a single set of self-contained procedural rules to implement the reforms (“the New Code”) : **Proposal 1.**

*Proposal 1*

*Hong Kong’s family justice system should adopt a single set of self-contained procedural rules to implement the reforms (“the New Code”).*

**E3. *A unified rule-making authority***

57. We have already alluded to the undesirability of having different rule-making authorities for family and matrimonial matters. We consider that the rule-making powers should be collected under the umbrella of a single rule-making authority. This is of particular importance for the New Code which requires a coherent, cohesive and consistent approach. We therefore propose that a new Family

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<sup>25</sup> “*Review of Civil Litigation Costs Preliminary Report*” by Lord Justice Jackson, Vol.1 published in May 2009, Part 1, para. 1.2.

Procedure Rules Committee be set up by way of primary legislation as the single rule-making authority for the New Code and any subsequent amendments. The proposed Rules Committee should model on the powers, composition and approach for the two rules committees established for the High Court and the District Court respectively, namely, the High Court Rules Committee and the District Court Rules Committee .<sup>26</sup> **Proposal 2.**

Proposal 2

*A new Family Procedure Rules Committee should be set up by way of primary legislation as the single rule-making authority for making the New Code and any subsequent amendments. The proposed Rules Committee should model on the powers, composition and approach for the two rules committees established for the High Court and the District Court respectively (namely, the High Court Rules Committee and the District Court Rules Committee).*

**E4. Consequential amendments**

58. All the proposed reforms concern rules and procedures only. However, in order to implement some of the proposals, it may be necessary to introduce consequential amendments to the relevant principal Ordinances and/or subsidiary legislation. A ready example is the proposed creation of the Family Procedure Rules Committee. The Working Party therefore proposes that where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation : **Proposal 3.**

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<sup>26</sup>

Section 55, HCO and section 17, DCO respectively.

Proposal 3

*Where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation.*

**F. ADOPTING THE FPR AS THE BASIC FRAMEWORK FOR THE NEW CODE**

59. Assuming that the New Code is to be introduced, the Working Party considers that there is a model that we can look to as its broad, basic framework: the FPR 2010.

60. The FPR 2010, which is largely premised on the CPR, sets out the latest development trend in family procedure within the global common law community. It is divided into 36 Parts each covering a specific topic. Under Rule 2.1, unless the context otherwise requires, it applies to family proceedings<sup>27</sup> in all three tiers of court.<sup>28</sup> Except where the rules are of general application, each Part begins by defining the application and/or scope of the rules in the Part. Where the Part covers specific proceedings, rules cover the parties, where the proceedings are to be started and what evidence is to be filed in support.

61. Adopting the FPR 2010 as a starting point of the broad, basic framework for our family procedure reform is necessarily a very helpful starting point because :-

61.1 Hong Kong family legislation has an English origin. Although English family law has changed quite considerably over the years and Hong Kong has not adopted many of such changes, there is still some commonality in approach and in the fundamental concepts and principles that underlie family law in both jurisdictions.

61.2 The FPR 2010 identifies and makes rules for all aspects of various proceedings within the family justice system. It is exactly what the New Code intends to do.

61.3 The CJR, which will feature prominently in the New Code, has incorporated many of the procedural concepts and measures of the

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<sup>27</sup> As defined in section 65 of the Magistrates' Courts Act 1980.

<sup>28</sup> That is, the High Court, the county court and the magistrates' court.

CPR. Hence, using the FPR 2010, which is based on the CPR, as the blueprint for the New Code may ease the implementation of the intended reforms.

62. On the other hand, Hong Kong family law has borrowed little, if at all, from the family law and practice of other common law jurisdictions. Indeed, the evolution of family law and practice in some common law jurisdictions has been shaped by federal and state/provincial developments, which are historically rooted in their own constitutional structure and have little applicability to Hong Kong.<sup>29</sup> Adopting their procedural codes for the purpose of our reform may not be suitable.
63. While it is desirable to refer to the FPR 2010 as the broad, basic framework for the New Code, the Working Party does not recommend a wholesale adoption of its general approach of setting out extensive provisions on practice and procedure by way of substantial PDs.
  - 63.1 As mandated by section 75(5) of the CA 2003, the FPR 2010 is a set of simple and simply expressed rules. The brevity and simplicity of the rules are augmented by a substantial suite of detailed PDs. Many of the detailed provisions on practice and procedure are now to be found in the PDs. The legitimacy of such approach is rooted in the CA 2003, which expressly empowers such PDs to be issued and governs its process and purpose.<sup>30</sup>
  - 63.2 In Hong Kong, provisions for practice and procedure are set out in the rules. PDs<sup>31</sup> are issued under the court's inherent jurisdiction to regulate its own process and not under the rules of court or other statutory power. They are designed, in consultation with the

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<sup>29</sup> See, for example in *LKW v DD* (2010) 13 HKCFAR 537, *per* Ribeiro PJ, pp. 552-554.

<sup>30</sup> See sections 75-81, CA 2003.

<sup>31</sup> Defined as directions issued by the Chief Justice as to the practice and procedure of the court or a direction issued by a specialist judge for his specialist list : Order 1, rule 4, RHC/RDC.

profession, to ensure the efficient, expeditious and economical despatch of the court's business.<sup>32</sup>

- 63.3 The difference between Hong Kong and England on PDs is significant. In the absence of any provisions in the primary legislation similar to those in the CA 2003, we simply cannot adopt the approach of the FPR 2010.
64. There are also other considerations militating against using PDs as a vehicle to contain extensive provisions on practice and procedure.
- 64.1 It is hard to justify why provisions which have the effect of rules of court and should be properly enshrined as such are to be replaced by PDs.
- 64.2 Both the family and civil procedures are very much part of the same civil justice system in Hong Kong. There is no convincing justification for the significant divergence in the use of PDs for family procedures alone by using them in the same way as the FPR 2010 does.
- 64.3 It will blur the important distinction between rules and PDs in Hong Kong.
65. Subject to the reservation above, the Working Party proposes to use the FPR 2010 as the broad, basic framework for the New Code :  
**Proposal 4.**

*Proposal 4*

*Subject to the reservation about the use of PDs as discussed herein, the FPR 2010 should be adopted as the broad, basic framework for the New Code.*

<sup>32</sup>

*Re Boon Voon King & ors, ex p Nedcor Asia Ltd [1998] 2 HKLRD 456, per Le Pichon J (as she then was) at p. 459F-G.*

## G. GENERAL CONTENTS OF THE NEW CODE

66. Assuming that the FPR 2010 will be adopted as the broad, basic framework of the New Code, the next question is how to fill in the contents. In this Part, we deal with the general approach.

### G1. *Modelling on the RHC*

67. A major theme of the intended reform is to align the general practice and procedure in both the family and civil jurisdictions in the post CJR-era and to harmonise as far as possible the general parts of the family rules with those for civil proceedings. The aim is to remove as far as possible the disparity in the general practice between the family and civil jurisdictions and to reap the benefits of the CJR reforms.<sup>33</sup> The goal can be best achieved by modelling the general provisions in the New Code on the equivalents in the RHC or incorporating the relevant provisions of the RHC, as the case may be, with modifications as appropriate for family and matrimonial matters : **Proposal 5**.

#### Proposal 5

*The general provisions in the New Code should be modelled on the equivalents in the RHC or incorporate the relevant provisions of the RHC, as the case may be, with modifications as appropriate for family and matrimonial matters.*

68. The Working Party notes that there are one or two areas such as the rules relating to domestic enforcement of court orders that the FPR 2010 simply falls back on the CPR with adjustments rather than incorporating rules modelled exactly on the CPR.<sup>34</sup> But we are given to understand that this is only a temporary measure. The

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<sup>33</sup> Statistics show that the implementation of the CJR continued to be smooth and satisfactory as a whole for the first two years from 2 April 2009 to 31 March 2011: LC paper No. CB(2)713/11/12(01), at para. 87.

<sup>34</sup> See Part 33, Chapter 8 (Charging Order, Stop Order, Stop Notice), FPR 2010.

FPR 2010 has always been intended to be a stand-alone code without any cross reference to the CPR, the RSC or the CCR.<sup>35</sup> Steps have in fact been taken by the FPR Committee to introduce specific rules for those areas in the FPR 2010. Ultimately, all the applicable provisions in the CPR, RSC and CCR will be incorporated into the FPR 2010.

69. As a self-contained instrument, the New Code should not, in principle, fall back on other provisions of the RHC. As noted, with careful drafting, any procedural gap should be extremely rare. That said, we think it prudent to have a general fall-back provision over any unforeseen procedural gap left in the New Code. **Proposal 6.**

*Proposal 6*

*A general fall-back provision on the applicable rules in the RHC should be created to fill any unforeseen procedural gap left in the New Code.*

70. The Working Party has identified the following RHC provisions which are by their nature of general applicability.<sup>36</sup>
- (a) Order 1A – Underlying objectives;
  - (b) Order 1B – Case management powers;
  - (c) Order 2 – Sanctions on non-compliance with the rules;
  - (d) Order 3 – Time;
  - (e) Order 24, rule 7A – Discovery before action or by non-party;

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<sup>35</sup> As advised by the members of the FPR Committee during the meetings with the judicial members of the Working Party in the UK in July 2013. In fact, the FPR Committee members stressed that the FPR 2010 should stand alone with no cross reference to the CPR.

<sup>36</sup> Some of the above provisions will be discussed in greater detail in Section H below.



- (f) Order 24, rule 15A – Limits on discovery;
- (g) Order 25 – Case management summons and conference;
- (h) Order 32A – Vexatious litigants;
- (i) Order 35, rule 3A – Time, etc., limits at trial;
- (j) Order 38, rule 4A – Single joint expert;
- (k) Order 38, Part IV – Expert evidence;
- (l) Order 41A – Statements of truth;
- (m) Order 62 – Costs; and
- (n) Order 62A – Costs offer and payments into court.

The Working Party proposes that they be adopted into the New Code, subject to modifications as appropriate for family and matrimonial matters : **Proposal 7**.

Proposal 7

*All the provisions in the RHC, as set out above, which are of general applicability, should be adopted into the New Code, with modifications appropriate for family and matrimonial matters.*

**G2. *Selecting from the FPR 2010***

- 71. Generally speaking, there is much to be said for selecting from the relevant applicable provisions in the FPR 2010 for adoption into our New Code. This will allow Hong Kong’s family justice system to draw on the practical experience of the English operation, which may help narrow debate and reduce effort in implementing the intended reforms.
- 72. As noted, the FPR 2010 is supplemented by dedicated PDs which contain very detailed and substantial provisions on the subject matters in question. So selecting from the FPR 2010 for our

purpose will entail selecting from the PDs as well. The selected provisions in the PDs should then be properly amalgamated into the New Code as rules.

73. The Working Party proposes to select from the FPR 2010 and those necessary PDs relevant applicable provisions with necessary modifications for adoption as rules in the New Code : **Proposal 8**.

*Proposal 8*

*The relevant applicable provisions in the FPR 2010 and those necessary PDs should be selected for adoption with necessary modifications as rules in the New Code.*

## H. SPECIFIC TOPICS OF REFORMS

74. In this Part, we discuss the specific topics of reforms.

### *H1. Application of the New Code*

75. In principle, as a comprehensive instrument, the New Code should apply to all family and matrimonial proceedings as defined, whether they are in the High Court or the Family Court : **Proposal 9.**

*Proposal 9*

*The New Code should apply to all family and matrimonial proceedings as defined, whether they are in the High Court or the Family Court.*

76. However, there is no clear definition for family and matrimonial proceedings.

76.1 Presently, family and matrimonial proceedings in Hong Kong are broadly categorised as follows :-

- (a) “Matrimonial Cause” – any proceedings for divorce, nullity, judicial separation, presumption of death and dissolution of marriage;<sup>37</sup>
- (b) “Matrimonial Proceedings” – any proceedings with respect to which rules may be made under section 54(1) of the MCO or section 32 of the MPPO;<sup>38</sup>
- (c) “Family Proceedings” – proceedings issued under the AO, the DVO (now known as DCRVO), the GMO, the I(PFD)O, the LO, the MO(RE)O, Part IIA of the MPPO, the MO, the MPSO, the MRO, the PCO and the SMOO;<sup>39</sup>

<sup>37</sup> Section 2, MCO.

<sup>38</sup> Rule 2, MCR and para. 2, PD 15.12.

<sup>39</sup> Para. 4, PD 15.12.

- (d) Proceedings under the CACO; and
- (e) Inherent jurisdiction including wardship proceedings.

76.2 The current categorisation is unsatisfactory. Only “Matrimonial Cause” is clearly defined by statute. The scope of “Matrimonial Proceedings” is wide and unclear. It may include some proceedings falling within the definition of “Family Proceedings” as well, such as the proceedings under Part II A of the MPPO or applications under the LO.

76.3 Proceedings under the CACO and wardship proceedings are clearly family-related proceedings and ought to be included as part of the family proceedings.

77. In the FPR 2010, “matrimonial cause” is defined to mean proceedings for a “matrimonial order” – a divorce order, a decree of nullity and a decree of judicial separation.<sup>40</sup> There is no statutory definition for “matrimonial proceedings”. In PD 7A, the reference to “matrimonial proceedings” appears. They are proceedings in which the applicant seeks a dissolution or annulment of the marriage or a decree of judicial separation. There is no statutory definition of “family proceedings” either. Cross-references to other instruments are made instead. In short, family proceedings are those family businesses for the time being assigned to the Family Division of England as set out in Schedule 1 to the Supreme Court Act 1981 (now renamed as the Senior Courts Act 1981).<sup>41</sup> Thus, under the FPR 2010 :-

77.1 The statutory definition of “matrimonial cause” is retained.

77.2 The term “matrimonial proceedings” is in effect synonymous with “matrimonial cause”.

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<sup>40</sup> Rule 2.3, FPR 2010.

<sup>41</sup> Annex 1 to this consultative paper is a list of all the proceedings which currently fall within “family proceedings” in England.

- 77.3 “Family proceedings” may vary from time to time, depending on the assignment made.
78. The Working Party proposes to largely follow the English approach :-
- 78.1 The statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code.
- 78.2 The term “matrimonial proceedings”, as currently defined, is unsatisfactory. Those proceedings can be included as “family proceedings”. Accordingly, to avoid redundancy, it is not necessary to give a definition of “matrimonial proceedings” in the New Code.
- 78.3 The term “family proceedings” should be comprehensive and list out all family-related proceedings to which the New Code is to apply, whether such proceedings are in the High Court or in the Family Court : **Proposal 10.**

*Proposal 10*

*The statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code.*

*It is not necessary to give a definition of “matrimonial proceedings” in the New Code.*

*The term “family proceedings” should be comprehensive and list out all family-related proceedings to which the New Code is to apply, whether such proceedings are in the High Court or in the Family Court.*

## ***H2. Definition and jurisdiction of the courts***

### ***H2.1. Definition of the courts***

79. The meaning of “court” or “judge” has not been consistently set out in the various Ordinances and rules of court relating to family law.<sup>42</sup> Basically, the different expressions for “court” really mean “the District Court” or “the Court of First Instance” or both and “judge”, “a judge of the District Court” or “a judge of the High Court” or both. These different expressions in different statutes and rules may easily cause confusion. The Working Party proposes that “court” and “judge” should be clearly defined in the New Code : **Proposal 11.**

#### *Proposal 11*

*There should be a clear definition of “court” and of “judge” in the New Code.*

### ***H2.2. Powers and functions of the judge***

80. In the FPR 2010, the powers of judges to perform functions

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<sup>42</sup> Section 2, MCO : “court” means the High Court or the District Court; Rule 2, MCR : “court” means only the District Court, “judge” means a District Judge in relation to proceedings pending in the District Court, and in relation to proceedings pending in the Court of First Instance, the Chief Judge of the High Court, any judge of the Court of First Instance exercising jurisdiction in matrimonial proceedings and any deputy judge exercising such jurisdiction; section 2, AO : “court” means the Court of First Instance or the District Court and in Part 5 and section 23B, the Court of First Instance; Rule 2, DCRVR : “judge” means in relation to proceedings commenced in the Court of First Instance, the Chief Judge of the High Court, a Justice of Appeal, a judge of the Court of First Instance, a deputy judge and a recorder of the Court of First Instance, and in relation to proceedings in the District Court, a District Judge and a deputy District Judge of the District Court; section 2, GMO : “court” means the Court of First Instance or the District Court; section 2, LO : “court” means the High Court or the District Court; section 2, I(PFD)O : “court”, unless the context otherwise requires, means the Court of First Instance or the District Court.

conferred by the FPR 2010 and accompanying PDs and other relevant family-related Acts have been spelt out.<sup>43</sup> This conveniently provides a unified source of powers and functions of the judge. The Working Party proposes that a similar provision be included in the New Code : **Proposal 12**.

Proposal 12

*The powers of judges to perform functions under the New Code should be spelt out.*

**H2.3. Jurisdiction of the Family Court**

**(a) Set-up of the Family Court**

81. There is at present no statutory provision in Hong Kong which sets out the establishment, jurisdiction or constitution of what has been known as the “Family Court”. It is a division of the District Court which is for the time being assigned by the Chief Justice to deal with matrimonial proceedings and/or family proceedings, as defined in PD 15.12.<sup>44</sup>

**(b) Monetary jurisdiction**

82. There are monetary limits on the District Court in civil jurisdiction as set out in the DCO.<sup>45</sup> Notwithstanding the monetary limits, the Family Court may exercise jurisdiction under the MCO although the amount claimed in the matrimonial causes and any other proceedings under the MCO would be beyond the jurisdiction of the District Court.<sup>46</sup> There is also a similar provision in the MPPO, which states the jurisdiction conferred on the District Court by the

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<sup>43</sup> Rules 2.5, 2.6 and 2.7, FPR 2010.

<sup>44</sup> Para. A1, PD 15.12.

<sup>45</sup> Sections 32-37, DCO.

<sup>46</sup> Section 10A (3), MCO.

MPPO shall be exercisable by such court notwithstanding that by reason of the amount claimed in an application made under the MPPO the jurisdiction would not but for such section be exercisable by such court.<sup>47</sup> Thus, for proceedings under the MCO and the MPPO, the Family Court has no monetary limits.

83. Again, although it appears that there is a jurisdictional monetary limit in the District Court generally for any action in which the title to an interest in land comes into question,<sup>48</sup> so far as applications under section 6 of the MPSO are concerned, which concern questions as to title and possession of property between spouses, it is provided in the DCO that for such applications, the District Court has the jurisdiction and powers of the Court of First Instance conferred by section 6 of the MPSO.<sup>49</sup> Thus, it appears that there should be no monetary limits in the Family Court in dealing with these applications.
84. Whether there are any monetary limits for family proceedings involving financial applications in the District Court under other Ordinances,<sup>50</sup> where there are no provisions to this effect, is not clear.
85. For applications under the I(PFD)O, it has been held that there should be no monetary limits for such applications<sup>51</sup> since there was no provision in the I(PFD)O adopting expressly or impliedly the monetary limits set out in sections 32 to 37 of the DCO. Adopting the same reasoning, if there is no provision in the other Ordinances in relation to family proceedings expressly or impliedly adopting the monetary limits in the DCO, there should

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<sup>47</sup> Section 30, MPPO.

<sup>48</sup> Section 36, DCO.

<sup>49</sup> Section 38, DCO.

<sup>50</sup> E.g. GMO and SMOO.

<sup>51</sup> See *Re Estate of Chow Nai Chee (Deceased)*, [2010] 5 HKLRD 640, per Lam J (as he then was), at paras. 21-23.



be no monetary limits for applications under these Ordinances in the Family Court.

(c) *Jurisdiction in children matters*

86. Created by statute, the District Court, and thus the Family Court, has very limited inherent jurisdiction, including that in children cases.<sup>52</sup> In the circumstances, applications concerning custody or upbringing of a child, or any other matters concerning a child must be brought under the relevant existing statutory provisions. The Family Court may as a result be handicapped in dealing with children cases although a majority of them are disposed of in the Family Court. It may be necessary to consider introducing rules to enable the Family Court to make orders on determining any issues in respect of a child where it would be just and equitable to do so in accordance with the best interest principle, unless restricted by legislation or case law.
87. To provide uniformity and clarity, the Working Party proposes that the New Code should define the Family Court, set out its jurisdiction, including the jurisdiction in relation to children matters, and make it clear there are no monetary limits for any financial applications to which the New Code shall apply :  
**Proposal 13.**

*Proposal 13*

*There should be a definition of “Family Court” in the New Code, setting out its jurisdiction, including the jurisdiction in children matters, and stating there are no monetary limits in any financial applications to which the New Code is to apply.*

<sup>52</sup>

See *Wong Kum Chi and Lee Tit Ying*, [2002] 1 HKLRD 420, in which HH Judge Lok (as he then was) held that the District Court had no jurisdiction to order a vacation of the registration of an Instrument of Transfer which was pending registration in the Land Registry.

88. In England, there is no family division in the county courts, but there is a Family Division in their High Court to which a list of family matters has been assigned.<sup>53</sup> This clearly informs court users as to what applications are to be dealt with by the Family Division. Following the same approach, the Working Party proposes that a list of matters assigned to be dealt with by the Family Court should be set out in the New Code : **Proposal 14**.

Proposal 14

*A list of matters assigned to be dealt with by the Family Court should also be set out in the New Code.*

**H2.4. Jurisdiction of the High Court**

**(a) Exclusive jurisdiction**

89. At present, there are certain applications which the Court of First Instance of the High Court has exclusive jurisdiction under different Ordinances and rules. These provisions should be collected together and put in one place. The Working Party proposes that there should be a provision in the New Code setting out clearly the matters over which the Court of First Instance has exclusive jurisdiction : **Proposal 15**.

Proposal 15

*The New Code should set out clearly the matters over which the Court of First Instance of the High Court has exclusive jurisdiction.*

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<sup>53</sup>

See Schedule to the Supreme Court Act 1981 (now renamed as the Senior Courts Act 1981) and Annex 1 to this consultative paper.

**(b) *Inherent jurisdiction in children matters***

90. The High Court enjoys inherent jurisdiction in children-related matters. Presently, one has to refer to case law to see what the inherent jurisdiction is.

91. In the FPR 2010, “inherent jurisdiction” has been set out to mean the High Court’s power to make any order or determine any issue in respect of a child, including in wardship proceedings, where it would be just and equitable to do so unless restricted by legislation or case law.<sup>54</sup> It is further stated that an application for proceedings under the inherent jurisdiction of the court must be started in the High Court of England.<sup>55</sup> PD 12D (Inherent Jurisdiction (including Wardship Proceedings)) makes extensive provisions supplementing the rules on inherent jurisdiction :-

91.1 It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of, and the court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute.<sup>56</sup>

91.2 The court, under its inherent jurisdiction, may make a wide range of injunctions for the child’s protection of which the most common are listed :-<sup>57</sup>

- (a) Orders to restrain publicity;
- (b) Orders to prevent an undesirable association;
- (c) Orders relating to medical treatment;

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<sup>54</sup> See Rule 2.3, Interpretation section, FPR 2010.

<sup>55</sup> Rule 12.36, FPR 2010.

<sup>56</sup> Para. 1.1, PD 12D.

<sup>57</sup> Para. 1.2, PD 12D.

- (d) Orders to protect abducted children, or children where the case has another substantial foreign element; and
- (e) Orders for the return of children to and from another state.

91.3 The court’s wardship jurisdiction is part of and not separate from the court’s inherent jurisdiction.<sup>58</sup>

91.4 It further sets out the circumstances where a wardship case can be transferred to the county court.<sup>59</sup> In particular, considerations should be given to transferring the case in whole or in part to a county court, which does not have jurisdiction to deal with applications that a child be made or cease to be a ward of court, where a direction has been given confirming the wardship and directing that the child remain a ward during his minority or until further order, and that the county court must transfer the case back to the High Court if a decision is required as to whether the child should remain a ward of court.<sup>60</sup>

91.5 It sets out proceedings in relation to a ward which will need to be dealt with in the High Court, unless the nature of the issues of fact or law makes them more suitable for hearing in the county court.<sup>61</sup>

92. The above provisions in the FPR 2010 and PD 12D comprehensively define inherent jurisdiction in children-related matters of the High Court. The need to refer to case law is greatly reduced. Further, the provisions for transfer in PD 12D enable the High Court to transfer the case to the lower court for dealing with relatively minor or more mundane matters or non-contentious matters concerning a ward. Judicial resources are hence better deployed. The Working Party proposes that those provisions should be adopted in the New Code with necessary modifications :

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<sup>58</sup> Para. 1.3, PD 12D.

<sup>59</sup> Para. 2.1, PD 12D.

<sup>60</sup> Para. 2.2, PD 12D.

<sup>61</sup> Para. 2.3, PD 12D.

## **Proposal 16.**

### *Proposal 16*

*The “inherent jurisdiction” of the Court of First Instance of the High Court in children matters should be defined in the New Code, following the FPR 2010, and the provisions in PD 12D therein should be adopted with necessary modifications, in particular the transfer of certain matters to be dealt with by the Family Court.*

### **H3. Underlying objectives**

#### **H3.1. The need for adoption**

93. One of the major CJR components is the underlying objectives now enshrined in Order 1A of the RHC. The rationale behind Order 1A is well summarised by the learned editors of the HKCP 2013 :-<sup>62</sup>

“These underlying objectives are intended to set out the basic principles underlying CJR, which will influence the court in exercising its discretion under the rules. They establish a framework for decision-making in procedural matters and guiding the court in managing individual cases. The court’s role is to control and manage litigation with a view to achieving these objectives. They are not intended to be an abstract aspirational statement, but to represent a set of principles to be projected into all procedural rules, guiding their interpretation in a dynamic and purposive way. Like the overriding objectives set out in the CPR, it is anticipated that these underlying objectives will bring about significant changes to the civil litigation culture in Hong Kong.”

94. Since its implementation, the underlying objectives in Order 1A have become a fundamental source of guidance for the operation of the civil justice system in Hong Kong as a whole.
95. It is now the common trend in contemporary family justice systems

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<sup>62</sup> Para. 1A/0/3, HKCP 2013.

to extend concepts similar to the underlying objectives as set out in Order 1A to their family procedural rules.<sup>63</sup> Such extension is regarded as the first and essential response to tackle adversarial excesses and to instil a shift of litigation culture in the family jurisdiction.

96. We take the FPR 2010 as an illustration. The overriding objective is expressed in Rule 1.1(1) in these terms :-

“These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issue involved.”

Further, under Rule 1.1(2) :-

“Dealing with a case justly includes, so far as practicable –

- (a) ensuring that it is dealt with expeditiously and fairly;
- (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
- (c) ensuring that the parties are on an equal footing;
- (d) saving expense; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

The overriding objective is intended to give a new ethos to family litigation. It applies to the conduct of all family proceedings.<sup>64</sup> The court must seek to give effect to the overriding objective when it exercises any power given to it by the FPR 2010 or interprets any rule.<sup>65</sup> The parties are required to help the court to further the overriding objective.<sup>66</sup>

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<sup>63</sup> See, e.g., in England and Wales, Part 1, FPR 2010; in Australia, section 43, Family Law Act 1975; in New Zealand, Rule 3(1), Family Courts Rules 2002; and in British Columbia, Canada, Rules 1-3, Supreme Court Family Rules.

<sup>64</sup> *Rayden and Jackson on Divorce and Family Matters* 18<sup>th</sup> ed Service Binder 1, Chapter 0, at para. [0.3].

<sup>65</sup> Rule 1.2, FPR 2010.

<sup>66</sup> Rule 1.3, FPR 2010.

97. To support the integrity and to guide the operation of the New Code, the Working Party proposes that a statement similar to “the underlying objectives” in Order 1A of the RHC encapsulating the fundamental purpose of the New Code and the key concepts of family case management should be adopted : **Proposal 17**.

Proposal 17

*Provisions expressly setting out the underlying objectives of the family justice system, similar to those in Order 1A of the RHC, should be adopted in the New Code.*

**H3.2. Regard to welfare issues**

98. Welfare issues have special relevance for the family jurisdiction. Family procedure must focus on ensuring that the litigation process achieves the best possible outcome in all the circumstances for those involved, especially for children. In England, the welfare principle under the Ch A 1989 requires the court to have regard to various factors that affect the child’s welfare and interests in children’s applications. Likewise, the courts have to weigh different interests in light of certain aims and standards in making reasonable provisions for self-support in spousal maintenance applications, and in dividing family assets in a way that best enables the parties to adjust to post-marital circumstances in ancillary relief applications.
99. Welfare issues are also something the English courts need to take into account when applying the overriding objectives in the FPR 2010.<sup>67</sup> But the term “welfare” is not defined in the FPR 2010. Presumably it covers a broad umbrella of factors that goes to the material maintenance and care as well as the stable and warm relationships that promote the physical and emotional well-being

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<sup>67</sup> In some other common law jurisdictions, a broad range of welfare considerations that meet the requirements of the varied facets of the family jurisdiction as well as the best interests of the child have been expressly identified in the procedural framework.

of the parties and children who come into contact with the family justice system.

100. But even though the requirement to have “regard to any welfare issues involved” is designed to ensure any application of the overriding objective takes into account welfare considerations, the qualification “makes it clear that the overriding objective applies even where welfare may be the court’s first or paramount consideration.”<sup>68</sup>
101. In Hong Kong, the welfare or the best interests of children are always paramount in family and matrimonial cases.<sup>69</sup> Although the welfare principle and the checklist of factors under the Ch A 1989<sup>70</sup> in the UK are not directly applicable in Hong Kong, child-focused safeguards are equally important in this jurisdiction.
102. The Working Party proposes that the New Code should follow the model of Rule 1.1(1) of the FPR 2010 in requiring the court to have regard to welfare issues when applying the underlying objectives for family procedure : **Proposal 18**.

*Proposal 18*

*The New Code should require the court to have regard to welfare issues when applying the underlying objectives for family procedure.*

**H4. Case management powers**

103. Another major CJR component is the case management powers as

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<sup>68</sup> *Rayden and Jackson on Divorce and Family Matters* 18<sup>th</sup> ed Service Binder 1, Chapter 0, at para. [0.3].

<sup>69</sup> See, e.g., section 4 of the Guardianship of Minors (Amendment) Ordinance 2012 (amending section 3, GMO) which came into operation on 13 April 2012, reinforces the need to regard “the best interests of the minor as the first and paramount consideration” in children’s proceedings.

<sup>70</sup> Section 1, Ch A 1989.



set out in Order 1B of the RHC. Most of the powers listed in Order 1B, modelled after the CPR, already existed but “somewhat patchily, scattered in various provisions of the RHC or to be found in the court’s inherent jurisdiction”.<sup>71</sup> By drawing these powers together and placing them on a clear and transparent legal footing, a scheme of fair and consistent judicial case management is created. The court needs similar case management powers to ensure that the procedural steps in the New Code are effectively carried out in accordance with the underlying objectives. Indeed, conferring case management powers on the court is another prominent feature commonly found in other contemporary family justice systems.<sup>72</sup>

104. We again use the FPR 2010 as an illustration. Part 4 of the FPR 2010 contains express and detailed provisions that are to be deployed in pursuit of the overriding objective in the family context, and they place procedural intervention by the court on a proper statutory basis. Rule 4.1 lists the case management powers given to the court, similar to those under Order 1B of the RHC, in addition to other powers given by any other rule and PD or by any other enactment or any powers it may otherwise have. These powers may be exercised by the court on its own initiative.<sup>73</sup>
105. The Working Party proposes that the New Code should have provisions setting out the court’s case management powers similar to those under Order 1B of the RHC : **Proposal 19.**

*Proposal 19*

*The New Code should have provisions setting out the court’s case management powers similar to those under Order 1B of the RHC.*

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<sup>71</sup> Para. 109, CJR Final Report.

<sup>72</sup> See, in England and Wales, Part 4, FPR 2010; in Australia, Part 1.3, Family Law Rules 2004; in New Zealand, Rules 13-17, Family Courts Rules 2002.

<sup>73</sup> Rule 4.3(1) and Part 18, FPR 2010 set out the procedure for making an application.

***H5. Alternative dispute resolution***

106. To facilitate the parties in resolving family disputes by mediation, PD 15.10 on family mediation was introduced in 2003.
- 106.1 It incorporates some of the applicable provisions of PD 31 on mediation, and now extends the procedure to family proceedings, including those applications under the new Part IIA of the MPPPO, and applications under the I(PFD)O, and also other respondents or intervening parties in the proceedings.<sup>74</sup>
- 106.2 It further stipulates that it is mandatory for the parties in matrimonial proceedings and family proceedings, and their respective solicitors, if legally represented, to sign a Certificate as to Family Mediation, upon institution of proceedings, or upon being served with proceedings. This is to ensure that the parties have considered, and have received advice from their respective solicitors on family mediation, with confirmation signed by their solicitors.
- 106.3 Part 3 of PD 15.10 further provides that during the course of litigation, the petitioner or the respondent or the applicant may separately or jointly file an application for family mediation and an application form was attached to PD 15.10.<sup>75</sup>
107. In England, the court's powers to deal with alternative dispute resolution rest on statute. Part 3 of the FPR 2010 sets out the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use.<sup>76</sup> "Alternative Dispute Resolution" means methods of resolving a dispute, including mediation, other than through the normal court process.<sup>77</sup> The

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<sup>74</sup> Paras. 2.5.1-2.5.3, PD 15.10. However, under para. 2.6, it does not automatically apply to the AO, LO, MO(RE)O, MO, MRO and PCO, unless otherwise directed by the court.

<sup>75</sup> Appendix 5, PD 15.10.

<sup>76</sup> Rule 3.2, FPR 2010.

<sup>77</sup> Rule 2.3, Interpretation section, FPR 2010.

term includes a collaborative approach and the use of arbitration.<sup>78</sup> The courts must consider at every stage in proceedings whether alternative dispute resolution is appropriate: if the court deems it appropriate, it may adjourn for a specified period to enable the parties to obtain information and advice about alternative dispute resolution and, where the parties agree, to enable this to take place.<sup>79</sup> The rules do not compel the parties to undertake alternative dispute resolution. They merely enable them to obtain information and advice. However, the court can make orders of its own initiative.<sup>80</sup>

108. To enhance the court's powers in promoting alternative dispute resolution, the Working Party proposes that express provisions modelled on Part 3 of the FPR 2010 should be introduced in the New Code with necessary modifications : **Proposal 20**.

*Proposal 20*

*Express provisions modelled on Part 3 of the FPR 2010 should be adopted into the New Code with necessary modifications to enhance the court's powers in dealing with alternative dispute resolution.*

109. The Working Party further proposes that considerations should be given to see if the mediation procedure as now stipulated in PD 15.10 needs any further enhancement and if so, how : **Proposal 21**.

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<sup>78</sup> See Duncan Adam: “*The Family Procedure Rules 2010: A District Judge’s Perspective*”, March [2011] Fam Law 244, at p. 249.

<sup>79</sup> Rules 3.2 and 3.3, FPR 2010.

<sup>80</sup> Rule 3.3, FPR 2010.

Proposal 21

*Considerations should be given to see if the mediation procedure as now stipulated in PD 15.10 needs any further enhancement and if so, how.*

110. In this regard, the Working Party notes that Part 3 of the FPR 2010 is supplemented by PD 3A, which sets out a pre-application protocol for mediation. Parties are now expected to explore the scope for resolving their dispute through mediation before embarking on court process.<sup>81</sup> The Working Party recognises the rationale behind a pre-action protocol. But we also note that the suggestion of introducing a pre-action protocol in other contexts has been met with strong objections from the legal profession. Front loading of costs and delaying the parties' access to the courts are the major concerns. Readers are asked to express their views on if a pre-action protocol for mediation for family and matrimonial disputes is suitable in local circumstances : **Proposal 22**.

Proposal 22

*Readers are asked to express their views on if a pre-action protocol for mediation for family and matrimonial disputes is suitable in local circumstances.*

**H6. Commencement and transfer of proceedings**

**H6.1. The current statutory scheme**

111. In Hong Kong, the procedural law relating to the commencement and transfer of proceedings between the Family Court and the High Court is seriously fragmented. Determining where to begin proceedings and how a transfer may be ordered is not always easy.

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<sup>81</sup>

Para. 3.5, PD 3A.

**(a) MCO/MCR**

112. Matrimonial causes and other proceedings under the MCO are brought in the first instance before the District Court (i.e. the Family Court), subject to subsequent transfer to the High Court if appropriate.<sup>82</sup> “Any other proceedings under this Ordinance” is not defined in the MCO. They may include an order for custody of a child,<sup>83</sup> a care or supervision order,<sup>84</sup> a declaration of legitimacy or legitimation etc.,<sup>85</sup> and/or an application for recognition of overseas divorces and legal separations.<sup>86</sup>
113. Where a petition for declaration of legitimation is made to the District Court, the District Court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court.<sup>87</sup>
114. The MCR has two provisions, largely modelled on the English equivalents, that deal with transfers of matrimonial proceedings<sup>88</sup> and ancillary relief proceedings<sup>89</sup> from the Family Court to the High Court.

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<sup>82</sup> Section 10A(1), MCO.

<sup>83</sup> Section 48A, MCO.

<sup>84</sup> Sections 48 and 48A, MCO.

<sup>85</sup> Section 49, MCO.

<sup>86</sup> Section 55, MCO.

<sup>87</sup> Section 49(3), MCO.

<sup>88</sup> As seen “matrimonial proceedings” means any proceedings with respect to which rules may be made under section 54(1) of the MCO or section 32 of the MPPO : see Rule 2(2), MCR.

<sup>89</sup> “Ancillary relief” means (a) an avoidance of disposition 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 : see Rule 2(2), MCR.

114.1 Rule 32 of the MCR provides for orders for transfer of “a cause or application” as follows :-

- “(1) The court may order that a cause or application pending in the District Court be transferred to the Court of First Instance, where, having regard to all the circumstances including the difficulty or importance of the cause or application or of any issue arising therein, the court thinks it desirable that the cause or application should be heard and determined in the Court of First Instance.
- (2) An order under paragraph (1) may be made by the judge of his own motion or on the application of a party, but before making an order of his own motion the judge shall 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.
- (3) Any cause or application transferred to the Court of First Instance under paragraph (1) may be re-transferred to the District Court at any stage of the proceedings if the Court of First Instance thinks it desirable.”

114.2 Rule 80 of the MCR provides for the transfer of applications for ancillary relief as follows :-

- “.....
- (3) The court may order the transfer to the Court of First Instance of any application for ancillary relief pending in the District Court where the transfer appears to the court to be desirable.
- .....
- (5) In considering whether an application should be transferred to the Court of First Instance the court shall have regard to all relevant considerations, including the nature and value of the property involved, the relief sought and the financial limits for the time being relating to the jurisdiction of the District Court in other matters.
- .....
- (7) Where pursuant to the provisions of this rule an application for ancillary relief or the cause is transferred to the Court of First Instance, the court may, on making the order for transfer, give directions as to the further conduct of the proceedings.
- .....
- (10) An order under this rule may be made by the court of its own motion or on the application of a party, but before making an order of its own motion the court shall 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.”

115. Rule 91 of the MCR further makes provision for the transfer of orders made by the Family Court in matrimonial proceedings to the High Court for the purpose of enforcement.
116. The power to transfer from the Family Court to the High Court may be exercised by the Family Court on its own motion. In considering transfer on its own motion, the court must give notice to the parties concerned, and they must be given the opportunity to be heard on the question.<sup>90</sup> However, such transfer may be ordered at any time.
117. But irrespective of whether the matrimonial proceedings are commenced and/or pending in the High Court or in the Family Court, subject to the provisions of the MCR and of any enactment, the RHC shall apply with the necessary modifications to the commencement of proceedings and to the practice and procedure of such proceedings.<sup>91</sup>
118. Turning to the criteria for the transfer of proceedings, the rationale for the transfer of “a cause or application” in matrimonial proceedings is the desirability in making such order having “regard to all the circumstances including the difficulty or importance of the cause or application or of any issue arising therein”.<sup>92</sup>
119. The criterion for making an order for the transfer of an application for ancillary relief is whether “the transfer appears to the court to be desirable”<sup>93</sup> having “regard to all relevant considerations, including the nature and value of the property involved, the relief sought and the financial limits for the time being relating to the

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<sup>90</sup> Rules 32(2) and 80(10), MCR (see also paras. 114.1 and 114.2 above).

<sup>91</sup> Rule 3, MCR and Order 78, RHC/RDC (see also HKCP 2013, pp.1340-1342).

<sup>92</sup> Rule 32(1), MCR.

<sup>93</sup> Rule 80(3), MCR.

jurisdiction of the District Court in other matters”.<sup>94</sup>

120. In considering transfer, the Family Court takes into account a host of factors, such as “where there is a matter of public interest; where there are novel or difficult points of law to be resolved; where delay will work a clear injustice and/or where there is unduly complicated or conflicting evidence the resolution to which is likely to be so protracted that it will unduly prejudice the Family Court lists and this work against the interests of other litigants”.<sup>95</sup> The Family Court will give due regard to the wide experience of Family Court judges in dealing with a broad range of ancillary relief cases including those involving substantial value and international implications, so there “must be cogent reasons why a case should be removed from the ambit of a group of specialist judges”.<sup>96</sup> The involvement of very large sums of money was rarely sufficient to justify a transfer, and “there must be some special complexity in the case which will demand that it be given the attention of a Judge of the Court of First Instance”.<sup>97</sup>

**(b) MPPO**

121. As required by section 2A, proceedings under the MPPO must be commenced in the District Court. Section 2A also makes provision for rule-making in respect of the transfer and retransfer of proceedings between the Family Court and the High Court, but so far no such rules have been made.

**(c) SMOO**

122. Proceedings under the SMOO are in the District Court.<sup>98</sup> The

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<sup>94</sup> Rule 80(5), MCR.

<sup>95</sup> *B v B*, FCMC 3105/1999, unreported, 11 July 2000; *Jack v Jack*, DJ No 3782 of 1995 (as cited in *B v B*).

<sup>96</sup> *H v H*, FCMC 7173/2000, unreported, 1 February 2002.

<sup>97</sup> *Ibid.*

<sup>98</sup> Section 3(1), SMOO.



SMOO does not contain express provisions for the transfer or retransfer of proceedings between the Family Court and the High Court. But it allows the District Court to refuse to make an order in any case more fit for the High Court.<sup>99</sup>

**(d) DCRVO**

123. Jurisdiction has been conferred on the District Court to deal with applications under the DCRVO.<sup>100</sup> The provisions in the DCRVO clearly intend the District Court to be the proper forum.<sup>101</sup>
124. However, the High Court may exercise the powers conferred on the District Court (i.e. the Family Court) under sections 3, 3A or 3B of the DCRVO (a) in a case of urgency or (b) where the High Court is satisfied that special circumstances are present which make it appropriate for the High Court rather than the District Court to exercise those powers.<sup>102</sup>
125. Rule 7 of the DCRVR provides that proceedings begun in the High Court under the DCRVO may be transferred to the District Court if a High Court judge is of the opinion that they should be heard and determined in the District.
126. Even though the Family Court is the main forum for dealing with applications under the DCRVO, the RHC shall, subject to the DCRVR, apply to proceedings under the DCRVO as they apply to proceedings in the High Court with such modifications as are necessary for that purpose.<sup>103</sup>

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<sup>99</sup> Section 8, SMOO.

<sup>100</sup> Sections 3, 3A and 3B, DCRVO.

<sup>101</sup> *Luk Suet Shi Cissy v Woo Chin Man*, HCMP 345/1999, unreported, 22 January 1999, per Cheung J (as he then was) at para. 13.

<sup>102</sup> Section 4, DCRVO.

<sup>103</sup> Rule 3, DCRVR.

**(e) GMO**

127. The Family Court and the High Court have concurrent jurisdiction over most applications under the GMO.<sup>104</sup> Indeed, it is expressly provided that nothing in the GMO shall restrict or affect the jurisdiction of the High Court to appoint or remove guardians or otherwise in respect of minors.<sup>105</sup>

128. The GMO also contains provisions for the procedure in the District Court and for removal of applications to the High Court :-

“23. Procedure in District Court

Except as otherwise expressly provided in this Ordinance, Part 4 of the District Court Ordinance (Cap. 336) shall apply to every proceeding before, and every order by, the District Court under this Ordinance, and

.....

(b) where the District Court considers that the matter is one which could more conveniently be dealt with by the Court of First Instance, the District Court may refuse to make an order and in that case, without prejudice to the general right of appeal conferred by Part 4 of the District Court Ordinance (Cap. 336), no appeal shall lie from the decision of the District Court;

.....

24. Removal to Court of First Instance

Where any application has been made under this Ordinance to the District Court, the Court of First Instance shall, at the instance of any party to the application, order the application to be removed to the Court of First Instance and there proceeded with on such terms as to costs as it thinks proper.”

**(f) PCO**

129. Again, the Family Court and the High Court have concurrent jurisdiction over applications under the PCO, but in respect of an

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<sup>104</sup> Section 2, GMO.

<sup>105</sup> Section 25, GMO.

application under section 6<sup>106</sup> or section 12<sup>107</sup> the District Court (a) may, if it considers that the case is one which for any reason ought to be dealt with by the High Court or (b) shall, if so ordered by the High Court, transfer the matter to the High Court.<sup>108</sup>

**(g) AO**

130. Applications under section 23B<sup>109</sup> and Part 5<sup>110</sup> of the AO are within the exclusive jurisdiction of the High Court.<sup>111</sup> Apart from the above, applications for adoption orders under section 4 of the AO shall be commenced in the District Court.<sup>112</sup> Section 4A(2) of the AO further provides for the transfer of adoption applications by the District Court to the Court of First Instance upon request or on own motion.

131. Although section 4A(3) of the AO provides that rules may be made for transfer and retransfer, the AR merely provides for the practice and procedure of the Family Court and of the High Court (subject to the AR) to apply to proceedings under the AO.<sup>113</sup> No specific procedural rules for transfer and retransfer have been made.

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<sup>106</sup> Declaration of parentage, legitimacy or legitimation.

<sup>107</sup> Parental orders in favour of gamete donors.

<sup>108</sup> Section 16, PCO.

<sup>109</sup> Order passing care and control of an infant to a person authorised by the Director of Social Welfare with a view to his adopting the infant.

<sup>110</sup> Convention adoption as defined in section 20A of the AO.

<sup>111</sup> “Court” means (a) subject to paragraph (b), the Court of First Instance or the District Court, (b) in Part 5 and section 23B, the Court of First Instance (section 2, AO) – see also footnote 42 above.

<sup>112</sup> Section 4A(1), AO.

<sup>113</sup> Rule 32, AR.

**(h) I(PFD)O**

132. Section 25(1) of the I(PFD)O provides that subject to subsections (2) and (3) thereof, proceedings under the I(PFD)O shall be commenced in the District Court.
133. In *Re Estate of Chow Nai Che (Deceased)*,<sup>114</sup> it was held that it would be more appropriate for applications under the I(PFD)O to be commenced in the Family Court, as the judicial task to be exercised under the I(PFD)O had a great deal of similarities and affinity with the task to be performed by a judge hearing cases in the Family Court. Judges of the Family Court routinely have to consider questions relating to maintenance and provision for dependants in ancillary relief applications. It was further held that as no monetary limit has been set in relation to the jurisdiction of the District Court for applications under the I(PFD)O, the monetary limits in sections 32 to 37 of the DCO should not be applicable. This is notwithstanding that there is no provision in the I(PFD)O which is equivalent to section 30 of the MPPO. Thus, the Family Court is not bound by any monetary limit in dealing with applications under the I(PFD)O. Since the above case, applications under the I(PFD)O have been commenced in the Family Court.
134. Although section 25(2) of the I(PFD)O sets out the power for the High Court and the District Court to make provisions for the transfer of any proceedings upon the application of any party or at the instance of the District Court to the High Court, and the transfer and retransfer from the High Court to the District Court, no specific procedural rules have so far been made. In the absence of specific rules, the statutory provisions in the RHC and RDC shall apply.
135. At the moment, there are also no provisions in the I(PFD)O similar to Rule 80 of the MCR which relates to transfer of ancillary relief applications to the High Court. So far, there have not yet been any transfers to the High Court from the Family Court. It is thus not clear as to how the discretion to transfer will be exercised.

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<sup>114</sup> [2010] 5 HKLRD 640, Lam J (as he then was). Cf. *Ho Sing Yin v Chan Yiu Ling, Administratrix of the estate of Tsang Kwong Lik, deceased*, HCA 90/2010, unreported, 13 July 2012, Saunders J (as he then was) at paras. 54-55.

**(i) Other family proceedings**

136. In the absence of specific procedural rules, the statutory scheme in the DCO for the transfer and retransfer of civil cases between the District Court and the High Court applies to other family proceedings.<sup>115</sup>

**H6.2. The English experience**

137. As a result of the iterative development of the family jurisdiction, family proceedings within the family justice system in England are allocated to three tiers of court, and within each court to different levels of the judiciary or different individual judges depending upon the authorisation that each judge may have to hear a particular category of case.<sup>116</sup> In short, where the family cases are heard depends on a complex mix of primary and secondary legislation. Negotiating one's way amongst the tiers of courts within the family justice system and working out which court will hear a particular type of matter can be a complicated exercise.

138. For present purposes, it is not necessary to discuss in detail the various provisions as to where to start family proceedings and when to transfer such proceedings between the courts. It is sufficient to mention the brief effect of the 2008 Order, the 2008 Direction and the relevant rules in the FPR 2010.

139. The 2008 Order is divided into 5 parts :-

139.1 Part 1 contains provisions for interpreting the 2008 Order, specifies classes of county courts, and provides for the Principal Registry of the Family Division to be treated as a county court;

139.2 Part 2 specifies the proceedings and the circumstances in which proceedings may be started in a particular level of court or specified class of court;

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<sup>115</sup> See sections 42-44A, DCO.

<sup>116</sup> *Family Justice Review : Interim Report* (March 2011), Annex M.

- 139.3 Part 3 sets out the circumstances in which proceedings may be transferred between levels of court, classes of court or particular courts;
- 139.4 Part 4 provides for applications following refusal to order the transfer of proceedings from a magistrates' court to a county court and for appeals against the transfer of proceedings to a magistrates' court by a county court; and
- 139.5 Part 5 contains revocations, consequential amendments and transitional provisions.
140. Under the 2008 Order, with some exceptions, proceedings may be started in the High Court only if (i) the proceedings are exceptionally complex, (ii) the outcome of the proceedings is important to the public in general or (iii) there is another substantial reason for the proceedings to be started in the High Court.<sup>117</sup>
141. Further, under the 2008 Order, cases can be transferred from the county court to the High Court only if the county court considers that the proceedings are exceedingly complex; the outcome of the proceedings is important to the public in general; and there is another substantial reason for the proceedings to be transferred.<sup>118</sup>
142. The 2008 Order is supplemented by the 2008 Direction.<sup>119</sup> The objective of the 2008 Direction is to ensure that the criteria for transfer of proceedings are applied in such a way that proceedings are heard at the appropriate level of court, that the capacity of the magistrates' courts is properly utilised, and that proceedings are only dealt with in the High Court if the relevant criteria are met.<sup>120</sup> The 2008 Direction emphasises the timeliness of the transfer<sup>121</sup> and

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<sup>117</sup> Article 7, 2008 Order and *Clarke Hall & Morrison on Children*, Vol.1, Chapter 1, at [449].

<sup>118</sup> Article 18, 2008 Order.

<sup>119</sup> [2009] 1 FLR 365.

<sup>120</sup> Para.1.2, 2008 Direction.

<sup>121</sup> Article 4.

further provides :-

“Transfer of proceedings to or from the High Court

5.1 A court will take into account the following factors (which are not exhaustive) when considering whether the criteria in articles 7 or 18<sup>122</sup> or paragraph 11.2 or 11.3<sup>123</sup> apply, such that the proceedings ought to be heard in the High Court –

- (1) there is alleged to be a risk that a child concerned in the proceedings will suffer serious physical or emotional harm in the light of –
  - (a) the death of another child in the family, a parent or any other material person; or
  - (b) the fact that a parent or other material person may have committed a grave crime, for example, murder, manslaughter or rape,  
in particular where the essential factual framework is in dispute or there are issues over the causation of injuries or a material conflict of expert evidence;
- (2) the application concerns medical treatment for a child which involves a risk to the child’s physical or emotional health which goes beyond the normal risks of routine medical treatment;
- (3) an adoption order is sought in relation to a child who has been adopted abroad in a country whose adoption orders are not recognised in England and Wales;
- (4) an adoption order is sought in relation to a child who has been brought into the United Kingdom in circumstances where section 83 of the Adoption and Children Act 2002 applies and
  - (a) the person bringing the child, or causing the child to be brought –
    - (i) has not complied with any requirement imposed by regulations made under section 83(4); or
    - (ii) has not met any condition required to be met by regulations made under section 83(5) within the required time; or
  - (b) there are complicating features in relation to the application;
- (5) it is likely that the proceedings will set a significant new precedent or alter existing principles of common law;
- (6) where periodical payments, a lump sum or transfer of property are an issue –
  - (a) the capital value of the assets involved and the extent to

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<sup>122</sup> 2008 Order.

<sup>123</sup> 2008 Direction.

which they are available for, or susceptible to, distribution or adjustment;

- (b) any substantial allegations of fraud or deception or non-disclosure;
- (c) any substantial contested allegations of conduct.

5.2 The following proceedings are likely to fall within the criteria for hearing in the High Court unless the nature of the issues of fact or law raised in the proceedings may make them more suitable to be dealt with in a county court –

- (1) proceedings involving a contested issue of domicile;
- (2) applications to restrain a respondent from taking or continuing with foreign proceedings;
- (3) suits in which the Queen’s Proctor intervenes or shows cause and elects trial in the High Court;
- (4) proceedings in which an application is opposed on the grounds of want of jurisdiction;
- (5) proceedings in which there is a complex foreign element or where the court has invited submissions to be made under Article 11(7) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility;
- (6) proceedings in which there is an application to remove a child permanently or temporarily from the jurisdiction to a non-Hague Convention country;
- (7) interlocutory applications involving –
  - (a) search orders; or
  - (b) directions as to dealing with assets out of the jurisdiction.

5.3 Proceedings will not normally be suitable to be dealt with in the High Court merely because of any of the following –

- (1) intractable problems with regard to contact;
- (2) sexual abuse;
- (3) injury to a child which is neither life-threatening nor permanently disabling;
- (4) routine neglect, even if it spans many years and there is copious documentation;
- (5) temporary or permanent removal to a Hague Convention country;
- (6) standard human rights issues;
- (7) uncertainty as to immigration status;
- (8) the celebrity of the parties;
- (9) the anticipated length of the hearing;
- (10) the quantity of evidence;
- (11) the number of experts;



(12) the possible availability of a speedier hearing.”

143. The FPR 2010 also contains provisions for transfer of family proceedings between the High Court and the county court :-

“7.24.....

(4) No transfer may be made under this rule or under section 38 or 39 of the 1984 Act [i.e. the MFPA 1984] (transfers between High Court and a county court) unless –

- (a) the parties consent to the transfer;
- (b) the court has held a hearing to determine whether a transfer should be ordered; or
- (c) the court has transferred a case without a hearing where neither party has, within 14 days of being notified in writing of the court’s intention to make such an order, requested a hearing to determine whether a transfer should be ordered.

(5) Proceedings –

- (a) which are transferred from the High Court to a divorce county court or a civil partnership proceedings county court and are to continue after the transfer in the principal registry are to be treated as pending in a divorce or civil partnership proceedings county court (as the case may be); and
- (b) which are transferred from a divorce county court or a civil partnership proceedings county court to the High Court and are to continue after the transfer in the principal registry are no longer to be treated as pending in a divorce or civil partnership proceedings county court (as the case may be).

(6) Proceedings transferred from a divorce county court or a civil partnership proceedings county court to the High Court are to proceed in the registry nearest to the court from which they were transferred unless –

- (a) the order transferring the proceedings directs otherwise; or
- (b) the court subsequently orders.<sup>124</sup>

9.25 .....

(4) A court may transfer a case to another court exercising the same jurisdiction, either of its own initiative or on the application of one of the parties, if –

- (a) the parties consent to the transfer;
- (b) the court has held a hearing to determine whether a transfer should

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<sup>124</sup> Part 7, FPR 2010 – applications in matrimonial and civil partnership proceedings.

be ordered; or  
(c) paragraph (5) applies.

- (5) A court may transfer a case without a hearing if –
- (a) the court has notified the parties in writing that it intends to order a transfer; and
  - (b) neither party has, within 14 days of the notification being sent, requested a hearing to determine whether a transfer should be ordered.<sup>125</sup>

.....

10.4 Subject to any enactment, where an application for an occupation order or a non-molestation order is pending, the court may transfer the proceedings to another court of its own initiative or on the application of either party.<sup>126</sup>

.....

11.5 Subject to any enactment, where proceedings to which this Part applies are pending, the court may transfer the proceedings to another court of its own initiative or on the application of a party or (if not a party) the person who is the subject of the proceedings.<sup>127</sup>

144. Cases may be transferred across to a lower court or up to a higher court to determine a particular issue. Once that issue has been determined the case may well return to the original court. Prime considerations are minimising delay and the efficient administration of justice.

### ***H6.3. Rationalising the entry point***

145. In Hong Kong, notwithstanding the relative simplicity of the family court structure, a confusing mixture of primary and secondary legislation determines where matrimonial and family cases are heard. Family court users may find it complicated to navigate the statutory network for allocation of cases to the Family Court and the High Court.

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<sup>125</sup> Part 9, FPR 2010 – applications for financial remedies.

<sup>126</sup> Part 10, FPR 2010 – applications under Part 4 of the Family Law Act 1996.

<sup>127</sup> Part 11, FPR 2010 – applications under Part 4A of the Family Law Act 1996.

146. As seen, some primary legislation designates the relevant court for commencing particular proceedings but some do not. Some primary legislation allows the transfer and/or retransfer of particular proceedings between the Family Court and the High Court but some do not. Where there is no such provision, the legislation can be silent on the subject, or it may enable the Family Court not to make an order if such matter will be more conveniently dealt with in the High Court, or it may enable the High Court to exercise certain powers in specified circumstances. Some primary legislation contains rule-making powers for the transfer and/or retransfer of proceedings but such rules may or may not have been made. Further, where there is no provision at all in any legislation, one may have to resort to the relevant provisions of the DCO, but their application to the family jurisdiction is, to say the least, awkward.
147. Such confusion leads to inefficiencies and wastes the time of family court users not only in working out which court to begin in but also in identifying which case is suitable for transfer to another court. The New Code should provide a simple route for access to the family justice system for all types of family and matrimonial proceedings. The Working Party therefore proposes that the New Code should set out clear points of entry to the family justice system, be it the Family Court or the High Court, for starting the matrimonial causes and each type of the family proceedings : **Proposal 23.**

Proposal 23

*The New Code should set out clearly the relevant court(s) for commencing the matrimonial causes and each type of the family proceedings.*

148. Under the current statutory scheme, most of the proceedings, other than those falling within the exclusive jurisdiction of the High Court, are brought before the Family Court in the first instance. Exceptionally, some of the proceedings may begin in the High Court. To provide certainty and clarity, the Working Party proposes that the New Code should provide that, unless the High Court has exclusive jurisdiction, generally, matrimonial causes and

family proceedings should begin in the Family Court; and the exceptional circumstances where certain proceedings may begin in the High Court should be clearly defined : **Proposal 24.**

Proposal 24

*The New Code should provide that matrimonial causes and family proceedings should generally begin in the Family Court unless the High Court has exclusive jurisdiction or in exceptional circumstances; and the New Code should further expressly spell out the exceptional circumstances where proceedings may begin in the High Court.*

149. The Working Party notes that in England, the provisions for starting proceedings are supplemented by legislation which allows the Lord Chancellor and the President of the Family Division to provide for the distribution of family business and the allocation of cases amongst different tiers of courts as well as different judges with the strategic aim of delivering fair and simple routes for access to the family justice system. The 2009 Direction issued pursuant to such empowering provisions helps to increase the flexibility of case allocation and the responsiveness of the judiciary in England to any change in the volume and/or type of matrimonial and family cases with a view to improving efficiency and reducing delay in the county courts.
150. Given the less complex family court structure in Hong Kong, the Working Party is satisfied that Proposals 23 and 24, if adopted, will be sufficient. It is not necessary to replicate the approach in England for distribution and allocation of family and matrimonial business within the Judiciary.

**H6.4. *Regulating transfer and retransfer***

151. Under the existing legislation, a limited category of matters are within the exclusive jurisdiction of the High Court. Beyond those non-transferable cases, there is a broad range of family and matrimonial cases and applications that can be suitably transferred

and/or retransferred between the Family Court and the High Court either on application or on the court's own motion. The benefits of a rational distribution of transferable family and matrimonial business between the Family Court and the High Court in conjunction with more efficient processes and robust case management are multiple :-

- 151.1 It will ensure the relevant cases are to be dealt with at the most appropriate level of court commensurate with their complexity.
- 151.2 It will ensure that all judicial resources available to the family justice system are effectively utilised.
- 151.3 It may mean a shorter case duration and earlier outcomes.
152. Conversely, a lack of clear processes may compromise efficiency, cause delay and reduce cost-effectiveness.
153. The purpose of PD 15.4 is limited. It only regulates the practice of cases transferred from the Family Court to the High Court. What we need is a simple and more principled approach to the transfer and/or retransfer of all transferrable family and matrimonial business for bringing greater clarity, certainty and cost-saving. The Working Party proposes that the New Code should contain provisions on transfer and retransfer for all types of transferable proceedings between the Family Court and the High Court (with empowering provisions added to the individual primary legislation if required), to be modelled on the relevant provisions in the FPR 2010 and augmented by PDs modelled on the 2008 Order and the 2008 Direction, with modifications to suit local circumstances :  
**Proposal 25.**

Proposal 25

*The New Code should adopt a simple, focused and efficient practice and procedure for the transfer and/or retransfer of all types of transferable proceedings between the Family Court and the High Court (with empowering provisions added to the individual primary legislation if required), to be modelled on the relevant provisions in the FPR 2010 and augmented by PDs modelled on the 2008 Order and the 2008 Direction, with modifications to suit local circumstances.*

**H7. Commencement of proceedings and forms**

154. The mode of commencement of matrimonial causes and family proceedings varies according to the type of proceedings. For some, the mode is prescribed by the principal Ordinance. For some, the principal Ordinance makes no provision for the mode. The lacuna is to some extent plugged by PD15.12. Broadly, there are three types of originating processes :-<sup>128</sup>
- (a) Petition, which applies to matrimonial causes.<sup>129</sup>
  - (b) Originating application, which includes a joint application. This applies to a joint application for divorce;<sup>130</sup> an application for leave to present a petition for divorce before the expiration of 1 year from the date of marriage;<sup>131</sup> an

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<sup>128</sup> A table setting out the different modes of commencement of proceedings with the applicable statutory forms can be found at Annex 2 to this consultative paper.

<sup>129</sup> Rule 9(1)(a), MCR.

<sup>130</sup> Brought by both parties to the marriage under section 11B, MCO by Rule 9(1)(b), MCR.

<sup>131</sup> Brought under section 12, MCO by Rule 5, MCR.

application to consider an agreement in contemplation of divorce or judicial separation;<sup>132</sup> an application for declaration that a customary/validated marriage subsists;<sup>133</sup> an application in respect of wilful neglect to maintain;<sup>134</sup> and an application for alteration of maintenance agreement during the lifetime of the parties.<sup>135</sup>

(c) Originating summons, which applies to the other family proceedings not mentioned above.<sup>136</sup>

155. Different statutory forms exist for some but not all of the proceedings.

156. When a petition is used, the applicant is called “Petitioner” and the respondent “Respondent”. In the case of a joint application for divorce, the two joint applicants are respectively called “1st Applicant” and “2nd Applicant”. When an originating summons is used, under Order 7, rule 2(2) of the RHC/RDC, the applicant is called “Plaintiff” and the respondent “Defendant”. Where PD 15.12 applies, when the mode of beginning the proceedings is by way of originating summons, notwithstanding Order 7, rule 2(2) of the RHC/RDC, the applicant is to be called “Applicant” and the respondent “Respondent”, instead of “Plaintiff” and “Defendant”.

157. The result is that there is a plethora of originating processes designated by rules or PDs, coupled with an array of statutory forms, if available, to be found in different places. And depending on the particular mode, the parties to the proceedings are called differently when their capacity is in substance the same.

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<sup>132</sup> See Rule 6, MCR.

<sup>133</sup> Brought under section 9, MRO. See the statutory forms for the application in Marriage Reform (Forms) Regulations (Cap. 178C).

<sup>134</sup> Brought under section 8, MPPO by Rule 98(1), MCR.

<sup>135</sup> Brought under section 15, MPPO by Rule 100, MCR.

<sup>136</sup> See in particular paras. 11-13, PD 15.12.

158. The modes of commencement evidently need to be simplified.
159. The English approach in the FPR 2010 is instructive in this regard. It now provides<sup>137</sup> that proceedings are started when a court officer issues an application at the request of the applicant. It further provides that an application is issued on the date entered in the application form by the court officer. An application form is a document in which the applicant states his intention to seek a court order other than in accordance with the Part 18 procedure. Different forms are contained in the PDs. The references to an applicant and a respondent across the board are simply “Applicant” and “Respondent”.<sup>138</sup> This is incidentally part of the modernisation of the language used.
160. Following the English approach, the Working Party considers that in principle, a unified mode of commencement should apply to matrimonial causes and all family proceedings. The Working Party proposes that a new unified mode of originating process for both matrimonial causes and family proceedings, namely, “originating application”, should be adopted and new statutory forms should be introduced to cater for the specific requirements of different types of proceedings. The nomenclature for the parties in the originating application should be unified to simply read “Applicant” and “Respondent”, save for Joint Application for divorce, where the parties should continue to be called “1st Applicant” and “2nd Applicant”. **Proposals 26 and 27.**

*Proposal 26*

*Originating application should be adopted as the unified mode of originating process for matrimonial causes and all family proceedings, accompanied by different statutory forms created specifically for the proceedings concerned.*

<sup>137</sup> In Part 5, FPR 2010.

<sup>138</sup> Note however some of the statutory forms under PD 5A of the FPR 2010 still refer to the old terminology of “petitioner” and “respondent”.



Proposal 27

*In the originating application, the nomenclature for the parties should be unified so that the applicant should be called “Applicant” and the respondent “Respondent”, save for joint application for divorce where the parties should be called “1st Applicant” and “2nd Applicant”.*

**H8. Service and acknowledgement**

161. Presently, the mode of service and acknowledgement of service of documents is governed by the following provisions in the MCR :-
- 161.1 Rule 14. It provides for service of petition to be served personally or by post on every respondent and other party to the proceedings. It also provides for application for deemed service, substituted service (such as by advertisement) or dispensation with service.
- 161.2 Rule 87(4). It deals with service of judgment summons which requires that “every judgment summons shall be in Form 23 and shall be served on the judgment debtor (maintenance payer) personally not less than 10 clear days before the hearing and at the time of service there shall be paid or tendered to the judgment debtor a sum reasonably sufficient to cover his expenses in travelling to and from the court at which he is summoned to appear.”
- 161.3 Rule 106. It deals with service on persons under disability.
- 161.4 Rule 109. It provides that service of any document in matrimonial proceedings may be served out of Hong Kong without leave. It goes on to provide that the service shall either be in the manner prescribed by these rules or where the proceedings are pending in the Court of First Instance or in the District Court, in accordance with Order 11, rules 5 and 6 of the RHC (which relate to the service of a writ abroad).

- 161.5 Rule 110. It provides that where a document is required by the MCR to be sent to any person, it can be sent by post.
- 161.6 Rule 111. It provides that where a document is required to be served on a party to any matrimonial proceedings, it can be done by personal service except it shall not be effected by the other party on his or her own. Service can also be effected by leaving or sending it by post to the solicitor's address or to the address for service given by the other party or his or her last known address. Or if it is impracticable to deliver the document, the court may dispense with service of the document. Where a decree or order requires a person to do or abstain from doing an act, it is to be served on him personally or be delivered to his solicitor.
- 161.7 Rule 112. It deals with proof of service by filing an affidavit of service.
162. Orders 10 and 65 of the RHC/RDC deal with the service of documents in other civil proceedings which are similar to the mode of service provided in the MCR. Order 80 rule 16 deals with service on persons under disability. By virtue of PD 15.12, those provisions in the RHC and RDC apply to the family proceedings subject to the rules made under the respective Ordinances.
163. In England, service is governed by Part 6 of the FPR 2010 :-
- 163.1 Rule 6.4 provides that an application may be served by any of the following methods :-
- (a) personal service which is served personally on a respondent by leaving it with that respondent;
  - (b) first class post or other service which provides for delivery on the next business day; or
  - (c) where there is a solicitor acting for the respondent and where Rule 6.11 applies, by document exchange.
- 163.2 An application may be served personally by the applicant (but not

the applicant himself or herself) or a court officer<sup>139</sup> if so requested by the applicant. Where the court officer fails to serve the application on the respondent at the address provided by the applicant, the applicant can provide an alternative address.<sup>140</sup>

- 163.3 Further, an applicant may request that an application be served by a bailiff delivering a copy of the application to the respondent personally.<sup>141</sup> According to paragraph 11 of PD 6A,<sup>142</sup> an applicant may request personal service by the bailiff if the address for service is within England and Wales and that postal service has been attempted and a signed acknowledgment of service is not returned within 14 days after posting. The applicant has to show he or she reasonably believes that the respondent is still living at the stated address. A request for service by bailiff will rarely be granted where the applicant is legally represented and it will be necessary for the representative to show why service by bailiff is required rather than by a process server.<sup>143</sup>
- 163.4 If it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by Part 6 of the FPR 2010, the court may direct that service is effected by an alternative method or at an alternative place.<sup>144</sup>
- 163.5 The service of documents other than an application for a matrimonial order is governed by Rule 6.23 of the FPR 2010. This rule provides for service by personal service, first class post,

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<sup>139</sup> A court officer is a member of the court staff of the High Court or the county court or in the magistrates' court, the designated officer : see Rule 2.3, FPR 2010.

<sup>140</sup> Rule 6.8, FPR 2010.

<sup>141</sup> Rule 6.9, FPR 2010.

<sup>142</sup> PD 6A supplements Part 6, FPR 2010 on service of the application and a document other than the application.

<sup>143</sup> Para. 11.4, PD 6A.

<sup>144</sup> Rule 6.19, FPR 2010.

leaving it at a party's address for service which must be within the UK at which the party resides or carries on business or by fax or other means of electronic communication in accordance with PD 6A.

- 163.6 Service of any document may be served out of the jurisdiction of England and Wales without leave of the court.<sup>145</sup> If it is service out of England and Wales but it is in Scotland and Northern Ireland (“United Kingdom”), the usual mode of service provided in the above paragraphs shall apply. If it is out of the United Kingdom, service has to be done in accordance with the Service Regulation and through foreign governments, judicial authorities and British Consular authorities. The relevant FPR and PD made no reference to the CPR, instead it provides all the rules required to be followed in Rule 6.41 of the FPR 2010, PDs 6A and 6B.

#### ***H8.1. Retaining the current mode***

164. The Working Party proposes that generally the present mode of service and acknowledgement of service in the MCR should be retained but refined and put in one place in the New Code : **Proposal 28.**

*Proposal 28*

*Generally, the present mode of service and acknowledgement of service in the MCR should be retained but refined and put in one place in the New Code.*

165. Rule 14(1) of the MCR allows service of a petition on every respondent or other party to the proceedings by post without specifying the requirement of registered post. However, if the service was effected by ordinary post only, the petitioner may still have to apply for a deemed service order by providing additional evidence to prove that the respondent has received actual notice of

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<sup>145</sup> Rule 6.41, FPR 2010.

the petition. In order to facilitate this application for a deemed service order, a petitioner may try to serve the petition by double registered post (i.e. by producing advice of delivery) in order to show the respondent's actual notice of the petition. In Order 10 of the RHC and RDC on service of the writ, originating summons, notice of motion or petition, service by post has to be effected by registered post,<sup>146</sup> upon the compliance of which a further application for a deemed service order is unnecessary.

- 165.1 There is a suggestion that the rules on service of a matrimonial cause should be simplified and aligned with those in the RHC and RDC. In addition to personal service, service by registered post should be provided for in place of ordinary post and upon the compliance of which, it will not be necessary to further apply for a deemed service order.
- 165.2 On this particular issue, it has to be borne in mind that the dissolution of a marriage affects the parties' legal status and every care has to be taken to make sure that a party to the proceeding is properly notified before a decree will be made against him/her.
- 165.3 If one should consider the provisions under the FPR 2010, despite the fact that service by first class post (similar to our ordinary post) is allowed under Rule 6.4(b), an application for a deemed service order is still necessary in the event that a properly signed acknowledgment of service has not been returned to the Registry indicating that the respondent has actual notice of the proceeding.<sup>147</sup>
- 165.4 The Australian position is even stricter. Although it is allowed to serve at a person's last known address by post,<sup>148</sup> service can only be proved by the return of a signed acknowledgment of service by the respondent,<sup>149</sup> failing which an application for service in

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<sup>146</sup> Order 10, rules 1(2)(a) and 5, RHC/RDC.

<sup>147</sup> Rule 6.16, FPR 2010.

<sup>148</sup> Rule 7.07(1), Family Law Rules 2004.

<sup>149</sup> Rule 7.14, Family Law Rules 2004.

another way (similar to our substituted service) or dispensation of service has to be made. There is no provision for the application of a deemed service order.

- 165.5 Similar strict provisions are also contained in the New Zealand rules. It is required under Rule 105 of the Family Courts Rules 2002 that personal service has to be effected on the respondent, failing which an application for substituted service or dispensation of service has to be made. There is likewise no provision for a deemed service order.
166. Readers are invited to express their views on whether the provision for service in matrimonial causes by ordinary post should be replaced by registered post for the alignment of the MCR, the RHC and the RDC, and to do away with the need for a deemed service order in cases where a signed acknowledgment of service by the respondent has not been returned to the Registry : **Proposal 29**.

Proposal 29

*Readers are invited to express their views on whether the provision for service in matrimonial causes by ordinary post should be replaced by registered post for the alignment of the MCR, the RHC and the RDC, and to do away with the need for a deemed service order in cases where a signed acknowledgment of service by the respondent has not been returned to the Registry.*

167. The Working Party notes the provisions in the FPR 2010 directing service by a court officer. In the local context, the court bailiff may be directed by the court to effect service if the court considers it desirable to do so in the particular circumstances of the case. We think that the current practice is sufficient to serve the local needs. It is not necessary to have a provision similar to that in the FPR 2010 in this regard.

## ***H8.2. Service by fax and electronic means***

168. For service of documents other than the originating process by way of fax and other electronic communication, the learned editors of the HKCP 2013 note :-<sup>150</sup>

“Although permitted for service of other documents, the use of a document exchange or facsimile transmission facilities is not permitted for the service of originating process. Email is not currently permitted for the service of any court documents, whether originating or otherwise, although a party could in theory agree to receive originating process by email.”

169. The Working Party wishes to consult readers on whether, as a matter of principle, in the New Code, documents other than the originating process and judgment summons should be permitted to be served by fax or other electronic communication in line with the FPR 2010. The readers are reminded that the first phase of the Information Technology Strategy Plan (“ITSP”) will not cover the Family Court. Any recommendation that the Working Party may make in respect of service by electronic means will have to be subject to the overall development and implementation game plan of the ITSP in the future.<sup>151</sup> **Proposal 30.**

### ***Proposal 30***

*Views are invited on whether in the New Code, documents other than the originating process and judgment summons should, as a matter of principle, be permitted to be served by fax or other electronic communication in line with the FPR 2010.*

## ***H8.3. Service outside the jurisdiction***

170. Rule 109(1) of the MCR provides for service out of the jurisdiction :-

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<sup>150</sup> Para. 10/1/11, HKCP 2013.

<sup>151</sup> See Part II below.

“(1) Any document in matrimonial proceedings may be served out of Hong Kong without leave either in the manner prescribed by these rules or where the proceedings are pending in the Court of First Instance or in the District Court, in accordance with RHC Order 11, rules 5 and 6 (which relate to the service of a writ abroad).”

171. The Working Party considers that the provision for service outside the jurisdiction without leave should be retained. However, the manner of service of documents outside the jurisdiction should be aligned with that of the general civil practice as contained in Order 11 of the RHC. We therefore propose to incorporate Order 11 into the New Code for the manner of service of documents outside the jurisdiction : **Proposal 31.**

Proposal 31

*The provision in Rule 109(1) of the MCR on service outside the jurisdiction without leave should be retained in the New Code. Order 11 of the RHC should also be incorporated into the New Code for the manner of service of documents outside the jurisdiction.*

172. The Working Party proposes to follow the FPR 2010 by expressly providing that all documents in matrimonial causes and family proceedings may be served outside the jurisdiction without leave : **Proposal 32.**

Proposal 32

*The New Code should follow the FPR 2010 by expressly providing that all documents in matrimonial causes and family proceedings may be served outside the jurisdiction without leave.*



## ***H9. Interlocutory applications***

173. The mode of making an interlocutory application in extant proceedings for matrimonial proceedings is by way of summons.<sup>152</sup> This is in line with the provisions in the RHC/RDC. The Working Party proposes that this should be the unified mode for making any interlocutory application in extant proceedings for matrimonial causes and family proceedings in the New Code. **Proposal 33.**

### *Proposal 33*

*For any interlocutory application in extant proceedings for matrimonial causes and family proceedings, such an application should be made by summons.*

## ***H10. Procedures for matrimonial causes***

### ***H10.1. An overview of the MCR***

174. The MCR is the principal rules governing the procedures for matrimonial causes.<sup>153</sup> A summary of the provisions appears as follows.
- 174.1 Rule 2 of the MCR is a definition provision.
- 174.2 Rule 3 provides that, subject to the MCR and any other enactment, the RHC shall apply with necessary modifications to the

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<sup>152</sup> Rule 114, MCR.

<sup>153</sup> Note also that a customary marriage or validated modern marriage which was celebrated before 7 October 1971, and which has been registered in accordance with Part IV of the MRO, may be dissolved in accordance with the MCO or in accordance with Part V of the MRO. Further, under section 7A(1) of the MCO, the dissolution of a marriage in accordance with Part V of the MRO is deemed to be a final decree of divorce granted by the court and the court shall have the same jurisdiction in relation to ancillary relief and protection of children as it would have had when it had pronounced a final decree of divorce.

commencement of matrimonial proceedings and to the practices and procedures in matrimonial proceedings pending in the CFI or the District Court.

- 174.3 Rule 4 provides for the use by judges, witnesses, parties and their legal representatives of either or both official languages.
- 174.4 Rule 5 applies to applications under section 12 of the MCO for leave to present a petition for divorce within one year of the date of the marriage.
- 174.5 Rule 6 applies to applications to the court made either before or after the presentation of a petition for divorce or judicial separation to enable the court to express an opinion on the reasonableness of an agreement or arrangement made or proposed to be made by the parties to a marriage which relates to the proceedings which are being contemplated or have already begun.
- 174.6 Rule 7 provides for the withdrawal of a petition before it is served and for the petition to thereupon stand dismissed.
- 174.7 Rule 9 requires a matrimonial cause to be begun by petition, unless it is a joint application, when it must be made by originating application. The rule prescribes the information to be contained in each petition and joint application including the facts on which the court is alleged to have jurisdiction.
- 174.8 Rule 11 provides for the signing of the petition and joint application.
- 174.9 Rule 12 requires a petition or joint application to be presented to the District Court and specifies the documents which must be filed.
- 174.10 Rule 13 provides that where a petition alleges that the other party has committed adultery with a named person, that person is to be a co-respondent, unless one of the specified circumstances applies.
- 174.11 Rules 14 to 15C prescribe rules relating to service and the respondent's consent or notice of intention to defend.

- 174.12 Rules 16 to 26 provide for pleadings and amendment of pleadings and for their filing and service.
- 174.13 Rules 28 and 29 provide for discovery of documents and by interrogatories in defended causes.
- 174.14 Rules 30 and 31 provide for medical examination in proceedings for nullity on the application of one of the parties. Rule 30 specifies the circumstances in which a party is required to make an application, in which a party is prohibited from making an application and in which a party may make an application; and provides that the court may, if it thinks fit, appoint one or two medical inspectors to examine any party. Rule 31 prescribes how such an examination should be conducted and reported.
- 174.15 Rules 32 to 37 provide for transfer of proceedings between the District Court and the CFI, directions for trial and security for costs.
- 174.16 Rules 38 to 42 provide for the giving of evidence.
- 174.17 Rules 44 to 47 provide for the fixing of a date, place and time of trial and for trial of any issue which the court has directed should be heard separately and for the giving of notice thereof.
- 174.18 Rule 47A provides for disposal of causes in a special procedure list.
- 174.19 Rules 48 to 55 provide for the mode of trial, for answers to be filed if ancillary relief is contested, for orders as to arrangements for children, for the restoration of matters that had been adjourned, for a shorthand note of proceedings in open court in the CFI and for applications for rehearing.
- 174.20 Rule 56 of the MCR provides for a decree nisi to be drawn up and sealed. Where the decree nisi is pronounced on a petition in which the fact of one year's separation and consent or two year's separation, is alleged, the decree shall state whether that is the only fact under section 11A(2) of the MCO on which the petitioner was entitled to rely in support of the petition.
- 174.21 Rule 56A provides for an application by the respondent under

section 15C(1) of the MCO or by either party to a marriage under section 15C(2) for the rescission of a decree of divorce to be made to a judge and heard in open court and for the future conduct of the application. Section 15C(1) applies where the only fact on which the petitioner relies is one-year separation and consent and the respondent alleges that he or she was misled by the petitioner into giving consent. Section 15C(2) applies when the parties filed an application jointly and one party alleges that he or she was misled into doing so.

- 174.22 Rule 56B provides for an application to the court by the respondent to a petition for divorce to consider the respondent's financial position under section 17A of the MCO and for the conduct of such an application.
- 174.23 Rules 61 and 62 provide for intervention to show cause by the Secretary for Justice and by any other person, respectively, against a decree nisi being made absolute and for the conduct of such applications. Rule 62(1) requires the person to file an affidavit, which in the case of a decree of nullity where collusion is alleged, must be served on the party or parties to the alleged collusion.
- 174.24 Rule 64 provides that after decree nisi but before it has been made absolute, either party may apply for an order rescinding the decree by consent, on the ground that the parties are reconciled. The rule prescribes that the application must be made in the court in which the proceedings are pending and the manner in which the application must be made.
- 174.25 Rule 65(1) provides for the spouse in whose favour a decree nisi was pronounced to apply to make the decree absolute by lodging a notice with the Registrar. Under Rule 65(2), the Registrar is required to search the court minutes and provided he is satisfied that no appeal or other application or intervention is pending or other specified circumstance applies, he shall make the decree absolute. If the notice of application is lodged more than 12 months after the decree nisi, the Registrar may require the applicant to file an affidavit accounting for the delay and may either make such order as he thinks fit or refer the application to a judge.

- 174.26 Rule 65(3) provides that the application must be referred to a judge “[w]here there are circumstances which ought to be brought to the notice of the court before a decree nisi is made absolute”. Unless otherwise directed, the application must be served on every other party and be heard in open court.
- 174.27 Rule 65(4) provides for the spouse against whom a decree nisi was pronounced to apply to either a judge or to the Registrar to make the decree absolute and for service of the application on the other spouse.
- 174.28 An order under either Rule 65(3) or (4) shall not take effect until the Registrar has searched the court minutes and satisfied himself as to the matters mentioned in Rule 65(2).
- 174.29 Rule 65A makes provision for one of the parties to a decree nisi pronounced in favour of joint applicants to apply for the decree to be made absolute, on notice to the other joint applicant. Similar provisions to those in Rule 65 apply to that application.
- 174.30 Rule 66(1) provides for the Registrar to send an authenticated certificate in the prescribed form to the parties. Rules 66(2) and (3) provide that an index of decrees absolute shall be kept at the registry of the Court of First Instance and any person shall be entitled to require a search to be made therein and to be furnished with a certificate of the result of the search and a copy of the certificate that a decree nisi has been made absolute, on payment of the prescribed fees.
- 174.31 Rule 67 provides for an application for rescission of a decree of judicial separation to be made by petition. The party in whose favour the decree was pronounced may file an answer within 14 days after service, but otherwise the proceedings on the petition must be carried on in the same manner as proceedings on a petition for judicial separation.
175. The Working Party considers that many of the essential features in the MCR should be retained and incorporated into the New Code. But they need to be updated so as to reflect the current and modern practice and modified with a view to simplifying the procedural

steps and harmonising them with other provisions in the New Code. Reference to the relevant provisions in Part 7 of the FPR 2010 may also assist in identifying areas of possible improvement.

### ***H10.2. Matters of general application***

176. Some of the matters contained in the MCR are of general application across the board. Provisions will be made in the New Code to cover them. It is therefore not necessary to deal with them separately in the procedures for matrimonial causes. Those general matters include :-

176.1 Use of the official languages (Rule 4).

176.2 Applications in the course of extant proceedings. The present mode of making such applications is by way of a summons (Rule 114). As seen, the Working Party proposes that a single unified procedure, namely, by issue of a summons, be adopted for the issue of any applications in the course of extant proceedings, for both matrimonial causes and family proceedings.<sup>154</sup>

176.3 Mode of commencement of a matrimonial cause (Rule 9) and leave to present a divorce petition within one year of marriage (Rule 5). As seen, the Working Party proposes to use originating application as the unified mode for both matrimonial causes and family proceedings.<sup>155</sup>

176.4 Where to start proceedings (Rule 12). As seen, the Working Party proposes that the New Code should have clear provisions as to where to start proceedings. For matrimonial causes, they are to be started in the Family Court.<sup>156</sup>

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<sup>154</sup> See Proposal 33 above.

<sup>155</sup> See Proposal 26 above.

<sup>156</sup> See Proposal 23 above.

- 176.5 Transfer of proceedings (Rule 32). As seen, the Working Party proposes that the practice and procedure of transfer should be clearly set out in the New Code.<sup>157</sup> They should include the transfer of a matrimonial cause from the Family Court to the High Court.
- 176.6 Pleadings, discovery, interrogatories, evidence, preparation for trial, security for costs (Rules 16-42). See the relevant proposals as agreed below.
- 176.7 Record of proceedings (Rule 54). See Order 68 of the RHC/RDC.
177. The Working Party proposes that for the above matters which are of general application, it is not necessary to make separate provisions in the procedures governing matrimonial causes : **Proposal 34.**

*Proposal 34*

*It is not necessary to make separate provisions in the procedures governing matrimonial causes for matters that are of general application, which will be covered by the relevant provisions in the New Code.*

***H10.3. Specific matters***

178. However, there are specific matters which feature in the procedures for matrimonial causes only. As said, they should be improved and if desirable, be adapted in accordance with the relevant provisions in Part 7 of the FPR 2010.

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<sup>157</sup>

See Proposal 24 above.

(a) *Application to consider agreement (Rule 6)*<sup>158</sup>

179. Such applications are now seldom, if ever, made. Although no rules of court have been made to implement the equivalent English provision, section 7 of the MCA 1973, the law and practice relating to the validity of such agreements between spouses on financial matters and the extent to which the courts give effect to them have developed without parties having recourse to an application under the section.<sup>159</sup>

180. That contrasts with the approach taken in Australia under Part VIIIA of the Family Law Act 1975<sup>160</sup> and in New Zealand under Part 6 of the Property (Relationships) Act 1976.<sup>161</sup> Under each of

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<sup>158</sup> This rule is made under section 18B of the MCO and was added in 1972, based on a similar provision which is found in section 7 of the MCA 1973. It originated in the Matrimonial Causes Act 1963, which amended the English law on collusion and permitted parties for the first time to make bargains relating to divorce proceedings. When collusion was abolished altogether by the Divorce Reform Act 1969, it was no longer necessary for parties to seek the court's approval to dispel any risk of collusion. It was described by Ormrod LJ (as he then was) in *Brockwell v Brockwell* [1975] 6 Fam Law 46 as being "an almost vestigial provision, not unlike the human appendix". See *The Family Court Practice 2012* at p. 753. Section 7 of the MCA 1973 was repealed by the Family Law Act 1996, as part of the far-reaching changes to divorce law and practice in England, but most of those changes have since been abandoned, without the relevant provisions of the Act ever having been brought into force. No rules have ever been made under the section.

<sup>159</sup> See *The Family Court Practice 2012*, at p. 1282 and the cases listed therein under the paragraph relating to section 7 of the MCA 1973. A similar approach has been followed in Singapore, where marital agreements relating to the division of matrimonial assets, are subject to the broad discretionary power of the court bestowed by section 112 of the Women's Charter in Singapore, Cap. 353, to order the "just and equitable" division of matrimonial assets that remain available upon the spouses' divorce. See *TQ v TTR and Another* [2009] 2 SLR 961 and see Professor Leong Wai Kum of the Law Faculty of the National University of Singapore *The Law in Singapore on Rights and Responsibilities in Marital Agreements* - Sydney Law Review, Vol. 32: 257.

<sup>160</sup> The Family Law Act 1975, amended as at 14 January 2013.

<sup>161</sup> The Property (Relationships) Act 1976, amended as at 18 May 2009.



those statutes, detailed provisions are set out prescribing, among other things, the parties and subject-matter of such agreements, the formality required before such agreements have legal effect, the consequences of a valid agreement having been made, the circumstances in which the court may declare the agreement to be binding and in which the court may set the agreement aside. The Family Law Act 1975 also provides for the parties to be able to vary or terminate the agreement and states that the validity of an agreement and its variation or termination is to be determined in accordance with the principles of law and equity applicable to a contract or purported contract.

181. The Working Party considers that in the absence of a comprehensive statutory code governing marital agreements, the law and practice relating to such agreements should continue to be developed by the courts and the New Code should not include any specific provision to enable the parties to a marriage to seek the court's opinion on an agreement or proposed arrangements before or after the presentation of a petition, except in the context of a joint application by the parties for the agreement or proposed arrangements to be incorporated in an order of the court or in the context of a FDR or CDR hearing :<sup>162</sup> **Proposal 35.**

*Proposal 35*

*The New Code should not include any specific provision to enable the parties to a marriage to seek the court's opinion on an agreement or proposed arrangements before or after the presentation of a petition, except in the context of a FDR or CDR hearing.*

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The English Law Commission is currently examining various aspects of the law relating to the financial consequences of divorce, including marital property agreements. See: “*Law Commission Consultation Paper No. 198 - Marital Property Agreements*”, duration of the consultation: 11 January 2011 to 11 April 2011 and “*Law Commission Consultation Paper No. 208 - Matrimonial Property, Needs and Agreements*”, duration of consultation: 11 September 2012 to 11 December 2012.

**(b) Reconciliation**

182. Rule 7.6 of the FPR 2010 provides for a legally represented applicant to file a statement certifying whether the legal representative has discussed the possibility of reconciliation with the applicant.<sup>163</sup> There is no such requirement in relation to an unrepresented applicant. Although section 15A of the MCO has provisions to encourage reconciliation, there is no equivalent to Rule 7.6 in the MCR, although PD 15.3 has similar requirements. It appears an anomaly that only the agencies of various Christian denominations are specifically listed as “persons” regarded as qualified to help effect reconciliation, although the list is stated not to be exhaustive.
183. If the attempt at reconciliation is to be more than a formality, the requirements currently set out in PD 15.3 should apply to both represented and unrepresented parties and the list of “persons” expanded to include non-Christian organisations. The Working Party proposes that the application and scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code : **Proposal 36**.

*Proposal 36*

*The application and scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code.*

**(c) Naming of co-respondents (Rule 13)**

184. In the FPR 2010, the naming of co-respondents is discouraged in PD 7A, which states that where adultery or an improper association is alleged, the other person should not be named unless the applicant believes that the other party to the marriage is likely

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<sup>163</sup> A requirement to encourage reconciliation was introduced into English law by the Divorce Reform Act 1969, but those provisions are described in *Rayden and Jackson on Divorce and Family Matters* 18<sup>th</sup> ed, Vol. 1(1), Chapter 1, para [1.26] as having been “a dead-letter from the outset, and little attention has been paid to the question of reconciliation”.

to object to the making of a matrimonial order. The Working Party proposes that the New Code should contain similar discouragement : **Proposal 37**.

Proposal 37

*The New Code should discourage the naming of co-respondents similar to that of PD 7A in the FPR 2010.*

**(d) Special procedure for undefended cases (Rule 47A)**

185. The vast majority of cases are not defended and are then disposed of under the Special Procedure List under Rule 47A of the MCR. That rule is supplemented by PD 15.4.
186. In the FPR 2010, what had been the “special procedure” has become the standard procedure and the rules relating to undefended proceedings have been very much simplified, leaving the future conduct of the hearing to be determined by the court at a case management hearing. In the FPR 2010, the “special procedure” covers nullity proceedings as well.
187. The Working Party proposes a similar approach in the New Code, so that what hitherto has been regarded as a special procedure becomes the norm to which the rules primarily apply and defended cases are treated as the exception. The Working Party further proposes to extend the current special procedure to nullity proceedings. The Working Party also proposes that the New Code should include those procedural matters which are currently set out in PD 15.4, including the Registrar’s directions for trial in the Special Procedure List, attendance of the parties, pronouncement of the decree in open court and subsequent procedures. **Proposals 38 and 39**.

Proposal 38

*The New Code should follow the FPR 2010 so that what hitherto has been regarded as a special procedure becomes the norm to which the rules primarily apply and defended cases are treated as the exception. The current special procedure should also be extended to nullity proceedings.*

Proposal 39

*The New Code should include those procedural matters which are currently set out in PD 15.4, including the Registrar's directions for trial in the Special Procedure List, attendance of the parties, pronouncement of the decree in open court and subsequent procedures.*

**(e) Medical examination (Rules 30 and 31)**

188. PD 15.6 provides for the Registrar to maintain a panel of medical inspectors, prescribes their fees and by whom they are to be paid and for their attendance at court.
189. Rule 7.26 of the FPR 2010, which provides for medical examination in proceedings for nullity, places the onus of determining whether medical examiners should be appointed on the court, without the need to make any application. The court must only appoint examiners where it is necessary for the proper disposal of the case. The provisions are supplemented by PD 7B. The provisions are shorter and more straightforward than Rules 30 and 31 of the MCR. The Working Party proposes that similar provisions be included in the New Code : **Proposal 40.**

Proposal 40

*Similar to Rule 7.26 of the FPR 2010, the New Code should provide for medical examination in proceedings for nullity, which places the onus of determining whether medical examiners should be appointed on the court, without the need to make any application. The court must only appoint examiners where it is necessary for the proper disposal of the case. Provisions similar to PD 7B should also be supplemented.*

**(f) Rescission (Rules 56A, 64 and 67)**

190. The Working Party proposes that the provisions of the New Code relating to rescission should be grouped together and that parties seeking rescission of all matrimonial decrees should do so by application made in accordance with a common procedure : **Proposal 41.**

Proposal 41

*The provisions of the New Code relating to rescission should be grouped together and parties seeking rescission of all matrimonial decrees should do so by application made in accordance with a common procedure.*

**(g) Making a decree absolute (Rule 65)**

191. The FPR 2010 sets out similar procedures for making a decree absolute.
- 191.1 Rule 7.32 provides that a spouse in whose favour a decree nisi was made may give notice to the court that he or she wishes the decree to be made absolute on the giving of notice, on the court being satisfied that no application for rescission or appeal or other specified application is pending. Where the notice is received

more than 12 months after the decree nisi, the notice must be accompanied by an explanation for the delay and a statement of whether the parties have lived together since the decree nisi was made and, whether the female party has given birth to any child since the making of the decree nisi and whether any such child is or is alleged to be a child of the family.

- 191.2 In the latter case and in the case where the Queen's Proctor has given notice under Rule 7.31(6)(a) and the notice has not been withdrawn or there are other circumstances which should be brought to the attention of the court, an application must be made. Where the Queen's Proctor has given notice, the application must be made to a judge, but not a district judge. An application under this rule is not to take effect until the court is satisfied about the matters referred to in Rule 7.32(2).
- 191.3 The procedures under Rules 7.32 and 7.33 in the FPR 2010 are broadly the same as those under Rule 65 of the MCR, but set out more clearly when an application must be made to a judge other than a district judge and prescribe the information to be included in the explanation for a delay of more than 12 months.
192. The Working Party proposes that provisions similar to Rules 7.32 and 7.33 of the FPR 2010 should be included in the New Code, save that the application must be made to a judge including a district judge : **Proposal 42**.

Proposal 42

*The New Code should include provisions similar to Rules 7.32 and 7.33 of the FPR 2010 on making a decree absolute, save that the application must be made to a judge including a district judge.*

193. Rule 7.34 of the FPR 2010 further provides that the court officer shall endorse the fact that a decree nisi has been made absolute on the decree nisi with the precise time at which it was made absolute recorded. Circumstances could arise in which the precise time when the decree nisi was made absolute could be relevant. The Working Party proposes that the New Code provides for that time to be recorded : **Proposal 43**.

Proposal 43

*The New Code should include provisions to record the precise time when the decree nisi is made absolute.*

**H10.4. Structure of the rules**

194. Subject to the discussion above, the Working Party proposes that considerations should be given to see (a) if and how the structure of the procedural rules of matrimonial causes in the New Code should be modelled on Part 7 of the FPR 2010; and (b) if and how the relevant provisions in Part 7 of the FPR 2010 should best be adopted with necessary modifications : **Proposal 44**.

Proposal 44

*Considerations should be given to see (a) if and how the structure of the procedural rules of matrimonial causes in the New Code should be modelled on Part 7 of the FPR 2010; and (b) if and how the relevant provisions in Part 7 of the FPR 2010 should best be adopted with necessary modifications.*

**H11. Application for a financial order**

**H11.1. A compendious code**

195. Applications for a financial order may arise in different scenarios and are governed by different statutory provisions :-

- 195.1 Under the SMOO, where there is a subsisting marriage and regardless of whether matrimonial proceedings are extant, for the party to the marriage and/or a child of the applicant.
- 195.2 Under the GMO, where there is a child, regardless of whether the parents were or are married and regardless of whether matrimonial proceedings are extant, for the child.
- 195.3 Under the MCO, MCR and MPPO, where there are extant matrimonial proceedings, for the party to the marriage and/or a child of the family.
- 195.4 Under Part IIA of the MPPO, where there has been an overseas divorce or legal separation duly recognised under Part IX of the MCO (subject to the exceptions and discretions therein), for the party to the marriage and/or child of the family, subject to leave to apply having been granted.
- 195.5 Under the I(PFD)O, where a person has passed away, for the surviving spouse and/or dependants.
196. There is no compendious procedural code or set of rules that applies to matters of a financial order generally. An applicant has to consult different rules to determine the correct procedure in bringing an application for a financial order, which is clearly unsatisfactory.
197. In England, a single unified procedural code can now be found in Part 9 of the FPR 2010. This approach should be adopted in the New Code. The Working Party proposes that the New Code should provide for the practice and procedure for a financial order that arises in matrimonial causes and family proceedings, applicable to both the High Court and the Family Court, to rationalise, reconcile and consolidate the procedural rules by way of a compendious code. The intention and aim is to promote consistency in approach, procedure and rules applicable, rather than to achieve absolute uniformity as such, in particular as there are (sometimes rather subtle) differences in the various empowering provisions and substantive law. Of emphasis are the desired characteristics of an effective family justice system



described in paragraph 20 above, and in particular the principles that the family justice system should be fair and seen to be so by treating like cases alike. **Proposal 45.**

Proposal 45

*The New Code should have provisions to provide for the practice and procedure for an application for a financial order that is made in matrimonial causes and family proceedings.*

198. The Working Party notes that in the FPR 2010, an application for a financial order after overseas proceedings, which is equivalent to an application under Part IIA of the MPPO, is dealt with under Chapter 6 of Part 8 on the Procedure for Miscellaneous Applications. Given its nature, the Working Party considers that the procedure for an application under Part IIA of the MPPO should be included in the part of the New Code applying to applications for financial orders, rather than in the part dealing with miscellaneous applications.

**H11.2. Limited application to the MPSO**

199. While in general, the New Code should apply to all applications for financial order in all family proceedings, there are exceptions relating to applications brought under the MPSO.
200. The Hong Kong matrimonial regime starts with the premise of “separate property”.<sup>164</sup> Even where two persons are a lawfully married couple, they will nevertheless remain separate legal persons. Generally speaking, the ownership of properties and assets of married couples is governed by the general law.<sup>165</sup> Hong

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<sup>164</sup> *Miller v Miller & McFarlane v McFarlane* [2006] 2 AC 618 at para.153; *Radmacher v Granatino* [2010] UKSC 42 at para.184.

<sup>165</sup> Section 3 of the MPSO establishes and confirms the legal capacity of a married woman to be unaffected and in all respects the same as if she were unmarried. See also section 4 of the MPSO regarding the property of married women.

Kong does not have a “community of property”<sup>166</sup> regime, and, generally speaking and subject to the general law, husbands and wives do not automatically share in each others’ risks or potential liabilities;<sup>167</sup> nor do they automatically have any title, beneficial ownership or interest in each others’ properties and assets.

201. The MPSO enables applications for a financial order to be made under :-
- 201.1 Under section 5, where each of the parties to a marriage shall have the like right of action in tort against the other as if they were unmarried, the general civil procedure applies to such a claim. An application for staying the claim is by summons, which is governed by Order 89, rule 2 of the RHC/RDC.
- 201.2 Under section 6, where a spouse may apply by summons or otherwise in a summary way to determine questions as to title to or possession of property. The application is by way of originating summons under Order 89, rule 1 of the RHC/RDC; or if brought in extant proceedings, by summons.
- 201.3 Under section 9, which provides for the potential acquisition of beneficial interest where a spouse has substantially contributed in money or money’s worth towards the improvement of property (whether real or personal), even in default of express or implied agreement. The application can be brought in extant proceedings or any other proceedings.
- 201.4 Under section 13, which deals with the establishment of a statutory trust where an insurance policy is effected by a spouse on his/her life for the benefit of the other spouse or their children. The application can arise by any originating proceedings as well as in the course of other proceedings.

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<sup>166</sup> *Miller v Miller & McFarlane v McFarlane* [2006] 2 AC 618 at para.151; see *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 for consideration of the effects of a community of property regime.

<sup>167</sup> See also section 10, MPSO which expressly provides for this.

202. The Working Party considers that where any of the above applications is brought in fresh proceedings, notwithstanding that the general civil procedure should apply, the New Code should still apply to such an application whether or not it is brought within the extant family or matrimonial proceedings. **Proposal 46.**

Proposal 46

*The New Code should clearly state that it does apply to financial applications made under the MPSO whether or not such applications are made within extant matrimonial proceedings or family proceedings.*

**H11.3. Clear definition for financial order**

203. Under Rule 2 of the MCR, the archaic term “ancillary relief” is used to define the financial order available in the MCO and the MPPO generally :-
- (a) an avoidance of disposition order – “an order under section 17 of the MPPO setting aside a disposition”;
  - (b) a lump sum order – “an order under section 4(1)(c) or section 5(2)(c) of the MPPO in respect of a party or a child of the family respectively”;
  - (c) an order for maintenance pending suit – “an order under section 3 of the MPPO”;
  - (d) a periodical payments order – “an order under section 4(1)(a) or under section 5(2)(a) of the MPPO in respect of a party or a child of the family respectively”;
  - (e) a secured periodical payments order – “an order under section 4(1)(b) or section 5(2)(b) of the MPPO in respect of a party or a child of the family respectively”;

- (f) a settlement of property order – “an order under section 6(1)(b) of the MPPO”;
- (g) a transfer of property order – “an order under section 6(1)(a) of the MPPO”;
- (h) a variation of settlement order – “an order under section 6(1)(c) or (d) of the MPPO”; or
- (i) a variation order – “an order under section 11 of the MPPO”.

However, in section 25(3) of the MPPO, “ancillary relief” is defined more narrowly, to mean “relief under any of the provisions of sections 3, 4, 5, 6 and 6A”; in particular, there is no express reference to sections 11 and/or 17 of the MPPO, which the definition of “ancillary relief” in Rule 2 of the MCR includes.

- 204. Contrast the above with the modern term “financial relief” used in Part IIA of the MPPO, which in essence refers to the same forms of financial order.
- 205. The New Code should modernise the language used and promote consistency in the terminology that is to be employed and the definitions thereof. The Working Party considers that the use of the term “ancillary relief” as the general all-encompassing term for financial remedy is inapt.
- 205.1 The New Code is intended to apply to all family proceedings generally, whereas the MCR<sup>168</sup> and MPPO<sup>169</sup> are, in the main, concerned with applications brought thereunder.
- 205.2 The use of the descriptive term “ancillary” connotes that the financial remedy sought is parasitic upon some other extant underlying proceedings. While this may be correct for those described in Rule 2 of the MCR and section 25(3) of the MPPO,

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<sup>168</sup> Rule 3 of the MCR refers to “the practice and procedure in matrimonial proceedings pending in the Court of First Instance or in the District Court”.

<sup>169</sup> See the Long Title of the MPPO.

applications made under the SMOO, GMO, I(PFD)O and Part IIA of the MPPO may be free-standing.

- 205.3 It carries the connotation that the financial order sought is secondary in its nature and importance, which in reality is quite the opposite.
206. The Working Party considers that a term such as “financial order” is preferable as a neutral and general all-encompassing term, and is apt to cover the types or forms of financial relief discussed herein. The Working Party further considers that financial order should be clearly defined in the New Code. The current categorisation and inconsistent use of terminology is unsatisfactory. The New Code should clearly set out the scope and ambit of its application. In this regard, the FPR 2010 again provides a useful example to follow. In Part 2, there is a clear and comprehensive definition of “financial order” and “financial remedy”.
207. The Working Party proposes that the New Code should contain a clear definition for “financial order”, which should be comprehensive and list out all financial orders for which applications may be made in matrimonial causes and all family proceedings to which the New Code is to apply : **Proposal 47**.

Proposal 47

*The New Code should define “financial order” to cover all categories of financial order for which application may be made in matrimonial causes and all family proceedings to which the New Code is to apply, whether in the High Court or the Family Court, together with definitions for related terminologies.*

**H11.4. General approach**

208. The Working Party considers that the procedures for all applications for financial order should be simplified and so far as circumstances permit, unified. The general approach in the

relevant procedural rules of the FPR 2010 provides a good model to follow.

- 208.1 Part 9 of the FPR 2010 sets out in clear terms, among other things, when an application may be made, who may make it, where to start the proceedings, and the procedural steps to follow.
- 208.2 A similar approach for an application for financial order after overseas divorce can be found in Chapter 6 of Part 8.
209. The Working Party proposes that the New Code should adopt a similar general approach for the procedures for applications for financial order and follow as far as possible the procedural steps with all necessary modifications to suit local circumstances : **Proposal 48.**

*Proposal 48*

*The New Code should adopt a similar general approach as that in the FPR 2010 for the procedures for applications for a financial order and follow as far as possible the procedural steps with all necessary modifications to suit local circumstances.*

210. In the discussion below, we deal with some points more specifically.

***H11.5. Where to start proceedings, etc.***

211. Applications for financial order will generally be commenced in the Family Court, with power to transfer to the High Court and also power to re-transfer part or portion back to the District Court.
212. Rule 9.5 of the FPR 2010 explicitly sets out the court where the relevant application must be filed. The Working Party considers that a similar provision should be made in the New Code. The Working Party proposes that the New Code should clearly state in which court the application should be commenced, and to provide

for the practice and procedure relating to applications for transfer and re-transfer : **Proposal 49**.

Proposal 49

*The New Code should clearly state the court in which the application should be commenced; and should provide for the practice and procedure to apply for transfer and re-transfer.*

213. Where there are family proceedings extant between the parties, the Working Party proposes that a financial order should be applied for within the extant family proceedings. If there are no extant family proceedings, a financial order (if available) should in general be commenced by way of separate family proceedings : **Proposal 50**.

Proposal 50

*The New Code should provide that where there are family proceedings extant between the parties, a financial order should be applied for within the extant family proceedings; if there are no extant family proceedings, a financial order (if available) should in general be commenced by way of separate family proceedings.*

**H11.6. Mode of commencement**

214. To simplify and unify the procedures, the Working Party proposes that the New Code should provide for standardised originating applications, summonses, forms and affidavits, together with the evidence that is to be provided for each type or form of financial order sought. The originating applications, summonses or forms should require that the orders applied for be stated with particularity unless the applicant provides reasonable grounds for being unable to do so. Particulars of orders applied for, including any changes thereto, ought to be stated by way of amendment as soon as practicable. Where an application is made before filing

Form E, there should be written evidence in support explaining why the order is necessary and giving up-to-date information about the applicant's financial circumstances : **Proposal 51**.

Proposal 51

*The New Code should provide for standardised originating applications, summonses, forms and affidavits, together with the evidence that is to be provided for each type or form of financial order sought. The originating applications, summonses or forms should require that the orders applied for be stated with particularity unless the applicant provides reasonable grounds for being unable to do so. Particulars of orders applied for, including any changes thereto, ought to be stated by way of amendment as soon as practicable. Where an application is made before filing Form E, there should be written evidence in support explaining why the order is necessary and giving up-to-date information about the applicant's financial circumstances.*

**H11.7. Mode of hearing**

215. Presently, applications falling under the GMO, the SMOO and Rule 81 of the MCR (except judgment summonses) fall under Schedule 2 to PD 25.1 and will usually be heard in Chambers and not be open to the public. Proceedings under Part IIA of the MPPO are not expressly set out in Schedule 2 to PD 25.1, but in principle they are analogous to applications under Rule 81 of the MCR.
216. The usual practice now is that such hearings are to be held in Chambers (not open to public). The Working Party proposes that such practice should continue : **Proposal 52**.



Proposal 52

*The New Code should clearly state the default mode of hearing is in Chambers (not open to the public).*

**H11.8. Service and joinder of third-parties**

217. It is not uncommon that the interests of a third-party are involved in an application for financial order. The New Code should provide for the following matters by adopting the relevant provisions in the FPR 2010 with necessary modifications.

**(a) Variation of settlement orders**

218. Where a variation of settlement order has been applied for, third-parties may well be affected or at least potentially affected. There may also be a need to ensure that such third-parties are bound, so as to facilitate enforceability and to avoid uncertainty and multiplicity of proceedings. Such third-parties may include, but are not necessarily limited to, trustees, settlors, and other beneficiaries or potential beneficiaries. It is also necessary to consider whether there is any need to join such third-parties to the proceedings or to decide whether they should be represented and heard. Children are specifically and separately dealt with under Rule 72(1) of the MCR.

219. Rule 9.13(1) of the FPR 2010 provides that : “where an application for a financial remedy includes an application for an order for a variation of settlement, the applicant must serve copies of the application on – (a) the trustees of the settlement; (b) the settlor if living; and (c) such other persons as the court directs”. Children who may be affected would fall within category (c).

220. The Working Party proposes that a similar provision be introduced into the New Code : **Proposal 53**.

Proposal 53

*The New Code should provide for service upon third-parties where a variation of settlement order has been applied for.*

**(b)      *Avoidance of disposition orders***

221.      An avoidance of disposition order inevitably affects third-parties. The relevant third-party should usually be afforded the right to be heard, adduce evidence and make representations. It is also desirable that the relevant third-party be bound, to avoid multiplicity of proceedings and to ensure enforceability.
222.      Rule 9.13(2) of the FPR 2010 provides that – “in the case of an application for an avoidance of disposition order, the applicant must serve copies of the application on the person in whose favour the disposition is alleged to have been made”.
223.      The Working Party proposes that a similar provision be introduced into the New Code : **Proposal 54**.

Proposal 54

*The New Code should provide for service upon alleged recipients where an avoidance of disposition order has been applied for.*

**(c)      *Applications relating to landed property and notice of ancillary relief (registration against landed property)***

224.      It has become almost standard practice to register notices of ancillary relief against landed properties at the Land Registry. Where the relevant landed property is held in the name of a party, this is relatively straightforward. Registration may also occur where the landed property is held in the name of a company and the corporate veil can be pierced or where the company is a trustee

or nominee for one of the parties.<sup>170</sup>

225. However, there have been instances where the court has permitted registration against landed properties held in the name of companies with third-party shareholders without seeking to pierce the corporate veil;<sup>171</sup> it may, however, be doubtful whether a transfer of property order is possible or enforceable, unless the corporate veil is lifted or the company is held to be a trustee or nominee for one of the parties.<sup>172</sup> In practical reality, however, the landed property is undoubtedly affected and the registered owner will likely be met with requisitions upon an attempted sale.
226. Rule 9.13(3) of the FPR 2010 provides that : “Where an application for a financial remedy includes an application relating to land, the applicant must serve a copy of the application on any mortgagee of whom particulars are given in the application”.
227. The Working Party proposes that Rule 9.13(3) of the FPR 2010 be adopted into the New Code. Moreover, the Working Party also proposes that in addition to the mortgagee, the registered owner should also be served where an application for financial order includes an application relating to landed property, or where a notice of financial order has been lodged with the Land Registry for registration against landed property. The Working Party considers that the registered owner should be served with notice in both scenarios, and should be afforded the opportunity to consider what (if anything) needs to be done. The registered owner may for example wish to apply for the registration to be vacated, or the registered owner may wish to sell the landed property (and such sale may be made subject to conditions, such as payment of the net proceeds of sale into court). The registered owner may also wish to be heard where an application for financial order may affect the

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<sup>170</sup> *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34.

<sup>171</sup> See e.g. *Sun Ngai International Investment Ltd. v Zhan Suhua* [2009] 1 HKLRD 48.

<sup>172</sup> See e.g. *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34.

landed property.<sup>173</sup> **Proposal 55.**

Proposal 55

*The New Code should provide for service upon the registered owner and mortgagee where an application for financial order includes an application relating to landed property, or where a notice of ancillary relief has been lodged with the Land Registry for registration against landed property.*

**(d) Disputed beneficial ownership or legal rights and entitlements**

228. In the course of family proceedings, there are often instances where the ownership or beneficial ownership of properties and assets is disputed, or where legal rights and entitlements are disputed. This may involve situations where it is said that the corporate veil ought to be pierced, or may involve situations where it is alleged that a third-party holds property or asset on trust for a party as nominee or *vice versa*. Although many instances of third-parties becoming involved concern disputes as to ownership, there are also cases of joinder and involvement of third-parties even though there is no real disputed ownership as such.<sup>174</sup>

229. There are presently no rules governing the procedures to be adopted in the above situations. The general practice in England has been to refer to the guidance given in *TL v ML* :-<sup>175</sup>

“(i) The third party should be joined to the proceedings at the earliest

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<sup>173</sup> See e.g. *SWE Ltd. v Chong Lai Fun*, HCA No. 1064/2004, unreported, 28 October 2004 where civil proceedings by a company (the registered owner) for eviction were stayed pending divorce proceedings.

<sup>174</sup> See e.g. *TCWF v LKKS, STL & OIL*, CACV 166/2012, 29 July 2013, on appeal from HCMC 5/2008, unreported, where the disputed issues concerned legal rights and entitlements and the interpretation of contractual documents.

<sup>175</sup> [2006] 1 FLR 1263, per Deputy High Court Judge Mostyn QC (as he then was) at para. 36.

- opportunity;
- (ii) Directions should be given for the issue to be fully pleaded by points of claim and points of defence;
- (iii) Separate witness statements should be directed in relation to the dispute; and
- (iv) The dispute should be directed to be heard separately as a preliminary issue, before the FDR (financial dispute resolution).”

230. It will not be that every case will require joinder of third-parties – there will be those where joinder is not necessary. Nor will it be that every case requires pleadings (for example, simple cases where the disputed issue is clear) or a separate preliminary issue (for example, where the disputed issue is minor and can be conveniently dealt with in the course of other proceedings). On the other hand, costs and expenses can sometimes be saved with the earlier determination by way of separate preliminary issue (for example, there may turn out to be no need to conduct expensive and time-consuming valuation exercises). However, the Working Party considers that it is conducive to efficient case management for such matters to be raised and for appropriate directions (if any) to be given as early as practicable.

231. In fact, the Judge in charge of the Civil List and the Family Law List of the High Court has also raised the following concerns, which were circulated to the legal profession :-<sup>176</sup>

- “1. Parties who are involved in matrimonial proceedings in the Family Court for matters which arose from or are closely connected with the extant disputes in the High Court have (most regrettably) failed to inform the Court of the existence of concurrent proceedings.
2. Parallel proceedings in the High Court and the Family Court on the same or substantially the same subject matters or disputes with close connection should be avoided as far as practicable. Legal advisers handling such proceedings all have a positive duty to assist the Court in this regard.
3. They should properly advise their clients as to the undesirability of commencing parallel and concurrent proceedings in both the Civil List and the Family Law List of the High Court.
4. Where such proceedings are to be or have been commenced, parties’ legal representatives should immediately inform the Court of the same in full and seek appropriate directions from the Court.

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<sup>176</sup>

Hong Kong Bar Association Circular No. 030/12, 23 March 2012.

5. Any failure to do so may attract adverse costs orders against not only their clients but also the legal advisers.”

232. The Working Party proposes that the New Code should set out the duties of the parties and their legal advisers to constantly monitor the progress of matrimonial proceedings and family proceedings. As far as possible, separate civil proceedings should be avoided and ought to be discouraged. In the event any party becomes aware of any issue or dispute arising involving third-parties, including where ownership or beneficial ownership of properties and assets is disputed or where legal rights and entitlements are disputed, the party should as soon as practicable make an application for appropriate directions to be given. Where third-parties have become aware of the dispute and/or the issues involved in the matrimonial proceedings or family proceedings, they may wish to apply to be joined and to have the issues determined. Permitting third-parties an avenue to determine the disputed issue will reduce and discourage the commencement of separate proceedings by such third-parties. **Proposals 56 to 59.**

Proposal 56

*The New Code should set out the duties of the parties and those of their legal advisors to constantly monitor the progress of matrimonial proceedings and family proceedings. In particular, a party should be under a duty to forthwith notify the other parties and the court as soon as that party becomes aware of other proceedings that arise from, may affect or are connected with the matrimonial proceedings and family proceedings.*

Proposal 57

*The New Code should expressly provide that as far as possible separate civil proceedings should be avoided.*

Proposal 58

*The New Code should provide that in the event any party becomes aware of any issue or dispute arising involving third-parties, including where ownership or beneficial ownership of properties and assets is disputed or where legal rights and entitlements are disputed, the party should as soon as practicable make an application for appropriate directions to be given.*

*The New Code should provide that third-parties are permitted to make an application for appropriate directions and for the determination of disputed issues.*

Proposal 59

*The New Code should provide for the general directions that the court may consider giving – including for the joinder of third-parties, the pleading of issues by way of points of claim and points of defence, the filing of separate witness statements, the hearing of the disputed issues separately by way of preliminary issue, the stay of other extant proceedings pending the relevant matrimonial proceedings or family proceedings, and other directions as the court may consider appropriate in the circumstances.*

233. The rules in the RHC in relation to joinder of third-parties should also be included in the New Code. Jurisdiction as to making an application for declaration of beneficial ownership against a third-party should also be provided for : **Proposal 60**.

Proposal 60

*The rules in the RHC in relation to joinder of third-parties should be included in the New Code. Jurisdiction as to making an application for declaration of beneficial ownership against a third-party should also be provided for.*

**H11.9. Financial Dispute Resolution (FDR)**

**(a) Codification**

234. As noted in paragraph 12 above, the pilot scheme for the FDR procedure, governed by PD 15.11, was introduced on 29 December 2003 and has worked successfully in procuring settlements in many financial relief claims brought in the Family Court.
235. By PD 15.11A, PD 15.11 was extended as from 5 August 2004 as to its scope of coverage. The most recent revision to PD 15.11 was made on 23 July 2012. Presently, steps have been taken to amalgamate the FDR procedure into rules and the draft rules are likely to be tabled at the Legislative Council in 2014, but it is not clear when the legislative process will complete.
236. The FDR procedure has essentially replaced and superseded the former practice of “affidavit of means”. However, strictly speaking, Rule 73 of the MCR and PD 15.5 still provide for filing and serving of “affidavit of means”. The Working Party proposes that the abandonment of this former practice should be clarified and reference to the same in the rules and PDs should be deleted for the avoidance of confusion. The Working Party further proposes that the New Code should largely adopt and incorporate the FDR procedure, and that abandonment of the former practice of “affidavit of means” should be clarified. **Proposal 61.**



Proposal 61

*The New Code should largely adopt and incorporate the FDR procedure and PD 15.11.*

*Abandonment of the former practice of ‘affidavit of means’ should be clarified and reference to the same deleted from the rules and PDs.*

237. The current FDR procedure does not cover any application for a variation order under section 11 of the MPPO, but the Working Party considers it now appropriate to extend the FDR procedure to cover such applications. **Proposal 62.**

Proposal 62

*The New Code should provide that the FDR procedure and PD 15.11 shall also apply to applications for a variation order under section 11 of the MPPO.*

238. Six specific points are considered below.

**(b) First appointment**

239. Paragraph 1(c) of PD 15.11 provides for the fixing of the First Appointment (as defined therein). Paragraph 2 of PD15.11 provides for the filing and simultaneous exchange of Form Es. Rule 9.14(3) of the FPR 2010 provides for the situation where a party was “unavoidably prevented” from including any document required by the Form E, and mandates that that party must “at the earliest opportunity” serve a copy of that document on the other party and file a copy with the court, together with a written explanation for the failure to send the same with the Form E. The Working Party considers that these are useful provisions that are presently not found in PD 15.11 and should be incorporated into the New Code : **Proposal 63.**

Proposal 63

*The New Code should incorporate provisions catering for the situation where parties have been unavoidably prevented from including documents with the Form E, for the provision of documents at the earliest opportunity together with a written explanation for the failure to do so earlier.*

**(c) Costs estimates**

240. Paragraph 10 of PD 15.11 provides for the provision of ‘costs estimates’. This has to be read together with PD 15.9 as well as Explanatory Note 3 to PD 15.11 and paragraphs 26 and 27 of PD 15.12. The Working Party recommends that these various disparately located PDs should be consolidated.

241. The Working Party echoes and supports the sentiments expressed in PD 15.9, which are reproduced below for reference :-

*“The costs of applications for ancillary relief relating to capital assets (applications for property adjustment and lump sum orders) are, in a great number of cases, so high in relation to the value of the assets involved that a judge will be unable to make a realistic determination without an approximate indication of the anticipated costs of each side.*

*It is, moreover, in the interests of the parties themselves that each should be aware, as early as possible before the hearing, of their potential liability for costs. It has been found that if the parties themselves are made to realise that the value of the assets after payment of costs may be so reduced as to make litigation unjustified, a sensible compromise can be effected.*

*Estimates of costs on each side should therefore be prepared as early as possible for submission to the court at the court’s request at any stage of the proceedings. At the time that the case is fixed for hearing, up-to-date estimates must be supplied to the court and the parties. Such estimates should differentiate costs already incurred from the expected costs of the hearing. They should also differentiate party and party costs from the balance payable by the client.”*

242. The Working Party considers that it will also be of assistance to the parties for costs estimates to be included and provided together with open proposals that have to be made (for which see below).  
**Proposal 64.**

*Proposal 64*

*The New Code should provide for and deal with costs estimates in a comprehensive and consolidated manner, incorporating paragraph 10 of PD 15.11, PD 15.9, paragraphs 26 and 27 of PD 15.12 and Rule 9.27 of the FPR 2010.*

*Costs estimates should be prepared and provided prior to the substantive hearings (in particular the FDR hearing and the financial order hearing) and should also be provided together with open proposals.*

**(d) *Open proposals***

243. Paragraph 11 of PD 15.11 provides for the mandatory making of open proposals, and paragraph 11(c) clarifies that no privilege attaches to such proposals.
244. As recommended above, the Working Party considers that it will be of assistance to the parties for costs estimates to be included and provided together with such open proposals that have to be made.

**(e) *Sanctioned offers***

245. PD 15.12 sets out the general applicability of the RHC and RDC to matrimonial proceedings and family proceedings (with necessary modifications). Rule 3 of the MCR also provides for the general applicability (with necessary modifications) of the RHC, subject to the MCR.

246. Paragraph 9 of PD 15.12 lists out “some of the examples” of “measures under the Civil Justice Reform [that] are by their nature of general applicability”. Thereunder, Order 22A (Miscellaneous Provisions about Payments into Court) has been listed, but Order 22 has not. In particular, Order 22 deals with *inter alia* sanctioned offers and sanctioned payments, together with the consequences (including costs consequences) of the same.
247. Considerations should be given as to whether Order 22 should apply to proceedings for financial order, and if so, what necessary and appropriate modifications should be incorporated into the New Code. In any event, the applicability (or not) of Order 22 ought to be clarified, as the present state of the procedural rules (with the general applicability of the RHC and RDC provided for in PD 15.12 and Rule 3 of the MCR, but the omission to mention Order 22 in the list at paragraph 9 of PD 15.12) is not desirable and should be made clearer.
248. Due to the nature of financial order proceedings and the potential and possible outcomes thereof, there may be more scope and latitude for reasonable debate concerning the question of, for example, whether or not the eventual judgment is “*more advantageous than*” the sanctioned offer, as compared to general civil litigation; similar to the manner in which orders for “costs in the cause” for interlocutory matters are generally inappropriate in financial relief proceedings.
249. Careful thought will also need to be directed at the interplay, if any, between the mandatory “open proposals” (or other optional open proposals voluntarily made) and sanctioned offers (which by their very nature are necessarily optional and elective) which may otherwise cause confusions to practitioners and/or parties.
250. The mandatory provisions and conditions in Order 22 were designed with general civil proceedings in mind, and careful thought will be required for necessary and appropriate modifications to be made, including for example, the matters which must be stated or provided for before there is a valid sanctioned offer and the conditions which must be fulfilled before the default consequences will follow, and which may be deemed as

unsuitable or inappropriate in family proceedings.

251. The Working Party proposes that for the reasons articulated above, sanctioned offers and sanctioned payments under Order 22 of the RHC shall not apply in family proceedings : **Proposal 65**.

Proposal 65

*The New Code should specifically stipulate that Order 22 of the RHC shall not apply in family proceedings.*

**(f) Forum of FDR hearings**

252. The First Appointment hearing is almost inevitably heard in the Family Court. Although most financial order proceedings will remain in the Family Court – where they are either settled (within or outside the FDR procedure) or proceed to trial in the Family Court – some financial order proceedings are transferred to the High Court.
253. In some instances, the transfer to the High Court will take place after the FDR process has already been concluded and has failed. However, there are also instances where the matter has been transferred to the High Court (for example, because earlier interlocutory matters had necessitated or justified such transfer) but without the FDR having taken place yet. In such situation, unless an FDR is, exceptionally, not appropriate, the FDR hearing may either take place in the High Court or the Family Court.
254. Although FDR hearings have also been conducted in the High Court, experience has shown that financial order proceedings that have been transferred to the High Court are occasionally re-transferred for the purposes of FDR to the Family Court, where, in practice, FDRs are dealt with far more frequently and in a procedurally well-established and well-managed manner that has developed over the years. To conduct the FDR in the Family Court also has the advantage of not “conflicting out” the judge of the Court of First Instance who had been handling the financial order

proceedings, in the event that the FDR process fails. This is of particular significance where, as is presently the situation, there is a limited number of judges of the Court of First Instance handling financial order matters. Furthermore, financial order proceedings that have warranted transfer to the High Court are often highly complex and the judge of the Court of First Instance will have acquired a detailed understanding of the case over the course of interlocutory matters – an advantage that would greatly assist a trial judge, but would not usually be necessary for the purposes of conducting an FDR.

255. In Proposal 49 above, the Working Party proposes that the New Code should provide for the practice and procedure to apply for transfer to and re-transfer from the High Court. The Working Party proposes that the New Code should also provide for the possible partial re-transfer from the High Court to the Family Court for the conduct of the FDR hearing, either upon application or of the court's own motion : **Proposal 66**.

Proposal 66

*Where proceedings have been transferred to the High Court, the New Code should provide for the possible partial re-transfer from the High Court to the Family Court for the conduct of the FDR hearing, either upon application or of the court's own motion.*

***H11.10. Application under the I(PFD)O***

256. Section 25(1) of the I(PFD)O provides that “subject to subsections (2) and (3), proceedings under this Ordinance shall be commenced in the District Court”. It was held that “the reference to District Court in section 25 should be read as referring to our Family Court”.<sup>177</sup> Further, paragraph 4(12) of PD 15.12 provides that proceedings issued under the I(PFD)O are included within “Family Proceedings”.

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<sup>177</sup> In *Re Estate of Chow Nai Chee (Deceased)*, [2010] 5 HKLRD 640, Lam J (as he then was), at para. 2.

257. Section 25(2) of the I(PFD)O provides for the transfer to the High Court upon application of any party or at the instance of the District Court (Family Court).
258. As such, the Working Party considers that the New Code should include provisions for the practice and procedure of proceedings under the I(PFD)O, applicable to both the Family Court and, in the event of transfer under section 25(2) of the I(PFD)O, the High Court. **Proposal 67.**

Proposal 67

*The New Code should have a new Part to provide for the practice and procedure for proceedings brought under the I(PFD)O, which should also be included within the meaning of “Family Proceedings”.*

*This should include provisions providing for the practice and procedure relating to commencement of proceedings in the Family Court, the filing of evidence and documents in support, and other procedural matters, including interlocutory applications, transfer and re-transfer.*

259. Proceedings under the I(PFD)O are usually commenced by way of originating summons. The I(PFD)O does not stipulate the parties that ought to be joined. The usual practice is to join the personal representative/executor (if any) and all beneficiaries of the relevant estate. The Working Party proposes that this be stipulated in the New Code. **Proposal 68.**

Proposal 68

*The New Code should stipulate the parties to be named in the originating application, including the personal representatives, executors (if any), all beneficiaries (whether testate, intestate or upon partial intestacy) and other persons affected by the application.*

260. Under section 11 of the I(PFD)O “Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of 6 months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 4, the court for the purpose of facilitating the making of financial provision for the applicant under this Ordinance may order that the deceased’s severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Ordinance as part of the net estate of the deceased”. The Working Party proposes that where such an order is applied for, the joint tenant should be joined as a party and should be entitled to be heard. **Proposal 69.**

Proposal 69

*Where there is an application for an order to be made under section 11 of the I(PFD)O, the joint tenant should be joined as a party.*

261. Section 6 of the I(PFD)O provides that the application for an order under section 4 thereof must be made within 6 months from the date on which representation to the estate is first taken out, but the court has power to grant leave for late application. The Working Party proposes that the New Code should provide that where such application has to be made, it should be made in the originating application, to be supported by affidavit setting out the grounds and evidence justifying the same. **Proposal 70.**



Proposal 70

*The New Code should provide that where an application is made after the 6-month period stipulated by section 6 of the I(PFD)O, the originating application shall include an application for leave to bring such late application, to be supported by affidavit setting out the grounds and evidence justifying the same.*

262. Section 7 of the I(PFD)O empowers the court to grant interim relief, subject to such conditions or restrictions, if any, as the court may impose. The Working Party proposes that the New Code should provide that applications for interim relief should be made in the originating application wherever appropriate or thereafter by way of summons. The Working Party also recommends that in general, interlocutory applications should be made by way of summons. **Proposal 71.**

Proposal 71

*The New Code should provide that applications for interim relief should be made in the originating application wherever appropriate or thereafter by way of summons.*

*The New Code should provide that in general interlocutory applications should be made by way of summons.*

263. Under section 8 of the I(PFD)O, applications may be made for variation, discharge, suspension or revival. Applications for variation may also be made under section 9 of the I(PFD)O. The Working Party proposes that the New Code should make provision for such applications. **Proposal 72.**

Proposal 72

*The New Code should provide for the practice and procedure relating to applications under section 8 of the I(PFD)O for variation, discharge, suspension or revival and section 9 of the I(PFD)O for variation.*

264. Sections 12 and 13 of the I(PFD)O empower the court to order a “donee” to provide money or other property for the purposes of making financial provision to the applicant, in certain circumstances where the deceased had made dispositions less than 6 years before the date of death or had made certain contracts. The Working Party proposes that the New Code should provide that such application should be made in the originating application wherever appropriate or thereafter by way of summons. The Working Party considers that where an application under section 12 or 13 of the I(PFD)O is made, the alleged “donee” should be joined as a party and should be entitled to be heard. **Proposal 73.**

Proposal 73

*The New Code should provide that applications under section 12 or 13 of the I(PFD)O should be made in the originating application wherever appropriate or thereafter by way of summons.*

*Where there is an application for an order to be made under section 12 or 13 of the I(PFD)O, the alleged “donee” should be joined as a party.*

265. The “true rivals” in contested proceedings under the I(PFD)O will generally involve the applicant on the one hand and those who oppose the application on the other hand. Where executors have been appointed or personal representatives exist, they will be joined as they are necessary parties and need to be bound by the judgment. However, the usual position is that the executor or personal representative will (in that capacity) normally adopt a

neutral position, leaving the “true rivals” or opposing camps to litigate. This will generally be so even if the relevant executor or personal representative is also (as often is the case) a beneficiary – when acting in the capacity of executor or personal representative, though he or she may choose to actively contest in a personal capacity.<sup>178</sup>

266. That being so, executors or personal representatives may sometimes find the need to bring an application for court directions, including *Beddoe* sanction and other related directions and orders relating to the position to be adopted, appropriate applications to be brought, provision for costs and indemnities to be paid. Such application would be made in the probate jurisdiction of the High Court and would be brought by way of a separate action (or integrated into existing probate proceedings).
267. The Working Party does not consider that the New Code should apply to such related proceedings or applications. The proceedings and applications lie outside “Family Proceedings” and are also not brought under the I(PFD)O itself, *albeit* that they arise from or the need to bring these proceedings and applications arises because of the I(PFD)O proceedings.
268. Experience has shown that proceedings under the I(PFD)O are often suitable for resolution by way of mediation or similar alternative dispute resolution avenues. The Working Party proposes that the New Code should make provisions for directions to be given for mediation or for the FDR procedure to be made applicable to proceedings under the I(PFD)O. **Proposal 74.**

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For example, in *Baker v Baker & Ors.* [2008] EWHC 977, the personal representatives of the estate of the deceased “*adopted a neutral position ... providing assistance to the court as appropriate*”, and the court described this position taken as “*as may be expected*”. On the other hand, in *Re Lee Sai Wai (Deceased)* [2002] 4 HKC 517, costs were awarded against Ms. Li personally – although she was also appointed executor of the estate of the deceased. Deputy High Court Judge Saunders (as he then was) remarked – “*There will be an order nisi that the wife shall have her costs paid by Ms. Li personally, not in her capacity as executrix of the estate, for it is in her personal capacity as a beneficiary that the claim has been resisted*”.

Proposal 74

*The New Code should make provisions for directions to be given for mediation or for the FDR procedure to be made applicable to proceedings under the I(PFD)O.*

**(a) Applications for alteration of maintenance agreement after the death of one party**

269. Rules for applications under section 16 of the MPPO (previously section 37 of the MCO) are provided by Rules 101 and 102 of the MCR, under which an application must be made by originating summons in the prescribed form, i.e. Form 17.<sup>179</sup>
270. The court also has jurisdiction to vary or revoke a maintenance agreement under section 19 of the I(PFD)O. Under section 20 of the I(PFD)O, the powers of the court under that Ordinance can also be exercised in relation to an application under either section 11(6) or 16(1) of the MPPO.
271. Unlike Chapter 3 of Part 8 of the FPR 2010, Rules 101 and 102 of the MCR and Form 17 appear to envisage that the applicant will only be one of the parties to the agreement. Rule 8.8 of the FPR 2010 provides for either the surviving party to the agreement or the personal representatives of the deceased to be the applicant.
272. In view of the overlapping jurisdiction under Part V of the I(PFD)O and sections 11(6) and 16 of the MPPO, the Working Party proposes that the New Code should provide rules for all such provisions in the same Part as the I(PFD)O : **Proposal 75.**

Proposal 75

*The New Code should provide rules for Part V of the I(PFD)O and sections 11(6) and 16 of the MPPO in the same Part as the I(PFD)O.*

<sup>179</sup>

The form still refers to the repealed section 37 of the MCO.

***(b) Application for provision from deceased's estate***

273. Rule 103 of the MCR applies to an application by a former spouse of a deceased person for provision out of the deceased's estate. It refers to an application under "section 38 of the Ordinance", i.e. the MCO, but that section was repealed when the I(PFD)O was enacted in 1995. The Working Party proposes that the New Code includes in the same Part as the I(PFD)O, rules which apply to all proceedings by which a person applies for provision from a deceased's estate, both under the I(PFD)O and the MPPO : **Proposal 76.**

*Proposal 76*

*The New Code should include, in the same Part as the I(PFD)O, rules which apply to all proceedings by which a person applies for provision from a deceased's estate, both under the I(PFD)O and the MPPO.*

***H12. Procedures for miscellaneous applications***

***H12.1. Types of applications***

274. There are various miscellaneous applications which arise in family proceedings. Those relating to financial applications have been grouped under the section on applications for financial orders, and those relating to children will be grouped under the section on children proceedings. Other miscellaneous applications are :-
- (a) Declarations;
  - (b) Applications under the DCRVO;
  - (c) Applications for non-cohabitation under the SMOO; and
  - (d) Applications for consent to marry under the MO.

## ***H12.2. General approach for the new rules***

275. There is at present no coherent set of procedural rules to cover all the miscellaneous applications listed above. While in some cases there are specific procedural rules, in others, reliance is placed on the RHC or RDC, expressly or by implication.
276. The Working Party considers that a code with, so far as circumstances permit, uniform procedures, covering all miscellaneous family proceedings would assist all persons involved in the conduct of such proceedings in their timely, just and cost-effective disposal.
277. Again a comparison with the relevant provisions of the FPR 2010 may help with the identification of areas of possible improvement :-
- 277.1 In the FPR 2010, matrimonial proceedings, applications for a financial remedy, proceedings under Part IV of the FLA 1996 relating to domestic violence, proceedings relating to children, including adoption and proceedings relating to the civil aspects of child abduction and reciprocal enforcement of maintenance orders are dealt with under separate Parts. The Working Party proposes to adopt a similar approach in the New Code : **Proposal 77**.

### *Proposal 77*

*The New Code should, so far as circumstances permit, include uniform procedures which cover all miscellaneous family proceedings which would assist all persons involved in the conduct of such proceedings in their timely, just and cost-effective disposal.*

- 277.2 In addition to the proceedings covered by specific parts, Part 8 of the FPR 2010 prescribes procedures for a number of miscellaneous applications. Each type of application is given a separate chapter. Each chapter sets out, among other things, its scope, where to start the proceedings and who the parties are. The Working Party

proposes that the procedures for miscellaneous applications not falling into any of the categories in the preceding paragraph are grouped together in the New Code and that a uniform format similar to that in Part 8 of the FPR 2010 is adopted : **Proposal 78**.

Proposal 78

*The procedures for miscellaneous applications not falling into any of the categories in paragraph 277.1 should be grouped together in the New Code and a uniform format similar to that in Part 8 of the FPR 2010 should be adopted.*

**H12.3. Specific applications**

**(a) Declarations**

278. Although sections 17 and 20F of the AO provide for the recognition of non-Convention and Convention adoptions respectively made outside Hong Kong, there is no specific provision for an application for a declaration to be made, unlike section 20G which provides for an application to be made to the court for non-recognition of a Convention adoption as a full adoption and section 20H which provides for an application to be made to the court for non-recognition of a Convention adoption on public policy grounds. Rules 28 and 29 of the CAR provide the procedures for applications under sections 20G and 20H, respectively.
279. Under section 49 of the MCO, a person who wishes to apply for a declaration of legitimacy or validity of marriage must do so by petition to the court. Rule 124 of the MCR provides procedures for such applications, including the giving of notice to the Law Officer (Civil Law).
280. No provision is made for a person to apply to the court to have his/her overseas divorce or legal separation recognised under Part IX of the MCO. While an application for a declaration could perhaps be made under the inherent jurisdiction of the court under

Order 15, rule 16 of the RHC or the RDC respectively, those provisions do not seem apt for what is in effect a declaration as to marital status.

281. No specific procedure is prescribed for an application made under section 9(3) or (7) of the MRO for a declaration that a customary marriage or a validated modern marriage subsists between the applicant and the other party to such a marriage.
282. Chapter 5 of Part 8 of the FPR 2010 applies to applications for declarations as to marital status, parentage, legitimacy or legitimation and adoptions effected overseas. In addition to specifying the scope of the chapter, where to start the proceedings and the parties, Chapter 5 provides for the role of the Attorney General (as defined in the FPR 2010) in the proceedings and for service of a declaration of parentage on the Registrar General (as defined in the FPR 2010). The Working Party proposes that the New Code should provide for procedures for applications for the declarations listed in the paragraph above : **Proposal 79**.

*Proposal 79*

*The New Code should provide for procedures for applications for declarations as to marital status, parentage, legitimacy or legitimation and adoptions effected overseas.*

**(b) Applications under the DCRVO**

283. Specific rules are contained in the DCRVR, but subject to those rules, the RHC applies to proceedings under the DCRVO. Under the Domestic Violence (Amendment) Ordinance 2009, there are transitional provisions in relation to proceedings under the repealed DVO, which were commenced prior to 1 January 2010 when the DCRVO came into force. Part 10 of the FPR 2010 applies to proceedings under Part 4 of the FLA 1996 in relation to domestic violence. The Working Party proposes that rules which apply to the DCRVO should be included in a separate part of the New Code : **Proposal 80**.



Proposal 80

*Rules applicable to the DCRVO should be included in a separate part of the New Code.*

**(c) Applications for non-cohabitation under the SMOO**

284. Under Order 89, rule 1 of the RDC, proceedings under section 3 of the SMOO must be begun by originating summons.
285. The SMOO is rarely invoked. But judicial experience shows that, in some circumstances, it may be the only Ordinance under which an applicant can seek remedy.<sup>180</sup> The Working Party proposes that rules should be made in the New Code to provide for applications for non-cohabitation under the SMOO to be made to the Family Court in accordance with the proposed uniform procedures : **Proposal 81.**

Proposal 81

*Rules should be made in the New Code to provide for applications for non-cohabitation under the SMOO to be made to the Family Court in accordance with the proposed uniform procedures.*

**(d) Applications for consent to marry under the MO**

286. Rules may be made pursuant to section 72 of the DCO prescribing the method of application for consent and other related matters. Chapter 9 of Part 8 of the FPR 2010 provides rules for similar applications under section 3 of the MA 1949. The Working Party proposes that the New Code should include rules for applications under section 18A of the MO to the Family Court : **Proposal 82.**

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<sup>180</sup>

For example, a party to a non-monogamous marriage may only make an application under the SMOO for separation orders and maintenance orders.

Proposal 82

*The New Code should include rules for applications under section 18A of the MO to the Family Court.*

**H13. Children proceedings**

**H13.1. Scope of the new rules**

287. Unlike England,<sup>181</sup> we do not have a comprehensive ordinance which exclusively deals with children's matters. Instead, the statutory provisions are scattered in different Ordinances including, the MCO, the MPPO, the GMO, the SMOO, the AO and the CACO. Inevitably, the procedures for proceedings relating to children are seriously fragmented and limited. In some cases, rules simply do not exist. A unified set of procedural rules for children proceedings should be introduced.

288. As to the scope of the new procedural rules for children proceedings, the Working Party considers :-

288.1 It should cover all the extant proceedings relating to children arising from the applications brought under sections 10, 11 and 12 of the GMO; section 19 of the MPPO; section 48 of the MCO; sections 6, 12 and 13 of the PCO; section 5(1)(b) of the SMOO; applications under the inherent jurisdiction of the High Court, including wardship proceedings under Order 90 of the RHC; the Hague Convention under the CACO and Order 121 of the RHC; and adoption proceedings under the AO : **Proposal 83**.

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<sup>181</sup>

See Ch A 1989.

Proposal 83

*The new rules on children proceedings should cover all the extant proceedings relating to children arising from the applications brought under sections 10, 11 and 12 of the GMO; section 19 of the MPPO; section 48 of the MCO; sections 6, 12 and 13 of the PCO; section 5(1)(b) of the SMOO; applications under the inherent jurisdiction of the High Court, including wardship proceedings under Order 90 of the RHC; the Hague Convention under the CACO and Order 121 of the RHC; and adoption proceedings under the AO.*

- 288.2 Applications for financial orders for children; applications under the I(PFD)O; and applications under the DCRVO will be separately provided for under separate Parts in the New Code.<sup>182</sup> It is not necessary to deal with them in the new rules on children proceedings.
- 288.3 In Hong Kong, applications for parental orders are covered by section 12 of the PCO or wardship proceedings. There is no equivalent of section 54 of the English HFEA 2008. Accordingly, it is not necessary to introduce provisions similar to Part 13 of the FPR 2010, which deals with applications under section 54 of the HFEA 2008.
- 288.4 Representation of children is a topic of general application. It will be dealt with separately in a separate part in the New Code.<sup>183</sup>

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<sup>182</sup> See Parts H11 and H12 of this consultative paper.

<sup>183</sup> See Part H25 of this consultative paper.

### ***H13.2. Parts 12 and 14 as broad framework***

289. Under the FPR 2010, Part 12 deals with children proceedings except parental order proceedings<sup>184</sup> and adoption proceedings. Part 14 deals with adoption proceedings.
290. While Part 12 principally sets out the procedure for proceedings brought under the Ch A 1989, of which there is no local equivalent, it may still be adopted as a broad framework for the new procedures for proceedings relating to children in the New Code, in that there will be five main chapters under this Part in the New Code, namely (i) Interpretation and Application; (ii) General Rules; (iii) Special Provisions; (iv) Inherent Jurisdiction, including Wardship Proceedings; and (v) Hague Proceedings. Part 14 is also a good model to follow. Both parts should be adopted with necessary modifications as the broad framework for the procedural rules on children proceedings in the New Code : **Proposal 84.**

#### *Proposal 84*

*Parts 12 and 14 of the FPR 2010 should be adopted as the broad framework for the new procedural rules on children proceedings in the New Code.*

291. As will be discussed below, in some areas such as inherent jurisdiction, the rules in Part 12 of the FPR 2010 may be adopted with necessary modifications. So are the rules in Part 14. We next address the need for a unified definition for “child”.

### ***H13.3. A unified definition for “child”***

292. Under section 2(1) of the AM(RP)O, a person shall attain full age on attaining the age of 18. Correspondingly, section 3 of the Interpretation and General Clauses Ordinance<sup>185</sup> defines “minor”

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<sup>184</sup> Which, as noted, is dealt with under Part 13.

<sup>185</sup> Cap 1.

or “infant” as a person who has not attained the age of 18. In the family and matrimonial context, different Ordinances use different expressions to describe the same person who is under 18. For example, “minor” is used in the GMO<sup>186</sup> and the DCRVO;<sup>187</sup> “specified minor” in the DCRVO;<sup>188</sup> “child” in the MPPO;<sup>189</sup> “child of the family” in the MPPO;<sup>190</sup> “child” and “child of the family” in the MCR;<sup>191</sup> “child” in the I(PFD)O;<sup>192</sup> and “infant” in wardship proceedings.<sup>193</sup> Note, however, for the purpose of the CACO, the Hague Convention ceases to apply to a child when he attains the age of 16.<sup>194</sup>

293. The use of different terms for the same category of persons easily leads to unnecessary confusion. To promote consistency with respect to both terminology and approach, the Working Party considers that a single unified term should be used in the New Code for all procedures concerning children irrespective of how

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<sup>186</sup> The term “minor” is not defined in the GMO. One goes back to the general definition in section 3 of Cap 1.

<sup>187</sup> See section 2, DCRVO.

<sup>188</sup> Which means a minor who is a child (whether a natural child, adoptive child or step-child) of the applicant or respondent concerned; or who is living with the applicant concerned.

<sup>189</sup> Which is defined to include, in relation to one or both parties to a marriage, an illegitimate or adopted child of that party or, as the case may be, of both parties : section 2, MPPO.

<sup>190</sup> Which means, in relation to a marriage, a child of both those parties; and any other child who has been treated by both those parties as a child of their family : section 2, MPPO.

<sup>191</sup> Which is given the same meaning as in the MPPO : Rule 2, MCR.

<sup>192</sup> Which includes a child whose father and mother were not married to each other at the time of its birth; a child en ventre sa mere at the death of the deceased; a child of a union of concubinage; a child adopted in Hong Kong in accordance with Chinese law and custom before 1 January 1973 : section 2, I(PFD)O.

<sup>193</sup> There is no separate statutory definition for “infant” in wardship proceedings.

<sup>194</sup> See Article 4, Hague Convention.

they are described under different Ordinances, subject to any contrary definition in any principal Ordinance : **Proposal 85**.

Proposal 85

*The New Code should contain a unified term for the procedures concerning children irrespective of how they are described under different Ordinances, subject to any contrary definition in any principal Ordinance.*

**H13.4. Statement as to arrangements for children**

294. The filing of a statement as to arrangements for children is governed by Rule 9(3) and Rule 15B of the MCR. We consider the current practice adequate and propose that Rules 9(3) and 15B should be incorporated to cover all children under the age of 18 years into the New Code : **Proposal 86**.

Proposal 86

*Rules 9(3) and 15B of the MCR should be incorporated into the New Code and should cover all children under the age of 18 years.*

**H13.5. Custody, care and supervision, removal, and related matters**

295. Presently, the procedures for custody, care and supervision, removal and related matters are contained in Rules 92 to 96 of the MCR.

**(a) Rule 92**

- 295.1 Rule 92(1) provides that an application for an order relating to custody, education or the supervision of a child shall be made to a judge.

- 295.2 Rule 92(2) provides that in an application for an order with terms

agreed by the parties for a child, or where the only question to be determined relates to the extent that access may be given, then the application may be made to the Registrar. It is then open to the Registrar to refer the matter to a judge if deemed necessary.

295.3 Rule 92(3) provides the circumstances whereby the guardian of a child may apply for an order with respect to a child as under Rule 92(1).

295.4 Rule 92(4) provides that a judge may refuse to allow affidavit evidence to be given if there is a dispute over a child's arrangements unless the deponent is available to give oral evidence in court.

295.5 Rule 92(5) and (6) relates to the procedure to be adopted where it is alleged that one party has committed adultery or formed an improper association with another. They allow the named third-party to be served with the affidavit concerned and to apply to intervene in the proceedings.

295.6 Rule 92(7) is a general provision allowing the court at any stage to give directions for the filing or service of pleadings or directions for the further conduct of the proceedings.

**(b) Rule 93**

295.7 If the Director of Social Welfare is applying to vary or discharge a supervision order made under section 48 of the MCO, this rule allows such applications in some instances to be made by letter, e.g. where the application is unopposed.

**(c) Rule 94**

295.8 Rule 94(1) provides that an application for leave to remove a child permanently out of Hong Kong shall be made to a judge, unless it is unopposed, in which instance the application may be made to the Registrar.

295.9 Rule 94(2) provides that either party in the proceedings may apply to the court for an order preventing a child's removal from Hong

Kong or out of the custody or care and control of the person named, unless the leave of the court is sought first. Further it states that such an application can be made ex parte.

**(d) Rule 95**

295.10 Rule 95(1) gives a judge or the Registrar the ability to refer a matter to the Social Welfare Department and to request a report.

295.11 Rule 95(2) provides that a request may be made by any party to an application to which Rule 92 applies to the Registrar who also has the ability to call for a report from the Director of Social Welfare.

295.12 Rule 95(3) provides that the Director of Social Welfare may search the court file, after the Director has completed his report the parties may inspect it and seek copies upon payment of the prescribed fee and the Director of Social Welfare will also be informed of the court date, when the matter is due to be determined.

**(e) Rule 96**

295.13 This allows a statement of the nature of proceedings to be made where such proceedings are brought before any court in Hong Kong relating to a child, though it is rarely invoked in practice.

296. Subject to Proposals 88 to 89 below, the Working Party proposes that Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code : **Proposal 87**.

*Proposal 87*

*Subject to Proposals 88 to 89 below, Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code.*



297. Rule 92(5) and (6) are effectively obsolete. We propose not to incorporate them into the New Code : **Proposal 88.**

Proposal 88

*Rule 92(5) and (6) of the MCR should not be incorporated into the New Code.*

298. Rule 95(2) enables the Registrar to call for a report from the Director of Social Welfare. Likewise, under section 17 of the GMO, the court may request the Social Welfare Department to provide a report to the court. Although not expressly stated, it is also possible for the court to direct that a clinical psychologist's report, government-funded, be provided and filed by the Director of Social Welfare. Likewise, orders are routinely made in practice for international social welfare reports. The parties are generally asked to pay a contribution towards the costs associated with the provision of such an international report. We propose to put the provision of a clinical psychologist's report and an international social welfare report on firmer statutory footing in the New Code : **Proposal 89.**

Proposal 89

*It should be expressly stated in the New Code that when the court directs that a report be filed by the Director of Social Welfare, it may also order that a clinical psychologist's report or an international social welfare report be provided.*

**H13.6. Child dispute resolution**

299. In line with international norms, PD 15.13 on the CDR PD pilot scheme was introduced on 3 October 2012 to establish a procedure for dealing with disputes relating to children in a less adversarial manner. The pilot scheme will run for three years and a research project will be established to ascertain its effectiveness. In

summary :-

- 299.1 Paragraph 1 states that it will apply to all children matters commenced in the Family Court, including applications under the GMO. It does not apply to adoptions.
- 299.2 Paragraph 2 states that the process is mandatory unless otherwise directed by the court.
- 299.3 Paragraph 3 sets out the underlying objective of the CDR PD : “The underlying objective is to support mothers and fathers, so that they are able to effectively parent their children post separation or divorce. The intention is to ensure that whilst the best interests of children remain the court’s paramount concern, lasting agreements concerning children are obtained quickly and in a less adversarial atmosphere. The focus is therefore on the children’s best interests together with the duties and responsibilities of their parents.”
- 299.4 Paragraph 4 provides that the trigger for the CDR PD is “where it is clear that there is a dispute over children”. It allows for a Children’s Appointment (“CA”) to be heard either at the same time as a First Appointment (as under PD15.11) or earlier if necessary. The notice of a CA is by way of a Form I, attached to PD15.13.
- 299.5 Paragraph 5 states that no affirmations/affidavits are to be filed by either party without leave of the court, save for an affirmation/affidavit in support of the summons.
- 299.6 Paragraph 6 provides for the Form I to be served on the respondent by the applicant.
- 299.7 Paragraph 7 provides a time frame for the filing of the new Children’s Form – Form J and a concise statement of issues in relation to the application. Both are to be filed 14 days prior to the CA.
- 299.8 Paragraph 8 provides for a situation where the CA is heard separately from the First Appointment. In that event in addition to the Form J and a concise statement of issues, the parties are also required to deliver to the court a brief chronology and a list of

orders and directions sought.

- 299.9 Paragraph 9 provides for the filing of a cost estimate on the last working day prior to the CA.
- 299.10 Paragraph 10 provides that at CA, the judge with a view to defining the specific issues in dispute shall give directions, if necessary, for the filing of a Social Investigation Report (“SIR”); an International SIR; other expert’s reports (e.g. psychologist’s reports); limited affirmations/affidavits from the parents (i.e. limited to the issues in dispute and only if necessary); and limited affirmations/affidavits from other third-parties. The judge may also make a host of orders as set out in paragraph 10 including a direction that the parties attend counselling, a parenting education programme and/or direct any other form of third-party intervention that may assist the parties.
- 299.11 Paragraph 11 provides that 14 days prior to the Children’s Dispute Resolution hearing (“CDR”) the parties shall file and exchange a detailed Statement of Proposals relating to the future arrangements for the children.
- 299.12 Paragraphs 12 to 18 provide for the conduct of the CDR.
- 299.13 Paragraphs 19 to 23 provide for the conduct of the trial.
300. The Working Party supports the introduction of PD 15.13. As a matter of principle, it should be incorporated into the New Code. However, we would like to make the following observations.
- 300.1 Although as a matter of good practice it is accepted that a child should not be arranged by one parent to be medically examined or assessed by a psychiatrist or psychologist without either the consent of the other parent or order of the court, nowhere is this specifically stated in our existing rules. In England, Rule 25.4(2)-(4) of the FPR 2010 states as follows :-

“(2) In children proceedings –

- (a) an expert may not be instructed; and

- (b) a child may not be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in the proceedings,

without the court's permission.

- (3) Where in contravention of paragraph 2(a) an expert is instructed, evidence resulting from the instructions is inadmissible in children proceedings unless the court rules that it is admissible.
- (4) Where in contravention of paragraph 2(b) a child is medically or psychiatrically examined or otherwise assessed, evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible.”

300.2 We propose to adopt Rule 25.4(2)-(4) into the New Code.

300.3 As noted, the court may under paragraph 10 of PD 15.13 direct that the parties attend counselling, a parenting education programme and/or any other form of third-party direct intervention that may assist the parties. There is however no express legislative basis for this. In England, the statutory underpinning is provided by section 11A of the Ch A 1989, which gives the English court the power to make a “contact activity direction”, where there are difficulties over contact (access). The activities include programmes, classes, counselling or guidance sessions. Although there is no local equivalent, we believe that the court may still derive the power to make such a direction from its inherent jurisdiction or within section 3 of the GMO and section 48 of the MCO. So we do not see any objection to the inclusion of such a power in the New Code.

300.4 We note that PD 15.13 will be reviewed in three years’ time. Any future amendments arising from the research project on review need to be incorporated into the New Code.

301. The Working Party proposes to incorporate into the New Code PD 15.13, with all future amendments arising from the review, and Rule 25.4(2)-(4) of the FPR 2010 with necessary modifications. Readers are invited to express their views with respect to whether or not the CDR procedure should be extended to the High Court : **Proposal 90.**

Proposal 90

*PD15.13 with all future amendments arising from the review and Rule 25.4(2)-(4) of the FPR 2010 with all necessary modifications should be incorporated into the New Code. Readers are also invited to express their views with respect to whether or not the CDR procedure should be extended to the High Court.*

**H13.7. Guardianship**

302. The procedures for applications under the GMO are contained in Order 90 of the RHC, Order 90 of the RDC and Rule 69 of the MCR. PD 15.13 also applies to disputes arising out of applications made under the GMO. The Working Party considers the current practice under these rules adequate and proposes to incorporate them into the New Code : **Proposal 91**.

Proposal 91

*The provisions in Order 90 of the RHC, Order 90 of the RDC and Rule 69 of the MCR, which are relevant to guardianship proceedings, should be incorporated into the New Code.*

**H13.8. Inherent jurisdiction including wardship**

303. Currently, the procedure for wardship proceedings is governed by Order 90, rule 3 of the RHC, supplemented by PD 23.1 on Wards of Court. In formulating the desired reforms, we repeat Proposal 16 above.

**H13.9. CACO**

304. The procedures for applications brought under the CACO are set out in Order 121 of the RHC. We consider the extant practice satisfactory and propose to incorporate Order 121 into the New

Code : **Proposal 92.**

Proposal 92

*Order 121 of the RHC should be incorporated into the New Code.*

**H13.10. Parentage, etc.**

305. Under section 49 of the MCO, an applicant may seek a declaration of legitimacy. The LO also sets out the applications that can be made by a legitimated person. The procedure is set out in Rule 124 of the MCR. We propose to incorporate Rule 124 into the New Code : **Proposal 93.**

Proposal 93

*Rule 124 of the MCR should be incorporated into the New Code.*

306. The PCO provides presumptions of paternity which can be rebutted (section 5), the same succession rights for illegitimate children as legitimate ones if their parents die after 19 June 1993 (section 3) and for a person to apply to court for a declaration of his parentage, legitimacy or legitimation (section 6). For children born as a result of medical treatment, it provides for the parties to the marriage to apply for a parental order (section 12) and for the court to have powers to order the use of scientific tests and the taking of bodily samples in cases where parentage is in dispute (section 13) except where the person from whom such bodily samples is to be taken does not consent (section 14). A minor who has attained the age of 16 can consent to the taking of bodily samples from him (section 14).
307. Section 18 of the PCO empowers the Chief Justice to make rules providing for the practice and procedure to be applied in any application under sections 6 and 12, as to the manner of giving effect to directions under section 13 or providing for the transfer of application to the High Court pursuant to section 16. To date, no rules have been made. The lacuna is partially filled by Order 90,

rule 1 of the RDC, which provides that the appropriate mode of beginning any application under the PCO is by way of an originating summons. The defendant is any person other than the plaintiff appearing to be interested in or affected by the application. Order 90, rule 1(3) deals with service and Order 90, rule 1(4) states that the application must be heard by a judge in chambers who may dispose of the application.

308. The lacuna in the rules must be fully filled. The Working Party proposes that provisions be made in the New Code to cater for the practice and procedure to be applied in applications under the PCO, including applications under sections 6 and 12, and for the transfer of applications to the High Court pursuant to section 16. Considerations should also be given as to the manner of giving effect to directions under section 13 such as by the making of rules or by means of PDs or guidance notes if necessary : **Proposal 94**.

*Proposal 94*

*Provisions should be made in the New Code to cater for the practice and procedure to be applied in applications under the PCO, including applications under sections 6 and 12, and for the transfer of applications to the High Court pursuant to section 16. Considerations should also be given as to the manner of giving effect to directions under section 13 such as by the making of rules or by means of PDs or guidance notes if necessary.*

**H13.11. Surrogacy**

309. The law on surrogacy in Hong Kong is set out in the HRTO. Commercial surrogacy is presently illegal in Hong Kong. The exact ambit of the Ordinance's extra-territorial effect is unknown given that to date there have been no court decisions on the issue of surrogacy or its effect. There are no rules specifically dealing with the HRTO. It is however possible to apply for a parental

order under the PCO.<sup>195</sup>

### ***H13.12. Adoption***

310. The AR applies to local adoptions and the CAR intercountry adoptions. On the whole, the current practice under the AR and CAR is working satisfactorily. There are, however, two areas that require closer attention.
- 310.1 The first is the mode of application. For some applications referred to in the AO, e.g. an application by the Director of Social Welfare to dispense with the consent to adoption of a parent under section 6 of the AO, no rules for the applicable practice and procedure exist in the AR. The lacuna should be plugged by creating rules for those applications in the New Code.
- 310.2 The second is the service of documents outside jurisdiction. Both the AR and CAR merely provide that documents must be served in accordance with the law of that place.<sup>196</sup> The Working Party considers that the practice should be aligned with that for other matrimonial and family proceedings and the general civil proceedings.
311. The Working Party proposes that the AR and CAR should be incorporated into the New Code. There should be rules for all the applications referred to in the AO. The practice for service outside jurisdiction should be aligned with that for other family and matrimonial cases : **Proposals 95 to 97.**

*Proposal 95*

*The AR and the CAR should be incorporated into the New Code.*

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<sup>195</sup> See paragraph 306 above.

<sup>196</sup> Rule 28(2), AR and Rule 31(2), CAR.



Proposal 96

*There should be rules in the New Code for all the applications referred to in the AO.*

Proposal 97

*In the New Code, the practice for service outside jurisdiction for adoption cases should be aligned with that for other family and matrimonial cases.*

***H13.13. Separate representation of children***

312. Under Rule 108 of the MCR, the court has a broad discretion to order that a child be separately represented in any matrimonial proceedings. Power is given to the court, of its own motion, to appoint the Official Solicitor if he consents or, on the application of any other proper person, appoint that person, to be *guardian ad litem* of the child with authority to take part in the proceedings on the child's behalf. Further powers are provided to the court under Rule 72 of the MCR in respect of certain financial and property matters. However, there are no similar provisions under the GMO, SMOO or I(PFD)O. The High Court also has an inherent jurisdiction in wardship proceedings.
313. On 23 July 2012, the Guidance on Separate Representation for Children in Matrimonial and Family Proceedings (“Guidance”) was issued. Its stated intention is to assist judges and family practitioners in considering whether an order should be made for separate representation of a child in matrimonial proceedings, family proceedings, wardship proceedings or proceedings under the CACO. The aim is to ensure consistency in such appointments. It sets out the law, the role of the *guardian ad litem*, the basis upon which appointments are made and the circumstances to be taken into account by the court. The Working Party notes that the Guidance contains many provisions of PD 16A of the FPR 2010 on the same subject matter. We consider the provisions in the

Guidance useful. But, we also note that the Guidance may give rise to policy and resources implications, such as demand for legal aid, which need to be addressed. We propose to consider incorporating it into the New Code : **Proposal 98**.

Proposal 98

*Considerations should be given to see if the provisions in the Guidance on Separate Representation for Children in Matrimonial and Family Proceedings should be incorporated into the New Code.*

**H13.14. Other miscellaneous applications**

314. For other various miscellaneous applications relating to children in our existing Ordinances of which no rules exist, we propose to adopt the relevant provisions in the FPR 2010, if applicable, with necessary modifications in the New Code :<sup>197</sup> **Proposal 99**.

Proposal 99

*For other various miscellaneous applications relating to children in our existing Ordinances of which no rules exist, the relevant provisions in the FPR 2010, if applicable, should be adopted in the New Code with necessary modifications.*

**H13.15. Guidance for judicial meetings of children**

315. There is no provision in the existing rules relating to judicial meetings of children. This gap has been largely dealt with by the Guidance on Meeting Children that took effect on 2 May 2012. In England, The Voice of the Child sub-committee of the Family

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<sup>197</sup> See, e.g. in *Re A (Parent and child: Declaration)* [2008] 4 HKLRD 526, where the court directed that for applications under section 6 of the PCO, the English rules and forms should be used.

Justice Council issued similar Guidelines in April 2010. It has been held by the Court of Appeal in England<sup>198</sup> that the primary purpose of seeing children was to benefit the child. It was not an evidence-gathering exercise. This is in keeping with our own guidance. The Court of Appeal's judgment underlines the importance of determining when it is appropriate to see a child, if at all.

316. Although the Guidance on Meeting Children is useful, it remains guidance to judges and no more. We do not consider it necessary to incorporate it into the New Code. In this regard, we note that the English guidance is not included in the FPR 2010 or any of the English PDs.

#### ***H14. Interim remedies and security for costs***

##### ***H14.1. Interim remedies***

317. Interim remedies, in terms of civil proceedings, refer to a series of measures including interlocutory injunctions, interim preservation of property, applications for interim relief in aid of foreign proceedings and interim payments provided under Order 29 of the RHC/RDC.
318. For matrimonial proceedings, the statutory basis for the granting of an injunction in respect of properties can only be found in sections 17(1)(a) and 29AJ of the MPPO in that the court may grant an injunction restraining the other party from making a disposition or to transfer out of jurisdiction or otherwise dealing in the property if it is satisfied that the other party is, with the intention to defeat the claim for financial provision, about to do so. The governing rules for such an application can be found in Rules 81 and 84 of the MCR.
319. It should be noted that the scope of a section 17(1)(a) or section 29AJ order is much narrower than Order 29 of the RHC/RDC as the former only deals with the granting of an interlocutory

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<sup>198</sup> *Re A (Children) (Meeting with Children: Contamination of Proceedings)*, [2012] EWCA Civ 185, as cited by Lord Justice Thorpe (as he then was).

injunction, whereas under Order 29 of the RHC/RDC, the court has the powers to grant orders on interim preservation of properties and interim payments as well.

320. In England, Chapter 1 of Part 20 of the FPR 2010 deals with interim remedies. Those provisions are very similar to our Order 29, except that their scope may be slightly larger.<sup>199</sup>
321. The Working Party considers that all the provisions for interim remedies should be gathered into one place. Sections 17(1)(a) and 29AJ of the MPPO and Order 29 of the RHC/RDC should therefore be combined and incorporated into the New Code with all necessary modifications. We note the wider scope of the FPR 2010, but consider that the incorporation should be based on our existing Order 29 in order to align the new provisions with the RHC/RDC. **Proposal 100.**

*Proposal 100*

*Sections 17(1)(a) and 29AJ of the MPPO and Order 29 of the RHC/RDC should be combined and incorporated into the New Code with all necessary modifications.*

**H14.2. Security for costs**

322. At present, the only provision for security for costs is under Rule 37 of the MCR which only deals with the main suit in matrimonial proceedings. There are no equivalent provisions for the application for ancillary relief or other family proceedings. Therefore, resort has to be made to the RHC/RDC in accordance with Rule 3 of the MCR or PD 15.12, as the case may be.
323. The governing provisions for security for costs in both the RHC

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<sup>199</sup> For example, there are provisions for interim declaration and an order directing a party to provide information about the location of relevant property or assets.

and RDC are to be found in Order 23.

- 323.1 It provides the court with the discretionary power to order a person in the position of a plaintiff to give security for the opponent's costs.<sup>200</sup>
- 323.2 Under Order 23, rule 1(1), the court may, after considering all the circumstances of the case and finding it is just to do so, grant such an order in one or more of the following situations :-
- (a) that the plaintiff is ordinarily resident out of the jurisdiction;
  - (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that that he will be unable to pay the costs of the defendant if ordered to do so;
  - (c) the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
  - (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation.
- 323.3 The purpose of Order 23 is to protect a defendant in a civil claim who may not be able to recover his costs from a foreign or impecunious plaintiff.
324. In England, the FPR 2010 contains provisions on security for costs in Chapter 2 of Part 20.
- 324.1 The terms used in the FPR 2010 have been adapted to cater for family cases in which the parties are referred to as the "applicant" or the "respondent", as opposed to the "plaintiff" or the "defendant".

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<sup>200</sup> It is to be noted that the order for security can only be made against the plaintiff, or a person in the position of a plaintiff, but not against a defendant.

- 324.2 There is also a section to provide for security for costs of an appeal.
- 324.3 The substance of the FPR 2010 is still similar to Order 23 of the RHC/RDC and the criteria for the granting of an order remain essentially the same.
325. The Working Party notes that because of the special nature of family litigation, the granting of an order for security for costs against a petitioner or applicant is extremely rare. Despite its rarity, the order for security for costs may still serve a useful purpose in the rare case where a foreign or impecunious third-party may be involved. This may happen when, for example, a third-party intervenes and claims an equitable interest in the family assets.
326. The Working Party proposes that the current Rule 37 of the MCR and Order 23 of the RHC/RDC should be incorporated into the New Code with all necessary modifications : **Proposal 101**.

*Proposal 101*

*The current Rule 37 of the MCR and Order 23 of the RHC/RDC should be incorporated into the New Code with all necessary modifications.*

***H15. Evidence***

***H15.1. General procedural rules***

327. In matrimonial causes and family proceedings, evidence is generally adduced by way of affidavits or affirmations. If necessary, in particular in cases where there is serious dispute of facts between the parties, the deponents of the affidavits or affirmations have to attend the hearing for cross-examination by the opposite party.
328. There are only a few procedural rules in the existing subsidiary legislation to deal with evidence in family and matrimonial proceedings. Rules 38 to 42 of the MCR provide the following :-

- (a) the taking of oral evidence;<sup>201</sup>
- (b) evidence by affidavit;<sup>202</sup>
- (c) evidence of marriage outside Hong Kong;<sup>203</sup>
- (d) power of the judge to refuse to admit any evidence if in the interest of justice to do so;<sup>204</sup> and
- (e) issue of witness summons or subpoena.<sup>205</sup>

329. As there are only a few procedural rules specifically relating to evidence in family and matrimonial proceedings, the courts in Hong Kong have to rely on the provisions in either the RHC or the RDC, in particular Order 38, to deal with evidence in such kinds of proceedings.

330. In England, the FPR 2010 now seeks to provide a self-contained set of procedural rules for all the family and matrimonial proceedings. The procedural rules relating to evidence in such kinds of proceedings can be found in Parts 22 to 24 of the FPR 2010, including :-

- (a) power of the court to control evidence and to exclude evidence that would otherwise be admissible;<sup>206</sup>

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<sup>201</sup> Rule 38, MCR.

<sup>202</sup> Rule 39, MCR.

<sup>203</sup> Rule 40, MCR.

<sup>204</sup> Rule 41, MCR.

<sup>205</sup> Rule 42, MCR.

<sup>206</sup> Rule 22.1, FPR 2010.

- (b) the giving of evidence by witnesses, including the use of witness statements and evidence by video link or other means;<sup>207</sup>
- (c) affidavit evidence;<sup>208</sup>
- (d) notice to admit facts and notice to admit or produce documents;<sup>209</sup>
- (e) notarial acts and instruments;<sup>210</sup>
- (f) availability of witness statements for inspection during the final hearing and use of witness statements for other purposes;<sup>211</sup>
- (g) hearsay evidence;<sup>212</sup>
- (h) use of plans, photographs and models etc. as evidence;<sup>213</sup>
- (i) evidence of finding on question of foreign law;<sup>214</sup>
- (j) witness summonses;<sup>215</sup> and

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<sup>207</sup> Rules 22.1-22.3, FPR 2010.

<sup>208</sup> Rules 22.12-22.14, FPR 2010.

<sup>209</sup> Rules 22.15-22.16, FPR 2010.

<sup>210</sup> Rule 22.17, FPR 2010.

<sup>211</sup> Rules 22.18-22.20, FPR 2010.

<sup>212</sup> Rules 23.2-23.5, FPR 2010.

<sup>213</sup> Rule 23.6, FPR 2010.

<sup>214</sup> Rule 23.7, FPR 2010.

<sup>215</sup> Rules 24.2-24.6, FPR 2010.



(k) evidence by deposition, including the issue of letter of request.<sup>216</sup>

331. After the implementation of the FPR 2010 in England, various practice directions have been issued supplementing the procedural rules about evidence in family and matrimonial proceedings.<sup>217</sup> The following matters are covered in these practice directions :-

- (a) the use of evidence in family proceedings,<sup>218</sup>
- (b) headings and formats of witness statements and affidavits/affirmations,<sup>219</sup>
- (c) the production of exhibits in affidavits,<sup>220</sup>
- (d) the giving of evidence by video conferencing facilities,<sup>221</sup>
- (e) the issue of witness summons,<sup>222</sup> and
- (f) the giving of evidence by deposition.<sup>223</sup>

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<sup>216</sup> Rules 24.7-24.14, FPR 2010.

<sup>217</sup> PDs 22A and 24A.

<sup>218</sup> Para. 1, PD 22A.

<sup>219</sup> Para. 3, PD 22A.

<sup>220</sup> Paras. 9-13, PD 22A.

<sup>221</sup> Para. 17, PD 22A.

<sup>222</sup> Para. 1, PD 24A.

<sup>223</sup> Paras. 4-5, PD 24A.

332. The Working Party proposes that the New Code should follow the model of the FPR 2010 and include procedural rules similar to those in Parts 22 to 24 of the FPR 2010. Similar PDs should also be introduced to give guidance to the practitioners about the procedural rules relating to evidence in matrimonial causes and family proceedings. **Proposal 102.**

Proposal 102

*The New Code should include procedural rules relating to evidence in matrimonial causes and family proceedings similar to those contained in Parts 22 to 24 of the FPR 2010. Similar PDs, like those contained in PDs 22A and 24A which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules.*

**H15.2. Discovery, etc.**

333. At present, there are very few procedural rules which specifically deal with the issue of discovery in matrimonial causes and family proceedings. Rules 28 and 29 of the MCR just provide that the formal procedures for discovery, inspection and discovery by interrogatories as provided for in Orders 24 and 26 of the RHC shall apply with necessary modifications. The courts in Hong Kong would therefore follow the practice and procedure contained in the RHC to deal with discovery in matrimonial causes and family proceedings.
334. Rule 77 of the MCR also specifically empowers the court to carry out investigation and to order for discovery of documents in ancillary relief proceedings.
335. In practice, the procedures relating to discovery in matrimonial causes and family proceedings are very different from those in ordinary civil actions.

- 335.1 In ordinary civil actions, discovery is generally conducted by way of filing of lists of documents by the parties after the close of pleadings. After the filing of the lists of documents, the parties can apply for specific discovery against the other party for the disclosure of further documents if necessary.
- 335.2 In matrimonial causes and family proceedings, filing of lists of documents has not been a standard practice.
- 335.3 In ancillary relief proceedings, the parties were formerly required to file affidavits of means pursuant to PD 15.5 together with exhibits and documents which are relevant to the means of the respective parties. If the opposite party thinks that the discovery is not complete, he or she can apply to the court for specific discovery of further documents. Now under PD 15.11, they are required to file Form Es with various attachments, including bank statements. Once those documents required in the Form E are provided, the discovery will be *prima facie* complete. A party may raise a questionnaire, and if a party thinks that those documents required in the Form E are not “sufficient”, he/she can make an application for further specific discovery.
- 335.4 For children proceedings and other miscellaneous applications, evidence is generally produced by way of Children’s Form (Form J) under PD 15.13. Applications for specific discovery are not common.
336. In England, there are different procedural rules relating to discovery depending on the nature of the proceedings.
337. Prior to the introduction of the FPR 2010 :-
- 337.1 Discovery in defended divorce proceedings was governed by Rule 2.20 of the FPR 1991, which applied the then Order 24 of the RSC to a defended cause begun by petition as it applied to an action begun by writ, with certain modifications.
- 337.2 For ancillary relief proceedings, the procedure relating to discovery was mainly governed by Rule 2.61B of the FPR 1991 as amended by the Family Proceedings (Amendment No. 2) Rules

1999, which provided that, after the service of Forms E, discovery was by mutual request by means of a questionnaire served in advance of the first appointment, and by further questionnaire at a later stage of the proceedings with the court's leave. Questionnaires could, like interrogatories, request information as well as seek production of documents. As provided for in Rule 2.51B(6)(d), as part of its case management role, the court would regulate the extent of the disclosure of documents so that the exercise was proportionate to the issues in question.

337.3 Under the FPR 1991, there was also no provision for general discovery in children cases. Under Rule 1.3(1) of the FPR 1991, the court could adopt the provisions in the then RSC such as Order 24 to deal with the issue of discovery, and so the court had the power to order a party to disclose certain specific documents just like any ordinary civil actions.

338. After the implementation of the FPR 2010 :-

338.1 For defended divorce proceedings, the court must direct a case management hearing after the lodging of the application for a decree nisi or a conditional order. Under Rule 7.22(2), the court can make such order for discovery and inspection of documents in the case management hearing. There is no more reference to the corresponding provisions in the RSC or the CPR relating to discovery and inspection of documents in defended divorce proceedings.

338.2 For ancillary relief proceedings, the procedural rules relating to discovery can be found in Rules 9.14 and 9.15 of the FPR 2010. Under the new rules, the parties have to file financial statements 35 days before the first appointment. The financial statement must be verified by an affidavit accompanied by the relevant documents. 14 days before the first appointment, each party must serve on the other party a questionnaire setting out, amongst other things, the documents required from the other side. In the first appointment, the court can then give directions for the production of such further documents as may be necessary.

- 338.3 For proceedings relating to children, Rule 12.12 of the FPR 2010 provides that the court can give directions about the conduct of the proceedings,<sup>224</sup> but there is no specific rule dealing with discovery in children cases. Again there is no more reference to Order 24 of the RSC in the FPR 2010.
- 338.4 The meanings of disclosure and inspections are further explained in Rule 21.1 of FPR 2010 and PD 21A. Under these provisions, the court can make orders for “standard disclosure” and “specific disclosure”. Standard disclosure is more or less the same as the filing of lists of documents under Order 24, rules 1 and 2 of the RHC. On the other hand, specific disclosure is like an order for specific discovery of documents under Order 24, rule 7 of the RHC.
339. Since there should be a unified and self-contained set of procedural rules for all matrimonial causes and family proceedings in Hong Kong, the Working Party considers it undesirable to contain any reference to Orders 24 and 26 of the RHC in the New Code so far as the procedures for discovery and inspection are concerned. This is also in line with the approach adopted in the FPR 2010. As the procedures for discovery may vary depending on the nature of the proceedings, the Working Party proposes that the New Code should follow the model in the FPR 2010 to provide for different procedures for discovery and inspection in three main types of proceedings, namely defended matrimonial causes, financial order proceedings and children proceedings. **Proposal 103.**

Proposal 103

*The New Code should follow the model in the FPR 2010 to provide for a self-contained set of procedural rules relating to discovery, inspection and interrogatories for defended matrimonial causes, financial order proceedings and children proceedings.*

<sup>224</sup>

See also Rule 12.48 relating to Hague Convention proceedings.

340. Since there are also various other kinds of applications in matrimonial causes and family proceedings, and some of these applications and proceedings may require the court to investigate matters such as the welfare of the children, the Working Party considers it necessary to include a specific provision in the New Code to give the court general power, in all such proceedings, to carry out investigations and to make orders for discovery of documents similar to the one in Rule 77 of the MCR. Such provision should also enable the court to order discovery against a third-party who is not directly involved in the proceedings.  
**Proposal 104.**

Proposal 104

*There should be a provision in the New Code to empower the court, in all matrimonial causes and family proceedings, to carry out investigations and to make orders for the discovery of documents against parties involved in the proceedings and other third-parties.*

**H16. Experts and assessors**

**H16.1. Experts**

341. Since there is no specific procedural rule on expert evidence, the court would generally follow the procedural rules on expert evidence in the RHC, in particular those contained in Part IV of Order 38, in dealing with expert evidence in such kinds of matrimonial causes and family proceedings.
342. Part IV of Order 38 of the RHC provides the following :-
- (a) no expert evidence shall be adduced in the proceedings except with the leave of the court or where all parties agree;<sup>225</sup>

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<sup>225</sup>

Order 38, rule 36, RHC.

- (b) the parties shall provide the expert witnesses with a copy of the code of conduct for expert witnesses;<sup>226</sup>
- (c) the experts will have to make certain declarations in the expert reports or in court;<sup>227</sup> and
- (d) the court can direct a meeting of the experts.<sup>228</sup>

343. In matrimonial causes and family proceedings, the parties may seek to rely on evidence from the followings experts to substantiate their claims :-

- (a) in ancillary relief proceedings involving substantial amount of assets, forensic accountants to examine the potential or hidden assets of their opponents;
- (b) in ancillary relief proceedings, experts to value certain assets of the parties; and
- (c) in children cases, psychologists to consider matters such as the impact of a particular incident on the child in issue and the reason for the hostility of a child against a particular parent.

344. After the implementation of the CJR, the court has more extensive case management powers to regulate the use of expert evidence in family and matrimonial proceedings.

345. In England, the FPR 2010 seeks to provide a self-contained set of procedural rules for expert evidence. Part 25 of the FPR 2010 contains detailed provisions relating to expert evidence including the following :-

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<sup>226</sup> Order 38, rule 37B, RHC.

<sup>227</sup> Order 38, rule 37C, RHC.

<sup>228</sup> Order 38, rule 38, RHC.

- (a) experts' overriding duty to the court;<sup>229</sup>
- (b) court's power to restrict expert evidence and to order single joint expert;<sup>230</sup>
- (c) written questions to experts;<sup>231</sup>
- (d) contents of expert reports;<sup>232</sup>
- (e) court's power to order discussions between experts;<sup>233</sup> and
- (f) experts' right to ask the court for directions.<sup>234</sup>

346. After the implementation of the FPR 2010, PDs 25A-25F have been issued to supplement the procedural rules relating to expert evidence in family and matrimonial proceedings, which contain detailed provisions on the following matters :-

- (a) seeking of leave to instruct an expert or to use expert evidence;<sup>235</sup>
- (b) pre-application instruction of experts;<sup>236</sup>
- (c) duties of experts;<sup>237</sup>

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<sup>229</sup> Rule 25.3, FPR 2010.

<sup>230</sup> Rules 25.4 and 25.11, FPR 2010.

<sup>231</sup> Rule 25.10, FPR 2010.

<sup>232</sup> Rule 25.14, FPR 2010.

<sup>233</sup> Rule 25.16, FPR 2010.

<sup>234</sup> Rule 25.17, FPR 2010.

<sup>235</sup> Para. 5.1, PD 25A.

<sup>236</sup> Paras. 3.1-3.4, PD 25A.

<sup>237</sup> Paras. 3.1-3.4, PD 25B.



- (d) contents of expert reports;<sup>238</sup>
- (e) preparation for relevant hearing relating to expert evidence and procedures for instructing experts;<sup>239</sup>
- (f) the power of the court to control expert evidence;<sup>240</sup>
- (g) arrangements for experts to give evidence in court hearings<sup>241</sup>
- (h) enquiries of expert and subsequent letter of instructions in children proceedings;<sup>242</sup>
- (i) enquiries of expert and subsequent letter of instructions in financial remedy and other family proceedings (except children proceedings);<sup>243</sup> and
- (j) appointment of assessors in family proceedings.<sup>244</sup>

347. The Working Party proposes that the New Code should follow the model in England and contain procedural rules similar to those in Part 25 of the FPR 2010. PDs similar to those contained in PDs 25A-25F should also be introduced to give guidance to the practitioners about the procedural rules relating to expert evidence in family and matrimonial proceedings. **Proposal 105.**

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<sup>238</sup> Para 9, PD 25B.

<sup>239</sup> Paras. 6.1-8.1 and 10.1-10.2, PD 25B.

<sup>240</sup> PD 25E.

<sup>241</sup> Para. 10, PD 25B.

<sup>242</sup> PD 25C.

<sup>243</sup> PD 25D.

<sup>244</sup> PD 25F.

Proposal 105

*The New Code should include procedural rules relating to expert evidence in family and matrimonial proceedings similar to those contained in Part 25 of the FPR 2010. Similar PDs, like those contained in PDs 25A-25F which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules.*

**H16.2. Assessors**

348. In Hong Kong, section 53 of the HCO and section 58 of the DCO enable the CFI and the District Court respectively to hear any civil proceedings with the assistance of assessors. An assessor is an expert to assist the court on expert matters. The procedural rules relating to trials involving assessors can be found in Order 33, rule 6 of the RHC/RDC.
349. Similarly in England, section 70 of the Senior Courts Act 1981 and section 63 of the County Courts Act 1984 enable the High Court and the County Court respectively to conduct proceedings with the assistance of assessors. The procedural rules relating to hearings involving assessors in family proceedings can be found in Rule 25.14 of the FPR 2010, which contains very detailed procedures for hearings involving assessors. Hearings involving assessors in family cases, as in civil cases generally, are extremely rare in Hong Kong. The Working Party does not see the need to incorporate elaborate provisions into the New Code for such hearings. The present provisions in Order 33, rule 6 of the RHC/RDC, should suffice. We propose to incorporate Order 33, rule 6 of the RHC/RDC into the New Code with necessary modifications : **Proposal 106.**

Proposal 106

*Order 33, rule 6 of the RHC/RDC, should be incorporated into the New Code with necessary modifications.*

**H16.3. Use of expert evidence**

350. The Working Party has also considered some of the concerns expressed in England about the use of expert evidence in family proceedings,<sup>245</sup> including :-

- (a) the inappropriate or excessive use of experts, which increases costs, the duration of the proceedings and their complexity;
- (b) partisanship and a lack of independence amongst experts, devaluing their role in the judicial process; and
- (c) poor quality of the advice of certain experts.

351. In the Final Report of the Family Justice Review published in England in November 2011, the Family Justice Review Panel has made a number of recommendations about the use of expert evidence in the family justice system,<sup>246</sup> including :-

- (a) primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The FPR would need to be amended to reflect the primary legislation;
- (b) the court should seek material from an expert witness only

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<sup>245</sup> See, the part on expert evidence in *Family Justice Review: Final Report* published in England in November 2011 at pp. 117-126 and the report in BBC news on 25 May 2012 with the title: "Family courts: New standards for expert witnesses".

<sup>246</sup> See, the list of final recommendations contained in pp. 125-126 of the report.

when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally;

- (c) judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving leave for the commissioning of the expert witness the questions on which the expert witness should focus;
- (d) the Family Justice Service should carry out studies of the expert witness reports, take steps to improve the quality and supply of expert witness services, develop agreed quality standards for expert witnesses in the family courts, and review mechanisms available to remunerate expert witnesses; and
- (e) further pilot scheme of multi-disciplinary expert witness teams should be taken forward.

352. We note that a lot of the recommendations are premised upon the establishment of a new organisation known as the Family Justice Service with the role to safeguard and protect the welfare of children in the family justice system. The consideration for the establishment of a similar organisation in Hong Kong is certainly beyond the terms of reference of the Working Party. However, after the CJR, the court now has more extensive case management powers to regulate and restrict the use of expert evidence. Similar case management powers will be made available to the judge under the New Code. The judge can therefore make use of such powers to restrict the use of unnecessary expert evidence, and this would, to a great extent, address some of the concerns expressed in England about the use of expert evidence in family.

353. Further, the general rule in the FPR 2010 is that the court's leave is required to call an expert or to put in evidence any expert report. PDs 25C and 25D also provide detailed guidance on the applications for such leave, such as the considerations that would be taken into account by the court in such applications and the time

when such applications should be made.<sup>247</sup> With similar procedural rules and PDs adopted in the New Code, the court should be well placed to tackle any excessive use of expert evidence in matrimonial causes and family proceedings. Presently, we do not see the need to make any proposals along the line of the recommendations referred to in paragraph 351 above.

***H17. Statement of truth***

354. At present, there is no provision in the MCR for the signing of a statement of truth, as in the case for general civil proceedings under Order 41A of the RHC/RDC.<sup>248</sup>

355. By signing the statement of truth, the signatory verifies the truthfulness of the contents in the document. If a statement in a document verified by a statement of truth is found to be false, the signatory is liable for contempt if he has made the statement without an honest belief.

356. By virtue of paragraphs 23 to 25 of PD 15.12, Order 41A of the RHC/RDC is now applicable, with necessary modifications to matrimonial proceedings and family proceedings. The following documents are now required to be verified by a statement of truth :-

- (a) petition, answer, or reply;
- (b) a joint application;
- (c) an originating application;

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<sup>247</sup> Paras. 3.2-3.11, PD 25C for children proceedings and paras. 3.3-3.12, PD 25D for financial remedy proceedings and other family proceedings (except children proceedings).

<sup>248</sup> Under Order 41A, the following documents are required to be verified by a statement of truth: a pleading, a witness statement, an expert report, and any other document, the verification of which is required by any of the RHC/RDC or PDs.

- (d) responses to questionnaires/requests for Further and Better Particulars;
- (e) a statement as to arrangement for children;
- (f) a witness statement;
- (g) an expert report; and
- (h) any other document, the verification of which is required by any other statutory provisions or PDs.

In addition, the court may also order any document submitted in the proceedings to be verified by a statement of truth.

357. In England, Part 17 of the FPR 2010 deals with Statements of Truth. Its contents are not entirely the same as our Order 41A. This is understandable because the English provision has its origin from the CPR and more importantly, adaptation has been made to cater for family cases.
358. The Working Party proposes that provisions on Statements of Truth in Order 41A of the RHC/RDC be incorporated into the New Code with all necessary modifications : **Proposal 107**.

*Proposal 107*

*Provisions on Statements of Truth in Order 41A of the RHC/RDC should be incorporated into the New Code with all necessary modifications.*

**H18. Trial**

359. At present, Rules 44 to 55 and 81 of the MCR deal with the trial of a matrimonial cause or ancillary relief in matrimonial proceedings. They cover a wide range of general procedures including the fixing of a date for trial and the giving of notice to the parties; disposal of causes in the special procedure list; the mode of trial; the right to

be heard without the filing of an answer; drawing up of orders; restoration of hearings; preparation of shorthand note; and application for rehearing. However, the detailed procedures to be adopted at trial are lacking. In order to fill up this gap, one has to apply Order 35 of the RHC/RDC, which contains, among other things, useful case management provisions on limiting the time to be used in different aspects of the trial, the order of speeches, etc.

360. In England, the FPR 2010 does not have a separate chapter on trial. Instead, there are provisions under Chapter 3 of Part 7 for “How the Court Determines Matrimonial and Civil Partnership Proceedings” and Part 27 for “Hearings and Directions Appointments”.
- 360.1 Under Chapter 3 of Part 7 for “How the Court Determines Matrimonial and Civil Partnership Proceedings”, quite detailed provisions are given for the conduct of a hearing, including matters like notices of hearing, what the court will do on an application for a decree nisi, further provisions about costs, transfers, medical examinations, stay of proceedings, etc.
- 360.2 Under Part 27 for “Hearings and Directions Appointments”, detailed provisions are given for matters like attendance at hearings, proceedings in the absence of a party, applications to set aside judgments or orders following failure to attend, court bundles, representation of companies, impounded documents, official shorthand notes of the proceedings, hearings in private, etc.
361. The Working Party considers that the current practice of referring to Order 35 of the RHC/RDC for procedure of trial both inconvenient and burdensome. The Working Party proposes that Order 35 of the RHC/RDC, relevant provisions in Chapter 3 of Part 7 and Part 27 of the FPR 2010 and the existing MCR should, with necessary modifications, be incorporated into one single set of rules in the New Code to govern the setting down and conduct of a trial in matrimonial causes and family proceedings : **Proposal 108**.

Proposal 108

*Order 35 of the RHC/RDC, relevant provisions in Chapter 3 of Part 7 and Part 27 of the FPR 2010 and the existing MCR should, with necessary modifications, be incorporated into one single set of rules in the New Code to govern the setting down and conduct of a trial in matrimonial causes and family proceedings.*

**H19. Appeals**

362. At present, the only relevant rule on appeal in the MCR is Rule 116, which only deals with appeals against a Registrar's decisions in the District Court to a judge. As to the provisions for other appeals, reference has to be made to the RHC/RDC.
- 362.1 For the RHC, the orders on appeal are from Orders 55 to 61. But for matrimonial and family proceedings, the more relevant orders are Orders 58 and 59. Order 58 provides for appeals from Masters and Order 59 provides for appeals to the Court of Appeal. Order 59, rule 1(2) expressly provides that this Order does apply to an appeal to the Court of Appeal from the District Court.
- 362.2 For the RDC, the relevant order is Order 58 which is to a certain extent similar to Orders 58 and 59 of the RHC.
363. In England, the FPR 2010 does have a chapter on appeals in Part 30.
- 363.1 Under Part 30, quite detailed provisions are given for appeals to the High Court or a county court, presumably from a county court to the High Court or from a magistrates' court to a county court.
- 363.2 Under Rule 30.13, only if the court from or to which an appeal is made considers that the intended appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it, then the relevant court may order the appeal to be transferred to the Court of Appeal.



364. The English regime of appeal is different from our system in which all appeals from the District Court and the Court of First Instance go directly to the Court of Appeal.
365. The Working Party considers that the reference to the RHC/RDC for procedures on appeal is both inconvenient and burdensome. We propose that a single set of rules should be drafted to cater for appeals in matrimonial causes and family proceedings from both the Court of First Instance and the District Court, by incorporating the present provisions in the MCR, the RHC and the RDC : **Proposal 109.**

Proposal 109

*A single set of rules should be drafted to cater for appeals in matrimonial causes and family proceedings from both the Court of First Instance and the District Court, by incorporating the present provisions in the MCR, the RHC and the RDC.*

366. If Proposals 127 to 130 in this report are to be adopted, a proper Registrar/Masters system similar to that in general civil proceedings will be established in the Family Court and the High Court. In that event, the Working Party proposes that further consideration needs to be given to the new rules governing future appeals from the Registrar/Masters to the judge or to the Court of Appeal. **Proposal 110.**

Proposal 110

*In the event that Proposals 127 to 130 in this report are to be adopted, the Working Party proposes that further consideration needs to be given to the new rules governing the future appeals from the Registrar/Masters to the judge or to the Court of Appeal.*

***H20. Setting aside decree nisi/absolute***

367. The court may grant a substituted service order<sup>249</sup> or dispensation of service order<sup>250</sup> of the petition for divorce under appropriate circumstances. Very often, the petitioner would justify such applications by putting forward reasons like the respondent having left or deserted the family and his or her whereabouts could then not be traced. The court, if being satisfied that all possible means have already been exhausted but the respondent still could not be found, may grant such an order for substituted service including the putting up of a notice by advertisement in a local circulating newspaper or other modes that would likely to bring such notice to the respondent. If no such mode of substituted service would likely to bring such notice to the respondent, the court may even grant an order dispensing with service altogether.
368. However, there have been cases where such orders for substituted service or dispensation of service were obtained by fraud or inaccurate information from the petitioner. This would render the service of the petition irregular and the subsequent decree nisi or decree absolute void as a nullity. Under such circumstances, the remedies available to the innocent respondent for setting aside the service and the subsequent decrees can arguably be by one of the following three ways :-
- (a) an application for re-hearing under Rule 55 of the MCR;
  - (b) a fresh action to set aside the decree absolute for fraud; and
  - (c) an appeal to the Court of Appeal to set aside the decree absolute.

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<sup>249</sup> Rule 14(9), MCR.

<sup>250</sup> Rule 14(10), MCR.

369. It was held in *LCM v LYY*<sup>251</sup> that it was within a party's rights to lodge an appeal to the Court of Appeal for an order setting aside the decree absolute under such circumstances. This practice of setting aside by way of appeal has been approved and followed by a number of subsequent cases.<sup>252</sup> Moreover, in the more recent case of *CFF v ZWJ*,<sup>253</sup> Lam JA (as he then was) was of the view that a more preferred option would be for the first instance court to set aside a decree nisi or decree absolute instead of an appeal to the Court of Appeal, when he said,

“19. There are obvious reasons why normally such an avenue should be preferred to the lodging of an appeal to the Court of Appeal. First, it would offer a less costly and more efficient resolution of the validity of the decrees: there is no need to apply for leave and then if leave is granted to wait for an appeal to be prepared and then listed for hearing. Second, as demonstrated in the present case (which apparently has not occurred in the earlier local cases where the matter was dealt with by way of appeal) there could be dispute of facts which necessitates the court to hear oral evidence and cross-examination of the witnesses. Though the Court of Appeal may take that course in exceptional circumstances, it would not do so in the normal course of hearing appeals. Third, in cases where finding of facts have to be made, if the task is undertaken by the Court of Appeal, it would effectively substantially undermine the right of appeal against such finding by a litigant since the right of appeal to the Court of Final Appeal is constrained by s.22 of the Hong Kong Court of Final Appeal Ordinance.”

370. The Working Party respectfully agrees with Lam JA (as he then was)'s observations. The procedures for setting aside by way of appeal are obviously too cumbersome and onerous. It is evidently more appropriate for the court granting the decree, instead of the Court of Appeal, to hear the application especially when there is dispute on facts.

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<sup>251</sup> [2003] 2 HKLRD 690.

<sup>252</sup> *MSK v PSK*, CACV 219/2005, unreported, 23 June 2006; *FHFK v NCM*, CACV 182/2007, unreported, 20 June 2008 and *L v L*, CACV 98/2010, unreported, 2 June 2010.

<sup>253</sup> CACV 171/2012, unreported, 27 May 2013.

371. This issue was not expressly dealt with in the FPR 2010. However, under Rule 27.5 of the FPR 2010, it is provided that where a party did not attend a hearing resulting in a judgment or order made against him, the party who failed to attend may apply for the judgment or order to be set aside, presumably by the court granting such judgment or order. This is to a certain extent similar to Rule 55 of the MCR where an application for re-hearing in the same court can be made.
372. The Working Party proposes that express rules should be provided in the New Code for the application for setting aside the decrees, judgments or orders obtained by irregular service to be dealt with by the court granting such decrees, judgments or orders : **Proposal 111.**

*Proposal 111*

*Express rules should be provided in the New Code for the application for setting aside the decrees, judgments or orders obtained by irregular service to be dealt with by the court granting such decrees, judgments or orders.*

**H21. Costs**

**H21.1. The current position**

373. Costs in matrimonial proceedings are governed by Rule 91A of the MCR, which provides that “*where the costs of and incidental to any matrimonial proceedings are directed to be taxed, RHC Order 62 shall have effect in relation to the costs of proceedings in the Court of First Instance, and RDC Order 62 shall have effect in relation to the costs of proceedings in the District Court*”. Further, where costs are directed to be taxed, PD 14.3 (costs), which sets out the practice of taxation in the High Court and the District Court, shall be complied with.

374. As for family proceedings, depending on the venue in which the proceedings are commenced, Order 62 of the RHC/RDC together with PD 14.3 (costs) will apply.
375. Apart from children’s cases, the starting point on costs in matrimonial and family proceedings, as it is in civil litigations, remains to be “*costs follow the event*”.<sup>254</sup> However, because of the special dynamics of family litigation (e.g. where the case involved children, or where financial resources were inadequate to meet the needs of both parties, etc.), the court’s discretion on costs may generally be broader than in civil matters.<sup>255</sup>
376. For children’s cases, the general principles are that there should be *no order as to costs* save when one party has been unreasonable or reprehensible in the conduct of the litigation, as parents should not be deterred from putting cases concerning children before the courts.<sup>256</sup>
377. In wardship proceedings, as are for children cases generally, the court’s usual practice is to make no order as to costs. Exceptionally, the court may depart from the general practice and

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<sup>254</sup> See Order 62, rule 3(2), RHC/RDC.

<sup>255</sup> *L v C*, CACV 169/2006, unreported, 19 March 2008. In *W v K and Anor (Costs)* [2008] HKFLR 378, Saunders J (as he then was) followed the English practice of making no order as to costs (discussed below). His approach was subsequently disapproved by the Court of Appeal in *TL v SN*, CACV 196/2009, unreported, 19 October 2010, where the court reaffirmed that in matrimonial cases, as in other cases, costs should normally follow the event and that the courts retain a discretion to deprive successful litigants of costs under *Re Elgindata Ltd. (No. 2)* [1992] 1 WLR 1207. See also *Z v X & C*, CACV 166/2011, unreported, 8 March 2013, the Court of Appeal reaffirmed the court’s approach on costs in ancillary relief application that costs should follow the event although because of the special dynamics of family litigation, the discretion may be broader than in civil matters generally. The court also noted that the changes in England were carried out by prescribed rules and the position in Hong Kong has remained unchanged since *L v C, supra* and *TL v SN, supra*.

<sup>256</sup> *R v R (Child Case: Costs)* [1997] 2 FLR 95, and *Re G (A Child) (Costs: Child Case)* [1999] 2 FLR 250, *H v H*, CACV 42/2002, unreported, 25 July 2002.

make a costs order.<sup>257</sup>

378. When the Official Solicitor is appointed as *guardian ad litem* in children cases, the court retains an unfettered discretion over the payment of the Official Solicitor's costs.<sup>258</sup>

### ***H21.2. The English position***

379. The “costs” provisions are contained in Part 28 of the FPR 2010. It is not a self-contained code but incorporates Part 44 (General Rules about Costs), Part 46 (Costs Special Cases), Part 47 (Procedure for Detailed Assessment of Costs and Default Provisions) and Rule 45.8 of the CPR (Fixed Enforcement Costs), which cover substantially the same scope and breadth as our Orders 62 and 62A of the RHC/RDC, with necessary modifications to cater for the special circumstances of matrimonial and family proceedings.

380. The landscape of costs and taxation has changed substantially in England since the CPR.<sup>259</sup> More importantly, the “*costs follow the event*” principle has been removed in matrimonial and family proceedings even before the promulgation of the FPR 2010.

- 380.1 As far as family proceedings are concerned, the general rule that the unsuccessful party would be ordered to pay the costs of the successful party as provided in Rule 44.3(2)(a) of the CPR was disapplied by virtue of the Family Proceedings (Miscellaneous Amendments) Rules 1999 (“the 1999 Rules”), which came into effect as from 26 April 1999.

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<sup>257</sup> *Re LB (Wardship: Costs)* [2012] 1 HKLRD 266.

<sup>258</sup> *Re LB (Wardship: Costs)*, *supra*, at paras. 27-30.

<sup>259</sup> For instance, there are now costs on the small claims track and the fast track, and there are now two bases of assessment only: being (i) the standard basis and (ii) the indemnity basis : Rule 46.11 (small claims track and fast track) and Rule 44.3 (basis of assessment), CPR.

- 380.2 As for ancillary relief proceedings, in order to encourage parties to attempt to settle, following the often quoted decision in *Gojkovic v Gojkovic (No. 2)*,<sup>260</sup> the *Calderbank* principles were codified in the FPR 1991.<sup>261</sup> However, the *Calderbank* procedure was under increasing criticism in judicial jurisprudence in about 2003.<sup>262</sup>
- 380.3 Consequently, the Family Proceedings (Amendment) Rules 2006 were enacted to abolish the *Calderbank* principles<sup>263</sup> and to add a new Rule 2.71 to disapply the *costs follow the event* principles in ancillary relief proceedings.
- 380.4 Hence, as from 2006, the general rule in England is that the court would not make an order requiring one party to pay the other's costs in family proceedings including ancillary relief proceedings.
381. The position is maintained in the FPR 2010.
- 381.1 Pursuant to Rule 28.2 of the FPR 2010, the general rule that the unsuccessful party will be ordered to pay the costs of the successful party under Rule 44.3(2)(a) of the CPR has been expressly excluded in family proceedings.<sup>264</sup>

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<sup>260</sup> [1991] 2 FLR 233.

<sup>261</sup> Rules 2.69, 2.69B and 2.69D. They were wholly rewritten by the Family Proceedings (Amendment No. 2) Rules 1999. For a general discussion, see *Cretney Principles of Family Law*, Sweet & Maxwell, 2008, pp. 337-339, also *Norris v Norris; Haskins v Haskins* [2003] EWCA Civ 1084, at para. 15.

<sup>262</sup> For instance, *Norris v Norris; Haskins v Haskins* [2003] EWCA Civ 1084; *C v C (Costs: Ancillary Relief)* [2004] 1 FLR 291; and *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam).

<sup>263</sup> Rule 6, Family Proceedings (Amendment) Rules 2006.

<sup>264</sup> Family proceeding is defined in Rule 2.3 of the FPR 2010, which refers to section 75(3) of the Courts Act 2003. Section 75(3) of the Courts Act 2003 states that "Family proceedings", in relation to a court, means proceedings in that court which are family proceedings as defined by either (a) section 65 of the Magistrates' Courts Act 1980 (c. 43) or (b) section 32 of the Matrimonial and Family Proceedings Act 1984 (c. 42).

381.2 As for financial remedy proceedings, Rule 28.3(5) of the FPR 2010 provides that subject to paragraph (6) of the same rule, the general rule is that the court will not make an order requiring one party to pay the costs of another party.

381.3 Rule 28.3 (6) of the FPR 2010 provides that the court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct<sup>265</sup> of a party in relation to the proceedings (whether before or during them).<sup>266</sup>

382. There are however already voices in England for reconsidering the position.<sup>267</sup>

### ***H21.3. Retaining the current practice***

383. The Working Party takes the view that the current law and practice

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<sup>265</sup> Under Rule 28.3(7) of the FPR 2010, the conduct that the court may consider includes :-

- (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
- (b) any open offer to settle made by a party;
- (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
- (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
- (f) the financial effect on the parties of any costs order.

<sup>266</sup> Rule 28.3(6), FPR 2010.

<sup>267</sup> It has been said that, "*A hugely unwelcome consequence of the current rules is that they fail to penalise those litigants who adopt (either deliberately as a tactic or through a lack of competence) a slow attritional approach to litigation by allowing cases to drift on to a final determinative hearing without any apparent attempt to settle or narrow the issues, safe in the knowledge that the court is very unlikely to make an adverse costs order due to the circumstances of the case*", see : Harbottle & Lewis, "*Should the cost rules in Family proceedings be reconsidered*", at <http://www.harbottle.com/should-the-cost-rules-in-family-proceedings-be-reconsidered>.



as summarised in Part H21.1 above gives the court a sufficiently wide discretion on costs in order to achieve justice and fairness between the parties. That has served us well so far. On the other hand, any changes following the English example by setting the “*no order as to costs*” in stone would certainly have significant ramifications on the landscape of our matrimonial and family litigations. And as noted, there are already voices for reconsidering the position. We therefore consider that it is not necessary to follow the English practice by having “*costs follow the event*” replaced by “*no order as to costs*”. We simply propose to incorporate into the New Code Orders 62 and 62A of the RHC/RDC with necessary modifications : **Proposal 112.**

*Proposal 112*

*Orders 62 and 62A of the RHC/RDC should be incorporated into the New Code with necessary modifications.*

**H22. Enforcement**

**H22.1. General**

384. The enforcement of orders discussed in this section refers to all judgments and orders issued in matrimonial and family proceedings.
385. There are a few provisions in the MCR (from Rules 86 to 91A) dealing with enforcement but they are by no means comprehensive or exhaustive :-
- (a) Rule 86 : Enforcement of Orders for Payment of Money, etc.;
  - (b) Rules 87 and 88 : Judgment Summons;
  - (c) Rule 90 : Committal and Injunction;
  - (d) Rule 91 : Removal of District Court Orders into Court of First Instance; and

(e) Rule 91A : Taxation of Costs.

386. Further, pursuant to Rule 3 of the MCR, subject to the provisions of rules under the MCR and of any enactment, the RHC shall apply with necessary modifications to the commencement of proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Court of First Instance or in the District Court. The effect is that as long as the proceedings involved are matrimonial proceedings, the RHC are to apply notwithstanding that the court seized with the jurisdiction is the Family Division of the District Court. Hence, reference has to be made to the relevant provisions in the RHC dealing with the enforcement of judgments and orders, including provisional remedies which are contained in Orders 44A to 52 of the RHC.<sup>268</sup>

387. The resultant position is that court orders made in matrimonial and family proceedings may be enforced by the following means :-<sup>269</sup>

- (a) Judgment summons;
- (b) Attachment of Income;
- (c) Committal for Contempt;
- (d) Writ of Sequestration;
- (e) Injunction;
- (f) Charging Order;

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<sup>268</sup> Order 44A (*Prohibition Order before or after Judgment and Attachment of Property before Judgment*), Order 45 (*Enforcement of Judgments and Orders: General*), Order 46 (*Writs of Execution: General*), Order 47 (*Writs of Fieri Facias*), Order 48 (*Examination of Judgment Debtor, etc.*), Order 49 (*Garnishee Proceedings*), Order 49B (*Execution and Enforcement of Judgment for Money by Imprisonment*), Order 50 (*Charging Orders, Stop Orders, etc.*), Order 51 (*Receivers: Equitable Execution*) and Order 52 (*Committal*), RHC.

<sup>269</sup> For the purpose of discussion, the authorisation of arrest as provided under the DCRVR is not regarded as a means of enforcement.

- (g) Garnishee Order;
- (h) Prohibition Order;
- (i) Writ of Fieri Facias; and
- (j) Appointment of Receivers : Equitable Execution.<sup>270</sup>

### ***H22.2. Judgment summons***

388. Judgment summons is by far the most common form of enforcement in the Family Court.

389. Judgment summonses are dealt with in open court by family judges, and are issued to enforce payment of monies due but not paid by virtue of a court order or undertaking to the court, usually periodical maintenance, sometimes a lump sum or costs. The judgment debtor is summoned to attend before the court and be orally examined on the questions (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 maintenance order. If the judgment debtor fails to attend or fails to show cause why an order of commitment should not be made against him, the judge may make an order for the commitment of the judgment debtor. If the judge makes an order of commitment, he may direct its execution to be suspended on terms that the judgment debtor pays to the judgment creditor the amount due, together with the costs of the judgment summons, the interest and surcharge payable either at a specified time or by instalments, in addition to any sums accruing due under the original maintenance order.<sup>271</sup>

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<sup>270</sup> See Annex 3 to this consultative paper for a table summarising the modes of enforcement.

<sup>271</sup> Rule 87, MCR.

390. For matrimonial proceedings,<sup>272</sup> the procedures are set out in Rules 87 and 88 of the MCR and in respect of family proceedings, the provisions are in Order 90A of the RDC (Proceedings Concerning Judgment Summons). The two provisions are essentially identical.
- 390.1 Rules 87 and 88 of the MCR apply to order for payment of money including an order for costs made under the MCO and MPPO. Rule 88(1) of the MCR provides that Order 38, rule 2(3) of the RHC, which allows evidence to be given by affidavit, applies to judgment summons proceedings. Hence, provisions under the RHC dealing with affidavit evidence are applicable.
- 390.2 Order 90A of the RDC applies to order for payment of money including an order for costs in proceedings under the GMO, SMOO and MO(RE)O. Order 90A, rule 3(1) of the RDC contains the same provision as in Rule 88(1) of the MCR, which allows evidence to be given by affidavit in judgment summons proceedings.
391. In *CYM v YML*,<sup>273</sup> the Court of Appeal cast doubt on the compatibility of the judgment summons proceedings with the rights enshrined in Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383), making reference to the decision of the English Court of Appeal in *Mubarak v Mubarak*,<sup>274</sup> which came before the court shortly after the coming into force of the Human Rights Act 1998. The English Court of Appeal held that judgment summonses were a criminal proceedings and hence caught by Article 6 of the European Convention on Human Rights which provided the “minimum” rights to persons charged with criminal offences<sup>275</sup> and that judgment summons proceedings were

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<sup>272</sup> Matrimonial proceedings are defined in Rule 2(2) of the MCR and mean any proceedings with respect to which rules may be made under the MCO or the MPPO.

<sup>273</sup> [2013] 1 HKLRD 701, per Lam JA (as he then was), at para. 52.

<sup>274</sup> [2001] 1 FLR 698.

<sup>275</sup> See Article 6(3) of the European Convention on Human Rights for “minimum rights” and see also footnote 276 below.

not in compliance with the said Article 6.<sup>276</sup> In the context of that case, the Court held that judgment summons proceedings required “a fair and public hearing”, that it was the judgment creditor who had the burden of proof to prove beyond reasonable doubt that the judgment debtor had the ability to pay but had refused or neglected to pay; that the presumption of innocence applied; that the judgment debtor had the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him and to examine or have examined witnesses against him.<sup>277</sup>

392. The FPR 2010 now has retained “*Convention-compliant*” judgment

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<sup>276</sup>

Article 6 of the European Convention on Human Rights reads as follows :-

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following *minimum rights* :-

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

<sup>277</sup>

Para. 62 of *Mubarak v Mubarak, supra*.

summons proceedings in Chapter 2 of Part 33. The prominent amendments from the pre-Human Rights Act 1998 version are that :-

- 392.1 An application must be accompanied by a statement which (a) states the amount due under the order, showing how that amount is arrived at, and must be verified by a statement of truth; (b) contains all the evidence on which the judgment creditor intends to rely; and (c) has exhibited to it a copy of the order.<sup>278</sup>
- 392.2 The judgement summons must be accompanied by the statement referred to in the above paragraph and be served on the judgement debtor personally.<sup>279</sup>
- 392.3 Further, the judgment creditor has to prove that the judgment debtor (i) has, or has had, since the date of the order, the means to pay the sum in respect of which the judgment debtor has made default; and (ii) has refused or neglected, or refuses or neglects, to pay that sum and that the debtor may not be compelled to give evidence.<sup>280</sup>
393. In short, in England, it is recognised that the right to remain silent (non-compellability to give evidence) is inherently inconsistent with the examination procedure, and if judgment summons is to be retained, it can no longer be used for dual purposes. Thus, the process of examination of the debtor has been removed from the proceedings and the burden of proof is put squarely on the judgement creditor.
394. The Working Party notes the close resemblance of Hong Kong's present judgment summons provisions with the English pre-Human Rights Act provisions, and that the present proceedings remain to be for a combined purpose. The Working Party considers that in light of *CYM v YML*, there is a real risk that the

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<sup>278</sup> Rule 33.10(2), FPR 2010.

<sup>279</sup> Rule 33.11(2), FPR 2010.

<sup>280</sup> Rules 33.14(1)(c) and (2), FPR 2010.

present provisions on judgment summons might be held inconsistent with the Hong Kong Bill of Rights. The Working Party therefore proposes that considerations should be given to whether any amendments to the existing provisions are required in light of Articles 10 and 11 of the Hong Kong Bill of Rights. **Proposal 113.**

Proposal 113

*Considerations should be given to whether any amendments to the existing provisions on judgment summons are required in light of Articles 10 and 11 of the Hong Kong Bill of Rights.*

**H22.3. Attachment of income order**

395. Where a maintenance payer has defaulted in payment and there is no reasonable excuse for that default, an attachment of income order can be made. This is an order to make the income of the maintenance payer, whether in whole or in part, be attached and the amount attached to be paid to the payee direct.<sup>281</sup>
396. Section 20 of the GMO, section 9A of the SMOO and section 28 of the MPPO have virtually identical provisions for the attachment of income, but the relevant rules are by way of a single subsidiary legislation under the GMO, being the AIOR.
397. At present, the AIOR do not apply to maintenance pending suit for spouses, and only interim maintenance orders for children. This anomaly partly was an inadvertent omission at the time when the AIOR were introduced. The Working Party proposes that the New Code should provide that the relevant AIOR provisions are to apply to maintenance pending suit for spouses. **Proposal 114.**

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<sup>281</sup>

Rule 3, AIOR.

Proposal 114

*The New Code should provide that the relevant AIOR provisions are to apply to maintenance pending suit for spouses.*

**H22.4. Committal for contempt**

398. Committal is a process under which the contemnor's person is seized, and he is taken to prison by bailiff of the court.<sup>282</sup> Committal is issued when a party has failed to comply with an order other than for payment of a sum of money. This would include enforcement of undertakings to court in matrimonial proceedings.<sup>283</sup>
399. Same as the judgment summons, it is heard in open court by family judges.
400. For matrimonial proceedings, such an application is made by summons pursuant to Rule 90(1) of the MCR and to Order 52 of the RHC with necessary modifications. Thus, no application for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with Order 52, rule 2 of the RHC. Rule 90(1A) of the MCR also provides that Order 52, rule 6 of the RHC (which, except in certain cases, requires an application to be heard in open court) shall apply to the hearing of the application. It should be noted that in appropriate circumstances, Order 45 of the RHC (Enforcement of Judgments and Orders: General) would be applicable. For instance, Order 45, rule 7(7) of the RHC would be applicable if the court is to dispense with service.<sup>284</sup>
401. As for family proceedings, Order 45, rule 5(1)(b)(iii) of the RDC

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<sup>282</sup> Section 38A, HCO and see para. 52/1/5, HKCP 2013.

<sup>283</sup> *Roberts v Roberts* [1990] 2 FLR 111.

<sup>284</sup> Order 45, rule 7(7), RHC empowers the court to dispense with service of a copy of any order under Order 45, rule 7, RHC if it thinks it just to do so.



provides that a judgment or an order may be enforced by an order of committal, in which event Order 52 of the RDC, which sets out the relevant procedures, will apply.

### ***H22.5. Writ of sequestration***

402. Where a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or within that time as extended or abridged, or a person disobeys a judgment or order requiring him to abstain from doing an act, then, with the leave of the court, that person may be punished for contempt by a writ of sequestration against the property of that person.<sup>285</sup>

### ***H22.6. Injunction***

403. This would include Preservation of Assets Order under section 17 (Avoidance of transactions intended to defeat certain claims) of the MPPO and Mareva Injunction. The MCR do not contain specific provisions dealing with these procedures. The only provision is in Rule 90(2)(b) of the MCR which states that where by reason of illness, the existence of any vacation or otherwise, no judge is conveniently available to hear the application, then, an application for the discharge by consent of an injunction granted by a judge, may be made to the Registrar of the High Court who may, if satisfied of the urgency of the matter and that it is expedient to do so, make any order on the application which a judge could have made.

404. Given that there are no specific provisions in the MCR, Order 29 of the RHC (Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, etc.) and PD 11.1 (*Ex parte*, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)) will apply.

### ***H22.7. Charging order***

405. Where under a judgment or order, a judgment debtor is required to

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<sup>285</sup> Order 45, rule 5(1)(b)(i), RHC/RDC.

pay a sum of money to a judgment creditor then, for the purpose of enforcing that judgment or order, the court may make an order imposing on any such property of the judgment debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.<sup>286</sup>

406. Applications for charging orders may be made under Order 50 of the RHC in matrimonial proceedings or under Order 50 of the RDC in family proceedings if commenced in the District Court, as in other civil proceedings. However, such applications are heard by family judges rather than by Masters as is usually the case in civil proceedings.

### ***H22.8. Garnishee order***

407. By virtue of a garnishee order, the obligation of a third-party within the jurisdiction to pay the judgment debtor is transformed into an obligation to pay the judgment creditor. Thus, the court may order the third-party (the garnishee) to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much of the amount as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.<sup>287</sup>

408. For matrimonial proceedings, the procedures are contained in Order 49 of the RHC and for family proceedings, the identical procedures are in Order 49 of the RDC. They are currently heard by Masters in the High Court and family judges in the District Court.

### ***H22.9. Prohibition order***

409. This is an order prohibiting a judgment debtor from leaving Hong Kong. Prohibition orders are valid for an initial period of one calendar month, and may be extended for two further periods of one month each. Thereafter, application may be made to renew the

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<sup>286</sup> See section 20, HCO.

<sup>287</sup> Order 49, rule 1(1), RHC/RDC.

prohibition order, which may again be extended. The process of extension and renewal may continue indefinitely until the judgment creditor has exhausted all remedies against the debtor.<sup>288</sup>

410. For matrimonial proceedings, the procedures are contained in Order 44A of the RHC whilst for family proceedings, the procedures are in Order 44A of the RDC. They are applied for by way of ex parte paper applications and are dealt with by duty family judges for proceedings in the District Court. This practice is different from that in other civil cases where prohibition orders are normally heard by Practice Masters.

#### ***H22.10. Writ of fieri facias or warrant of execution***

411. They are not often used in matrimonial or family proceedings. Writ of fieri facias is a writ requiring the bailiff to seize the goods, chattels and other property of the judgment debtor to satisfy the judgment debt.
412. As for matrimonial proceedings, the relevant provisions are Orders 46 and 47 of the RHC, and in respect of family proceedings, they are in the same mirror provisions of the RDC.
413. However, one should note that Rule 86(2) of the MCR provides that “*Except with the leave of the registrar, no writ of fieri facias or warrant of execution shall be issued to enforce payment of any sum due under an order for ancillary relief or an order made under the provisions of section 8 of the MPPO where an application for a variation order is pending*”. However, there is no similar restriction in family proceedings.

#### ***H22.11. Appointment of receivers: equitable execution***

414. Where there are various interests in property to which a judgment debtor may be entitled, yet which cannot be taken by normal means of legal execution, the court may appoint a receiver by way of equitable execution in relation to those interests belonging to the

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<sup>288</sup>

Para. 44A/3/7, HKCP 2013.

judgment debtor.<sup>289</sup> The order operates as an injunction to prevent the judgment debtor from receiving the money and from dealing with the money to the prejudice of the judgment creditor.<sup>290</sup> Due to the greatly increased scope of charging orders, the appointment of a receiver by way of equitable execution is rarely necessary nowadays.<sup>291</sup>

415. As can be readily seen, the rules on enforcement of orders are fragmented and scattered over a number of Ordinances, i.e. the MCR, the RHC, the RDC and the AIOR. The distinction between matrimonial and family proceedings appears to be artificial but this leads to the duplication of rules. Practitioners would have to refer to Rules 87 and 88 of the MCR for judgment summons in matrimonial proceedings, whether in the High Court or the Family Court, but when it comes to the family proceedings in the Family Court, they would have to refer to Order 90A of the RDC. It is questionable whether any practical purpose is being served to distinguish between matrimonial proceedings and family proceedings.

#### ***H22.12. The position in England***

416. The provisions on enforcement are contained in Part 33 (Enforcement) of the FPR 2010. However, it is not a comprehensive or exhaustive code. Apart from Chapter 2 of that Part which provides for a comprehensive code on practice and procedure in respect of committal by way of a judgment summons, Part 33 refers to the relevant provisions in the CPR, the RSC and the CCR with necessary modifications.

- 416.1 As a general rule, Rule 33.1(2) provides that Part 50 of, and Schedules 1 and 2 to the CPR apply, *as far as they are relevant and with necessary modification* to an application made in the High Court and a county court to enforce an order made in family

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<sup>289</sup> Section 21L, HCO, Order 51, RHC/RDC and see paras. 51/1/1 & 51/1/2, HKCP 2013.

<sup>290</sup> Para. 51/1/4, HKCP 2013.

<sup>291</sup> Para. 51/1/1, HKCP 2013.

proceedings.<sup>292</sup> The modifications are then set out in the following Chapters.

- 416.2 For the enforcement of orders for payment of money, Rule 33.2 provides that Part 70 of the CPR (General Rules about Enforcement of Judgments and Orders) applies with modifications set out in sub-paragraphs (a) and (b) of the same rule.
- 416.3 Rule 33.5(2) (under section 2 of Chapter 1) provides that an order of committal may be heard in private where this is permitted by Order 52, rule 6 of the RSC and Rule 33.7 under the same Section 2 provides for the specific modifications of the CCR. The same treatment is given in :-

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The RSC Rules in Schedule 1 to the CPR are :-

- (a) RSC Order 17 Interpleader;
- (b) RSC Order 45 Enforcement of Judgment and Orders: General;
- (c) RSC Order 46 Writs of Execution: General and Practice Direction;
- (d) RSC Order 47 Writs of Fieri Facias;
- (e) RSC Order 54 Application for Writ of Habeas Corpus and Practice Direction;
- (f) RSC Order 79 Criminal Proceedings;
- (g) RSC Order 109 The Administration of Justice Act 1960;
- (h) RSC Order 113 Summary Proceedings for Possession of Land; and
- (i) RSC Order 115 Confiscation and Forfeiture in Connection with Criminal Proceedings and Practice Direction.

The CCR Rules in Schedule 2 to the CPR are :-

- (a) CCR Order 1 Interpleader;
- (b) CCR Order 16 Transfer of Proceedings;
- (c) CCR Order 22 Judgments and Orders;
- (d) CCR Order 24 Summary Proceedings for the Recovery of Land;
- (e) CCR Order 25 Enforcement of Judgments and Orders: General;
- (f) CCR Order 26 Warrants of Execution, Delivery and Possession and Practice Direction;
- (g) CCR Order 27 Attachment of Earnings;
- (h) CCR Order 28 Judgment Summons;
- (i) CCR Order 33 Interpleader Proceedings;
- (j) CCR Order 39 Administration Orders;
- (k) CCR Order 44 The Agricultural Holdings Act 1986; and
- (l) CCR Order 49 Miscellaneous Statutes.

- (a) Chapter 5 which applies Part 69 of the CPR in respect of Court's Power to Appoint a Receiver : Rule 33.22;
- (b) Chapter 6 which applies Part 71 of the CPR in respect of Orders to Obtain Information from Judgment Debtors (Cross-Examination of Judgment Debtors) : Rule 33.23;
- (c) Chapter 7 which applies Part 72 of the CPR with modifications in respect of Third-Party Debt Orders (Garnishee Proceedings) : Rule 33.24; and
- (d) Chapter 8 which applies Part 73 of the CPR with modifications in respect of Charging Orders, Stop Orders, Stop Notices : Rule 33.25.

417. Because of how the relevant rules are drafted, any amendment to the CPR will not apply automatically to family proceedings.<sup>293</sup> As a matter of fact, the part of the CPR that is referred to in the FPR 2010 is not itself a comprehensive code but makes further reference to the relevant RSC and CCR. But steps have already been taken to bring the necessary rules into the FPR 2010 to remove the need of cross-referencing to the RSC and CCR.

### ***H22.13. Proposals***

418. Following the English approach, the Working Party considers that a single, self-contained set of rules on enforcement for all matrimonial and family proceedings should be introduced into the New Code. The Working Party prefers the English approach. We propose that the New Code should include the enforcement provisions in the MCR and the AIOR and all the relevant provisions in Orders 44A to 52 of the RHC, with necessary modifications. Any future amendments to the RHC/RDC will not

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<sup>293</sup> See *Family Procedure Rules, An Invitation to Comment on the Draft Rules, Practice Directions and Forms* published by the FPR Committee on 28 November, 2008, at para. 22.

automatically apply to the New Code :<sup>294</sup> **Proposal 115.**

Proposal 115

*It is proposed that our New Code should include the enforcement provisions in the MCR and the AIOR and all the relevant provisions in Orders 44A to 52 of the RHC, with necessary modifications. Any future amendments to the RHC/RDC will not automatically apply to the New Code.*

419. Further, Rule 33.3(2) of the FPR 2010 provides that a notice of application for an order to enforce an order for the payment of money may either (a) apply for an order specifying the method of enforcement; or (b) apply for an order for such method of enforcement as the court may consider appropriate. Hence, pursuant to paragraph (b), an applicant may ask the court to decide which method of enforcement is the most appropriate in the circumstances of a given case. The Working Party takes the view that this provision should be adopted : **Proposal 116.**

Proposal 116

*It is proposed that Rule 33.3(2) of the FPR 2010 be adopted into the New Code.*

**H22.14. Enforcement of undertakings**

420. The enforcement of undertakings is of particular concern to parties in matrimonial and family proceedings, since it is not uncommon to have orders made embodying agreement reached between the parties to contain rather lengthy and extensive undertakings. The

<sup>294</sup>

This proposal is in line with our Proposal 5 that the general provisions in the New Code should be modelled on the equivalents in the RHC or incorporate the relevant provisions of the RHC, as the case may be, with modifications as appropriate for family and matrimonial matters.

appropriate method of enforcing an undertaking will depend on the nature of obligation which it embodies.<sup>295</sup>

421. Generally speaking, an undertaking to pay money could be enforced by committal under a judgment summons and by way of garnishee proceedings if it is an integral and indivisible part of the order.<sup>296</sup> An undertaking may also be enforced by an application to commit for civil contempt.<sup>297</sup> It is also possible to enforce certain undertakings given by a party to the court in a consent order by way of separate proceedings for a breach of contract rather than by way of committal for civil contempt.<sup>298</sup>

422. PD 33A (Enforcement of Undertakings) supplements Part 33 of the FPR 2010 and contains two parts.

**(a) *Enforcement by committal for contempt of court***

422.1 The first part deals with enforcement under Order 45, Rule 5 of the RSC, which provides for enforcement by committal for contempt of court where (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do that act within the specified time; or (b) a person disobeys a judgment or order requiring him to abstain from doing an act.

422.2 Para. 1.3 of the PD provides that these rules apply to undertakings as they apply to orders, with necessary modifications, hence enabling enforcement for a breach of an undertaking.

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<sup>295</sup> *Rayden and Jackson on Divorce and Family Matters* 18<sup>th</sup> ed, Vol. 1(1), Chapter 28, at para. [28.2].

<sup>296</sup> *Symmons v Symmons* [1993] 1 FLR 317; *Gandolfo v Gandolfo* [1981] QB 359; *Gandolfo v Gandolfo (Standard Chartered Bank Ltd, garnishee)* [1980] 1 All ER 833; and para. 49/1/6, HKCP 2013.

<sup>297</sup> Para. 45/5/3, HKCP 2013.

<sup>298</sup> *Rayden and Jackson on Divorce and Family Matters* 18<sup>th</sup> ed, Service Binder 1, Noter-up to Volume 1, at para. [28.2].



- 422.3 The PD states that the form of an undertaking to do or abstain from doing any act must be endorsed with a penal notice setting out the consequences of disobedience, as follows, “*You may be sent to prison for contempt of court if you break the promises that you have given to the court*”.<sup>299</sup>
- 422.4 The person giving the undertaking must make a signed statement to the effect that he or she understands the terms of the undertaking being given and the consequences of failure to comply with it, as follows, “*I understand the undertaking that I have given, and that if I break any of my promises to the court I may be sent to prison for contempt of court*”.<sup>300</sup>
- 422.5 The PD further provides that the statement need not be given before the court in person. It may be endorsed on the court’s copy of the undertaking or may be filed in a separate document such as a letter.<sup>301</sup>

**(b) *Enforcement of undertaking for the payment of money***

- 422.6 The second part of the PD relates to enforcement of undertaking for the payment of money. Para. 2.1 of the PD provides that any undertaking for the payment of money that has effect as if it was an order made under Part 2 of the MCA 1973 may be enforced as if it was an order and Part 33 applies accordingly.
- 422.7 Pursuant to para. 2.2 of PD 33A, the form of an undertaking must be endorsed with a penal notice setting out the consequences of disobedience, as follows, “*If you fail to pay any sum of money which you have promised the court that you will pay, a person entitled to enforce the undertaking may apply to the court for an order. You may be sent to prison if it is proved that you –*  
*(a) Have, or have had since the date of your undertaking, the means to pay the sum;*  
*and*

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<sup>299</sup> Para. 1.4, PD 33A.

<sup>300</sup> Para. 1.5, PD 33A.

<sup>301</sup> Para. 1.6, PD 33A.

*(b) Have refused or neglected, or are refusing or neglecting, to pay that sum.”*

- 422.8 Same as in the first part, the person giving the undertaking is required to sign a statement to the effect that he or she understands the terms of the undertaking being given.<sup>302</sup>
423. The Working Party proposes that provisions similar to the above PD be adopted with necessary modifications in order to provide a solid legislative underpinning for the enforcement of the undertaking and to ensure that the person giving the undertaking is fully aware of the undertaking being given and the serious consequences that it entails if in breach. **Proposal 117.**

*Proposal 117*

*Provisions similar to the English Practice Direction 33A (Enforcement of Undertakings) should be adopted with necessary modifications in order to provide a solid legislative underpinning for the enforcement of the undertaking and to ensure that the person giving the undertaking is fully aware of the undertaking being given and the serious consequences that it entails if in breach.*

424. The Working Party has borne in mind that a major theme of the intended reform is to align the general practice in both the family and civil jurisdictions in the post-CJR era and thus disparity in the general practice between the two jurisdictions should be avoided as far as possible. The Working Party therefore proposes that, subject to Proposal 117 being accepted, the New Code should provide the express legislative underpinning whilst the form of the penal notice and statement to be signed by the person giving the undertaking are to be dealt with by way of a PD. **Proposal 118.**

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<sup>302</sup>

Para. 2.3, PD 33A.

Proposal 118

*Subject to Proposal 117 being accepted, the New Code should provide the express legislative underpinning for the enforcement of undertakings whilst the form of the penal notice and statement to be signed by the person giving the undertaking are to be dealt with by way of a PD.*

**H23. Reciprocal enforcement of maintenance orders**

425. Pursuant to section 9(1) of the MO(RE)O, a maintenance order issued by a reciprocating country and registered in Hong Kong may be enforced in Hong Kong as if it had been made by the District Court and as if that court had had jurisdiction to make it, and proceedings for or with respect to the enforcement of any such order may be taken accordingly. The practice and procedure on registration and transmission of maintenance orders are set out in the MO(RE)R.
426. Further, pursuant to section 9(3)(b) of the MO(RE)O, the District Court has the power to issue a warrant of arrest if default has been made in paying a sum ordered to be paid under a registered order.
427. In England, the relevant provisions are contained in Part 34 of the FPR 2010, which provides for the practice and procedure of the registration and enforcement of orders. Caution should be given to these provisions as they deal with the reciprocal enforcement of maintenance orders in accordance with legislation specific to the circumstances in and the international obligations of England.<sup>303</sup> For these reasons, the Working Party considers that they are not relevant for the present exercise. In any event, as mentioned above, Hong Kong already has a single code on the practice and

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Such as the position of England vis-à-vis the Republic of Ireland or the United States of America and “*the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters*” done at Lugano on 16 September 1988 and the relevant European Union Council Regulations.

procedure dealing with registration and transmission of orders in reciprocating countries.<sup>304</sup>

428. The Working Party proposes that the present provisions in the MO(RE)R be incorporated into the New Code : **Proposal 119**.

Proposal 119

*The present provisions in the MO(RE)R should be incorporated into the New Code.*

**H24. Hearing and reporting of proceedings**

**H24.1. Current practice in Hong Kong and proposals**

**(a) Hearing**

429. The principle of open justice is essential to the impartial and efficient administration of justice.<sup>305</sup> The transparency promotes the rule of law as well as public confidence in and respect of the legal system, and forms the bedrock upon which the court derives its legitimacy. Open justice gives effect to the right of the public to be informed and the right of the media to inform the public. This principle of open justice is firmly enshrined in case law and constitutionally guaranteed under Articles 10 and 16 of the BOR on fair and public hearing and on freedom of expression respectively. However, the principle of open justice is not absolute. There are recognised exceptions where cases, because of their special nature and in the interests of justice, should be heard in private to the exclusion of the public.

430. The principle of open justice with its exceptions governs how family cases are heard. For example, matrimonial causes are heard in open court save and except for evidence on the question of

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<sup>304</sup> MO(RE)O and MO(RE)R.

<sup>305</sup> See *Scott v Scott* [1913] AC 417, the leading judgment on the subject and *TCWF v LKKS*, CACV 154&166/2012, unreported, 29 July 2013.

sexual capacity in proceedings for nullity which must be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.<sup>306</sup> This stems from the need to deal with the change of marital status publicly. For other proceedings, the practice is governed by PD 25.1 :-

- 430.1 All proceedings under the AO are heard in private to the exclusion of the public. This is mandated by Rule 4 of the AR.<sup>307</sup>
- 430.2 Matters relating to children and applications for financial provisions and ancillary relief are usually heard in private to the exclusion of the public.<sup>308</sup> In relation to these proceedings, it is considered that having regard to their nature, one or more of the reasons for excluding the press and the public laid down in Article 10 of the BOR are usually satisfied. Accordingly, such proceedings would usually not be open to the public. However, the court retains the discretion to order that the hearing be open to the public if it is of the view that none of the reasons in Article 10 is satisfied in the circumstances of the case concerned.<sup>309</sup>
431. The Working Party considers that the above should be incorporated into the New Code. We propose that the New Code should expressly provide that subject to any enactment or any rules in the New Code, all proceedings to which the New Code applies, where they are pending in the first instance courts, should be held in private to the exclusion of the public, but the court retains the discretion to order the hearing to be open to the public if it is of the view that none of the reasons in Article 10 of the BOR is satisfied in the circumstances of the case concerned : **Proposal 120.**

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<sup>306</sup> See section 52(3), MCO.

<sup>307</sup> See para. 3 and Schedule 1, PD 25.1.

<sup>308</sup> See Schedule 2, PD 25.1.

<sup>309</sup> See para. 4, PD 25.1.

Proposal 120

*The New Code should expressly provide that subject to any enactment or any rules in the New Code, all proceedings to which the New Code applies, where they are pending in the first instance courts, should be held in private to the exclusion of the public, but the court retains the discretion to order the hearing to be open to the public if it is of the view that none of the reasons in the BOR Article 10 is satisfied in the circumstances of the case concerned.*

432. Family cases heard in the Court of Appeal are invariably heard in open court notwithstanding that first instance proceedings were heard in private.<sup>310</sup> Various rights and interests have to be balanced before an appeal hearing is heard in camera.<sup>311</sup> Often less draconian measures, e.g. a grant of an anonymity order, an injunction to restrict publication of some highly sensitive information, or a refusal of access to highly sensitive documents or materials placed before the court without them being read openly, are sufficient. Although more circumspection is applied in proceedings relating to children, even children's matters are usually heard in open court in the Court of Appeal though protection is given by an anonymity order.<sup>312</sup>

**(b) Reporting of proceedings and judgments**

433. The governing Ordinance is the JP(RR)O :-

- 433.1 Under section 3(1), it shall not be lawful to print or publish, or cause or procure to be printed or published in relation to any

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<sup>310</sup> *TCWF v LKKS*, CACV 154&166/2012, unreported, 29 July 2013 paras. 24-27.

<sup>311</sup> *Ibid*, paras. 44-46 and *Practice Guidance (HC: Interim Non-disclosure Orders)* [2012] 1 WLR 1003.

<sup>312</sup> *TCWF v LKKS*, CACV 154&166/2012, unreported, 29 July 2013 para. 43.

judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, any particulars other than, among other things, the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences and counter-charges in support of which evidence has been given; submission of law and the court's decision thereon; and the judgment of the court.

433.2 Under section 5(1), the publication of information relating to proceedings before any court sitting in private shall not be of itself be contempt of court except in, among others, cases where the proceedings relate to the wardship or adoption of any infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of any infant, or rights of access to an infant; and where the court, having power to do so, expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

434. Further, under PD 25.2, no report should be made of any proceedings (including judgment) held in chambers not open to public, referring to those proceedings referred to in PD 25.1, without the authority of the court before whom the proceedings were conducted. In short, for proceedings in relation to children and financial matters including ancillary relief, no report including judgment can be reported without the court's leave.

435. The restrictions on publication of judgments in family cases may unnecessarily inhibit dissemination of judgments, which is essential to the development of the case law, and deprive practitioners of access to authorities, which they need to advise their clients properly. Thus, the Family Court has recently decided to adopt the practice whereby for all judgments delivered after a trial of 2 days or more, or after any hearing/trial touching on legal principles, irrespective of whether those proceedings were held in chambers (not open to public) or not, such judgments should be published on the "Legal Reference" website, and available for public search/reporting. This is subject to (a) the judgment having been anonymised; and (b) a letter having been sent to the parties to give them an opportunity to object and no objection has been received.

436. Further, pursuant to an internal instruction from the Chief Justice, with effect from April 2011, all judgments in family and matrimonial cases at every level of courts, whether in open court or in chambers, should be suitably anonymised before release.
437. The Working Party considers that the extant practice of the Family Court and the internal instruction of the Chief Justice should be incorporated into a new PD under the New Code : **Proposal 121**.

*Proposal 121*

*The New Code should have a new PD to include the extant practice of the Family Court for publishing judgments and the internal instruction of the Chief Justice for anonymising judgments before release for publication.*

**(c) Access to court documents**

438. The general provision on access to court documents is found in Order 63, rule 4 of the RHC/RDC. It draws a distinction between the rights of the parties<sup>313</sup> and those of the non-parties. For non-parties, they can search for, inspect and obtain a copy of the originating process, any judgment or order made in open court and any other document with the court's leave.<sup>314</sup>

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<sup>313</sup> Note that parties to the proceedings are subject to the common law implied undertaking in respect of documents/information disclosed during the proceedings under compulsion.

<sup>314</sup> In *Secretary for Justice v FTCW*, CACV 101&107/2013, unreported, 29 July 2013, the Director of Public Prosecutions was granted access in respect of some documents in the matrimonial proceedings court file, and leave was granted to the wife to discuss the matter with the Director or the police for the purpose of criminal investigation. The Court of Appeal held at para. 11 that the appeal against such decision as well as the debate whether such appeal should be heard in camera should be conducted in open court hearing.



439. Apart from Order 63, rule 4, there are specific provisions for specific matrimonial and family proceedings as well. In respect of the Hague Convention cases, confidentiality is preserved by (before the originating summons is filed with the Court Registry) applying for an express order prohibiting public search and inspection of documents related to the case. Since September 2001, the Hong Kong Central Authority has committed to applying for such an order in every incoming child abduction case. It would save the court's time and put the matter beyond doubt if specific legislative provisions could be introduced to cover the matter.<sup>315</sup> The Working Party considers that it will be useful to extend such confidentiality protection to all children proceedings to prevent public search and inspection of any document filed in the Court Registry, including an originating summons but excepting a decree or order made in open court, without leave of the court except by a party to such proceedings.
- 439.1 Rule 121(2) of the MCR provides that, subject to the exceptions as set out therein, other than a decree or order made in open court the public has no right to inspect any documents filed or lodged in the registry in relation to matrimonial proceedings, including ancillary relief proceedings, without leave of the court, and no copy or extract of such document shall be taken or issued to any person without such leave.
- 439.2 Rule 21 of the AR provides that no duplicate of an adoption order or interim order shall be given to or served upon any person other than the Registrar of Births and Deaths or the applicant except by an order of the judge.
440. The Working Party considers the above provisions should be incorporated into the New Code, but confidentiality protection from public search and inspection should be extended to all documents filed in children proceedings save with leave of the court : **Proposal 122.**

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It is also noted that the Child Abduction Legislation (Miscellaneous Amendments) Bill 2013 introduced into the Legislative Council on 12 July 2013 seeks to amend Order 121 of the RHC to add a new rule 13 restricting public inspection of court documents filed in the Hague Convention-related proceedings.

Proposal 122

*The New Code should incorporate the provisions of Order 63, rule 4 of the RHC, Rule 121(2) of the MCR and Rule 21 of the AR, but should expressly provide for prohibition against public search and inspection of all documents filed in the Court Registry in children proceedings, other than a decree or order made in open court, without leave of the court.*

**(d) Anonymisation**

441. Rule 6 of the AR provides that if any person proposing to apply to the court for an adoption order desires that his identity shall be kept confidential, he may, before taking out an originating summons, apply to the court for a serial number to be assigned to him for the purpose of the proposed application and such a number shall be assigned to him accordingly.
442. Where a serial number has been so assigned, Rule 14A(5) of the AR provides that in an application by a parent under section 5(5D) of the AO for an order revoking the parent's consent, (a) the documents to be served under Rule 14A(4) of the AR shall not disclose the identity of that person to any other person who is not already aware of that person's identity; and (b) the proceedings on the application shall be conducted with a view to securing that that person is not seen by or made known to any other person concerned with the application who is not already aware of his identity except with his consent.<sup>316</sup>
443. To complement Proposal 122, the Working Party proposes that the New Code should include provisions for anonymisation in children proceedings to preserve confidentiality, and for such anonymisation to take effect upon filing of the originating summons to prevent subsequent jigsaw identification : **Proposal 123.**

<sup>316</sup>

There are similar provisions in Rules 7 and 14(5) of the CAR.

Proposal 123

*The New Code should incorporate the provisions in Rules 6 and 14A of the AR pertaining to anonymisation in adoption proceedings, and should include provisions for anonymisation in children proceedings to preserve confidentiality as from the filing of the originating process.*

**(e) A new Part**

444. The Working Party notes that the provisions discussed above are currently scattered in different places. They should be put in one place in the New Code and, if necessary, augmented by PDs : **Proposal 124.**

Proposal 124

*In the New Code, all the relevant provisions relating to hearing and reporting of proceedings, access to court documents, anonymisation of parties and judgments and orders should be put together in a new Part, to be augmented by PDs if necessary.*

**H24.2. The English experience**

445. In England, divorce suits are heard in open court.
446. For other proceedings, the position is governed by Parts 27.10 and 27.11 of the FPR 2010.
- 446.1 Part 27.10(1) provides that proceedings to which those rules apply will be held in private, except where those rules or any other enactment provide otherwise; or subject to any enactment where the court directs otherwise.

- 446.2 Part 27.11(2) provides that no person shall be present during any hearing other than an officer of the court; a party to the proceedings, a litigation friend or legal representative of a party; an officer of the Service or Welsh family proceedings officer; a witness; duly accredited representatives of news gathering and reporting organisations; and any other person whom the court permits to be present.
- 446.3 The media may be excluded under Part 27.11(3) if the court is satisfied that it is necessary in the interest of any child concerned in or connected with the proceedings; for the protection of the safety of a party, a witness in the proceedings, or a person connected with such a party or witness; or for the orderly conduct of the proceedings; or justice will otherwise be impeded or prejudiced.
447. The FPR 2010 also have detailed provisions for access to and inspection of documents and for use of and access to witness statements in family law proceedings. Generally, the media is not entitled to access documents in most family proceedings without the court's leave or further publish to the general public information obtained in such proceedings.<sup>317</sup>
448. The media's presence and the extent to which they are allowed to report the proceedings have remained highly controversial among the stakeholders for years. And the relevant statutory provisions evolved as the debate over the issues developed. Now is not the occasion to detail the development.<sup>318</sup> Suffice it to say that England and Wales are still searching for their own optimal balance between transparency and privacy in this complicated and sensitive area of the law. That being the case, the Working Party does not consider it appropriate or indeed desirable at this stage to

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<sup>317</sup> See *The Family Courts: Media Access & Reporting*, a joint publication by the President of the Family Division, the Judicial College and the Society of Editors, July 2011 (UK), at para. 31.

<sup>318</sup> Additional to the paper referred to in footnote 317, interested readers may also wish to consult a paper prepared by Catherine Fairbairn entitled "*Confidentiality and openness in family courts*", 7 January 2013, available at the Library of the House of Commons.

refer to the English experience for reforms as to publicity and privacy in family proceedings.

449. We believe that in the local context, this area of the law may operate better by maintaining the present regime and entrusting a relatively free discretion to family judges instead of regulating publicity and disclosure in prescriptive and even minute detail in the rules. In exercising the discretion, the court would of course be guided by the principle of open justice, firmly bearing in mind the need to balance the interests of open justice against the public interests of protecting privacy in family proceedings. We believe that the proposals made above will help achieve an optimal mix of regulation and discretion by (a) collecting under the New Code all dispersed statutory provisions in this area; (b) making clear the applicable provisions for those types of family proceedings where it is currently not clear if they apply; and (c) providing for some consistency in practice by way of PDs. That said, the development in England and Wales should be kept in view. When appropriate, consideration may be given to see if we need to re-visit the matter.

## ***H25. Representation***

### ***H25.1. Change of solicitors/Acting in person***

450. There are no provisions in the MCR dealing with the change of solicitors. It follows that Order 67 of the RHC applies by virtue of Rule 3 of the MCR in matrimonial proceedings. Correspondingly, Order 67, rule 9 of the RHC expressly provides that Order 67 shall have effect in relation to matrimonial causes and matters. For family proceedings, either Order 67 of the RHC or Order 67 of the RDC would apply, depending on the venue in which the proceedings are being heard.
451. In England, Part 26 of the FPR 2010 deals with the change of solicitors. Apart from Rule 26.1 of the FPR 2010, the provisions are similar to those in our Order 67 of the RHC or RDC. Rule 26.1 of the FPR 2010<sup>319</sup> is unique in that it provides “*Where the address for service of a party is the business address of that party’s solicitor,*

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<sup>319</sup>

This provision is the same as Rule 42.1 of the CPR.

*the solicitor will be considered to be acting for that party until the provisions of Part 26 have been complied with.”* This provision removes the doubt as to whether a solicitor is acting for a party where Notice to Act has not been filed but the business address of the party’s solicitors has been stated on the notice of acknowledgement of service as the address for service.

452. The Working Party recognises the benefit of Rule 26.1 of the FPR 2010. However, we also note that no similar provision exists in our Order 67 of the RHC/RDC. So if Rule 26.1 of the FPR 2010 is adopted, the practice on this particular aspect in family jurisdiction would deviate from that in general civil matters and this should be avoided. The Working Party also considers that the present provisions in Order 67 of the RHC/RDC have all along been working well for matrimonial and family proceedings and subject to the discussions in the following paragraph, there is no disparity in the practice and the procedure on this subject matter between the two jurisdictions. Taking all these into consideration, the Working Party considers that Rule 26.1 of the FPR 2010 needs not be adopted into the New Code and the preferred course is to incorporate the existing Order 67 of the RHC/RDC into the New Code.

453. In *Dianoor International Limited v Aiyer Vembu Subramaniam*,<sup>320</sup> it was held by Deputy High Court Judge Chan (as he then was) that because of the combined effect of Order 12, rule 3(2)(a) and Order 67, rule 4 of the RHC/RDC, a defendant must give an address within the jurisdiction for service in his Notice of Intention to Act in Person. As for matrimonial proceedings, no leave is required for service out of the jurisdiction<sup>321</sup> and Order 12, rule 3(2)(a) of the RHC does not apply. It has been the practice of the Family Court Registry to accept a respondent’s Notice of Intention to Act in Person giving an address outside the jurisdiction for service. The Working Party considers that whilst the practice and procedure of matrimonial proceedings on this subject should align with those in the general civil matters as much as practicable, the reality is that

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<sup>320</sup> HCA 806/2008, unreported, 19 November 2010.

<sup>321</sup> Rule 109(1), MCR.

there is now a significant number of parties residing out of the jurisdiction, notably in the Mainland, so the requirement of providing an address within the jurisdiction may cause inconvenience and even hardship on them. Further, if a respondent is allowed to give an address out of the jurisdiction, one may question, for parity, why a petitioner should not be allowed to do so. Readers are therefore invited to express their views on whether or not an address within the jurisdiction should be given in the Notice of Intention to Act in Person : **Proposal 125**.

Proposal 125

*Readers are invited to express their views on whether or not an address within the jurisdiction should be given in the Notice of Intention to Act in Person. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC/RDC into the New Code.*

**H25.2. Representation of protected parties**

454. For matrimonial proceedings, Rules 105 to 107 of the MCR contain provisions on this subject matter similar to those in Order 80 of the RHC/RDC.
- 454.1 Rule 105 of the MCR provides that persons with disabilities may sue by next friend or defend by his *guardian ad litem* in matrimonial proceedings. Same as the definition laid down in the RHC/RDC, a person under disability means a person who is a minor or a mentally disordered person as defined in the Mental Health Ordinance (Cap. 136).
- 454.2 Rule 106 of the MCR deals with service of (i) the originating application taken out before the presentation of a petition or joint application;<sup>322</sup> and (ii) the petition<sup>323</sup> on a person under disability.

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<sup>322</sup> Rule 6(3)(b), MCR.

<sup>323</sup> Rule 14, MCR.

- 454.3 Rule 107 of the MCR provides that where a petition for nullity of marriage has been presented on the ground that the respondent at the time of the marriage was of unsound mind or suffering from mental disorder of such a kind or to such an extent as to be unfitted for marriage and the procreation of children, or was subject to recurrent attacks of insanity or epilepsy, then whether or not the respondent gives notice of intention to defend, the petitioner shall not proceed with the cause without leave of the court and the court may make it a condition of granting leave that some proper person be appointed to act as *guardian ad litem* of the respondent.
455. For family proceedings, depending on where the proceedings are heard, Order 80 of the RHC/RDC shall apply.
456. In England, the relevant provisions are in Part 15 of the FPR 2010, which is a self-contained code.
- 456.1 The FPR 2010 modernises the terms used. Hence, “person under disability” is replaced by “protected parties” and “next friend” and “*guardian ad litem*” are replaced by “litigation friend”.
- 456.2 Same as before and the situation in Hong Kong, the general position is that it is not necessary for a litigation friend to be appointed by the court.<sup>324</sup>
- 456.3 Rule 15.3 of the FPR 2010 states that a person may not without leave of the court take any step in proceedings until the protected party has a litigation friend and that any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise.<sup>325</sup>
- 456.4 Part 15 also sets out in comprehensive manner how a litigation friend can be appointed by the court, and how an appointment may be changed or come to an end.<sup>326</sup> In particular :-

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<sup>324</sup> Rule 15.5, FPR 2010.

<sup>325</sup> Rule 15.3(3), FPR 2010.

<sup>326</sup> Rules 15.6, 15.7 and 15.9, FPR 2010.



- 456.4.1 Rule 15.6(2) expressly provides that an appointment of a litigation friend may be made by the court of its own initiative or on an application.
- 456.4.2 Rule 15.7 provides that the court may (a) direct that a person may not act as a litigation friend; (b) terminate a litigation friend's appointment; or (c) appoint a new litigation friend in substitution for an existing one.
- 456.4.3 Rule 15.9(1) states that when a party ceases to be a protected party, the litigation friend's appointment continues until it is brought to an end by a court order. Such an application may be made by (a) the former protected party; (b) the litigation friend; or (c) a party.
457. While the Working Party recognises the benefits of having comprehensive provisions on terms similar to those set out in Rules 15.3, 15.6, 15.7 and 15.9 of the FPR 2010, it is noted that no similar provisions exist in our Order 80 of the RHC. The Working Party has borne in mind the need for harmonisation as far as possible the general parts of the family rules with those for civil proceedings; and further considers that our existing provisions on this subject matter have been working well in matrimonial and family proceedings. Considering all these, the Working Party takes the view that we do not have to adopt the English provisions.
458. The Working Party further considers that there should be one unified code governing the representation of parties under disabilities in both matrimonial and family proceedings. The Working Party therefore proposes that the New Code can conveniently comprise the extant provisions in the MCR and the RHC with duplicated provisions removed : **Proposal 126.**

Proposal 126

*It is proposed to have one set of codes for both the matrimonial and family proceedings for rules governing representation of parties under disabilities in the New Code, incorporating the extant provisions in Rules 105 to 107 of the MCR and Order 80 of the RHC with duplicated provisions removed.*

**H26. Registrar and Masters**

**H26.1. The Registrar**

459. The “Registrar” is defined in Rule 2 of the MCR as :-

- (a) in relation to proceedings (being proceedings other than taxation of costs of proceedings) pending in the District Court, the Registrar of the High Court exercising his jurisdiction as the Registrar of the District Court;
- (b) in relation to taxation of costs of proceedings in the District Court, the Registrar of the District Court including a Deputy Registrar; and
- (c) in relation to proceedings in the Court of First Instance, the Registrar of the High Court.

460. Thus, apart from taxation pending in the District Court (which will be handled by the Registrar and Deputy Registrar of the District Court), the Registrar for all cases pending in the Family Court and the Court of First Instance is the Registrar of the High Court.

**H26.2. Powers and duties of the Registrar**

461. The duties of the Registrar under the MCR can be broadly categorised as follows :-

- 461.1 Case management or administrative duties, including giving directions for trial,<sup>327</sup> fixing dates for trial and giving notices thereof,<sup>328</sup> making decrees absolute,<sup>329</sup> granting unopposed removal orders,<sup>330</sup> and giving various notices to parties.
- 461.2 Judicial functions, involving granting of deemed service orders<sup>331</sup> substituted service orders,<sup>332</sup> dispensation with service orders,<sup>333</sup> and different kinds of orders on execution. In practice, these applications are mostly ex parte paper applications.<sup>334</sup> As the Registrar of the High Court does not sit in the Family Court physically, these applications are dealt with by the Duty Judge of the Family Court.<sup>335</sup>
- 461.3 The granting of the Registrar's certificate. Under Rule 33 (2A) and (2B) of the MCR, in cases of undefended petition or joint application for divorce, after the Registrar is satisfied with some procedural requirements, he will set the case down in the special procedure list. As soon as practicable after the case has been set down, the Registrar should then proceed to consider whether the petitioner or joint applicants have sufficiently proved the contents of the petition or joint application.<sup>336</sup> If he is so satisfied, he shall grant the Registrar's certificate and fix a date for the

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<sup>327</sup> Rule 33, MCR.

<sup>328</sup> Rule 44, MCR.

<sup>329</sup> Rule 65, MCR.

<sup>330</sup> Rule 94, MCR.

<sup>331</sup> Rule 14(6), MCR.

<sup>332</sup> Rule 14(9), MCR.

<sup>333</sup> Rule 14(10), MCR.

<sup>334</sup> See Annex 4 to this consultative paper.

<sup>335</sup> According to the figures kept by the Family Court Registry, there are currently on average 250 such applications to be handled by the Duty Judge per week.

<sup>336</sup> Rule 47A, MCR.

pronouncement of decree by a judge. If he is not so satisfied, he may require the petitioner or joint applicants to file further evidence or remove the cause from the special procedure list. The judge, upon seeing the Registrar's certificate, will grant the decree nisi of divorce and then proceed to deal with the other issues like children or ancillary matters.

### ***H26.3. Proposals***

462. As a matter of principle and practicality, the Family Court should have its own Registrar, who should be the Registrar of the District Court. The Registrar of the High Court should only act as the Registrar for handling family cases pending in the High Court. Like the general civil cases, the jurisdiction, powers and duties of the "Registrar" should also be exercised or performed by Masters, i.e. Senior Deputy Registrar, Deputy Registrar and Assistant Registrar as appropriate. We therefore propose that in the New Code, "Registrar" should be defined as the Registrar of the District Court if the case is pending in the Family Court, and the Registrar of the High Court if the case is pending in the High Court : **Proposal 127.**

*Proposal 127*

*In the New Code, "Registrar" should be defined as the Registrar of the District Court if the case is pending in the Family Court, and the Registrar of the High Court if the case is pending in the High Court.*

463. As for the scope of the duties of the Registrar, other than those extant matters, the Working Party considers that it should be expanded to cover simple applications such as amendments to the originating process, time extension and approval of consent summonses on procedural matters. These simple applications can be capably disposed of by the Registrar without troubling the judges : **Proposal 128.**

Proposal 128

*The scope of the duties of the Registrar, other than those extant matters, should be expanded to cover simple applications such as amendments to the originating process, time extension and approval of consent summonses on procedural matters.*

464. To implement these proposals, one option is to set out in different places of the New Code what the Registrar is empowered to do. This is the current approach in the MCR. In our view, a better option is to follow the usual practice in general civil proceedings by setting out the jurisdiction, powers and duties of the Registrar in general terms in the rules and then regulate the matter by way of PD. The practice in the bankruptcy jurisdiction provides a good example.
- 464.1 Under Rule 6(a) of the Bankruptcy Rules (Cap. 6A), the Registrar may under the general or special directions of a judge hear and determine any application or matter which under the Bankruptcy Ordinance (Cap. 6) and the Bankruptcy Rules may be heard and determined in Chambers.
- 464.2 Paragraph 3 of PD 3.1 lists out all the matters that may be heard and determined by the Registrar in chambers under Rule 6(a).
- 464.3 Rule 6(b) further provides that any matter or application before the Registrar may at any time be adjourned by him to be heard before a judge.
465. The Working Party considers that a similar approach may be adopted for the purpose of the New Code. The Registrar's jurisdiction, powers and duties will be conveniently set out in one place in a coherent manner. Further, if and when it is necessary to expand the scope of the Registrar's jurisdiction, powers or duties in the future, it can be conveniently done by revising the PDs after consultation with the profession without amending the rules. We therefore propose that the New Code should provide that the

Registrar may under the general or special directions of a judge hear and determine any application or matter which under the principal Ordinances and provisions in the New Code may be heard and determined in Chambers. It should further provide that any matter or application before the Registrar may at any time be adjourned by him to be heard before a judge. A PD should be introduced to list out all the matters and applications that the Registrar may hear and determine : **Proposal 129.**

Proposal 129

*The New Code should provide that the Registrar may under the general or special directions of a judge hear and determine any application or matter which under the principal Ordinances and provisions in the New Code may be heard and determined in Chambers; and that any matter or application before the Registrar may at any time be adjourned by him to be heard before a judge. A PD should be introduced to list out all the matters and applications that the Registrar may hear and determine.*

466. The Working Party further proposes that all the jurisdiction, powers and duties conferred on the Registrar in the New Code may be exercised and performed by a Master : **Proposal 130.**

Proposal 130

*All the jurisdiction, powers and duties conferred on the Registrar in the New Code may be exercised and performed by a Master.*

**H27. Modernisation of language**

**H27.1. Benefits**

467. The benefits of modernisation of language used in legislation are

obvious. It removes outdated legislative language which tends to generate misunderstanding, jeopardise rights, increase costs, encourage non-compliance and create unnecessary difficulties. It makes legislation more readable, more easy to understand and more accessible to the public (as far as possible without making the law significantly less lucid, accurate or certain) with a view to improving access to justice, enhancing efficiency and helping citizens make informed decisions as they go about their lives.

468. An important element of the effort to modernise legislation is to encourage the use of plain language. Plain language is direct and straightforward language designed to clearly communicate with and effectively inform its audience. It is more than just eradication of complex legalese and substitution of outdated jargons. More importantly, it includes clear logic, simple structure and easy-to-follow presentation that are focused on the needs of the audience. Clear thinking and skilled drafting are essential for presenting complicated legal concepts to a diverse audience in a simple and user-friendly way. But at the same time it should not be less accurate or precise in its substantive effect.

### ***H27.2. The English experience***

469. In England, the FPR 2010 was introduced with the aim to ensure that the rules in the new family procedural code are both simple and simply expressed. In order to achieve such aim and to enhance harmonisation with the CPR, the language in the FPR 2010 has been modernised by replacing outdated or archaic terms in the existing rules with user-friendly style and plain English terminology which mirrors that of the CPR and which is more suited to modern court use. Examples are as follows :-

<u>Old</u>	<u>New</u>
Ancillary relief	Financial order <sup>337</sup>
Ex parte	Without notice <sup>338</sup>
Guardian ad litem	Children’s guardian <sup>339</sup>
Leave	Permission <sup>340</sup>

470. Such plain language sets out a coherent guide for litigants and their representatives, advisers and experts to understand what is expected of them, and what they should expect of the family justice system and the family courts that operate within it.
471. There is also a glossary at the end of the FPR 2010 which guides the meaning of certain legal expressions used in the rules, but such meaning is not to be taken as giving those expressions any meaning in the rules which they do not have in the law generally.<sup>341</sup> For convenience, the words in the FPR 2010 (save for the word “service”) which are included in the glossary are followed by “GL”<sup>342</sup>.
472. However, although the FPR 2010 refers to a “matrimonial order”<sup>343</sup> and “an applicant”,<sup>344</sup> the forms still refer to a “petition” and “a petitioner”.<sup>345</sup> Further, even though the FPR 2010 also intends to

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<sup>337</sup> “Financial order” is defined in Rule 2.3(1), FPR 2010.

<sup>338</sup> E.g. Rule 8.40, FPR 2010.

<sup>339</sup> “Children’s guardian” is defined in Rule 2.3(1), FPR 2010.

<sup>340</sup> E.g. Rule 8.23, FPR 2010.

<sup>341</sup> Rule 2.2(1), FPR 2010.

<sup>342</sup> Rule 2.2(2)-(3), FPR 2010.

<sup>343</sup> “Matrimonial order” means – (a) a decree of divorce made under section 1 of the MCA 1973; (b) a decree of nullity made on one of the grounds set out in sections 11 or 12 of the MCA 1973; (c) a decree of judicial separation under section 17 of the MCA 1973 (see Rule 2.3(1), FPR 2010).

<sup>344</sup> E.g. Rule 7.6(1), FPR 2010.

<sup>345</sup> E.g. Form D8 – Divorce/dissolution/(judicial) separation petition.



remove “decree nisi”,<sup>346</sup> “decree absolute”,<sup>347</sup> “decree of divorce”, “decree of nullity”, “decree of judicial separation”, “maintenance pending suit” and “prayer”,<sup>348</sup> they remain for the time being because the cost of updating the judiciary’s software was too prohibitive.<sup>349</sup> But apart from this, the FPR 2010 has adopted the new terminology for civil partnership proceedings, and has been harmonised with and styled on the CPR so there is now one set of simply expressed rules of court for all family proceedings.

### ***H27.3. Proposals***

473. The proposed reform in Hong Kong provides a welcome opportunity to consider how best to replace outmoded provisions in family procedural law for the benefit of its users. Adopting a plain and simple overall drafting style and, where possible, replacing outdated legalese (or even Latin phrases) with more functional alternatives similar to the approach and language of the FPR 2010 are an attractive option.

474. However, there are other concerns that merit attention.

474.1 Hong Kong is a bilingual legal system. So modernisation of legislative language has wider ramifications than removing archaic terminology and adopting plain English. For family procedural law in Hong Kong, modernising legislative language and simplifying legislative drafting cannot be fully effective unless plain and simple legislative language can be achieved for both the English and Chinese counterparts. In the circumstances, one has to approach any proposal for plain language family procedural legislation in a bilingual jurisdiction and multicultural society such as Hong Kong with care.

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<sup>346</sup> E.g. Rule 7.19, FPR 2010.

<sup>347</sup> E.g. Rule 7.29, FPR 2010.

<sup>348</sup> E.g. Rules 7.26(1), 7.28(1)-(2) and 9.7(1), FPR 2010.

<sup>349</sup> Duncan Adam: “*The Family Procedure Rules 2010: A District Judge’s Perspective*”, March [2011] Fam Law, at pp. 244-245.

- 474.2 One should also be careful if any modernisation of terminology in family procedural law such as that used in the FPR 2010 would give rise to read-across implications on the general civil procedure/provisions in the RHC/RDC. Since the RHC/RDC have retained similar terminologies notwithstanding the CJR, to avoid any read-across confusion, the Working Party thinks that consideration should first be given for adopting simple and simply-expressed terminologies that are unique to family proceedings.
- 474.3 There is clearly a risk in migrating to a modernised code, although it is arguable that in the long run the advantages of legislation that is more easily understood may outweigh the transitional costs of having to adjust to a modernised system.
- 474.4 We are also conscious of possible resource implications not just for the wholesale redrafting and translating of the new family procedure rules, but also for the stakeholders' adjustment to the new format.
- 474.5 Modernisation of language also requires IT support, including upgrading of court software. Experience in England has shown that envisaged changes cannot be fully implemented without administrative support to train court staff and update court software.
475. Having balanced all the factors, the Working Party considers that as a matter of principle, the provisions in the New Code should be simple and simply expressed, and where appropriate, the language used may be modernised. But further consideration should be given as to how to pursue this objective as far as practicable, bearing in mind the concerns discussed above. **Proposal 131.**

Proposal 131

*As a matter of principle, the provisions in the New Code should be simple and simply expressed, and where appropriate, the language used may be modernised. Further consideration should be given as to how to pursue this objective as far as practicable, bearing in mind the various concerns.*

**H28. Removal of inconsistent language**

476. It is self-evident that any inconsistent language used in any statutory instrument should be avoided, and if there is any, should be removed.
477. The New Code will be a new procedural instrument. It will be derived partly from the existing provisions in the RHC/RDC, the MCR and other rules, and partly from the relevant provisions in the FPR 2010 and its PDs. Some provisions will be newly drafted, tailor-made to suit the specific needs as identified. Extreme care must be exercised in order to ensure that all the provisions in the New Code are consistent in their approaches, meanings and contents.

## **I. MISCELLANEOUS TOPICS**

### ***II. Information technology***

478. The Working Party has been advised by the Judiciary that it has recently formulated an up-to-date and comprehensive strategy plan, called the Information Technology Strategy Plan (“ITSP”), on the use of information technology (“IT”) in support of its operations for the coming ten years and beyond.

478.1 The aim of the ITSP is to implement an integrated court case management system to streamline and standardise court processes across different levels of courts as appropriate and to put in place a number of non-court systems to meet the operational requirements of the Judiciary.

478.2 The Judiciary will take a building-block approach in implementing the ITSP at various courts and tribunals. In Phase I of the exercise (which is expected to last for about six years from July 2013), the ITSP will cover courts including the Court of Final Appeal, the High Court, the District Court, the Magistrates’ Courts and the Small Claims Tribunal. Legislative amendments to the relevant court rules and procedures would be required for the ITSP implementation. With the foundations to be built and the experience to be gained in Phase I, the Judiciary will consider implementing the integrated court case management system for the remaining courts and tribunals in Phase II.

478.3 In light of the present procedural reform for matrimonial and family proceedings, and taking into account other considerations including resources, the Judiciary considers it more desirable to take forward the integrated court case management system in the Family Court in Phase II. In the meantime, the Judiciary will continue to upkeep our present IT systems for the Family Court to meet its operational needs.

479. In view of the Judiciary’s position, the Working Party will not carry out any detailed consultation on issues relating to use of IT for the Family Court at this stage. We understand that the Judiciary will monitor the developments closely and carry out any

other consultation on the IT front as may be necessary at the appropriate juncture.

## ***12. Implications on resources***

480. The proposals as set out in this paper, if implemented, would give rise to resource implications and require infrastructural support in various ways. While it is difficult to quantify these implications at this stage, it is likely that additional resources and support are needed in the following areas :-

- (a) manpower resources;
- (b) system support;
- (c) training;
- (d) assistance to litigants in person; and
- (e) public education.

### ***12.1. Manpower resources***

481. Proposals have been made to provide greater support to family judges at the High Court and District Court by the respective Registrar(s) and the Masters holding a newly-created family portfolio. This is intended to help ease the workload of the family judges. Such proposals, however, would have organisational and manpower implications. For example, additional Registrar/Master posts may need to be created and other changes may be needed to ensure that they would carry out their judicial duties effectively. In addition, extra support staff would be required to assist these additional judicial officers serving as Registrar(s) or Masters.

482. The Working Party proposes that an assessment should be carried out on the organisational and manpower implications on the Judiciary arising from the proposals : **Proposal 132.**

Proposal 132

*An assessment on the organisational and manpower implications of the proposals on the Judiciary should be carried out.*

**12.2. System changes**

483. The implementation of a revised set of procedural rules in family proceedings will require system support by the appropriate application of IT in all aspects. The existing case management system in the Family Court has very limited functions and a comprehensive revamp of the IT system is called for to support the new procedural rules. Further, it is likely that the proposed changes in terminologies would require some corresponding changes to the IT system if the relevant forms are to be made available in the electronic format.
484. The Working Party suggests that in taking forward the proposals, the Judiciary should consider undertaking a further study on the scope of system changes required and the approach to be adopted in the context of the implementation of Phase II of the Judiciary-wide ITSP for better synergy and cost-effectiveness etc. This will also provide a better estimate of the resources required for implementing the system changes. **Proposal 133.**

Proposal 133

*In taking forward the proposals, the Judiciary should consider undertaking a further study on the scope of IT system changes required and the approach to be adopted in the context of Phase II of the Judiciary-wide Information Technology Strategy Plan for better synergy and cost-effectiveness etc.*

### ***12.3. Training***

485. It is envisaged that the New Code, as a unified procedural code that comprehensively deals with the practices and procedures for all family and matrimonial matters, would bring about changes to the existing processes and arrangements, though such changes should not be too burdensome. To ensure a smooth transition to the proposed New Code, the Working Party considers that necessary training should be given to the judges and judicial officers dealing with family cases and the support court staff. Separately, the Working Party also takes the view that suitable training should be conducted for the practitioners by the relevant legal professional bodies with support from the Judiciary. **Proposal 134.**

#### *Proposal 134*

*Suitable training on the New Code should be provided to judges and judicial officers dealing with family cases, the support court staff and the legal professionals.*

### ***12.4. Publicity materials for litigants in person and the public***

486. With greater procedural clarity and certainty, we believe that the proposals would facilitate litigants in person in taking forward matrimonial and family proceedings. To enhance the understanding of the overall procedures by the litigants in person, we propose that the Judiciary should consider producing suitable publications and materials to assist them in navigating through the process : **Proposal 135.**

#### *Proposal 135*

*The Judiciary should consider producing suitable publications and materials to assist the litigants in person in navigating through the process.*

487. The introduction of the New Code will be conducive to the work of the family and welfare organisations and other associated bodies which are providing assistance to litigants in family proceedings. In addition, it would be important for the family procedural rules to be accessible to the public in a user-friendly manner. In this regard, we propose that the Judiciary should consider if general publicity materials should be produced to enable the interested bodies and members of the public to have a good general understanding of the New Code. **Proposal 136.**

*Proposal 136*

*Considerations should be given by the Judiciary for producing general publicity materials to enable the interested bodies and members of the public to have a good general understanding of the New Code.*



# ***ANNEXES***

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**Schedule 1 to the Supreme Court Act 1981  
(now renamed as the Senior Courts Act 1981)**

To the Family Division are assigned :-

- (a) all matrimonial causes and matters (whether at first instance or on appeal);
- (b) all causes and matters (whether at first instance or on appeal) relating to :-
  - (i) legitimacy;
  - (ii) the exercise of the inherent jurisdiction of the High Court with respect to minors, the maintenance of minors and any proceedings under the Children Act 1989, except proceedings solely for the appointment of a guardian of a minor's estate;
  - (iii) adoption;
  - (iv) non-contentious or common form probate business;
- (c) applications for consent to the marriage of a minor or for a declaration under section 27B(5) of the Marriage Act 1949;
- (d) proceedings on appeal under section 13 of the Administration of Justice Act 1960 from an order or decision made under section 63(3) of the Magistrates' Courts Act 1980 to enforce an order of a magistrates' court made in matrimonial proceedings or proceedings under Part IV of the Family Law Act 1996 or with respect to the guardianship of a minor;
- (e) applications under Part III of the Family Law Act 1986;
- (e) proceedings under the Children Act 1989;
- (ea) proceedings under section 79 of the Childcare Act 2006;

- (f) all proceedings under :-
  - (i) the Part IV or 4A of the Family Law Act 1996;
  - (ii) the Child Abduction and Custody Act 1985;
  - (iii) the Family Law Act 1986;
  - (iv) section 30 of the Human Fertilisation and Embryology Act 1990;
  - (v) Council Regulation (EC) No. 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, so far as that Regulation relates to jurisdiction, recognition and enforcement in parental responsibility matters;
- (fa) all proceedings relating to a debit or credit under section 29(1) or 49(1) of the Welfare Reform and Pensions Act 1999;
- (g) all proceedings for the purpose of enforcing an order made in any proceedings of a type described in this paragraph;
- (h) all proceedings under the Child Support Act 1991;
- (i) all proceedings under sections 6 and 8 of the Gender Recognition Act 2004;
- (i) all civil partnership causes and matters (whether at first instance or on appeal);
- (j) applications for consent to the formation of a civil partnership by a minor or for a declaration under paragraph 7 of Schedule 1 to the Civil Partnership Act 2004; and
- (k) applications under section 58 of that Act (declarations relating to civil partnerships).

**Commencement of Proceedings**

<b>Ordinance</b>	<b>Applicable Rules in Hong Kong</b>	<b>Mode of Start of Proceedings</b>	<b>Statutory Forms</b>
<b>AO</b>			
Section 4—Application for an Adoption Order	Rule 5, AR	Originating summons	Schedule 1 Form 2
Part 5—Convention Adoption	Rule 6, CAR	Originating summons	Schedule 1 Form C2
<b>CACO</b>	Order 121, rule 2, RHC	Originating summons	Appendix A Form 10
<b>DCRVO</b>	Rule 3, DCRVR applies RHC and PD 15.12	Originating summons	Appendix A Form 10
<b>GMO</b>	Part H, PD 15.12	Originating summons	Appendix A Form 10
<b>I(PFD)O</b>	Part H, PD 15.12	Originating summons	Appendix A Form 10
<b>LO</b>	Part H, PD 15.12	Originating summons	Appendix A Form 10
<b>But note</b>			
MCO Section 49— Declaration of Legitimacy	Rule 124, MCR	Petition	-----

<b>Ordinance</b>	<b>Applicable Rules in Hong Kong</b>	<b>Mode of Start of Proceedings</b>	<b>Statutory Forms</b>
<b>MO(RE)O</b>	MO(RE)R  Part H, PD 15.12	Originating summons	Appendix A Form 10
<b>MO</b>  Section 18A– Seeking consent to marriage of persons of and over 16 but under 21 years of age	-----	Originating summons	Appendix A Form 10
<b>MRO</b>  Section 9– Application that a customary/validated marriage subsists	-----	Originating application	Appendix D Form No.3 of the RDC
<b>MPSO</b>  Section 6– Application to determine any question between husband and wife as to the title to or possession of property	Order 89, RDC/RHC and PD 15.12	Originating summons	Appendix A Form 10

<b>Ordinance</b>	<b>Applicable Rules in Hong Kong</b>	<b>Mode of Start of Proceedings</b>	<b>Statutory Forms</b>
<b>MCO</b>	MCR		
Section 12 – Leave to petition within 1 year of marriage	Rule 5(1), MCR	Originating application	MCR - Appendix Form 1
Section 18B(c) – Application to consider agreement in contemplation of divorce or judicial separation	Rule 6(3)(a), MCR	Originating application	No statutory form
Section 10A– Commencement of a matrimonial cause other than a joint application	Rule 9(1)(a), MCR	Petition	MCR- Appendix Form 2
Commencement of a matrimonial cause which is a joint application	Rule 9(1)(b), MCR	Originating application	MCR- Appendix Form 2C
Part IX Declaration for validity of an overseas divorce or legal separation	No specific rules in MCR	Originating summons	Appendix A Form10

Ordinance	Applicable Rules in Hong Kong	Mode of Start of Proceedings	Statutory Forms
<p><b>MPPO</b></p> <p>Section 8– Wilful Neglect to Maintain</p> <p>Section 15– Alteration of Maintenance Agreement <i>during lifetime of parties</i></p> <p>Section 16– Alteration of Maintenance Agreement <i>after the death of one of the parties</i></p> <p>Part IIA Financial Relief in Hong Kong After Divorce, etc Outside Hong Kong</p> <p>Section 29AC– Leave to apply for financial relief</p> <p>Section 29AB– Application for financial relief</p> <p>Section 29AK– Application to prevent transactions intended to defeat prospective applications for financial relief</p>	<p>Rule 98(1), MCR</p> <p>Rule 100, MCR</p> <p>Rule 101, MCR</p> <p>Rule 103A(1), MCR</p> <p>Rule 103B(1), MCR</p> <p>Rule 103D, MCR</p>	<p>Originating application</p> <p>Originating application</p> <p>Originating summons</p> <p>Ex-parte originating summons</p> <p>Originating summons</p> <p>Originating summons</p>	<p>MCR- Appendix Form 14 and Form 15</p> <p>MCR- Appendix Form 16</p> <p>MCR- Appendix Form 17</p> <p>MCR- Appendix Form 27</p> <p>MCR- Appendix Form 28</p> <p>MCR- Appendix Form 30</p>



Ordinance	Applicable Rules in Hong Kong	Mode of Start of Proceedings	Statutory Forms
<p><b>PCO</b></p> <p>Section 6— Declarations of parentage, legitimacy or legitimation</p> <p>Section 12— Application for parental orders in favour of gamete donors</p> <p>Section 13— Application for direction for use of scientific tests in determining parentage</p>	<p>-----</p> <p>-----</p> <p>-----</p>	<p>Originating summons</p> <p>Originating summons</p> <p>Originating summons</p>	<p>Appendix A Form 10</p> <p>Appendix A Form 10</p> <p>Appendix A Form 10</p>
<p><b>SMOO</b></p> <p>Section 5— Application for order regarding applicant no longer bound to cohabit, custody of child, financial provision etc.</p>	<p>Order 89(1), RDC (N.B. no such provision in RHC)</p>	<p>Originating summons</p>	<p>Appendix A Form 10</p>

<b>Ordinance</b>	<b>Applicable Rules in Hong Kong</b>	<b>Mode of Start of Proceedings</b>	<b>Statutory Forms</b>
<b>HCO</b>			
Section 12– Inherent jurisdiction	-----	-----	-----
Section 26– Wardship Proceedings	Order 90, rule 3(1), RHC	Originating summons	Appendix A Form 10
Sections 21M and 21 N– Interim relief in aid of foreign proceedings	Order 29, rule 8A, RHC	Originating summons	Appendix A Form 10

**List of Modes of Enforcement in Matrimonial and Family Proceedings**

<b><u>Enforcement means</u></b>	<b><u>Rules</u></b>
1. Judgment Summons	Rules 87 and 88, MCR for proceedings in the High Court and matrimonial proceedings in the Family Court;  RDC Order 90A for proceedings in the District Court and family proceedings
2. Attachment of Income Order	AIOR
3. Committal for Contempt	Rule 90, MCR and RHC/RDC Order 52
4. Writ of Sequestration	RHC/RDC Order 45, rule 5
5. Injunction	RHC/RDC Order 29 and PD 11.1
6. Charging Order	RHC/RDC Order 50
7. Garnishee Order	RHC/RDC Order 49
8. Prohibition Order	RHC/RDC Order 44A
9. Writ of Fieri Facias	RHC/RDC Order 47
10. Appointment of Receivers : Equitable Execution	RHC/RDC Order 51

**List of the Nature of Ex-parte Applications filed at the Family Court**

1. Application for inspection of court documents and/or Cause Book
2. Application for leave to issue Judgment Summons
3. Application for attachment of income order
4. Application for amendment (including petitions, orders and decrees absolute)
5. Application for leave to dispense with the filing of original marriage certificate
6. Application for leave for not to disclose the residential address of petitioner and the school name of the child
7. Application for prohibition order
8. Application for charging order
9. Application for garnishee order
10. Application for dismissal/discontinuance of petition
11. Application for substituted service
12. Application for deemed service
13. Application for leave to issue committal proceedings
14. Application for writ of possession

