



***HAGUE QUESTIONNAIRE CONCERNING A NEW GLOBAL
INSTRUMENT ON THE INTERNATIONAL RECOVERY OF CHILD
SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE***

***Part II Questions concerning National Systems of Maintenance
Obligations in respect of Children and other Family Members***

Form of maintenance decision

1. What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Answer

There are various forms of maintenance decisions which can be taken in respect of (a) a child and (b) a spouse or other family member. They are not confined to periodic payments and governed by different pieces of legislation according to different circumstances:

For spouse	
During subsistence of marriage	Upon divorce, nullity and judicial separation
Under <i>Separation and Maintenance Orders Ordinance</i> (“SMOO”) (Cap.16) S.5 <ul style="list-style-type: none"> • Lump sum • Periodic payment Under <i>Matrimonial Proceedings and Property Ordinance</i> (“MPPO”) (Cap.192) S.8 <ul style="list-style-type: none"> • Periodic payment • Secured periodic payment • Lump sum 	Under MPPO S.3,4 and 6 <ul style="list-style-type: none"> • Maintenance pending suit • Periodic payment • Secured periodic payment • Lump sum • Settlement of property • Transfer of property

** **Lump sum orders** are granted for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining such other party before the making of the order to be met. Also it aims at achieving so-called “clean-break” settlement.

** **Secured periodic payment orders** are granted where there is reason to believe that the party ordered to make the payments will not pay them.

** **Maintenance pending suit orders** are granted while either party is already in urgent need of money prior to the determination of proceedings.

** **Transfer of property orders** are granted to achieve redistribution of family assets so as to recognize the transferee’s contribution to the family assets.

For children	
During subsistence of marriage	Upon divorce, nullity and judicial separation
Under SMOO S.5 <ul style="list-style-type: none"> • Lump sum • Periodic payment Under MPPO S.8 <ul style="list-style-type: none"> • Periodic payment • Secured periodic payment • Lump sum Under Guardianship of Minors Ordinance (Cap.13) S.10 <ul style="list-style-type: none"> • Periodic payment • Secured periodic payment • Lump sum • Transfer of property • Settlement of property 	Under MPPO S.5 and 6 <ul style="list-style-type: none"> • Periodic payment • Secured periodic payment • Lump sum • Settlement of property • Transfer of property • Maintenance pending suit (no specific provision but court should have power)

** Lump sum orders are granted for either or both of the following purposes:

- 1) Providing for immediate and non-recurring needs of the child;
- 2) Enabling any liabilities or expenses reasonably incurred in maintaining or educating the child before the making of the order to be met.

The Inheritance (Provision for Family and Dependants) Ordinance enables family members and dependants of a deceased person to apply for financial provision from the deceased's estate. It is opened to a wider scope of applicants: any person, who immediately before the death of the deceased was being maintained by the deceased, can apply. Forms of orders under section: S.4 are:

- Periodic payment
- Lump sum
- Transfer of property
- Settlement of property
- Acquisition of property

Eligibility

2. **Who is eligible in your country to benefit from a maintenance decision? (e.g. child, spouse, other relative, etc).**

Answer

Different persons are eligible to benefit from a maintenance decision under different ordinances.

Ordinance	Person eligible
SMO	Spouse, child
MPPO	Spouse, child
Guardianship of Minors Ordinance	Child
Inheritance (Provisions for Family and Dependants) Ordinance	Family members and dependants who immediately before the death of the deceased was being maintained by the deceased

Procedures for the initial assessment of maintenance

3. What is your definition of a “dependent” child for child support purposes?

Answer

S.2 of the MPPO defines “child” in relation to one or both parties to a marriage, and includes an illegitimate or adopted child of that party or, as the case may be, of both parties.

“Child of the family” to the parties to a marriage means:-

- (a) a child of both of those parties;
- (b) any other child who has been treated by both those parties as a child of their family.”

There is no precise definition of “dependant child” in HK legislation.

Generally a minor child i.e. under 18 years of age is usually regarded by law to be a dependant, also children who are over 18 receiving full time education. But in the context of inheritance claims, an adult child of the deceased who immediately before the death of the deceased was being maintained by the deceased can also apply.

4. Which is the law applicable to the question of eligibility of (a) child and (b) a spouse or other family member to obtain maintenance?

Answer

See Answer 2 above.

Procedures for the initial assessment of maintenance

5. **Is child support determined through an administrative or a judicial process?**

Answer

Child support is determined through a judicial process in Hong Kong.

6. **Is the process different where either the applicant or the respondent live abroad? If so, please give details.**

Answer

In divorce, nullity and judicial separation proceedings, provided the Hong Kong court has jurisdiction under the relevant legislation, either spouse can commence and ask for maintenance orders for children. There is no difference in the process.

7. **Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?**

Answer

There is not much difference on applications for maintenance for a spouse or other family member rather than a child. The difference mainly lies in the factors for consideration by the court in making the maintenance orders. The two processes can be joined together.

Method of calculating maintenance

8. **Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.**

Answer

The assessment takes in the following factors from S.7 of the MPPO :-

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

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Without prejudice to (d) above, it shall be the duty of the court when deciding whether to exercise its powers under sections 5, 6 or 6A of the MPPO in relation to a child of the family, to have regard to all the circumstances of the case including the following matters:-

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

9. Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?

Answer

No, although this may effect the needs and resources of each party.

10. **Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?**

Answer

No.

11. **Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?**

Answer

See the Answer to Question 8 above.

Reassessment/adjustment/modification of maintenance decisions or assessments

12. **Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?**

Answer

No; there may be an inflation or review clause incorporated in the order; each party is entitled to apply to the court for variation of the order if there is a change in circumstances.

QUESTIONS CONCERNING NATIONAL SYSTEMS OF MAINTENANCE OBLIGATIONS IN RESPECT OF CHILDREN AND OTHER FAMILY MEMBERS

Method of calculating maintenance

14. **In what circumstances may a maintenance decision or assessment decision or assessment in respect of a child or a spouse or other family member be varied/modified upwards or downwards? Is this done by the same authority that made the original determination?**

Answer

Yes, its done by same authority which made the original determination. If there is a change of circumstances either spouse is entitled to make an application to vary maintenance for that spouse or any child of the family either upwards or downwards. The application is made by summons supported by affidavit and thereafter the other party responds on affidavit.

When considering the application to vary the Court will take into account the factors that it would originally have taken into account as outlined in the answer to Question 8.

15. **In what circumstances may a foreign decision or assessment be varied/modified on the application of a resident debtor?**

Answer

Before a foreign decision or assessment could be varied, Hong Kong would have to accept jurisdiction; once jurisdiction is accepted the application will be dealt with as in the Answer to Question 14 above.

16. **Which is the law applicable to the determination of paternity in the context of child support proceedings?**

Answer

16.1 The law applicable to the determination of paternity is S.13 of the *Parent and Child Ordinance* (PCO) (Cap. 429) which empowers the court to give directions for the use of scientific tests and for the taking of bodily samples to determine the disputed paternity of a child.

16.2 Two legal presumptions of parentage also exist under S. 5 of the PCO:

- (a) A man married to the child's mother is presumed to be the father of the child by virtue of

the marriage; and

(b) that a man who is registered as the child's father by the Registrar of Birth and Deaths is presumed to be the child's father.

16.3 Note that presumption (a) above also applies in the case of a void or voidable marriage.

17. Summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.

Legal Requirements (references are to the PCO)

Answer

17.1 The law provides that where the court gives directions for the taking of bodily samples under S.13, any adult person whose bodily sample is required has to provide consent before it can be taken (S.15). Where such consent is refused, the court may draw appropriate inferences from that fact having regard to the circumstances of the case (Section 15(1)).

17.2 Where bodily samples are to be taken from a minor under the age of 16 years, the consent of a person who has the care and control of the minor is required.

17.3 A minor who has attained the age of 16 years may consent to the taking of bodily samples for the purpose of establishing his or her parentage and this consent shall be effective as if the minor had attained the age of majority age (S.14(2)).

17.4. Consent for the taking of bodily samples from a person who is mentally ill may be given by a person who has care and control of that person provided that it will not be prejudicial to the proper care and treatment of that person (S.14(4)).

17.5 In 1987 the Hong Kong Court of Appeal ordered that scientific tests be carried out in order to establish the paternity of a child in the context of matrimonial proceedings.¹

17.6 In a recent immigration case, the Court of First Instance (of the High Court) approved the use of DNA test, adding that it was a "*simple test of consanguinity which ought to be available to anyone claiming birthright ... even though this might be contrary to an*

¹ *Yeung Chung Ping v Yeung Wan Yuet Kuen* [1987] 1 HKC 206 (CA)

administrative decision made by the government.”²

18. Outline the legal procedures and the methods by which paternity may be established in the context of proceedings for the determination of child support.

Answer

18.1 In addition to the information provided in Question 17 the Court has power under S. 6 to make a declaration of parentage on the application of any person. Note that this jurisdiction is strictly limited to the declaration of parentage. The court has no power to make any declaration on illegitimacy.

18.2 There is judicial dicta preceding enactment of the PCO in 1993, (and relying on English practice) that in appropriate cases “*the court ought to permit a blood test of a young child to be taken unless satisfied that that would be against the child's interests*” (per Roberts CJ)³.

18.3 Legal aid would cover the cost of establishing paternity, subject to the “*merits test*” which is an assessment by the lawyer-in-charge in. In Hong Kong both residents and non-resident can apply for legal aid.

18.4 The Hospital Authority has indicated, the cost of scientific tests is determined by the private hospital and diagnosis centres. Government hospitals do not normally carry out blood tests or DNA tests except on referral by a doctor.

18.5 According to the Government Chemist, the Government Laboratory will not entertain private requests for scientific tests, and will only provide such service if ordered by Court. Where there is an application for the right of abode to Hong Kong, then standard charges will be levied, these will only be waived if the case is in relation to referral by the government in relation to a government enquiry.

18.6 In reality, individuals will bear the costs of the scientific tests.

19. Recognition of Foreign Child Support Decrees and Orders.

Answer

² *Naj Limbu v Commissioner for Registration and Another* [2000] 2 HKLRD G11 (CFI)

³ *Yeung Chung Ping v Yeung Wan Yuet Kuen* [1987] 1 HKC 206 (CA)

19.1 A foreign judgement regarding child support will not be refused on the ground that (a) the foreign decision entailed a determination of paternity, or (b) the foreign decision applied a law or a method regarding the determination of paternity which is different from those applied in Hong Kong.

19.2 As noted in Question 17 Hong Kong courts have ordered the use of scientific tests including blood tests⁴ and DNA tests,⁵ therefore, it is unlikely the Hong Kong courts will reject any findings of paternity by a foreign tribunal based on these scientific tests.

19.3 Under the *Maintenance Orders (Reciprocal Enforcement) Ordinance* (Cap 188) the court does not have the power to refuse recognition of foreign child maintenance decrees based on either of the grounds cited above.

20. Legal Aid and Administrative Assistance to Child Support Claimants

Answer

20.1 The Hong Kong SAR (HKSAR) provides legal aid (via the Legal Aid Department) to residents and non-residents alike subject to assessment criteria described below.

20.2 Assistance in the form of legal aid includes legal representation by a solicitor and, if necessary, a barrister in the District Court and the Higher courts.

20.3 A successful applicant can choose a lawyer on the Legal Aid Panel, alternatively, if the applicant prefers, the Director of Legal Aid may select a lawyer.

20.4 A family mediation service is available from the Mediation Co-ordinator's Office attached to the Family Court in the Wanchai District Court. The scope of assistance includes information sessions, interviews and a number of mediation sessions chaired by professional mediators specialising in family mediation.

21. Eligibility Requirements for Legal Aid and other forms of assistance

Answer

⁴ *Yeung Chung Ping v Yeung Wan Yuet Kuen* [1987] 1 HKC 206 (CA)

⁵ *Naj Limbu v Commissioner for Registration and Another* [2000] 2 HKLRD G11 (CFI)

21.1 Legal aid will be granted if the applicant can satisfy the statutory criteria⁶ as to the financial eligibility (the means test) and whether there is a reasonable claim or defence (the merits test).

21.2 The *means test* is based on a review of the applicant's total financial resources which should not exceed the current limit of HK\$169,700.

21.3 An aided person whose financial resources are between HK\$20,001 and HK\$169,700 will be required to pay a contribution on accepting an offer for legal aid. The contribution ranges from HK\$1,000 to HK\$42,425 depending on the financial resources of the aided person.

21.5 Free family mediation services may be granted under the Family Mediation Pilot Scheme after the Mediation Co-ordinator has conducted an initial assessment to determine the suitability of the applicant for mediation having regard to the nature of the dispute.

22. Spousal Maintenance and Maintenance of other Family Members.

Answer

22.1 The Hong Kong regulations on seeking assistance or making claims for maintenance (for a spouse and other family members) do not distinguish between residents and non-resident.

22.2 However, issues such as residence, domicile and substantial connection, including physical presence in Hong Kong of the person liable to pay maintenance are important as they govern the court's jurisdiction to hear and determine the merits of such applications (See sections 3, 4 and 5, Matrimonial Causes Ordinance "MCO" Cap 179).

22.3 It must be stressed, that there are different legal provisions governing maintenance orders for former spouses and children, including children of the family.

22.4 The major distinction here is that the intention of the primary legislation on child maintenance is to place the child in a position he/she would have been in had the marriage

⁶ *Legal Aid Ordinance (Cap 91), Legal Aid Regulations (Cap 91A), Legal Aid (Assessment of Resources and Contributions) Regulations (Cap 91B), Legal Aid (Scale of Fees) Regulations (Cap 91C)*

continued, namely, the “minimal loss principle” (S. 7(2) MPPO).

22.5 Orders made in Hong Kong assumes the sums awarded will provide for the upkeep of the child during minority or while the child is in school. Unlike the laws governing spousal maintenance and division of family property, the law on child support is not intended to provide for the child beyond childhood.

23. What are the typical legal costs and expenses (including lawyers’ fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you indicate how these costs and expenses will vary from the initial application through any processes of appeal or review?

Answer

The legal costs of cases on the whole depends on the complexity and the experience of the handling solicitor or barrister. In uncontested cases, a fixed fee is not uncommon pursuant to the District Court (Fixed Fees in Matrimonial Proceedings Rules). In contested cases, the fees are based on a band of hourly rates set by the Judiciary. The rate for solicitors depends on a variety of factors, years of experience complexity of the case and whether the case was heard in the High Court or District Court. In the District Court, the hourly rate is approximately 2/3 of the High Court rates which range from HK\$1,600 to HK\$4,000 per hour. A private client can negotiate an agreement with the solicitor on fees. Around 40% of family cases in Hong Kong are legally aided. In uncontested cases, Legal Aid pays a fixed cost of HK\$8,800.00. In contested cases, Legal Aid adopts the hourly rates set by the Judiciary. Court fees by comparison are small. (US\$1.00 is equivalent to roughly HK\$7.80).

24. Is it possible for payments of costs and expenses to be met from maintenance payments?

Answer

The court may make an order of “no order as to costs” which means the maintenance payee may have to meet the legal costs and expenses from the maintenance payments. With legally aided cases, the Director of Legal Aid will have a “first charge” on the aided party’s property to secure payment of the aided party’s own legal costs. The first charge still applies even when the maintenance payer has been ordered to pay the costs of the aided person but has failed to do so. The definition of property includes maintenance

payments. In Hong Kong it is currently illegal to offer to perform legal services on a conditional or contingency fee basis.

Collection and transfer arrangements and enforcement of decisions

25. **How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organized in your country?**

Answer

In the Hong Kong, the payment and collection of maintenance is usually dealt with by the parties themselves pursuant to the court order.

26. **What, if any, particular arrangements apply where payments are to be made or collected from abroad?**

Answer

None, apart from normal banking procedures. Maintenance orders granted overseas may be registered and enforced under the Foreign Judgments (Reciprocal Enforcement) Ordinance.

27. **What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?**

Answer

There are various procedures in place to enforce maintenance orders. Please refer to Question 28 below.

28. **Please list the method available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement/collection methods are available in your jurisdiction:-**

- wage withholding;
- tax refund intercepts;
- garnishment from bank accounts or other sources;

- deductions from social security payments;
- forced sale of property;
- division of pension benefits and
- committal to prison.

Answer

Orders of the Court of First Instance are enforced by various procedures: writs of execution, charging the debtor's property, appointing a receiver, attaching debts, or by committal orders. By virtue of the Matrimonial Causes Rules, the District Court enjoys almost the same power of enforcing its orders as does the Court of First Instance. Further, any order made the District Court in matrimonial proceedings can be transferred to the Court of First Instance by direction of the Registrar of the District Court, if he is satisfied that the order cannot conveniently be enforced in the District Court. Upon transfer, it will have the benefit of the enforcement procedures of the Court of First Instance.

Part I

Answer

The following are methods on enforcement of maintenance orders in Hong Kong:-

A.) Judgment Summons

The most common method of enforcing a maintenance order is by judgment summons which can proceed under the original action, and so there is no need to issue separate proceedings. The remedy can be issued in both the Court of First Instance and District Court.

The applicant can only make an application for payment of a lump sum, or costs, or maintenance pending suit, or other periodical payments.

The first step is to issue a praecipe of the summons in the prescribed Form 22, accompanied by an affidavit verifying the amount due under the order, with a calculation of the outstanding amount, and exhibiting a copy of the order. This application should be made *ex parte*. On hearing this initial application, the judge may then order that a summons to be issued to the judgment debtor to attend court for an oral examination. The judgment debtor may also be ordered to produce any relevant books or documents.

Every judgment summons shall be in Form 23 and shall be served personally on the judgment debtor not less than 10 clear days before the hearing date. Further, at the time of service, the judgment debtor should be given enough money to cover travelling expenses to and from the court.

Witnesses may be summoned to provide evidence on the judgment debtor's means, and where necessary writs of subpoena can also be issued.

On the hearing of the judgment summons the judge may:-

- (a) make a new order for payment of any amount due under the original order (usually to the judgment creditor), the costs of the judgment summons. The new order can specify a time or by instalments;
- (b) where the judgment debtor fails to attend, adjourn the summons and order the judgment debtor to attend at the rescheduled hearing; and
- (c) where the judgment debtor, fails to attend the rescheduled hearing, or where the judgment debtor attends but fails to show cause why a committal order should not be made, order the committal of the judgment debtor.

If the judge makes a committal order it may be suspended on terms e.g. the judgment debtor pays the amount due, together with the costs of the judgment summons, either by a specified time or by instalments.

Committal orders will not be effective until the judgment creditor files an affidavit stating the judgment debtor has defaulted. The committal order is passed the Bailiff's Office for execution.

B.) Attachment of Income Order

Answer

The procedure for an Attachment of Income Order (AIO) is similar to those for a Garnishee Order, full details of which are discussed in paragraph E.

An AIO may be made by the court on its own motion or on the application of the maintenance

payer or the designated payee or both. The court may, at any time after a maintenance order has been made, (including in the same hearing in which the maintenance order is made or varied), make an AIO.

Where a maintenance order has been made against a maintenance payer and:

- (a) (i) a court is satisfied that the payer has without reasonable excuse failed to make any payment which he is required to make by the maintenance order; (ii) a court is satisfied that there are reasonable grounds to believe that the maintenance payer will not make full and punctual payment in compliance with the maintenance order; or (iii) the maintenance payer and designated payee agree to the making of an attachment order; and
- (b) there is income capable of being attached,

The court may make an order attaching the whole or part of the amount payable under the maintenance order, and for the amount attached to be paid to the designated payee.

Where an attachment of income order is made, the employer of the maintenance payer will be ordered to deduct a certain sum (each week or month) from the pay and send it to the court to pay off the sums due under the order.

C.) Prohibition Order

Answer

A prohibition order is a court order which prevents a person from leaving Hong Kong. It can be used to facilitate the enforcement of a judgment e.g. for the payment of money or delivery of property or the performance of any other act.

A judgment creditor may apply ex parte to the court for a prohibitory order. The application will be supported by an affidavit containing full and frank disclosure of all relevant facts and failure to do will result in the order being discharged.

A prohibition order lapses on the expiry of one month but the court may, on the application of the judgment creditor, extend or renew the order for a total period not exceeding, three months. The court may make more than one prohibition order.

A copy of any prohibition order must be served on the Director of Immigration, the Commissioner of Police and, if he can be found, the judgment debtor. Once the Director of

Immigration has been served with the order, the name of the judgment debtor will be placed on the “stop list”.

The order lapses when the judgment creditor serves notice on the Director of Immigration and the Registrar that the order is no longer required.

D.) *Charging Order*

Answer

An order covering the outstanding sum can be made by charging the judgment debtor’s land or any interest in land. This is an indirect means of enforcement by providing the judgment creditor with security over the judgment debtor’s property. The power extends to the following assets of the debtor:

- land
- securities
- funds in court.

The procedure takes place in two stages:

- (1) an order to show cause, namely an order nisi; and
- (2) an order absolute.

Applications for a charging order in respect of beneficial interests may be made ex parte supported by an affidavit which:

- identifies the judgment or order to be enforced and states the amount unpaid at the date of application
- states the name of the judgment debtor and of any creditor of his whom the applicant can identify
- gives full particulars of the interest on which it is sought to impose a charge
- verifies that the interest to be charged is owned beneficially by the judgment debtor.

On the making of an order to show cause, unless the court otherwise directs, notice of the order must be served as follows: -

- (a) a copy of the order, together with a copy of the affidavit in support, must be served on the

judgment debtor;

- (b) where the order relates to securities, other than securities in court, copies of the order must also be served
 - (i) in the case of stock of any body incorporated in Hong Kong, on that body;
 - (ii) in the case of stock of any body incorporated outside Hong Kong, being stock registered in a register kept in Hong Kong, on the keeper of the register;
 - (iii) in the case of units of any unit trust in respect of which a register of unit trust holders is kept in Hong Kong, on the keeper of the register.
- (c) where the order relates to funds in court, a copy of the order must be served on the Registrar at the registry;
- (d) where the order relates to an interest under a trust, copies of the order must be served on such of the trustees as the court may direct; and
- (e) the court may also direct the service of copies of the order and the affidavit on any other creditor of the judgment debtor or on any other interested person as may be appropriate in the circumstances.

The documents must be served at least seven days before the time appointed for the further consideration of the matter. Proof of service must be given if the debtor does not attend on the further consideration of the matter.

The second stage of the proceedings is the further consideration at the date and time specified in the order nisi. The court must either make the order absolute, with or without modifications, or discharge it.

The effect of a charging order on land is as follows:-

- (a) The Land Registration Ordinance applies in relation to the priority of the charging order.
- (b) To enforce a charging order on land, the judgment creditor must apply in the ordinary way for sale of the property but the court may appoint a receiver.
- (c) Proceedings for the enforcement of a charging order by sale of property is by Originating Summons, together with an affidavit in support.

- (d) The affidavit must (i) identify the charging order sought to be enforced and the subject matter of the charge; (ii) specify the amount in respect of which the charge was imposed and the balance outstanding at the date of the affidavit; (iii) verify, so far as is known, the debtor's title to the property charged; (iv) identify other incumbrances on the property charged stating, so far as is known, the names and addresses of the incumbrances and the amounts owing to them; (v) set out the plaintiff's proposals as to the manner of sale of the property charged together with estimates of the gross price which would be obtained on a sale in that manner and of the costs of such sale; and (vi) where the property charged consists of land in respect of which the Plaintiff claims delivery of possession, give particulars of every person, who to the best of the Plaintiff's knowledge, is in possession of the property charged or any part of it.
- (e) Where the judgment debtor holds the entire equitable interest but not the legal interest, the legal owner should be joined in the sale to enable good title to be given.

The effect of a charging order in relation to securities is as follows: -

- (a) If the court makes the charging order absolute, a copy of the order, including a stop notice, must be served on the person or body specified as may be appropriate.
- (b) The charging order on the securities has the same effect as an equitable charge created by the debtor in writing under his hand and may be enforced by sale or the appointment of a receiver.
- (c) Although a charging order can be made in respect of shares in a private company, they cannot be sold since shares in a private company do not appear in the list of items which are liable to attachment and sale by way of execution.

The effect of charging order in relation to funds in court is as follows:-

- (a) If the court makes an order absolute, a copy of the order must be served on the Registrar. A stop order will also be served.
- (b) A charging order on funds in court has the same effect as an equitable charge created by the debtor in writing under his hand and may be enforced by sale or appointment of a receiver.

E.) Garnishee order

Answer

A garnishee order enables the applicant to obtain payment of the sum directly from a third party who is indebted to the maintenance payer. Garnishee proceedings may be instituted where a person, referred to as “the judgment creditor”, has obtained a judgment or order for the payment of money amounting to at least HK\$1,000.00 by some other person, referred to as “the judgment debtor”. It is an essential condition for the institution of garnishee proceedings that the garnishee (namely the person who is indebted to the judgment debtor) should be within the jurisdiction.

The process of attaching debts due or accruing due to the judgment debtor operates in two separate and distinct stages:

The first stage is to obtain a garnishee order nisi which specifies the time and place for further consideration of the application. In the meantime, the debt claimed to be due, or accruing due from the garnishee to the judgment debtor is attached, or so much of it as may be specified in the order.

The second stage is when a garnishee order absolute will be made against the garnishee, ordering payment of the attached debt to answer the judgment debt and the costs of the garnishee proceedings.

An application for a garnishee order nisi is made to the court *ex parte* supported by an affidavit: (1) stating the name and the last known address of the judgment debtor; (2) identifying the judgment or order to be enforced and stating the amount remaining unpaid under it at the time of the application; (3) stating that, to the best of the deponent’s information or belief, the garnishee is within the jurisdiction and is indebted to the judgment debtor and stating the sources of the deponent’s information or the grounds for the belief; (4) stating, where the garnishee is a bank having more than one place of business, the name and address of the branch at which the judgment debtor’s account is believed to be held.

The order nisi gives no rights to the judgment creditor until it has been served on the garnishee. Unless the court otherwise directs, the garnishee order nisi must be served (1) on the garnishee personally at least 15 days before the day appointed for the further consideration of the matter; and (2) on the judgment debtor at least seven days after the order has been served on the garnishee and at least seven days before the date appointed for the further

consideration of the matter.

Where, on the further consideration of the matter, the garnishee fails to attend, or does not dispute the debt due or claimed to be due from him to the judgment debtor, the court may make a garnishee order absolute under which the garnishee is immediately ordered to pay to the judgment creditor the amount of the debt due from him to the judgment debtor, or the appropriate sum so much of to satisfy the judgment debt together with the costs of the garnishee proceedings. Service of the garnishee order absolute on the garnishee is not a pre-condition to its execution.

E.) *Writ of Sequestration*

Answer

The writ of sequestration is available only where the person against whom it is sought is in contempt of court by disobeying an order of the court.

It can only be issued with the leave of the court and an application for such leave must be made to a judge by Motion. The Notice of Motion must state the grounds of the application and be accompanied by a supporting affidavit, it must be served personally on the person whose property is to be sequestered.

The writ has to be addressed to no fewer than four commissioners, called sequestrators, and it binds the property from the date of its issue.

Generally speaking, it is the duty of the sequestrators immediately upon receipt of the writ of sequestration to enter upon the contemnor’s property and to take possession of all his land and personal estate. The sequestrators are not to levy for the benefit of any person, but merely to detain and hold the property in until the contempt is cleared. Sequestered property can not be sold without leave of the court.

When the contemnor has cleared his contempt, the sequestration order will be discharged.

Part II

Method	Answers
(a). Wage withholding	Yes

- | | | |
|-----|---|-----|
| (b) | Tax refund intercepts | No. |
| (c) | Garnishment from bank
or other sources | Yes |
| (d) | Deductions from social
security payments | No |
| (e) | Forced sale of property | Yes |
| (f) | Division of pension benefits | Yes |
| (g) | Committal to prison | Yes |

29. **What are the typical banking costs involved in the transfer of maintenance payments from/or your country?**

Answer

The typical banking costs involved for transferring maintenance from Hong Kong include auto pay set-up fees, handling charge and cable fees. Conversely incoming maintenance attracts handling charges.

30. **Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payments to/from abroad?**

Answer

We have made enquires with a number of public services operated by the Social Welfare Department as well as charitable organisations in Hong Kong to see if they have developed any system/arrangement to facilitate easy and low-cost transfers of maintenance to/from abroad. The public services operated by the Social Welfare Department contacted are as follows:-

Name	Telephone Number
(a) Hong Kong Single Parent Association	2776 4113
(b) Neighbourhood Advice-Action Council Single Parent Family Centre	2144 9567
(c) Yan Oi Tong Single Parent Centre	2458 4051

In addition to the above, we have made enquiries with the following charitable organizations:-

Name	Telephone Number
(a) International Social Service (HK Branch)	(852) 2834 6863
(b) Hong Kong Christian Service	(852) 2731 6316
(c) Hong Kong Lutheran Social Service	(852) 2711 9131
(d) The Evangelical Lutheran Church of Hong Kong	(852) 2388 5847
(e) Haven of Hope Christian Service	(852) 2701 9019
(f) Yang Memorial Methodist Social Service	(852) 2388 7141
(g) Po Leung Kuk	(852) 2277 8888
(h) Christian Family Service Centre	(852) 2861 0283
(i) Caritas (Hong Kong)	(852) 2339-3739
(j) Baptist Oi Kwan Social Service	(852) 2572 1799

However, none of the above organizations (both public and private) have developed any arrangements or services.

31. **Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.**

Answer

Enforcement of an overseas child support order can only operate under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188). This statute only provides reciprocal enforcement of child support orders for countries in the Schedule which lists only Commonwealth Countries. In Hong Kong there are many residents from other countries such as Americans, Mainland Chinese and the Filipinos, therefore, any child support order from such countries may be difficult to enforce. It would be useful and beneficial to the payees under such child support orders if the new instrument can provide a simple and clear process for enforcement in the contracting states of the Hague Convention.

32. **Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from**

a person resident in your jurisdiction which might be improved or remedied in the new instrument.

Answer

Likewise, the enforcement of a Hong Kong child support order overseas is restricted to the provisions provided under the Maintenance Orders (Reciprocal Enforcement) Ordinance i.e. only those countries listed in the Schedule. Again, it would be useful and beneficial to see as many countries as possible under the Hague Convention covered under a comprehensive procedure.

33. **Bearing in mind that the new instrument is to be “comprehensive in nature, building on the best features of the existing Conventions”, and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:**

Answer

The degree of importance is in the following order:

1. b: provisions for the recognition and enforcement of foreign decisions.
2. a: provisions concerning administrative co-operation.
3. f: provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party.
4. j: standard forms.
5. k: provisions aimed at securing compliance with obligations under the instrument.
6. d: uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance.
7. e: provisions specifying the assistance to be provided to an applicant from another Contracting Party.
8. i: provisions enabling Contracting parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis.
9. l: provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor.
10. h: provisions concerning co-operation in the international transfer of funds at low costs.

11. c: applicable law principles.
12. g: provisions concerning co-operation in the establishment of paternity.

34. **With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should “combine the maximum efficiency with the flexibility necessary to achieve widespread ratification”.**

Answer

- a. The core elements should include: b, a, f, j and k. under 33 above.
- b. The elements for opting in and opting out are: d, e, i, l, h, c and g under 33 above.
- c. No.

35. **In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.**

Answer

The existing arrangement Hong Kong has with the states listed in the Maintenance Orders (Reciprocal Enforcement) Ordinance and the provisions of that Ordinance which may be replicated or reflected in the new global instrument are:

1. section 7 – Registration in Hong Kong of maintenance order made in Hong Kong
2. section 9 – Enforcement of maintenance order registered in Hong Kong
3. section 14 – Admissibility of evidence given in a reciprocating country
4. section 16 – Order etc. made abroad need not be proved
5. section 17 – Payment of sums under order made abroad: conversion of currency
6. section 18 – Absence of respondent

36. **Apart from the member States of the Hague Conference and the States Parties to the New York Convention of 1956 (a full list provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?**

Answer

N/A

37. **Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?**

Answer

N/A

38. **Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so please provide details or a copy of any publications**

Answer

Currently no comprehensive website or brochure available.

**The Family Law Committee
The Law Society of Hong Kong
April 2003**