WoC 05/03
(for discussion on
8 April 2003)

WOMEN'S COMMISSION
Pilot Scheme for the Reform of Ancillary Relief Procedures in Matrimonial Proceedings

PURPOSE

The purpose of this paper is to introduce the proposed pilot scheme for the reform of ancillary relief procedures in matrimonial proceedings.

BACKGROUND

2. The existing ancillary relief [1] procedures in matrimonial proceedings in Hong Kong have been in operation since 1972. Hong Kong has since been transformed dramatically. Along with a growth in affluence, traditional views of marriage have changed. Divorce no longer carries the same stigma. The result has been an almost exponential expansion in the number of divorce cases filed each year and with it increasingly complex litigation concerning the equitable distribution of family assets.

3. The statistics on divorce cases filed with the Family Court Registry over the past three years are as follows :

	2000	**2001**	**2002**
Defended divorce	101	93	33
Undefended divorce	13,962	15,287	16,806
Total	14,063	15,380	16,839

[1] The term 'ancillary relief' is defined in rule 2 of the Matrimonial Causes Rules, Chapter 179 and 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.

EXISTING ANCILLARY RELIEF PROCEDURES

4. The ancillary relief proceedings commence when one party gives to the other a formal notice of intention to seek money or property orders from the court. If a petitioner seeks ancillary relief, the notice will invariably be contained in the body of the Divorce Petition. If a respondent seeks ancillary relief, the notice will be contained in the respondent's Answer to the Petition.

5. A respondent receiving a Notice of Application for Ancillary Relief is obliged to file an Affidavit of Means giving full particulars of property and income within 14 days. The petitioner should then reply to the Affidavit of Means within 14 days.

6. The petitioner or respondent may each raise a financial Questionnaire for further discovery on the other's Affidavit of Means. In addition, the parties may file further Affidavits commenting on the matters raised in the other's Affidavit.

7. The discovery of documents taking the form of Questionnaires, further Affidavits of Means and Replies thereto is usually a lengthy and sometimes complex process. Discovery can be extensive, often exceeding the realistic requirements of the case.

8. Directions are often given at the divorce hearing which, in the majority of cases, occurs before the discovery of documents. The court will order discovery of documents within a certain time. The court may also fix a date for the hearing for ancillary relief.

9. At the hearing, the court will investigate the allegations made in support of, and in answer to, the application and may order the attendance of any person for the purpose of being examined or cross-examined. The court may also order the discovery and production of any document or require further Affidavits. In a simple case, the judge may deliver judgment at the end of the hearing. In a complex case, the judge will reserve judgment for delivery on another day.

Problems with the existing ancillary relief procedures

10. It is observed that the present system allows too much leeway for litigants to turn ancillary relief proceedings into a battlefield for the exhaustion of their marital antagonisms. The adoption of an antagonistic approach by the parties very often prolongs the emotional trauma of divorce, resulting in the dissipation of family assets in costs.

11. The current ancillary relief procedures are generally considered :

(a) too adversarial in nature;

(b) not in any way designed to promote a culture of settlement;

(c) too susceptible to obstructionist tactics, especially oppressive discovery proceedings;

(d) too expensive, and

(e) too complex in nature.

12. In particular, the current procedures do not make provision for a mandatory directions hearing. Delays in bringing ancillary relief proceedings to conclusion often mean that in the interim period the financial circumstances of the parties change. This requires the parties to file further Affidavits of Means to bring matters up to date.

13. Furthermore, the matter of settlement is left entirely to the discretion of the parties and their legal advisors. Settlements reached 'at the door of the court' on the morning of the ancillary relief hearing or during the course of the hearing itself are common. By then, all too often the legal costs incurred by the parties frustrate any substantive benefit which the parties receive from an otherwise equitable distribution of the matrimonial assets.

Overseas experience

14. In recent years, a number of common law jurisdictions have attempted to tackle similar problems by changing the nature of their ancillary relief proceedings. Over the past 15 years, Australia and New Zealand have instituted far-reaching reforms.

15. In England and Wales, the need for reform was recognised as far back as 1992 when the Family Law Bar Association made proposals for wide-ranging reforms. In that same year, an ad hoc group was set up under the chairmanship of Lord Justice Thorpe. The group called itself the Ancillary Relief Working Party. A new set of procedures (much of it drawn from Australasian models) was drafted. This culminated in 1996 in the decision of the Lord Chancellor to pilot the new procedures in a limited number of courts.

16. In order to evaluate the success of the English pilot scheme, the Lord Chancellor's Department briefed independent consultants, KPMG, to conduct an assessment. In their report, the consultants found that there was significant evidence that the overall length of cases was being reduced and there was some evidence that settlement rates were increasing. The report was generally very positive. In addition, there was widespread support for the pilot scheme from the

legal profession. The pilot scheme not only simplified and rationalised proceedings, but promoted a 'culture of settlement' which took much of the sting out of the traditional adversarial process.

17. As a result, the Lord Chancellor directed that the scheme be extended to all the courts of England and Wales. This was implemented through the Family Proceedings (Amendment No. 2) Rules 1999 which came into force in June 2000.

The appointment of a Working Group to consider reform

18. In November 1999, being aware of developments in other jurisdictions, the Chief Justice appointed a Working Group to consider the reform of the ancillary relief procedures with a view to making them quicker, cheaper, less adversarial and more conducive to a culture of settlement.

19. The terms of reference of the Working Group was as follows:-

> "To consider whether there should be a reform of existing ancillary relief procedures and, if so –
>
> (a) to recommend a new procedural framework for the resolution of ancillary relief disputes and, where custody (and access) disputes are integral to a resolution of such disputes, their incorporation into that new procedural framework; and
>
> (b) if thought appropriate, to recommend a pilot scheme to test the effectiveness of any new procedural framework."

20. The membership of the Working Group was as follows:-

> The Hon Mr Justice Hartmann (Chairman)
> H H Judge Carlson
> H H Judge Chan
> The late Ms Pam Baker, Hong Kong Family Law Association
> Ms Corinne Remedios, Hong Kong Bar Association
> Miss Anita Yip, Hong Kong Bar Association
> Ms Bebe Chu, The Law Society of Hong Kong
> Mr Robin Egerton, The Law Society of Hong Kong
> Representative from the Legal Aid Department
> Representatives from the Judiciary Administration

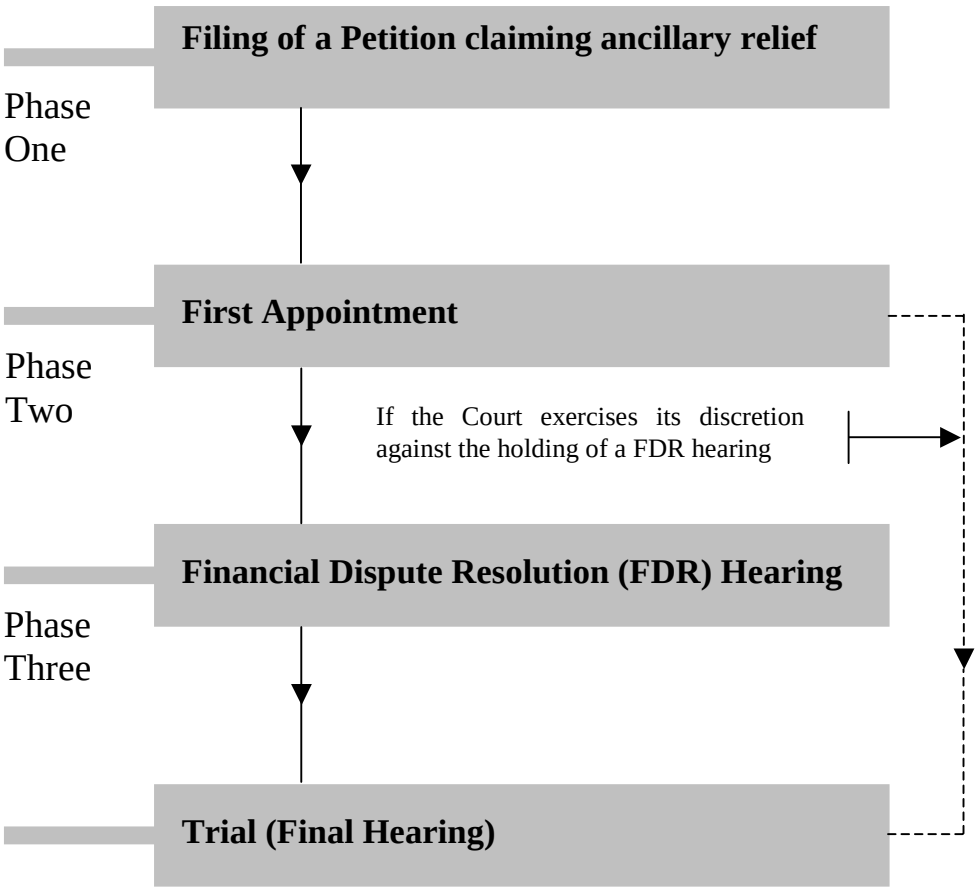
21. Having regard to the overseas experience, the Working Group considered that the English pilot scheme presented the best model for Hong Kong. That pilot scheme had itself adopted a number of the salient features of the ancillary relief regimes introduced into Australia and New Zealand and

therefore reflected a broad consensus of opinion in the common law world as to the best way forward.

22. The Working Group further agreed that the introduction of the reformed procedures into Hong Kong should be tested by a two-year pilot scheme. This recommendation has been approved by the Chief Justice.

THE REFORMED ANCILLARY RELIEF PROCEDURES

23. Broadly speaking, the reformed ancillary relief procedures are divided into three phases, each phase concluding with a 'milestone' court hearing, as illustrated in the flowchart below.



Phase One

24. This phase commences with the filing of a Petition, Joint Application or Answer in which a claim for ancillary relief, other than only nominal maintenance, is contained and concludes with the holding of the First Appointment.

25. The date of the First Appointment will in the ordinary course of events be some 10 to 14 weeks ahead. A later date within such time frame may be given, if, for example, difficulties are anticipated in serving process on the other party.

26. At least 28 days before the date of the First Appointment, the parties must each file with the court and simultaneously exchange their respective Financial Statements. A failure to file the Statement on due date may be penalised in costs. Where one party only is in the position to file and exchange the Financial Statement, that party shall be at liberty to file the Statement in a sealed envelope so that it cannot be read by the defaulting party until that party has filed his/her Statement and is in the position to exchange his/her Statement.

27. After the exchange of the Financial Statements, and at least 14 days before the hearing of the First Appointment, the parties are required to file a bundle of documents including a concise statement of the issues between the parties; a brief chronology relevant to the matters in issue; a questionnaire (if necessary); and a statement of costs incurred and to be incurred by the conclusion of the First Appointment.

28. The First Appointment will be presided over by the judge who will 'manage' the case. Issues will be defined and a broad range of directions will be given by the judge at the First Appointment to ensure that the matter proceeds to resolution economically and with a minimum of delay.

29. If the court at the First Appointment exercises its discretion against the holding of a Financial Dispute Resolution (FDR) hearing, then it will proceed directly to trial.

Phase two

30. This phase proceeds from the First Appointment and concludes with the FDR hearing.

31. All correspondence between the parties aimed at settlement will be considered at the FDR hearing. This hearing is presided over by the judge who has been given management of the case. The purpose of the FDR hearing is to explore possible grounds for settlement.

32. At the FDR hearing, the judge sits essentially in the role of a 'facilitator', assisting the parties to try to reach a settlement. The parties are obliged to provide a statement of their costs incurred to date. If a settlement is not obtained at the FDR hearing, the matter will be set down for trial before another judge.

Phase Three

33. This phase proceeds from the conclusion of the FDR hearing, if that has not been fully successful, and concludes with the trial.

34. At least 21 days before the trial, the applicant must file and serve an open proposal and the respondent must, within seven days of receipt of that open proposal, file his or her open proposal.

35. At the commencement of the trial, each party must submit a final statement of their costs, such costs being estimated to the end of the trial.

36. The trial will proceed in the usual manner before a judge other than the one who presided at the FDR hearing. As the issues will have been defined at the First Appointment and pleadings kept within realistic limits, trials are expected to be shorter.

APPLICATION OF THE PILOT SCHEME

37. The pilot scheme will apply to all cases involving claims for ancillary relief, except for those in which nominal maintenance only is claimed. When the resolution of a custody dispute is integral to the resolution of an ancillary relief dispute, that custody dispute will also fall under the pilot scheme.

38. All claims for ancillary relief contained in Petitions or Joint Applications which are filed on or after the commencement date of the pilot scheme are subject to the pilot scheme. Claims contained in Petitions or Joint Applications filed prior to the commencement date of the pilot scheme will not be subject to the pilot scheme unless the parties agree and the court so orders. If so, and depending on the stage of that prior litigation, it may be necessary to seek directions from the court.

The aims of the pilot scheme

39. The aims of the pilot scheme are as follows:-

(a) to identify the issues which are important to the parties and to encourage them to reach settlement on those issues;

(b) to reduce unnecessary costs, delay and personal distress for the parties;

(c) to ensure that the parties are made aware at every stage of the proceedings of the costs incurred to date and, where appropriate, the costs that may be incurred if the matter is to proceed; and

(d) to curb exhaustive and unnecessary disclosure of financial information, especially copious discovery (and copying) of documents so that the parties and the court can, at a reduced cost, focus on the matters of material relevance.

The main features of the pilot scheme

40. The main features of the pilot scheme include the following:-

(a) substitution of Affidavits of Means with a disclosure of financial information in a standardized form (the "Financial Statement"). All parties must file a Financial Statement notwithstanding the level of their affluence;

(b) mandatory attendance of the parties at the First Appointment and the FDR hearing;

(c) once a date for the hearing of the First Appointment is given, a timetable is thereby created. Such timetable cannot be altered without the leave of the court;

(d) the First Appointment will be presided over by the judge who will 'manage' the case. The issues must be defined and a broad range of directions will be given at the First Appointment to ensure that the matter proceeds to resolution economically and with a minimum of delay;

(e) the FDR hearing will take place after the filing of all necessary documents on a date fixed at the First Appointment. This hearing is presided over by the judge who has been given management of the case. The purpose of the FDR hearing is to explore possible grounds for settlement. All settlement proposals that the parties have made to each other, together with any fresh proposal, will be tabled at the hearing to enable the parties to seek common ground for settlement. The judge, where appropriate, will attempt to facilitate settlement;

(f) if a settlement is not obtained at the FDR hearing, the matter will be set down for trial before another judge.

(g) a requirement for the parties or their legal representatives to submit at each hearing a statement of costs incurred by them to

date. The purpose of this is to ensure that both the parties and the court are, at each milestone event, kept aware of the costs incurred to date and thereby their impact on the family assets;

(h) matters of custody are often integral to ancillary relief proceedings. At the First Appointment, the judge will have discretion to seek a way to best manage the collateral custody proceedings, perhaps by directing that custody issues be resolved first in a separate hearing, and the ancillary relief hearings will be consequent upon that resolution.

ADVICE SOUGHT

41. Members are invited to comment on the proposed pilot scheme for the reform of ancillary relief procedures in matrimonial proceedings.

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Judiciary Administration
2 April 2003