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Presentation on the Approach Upon which Consent Summons on Ancillary Relief and/or Care Arrangements for Children are to be Approved by the Court on 8 November 2024

Today's seminar is an attempt of the Family Court to have more communications with the legal professions. Today's subject is a matter that we both sides have to deal with on a frequent basis, so it should be a good starting point for building up communications.

I must say all the judges and masters appreciate and acknowledge the tireless efforts that practitioners made in achieving a settlement and then to have it reduced to a consent summons. I understand very often it is hard to achieve a settlement; it is time consuming, sometimes the other side is difficult to catch or may even go back on his words and you may find it difficult to persuade your client. Therefore, it is all the more important that both sides, ie the judicial officers and the legal practitioners, are working on the same page so that consent summonses can be dealt with expeditiously.

I must emphasize that we do not intend to state any new principles of law here. There is none. All the legal principles that we are going to refer to are well established and that legal practitioners should be aware of. What we have done is just to summarize the mistakes or fallacies that we saw and to provide solutions on a practical level. For this reason, and in the interest of time, when I come to some legal provisions or cases, I will not elaborate on what these provisions or cases are.

By the way, today's materials will be uploaded to the Judiciary's website.

Without further ado, I shall start.

My presentation will follow the following Table of Contents.

(A) Broad Principles

1. To start with, while the court respects the agreement of the parties, the court will not simply rubber-stamp a consent summons. The court is tasked to dispose of ancillary relief disputes by way of making **appropriate orders**.
2. The term of ancillary relief is defined in section 2 of the Matrimonial Causes Rules (Cap 179A) ("**MCR**"). In the context of ancillary relief upon

divorce, these are normally orders made under section 4 (periodical and/or lump sum payment for spouse), section 5 (periodical and/or lump sum payment for children of the family), section 6 (property orders), sections 6A (orders for sale) and section 17 (avoidance of disposition order) of the Matrimonial Proceedings and Property Ordinance (Cap 192) (“**MPPO**”).

3. Generally speaking, without any order or without an order dismissing parties' claims for all ancillary relief, there is **no finality** on the matter.
4. In the discharge of its duties, the court's power is not unlimited. In the context of matrimonial proceedings, when approving a consent summons on ancillary relief, the court is enjoined to exercise its discretion after having given regard to matters set out in section 7 of MPPO. At the same time, the court is being constrained by the provisions under sections 9, 10 and 25 of MPPO; and in application for variation of maintenance, by section 11 of MPPO. Practitioners should be well aware of these provisions.
5. It is important that orders prayed in consent summons must be worded in certain and unambiguous terms for compliance.
6. It also has to borne in mind that *Practice Direction 15.8 Decrees and Orders: Agreed Terms* provides that agreed terms in an order will usually be justified only where they are in a form capable of subsequent variation or enforcement. Thus, parties should ensure that the orders prayed for are within the statutory power of the court to make: see para 2 of PD 15.8.
7. Once their ancillary relief claims have been dismissed, parties cannot pursue further claims unless the consent order is set aside based on common law principles. Practitioners should also be aware of the principles set out in *De Lasala v De Lasala* [1980] AC 546, [1979] 2 All ER 1146 and recently in *Wong Oi Han v Sin Wai Chung* [2012] 3 HKLRD 142; and also in *PDSL 10.3-Guidance on Setting Aside a Consent Order on Ancillary Relief*.

(B) Preamble

8. It is good practice to have provisions along the lines that the terms are agreed on the understanding that there have been full and frank disclosure

- of parties' respective financial means and that properties being owned by them respectively or being held or registered under his/her name shall remain unchanged and the other party shall have no claim (whatever its nature) on them.
9. The practice by some practitioners that all the terms of the agreement are set out in the Preamble with a provision of costs order in the main body only is undesirable. The reason is simple: there is simply no order for the disposal of the application/s for ancillary relief by the court.
 10. There is a tendency to have voluminous preamble paragraphs giving basic information and incorporating all ancillary relief arrangements by way of undertakings with a single paragraph praying for a court order to have the ancillary relief claims be dismissed or a clean break upon compliance of these undertakings. For the reasons set out below regarding undertakings, the court would be slow to endorse such consent summonses.
 11. There is also a tendency for parties putting long and unnecessary background matters in the preamble. Court orders should be succinct, simple and clear. Background information can be provided by filing Form Es or by way of a joint letter providing background information of both parties' finances for court's consideration at the time of filing of the consent summons; where relevant, the court should be provided with a full land search record from the Land Registry and/or relevant records from the Companies Registry.

Acknowledgment, Agreement and Undertaking

12. Any "acknowledgment", "agreement" or "undertaking" concerning financial matters should be concise and unambiguous leaving no room for further argument; otherwise, it would be a good recipe for future litigation.
13. There is a difference between "acknowledgment and agreement" on the one part and "undertaking" and on the other. The former is between the parties, the latter is in favour of the court, which the court may or may not accept.
14. Further, parties should be advised by their lawyers that some acknowledgements or agreement may not be legally enforceable.

15. *Practice Direction 15.8 Decrees and Orders: Agreed Terms* provides that a party should submit to an undertaking to court which, in the event of non-compliance, is to be enforceable by committal.
16. Provisions which are ambiguous, uncertain or are merely aspirational, expression of goodwill or well intention cannot be accepted as undertakings.
17. There could also be problems if undertakings are to be performed over a long period of time because in times circumstances may change and such undertakings may require continuous management. In other words, strictly speaking, there is no finality but the relevant parties may well conceive (or misconceive) that they have achieved finality. For these reasons, the court would be slow to accept this kind of undertakings.
18. The consent summons should only contain those undertakings relating to financial arrangements or children's arrangements.
19. An undertaking (1) in respect of acts already performed; or (2) to make a will on agreed contents would not be accepted. The maker may make another will anytime during his/her lifetime or it will be revoked upon re-marriage of the maker.
20. Where parties agree on matters other than relating to ancillary relief and/or children in the winding up of their marriage (such as how the furniture or parties' pets, etc are to be dealt with), those agreements and acknowledgments should not be dealt with in the consent summons and may be made by way of an Agreement to be signed by the parties. Such an Agreement should **not** be attached to the consent summons.
21. If a provision can be made by way of a court order, it should not be made by way of an undertaking.
22. Practitioners should bear in mind that enforcement of undertakings may take longer time than enforcement of a simple order.
23. Further, practitioners should be aware that undertakings may not be enforceable outside Hong Kong.

Financial Undertakings

24. Financial undertakings are only used where the court has no power or jurisdiction to make the order. Thus, lump sum and periodical payments and costs should be in the body of the order and not be contained in undertakings.
25. Financial undertakings are mainly used, say, in situations where a payer prefers to pay directly to a third party, such as school fees, rent, medical insurance premium, etc., in which case, the items should be well defined, ascertainable and quantifiable.
26. If there is non-compliance, the payee may need to consider to come back to the court to seek a variation for those direct payments be paid to the payee in cash by way of periodical payments, and for the payee to then pay the third parties.

(C) Decree of Divorce

27. A prayer for a decree of divorce is not necessary.

(D) Ancillary Relief for Spouse

Sections 9 and 25 of MPPO

28. Practitioners should bear in mind
- (1) that no order under section 4, 6 or 6A of MPPO shall be made unless a decree nisi has been granted and no such order made on or after granting a decree nisi and no settlement made in pursuance of such an order shall take effect unless the decree has been made absolute under section 25(1), MPPO; and
- (2) that there is a maximum term of periodical payment under section 9 of MPPO.

29. Where parties agree to have a lump sum to be paid by instalments spreading over a period of time before and after decree absolute, practitioners should ensure that section 25(1) MPPO is complied with.

Dismissal of Ancillary Relief Claims

30. Where parties have agreed to have a full and final settlement (or a clean break) of the ancillary relief claims, parties should consider praying for **all** ancillary relief claims (including any section 17 MPPO application) against the other party and his/her estate be dismissed by an order of the court.
31. Even if eventually a periodical payment order only is sought in the consent summons, parties should consider and suggest in the consent summons as to how to dispose of their respective claims on each other's assets, especially when they may have all kinds of ancillary relief claims set out in the petition/answer/cross petition/Form A.
32. However, there can be no dismissal or full and final settlement with an ongoing periodical payment order. By the same token, clean break between parties cannot be achieved if there is an order of nominal maintenance which can be varied subsequently under section 11 of MPPO. Parties should be aware of the provisions under section 11 of MPPO.
33. That said, we consider that a provision dismissing all ancillary relief claims (including any section 17 MPPO application) against the other party (and his/her estate) except periodical payment (both secured and unsecured) for a spouse is acceptable.
34. For the avoidance of doubt, it is good practice to have all interim orders be discharged in the consent summons.

Transfer of Property

35. Where a transfer of landed property is involved, whether for the benefit of a spouse and/or for a child, practitioners should be reminded to state in the consent summons who is residing at the property, if such use is rent-free, who is paying the management fees, rates etc, whether the transfer is to be subject to encumbrances/mortgage, or free of mortgage, whether it is to be transferred with vacant possession, if premium is payable who is to pay and who is to be responsible for the legal costs and stamp duty. If the property

is tenanted, the tenant will have to be notified and that the rental deposit will need to be transferred.

36. Where a property is a Home Ownership Scheme property and premium is payable, the order has to be made subject to the **consent** of the Hong Kong Housing Authority or the Hong Kong Housing Society, as the case may be.
37. If parties need to register any order at the Land Registry, they may have to apply for a short form of the consent order for registration.

Act to be done by a Third Party

38. There could be situations where a consent summons provides for an act to be done by a third party. There are largely two scenarios.
39. The first is where an act does not involve transfer of property, for instance, the husband's father agrees to allow the wife and the child of the family to continue to reside in his property after divorce. While in such a case the court in general would not require joining the father as a party, it would have to satisfy itself with sufficient materials that the provision would be performed. The court would expect to see there be a "Licence Deed" between the father and the wife for the father to provide a licence to allow the wife to reside say rent free in his property and duration to be set out. In the absence of such a "License Deed", the court would have to satisfy that the wife should at least be alerted to the possibility of her being evicted or the property being mortgaged or sold without her notice.
40. The second is where a transfer of property involves a third party. By way of an example, the husband's father agrees to transfer his share of the former matrimonial home to the wife. If the agreement of transfer has not been produced, the father should be joined as a party for the purpose of enforcement.
41. In any case, if the court sees any problem, it may direct a **short hearing** for the court to explain its concerns.

(E) Financial Relief for Children

Section 10 of MPPO

42. Practitioners should bear in mind of the restrictions imposed by section 10 of MPPO regarding the age and the duration of periodical payment orders that the court may make in favour of a child of the family.

Lump Sum

43. Where there is a substantial lump sum payable for the benefit of a child of the family, parties should consider if measures of protection for the child are needed and should be aware of the provision under Order 80, rule 12, RHC.

Transfer of Property

44. Where there is a provision for transfer of a property (especially landed property) to a minor child upon reaching the age of majority, parties should consider how the minor child's interest (especially when he or she is of tender age) is to be protected before the transfer such as whether any instrument is registrable at the Land Registry and whether any instrument is chargeable to stamp duty. Where the property is to be transferred to a trustee holding on trust for the child, parties should consider whether there is a power of sale on the part of the trustee prior to the vesting of the beneficial interest in the child.
45. In considering whether to grant the order or not, the court is required to give regard to matters set out in section 7(2) of the Matrimonial Proceedings and Property Ordinance (Cap 192). Parties should be prepared to inform the court the purpose of transfer, such as to provide accommodation for the child or to provide rental income for the maintenance of the child.
46. Where a child of the family has already attained the age of 18, parties should consider transferring the property to the child directly. It is not necessary for this to be done by way of an order of the court. Again, parties should be aware of the provision under section 10, MPPO.

(F) Arrangements for the Care of Children

Custody, Care and Control and Access

47. Parties should be aware of the meanings of “custody”, “care and control” and “access”: see *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191.
48. Where Joint Care and Control or Shared Care and Control is agreed, the sharing arrangement should be specified: see *SKP v Y, ITT (Legal Terminology to be Used in Relation to Children’s Arrangements)* [2012] HKFLR 422.
49. Where Reasonable Access is agreed, no further access details are needed in the order. It is only when “Defined Access” is agreed that the access arrangement should be spelt out.
50. Where necessary, the court may direct an Updated Statement as to Arrangement for Children to be filed by the parties.

Temporary Removal

51. It is important to bear in mind that these orders are to be enforced by the Immigration Department at the immigration checkpoints. A simple and straight forward order would not only save the Immigration Department's work but more importantly, it saves the children and their caretaker's time and from embarrassment if they travel together with other people.
52. Parties should consider making an application for a Truncated Order in the Consent Summons as set out in the Law Society’s Circular 22-584 (PA) (15 September 2022).
53. Where parties’ consent and/or undertaking have already been adequately worded in the consent summons, a separate consent or undertaking (as the case may be) is not required.

Permanent Relocation

54. Generally speaking, the original court retains jurisdiction until the child has changed the “habitual residence” to the new state. As most relocation orders, whether by consent or not, may contain certain access or post-relocation matters and the court in the new state may decline jurisdiction, hence, there should be an undertaking to return by the outgoing parent.

(G) Liberty to Apply

55. Some practitioners tend to include a “liberty to apply” provision on a liberal basis, regardless of the contents of the consent summons. This is unacceptable. “Liberty to Apply” would only be accepted if there are steps of which court’s further directions may be required in the carrying out of the order.

(H) Section 18, MPPO Declaration

56. Section 18 Declaration cannot be granted by consent and will be struck out.

(I) Enforcement

57. Mainland courts and non-common law jurisdictions may not recognize undertakings.

58. It is not uncommon for parties to provide a sale or transfer of Mainland property by way of an undertaking. It is important to note that an undertaking is not a “*Hong Kong Judgment*” that can be enforced in the Mainland under the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap 639): see sections 2, 4, 6 and Schedule 3.

59. If parties’ ancillary relief involves Mainland assets, the provisions should be by way of court orders rather than have them set out in the preamble.

(J) Attachment

60. Generally speaking, the consent summons should **not** be attached with any additional documents; in particular, parties’ mediation settlement or nuptial agreement should not be attached.

61. The consent summons should not be attached with another consent summons, eg consent summons to vacate Ancillary Relief Notice at Land Registry.

(K) Reminder

62. While this Approach strives to achieve consistency, it should be appreciated that each case is different and each judicial officer may have a slight difference in approaching an issue.

63. The court may call for a short hearing before endorsing its approval. Whether it will do so would depend on the circumstances of a case. By way of illustrations, in a case of long marriage and the only substantial asset is the former matrimonial home, the court may decide to ascertain the parties' agreement if the only provision in their consent summons is for one party to transfer his/her share in the former matrimonial home at nil consideration.

64. Another scenario is if the only substantial provision in the consent summons is the dismissal of each party's ancillary relief claim but there is information that the former matrimonial home is registered in one of the parties' name (for instance, the husband) and the other party (ie the wife) together with their children of the family are to move out, the court may wish to ascertain not only their agreements but also the practical arrangement for the children.

65. I have finally reached the end. Thank You.

Dated 8 November 2024

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